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

[B-179047]

Contracts—Negotiation—Competition—Test Demonstration—Performance

Where request for proposals required live test demonstration of computer terminal by "Contractor" (offeror) and procuring activity interpreted clause as requiring protester to perform test with its personnel, rejection of protester's proposal as nonresponsive because test was performed by supplier's personnel was improper under competitive negotiation procedures.

Contracts—Negotiation—Evaluation Factors—Delivery Provisions, Freight Rates, etc.

Evaluation criteria under a request for proposals must reflect the actual circumstances of the resulting contract; therefore, it was improper to evaluate cost proposals for a time period extending 2 months beyond the contract term and also to allow a 5 percent rental credit offered by one offeror if equipment was leased for 24 months because the greatest length of time possible under contract terms was 22 months and therefore Government would never obtain benefit of rental credit.

Contracts—Negotiation—Evaluation Factors—Discount Terms

While prompt payment discount was not included in section of request for proposals (RFP) dealing with cost evaluation, Standard Form 33A included in RFP made provision for offering such a discount and Government therefore may evaluate discount along with other costs for it is presumed that Government will take advantage of any discount offered; moreover, argument that discount is too uncertain to be evaluated has no merit where agency sets minimum time which discount must remain available to allow taking advantage of discount.

Contracts—Negotiation—Request for Proposals—Offer—Deviations

Where offeror's proposal stated no minimum time for maintenance of computer terminals but offeror had incorporated prior contract provisions in its proposal, which stated 2-hour minimum, the proposal was ambiguous and agency should have sought clarification pursuant to Federal Procurement Regulations 1-3.805.1(a).

Contracts—Negotiation—Prices—Cost and Pricing Data Evaluation—Present Value Method

While present value method (PVM) of cost evaluation need not be applied separately to 3 percent prompt payment discount, PVM should be calculated on monthly basis and not yearly basis, as was done in instant case, because contract payments will be made monthly.

[The matter of resolicitation recommendation was reconsidered in 54 Comp. Gen. —— (B-179047, Dec. 16, 1974).]

In the matter of Linolex Systems, Inc., and American Terminals & Communications, Inc., June 4, 1974:

On April 16, 1973, request for proposals (RFP) No. 42-73-HEW-OS was issued by the Department of Health, Education, and Welfare (HEW). The RFP requested proposals for the installation and maintenance of a Terminal Data Collection Service for the purpose of capturing personnel and payroll data in computer sensible form at

its origin and transmitting the data via the Federal Telecommunications Systems to a central terminal or a central computer site.

Four proposals were received in response to the RFP and, after evaluation, the proposals of Sycor, Inc. (Sycor), Linolex Systems, Inc. (Linolex), and American Terminals & Communications, Inc. (ATC) were found to be acceptable.

In accordance with paragraph 3.2.3 of the specifications, the three acceptable offerors were requested to perform a live test demonstration (benchmark). As a result of the demonstration, the proposals of Sycor and Linolex were found to be acceptable. Subsequently, the cost proposals of Sycor and Linolex were evaluated after receipt of best and final offers and on June 22, 1973, a contract was awarded to Sycor. It is significant to observe here that both Sycor and ATC offered the Sycor 340 system.

PROTEST OF ATC

On June 26, 1973, ATC protested the rejection of its proposal on the grounds that its proposal fulfilled all the requirements of the RFP and was the lowest priced proposal submitted.

It is reported that ATC failed to meet the live test demonstration requirements of paragraph 3.2.3 of the RFP, which reads, in pertinent part, as follows:

> The Government will require live test demonstration of the proposed equipment during the evaluation period. The contractor is required to perform a live test demonstration within 7 days of receipt of written request from the Contracting Officer and is required to notify the Government by telegram as to the time and place for this demonstration. Personnel, supplies, and equipment necessary to conduct the demonstration will be provided at no cost to the Government. This demonstration shall validate the proposal. Failure to do so will result in the proposal being rejected as non-responsive * * *.

ATC's demonstration was found by the procurement activity to be unacceptable because it was performed by Sycor's personnel rather than by ATC's personnel. Therefore, the ATC proposal was determined to be nonresponsive.

The purpose of the above test, according to HEW, was to validate each offeror's written proposal by showing how familiar the offeror was with the equipment it proposed to furnish as well as demonstrating the performance of the equipment. Also, by demonstrating its familiarity with the equipment, the offeror's ability to maintain the equipment also would be shown.

While it may be that the purpose of paragraph 3.2.3 was as stated by HEW, we believe it is susceptible of other reasonable interpretations and, therefore, we do not agree that ATC should have been determined to be nonresponsive because of its failure to employ its own personnel in performing the live test demonstration. The formal

advertising mandate that an acceptable bid must be responsive to the competitive requirements is not applicable to a proposal submitted under negotiated procedures which has been determined initially to be acceptable. The flexibility inherent in competitive negotiation (Federal Procurement Regulations 1.3–805.1(a)) would seem to have required, in the case of ATC, a further opportunity to demonstrate its proposed system with its own personnel, particularly where the language of the requirement may be interpreted in more than one way. At least, HEW personnel administering paragraph 3.2.3 should have apprised ATC of HEW's understanding of the paragraph when it became aware that another competitor for the procurement was to perform the demonstration as the supplier to ATC. We conclude, therefore, that ATC was improperly excluded from the award selection process. *See* 52 Comp. Gen. 382 (1972); *cf.* 47 *id.* 29 (1967).

PROTEST OF LINOLEX

Linolex protested the award to Sycor on the basis that the proposals were improperly evaluated.

The award of the contract to Sycor on June 22, 1973, was based on the following evaluation of cost:

	One Year	Two Years
Sycor	$407,352	$719,929.49
Linolex	$404,736	$728,524.80

Sycor offered a 5 percent rental credit if the equipment was leased for at least a 24-month period. The provision was included in GSA contract No. GS–00C–00010, which was made a part of Sycor's proposal. The credit consisted of no rental charges for the last 36 days if the equipment was leased for at least a 24-month period. HEW deducted this amount from the rental charges for the first set of terminals to be installed 2 months after award.

The RFP stated that the contract was to be for 1-year from its effective date (July 1, 1973), with a 1-year option to June 30, 1975. Under the express language of paragraph 1.22 of the RFP, the contract could not be extended beyond June 30, 1975. Under paragraph 1.22 of the RFP, offerors were advised that while the option could not be exercised at date of award because of the lack of funds, option prices would be evaluated in making the award selection so as to avoid "buy-in" possibilities and to assure an expected systems life of 24 months.

The RFP in Chapter 4 "Cost Evaluation," stated that the evaluation would be based on the total cost to the Government for 24 months

from the date of the contract award for 75 terminals. However, subparagraph B of paragraph 4.2 provided that the evaluation time schedule would start with a hypothetical first installation date, 2 months after award, and continue for 24 months. Therefore, the RFP was unclear whether costs would be evaluated from the date of the first installation (2 months after award) to June 30, 1975 (22 months of lease cost) or from the date of the first installation to September 31, 1975 (24 months of lease cost). It is reasonable, therefore, to state that lease cost evaluation should have covered a period which would not extend beyond June 30, 1975, or a period of 22 months.

The above-cited cost evaluation upon which the contract was awarded was computed for 24 months from the date of award. However, maintenance costs were not included in the costs nor was the present value method, required by paragraph 4.1.5 of Chapter 4, employed in the evaluation. These evaluation factors will be discussed subsequently.

The uncertainty regarding the timeframe to be evaluated was discovered after the protest of Linolex was filed with our Office and HEW. In view of this, HEW conducted a second cost evaluation using both 22- and 24-month leasing periods with the following results:

	From Award (July 1, 1973)		From First Installation (September 1, 1973)	
	One Year	Two Years	One Year	Two Years
Sycor	$237, 109. 70	$544, 895. 56	$294, 392. 94	$589, 289. 35
Linolex	$236, 662. 34	$544, 812. 05	$294, 004. 47	$598, 609. 44

For the 24 months commencing with the effective date of award, Linolex was low by $83.51, and Sycor was low by $9,320.09 if the costs were evaluated for 24 months from the date of the first installation.

HEW admits the first evaluation conducted before the award of the contract was improper because maintenance costs and present value method were not considered. However, HEW states that the award to Sycor was proper because it was still low under the second evaluation based on the timeframe of 24 months from the date of the first installation, which the contracting officer determined to result in the lowest total cost to the Government.

Since the contract contemplated by the RFP may not extend beyond June 30, 1975, we do not agree with the contracting officer's determination that the proposal of Sycor evaluated over a 24-month period from the date of the first installation results in the lowest overall evaluated cost to the Government. The last 2 months of that evaluation period (July and August 1975) will never be reached under the RFP con-

tract terms and, therefore, those months should not have been considered in the cost evaluation nor should the 5 percent rental credit have been considered since the longest time the system would be leased under the terms of the contract contemplated by the RFP is 22 months. The only proper timeframe to evaluate would be 24 months from the date of award. To do otherwise results in the Government not obtaining a true and realistic picture of proposals and their costs. Accordingly, for the above reasons and others to be explained later, we must conclude the contract was improperly awarded.

Linolex also protested the inclusion of a 3 percent 20-day prompt payment discount offered by Sycor in the evaluation of its proposal because it was not included in the RFP as one of the cost factors to be considered. Linolex states that it would be improper to base a contract award solely on the prompt payment discount, since the ability of the Government to take advantage of the discount is an unforeseeable contingency.

While the RFP makes no mention in its evaluation section that prompt payment discounts would be evaluated, paragraph 9(a) of Standard Form 33A, included in the RFP, states that discounts for a period of not less than 20 days would be considered in evaluating offers for award. While this provision was not included or referenced in the evaluation section of the RFP, the Government properly could consider the discount in the evaluation of offers. *Cf.* 48 Comp. Gen. 256 (1968). In evaluating offers it is required that these be deducted from the gross price the amount of discount tendered by an offeror, since it is presumed that the Government will take advantage of any discount offered. 32 Comp. Gen. 328, 330 (1953). The practice of offerors tendering prompt payment discounts is so well established that the Government may accept the same even when the solicitation is silent as to discount.

Linolex further argues that there are real cost factors which should have been added to the Sycor proposal, and that if those costs were considered, the Linolex proposal would have been low. Linolex states that it offered at no cost to the Government programs which will be required by HEW before it can use the equipment. These programs are data input formats, including checks and edits, required for the HEW application. Linolex estimates these programs to cost at least $15,000. HEW answers this contention by stating that these formats were previously developed by HEW in conjunction with Sycor furnished software and, therefore, no costs need be added to the Sycor proposal. Moreover, in our view, since no evaluation factor was included in the RFP for these costs, it would have been improper for HEW to consider such costs in its evaluation.

Linolex also disagrees with the manner in which maintenance costs were evaluated under the RFP. Paragraph 4.2(a) of the RFP states that:

Maintenance calls outside the principal period of maintenance (weekends or holidays) will be evaluated as three per month after initial delivery.

HEW states that both Linolex and Sycor proposed a $28 per-hour rate for maintenance on weekends and holidays. Linolex stated in its proposal that the minimum charge for each maintenance call would be two hours. Sycor's proposal stated that the time to be charged would be rounded to the nearest ¼ hour with no minimum. The cost evaluation panel concluded that Sycor maintenance time should average less than one hour per call and, therefore, one hour per call was used for evaluation of Sycor's proposal and two hours for Linolex's. This basis for evaluation resulted in the cost of maintenance for the Linolex system being $16,800 as compared to $8,400 for the Sycor system.

We note that in the proposal of Sycor and also in the resulting HEW contract, the terms of GSA contract No. GS–00C–00010 were incorporated. The portion of that contract dealing with maintenance costs shows a 2-hour minimum charge for maintenance outside the principal period. The proposal of Sycor was ambiguous as to its minimum charge for maintenance on weekends and holidays because it offered a 2-hour minimum in one portion and no minimum in another. Therefore, HEW should have sought clarification of this discrepancy as contemplated by FPR 1–3.805.1(a).

In addition, Linolex protests the manner in which the present value method (PVM) contained in paragraph 4.1.5 of Chapter 4 of the RFP was used in regard to the 3 percent prompt payment discount offered by Sycor and alleges that if the PVM were applied to the 3-percent discount, the true value of the discount to the Government would be reduced. This would result in increasing the cost of Sycor's proposal for evaluation purposes.

Paragraph 4.1.5 reads as follows:

PRESENT VALUE METHOD

A present value method will be used in calculation of all costs. The discount rate will be applied annually. The rate used will be current average market yield, rounded to the nearest one-eighth of one percent, on outstanding treasury marketable obligations with approximately five years remaining to maturity at the time proposals are received. As an example, if the rate were 6%, the factors would be:

Year from contract award	Discount Factor
1	.943
2	.890
3	.840
4	.792
5	.747

The reason for the use of the PVM is that in making the determination whether to lease or purchase equipment, the time value of money must be considered. It is necessary to determine present values because money has earning power over time. A dollar received today is worth more than a dollar received next year, and conversely, to postpone spending a dollar until next year gives one the opportunity to earn interest on that dollar or otherwise productively use it for the 1-year period.

In regard to Linolex's allegation, we see nothing wrong with not applying the PVM to a prompt payment discount. Since the amount the Government will be paying out is the amount of the monthly invoice minus the 3-percent discount, only the total should be discounted by the PVM because that is the amount the Government is actually spending.

While we have no objection to the manner in which the PVM was applied to the 3-percent discount, upon review of the RFP, we note that the PVM was applied on an annual basis as opposed to a monthly basis, which is the manner in which payments will be made under the contract. This is improper because the Government does not retain the annual contract price for a full year but disburses it in 12 more or less equal payments. Therefore, the PVM should have been applied monthly rather than yearly to obtain the results and benefits expected from the PVM.

Due to the referenced defects in the evaluation process and the ambiguous terms of the RFP regarding the period to be evaluated, we must conclude that the contract was improperly awarded, and the requirement should be resolicited immediately. After the resolicitation, the present contract should be terminated and a new contract entered into with the successful offeror at its newly offered price. The termination should be effected under the paragraph of the RFP entitled "Discontinuance of Use and Rental" which allows the Government to discontinue use and rental upon 30 days written notice to the contractor and states further that the Government's obligation under the contract is fulfilled by the payment of the rental for the 30-day notice period.

We believe that the 30-day notice period provided by paragraph 1.22 should prevent any disruption in the required services when the present contract with Sycor is terminated.

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. Code 1172.

[B–180081]

Leases—Termination—Notice—90-Day Requirement

Initial term of lease for operation of concession lapsed midway through agency's 90-day termination notice required by lease, which also gives agency right to extend on year-to-year basis. Although lapse caused controversy concerning notice's legal effect, agency termination is valid since notice provision is intended to give parties time to prepare for transition necessitated by termination and lessee's continued operation of concession for duration of notice period despite lapse caused agency's action to have the practical effect of providing necessary transition time.

In the matter of Ronald K. Bradley d/b/a Alaska Hospitality, June 4, 1974:

On October 27, 1972, the Alaska Railroad, Federal Railroad Administration, Department of Transportation (Railroad), leased (contract No. 69–25–0003–3984), its Dining and Club Car Concessions to Alaska Hospitality (Hospitality), for a period of 1 year effective November 1, 1972. The lease provides that the Railroad has the right to extend the lease term "from year-to-year for a maximum term of five (5) years."

The lease also provides in part as follows:

3. *Termination:* This lease may be terminated at any time by either party on ninety (90) days notice in writing to the other party * * * Provided, however, that this lease may be terminated at any time by the Railroad should the Lessee violate any of the terms and/or conditions of this lease.

By letter dated September 12, 1973, the Railroad informed Hospitality that in accordance with the above-cited provision its lease was being terminated effective December 13, 1973.

Subsequently, proposals were solicited for a new lease agreement which was awarded to George Nicklaus and Associates (Nicklaus). This lease became effective on December 15, 1973.

Hospitality protests the award of any new lease because it contends that its initial lease was improperly terminated. It is Hospitality's position that since the Railroad has not alleged that Hospitality has violated any of the terms and conditions of the lease, any termination requires a 90-day written notice. Hospitality argues that this condition has not been met because, although the written notice dated September 12, 1973, to be effective December 13, encompasses a 90-day period, the initial 1-year lease term expired on October 31. Accordingly, it is Hospitality's position that as a new lease term commenced on November 1, 1973, the notice which was to be effective December 13 did not provide the required 90-day notice for termination within the second lease term.

Although the agency states that Hospitality's lease was terminated because it wished to improve the service of the concessions, it does not contend that Hospitality breached any of the terms of the lease. In

the absence of a breach the lease clearly requires that a 90-day written notice be provided prior to termination. The lease also provides that the Railroad has the right to extend the lease from year to year up to a maximum of 5 years. Since no specific method of exercising this right is specified, it appears that by merely failing to extend the lease term on October 31, the Railroad at its option could have terminated Hospitality's concession without adhering to the 90-day notice requirement. However, we are informed that the Railroad felt that the 90-day period was necessary for an orderly transition of the concession to another contractor so it chose to invoke the termination clause, despite the fact that the Railroad's option to extend arose in the middle of the 90-day notice period.

Clearly, the effect of the September 12 termination notice on the Government's option to extend is critical. Hospitality derives no right whatsoever from the extension provision which is solely subject to the Railroad's choice. If the Railroad elects to exercise its option to extend, such an election must be positive, unambiguous and in exact compliance with the provisions for extension and any election differing from the requirements of the extension provision operates as a rejection. *See generally*, 51 Comp. Gen. 119, 122 (1971).

The lease does not provide for an extension for a term of less than 1 year. Accordingly, when the Railroad provided Hospitality with the termination notice to be effective less than 2 months after the lapse of the initial lease term, it deviated from the express terms of the renewal provision. Such action did not constitute a proper exercise of the Government's option to extend, rather it was a counteroffer which Hospitality was either free to reject or accept independently of any reference to the extension provisions of the lease.

Although it may be argued that Hospitality's protest filed with this Office and the Railroad in mid-November constituted a rejection of the counteroffer, we are informed that it continued to operate the concession and pay rent until the December 13 termination date.

It is plain that the 90-day notice provision in the termination clause is intended to allow the parties ample time in which to prepare for the transitions necessitated by termination. Although the lapse of the initial lease term midway through the notice period has spawned controversy concerning the lapse's precise legal effect on the notice requirement, the practical effect of the Railroad's action was that both it and Hospitailty did, in fact, have the required 90 days within which to phase out the original operation. In view of the fact the Railroad could have elected to terminate Hospitality's concession without providing a 90-day notice by not extending the lease term after October 31 and considering that Hospitality operated the concession until Decem-

ber 13, we are unconvinced that any technical irregularity in the notice procedure was prejudicial to Hospitality.

In addition, we do not believe that Hospitality may be heard to complain of economic hardships caused by termination when the lease which it signed already provides for termination by either party upon notice and gives the Railroad the right after October 31, 1973, to extend the term or not at its option.

Hospitality contends that it was given verbal assurances by Railroad representatives that the lease would be extended for 10 years. The Railroad does not admit that any such assurances were given in connection with the concession lease. In any event, since the extension provisions of the lease have not been modified in writing, any oral statement proporting to alter those provisions would be ineffective. Corbin on Contracts, section 573.

In view of the above, we do not believe that the Railroad's termination of its lease with Hospitality was invalid, and therefore, we have no basis upon which to question the subsequent award to Nicklaus.

[B–180196]

Contracts—Awards—Small Business Concerns—Size—Standard Used in Invitation Erroneous

Requirement in Armed Services Procurement Regulation 1-701.1(a)(2)a that eligibility for award of small business set-aside dredging contract is dependent on use of small business dredge for at least 40 percent of dredging work is an unauthorized size standard since Small Business Administration has exclusive statutory jurisdiction in small business size matters.

Contracts—Awards—Small Business Concerns—Set-Asides—Restrictive of Competition

Provision in Armed Services Procurement Regulation 1–701.1(a)(2)a that small business dredging work be accomplished with small business dredge for at least 40 percent of work constitutes an improper restriction on competition.

In the matter of the Atkinson Dredging Company, June 4, 1974:

This protest presents the question whether the requirement in Armed Services Procurement Regulation (ASPR) 1–701.1(a)(2)a that at least 40 percent of the yardage advertised in small business total set-asides must be performed with dredging equipment owned by small business is a proper exercise of procurement responsibility. For the reasons set forth below, we have concluded that the cited ASPR imposes a size standard in addition to that promulgated by the Small Business Administration (SBA) and is, consequently, unauthorized. Therefore, its inclusion in the invitation for bids (IFB) represents an undue restriction on competition. In view of this conclusion, it is

unnecessary to discuss the contentions whether the low bidder's failure to commit itself to meet the ASPR requirement constitutes a matter of responsiveness or responsibility. As necessary for our resolution of this question, the facts are as follows:

IFB DACW 65-74-B-0004 was issued by the United States Army Corps of Engineers, Norfolk District, as a total small business set-aside for maintenance dredging of Norfolk Harbor. Gahagan Dredging Associates, Inc. (Gahagan) submitted the low bid of $567,511, while the Atkinson Dredging Company (Atkinson) submitted the next low bid of $696,129. In addition to the SBA size standards applicable for dredging, paragraph 2.2 of the Additional Terms and Conditions of the IFB provided:

> * * * Also, in order to be eligible for a small business, set-aside award on dredging contracts, the firms must perform the dredging of at least 40% of the yardage advertised in the plans and specifications with dredging equipment owned by the bidder or obtained from another small business dredging concern. (ASPR 1-701.1(a)(2)).

ENG Form 1619-R (1 May 1959), Plant and Equipment Schedule, attached to the IFB, required information from bidders concerning the dredge or dredges to be used.

In response to ENG Form 1619-R, Gahagan indicated that it intended to use the dredge Philadelphia, which was located in Norfolk. By letter of November 7, 1973, Atkinson protested consideration of Gahagan's bid on the basis that the Philadelphia was owned by large business, thereby rendering Gahagan's bid in violation of section 2.2, quoted above. Thereafter, on November 9, 1973, the District Engineer forwarded the requisite information to the cognizant SBA regional office for determination of Gahagan's size status. By letter dated November 26, 1973, the SBA regional office determined Gahagan to be a small business concern for purposes of the procurement.

On November 27, 1973, the contracting officer wrote Gahagan requesting information concerning: (1) the requirement that 40 percent of the work be performed with a dredge owned by small business; (2) previous experience on similar work; and (3) a description of the plant proposed to be used. Gahagan responded by letter of December 3, 1973:

> * * * Since the size of the owner of the dredge we use is in no way related to the needs of the Corps of Engineers, we would view the provisions of Paragraph 2.2, Page IV of the Invitation as immaterial requirements which may be waived and which, in the light of the decision of the Small Business Administration, must be waived by the Contracting Officer in awarding the contract.

Gahagan further indicated that inasmuch as it was newly formed it had no prior related experience. While its capitalization as of that date was minimal ($1,000), Gahagan stated that it would increase its capitalization by $150,000 upon advice of award. It was indicated that

a firm agreement for lease of the dredge Philadelphia was also dependent upon notice of contract award to Gahagan.

On November 29, 1973, Atkinson submitted an appeal from the regional size determination to the SBA Size Appeals Board. On the same day, Atkinson protested any award to Gahagan to our Office.

On December 13, 1973, the Corps' District Counsel wrote Gahagan that its December 3, 1973, letter in response to the contracting officer's November 27, 1973, letter, requesting certain information, was not responsive to the inquiry. Accordingly, Gahagan was again requested to provide the information which would show how Gahagan intended to comply with the 40-percent small business subcontracting requirement. Gahagan responded with a December 29 letter again to the effect that the requested information was immaterial.

On January 24, 1974, the SBA Size Appeals Board rendered its decision on Atkinson's appeal affirming that Gahagan was small business. Pertinent portions of the decision stated:

> The jurisdiction of the Size Appeals Board extends only to a review of size decisions by SBA field offices or of contracting officers with regard to product or service classifications, Section 121.3-16(g), SBA Regulations. It has no authority to pass upon questions of responsiveness or responsibility to perform a particular Government contract. It has only the jurisdiction conferred upon it by the Small Business Act or the Regulations promulgated under its authority. *It has no authority to enforce a provision of the Armed Services Procurement Regulation enlarging the definition of a small business for purposes of bidders and receiving award of dredging procurements.* Therefore, the Board holds that whether Gahagan Dredging Associates, Inc., will perform at least 40 percent of the yardage advertised with its own dredging equipment or equipment obtained from another small business is a matter of responsiveness or responsibility to be resolved by the contracting officer, and not one of size cognizable by the Board. [Italic supplied.]

In the interim, on December 20, 1973, the contracting officer referred the matter of Gahagan's responsibility, i.e., capacity and credit, to the cognizant SBA regional office for certificate of competency (COC) proceedings. However, since the Atkinson protest had already been filed with our Office by this time, the SBA regional office advised that the COC action would be held in abeyance pending this decision.

SBA has since further stated its position concerning the effect to be accorded the 40-percent subcontracting requirement of the ASPR. In a letter dated April 12, 1974, from the SBA General Counsel, responding to a GAO inquiry, it was stated:

> Under the Regulations of the Small Business Administration, a concern which is bidding on a contract for dredging is defined as small if its average annual receipts for its preceding three (3) fiscal years does not exceed $5 million. [See 13 C.F.R. 121.3-8(a)(2).] It is this standard that must be met in order for a concern to be determined small by this Agency. The provisions of ASPR 1-701.1(a)(2) that further require a bidder to perform 40 percent of the dredging with its own equipment, or the equipment of another small business concern, may be a question of the responsiveness or responsibility of the bidder to perform the contract. In any event however, in view of the foregoing, it is our opinion that this 40 percent requirement is not part of the applicable size standard.

As stated in the Corps of Engineers' report on the protest, it is the opinion of the contracting officer that Gahagan is nonresponsible since it repeatedly confirmed that it intends to perform 100 percent of the work with the large business dredge Philadelphia. Gahagan's intent was evidenced by its completed ENG Form 1619–R, as well as affirmative post-bid-opening statements of its intent to utilize the Philadelphia, as stated in Gahagan's letters of December 3 and 29, 1973. Therefore, the contracting officer recommended that Gahagan be determined to be nonresponsible pursuant to ASPR 1–903.1(v), which requires that a prospective contractor be otherwise qualified and eligible to receive an award under applicable law and regulation. Further, under ASPR 1–705.4(c)(v), it is the contracting officer's opinion that the matter of Gahagan's responsibility need not be referred to SBA for possible COC procedures since he recommended that Gahagan be determined to be nonresponsible under ASPR 1–903.1(v). The report from the General Counsel, Office of the Chief of Engineers, concurs in this recommendation of nonresponsibility.

Gahagan maintains that the subcontracting requirement of ASPR is, in effect, a size determination by the Department of Defense that has no force or effect. Gahagan maintains that only SBA is empowered by statute to make size determinations. Gahagan points out that since the 40-percent requirement is contained only in that portion of ASPR concerning small business size standards, its only purpose is to establish eligibility for participation in small business set-asides for dredging work. Gahagan refers to the same legislative hearings and studies as do Atkinson and the Corps, to reinforce its position that the purpose of the 40-percent requirement relates solely to the effectuation of the purposes of the Small Business Act. It is observed that the intended purpose was to prevent small business from acting as brokers in obtaining small business set-aside awards and subcontracting substantially all of the work to large business. Therefore, counsel for Gahagan urges that this ASPR is beyond the Department of Defense's authority, has no force and effect, and may be waived because the 40-percent requirement does not affect price, quality, quantity or time of performance, and is, in the end result, immaterial and of no consequence.

Total small business set-asides are by their very nature restrictive of competition because an entire segment of an industry is excluded from participation, i.e., large business. However, the Congress has expressed its intent that a fair proportion of purchases and contracts for property and services for the Government be placed with small business. 15 U.S. Code 631. In furtherance of this declared national policy, the Congress has countenanced the small business set-aside program

as a valid restriction on competition (15 U.S.C. 644) and has delegated conclusive authority to SBA to determine matters of small business size for procurement purposes (15 U.S.C. 637(b)(6)).

In discharge of this responsibility, SBA has promulgated small business size regulations found at part 121 of Chapter I of title 13 of the Code of Federal Regulations, which have the force and effect of law. *See* 15 U.S.C. 634(b)(6); *Otis Steel Products Corp.* v. *United States*, 161 Ct. Cl. 694 (1963); 53 Comp. Gen. 434 (1973). Section 121.3-4 of 13 CFR authorizes the SBA regional director to issue initial determinations as to size. Section 121.3-6(a) provides that the Size Appeals Board shall review appeals from size determinations made pursuant to section 121.3-4, and shall make final decisions as to whether the determination should be affirmed, reversed or modified. This process was exhausted by the January 24, 1974, decision of the Size Appeals Board determining Gahagan to be a small business concern.

Notwithstanding this size determination by SBA, the inclusion of this ASPR in the solicitation placed a further administrative obstacle in the path of Gahagan to be eligible for award of this small business set-aside contract. We believe it significant that the 40-percent requirement is found in subpart "G" of Chapter "I" of ASPR, entitled "Small Business Concerns" and ASPR 1-701.1(a)(2)a contains definitions of small business for the construction and dredging industry.

In our view, the clear effect of the 40-percent provision is to impose requirements beyond those of SBA to receiving awards as small business. The ASPR provision is an administrative refinement which goes significantly beyond that promulgated by SBA. It is urged that since SBA was aware of the ASPR requirement and participated in its formation, that SBA has sanctioned it. We do not believe that SBA can abdicate its exclusive role in this size area mandated by the Congress by acquiescence or inaction. SBA advances the view that the Department of Defense possesses the authority to regulate the amount of permissible subcontracting. See H.R. No. 2341, 89th Congress, 2d session 31, 150 (1966); Subcommittee on Government Procurement, Select Committee on Small Business of the House of Representatives, Improvements in Government Small Business Procurement Practices (Comm. Print 1970). As a general proposition, we agree. However, the Department of Defense cannot exercise its authority to regulate the amount of subcontracting through the device of a size standard.

The Corps contends that the 40-percent requirement effects a socio-economic goal in furtherance of the Small Business Act to prevent small business from acting as a broker for large business dredging contractors. While we recognize the legitimacy of its concern, the particular ASPR requirement encroaches on SBA's exclusive jurisdiction.

In other instances, SBA has exercised its statutory prerogative to limit the extent of subcontracting permissible to large business. *See* 13 CFR sections 121.3-16(1) concerning kit assemblies; 121.3-8(c) concerning nonmanufacturers, and 121.3-9(b) for subcontracting limitation in timber sales. We believe that similar regulatory action should be taken by SBA in this situation.

Without the underlying statutory authority of SBA to restrict competition, ASPR 1-701.1(a)(2)a constitutes an undue restriction on competition.

Therefore, we conclude the IFB is legally defective. Consequently, we recommend that the dredging requirements be resolicited without the 40-percent subcontracting limitation. Also, by separate letters we are bringing our conclusions to the attention of the Secretary of Defense and Administrator, Small Business Administration, for their corrective action.

[B-179087]

Bids—Qualified—Bid Nonresponsive

Bidder, which by its bid on water purification system transformed design specification for a membrane with required pH range of 1–13 into performance specification for its entire system and offered membrane having range of only pH 4.5–5.0, should have been declared nonresponsive since transformation of specification should have been accomplished by (1) invitation for bids amendment, or (2) rejection of all bids and readvertisement.

Contracts—Specifications—Conformability of Equipment, etc., Offered—Technical Deficiencies—Acceptance—Prejudicial to Other Bidders

Where invitation for bids sets out maximum time for service and maintenance for water purification unit and procurement agency does not refute contention that system bid by successful bidder could not meet these service and maintenance requirements but merely states that with post-award change in chemicals to be used contractor will meet specification requirement, General Accounting Office concludes action was "waiver" of the specification and was prejudicial in material respect to other bidders.

Bids—Qualified—Letter, etc.—Containing Conditions Not in Invitation

Bid submitted with cover letter which (1) clearly conditions bidder's performance on presence of certain physical site conditions which did not exist, and (2) attempts to reduce bidder's obligation to meet specifications as written is unacceptable qualified bid.

Bids—Preparation—Costs—Recovery

General Accounting Office is aware of no authority to support bidder claim for "damages and a reward for our valuable suggestions." However, it may be, we do not decide, that protester would have valid claim for bid preparation costs under criteria of *Excavation Construction Inc.* v. *United States*, No. 408-71, U.S. Ct. Cl., April 17, 1974; *Keco Industries, Inc.* v. *United States*, No. 173-69, U.S. Ct. Cl.,

Feb. 20, 1974; and *Keco Industries, Inc.* v. *United States*, 192 Ct. Cl. 773, 428 F. 2d 1233 (1970). Should protester choose to file such claim GAO would be obliged to consider it under above-noted case law and make determination at that time.

In the matter of Ionics, Inc., June 5, 1974:

On June 6, 1973, invitation for bids (IFB) F42650–73–B–5898 was issued by the Directorate of Procurement and Production, Hill Air Force Base, Utah. The IFB requested bids on a water treatment plant, the specifications for which initially read in part:

e. Equipment Design and Operating Features: The water purification equipment shall incorporate the following operating and design features:
(1) Zero chemical feed requirement: No acid, base, or inhibiting chemicals shall be required to be fed either to the water processing equipment feed or to the effluent in order to attain the water quality requirements of paragraph 3 of this specification.

Bid opening was scheduled for June 20, 1973.

On June 13, 1973, the IFB was amended to delete paragraph (1) above. Moreover, the following provision was added:

An existing 12,000 gallon sulfuric acid storage tank is located at the site and may be used for this system.

Subsequent to the opening of bids, the low bidder, Osmonics Inc., was rejected as nonresponsive for its failure to comply with IFB provision H–1 relative to shipment. The subject contract was thereafter awarded, on June 28, to Gulf Energy & Environmental Systems, a division of Gulf Oil Corporation (Gulf). Gulf's bid was based upon the utilization of an acid feed reverse osmosis process.

Ionics, Incorporated (Ionics), protested the award to Gulf on the basis that Gulf's bid was nonresponsive to the following specification requirements: (a) purification membranes; (b) service and maintenance; (c) 20-year minimum life; (d) emission of process chemicals; and (e) inclusion of a fully automatic chlorinator. Moreover, Ionics contends that Gulf qualified its bid with respect to the requirements for (a) size; (b) maximum temperature; (c) product water; and (d) feed water pressure.

I. *Gulf's alleged failure to meet the requirements.*

(*a*) *the purification membranes*

Paragraph 4e(13) of the specification states that:

(13) The purification membrances shall be stable and be capable of proper operation for a temperature range of 33° to 110° F., a pH range of 1 to 13, and a minimum pressure of 100 psig.

The Air Force agrees that the cellulose acetate reverse osmosis membranes included in the Gulf equipment to be offered under its bid cannot operate efficiently and must be replaced within a few days when operating in the extremes of the pH range (pH of 1 and pH's of 9 and above (extreme acidity and high alkali levels, respectively)).

However, the agency states that the automatic control designed into the offered Gulf system will reduce the pH of the feed water from its analyzed normal of 7.7–8.0 to the 4.5–5.0 required by the Gulf membranes by automatically feeding acid into the water whenever appropriate.

It is apparent that Gulf, with the concurrence of the Air Force, transformed the design specification in paragraph 4e(13) for a given part of the system—that *the membrane in question* have a certain capacity or range (pH 1–13)—into a performance specification whereunder the system can accept feed water within the 1–13 pH range and still produce output water of acceptable quality by utilizing an automatic acid feed. The transformation of this IFB design requirement into a performance requirement is not in and of itself improper. However, it is improper when the change or transformation is not effected by a Government-issued amendment to the IFB made known to all potential bidders, or, as is the case here, rejection of all bids and reprocurement when the change in specifications becomes known only after opening. *See* B–171378, April 28, 1971; 37 Comp. Gen. 524 (1958); 49 *id.* 584 (1970). Thus, even though we do not disagree with the agency's belief that Gulf can meet the water output requirements of the specifications through the utilization of its "process," since the system tendered by Gulf does not contain the membrane specifically required by paragraph 4e(13), Gulf's bid should have been declared nonresponsive. Armed Services Procurement Regulation 2–404.2.

(*b*) *service and maintenance*

Paragraph 4d of the technical specifications state that:

> The maximum time of an attendant for the service and maintenance of this water purification equipment to operate on a continuous basis shall be not more than two man-hours per day.

Ionics contends that the Gulf system which uses a number of chemicals, most predominantly sulfuric acid, cannot meet the above-noted requirement. The basis for the contention lies in the Air Force's statement in its initial report of August 31, 1973, that: "The acid will be used directly from carboys * * *." Ionics thus asserts that because the carboys need be changed two or more times per day, this switching time when added to the already existing requirements for cleaning, monitoring and logging of variables, and other general maintenance, will exceed the 2-man-hour maximum established for maintenance.

In response, the agency now states in its supplemental report of February 1, 1974, that it was agreed in July (subsequent to award) that Gulf would use the 12,000-gallon concentrated sulfuric acid tank at the site for primary acid storage and that "[n]o picking up, moving, pouring, or manual transferring of acid is necessary from carboys."

As such, it appears that the sulfuric acid operation will not increase the amount of downtime to exceed the 2-man-hour-per-day maximum.

However, as noted both by Ionics and the Air Force, the literature submitted with Gulf's bid described the use of hydrochloric acid in its process (which would require the use of carboys). Indeed, it appears that Gulf's bid was accepted on this basis and it was not until after award that the Air Force allowed the utilization of sulfuric acid and the sulfuric acid tank at Hill Air Force Base. Thus, as indicated in the Air Force's initial submission, an acid carboy system would have been required on the specific system bid by Gulf.

While Ionics raises the point that a system using carboys would require sufficient changeover time so as to cause maintenance to exceed the 2-man-hour maximum, the Air Force relies on the fact that carboys will not be used. The agency does not, however, refute Ionics' contention that the system bid by Gulf could not meet the service and maintenance requirements of the IFB. As such, it appears that the agency, by acquiescing in the post-award change of acid type, may have transformed a nonresponsive bid into one conforming with the solicitation. Since this apparent initial "waiver" of the specifications, as evidenced by the acceptance of Gulf's bid, was prejudicial in a material respect to other bidders, Gulf's bid should have been declared nonresponsive in this regard as well.

(*c*) *20-year minimum life requirement*

Paragraph 4e(12) of the technical specifications states that: "A twenty-year minimum design life shall be designed into the whole purification system."

Ionics raises the argument that acid systems, such as Gulf's, have not in the past achieved 20-year lives even when utilizing a tank sulfuric acid feed. Indeed, scientific literature submitted by the protester seriously questions both the usable life of such systems and also the life-cycle costs of such a system (low initial cost but high total cost over an entire 20-year period).

The Air Force, on the other hand, indicates that a 9-year-old acid-utilizing compressor unit at Hill Air Force Base which exhibits corrosive effects only on some mild steel membranes, is indicative of the lack of a corrosive problem with acid systems. Moreover, the agency states that Gulf's equipment now being provided, which utilizes corrosion-resistant stainless steel for structural members and polyvinyl-chloride for the piping, will further reduce the possibility of acid corrosion.

Our Office has closely examined the 9-year-old compressor unit and, contrary to the Air Force's assertions, we have found many examples

of heavily acid corroded parts. Specifically, we found serious corrosion in the following respects:

(1) the concrete under the small acid-holding tank near the unit;

(2) the unit's acid-injection chamber is so heavily corroded that rags surround the chamber to protect against acid leaks through the metal skin;

(3) the heat exchanger which has been replaced twice;

(4) product water pump which has been replaced three times; and

(5) the raw water feed pump which has been replaced once.

This unit, cited by the Air Force as an example of the long-term life capacity of acid systems, certainly is not indicative of a lack of corrosive problems with acid systems. Rather, the contrary appears to be the case, i.e., that acid systems are subject to extensive corrosion.

The Air Force also states that certainly the 20-year design requirement should not be taken to mean that no repair or replacement was contemplated. The agency advises that at the time the specifications were written, it was contemplated that the water purification membranes of an electrodialysis process (like Ionics') would be replaced every 5 to 10 years at a cost of $20,000 per replacement. Replacement of the membranes for a reverse osmosis system (Gulf's) was contemplated every 3 to 5 years at a cost of $10,000 per replacement.

Based on the Air Force's figures, we have projected the following costs:

	Replacement interval	Cost of replacement	Est. minimum total cost (20 years)	Est. maximum total cost (20 years)
Reverse osmosis	3 to 5 years*	$10,000	$40,000	$70,000
Electrodialysis	5 to 10 years	20,000	40,000	100,000

*(Note: In our opinion, the membrane in question is, as has been shown, susceptible to damage when exposed to extremes of pH. The 3- to 5-year replacement does not, therefore, take into account any acid leak or vaporization problems.)

While Ionics asserts that units using large quantities of acid do not generally last for 20 years, citing as an example the 9-year-old compressor at Hill Air Force Base, the Air Force disagrees. Moreover,

in the additional statement of the contracting officer dated November 27, 1973, it was stated that:

> * * * Due to the fact that acid would have been required for the operation of both Ionics' Electrodialysis as well as the Gulf Roga plants, any conversation [discussion] of possible acid leaks, vaporization, corrosion of concrete, or corrosion of metals is of little consequence.

The Air Force, therefore, implies that corrosion is not a problem because both systems (the Ionics' electrodialysis and the Gulf reverse osmosis) would have equally corrosive effects. If this were the case, then perhaps both bids were nonresponsive to the IFB's 20-year design requirement. However, in reaching its premise, the agency has, in our view, improperly equated the acid utilization of the two systems.

Gulf's equipment requires a continuous feed of acid to lower the pH of the water to be treated to a level within the acceptable range of its membranes. Ionics, on the other hand, requires zero chemical feed into the water.

It is apparent that the agency misinterpreted a portion of Ionics' description of equipment to be supplied in equating the acid requirements of the two systems.

Ionics stated in its bid that:

> The AQUAMITE[R] x-2 uses Ionics ZERO Chemical Feed feature in which current reversal every 15 minutes *replaces* acid and/or inhibitor feed for solubilization of calcium carbonate. [Italic supplied.]

Contrary to the Air Force's position, and demonstrated by Ionics' bid, the above-quoted statement indicates that, unlike the Gulf system which must utilize the 12,000-gallon sulfuric acid tank to provide acid feed into the water, Ionics' system would not inject any acid into the water to be treated. This is evident from a reading of Ionics' descriptive literature submitted with its bid. For example, paragraph VIII–B of Ionics' descriptive literature states that: "The unit will require no continuous feed of either acid or inhibiting chemicals."

Note: Ionics states that if its equipment requires, it will be flushed (cleaned) every 6 to 9 months with 10 gallons (120 pounds) of hydrochloric acid. Moreover, the Air Force does not dispute that extremely large quantities of sulfuric acid will be utilized by Gulf. (Ionics informally suggests 60,000 pounds' annual usage, while the Air Force has informally advised our Office that 40,000 pounds will be used annually.)

From the foregoing, it is reasonable to conclude that the agency improperly equated the respective systems with regard to acid utilization and, in doing so, has minimized the effects of acid corrosion on the life expectancy of the Gulf unit. As such, we doubt that the contracting officer should have accepted Gulf's bid.

(d) emission of process chemicals

Paragraph 4e(15) of the technical specifications states that:

> No process chemicals shall be emitted from the purification equipment either during normal operation or during cleaning that shall be corrosive to standard sewer materials, concrete, or brass; or shall inhibit normal sewage treatment in a modern sewage treatment plant or in a sewage lagoon. A catch tank shall be provided for any such chemical including effluents with a pH greater than 10.0 or less than 4.0.

While Ionics argues that Gulf's equipment does not meet this requirement, the Air Force indicates that the reject water of the Gulf system will have a pH of about 5.0 (due to the presence of sulfuric acid), but the elimination of carbon dioxide at 640 mm pressure from the bicarbonate present in the water will raise the pH level to a point where it is not expected to be a problem. We see no basis to disagree with the Air Force on this matter.

(e) inclusion of a fully automatic chlorinator

Paragraph 4e(17) of the technical specifications provides that: "A high quality, fully automatic chlorinator for product water shall be included."

Ionics contends that the Gulf equipment which adds chlorine to the feed water will not meet the chlorine level requirements for the product water. It states that since the feed water containing the chlorine is separated from the product water, only some of the chlorine will diffuse through the membrane. The Air Force indicates that the fact that the Gulf chlorinator works on feed water rather than product water is insignificant for the product water will contain a chlorine residual. Indeed, Gulf states that Ionics' above-paraphrased statement "indicates some misunderstanding about chlorine diffusion." Moreover, it indicates that the chlorine placed in the feed water has both the requisite solubility and diffusion rate (relative to the membrane) to insure the adequacy of the chlorine level in the product water.

In view of the above, we see no reason to disagree with the Air Force position as to this contention.

II. *Gulf's alleged qualification of its bid*

In a June 18, 1973, letter accompanying its bid, Gulf stated that:

> GESCO [Gulf] accepts the technical specifications of the IFB, subject to the following clarifications and exceptions:
> 1. The relationship of the raw water storage tank to the building in which the water treatment plant is to be located is not described in the IFB. Feedwater is to be supplied to the reverse osmosis unit at a minimum pressure of 10 psi.
> 2. A 10-by-10-foot door at the end of the building is required for installation of the reverse osmosis unit.

* * * * * * *

4. At 50°F, product water quality will meet specifications, but it will vary at other temperatures.
5. GESCO suggests that the maximum operating temperature be 85°F.

This letter is considered to be a part of the bid. 48 Comp. Gen. 93 (1968); 52 *id.* 967 (1973).

With regard to the size door required by Gulf (No. 2, above), the Air Force admits that its building has a door 7 by 7 feet and not the 10 by 10 feet indicated as a requirement in Gulf's bid. Moreover, the agency informally states that although Gulf had not conducted a pre-bid site survey, and irrespective of Gulf's statement in its June 18 letter, its equipment was able to be installed through the 7-by-7-foot door, apparently by disassembling and reassembling the unit.

The question is, however, what Gulf had bound itself to do under its bid. Under the bid submitted Gulf indicated that a 10-by-10 foot door was *required* for installation. The reasonable construction of this statement clearly conditions performance on the presence of a certain physical circumstance which did not exist. *See* B-180362, February 14, 1974. This qualification of the bid, being a material deviation, rendered its bid nonresponsive.

With regard to Gulf's statements in its June 18 letter about (4) water quality meeting the specification at 50° F., but varying at other temperatures, and (5) suggesting that the maximum operating temperature be 85° F., Gulf adds the following comments which apparently have been accepted by the agency:

> The design point for the Gulf system is 50° F, and variation from this temperature does make a slight difference in operating pressures and thereby making some differences in product quality. * * *
>
> Further—
>
> The Gulf reverse osmosis membranes have operated successfully at temperatures above 100°F. Review of the site shows that the well temperature is a consistent 50° F all year. The water in the storage tank that is at ambient temperature can be handled by the equipment.

Paragraph 4e(13) of the technical specifications requires that the purification membranes be capable of proper operation for a temperature range of 33° to 110° F. Gulf readily admits that product quality is affected by deviations from the 50° F. level. More specifically, however, the most reasonable construction of Gulf's June 18 statement relative to maximum operating temperature of 85° is one whereby Gulf sought to decrease the operational range required of its equipment by 25° (from 110° to 85°). Such a "clarification or exception" should have been requested prior to bid opening so that, if acceptable, the Air Force could have amended the IFB so as to more closely reflect the agency's later apparent actual needs. However, since Gulf chose rather to "clarify" the specifications in part by reducing

its obligation to meet them as written, on this basis as well Gulf improperly qualified its bid. B–180362, *supra.*

As to Gulf's further statement in its letter of June 18 (1) that a minimum feed water pressure of 10 p.s.i. is needed, Ionics asserts that the maximum pressure available even from the filled holding tank at the site will be only 7 p.s.i. This fact is not disputed either by the Air Force or Gulf although the latter does comment that "The Gulf System can be operated satisfactorily at feedwater pressures below 10 psig."

The ability of Gulf to accomplish the purification of feed water at less than 10 p.s.i. is irrelevant since, by stipulating that feed water is to be supplied by the Government, at a minimum pressure of 10 p.s.i., Gulf is protecting itself against the contingency of failure to accomplish this task because of limited water pressure. In any case, where the reasonable construction of the bid taken as a whole attempts to diminish a bidder's risk of failure to perform a contract below that level of risk contemplated by the express language of the IFB, the bid must be considered qualified and, hence, nonresponsive.

In view of all of the above, Ionics' protest is sustained. However, our Office has been informed by all parties concerned that performance of the instant contract has long since passed beyond the point where we would be able to recommend corrective action.

Based on the facts which led to an improper award plus delays by the agency in responding to GAO requests for reports (2 months for initial report; 4 months for supplemental report), Ionics asserts that "* * * the Agency has been able to circumvent administrative justice with a 'fait accompli' * * *." The protester, therefore, contends that "* * * *an appropriate remedy would be the award to Ionics of monetary compensation*—a combination of damages and a reward for our valuable suggestions— * * * [relative to the $100,000 savings alleged to be generated over the next 20 years with respect to suggesting a change in the Gulf system from hydrochloric acid to sulfuric]."

Under the facts presented, we are aware of no authority which would support recovery of "damages and a reward for valuable suggestions," as we understand Ionics' use of the claim for compensation. However, it may be, we do not decide, that Ionics would have a valid claim for bid preparation costs under the criteria of *Excavation Construction, Inc.* v. *United States*, No. 408–71, United States Court of Claims, April 17, 1974; *Keco Industries, Inc.* v. *United States*, No. 173–69, United States Court of Claims, February 20, 1974; and *Keco Industries, Inc.* v. *United States*, 192 Ct. Cl. 773, 428 F. 2d 1233 (1970). Should Ionics choose to file such a claim GAO would be obliged to consider it under the above-noted case law and make our determination at that time.

[B-179712]

Pay—Retired—Survivor Benefit Plan—Children—Blind

When a deceased service member's child is receiving welfare and Social Security payments based on a determination of blindness and that condition is indicated to have existed since birth, such payments may not be considered as constituting substantial gainful activity so as to disqualify the child as an eligible annuitant under 10 U.S.C. 1435(2)(B) to receive an annuity under the Retired Serviceman's Family Protection Plan, 10 U.S.C. 1431, *et seq.*

Pay—Retired—Survivor Benefit Plan—Children—Blind

Whether a child of a deceased member of the uniformed service, who is over 18 years of age, is or is not capable of self-support in blindness or other physical disability cases, where such condition antedated the 18th birthday, for the purposes of establishing eligibility as an annuitant under 10 U.S.C. 1435(2)(B), such issue is for resolution based on all facts in each particular case and no specific guidelines can be established.

In the matter of eligibility for annuity under the Retired Serviceman's Family Protection Plan, June 5, 1974:

This action is in response to a letter dated August 28, 1973, with enclosures (file reference RPTA) from the Chief, Accounting and Finance Division, United States Air Force Accounting and Finance Center, Denver, Colorado 80205, requesting an advance decision concerning the propriety of making payment on a voucher in the amount of $6,099.95, in the case of Dolores Humes, representing annuity payments pursuant to the Retired Serviceman's Family Protection Plan (RSFPP), 10 U.S. Code 1431–1446 and has been assigned Air Force Submission No. DO–AF–1203 by the Department of Defense Military Pay and Allowance Committee.

The submission indicates that prior to his death on February 8, 1970, the claimant's father, Lieutenant Colonel Patrick J. Humes, USAF (Retired), elected options 2 and 4 under the RSFPP. The member was survived by three children, Denise, Regina and Dolores, who on the date of the member's death may have been entitled to the annuity. Denise became 18 years of age on March 8, 1970, and was paid one-half of the annuity for the month of February 1970. Regina, who was physically incapacitated with cerebral palsy from the time of birth, was paid the other one-half of the annuity for the month of February 1970, and all full annuity from March 1970 to the date of her death, June 20, 1972. Dolores has not received any of the annuity, which is stated in the submission to be $219.16 per month.

The submission further states that Dolores was born on March 28, 1950, and that a certificate of an examining physician dated March 25, 1961, stated that Dolores had poor vision since birth and that "the visual function of this young girl is so poor that she will not be economically independent at anytime during her life." In this regard, it ap-

pears from the submission that the member was Dolores' sole support prior to his death. It also appears from the submission that in a letter dated January 28, 1972, from Dolores' brother it is stated that Dolores is legally blind and is "living independently." Further, that Dolores currently receives financial aid from the San Diego County Department of Welfare in the amount of $232 a month and Social Security benefits.

The submission states that in 44 Comp. Gen. 551 (1965) we held that the issue as to whether a child is incapable of self-support for purposes of 10 U.S.C. 1435(2)(B) is a matter for determination from all the facts. Further, that the phrase in section 1435(2)(B) "incapable of supporting themselves" should be applied in the light of available interpretations by the Federal courts of similar provisions in other laws, for example, under the provisions of the Social Security Act where the statutory phrase used is "inability to engage in any substantial gainful activity by any medically determinable physical or mental impairment * * *," and that the general principles outlined in the several court cases cited therein may properly be applied in connection with provisions of section 1435(2)(B).

The view expressed in the submission is that the court cases mentioned in connection with 44 Comp. Gen. 551 (1965) turned on the concept of the reasonable possibility of the claimant being able to engage in substantial gainful activity with reasonable regularity as opposed to intermittent or infrequent gainful activity. The submission continues as follows:

> * * * There was no indication that "independence" because of income from other than a reasonably regular employment capability had a bearing on the decisions, especially where the other income was related to and received because of the disability, as appears to be the case here. Moreover, the fact that awards are currently paying from California State Aid for the Blind and from Social Security would seem to indicate a *situation of incapability of self-support.*

Finally, the submission directs attention to 44 Comp. Gen. 280 (1964) wherein it was stated that the language of the statute appears to be addressed to the situations of children who must necessarily look to their parent member for their support, who had no independent source of income, and who are dependent because of being incapable of supporting themselves due to a mental defect existing prior to their 18th birthdays.

Section 1435 of Title 10, U.S. Code, provides in pertinent part:

> Only the following persons are eligible to be made the beneficiaries of, or to receive payments under, an annuity elected under this subchapter by a member of the armed forces:
>
> * * * * * * *
>
> (2) The children of the member who are—
>
> * * * * * * *

(B) * * * incapable of supporting themselves because of a * * * physical incapacity existing before their eighteenth birthday * * *.

Concerning the effect of receiving welfare and Social Security payments on the ability to support oneself, this Office defined the phrase "incapable of supporting themselves" found in 10 U.S.C. 1435(2)(B) as being equivalent to the phrase "inability to engage in any substantial gainful activity" relating to the provisions of 42 U.S.C. 423(C)(2). *See* 44 Comp. Gen. 551, 556 (1965). We do not believe that, in the circumstances described in the submission, the receipt of welfare or Social Security payments should be considered as constituting "substantial gainful activity." Instead, this fact should be considered as evidence of an inability to obtain and maintain suitable employment. Therefore, it is our view that the claimant is fully qualified as an eligible annuitant under the provisions of 10 U.S.C. 1435(2)(B), and has been so qualified since the death of the member on February 8, 1970.

Concerning the amount due the claimant, we should point out that 10 U.S.C. 1434 provides in part that the annuity is payable in equal shares to, or on behalf of, the surviving children eligible for the annuity at the time each payment is due, ending when there is no surviving child. In determining the amount due, consideration must be given to the fact that on the basis of the record before us it appears that there were three eligible beneficiaries from February 8, 1970, to March 8, 1970, and two eligible beneficiaries from March 9, 1970, to June 20, 1972. Therefore, the claimant would be entitled to one-third of the total monthly annuity payment due prior to March 8, 1970, and one-half of the total annuity payment due from March 9, 1970, to June 20, 1972. Beginning June 21, 1972, she is entitled to the entire monthly annuity. We should also point out that the fact that her share of the annuity was erroneously paid to her sisters does not prevent payment to the claimant. In this regard, under the concurrent authority contained in 10 U.S.C. 1442, we agree in advance not to object to waiver of recovery of the erroneous payments in this case.

Accordingly, settlement should issue in favor of the claimant, if otherwise correct.

With regard to the request for specific guidelines in "blindness" cases in determining the entitlement to RSFPP annuities, we stated in 44 Comp. Gen. 551, 558 (1965) that:

Whether a child is capable or incapable of self-support for purposes of 10 U.S.C. 1435(2)(B) is a matter for determination from all the facts of the particular case. * * *

Therefore, we will not issue specific guidelines for any type of physical incapacity because it is our view that the particular circumstances

of an individual's situation must be considered before a determination can be made as to whether a person's status may properly be viewed as being within the scope of section 1435(2)(B).

[B-179859]

Pay—Severance—Effect on Subsequent Retirement Benefits

Regular Air Force officer who was removed from the active list under section 106 of Title I of Public Law 810, 80th Congress and who received severance pay under that section is not barred from being retired under 10 U.S.C. 1331, upon attaining age 60 so long as he is otherwise qualified to receive such retired pay.

Pay—Severance—Recoupment—Exception

Where certain provisions of law governing separation from the active list authorize severance pay, and require refund of such pay upon retirement, but where other provisions such as 10 U.S.C. 3786 and 8786 do not state such requirement, in the absence of such a limiting statutory provision or a clear indication of Congressional intent to the contrary refund of severance pay is not required as a condition precedent to the receipt of retired pay under 10 U.S.C. 1331.

Pay—Retired—Effective Date—Subsequent Application Effect—*Seagrave* Case

Where a member who is otherwise entitled to retired pay under 10 U.S.C. 1331, but who does not file application for such pay until well after meeting age requirement, on the basis of the holding in the case of *Seagrave* v. *United States*, 131 Ct. Cl. 790 (1955), and similar cases, such pay accrues from date of qualification or on first day of any subsequent month stipulated in application for such pay to begin, without regard to date such application is filed.

In the matter of receipt of severance pay and non-Regular retirement pay, June 5, 1974:

This action is in response to a letter dated October 10, 1973, from the Assistant Secretary of Defense (Comptroller), requesting an advance decision as to the entitlement of a service member to receive retired pay under the provisions of Chapter 67 of Title 10, U.S. Code, in the circumstances described in Department of Defense Military Pay and Allowance Committee Action No. 492, which was enclosed with the request.

The questions set forth in the Committee Action are:

1. Does the receipt of severance pay by a Regular officer removed from the active list under Pub. L. 810, 80th Congress, 2nd Session bar his subsequent retirement under 10 U.S.C. 1331 upon his attaining age 60, assuming that prior to the receipt of such severance pay he had performed 20 years of service computed under 10 U.S.C. 1332, and the last eight years of such qualifying service were performed as a member of a category listed in Section 1332?
2. If the previous question is answered in the negative, is a refund of the severance pay a condition precedent to his entitlement to retired pay under 10 U.S.C. 1331?
3. The former officer's date of birth is 29 June 1903. He has requested retired pay to begin 15 August 1973. If he is determined eligible to receive retired pay, what is the effective date pay is allowable?

The discussion in the Committee Action states that the statute which provides for readjustment pay for non-Regular officers released from active duty (10 U.S.C. 687) provides in subsection (f) thereof that a deduction of a portion of the readjustment pay received is required in the event of later qualification for retired pay. However, the statute which provides for severance pay to Regular Air Force members removed from the active list (10 U.S.C. 8786) is silent on this point.

In this regard, the discussion suggests that the distinction which exists may be in the fact that a non-Regular who is released from active duty involuntarily with readjustment pay under 10 U.S.C. 687 retains his Reserve commission and may continue to earn credits toward retirement under some provision of law, while a Regular member removed from the active list is severed from all appointments and retains no continuing status in which he can earn eligibility.

Generally, severance pay is payable to Regular officers of the uniformed services because of forced separation from the service for various reasons, including failure of selection for promotion and elimination because of unfitness or unsatisfactory performance of duty, and who are otherwise ineligible to receive retired pay, in order to help those who are separated to resettle in civilian circumstances.

Regular Army and Air Force officers are entitled to severance pay as provided in 10 U.S.C. 3786(b)(2) and 8786(b)(2). Those subsections--which were derived from section 106 of title I of the Army and Air Force Vitalization and Retirement Equalization Act, approved June 29, 1948, Ch. 708, 62 Stat. 1082--provide in pertinent part:

> (b) Each officer removed from the active list * * * under this chapter shall—
>
> * * * * * * *
>
> (2) if on that date he is ineligible for voluntary retirement under any law, be honorably discharged in the grade then held with severance pay computed by multiplying his years of active commissioned service, but not more than 12, by one month's basic pay of that grade.

Severance pay is also authorized for Regular Army and Air Force officers under subsections 3303(d)(3) and 8303(d)(3) of Title 10, U.S. Code, in substantially the same language as that quoted above. In addition, similar severance pay provisions are contained in 10 U.S.C. 6395(g), 6401(b) and 6402(b), for certain Regular Navy and Marine Corps officers.

In contrast to the above, severance pay benefits for Regular warrant officers (10 U.S.C. 1167 (b) and (d)) and Regular Navy and Marine Corps officers (10 U.S.C. 6382(c), 6383(f), and 6384(b)), provide basically that the acceptance of a lump-sum payment of severance pay under any of the above sections does not deprive a person of any retirement benefits from the United States. However, these sections further provide that there shall be deducted from each of his retire-

ment payments so much thereof as is based on the service for which he has received severance pay payment until the total deducted equals the amount of the lump-sum payment.

In 43 Comp. Gen. 768 (1964) we said that the legislative history of the phrase "acceptance of a lump-sum payment under this section does not deprive a person of any retirement benefits from the United States," shows that its purpose was to establish that the payment of severance pay would not bar an officer from later qualifying for any other type of Government retirement, such as Reserve retirement under Title III of Public Law 810, 80th Congress.

In 39 Comp. Gen. 360 (1959) which construed 10 U.S.C. 8303(d)(3), a provision which as previously indicated contains language similar to that in 10 U.S.C. 3786(b)(2) and 8786(b)(2), we said:

> * * * their eligibility for voluntary retirement or for retired pay under 10 U.S.C. 1331, and the computation of the amount of retired pay upon retirement, must be regarded as being governed by the same provisions of law as those applicable to other members of the Armed Forces serving in a similar capacity who have not received severance pay prior to retirement, in the absence of some statutory provision requiring a different conclusion. * * *

Since the primary purpose for authorizing severance pay to Regular officers is because of involuntary separation from service and to provide a monetary cushion to help the individuals relocate and readjust to civilian pursuits and since Congress has not imposed any restrictions in 10 U.S.C. 3786 or 8786, it is our view that in the circumstances set forth in the Committee Action, the payment of severance pay would not bar subsequent retirement under 10 U.S.C. 1331, nor would refund of such pay be required as a condition precedent to entitlement to retired pay under 10 U.S.C. 1331. Questions 1 and 2 are answered accordingly.

With regard to question 3, the discussion in the Committee Action stated that the officer completed the statutory service requisite for retirement under 10 U.S.C. 1331 prior to his acceptance of a Regular status in 1947 and that the only further statutory prerequisite to his actual eligibility to receive retired pay was that he attain 60 years of age. Further, that while he attained that age on June 29, 1963, he did not file an application for retirement under 10 U.S.C. 1331 until August 15, 1973.

In the case of *Seagrave* v. *United States*, 131 Ct. Cl. 790 (1955), the court held that retired pay under Title III of the act of June 29, 1948, 62 Stat. 1087, was payable from the date the plaintiff met the age and service requirements for such pay even though he did not make application therefor, a condition precedent under the statute, until some time subsequent to such date. That principle was followed in *Hyde* v. *United States*, 134 Ct. Cl. 690 (1956) and in *Stevanus* v. *United States*, 138 Ct. Cl. 149 (1957).

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In 37 Comp. Gen. 653 (1958) we stated with regard to these matters:

* * * hereafter we will follow the decision of the Court of Claims in the *Seagrave* case as a precedent in the settlement of similar claims and we will not question otherwise proper payments of retired pay made in accordance with the rule established by that decision. * * *

Therefore, in the situation where a member is otherwise fully qualified to receive retired pay for non-Regular retirement, but does not file an application for such retired pay until well after he has met the age requirements, such pay still accrues from the date the member qualifies by reason of age and service for such pay or on the first day of any subsequent month stipulated by the member in his application, without regard to the date of such application. *See* 48 Comp. Gen. 652 (1969).

Question 3 is answered accordingly.

[B–180159]

Transportation—Automobiles—Military Personnel—Long-Term Leased Vehicles—No Authority for Shipment

Member with motor vehicle under long-term lease is not entitled to shipment of leased vehicle overseas at Government expense since 10 U.S.C. 2634 and paragraph M11000–1, Joint Travel Regulations, provide vehicle must be owned by the member, and a long-term lease is a bailment agreement in which the lessee is given possession, but the lessor retains ownership.

To the Secretary of the Army, June 5, 1974:

Further reference is made to letter, with attachments, dated November 9, 1973, from the Assistant Secretary of the Army (Manpower and Reserve Affairs), requesting a decision as to whether members of the uniformed services, who are entitled to shipment of privately owned vehicles, may ship long-term leased vehicles under the same statute, section 2634, Title 10, U.S. Code. This request has been assigned PDTATAC Control No. 73–50 by the Per Diem, Travel and Transportation Allowance Committee.

In his letter the Assistant Secretary states that the Judge Advocate General, Department of the Army, is of the opinion that the concept of a privately owned vehicle, under the statute, does not include a leased vehicle but that the Staff Judge Advocate, Military Traffic Management and Terminal Service (from whom the request for a decision originated), is of the opinion that a lessee of a vehicle has equitable title, and thus a leased vehicle should be eligible for shipment under the statute.

The statutory authority for the shipment of a motor vehicle is contained in section 2634 of Title 10, U.S. Code, which provides:

(a) When a member of an armed force is ordered to make a change of permanent station, one motor vehicle *owned* by him and for his personal use or the

use of his dependents may * * * be transported, at the expense of the United States, to his new station * * *. [Italic supplied.]

The above statutory authority is implemented in Chapter II of Volume I, Joint Travel Regulations, paragraph M1000–1, which states as follows:

* * * As used in this Chapter, the term "privately owned motor vehicle" means any self-propelled wheeled motor conveyance *owned* by the member, in his possession, and for use by the member and/or his dependents * * *. [Italic supplied.]

In the present circumstances, it appears that the vehicle is the subject of a bailment agreement. In 8 Am Jur 2d, Bailments § 16, it is stated that:

* * * it is a generally recognized feature of bailments that possession of the thing bailed is severed from ownership; the bailor retains the general ownership, while the bailee has the lawful possession or custody for the specific purpose of the bailment * * *

Further, in 8 am Jur 2d, Bailments § 30, it is stated that:

* * * If the agreement is that the party who receives possession of the property is to retain it for a definite period, and that if, at or before the expiration of that period, he pays for the property, he is to become the owner, otherwise to pay for its use, the transaction is merely a bailment and title to the property, even as against creditors, remains in the bailor until the price is paid. * * *

This Office held in decision B–167036, February 18, 1970, that while the word "ownership" may be used with several meanings, depending upon the context, one of the accepted tests of "ownership" in its customary sense is the right to dispose of, sell, convey, assign or give away. In the present situation, the lessee of the vehicle would have no right of disposal. If there were an option to purchase the vehicle there would be no right of disposal until after the option was exercised.

Among the attachments to the Assistant Secretary's letter is a statement from the Military Traffic Management and Terminal Service to the effect that a lessee under a long-term lease may be considered as having equitable title to the motor vehicle and as such should be considered to be an owner, citing as authority *Powell* v. *Home Indemnity Company*, 343 F. 2d 856 (8th Cir. 1965). In this case the court had for determination the question of whether the company which was using a leased vehicle was the owner within the meaning of its liability insurance policy. In construing the word "owner" the court stated that it should take the meaning most favorable to the insured. It would thus appear that the *Powell* decision is limited in its effect and is not for application to the question now before us.

Also, 19 Comp. Gen. 684 (1940) is cited in support of the acceptance of equitable ownership under 10 U.S.C. 2634. That decision which involved the right to reimbursement of mileage expenses of Govern-

ment employees under a 1931 statute, stated the general rule that equitable ownership is not controlling to establish right to mileage, but that where the traveler had equitable ownership of an automobile at the time of performance of official travel and registration of the automobile used was subsequently changed to the traveler's name, mileage was authorized in the interim period.

However, while equitable ownership has been considered sufficient in the special circumstances indicated, a member who has use and possession but not the right of disposal of a vehicle, i.e., a bailment, in our opinion, is not an owner within the contemplation of 10 U.S.C. 2634.

Accordingly, it is our view that there is no legal authority for the transportation of a long-term leased vehicle under 10 U.S.C. 2634.

[B–180313]

Compensation—Promotions—Delayed—Freeze on Promotions

Employee whose promotion was delayed as a result of the President's freeze on promotions and administrative delay in perfecting promotion recommendation due to erroneous view that promotion could not be made until freeze was lifted is not entitled to a retroactive promotion pursuant to recommendation of a Grievance Examiner because the error involved was the misinterpretation of instructions and the type of administrative error which will permit a retroactive promotion is an error which involves a ministerial action not accomplished through inadvertence or a failure to implement mandatory provisions of laws and regulations.

Compensation—Promotions—Retroactive—Rule

Retroactive promotion of an employee as recommended by a Grievance Examiner on the basis that employees similarly situated in other locations were promoted may not be followed since employees are not entitled to identical treatment in promotion actions compared to other employees.

In the matter of implementation of recommendation for retroactive promotion, June 5, 1974:

This action concerns the question as to whether the Department of Labor may properly implement the recommendations of a grievance examiner that Mr. Elvin P. Donald, a Department of Labor employee, be promoted retroactively with back pay.

The record indicates that on January 11, 1973, Mr. Donald, while serving as a GS–11 Compliance Officer in the Denver Area Office of the Kansas City Region of the Labor-Management Service Administration (LMSA), completed his time-in-grade eligibility under then existing Department of Labor requirements for promotion in his career ladder to the journeyman (GS–12) level. A few days earlier, on January 3, 1973, his immediate supervisor had recommended him for advancement to the GS–12 level and forwarded his recommendation to the

LMSA regional office in Kansas City where the regional administrator had authority to effect the promotion. At the time, throughout the executive branch of the Government, there was in effect the President's directive of December 11, 1972, announcing a temporary freeze on hirings and promotions, which had been implemented in the Department of Labor by a memorandum of January 2, 1973, outlining procedures that would govern the freeze in that agency. This memorandum provided certain limited exceptions to the freeze including an exception for the promotion of certain "career ladder" employees which was applicable to Mr. Donald. The exception read as follows:

> The only exceptions to the freeze with respect to * * * [career ladder] * * * promotions are where the employee actually had assumed the higher level duties and responsibilities and actually operated at the higher level for some time *prior to December 11, 1972.* "For some time" is interpreted as meaning for 30 days or more.

This exception to the freeze was further limited on February 8, 1973, when the Secretary of Labor ordered that no departmental employee would be placed in a position of GS–11 or above without prior approval of the Office of the Secretary.

When the January 3 recommendation that Mr. Donald be promoted was reviewed by the assistant regional administrator at the LMSA regional office in Kansas City, sometime in mid-January 1973, it was determined to contain insufficient information and justification for processing and was, therefore, returned to the Denver area office for correction. The area office made the required amendments and resubmitted the promotion recommendation to the regional office in Kansas City on January 22, 1973. From there, it was forwarded to the regional personnel office for appropriate action, including a classification audit, in accordance with departmental regulations.

On or soon after March 16, 1973, the regional personnel officer at the Kansas City Office requested the personnel specialist in the Denver office to conduct a desk audit on work performed by Mr. Donald. The desk audit was conducted on March 22, 1973, and the audit report, which indicated that Mr. Donald had actually performed at the higher classification level for 30 days prior to December 11, 1972, was submitted to the Kansas City regional office on April 16, 1973. Subsequently it was forwarded to the regional administrator on April 18, 1973, while the restrictions on promotions were still in effect. Mr. Donald was finally promoted on May 27, 1973, when it was known that the Assistant Secretary of Labor for LMSA was about to lift the restrictions that had delayed promotions. Apparently, some of the administrative actions were not taken as expeditiously as possible because Kansas City Region officials were under the mistaken impression that the freeze on promotions was applicable to Mr. Donald.

Mr. Donald filed a grievance alleging that disparate treatment was accorded him by the Kansas City Region of LMSA as compared with the treatment of compliance officers in similar positions in the other five regions of LMSA and, therefore, he contends that he is entitled to a retroactive promotion to the date of his promotion eligibility.

A grievance examiner was appointed and a hearing was held on the matter. Mr. Donald was represented by a representative of the National Union of Compliance Officers (NUCO) Independent, his union, and the Government was represented by a representative of LMSA, Department of Labor. After considering the evidence submitted by each side, the grievance examiner made the following findings and recommendation:

> The Grievance Examiner finds that there was disparate treatment and administrative error in the matter of promoting Grievant Donald and that LMSA has the right and the duty to make Mr. Donald's promotion retroactive with pay. Therefore, the Grievance Examiner recommends that * * * the promotion of Grievant Donald to GS–12 be made retroactive from January 21, 1973, with pay.

The grievance examiner based his findings and recommendation, in part, on his opinion that the grievant was subject to disparate treatment with regard to promotion in comparison with similarly situated compliance officers in other regions of LMSA. He indicated that an employee has a "* * * right to equal treatment under the law and rules and regulations implementing collective representation, labor-management relations, and the promulgation and enforcement of personnel policies in the federal sector should be respected, no less than the right of an employee to be free from discrimination on the basis of race, and he should be afforded appropriate remedy for infringement of his right." The examiner found support for this position in recent court cases that have provided remedies to Government employees who have been accorded discriminatory treatment on the basis of their race. In this connection he cites *Walker* v. *Kleindienst*, 357 F. Supp. 749 (1973), *Chambers* v. *United States*, 196 Ct. Cl. 186 (1971), and *Allison* v. *United States*, 196 Ct. Cl. 263 (1971).

We believe the examiner has assigned a far broader meaning to these cases than was ever intended by the court in citing them for the proposition that each Federal employee is entitled to precisely equal or identical treatment vis-a-vis other similarly situated employees. Those cases stand for the much narrower principle that Federal employees are entitled to equal employment opportunities without discrimination because of race, color, religion, sex or national origin under the provisions of 5 U.S.C. 7151 and 42 U.S.C. 2000e–1 *et seq.* In this connection we are not aware of any law or regulation that requires the promotion of Federal employees in one office because employees holding similar positions in other offices are promoted. Moreover, we

point out that, while the Equal Protection Clause of the 14th Amendment to the United States Constitution prohibits arbitrary and capricious distinctions, it does not require identical treatment among those similarly situated. *Milnot Co.* v. *Richardson*, 350 F. Supp. 221 (1972). Hence, we find no legal basis for the examiner's conclusion that Mr. Donald is entitled to a retroactive promotion because employees in other regions were promoted when they became eligible for promotion while he was not.

The grievance examiner further supported his recommendation for a retroactive promotion on the basis that the agency violated the applicable requirements of its promotion plan by failing to consider "* * * the promotion of Grievant Donald as an exception to the freeze." He cited subchapter 6–4, chapter 335, Federal Personnel Manual, as authority in this connection. That chapter is primarily concerned with merit promotions where, in response to a particular vacancy, the agency must consider employees within a predesignated area for appointment to the position. It also contains a discussion of corrective actions which should be taken if the agency should overlook an employee within the area since such action would constitute the procedural violation of failing to consider an employee entitled to consideration. Further, while that chapter and subpart A of part 335 of the Commission's regulations (5 CFR 335.101–103) provide that agency promotion programs will be in conformity with law and Civil Service Commission (CSC) regulations and instructions, nothing in those regulations or instructions authorizes the retroactive promotion of employees based on the failure of an agency to comply with CSC policies. In fact the only remedies for employees who have not been promoted because of agency error in following the CSC policies as discussed in chapter 335 of the Federal Personnel Manual are immediate prospective promotion and first opportunity to be promoted if an opening for an immediate promotion is not available.

Finally, the grievance examiner based his recomemndation on his conclusion that Mr. Donald would have been promoted on an earlier date "* * * except for inadvertent oversight of Management representatives in the Kansas City Region * * *" and expresses the belief "* * * that the circumstances present such administrative error as should be retroactively corrected under notions similar to those expressed in Comptroller General Decisions #B–135656 dated May 19, 1958 [37 Comp. Gen. 774] and #B–133878, dated November 5, 1957 [37 Comp. Gen. 300] * * *."

The "inadvertent oversight" or erroneous application of administration which occurred in this case is not an administrative error which will entitle Mr. Donald to a retroactive promotion. It has long been the general rule that a personnel action may not be made retroactively

effective so as to increase the right of an employee to compensation. 31 Comp. Gen. 15 (1951); 40 *id.* 207 (1960); 52 *id.* 631 (1973). Exceptions have been made to the rule where through *bona fide* administrative error a personnel action was not effected as intended or where an agency has failed to carry out written administrative regulations having mandatory effect. 34 Comp. Gen. 380 (1955); 39 *id.* 550 (1960); B-173815, April 18, 1973.

The facts in the present case do not appear to satisfy either of these exceptions. We note that the LMSA regional administrator at Kansas City had promotion appointment authority until February 8, 1973, when the Secretary of Labor ordered that approval be obtained from his office before employees could be promoted to grades GS-11 and above. Prior to February 8, 1973, however, the regional administrator did not exercise his authority to promote Mr. Donald. Although his decision not to expedite completion of the investigation he considered necessary prior to effecting the promotion may have been influenced by a belief that the promotion was precluded by the freeze, the fact is that the regional administrator did not have a present intention to promote Mr. Donald at any time prior to February 8. On the contrary Mr. Donald's case was treated as if actions prerequisite to promotion had not been accomplished until the desk audit of his position was completed on April 16, 1973.

It has been long held that the power of appointment is within the discretion of the head of a department and in those to whom he has delegated such power. It is an executive function which involves exercising the discretion of the executive. *Wienberg* v. *United States*, 425 F. 2d 1244 (1970), *Tierney* v. *United States*, 168 Ct. Cl. 77 (1964). Where agency action is by law committed to agency discretion, the standard to be applied by the reviewing authority in reviewing the action of the agency is whether the actions are arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. *United States* v. *Walker*, 409 F. 2d 477 (1969), *Warren Bank* v. *Camp*, 396 F. 2d 52 (1968). Arbitrariness and capriciousness exist only if the agency action lacks a rational basis. *Pace Co., Division of Ambac Industries, Inc.* v. *Department of the Army of the United States*, 344 F. Supp. 787, case remanded 453 F. 2d 898, cert. denied 405 U.S. 974 (1971).

Our review of the facts in this case does not indicate that the actions of the LMSA regional administrator at Kansas City with regard to Mr. Donald's promotion were arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, notwithstanding the fact that most other similarly situated compliance officers in other regions were promoted during the period in question.

Comptroller General decisions B–135656 and B–133878, *supra*, cited by the examiner as cases permitting the retroactive correction of administrative error, involved the inadvertent delay of agency officials in performing the ministerial action of awarding within-grade pay advancements to qualified employees entitled to such advancements under applicable regulations. These cases are differentiated from the present situation since agency discretion to appoint an employee to a higher grade was involved and the delay in promotion was caused by the decision to obtain additional information concerning Mr. Donald's qualifications and the President's freeze order.

Accordingly, it is our view that there is no authority under which the Department of Labor may retroactively promote Mr. Donald as recommended by the grievance examiner.

[B–177512]

Contracts—Protests—Contracting Officer's Affirmative Responsibility Determination—GAO Review Discontinued—Exceptions—Fraud

Allegation of noncompetitive practices because of communality of ownership and financial interests between two bidders is referred to Defense Supply Agency for consideration in accordance with Armed Services Procurement Regulation (ASPR) 1–111 and ASPR 1–600. General Accounting Office (GAO) has discontinued practice of reviewing bid protests of contracting officer's affirmative responsibility determination, except for actions by procuring officials which are tantamount to fraud, and GAO has no authority to administratively debar or suspend other than for violations of Davis-Bacon Act, which is not relevant here.

In the matter of United Hatters, Cap and Millinery Workers International Union, June 7, 1974:

The United Hatters, Cap and Millinery Workers International Union (hereinafter referred to as the Union), has submitted correspondence purporting to establish a communality of ownership and financial interests between Propper International Hat Company and Society Brand Hat Company and the occurrence of certain noncompetitive practices. The Union requests this Office to institute appropriate action to effect imposition of penalties upon the above-named corporations, to deny them "further fruit of their illegal association and combination" and to hold them ineligible for future Government contracts.

The Union notes that although this Office reviewed a 1972 procurement (IFB No. DSA100–72–B–1543, issued by the Defense Supply Agency (DSA)), and did not find an adequate basis for questioning the validity of the contract awarded to Propper, we advised that we would consider the matter further upon the submission of

evidence showing a communality of ownership or financial interests between the corporations. B–177512, February 23, 1973. The Union further states that both firms have submitted bids on at least one recent solicitation (DSA100–74–B–1223) which has yet to be awarded.

In essence the correspondence questions the responsibility of the above-named corporations and their eligibility for contract awards. However, this Office has discontinued its prior practice of reviewing bid protests involving a contracting officer's affirmative determination of responsibility of a prospective contractor since any such determination is largely within the discretion of the procuring officials who must suffer any difficulties experienced by reason of the contractor's nonresponsibility. If pursuant to the applicable regulations the contracting officer finds the proposed contractor responsible, we do not believe the finding should be disturbed except for actions by procuring officials which are tantamount to fraud. (See *Keco Industries, Inc.* v. *United States*, decided February 20, 1974, United States Court of Claims No. 173–69, wherein the court, in reviewing a disappointed bidder's claim for bid preparation expenses, observes that criteria for determining bidder responsibility "are not readily susceptible to reasoned judicial review.") The allegations of noncompetitive practices because of communality of ownership and financial interests concern matters which are properly for consideration pursuant to agency debarment and suspension procedures, as provided in Armed Services Procurement Regulation (ASPR) 1–600, and the reporting procedures in ASPR 1–111. This Office has no authority to administratively debar or suspend except for violations of the Davis-Bacon Act (40 U.S. Code 276a–2) which is not relevant to this case.

Accordingly, we are referring this matter to DSA for consideration and appropriate action in accordance with the above regulations.

[B–180460]

Bidders—Qualifications—Capacity, etc.—Plant Facilities, etc.

Review of record concerning determination of bidder's nonresponsibility to perform contract for provision of hard copies and microfiche of educational literature indicates that although bidder has equipment capability, with exception of backup copier, contracting officer's finding on this responsibility factor, as well as finding that bidder lacks necessary personnel, is not patently unreasonable.

Contracts—Specifications—Failure to Furnish Something Required—Invitation to Bid Attachments

Bid which omits pages of invitation for bids containing material provisions, but which on page 1 contains Standard Form 33 "Solicitation" and "Offer" clauses, indicates it is page 1 of 13, and which on page 2 acknowledges all four amendments which altered every page of schedule contained in and work scope at-

tached to 13 pages of solicitation as originally issued, is responsive because it clearly identifies complete solicitation and clauses contained or referenced therein are incorporated by specific reference in bid.

Bids—Qualified—Letter, etc.—Listing Production Facilities

Cover letter included with bid which lists bidder's production facilities in several cities and describes new facility to be opened in Washington, D.C., is responsibility information which does not qualify or condition bid or limit basis of responsibility determination.

Bidders—Qualifications—Manufacturer or Dealer—Administrative Determination—Labor Department

Bidder's qualification as "regular dealer" or "manufacturer" under Walsh-Healey Act is determination vested in contracting officer, subject to final review by Department of Labor, and General Accounting Office is without authority to review; and where bid represents bidder is "regular dealer," protester's contention that bidder actually is "manufacturer" provides no basis to question bid responsiveness.

Contracts—Protests—Timeliness

Where contention in protester's comments on administrative report challenging propriety of film types specification in solicitation for distribution of hard copies and microfiche of educational literature is presented to General Accounting Office (GAO) 3 months after agency denial of protest on same issue and subsequent bid opening, it is untimely because issue was not brought to GAO's attention within 5 working days after adverse agency action; to extent issue of propriety of diazo film might be regarded as being raised initially in comments, it is untimely since alleged solicitation impropriety was apparent and should have been raised before bid opening.

Contracts—Specifications—Adequacy—Minimum Needs Standard

Since no reason is presented why protester did not bring objection to film types specification to General Accounting Office's (GAO) attention until 3 months after bid opening. no good cause is shown why issue should now be considered; nor is issue significant, since it merely involves propriety of agency's determination of minimum needs and drafting of specifications, and application of GAO standards of review to present facts does not involve procurement principle of widespread interest.

Contracts—Protests—Timeliness—Limitations

Protester's objection to General Accounting Office's bid protest timeliness rules is without merit since, as indicated in preamble to 4 CFR 20, rules represent tested and proven principles providing parties fair opportunity to present cases consistent with need to resolve protests in reasonably speedy manner.

In the matter of Leasco Information Products, Inc.; Computer Microfilm International Corporation; Educational Facilities Center; Xerox Corporation; Bell & Howell, June 10, 1974:

We have considered the protests of Leasco Information Products, Inc. (Leasco), and Computer Microfilm International, Corp. (CMIC), under invitation for bids (IFB) NIE–B–74–0001, issued by the National Institute of Education (NIE), Department of Health, Education, and Welfare (HEW). Each bidder has protested against award

to any bidder other than itself. In addition, we have had the benefit of written comments submitted by representatives of three other bidders---Educational Facilities Center (EFC), Xerox Corporation, Xerox University Microfilms (Xerox), and Bell & Howell, Micro Photo Division (Bell & Howell). Also, representatives of the five parties and the agency presented their views orally at a conference on the protest requested by counsel for Leasco and held at our Office on April 8, 1974. The controversy essentially involves a question of which of these five bidders is the low responsive, responsible, and otherwise qualified bidder for this procurement. To the extent necessary, the specific contentions of the parties will be discussed in detail in a *seriatim* review of the bids, beginning with the lowest.

The IFB was issued on October 10, 1973. As amended, the solicitation invited bids on a fixed-price requirements type contract for the operation of the ERIC Document Reproduction Service (EDRS) for a 1-year period, with options for 2 succeeding years. ERIC is the Education Resources Information Center, an international system with the primary purpose of acquiring, selecting, processing and disseminating significant R&D and related educational literature. EDRS, one of the components of this system, involves the provision, either in microfiche or hard copy format, of the full text of reports cited in the journal "Research in Education." In short, the work involves both the preparation of microfiche and hard copies of educational literature and the mailing of this material in response to orders received both from the Government and from private parties.

Six bids were opened on January 11, 1974, and the bid prices were evaluated with the following results:

1. EFC	$201,237.00
2. CMIC	299,101.50
3. Xerox	311,985.00
4. Bell & Howell	329,447.00
5. Leasco	338,817.50
6. Microform Management Corp	396,628.00

The contracting agency has determined that CMIC is the low responsive, responsible, and otherwise qualified bidder. Award to CMIC is being withheld pending our decision on the protests.

By letter of January 18, 1974, Leasco protested to our Office against award to any other concern. In regard to EFC, Leasco contended the apparent low bid was null and void, as well as nonresponsive; that EFC did not meet the necessary qualifications under the Walsh-Healey Act; and that its responsibility was questionable. In addition, Leasco questioned EFC's certification in its bid that it was a small business concern.

Subsequently, the contracting officer determined that the EFC bid was responsive and was not null and void as contended by Leasco. The contracting officer also determined that EFC qualified under the Walsh-Healey Act as a "manufacturer." As to EFC's small business size status, the contracting officer requested the Small Business Administration (SBA) regional office in Chicago for a formal size determination. The SBA regional office determined that EFC was other than a small business concern. This determination was appealed to the SBA Size Appeals Board and was upheld in a decision of May 8, 1974. As to EFC's responsibility, the contracting officer has made a determination that the low bidder is not a responsible prospective contractor.

Notwithstanding the determination that EFC was nonresponsible, the contracting officer has requested our Office to decide the issues relating to the responsiveness of EFC's bid on the basis that if EFC was determined by the SBA Size Appeals Board to be a small business concern, a certificate of competency might conceivably be issued overturning the contracting officer's determination of nonresponsibility. Since this is no longer a possibility, and since, for the reasons which follow, we uphold the contracting officer's determination of EFC's nonresponsibility, we do not find it necessary to consider the issues relating to the responsiveness of EFC's bid.

Both Leasco and CMIC have contended that the low bidder is not a responsible prospective contractor. Counsel for Leasco stated on information and belief that EFC may not have the required technical, managerial and financial capabilities to perform in a timely manner. These views have been echoed by counsel for CMIC, who doubts that EFC has the personnel, facilities, or financial capability to perform a contract for sophisticated reproduction of a large volume of documents. Both protesters point to the large disparity between EFC's bid price and the other bid prices as indicating that the low bidder may not have comprehended the scope of the contract.

On January 21, 1974, a site visit was made at EFC by a team of five Government representatives, including the contracting officer. Among other things, the team investigated EFC's equipment and personnel. Subsequently, the contracting officer on March 1, 1974, made a determination pursuant to section 1–1.1204–1(b) of the Federal Procurement Regulations (FPR) that EFC was nonresponsible. The contracting officer stated the basis for the determination was that EFC did not have the equipment and personnel capacity to perform adequately and/or meet the required production schedules.

It is reported that the determination was orally communicated to EFC's counsel on March 1, 1974. However, the matter was apparently held in abeyance because the preliminary issue of whether EFC qualified as a "manufacturer" under the Walsh-Healey Act (41 U.S. Code

35 note) had to be resolved. By letter of March 14, 1974, with enclosures, counsel for EFC submitted to the contracting officer information in support of its contention that it is a "manufacturer." Some of this information also had a bearing on the question of EFC's responsibility.

In a letter dated March 30, 1974, to EFC, the contracting officer reversed his determination regarding EFC's nonqualification as a "manufacturer." By a separate letter of the same date to EFC, the contracting officer stated that after a thorough review of the record, he had made a final determination of EFC's nonresponsibility. This letter listed a number of deficiencies in EFC's equipment and personnel.

EFC's counsel replied to the determination of nonresponsibility by letter dated apparently April 5, 1974, to the contracting officer, a copy of which was provided to our Office on April 8, 1974. Counsel claimed that the cited deficiencies did not have to be corrected, since no such deficiencies ever existed. The letter concluded:

> * * * I therefore ask you to reverse your decision and declare EFC a responsible contractor. If you decide not to reverse your decision regarding EFC's responsibility, I hereby appeal your decision to the United States Government General Accounting Office as arbitrary and capricious.

We have since been informally advised, both by the agency and EFC's counsel, that the contracting officer has considered the material presented by EFC in the above letter. However, the contracting officer has not reversed his determination of nonresponsibility.

One of the important elements of a bidder's responsibility is the capability to perform in accordance with the requirements set forth in the solicitation, which includes such factors as equipment and personnel. Resolving this question of fact necessarily involves the exercise of a considerable range of judgment and discretion by the contracting officer. 43 Comp. Gen. 228, 230 (1963). It is not the function of our Office to determine whether EFC has demonstrated a capability to perform this contract; rather, our function is to review the record to determine whether the contracting officer's exercise of judgment and discretion in finding EFC nonresponsible was reasonable under the circumstances. In this regard, we have stated in prior cases that a contracting officer's determination of responsibility or nonresponsibility will not be disturbed absent a reasonable basis therefor. 51 Comp. Gen. 233 (1971); 45 *id.* 4 (1965).

We have reviewed the record supporting the administrative determination of nonresponsibility, as supplemented by opposing counsel and disputed by counsel for EFC, and we have concluded that the contracting officer's determination in this regard represented a reasonable exercise of procurement discretion. Though we believe that EFC

has made out a case supporting its contention that it has, or has the ability to obtain, equipment adequate to the fulfillment of the contract, we can, at the same time, appreciate the contracting officer's concern regarding EFC's backup copier capability since the backup copier—because of its location—may not meet the heavy daily volume of work. The contracting officer's decision on this responsibility factor (FPR 1-1.1203-2(a)(2)) is based on sufficient facts and findings which raise doubt as to the ability of EFC to perform properly under the production constraints of the solicitation and while we may not share entirely this doubt, we cannot say that the decision is patently unreasonable.

On the other hand, the contracting officer has established, to our satisfaction, the basis for his conclusion that EFC does not have the necessary personnel to perform the contract work in an adequate and timely manner. We are of the opinion that the contracting officer, and other officials of the agency having procurement responsibilities, who must bear the brunt of difficulties that may be experienced during performance, are in the best position to judge the quantity and quality of personnel necessary to perform the work contemplated by the solicitation. In view of these facts and considerations, together with the fact that the contracting officer twice reconsidered his determination but was unable to resolve his doubts and find EFC responsible, we cannot say his decision was without a reasonable basis; rather, his decision comported with FPR 1-1.1202(d) providing:

> * * * Where a contracting officer has doubts regarding the productive capacity * * * of a prospective contractor which cannot be resolved affirmatively, the contracting officer shall determine that the prospective contractor is nonresponsible.

As for the second low bidder, CMIC, Leasco and Bell & Howell have contended that its bid is nonresponsive, and that it is a nonresponsible prospective contractor.

Leasco and Bell & Howell first contend that the CMIC bid is nonresponsive because it did not include various pages of the solicitation which contained material terms and provisions. Second, Bell & Howell points to a letter submitted with CMIC's bid which made reference to a CMIC production facility in Washington, D.C. Bell & Howell views this letter as creating a reservation concerning the ability of CMIC to perform and as calling into question the responsiveness of the bid. Bell & Howell believes the letter creates doubts as to whether acceptance of the bid would result in a binding contract and argues that a doubtful bid is nonresponsive and should be rejected. Third, Leasco contends that CMIC's certification in its bid that it is a "regular dealer" renders the bid nonresponsive because the total bid (including the cover letter) indicates that CMIC intends to be a "manufacturer." In addition, Leasco argues that CMIC is not a "regular dealer" as that term is defined in the Federal Procurement Regulations.

We will first consider the contention that the CMIC bid is nonresponsive because of failure to include certain pages from the solicitation. In this regard, it is necessary to describe in some detail the contents of the IFB, as amended, and CMIC's bid.

The "TABLE OF CONTENTS" at page 5 of the IFB indicates that the solicitation consisted of the following:

Cover Page—(SF-33)
Representations and Certifications—(SF-33-p. 2)
Solicitation Instructions and Conditions—(SF-33A-pp. 3-4)
Schedule—(pp. 3-14 [sic])
General Provisions—(SF-32)
Scope of Work—(Enclosure I)

Also, page 1 of the IFB SF33, indicates in block 4 at the top of the page that it is page 1 of 13 and contains the following language in block 9 under the heading "SOLICITATION":

All offers are subject to the following:
1. The attached Solicitation Instructions and Conditions, SF 33-A.
2. The General Provisions, SF 32 11/69 edition, which is attached or incorporated herein by reference.
3. The Schedule included below and/or attached hereto.
4. Such other provisions, representations, certifications, and specifications as are attached or incorporated herein by reference. (Attachments are listed in the Schedule.)

Further down the page, the "OFFER" portion of SF 33 states:

OFFER (NOTE: *Reverse Must Also Be Fully Completed By Offeror*)
In compliance with the above, the undersigned offers and agrees, if this offer is accepted within — calendar days (60 calendar days unless a different period is inserted by offeror) from the date for receipt of offers specified above, to furnish any or all items upon which prices are offered, at the price set opposite each item, delivered at the designated point(s), within the time specified in the Schedule.

In addition, section XXI of the IFB, page 13, stated:

The following General Provisions, except as expressly modified elsewhere in this Schedule, are incorporated herein by this reference with the same force and effect as if set forth herein in full: (1) Standard Form 32 (Nov. '69) entitled "General Provisions (Supply Contract)," (2) Tax Clause.

Standard Form 32, General Provisions (Supply Contract), consists of four pages of provisions. The following page, with the heading "General Provisions Page 5," was entitled "TAX CLAUSE FOR FORMALLY ADVERTISED CONTRACTS (See Federal Procurement Regulations, Subpart 1-11.4 Regarding Use.) FEDERAL, STATE AND LOCAL TAXES." At the bottom of the page, this form bears the notation "HEW-328." This page was followed by enclosure I, the Work Scope, which consisted of 10 pages of material describing EDRS.

The IFB was amended four times. Amendment No. 1, dated October 30, 1973, made administrative and substantive changes and included attachment "B" which changed the bid evaluation method in

section XX of the IFB. Amendment No. 2, issued on November 14, 1973, noted, in part, that the schedule pages "* * * have been considerably altered per Amendment No. 1 to the extent that the number of pages cannot now be listed as a specific quantity." Amendment No. 3, dated December 19, 1973, also made substantial changes and amendment No. 4, of December 27, 1973, corrected a clerical error in amendment No. 3.

CMIC submitted a bid which, excluding its cover letter, consists of seven pages: the cover page SF 33; page 2 of SF 33; pages 6 and 7 of the Schedule; and pages 2, 3 and 4 (schedule of prices for the initial 12-month award period and the 2 option years) of attachment "B," included in amendment No. 1. On page 2 of SF 33, the bidder acknowledged the receipt of all four amendments.

Leasco argues CMIC's bid is nonresponsive because of its failure to include the SF 32 General Provisions, the HEW Form 328, and the Work Scope. It is stated that since these pages contain material provisions, acceptance of the bid would not bind CMIC to all the material terms and provisions of the contemplated contract. Leasco notes that while the table of contents on page 5 of the IFB lists the General Provisions and Work Scope, there is no specific reference to the taxes clause in HEW form 328. Nor is the Work Scope specifically referenced in the table of contents by its complete title. Counsel for Leasco cites B-172183, June 29, 1971, as determinative of the nonresponsiveness of CMIC's bid.

Counsel for Bell & Howell has argued, first, that the IFB placed bidders on notice that bids were to conform exactly to the invitation. At page 11 the IFB states in part:

> * * * Failure to bid on all items or any other omission, obliteration or alteration to these specifications or the order and manner of submitting the prices herein may be reason for *Rejection of Bid.*

Counsel contends that since CMIC's bid did not conform exactly to the IFB, it must be rejected on this basis alone. Second, it is argued that since the IFB states at page 5 that failure to agree to the "Certification of Nonsegregated Facilities" clause will render the bid nonresponsive, and since CMIC did not return this page, its bid must be found nonresponsive on that basis.

Third, counsel for Bell & Howell contends that even if the IFB had not required exact compliance in bidding, CMIC's bid is nonresponsive since, under the standards established by our Office, its bid failed to return material provisions. Counsel cites 49 Comp. Gen. 289 (1969), *id.* 538 (1970), and B-169594(1), October 27, 1970, for the general proposition that an incomplete bid may be considered responsive only if it includes the SF 33 cover page as well as an exact listing specifically incorporating all omitted pages by reference. Counsel contends

that such incorporation is absent in CMIC's bid and points out that it is virtually impossible to find an incorporation of all missing pages of the present invitation, since amendment No. 2 itself acknowledged that the IFB had been so altered that it was not possible to list the number of pages as a specific quantity. Like Leasco, counsel also cites B–172183, *supra.*

We see no basis for Bell & Howell's contention that the IFB required bids to conform exactly to the invitation. The above-quoted provision from page 11 of the IFB, *supra*, is clearly permissive rather than mandatory in its terms. In the absence of such a requirement, the general rule is that where a bidder fails to return with his bid all of the documents which were part of the invitation, the bid must be submitted in such form that acceptance would create a valid and binding contract requiring the bidder to perform in accordance with all of the material terms and conditions of the invitation.

In 49 Comp. Gen. 289 (1969), the bidder submitted a bid "in compliance with the above," that is, in compliance with the Solicitation Instructions and Conditions, the General Provisions, the Schedule, and such other provisions, representations, certifications, and specifications as were incorporated by reference or listed in the Schedule as attachments. Also, in that decision the bid included that portion of the Schedule entitled "Composition," which identified in detail all of the various conditions, provisions, schedules, certficates and other documents comprising the terms of the contract to be awarded. In view of these facts, we held that such references in the bid clearly operated to incorporate all of the invitation documents into the bid and that award to the bidder would therefore bind him to performance in full accord with the conditions set out in the referenced documents.

In 49 Comp. Gen. 538 (1970), where the bidder submitted at least two pages of the Schedule which made reference to the material provisions of the IFB, it was found that such references operated to incorporate the essential invitation documents into the bid.

A similar result was reached in B-169594, *supra*, where the bidder acknowledged receipt of nine amendments, which identified the material parts of the IFB by name and number as well as many of the individual provisions, thus manifesting the bidder's intent to be bound by the IFB as amended and to comply with all the material provisions of the contemplated contract.

In B–170044, October 15, 1970, the bid included the SF 33 with the "Solicitation" and "Offer" clauses referred to previously; however, it failed to include pages 5 and 6 of the solicitation, which contained numerous material terms, including clauses supplementing and modifying SF 32 and SF 33A. The decision stated:

* * * The question then arises whether there is some evidence in the Gornell bid, or language in those portions of the invitation submitted with its bid, that would incorporate the above provisions into the corporation's bid. In this connection we note that the entire invitation package consisted of 28 pages numbered in sequence. Gornell executed the "Offer" portion of the Standard Form 33 used in the solicitation, and included that form with its bid. The solicitation was specifically identified, by number and date and place of issuance, at the top of the facesheet of the form, and as being comprised of 28 pages which designated the facesheet as "Page 1 of 28." Since Gornell's bid clearly identified the complete solicitation to which it responded as consisting of 28 pages all of the 28 pages of the invitation and the clauses contained or referenced therein were, in our opinion, incorporated by specific reference in the bid documents as signed and submitted by Gornell. Such documents should therefore be considered as evidencing Gornell's intention to be bound by all of the substantive terms and conditions of the IFB. See 47 Comp. Gen. 680 (1968).

However, in B–172183, *supra*, the decision relied on by both Leasco and Bell & Howell, the solicitation did not contain the SF 33 "Solicitation" and "Offer" clauses or similar language. While the first page of the bid did contain the language "Subject to the terms and conditions herein, the undersigned offers to lease * * *," we found that there was a substantial question as to whether the "herein" referred to the provisions of the solicitation as issued or to the provisions returned with the bid. Since there was no clear indication that the bidder intended to be bound by all of the material provisions of the solicitation, the bid was found to be nonresponsive.

In the present case, the contracting officer found CMIC's bid to be responsive for the following reasons:

Quite simply, the lowest three bidders are responsive because it is the B–170044 case, not the B–172183, that matches this IFB. The Bell & Howell protest, presumably realizing this, attempts to make a distinction from B–170044 because while "Scope of Work—(Enclosure I)" is referenced on Page 5 of the solicitation, it is not identified clearly enough by title or pagination to adequately insure that the lowest three bidders knew what they were bidding on.

In this regard, NIE agrees with CMIC's counter-argument (on Pages 7-8 of their response) that references in the 13 pages of this IFB to "Scope of Work" and "Tax Clause" could mean nothing other than the "Work Scope for the Operation of EDRS" and the only tax clause required by the Federal Procurement Regulations in a procurement of this kind (FPR 1–11.401–1).

The contention that the bidders might not have known what they were bidding on can more affirmatively be eliminated by outlining some of the peculiarities of this invitation. All bidders acknowledged receipt of all four amendments. The amendments, where over 1 page, have the same page indicator block (i.e., Page 1 of —) as Standard Form 33 does. These amendments have changed *every* page of the original scope of work, including its Table 1, and pages 5 through 13 of the original schedule. Thus, all bidders had to be on notice of any possible omissions in any part of the original bid package sent to them. * * *

We agree with the contracting officer's decision that CMIC's bid is responsive. Admittedly, the present factual situation differs from the facts in B–170044, where the 28-page solicitation had apparently been undisturbed by any amendments. However, the basis of the B–170044 holding that the bid identified the complete solicitation to which it responded and that the clauses contained or referenced therein were

incorporated by specific reference in the bid submitted is applicable here. By acknowledging on page 2 of its bid the receipt of all four amendments, CMIC first of all bound itself to comply with all of the material terms set forth in the amendments. B–176462, October 20, 1972. In addition, since the amendments changed every page of the original schedule and work scope, the acknowledgments served to identify the complete solicitation to which the bid responded, regardless of what the exact number of pages in the solicitation, as amended, may have been. *Cf.* B–169594, *supra.* Under these circumstances, as in B–170044, the clauses either contained in or referenced in the complete solicitation were incorporated by reference in the bid.

In regard to the contentions that the "Work Scope" is not sufficiently identified in the solicitation, we agree with the contracting officer that the reference to "Work Scope" at page 5 of the solicitation could reasonably be regarded as referring only to the Work Scope for the operation of EDRS. In any event, at page 3 of amendment No. 1 the provision is identified by its full title. As for the tax clause, it appears that FPR subpart 1–11.4 provides only one basic type of tax clause which must be used in advertised procurements. *See* FPR 1–11.401–1 (c). This was the clause included in this solicitation. Again, the identification of the provision is clear.

We see no merit in Bell & Howell's contention that the CMIC bid is nonresponsive because of failure to agree to the Certification of Nonsegregated Facilities clause. Under the language of that provision, offerors "* * * will be deemed to have signed and agreed to the provisions of the 'Certification of Nonsegregated Facilities.'" Thus, by signing its bid, CMIC indicated its agreement that it will not segregate its facilities. Moreover, it appears to us that the later language in the clause, "Failure * * * to agree * * * will render his bid or offer nonresponsive * * *," has reference to an ancillary statement or indication in the bid which raises a question of possible nonagreement notwithstanding the bid signature. Such is not the case here.

As for the cover letter submitted with CMIC's bid, it stated in pertinent part as follows:

Enclosed is our bid for this solicitation.

We are a well established microfilm service company with production facilities in the following cities: Atlanta, New York, Indianapolis, Boston, Hartford and Houston.

In addition, we will have a new facility operating in the Washington area by March 1974. It will have modern equipment and experienced staff for all the microfilming and copy production requirements of this contract. This includes, cameras, processors, duplicators, quality control and other production equipment.

It is our intention to support the sale of E.R.I.C. publications in new micropublishing ventures.

3M Company has the majority interest in C.M.I.C.

We will be happy to present our capabilities in detail.

We do not read this letter as qualifying or placing conditions on the bid. We agree with the contracting agency that it merely provides information concerning CMIC's responsibility as a prospective contractor.

In this regard, Leasco contends that the cover letter indicates that CMIC intends to use the Washington, D.C., facility for performance of the contract. Leasco argues that CMIC's responsibility and qualification under the Walsh-Healey Act must be judged on the basis of its Washington facility's capabilities as of the time of bid opening.

As a general rule, a determination of responsibility is to be based upon all information available to the contracting officer at the time of award, rather than only upon the information submitted with the bid. *See* 41 Comp. Gen. 302 (1961). In the present case, we see no reason why the cover letter should have the effect of limiting the findings of a responsibility determination to the possible use of CMIC's Washington facility to the exclusion of its other facilities.

As for CMIC's qualifications under the Walsh-Healey Act and Leasco's contention that CMIC is not a "regular dealer," such determinations are vested in the contracting officer, subject to final review by the Department of Labor, and our Office is without authority to review them. B–179509, B–179518, November 6, 1973; B–179518, January 23, 1974. Any disagreement on Leasco's part as to the contracting Officer's determination that CMIC is a "regular dealer" should be brought to the attention of the Department of Labor. Furthermore, we see no basis to regard the "regular dealer" representation in CMIC's bid as one affecting its responsiveness.

In its letter of April 8, 1974, commenting upon the administrative report, counsel for Leasco presents an additional argument—that two of the three film types for microfiche specified in the IFB "* * * may be totally unacceptable to a substantial portion of the prospective purchasers of microfiche under any contract to be awarded on this IFB."

Counsel points out that the IFB originally provided that a contractor could, at its option, use silver halide, diazo, or vesicular film, and that the film type had to be specified in the bids. Leasco states that upon receipt of the IFB, it discussed this matter and other complaints with NIE, and that it advised NIE that "* * * vesicular film probably would be unacceptable to the library community but that most bidders in this competitive situation would be forced to bid on the basis of using the least expensive vesicular film." Leasco states it requested NIE to amend the IFB to exclude vesicular film, and that, while amendments Nos. 1 and 2 resolved some of the complaints raised by Leasco, they did not change the film types specification.

On November 29, 1973, Leasco submitted a lengthy written protest to NIE. Leasco objected, *inter alia*, to the film types specification. In section IX of the letter, Leasco objected on the basis that the three film types vary in cost, with silver halide the most expensive, followed by diazo and vesicular in declining magnitude of expense. Leasco contended that, since the IFB required bidders to specify film type in their bids, for competitive reasons bidders would select vesicular and, thus, that the IFB's option to select from among the three film types was illusory. Section X of this letter went on to point out that, in Leasco's view, the three film types are not of equal quality, and that vesicular is of inferior quality to the other two. A copy of two articles from the October 1973 issue of "AMERICAN LIBRARIES" magazine was submitted with the letter; it was stated these articles indicate that vesicular film emits a gas which corrodes metal storage cabinets and shelves, and that the Library of Congress will not use vesicular film for copies of permanent collections. It was also stated that one article refers to a study being conducted on the permanent characteristics of vesicular film by the American National Standards Institute (ANSI). Leasco questioned whether NIE should permit the use of vesicular films, stating that many potential purchasers will refrain from purchasing vesicular fiche, and the purpose of the contract may thereby be defeated. Leasco questioned the "hazards and consequences" to purchasers of ERIC documents if the contractor uses vesicular film; Leasco also alleged the IFB is defective due to the illusory film types option referred to above.

The November 29, 1973, protest to NIE concluded by stating that Leasco would seek immediate relief from GAO and/or the courts if any of the alleged defects were not corrected in forthcoming amendments to the IFB.

Leasco's April 8, 1974, letter states that amendment No. 3 corrected some of the alleged improprieties and that it deleted the requirement that bidders specify in their bids which of the film types they intended to use. However, neither amendment No. 3 nor No. 4 deleted the authorized use of vesicular or diazo film notwithstanding Leasco's administrative protest. Also, the contracting officer, by letter of January 2, 1974, replied to Leasco's protest. The contracting officer stated his belief that he felt the amendments to the solicitation had satisfied all of Leasco's concerns "except for a few"; as to Leasco's objection to the quality of the various film types, the contracting officer stated that this "* * * did not cause any change because of our continuing determination that all three types of film are satisfactory."

The film types issue was not raised in any written submission to our Office until receipt of Leasco's letter of April 8, 1974, more than 3

months after the contracting officer's letter of January 2 and almost 3 months after bids were opened. In this regard, the letter of April 8, 1974, states:

> As indicated above, Leasco has just recently learned that NIE did not obtain the concurrence of the library community when it "determined," in response to Leasco's protest, that vesicular film was satisfactory for this procurement. In addition, Leasco has just recently learned that the library community does not consider diazo film acceptable on this procurement. Apparently the library community, obviously familiar with the current contract which requires silver halide film for all materials which likely will form a portion of a permanent collection and which authorizes diazo film for non-permanent collection purposes, did not learn until January 1974 (after NIE had transmitted its January 2, 1974 letter to Leasco) that this Invitation authorized vesicular and diazo film for permanent collection materials.

The letter makes a number of allegations concerning diazo and vesicular films. Briefly, these are that the American Library Association (ALA) Micropublishing Committee has expressed concern that diazo and vesicular film will not be acceptable to librarians; that the chairman of this committee has stated to NIE that neither he nor the committee would endorse the acceptance for permanent collections of film types not tested and proved by ANSI; that ALA and the National Microfilm Association take the position that vesicular and diazo microfiche should not be purchased for permanent collection until they have been tested and found acceptable by ANSI; and that the chairman of the Micropublishing Committee has told NIE that perhaps half of the customers under the current EDRS will stop purchasing if diazo or vesicular film is used. Further, Leasco's letter makes reference to several published articles wherein doubts are expressed about the permanence characteristics of diazo and vesicular film.

Based upon the foregoing allegations, the substance of Leasco's argument is that the instant IFB, by authorizing the use of diazo and vesicular film, is defective in that it is contrary to sound procurement policy for at least three reasons. First, that the actions of NIE in authorizing diazo and vesicular film undertaken without the concurrence of the library community render the IFB contrary to the public interest; second, that the projected lack of acceptance by the public of these film types renders the IFB self-defeating; and, third, that the failure of NIE to heed warnings about the potential hazards and the questionable permanence of these film types violates all concepts of sound procurement policy. In addition, Leasco's letter states that the IFB is legally defective because there is no provision whereby the contractor promises to take responsibility for damage caused by diazo or vesicular film. Leasco has stated on information and belief that NIE is contemplating obtaining such a promise from the successful contractor, which Leasco concludes represents an implicit admis-

sion on NIE's part that the IFB is now recognized to be fatally defective.

The initial question for consideration as regards the additional argument presented by Leasco in its April 8, 1974, letter is whether it has been timely raised. In this regard, section 20.2 of our Interim Bid Protest Procedures and Standards (4 CFR 20.2) provides in pertinent part:

> (a) Protestors are urged to seek resolution of their complaints initially with the contracting agency. Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of proposals shall be filed prior to bid opening or the closing date for receipt of proposals. In other cases, bid protests shall be filed not later than 5 days after the basis for protest is known or should have been known, whichever is earlier. If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 5 days of notification of adverse agency action will be considered provided the initial protest to the agency was made timely * * *
>
> (b) The Comptroller General, for good cause shown, or where he determines that a protest raises issues significant to procurement practices or procedures, may consider any protest which is not filed timely.

Since Leasco filed a protest with the contracting agency on the film types issue, its protest to our Office on issues involved in the agency protest should have been filed within 5 working days of notification of the initial adverse agency action. *See* 52 Comp. Gen. 20, 23 (1972). It would appear that notification of the initial adverse agency action on the film types question occurred upon Leasco's receipt of the contracting officer's letter dated January 2, 1974. The record does not indicate the date of receipt. However, at the very latest, bid opening on January 11, 1974, would have constituted adverse action. While Leasco's protest of January 18, 1974, to our Office was timely filed within 5 working days of bid opening, this protest was directed entirely at the responsiveness, responsibility and other qualifications of the lower-priced bidders; the issue of the film types specification was nowhere mentioned. Therefore, we conclude this issue was not timely raised.

In this regard, we might note that, in our view, the propriety of both diazo and vesicular film types was put into issue by Leasco's November 29, 1973, protest to NIE. It is noted that the protest to NIE as regards the acceptability of film types to potential purchasers made reference only to vesicular film. To the extent that Leasco's April 8, 1974, letter might be regarded as calling into question for the first time whether diazo film was likewise unacceptable to potential purchasers, we think such issue is untimely on the alternative basis that it was a solicitation impropriety which was apparent and which should have been raised before bid opening.

In the event its additional argument is found to be untimely, Leasco has next contended that our Office should consider it on the merits

pursuant to 4 CFR 20.2(b) on the basis that good cause has been shown. In this regard, we have stated that while "good cause" varies with the circumstances of each protest, it generally refers to some compelling reason, beyond the protester's control, which prevented it from filing a timely protest. 52 Comp. Gen., *supra.* Leasco has stated that, after the contracting officer's denial of its protest to NIE, it did not bring the film types issue to our attention at that time because the denial of its protest was stated to be based on a "determination" that all three types of film were satisfactory. Leasco contends that NIE has admitted, at some unspecified recent time, that the use of vesicular film was not even discussed with the "library community" prior to the denial of Leasco's protest. It is contended that, in view of the importance of the film type specification to the "library community," the specific language and import of the protest denial thus constituted an actual or constructive misrepresentation by NIE which unjustly lulled Leasco into not protesting to our Office in a timely manner.

We are not persuaded by the contention that good cause exists for a 3 months' delay in pressing an objection to specifications, based upon the protester's self-serving assumption as to the propriety of the manner in which the agency arrived at its decision to deny the pre-bid-opening protest. We see no valid reason why Leasco was prevented from filing a timely protest with GAO on this issue, and therefore no good cause is shown why our Office should now consider it.

Leasco next contends that the film types question raises issues significant to procurement practices and procedures and should be considered pursuant to 4 CFR 20.2(b) on that basis. In this regard, we have held that this exception to the timeliness rules has reference to the presence of a principle of widespread procurement interest. 52 Comp. Gen., *supra.* The record does not support the application of the exception to the timeliness rules.

Leasco contends the procurement is unique, since the Government is, in effect, making an award for sales to non-Government purchasers, and the issue of acceptable film types to ultimate users is crucial; thus, it is contended that the authorization of use of diazo and vesicular film without the concurrence of the library community must be resolved by our Office. Secondly, Leasco points to what it terms disastrous consequences to non-Government purchasers if diazo and vesicular film are in practice as unacceptable as Leasco believes. Thirdly, the issue is said to be significant because of the profound impact on the library community beyond the specific ERIC materials to be distributed under this contract. Leasco argues an award will constitute a Government endorsement of the controverted film types, giving them

an aura of acceptability and allegedly leading to detrimental ramifications on the future course of library work in this area.

We do not believe a significant issue is involved. All of the questions presented—the acceptability of various film types to potential users, the possibility that the ultimate function of the contract may be thwarted by user nonacceptance, the possible hazards to users of certain film types, and the long-range effect of use of certain film types on library work generally—appear to involve procurement policy issues concerning the drafting of specifications to meet particular needs. While these matters may be of importance to the library community, in the context of procurement principles and procedures generally, the issue is one of whether the minimum needs of the Government were properly determined and reflected in specifications properly drafted. We do not find that the application of our well-established standards of review in this area to the present factual circumstances would involve a procurement principle of widespread interest.

Alternatively, Leasco has stated that in the event its additional argument is found to be untimely and not for consideration under 4 CFR 20.2(b), Leasco then submits that the timeliness rules of our Office "* * * are improper and cannot be applied to the disadvantage of Leasco." Leasco has contended that it is a matter of fact that agencies often do not furnish administrative reports within the time limit provided (4 CFR 20.5); that HEW in the present case did not do so; and that it is unfair in these circumstances that the agency suffers no penalties or adverse consequences as a result of its noncompliance with our protest rules. Leasco also has stated that it is a matter of record that our Office often does not meet its own time regulations with regard to the issuance of a decision or a written statement regarding the expected date of decision (4 CFR 20.10).

We do not believe these contentions require extended comment. Briefly, the principles embodied in the timeliness standards of our Bid Protest Procedures and Standards reflect our long experience with two sometimes conflicting considerations—the problem of providing protesters and interested parties a fair opportunity to present their cases on the one hand and the problem of attempting to resolve bid protests in a reasonably speedy manner on the other. See the preamble to our protest rules. To these ends, we recognized, even before the adoption of our current procedures, that unjustified delays in the presentation of issues by parties—such as allegations of solicitation improprieties raised long after bid opening—were a factor to be taken into consideration in resolving protests. *See*, for example, 50 Comp. Gen. 565, 576 (1971). As for Leasco's specific contentions, we have

held that a delay beyond 20 working days by the agency in furnishing its administrative report does not justify the rejection of the report. *See* B-177557, July 23, 1973. We might note that in circumstances where a delay beyond 20 days in furnishing a report appears to be unreasonable, it is our practice to call such matters to the attention of appropriate agency officials. *See*, for example, B-175854(2), September 1, 1972. In regard to Leasco's contention concerning section 20.10 of our procedures, it has been our practice to informally notify all interested parties of the status of the case and our estimate of expected decision date. In the present case, all parties were so notified. In any event, since Leasco is the incumbent contractor, we fail to see how the complained of delays would work to its disadvantage.

In view of the foregoing, we find no basis for legal objection to the proposed award to CMIC as that firm found to be responsible and otherwise qualified by the contracting officer to perform the required contract. Under the circumstances, other issues raised concerning the responsiveness and qualifications of Xerox and Bell & Howell are academic and need not be considered.

The protest of Leasco against award to any concern other than itself is therefore denied.

[B-178339]

Interior Department—Bureau of Sport Fisheries and Wildlife—Permit Issuances—Operation of Citrus Groves

The Federal Property and Administrative Services Act of 1949 and Federal Procurement Regulations are inapplicable to Bureau of Sport Fisheries and Wildlife's award of use permits for operation of citrus groves located on wildlife refuge, because both 16 U.S.C. 715s(f) and 668dd(d)(2) authorize the Secretary of the Interior to permit use of refuges or disposal of products thereof upon conditions he determines are in best interests of United States.

Contracts—Negotiation—Competition—"Grower/Packers" *v.* Independent Growers—Propriety

Agency did not act unreasonably in permitting "grower/packers" to compete with independent growers for award of use permits for operation of citrus groves since matter was one for agency's discretion and agency believes it had adequate safeguards against possibility of receiving artificially low returns from "grower/packers."

Contracts—Negotiation—Awards—Propriety—Evaluation of Proposals

Award of use permits was not shown to have been arbitrary, capricious or without a reasonable basis, because offers were impartially evaluated against factors set forth in Public Notice soliciting proposals.

Contracts—Negotiation—Requests for Proposals—Deficient—Minimum Standards

Statement of evaluation criteria, contained in Public Notice soliciting proposals for use permits to operate citrus groves, was deficient in that it did not set forth minimum standards or provide reasonably definite information as to degree of importance to be accorded particular evaluation factors in relation to each other.

In the matter of Nathaniel and Bernice Pilate; Caroline J. Starkey, June 11, 1974:

Nathaniel and Bernice Pilate and Caroline Starkey independently protested against the failure of the Government to award them special use permits for the operation of citrus groves on a wildlife refuge. This decision responds to both protests, which arose from the same solicitation and which present some common issues.

The Department of the Interior, Bureau of Sport Fisheries and Wildlife (BSFW), administers the Merritt Island National Wildlife Refuge, Titusville, Florida. Orange and grapefruit groves were located on this land when it was acquired by the Government. In order to preserve this valuable asset, private firms, under permit, have maintained the groves and harvested and marketed the fruit. In exchange, the permittees pay the Government rental.

In November 1972, a Public Notice was released by BSFW, requesting proposals for permits to operate nine groups of groves located on the refuge. The Public Notice provided that proposals should contain "information on the following:"

a. The firm name and names of the principals interested.
b. An explanation of the proposed method of citrus caretaking with particular reference to planned procedures over and above those required * * *.
c. Experience and ability in management of citrus groves.
d. Financial responsibility and resources, with references, adequate for operation of this size.
e. Percentage of gross receipts (on tree value) proposed to be paid to the Government as rental.

Other than an expressed desire to make the groves available to "experienced and professional citrus producers," the Public Notice did not restrict permit applicants to any type of business entity. The Public Notice also did not specifically state the relative importance of items b., c., d., and e., quoted above, to the determination of which applicants would be awarded permits. It is clear that caretaking of the groves was a significant factor, for the Public Notice contained detailed maintenance requirements for each group of groves and advised applicants:

The permittee shall, without cost to the Government, furnish all labor, equipment, and materials necessary to cultivate, fertilize, spray, drain, irrigate, hedge, top, prune rootstock sprouts, remove rootstock trees, replace dead or missing trees, do normal clean-up and minor improvements in accordance with good standard practices, and shall attempt to maintain the groves in a healthy, vigorous condition at all times. The groves shall be operated in a manner to insure their continued healthy, vigorous condition and production of a satisfactory quantity

of high quality fruit. Excellent caretaking is mandatory in maintenance of these groves.

In response to the Public Notice, two proposals for a permit to operate the groves in Group No. 5 were received by BSFW on the December 15, 1972, closing date. The permit for Group No. 5 was awarded to Mr. Frank E. Sullivan, Jr., because, in the agency's opinion, Mr. Sullivan's offer to pay the Government a rental fee of 30.5 percent of the gross receipts, as opposed to Mrs. Starkey's offer of 7.5 percent, more than overcame any possible advantage Mrs. Starkey may have had in the caretaking area. Mrs. Starkey subsequently filed with this Office a protest against the award.

Mr. and Mrs. Pilate, who submitted one of the three proposals for the operation of Group No. 1, offered a rental return of 11 percent of gross receipts. The successful offeror, Egan, Fickett & Co., proposed a 10 percent return and the third offeror proposed a return of 8 percent. Our examination of the record shows that the manager of the wildlife refuge concluded that "the best interest of the Government and public at large" would be served by an award to Egan because Egan proposed to perform caretaking, over and above the minimum required, of a more valuable nature than that planned by the other two firms and because Egan's management team, financial resources, and maintenance and production capability were superior.

It is further reported that after the proposals for Group No. 1 were analyzed and it was determined that Egan's proposal rated highest, all factors being considered, an additional examination was made of the Egan and Pilate proposals because the offered rental percentages were so close. It was then noted for the first time that Mr. Pilate was an employee of the National Aeronautics and Space Administration, a circumstance which in the BSFW's view precluded further consideration of Mr. Pilate's proposal. *See* B–159472, August 10, 1966. Upon being advised of the rejection of their proposal, the Pilates also protested to our Office. In this connection BSFW reports that the Pilates would not have received the award for Group No. 1 even if Mr. Pilate had not been a Federal employee, in view of the relative merits of the proposals.

The provisions of the Federal Property and Administrative Services Act, 41 U.S.C. 201 note (1964 ed.)) and the FPR issued in implementation of the act are not applicable to the grant of these use permits since the transactions concern neither the procurement of supplies or services, nor the disposal of surplus property. We note that 16 U.S.C. 715s(f) authorizes the Secretary of the Interior to permit the use of lands or the disposal of products of those lands within the Refuge system "upon such terms, conditions, or regulations, including sale in the open markets, as the Secretary shall determine to be in the best interest of the United States." Furthermore, section 4(d)(2) of

the National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. 668dd(d)(2), authorizes the Secretary of the Interior to:

> * * * permit the use of, or grant easements in, over, across, upon, through, or under any areas within the System for purposes such as but not necessarily limited to, powerlines, telephone lines, canals, ditches, pipelines, and roads, including the construction, operation, and maintenance thereof, whenever he determines that uses are compatible with the purposes for which these areas are established.

Regulations published at 50 CFR, Parts 25–35, deal with the National Wildlife Refuge System. Section 29.1 provides that "Permits for economic use will contain such terms and conditions as are determined to be necessary for the proper administration of the resources." The regulations provide no more specific guidance as to what terms and conditions might be appropriate, nor do the regulations set forth a uniform method for selecting permittees. Under these circumstances, we believe that the establishment of the terms and conditions under which an economic use permit will be granted, the statement of the needs which will be served by an award of the permit, and the determination of which prospective permittee will best meet those needs, all are matters of judgment to be exercised by the administrative agency, which we shall not question unless it is clearly shown that the action taken was arbitrary, capricious or without a reasonable basis. *See* B–172177, August 17, 1971.

One of the evaluation criteria for determining to whom to award these permits was the amount the prospective permittee offered to pay the Government as rental, expressed as a "percentage of gross receipts." The protesters' first contention basically is that the successful offerors' type of business organization permits them to offer an illusory high "percentage of gross receipts" as rental.

Egan and Sullivan, the successful offerors for Groups 1 and 5 respectively, operate packing plants in addition to being citrus growers. The protesters, who are independent growers, contend that it is unfair to compel them to compete with "grower/packers" for use permits where the return to the Government is based on a percentage of receipts from the sale of the crop. The protesters note that since an independent grower must derive all of his return on the sale of the crop directly from the groves, the percentage offered the Government must allow for a reasonable profit. It is argued that in contrast, a "grower/packer" can offer an artificially high rental percentage, because it is able to keep the return on the initial sale of the crop from the groves to a minimum by "selling" or consigning the crop to its own packing organization at an unrealistically low price. The grower/packer is then allegedly able to market the crop through its packing organization at a higher price which is exempt from the Government's

rental share. It is asserted that a comparison of rental fees paid the Government over the years by independent growers with fees received from "grower/packers" would reveal that payments from independent growers have been much larger. In addition, it is contended that a "grower/packer" is in a position to easily defraud the Government during the operation of the groves by altering shipping manifests.

The agency points out that there is no provision in the Public Notice restricting competition to independent growers nor does it believe that such a restriction is necessary. Our attention is directed to the following provisions in the use permit which in the agency's view protect its interest from fraud by a "grower/packer," or for that matter, by any permittee:

a. Section 29 of the General Provisions of the Special Use Permit requires the permittee to "maintain records and books of account" which shall be open to the Government "at all reasonable times" for inspection and audit. During August of each year Section 29 requires that the records shall be certified to be true and correct by a Certified Public Accountant.

b. Section 32 of the General Provisions authorizes use of only two routes for hauling fruit from the groves. Further, the Government reserves the right to stop any or all trucks for inspection to determine accuracy of trip tickets, which are required by Florida law. In accordance with Section 30 of the General Provisions, trip tickets must be mailed to the Merritt Island National Wildlife Refuge office within seventy-two hours after hauling of each truckload of citrus from the groves.

c. Section 34 requires that all fruit picked for delivery to a packing house for processing on consignment be entered in a receipt book at the packing house. During the process of grading and packing the fruit, quantities are recorded on a "Run Sheet." From run sheets manifests are prepared indicating to whom and to what markets the packed fruit was shipped. Within 30 days of the sale, the proceeds are normally received by the packing house, and the net proceeds are remitted to the grower involved. The permit issuing officer, the citrus grove manager, or other inspector designated by the permit issuing officer can inspect the fruit and records for compliance with Section 34.

d. The permit issuing officer has a citrus grove manager on his staff who devotes all of his time to inspecting the groves, fruit, and records to determine that each permittee is performing honestly in accordance with terms of his permit.

e. Government files contain records showing total gross sales for the groves in Group No. 5 for the last five years. Analysis and comparison of previous and current records and reports would quickly call attention to any questionable activities.

f. The successful permittees are required to furnish performance bonds to insure faithful performance.

Further, the agency informs us that there are three main methods by which growers may market the crop, none of which gives "grower/packers" an unfair advantage over independent growers. First, we are informed, the grower, whether an independent or also a packer, may sell his fruit on the tree. In such cases the contract price is the "gross receipts (on tree value)" on which the rental fee is based. The buyer is responsible for all costs of harvesting, packing, shipping, etc. This method, we are assured, is available to both independents and "grower/packers."

Second, the agency informs us, either type of grower may consign the fruit to a processor who charges the consignor a fee to grade, process and pack the fruit and ship it to wholesale markets where it is sold at auction. The proceeds, less packing and shipping fees, are remitted through the packer to the grower. This amount (proceeds less harvesting, packing and shipping charges) comprises the "gross receipts (on tree value)." This method, we are informed, is equally available to independent growers and "grower/packers."

The third method is similar to the above method minus the final step. Instead of shipping the fruit to wholesale markets, processed and packed fruit is sold f.o.b. packing plant to large grocery chains. After deduction of the harvesting and packing charge from the amount received, the remainder is remitted to the grower as the "gross receipts (on tree value)." This method, the agency also contends, can be used by both categories of growers.

The agency points out that "if a grower is also the owner of a packing plant and that plant is used to process and pack the fruit, there is in fact no sale from one entity to another at this point. There would be no need or practical purpose in doing this. In legal effect what is done is a consignment or bailment." Although we think that the agency position may well have merit as far as the second method of marketing is concerned we are unable to find any provision in the use permit or Public Notice which would prohibit the ouright sale of fruit, as illustrated in the first marketing method, to a packing organization controlled by the grower/permittee. However, we feel that the question of "grower/packer" eligibility to compete for use permits is a matter of judgment within the cognizance of the agency. Since the agency which has experience in the area of land management does not believe that it is assuming

an undue risk of receiving artificially low returns because of awards of permits to "grower/packers," and considering the fact that a prohibition against "grower/packer" participation would have resulted in only one offer under Group No. 5 and two offers under Group No. 1, we do not find the agency acted unreasonably in soliciting both categories of growers.

Concerning the contention that historically, independent growers have given the Government higher rates of return than "grower/packers," the agency informs us that the three "grower/packers" who have received permits have produced a higher average return than that received from independent growers.

Mrs. Starkey further contends that a BSFW representative informed her prior to the submission of offers that the agency's primary interest was in maintenance of the groves and that return to the Government was merely a secondary consideration. She also maintains that she was informed that any return rate of over 15 percent would be suspect and that an offer of between 5 and 10 percent would be considered a reasonable offer. The protester contends that, relying upon these representations, she prepared an offer stressing a comprehensive maintenance plan with a 7.5 percent return to the Government. As stated above, the award for Group No. 5 was made to Sullivan at a rental rate of 30.5 percent in what Mrs. Starkey considers as total disregard for the above-mentioned representations. Mrs. Starkey has submitted a personal affidavit and those of two others supporting her contention.

In response, the BSFW representative has also submitted an affidavit which states that he discussed in a general manner the work which would be required and also states that he indicated the groves would on an average produce a return to the Government of between 5 to 10 percent. However, the representative insists in his affidavit that he did not suggest to Mrs. Starkey that she should submit an offer of 5 to 10 percent on Group No. 5, which he says he described to Mrs. Starkey as an extraordinary tract. Therefore, we do not find that the Government representative advised Mrs. Starkey as to the percentage which should be offered. *See* B–167102(1), October 10, 1969.

In a different context, the Pilates also have questioned whether grove maintenance or rate of return to the Government was the paramount consideration in selecting permittees. The award for Group No. 1 was made to Egan at a return of 10 percent, even though the Pilates offered 11 percent. The Pilates maintain that all other permittees were selected because they offered the highest percentage of gross receipts to be paid as rental, and, therefore, the Pilates' proposal similarly should have been accepted as representing the best value to the Government.

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In response to this contention, the Department of the Interior stated in its report to our Office:

> The Grove Managers' letter of January 2, 1973, * * * sets forth the reasoning used in evaluating proposals. A close analysis of that letter indicates that *all* factors listed in the Public Notice were considered. In some cases, if all other factors were rated substantially equal, award was made on the basis of the highest percentage to the Government. In other cases, where two firms offered the highest and the same percentage payment, a value judgment was made as to which firm would perform best. In still other cases, where percentage payments offered were close, a judgment was made as to the relative importance of ratings received on other factors. No attempt was made to award *only* on the basis of the high offered percentage payment.

This statement is supported by the "Analysis of Bids for Citrus Grove Contracts" prepared by employees of the Merritt Island Refuge and upon which the awards were based. Included in the analysis was a discussion of the planned caretaking of the groves in Group No. 1 over and above the minimum required. It was concluded that the caretaking proposed by Egan was of a more valuable nature than the other two offerors. With regard to experience and ability, it was noted that Mr. Egan's full time occupation since the mid-1920's was citrus growing; that his son was "raised in the business;" and that the Egans had retained as a consultant a "well-known and highly regarded" individual. Although the evaluators considered the prior experience of Mr. and Mrs. Pilate in managing groves, concern was expressed at the fact that the Pilates' primary occupations were other than citrus growers. Mr. Egan's financial resources were deemed by the evaluators to "far exceed" those of the other two offerors. In conclusion, the evaluators regarded Egan's superior caretaking plan, experience and ability and financial resources merited an award to him at a rate of return one percent less than that offered by the Pilates.

With regard to Group No. 5, the evaluators concluded that both Mrs. Starkey and Sullivan:

> * * * are substantial professional citrus producers, highly regarded in their community. Both have adequate financial responsibility, resources, experience, and ability to qualify as permittees.

The analysis also indicates that Mrs. Starkey offered more desirable caretaking above the minimum required. However, in view of the fact that Sullivan offered a 23 percent greater return on a group which had been grossing in excess of $200,000 annually, it was recommended that Group No. 5 be awarded to him.

It therefore appears that the proposals were evaluated in the light of the information which the Public Notice required of prospective permittees. From our review of the record, we are unable to conclude that BSFW's determinations to make awards to Egan and Sullivan were arbitrary or capricious or lacking in substantial evidentiary support.

We are of the view, however, that the criteria used by the agency to evaluate the proposals should have been set forth more clearly in the Public Notice. First, we note that although the Public Notice advised offerors to provide "as a minimum, information on" caretaking, management experience, financial responsibility and percentage of gross receipts to be paid to the Government as rental, offerors were not specifically advised that these factors constituted the evaluation criteria. More importantly, offerors were not informed of the relative importance of these criteria. We have often stated that good procurement practice requires that notice should be given as to any minimum standards which will be required for any particular element of the evaluation, as well as reasonably definite information as to the degree of importance to be accorded to particular factors in relation to each other. 50 Comp. Gen. 59 (1970); 50 *id.* 117 (1970).

We believe that the Government's interests would have been served in this case if the competitors for these use permits had been advised of the minimum evaluation standards and the relative importance of these standards prior to submitting their proposals. By letter of today we are bringing this matter to the attention of the Secretary of the Interior for consideration in future solicitations. However, we do not believe this deficiency affects the validity of the awards since the record indicates that proposals were impartially evaluated according to the same criteria.

For the reasons stated above, after review of the record before us, we do not regard the actions taken by BSFW as arbitrary, capricious or lacking a reasonable basis. Accordingly, the protests must be denied.

[B-158566]

Subsistence—Per Diem—Military Personnel—Reserve Officers' Training Corps—Travel Allowance

Paragraph M6005 of Joint Travel Regulations may not be revised to authorize per diem allowances for members of, and applicants for, Senior Reserve Officers' Training Corps to same extent as prescribed for cadets and midshipmen appointed under 10 U.S.C. 2107, in the absence of specific statutory authority for such allowance in 10 U.S.C. 2109 for members not appointed under 10 U.S.C. 2107.

Subsistence—Per Diem—Military Personnel—Reserve Officers' Training Corps—Travel Allowance

Members of, and applicants for, Senior Reserve Officers' Training Corps may not be authorized per diem under paragraph M6001 of the Joint Travel Regulations by virtue of enlisted status in Reserve component, since requirement that such members enlist in Reserve component is for purpose of securing involuntary active military service as enlisted member if student fails to complete course of instruction or refuses to accept appointment as commissioned officer with its obligated service and these members do not attend drills or perform duty other than that prescribed in 10 U.S.C. 2109, which specifically provides travel allowances incident thereto.

In the matter of per diem allowances for certain members of, and applicants for, Senior Reserve Officers' Training Corps, June 12, 1974:

This action is in response to a request for advance decision from the Assistant Secretary of the Army (Manpower and Reserve Affairs) concerning whether this Office would be required to object to a revision to paragraph M6005 of the Joint Travel Regulations which would extend per diem entitlement to all members of the Senior Reserve Officers' Training Corps. Currently this paragraph prescribes such entitlement for cadets and midshipmen. If this Office objects to such revision, a decision is requested as to whether a per diem allowance for members of, or applicants for the Senior Reserve Officers' Training Corps may be authorized by virtue of their status as enlistees in the Reserves. This request was assigned PDTATAC Control No. 73-44 by the Per Diem, Travel and Transportation Allowance Committee.

The Assistant Secretary states in his letter that paragraph M6005 of the Joint Travel Regulations was revised effective May 27, 1965 (change 151, August 1, 1965), to implement the Reserve Officers' Training Corps Vitalization Act of 1964, approved October 13, 1964, Public Law 88-647, 78 Stat. 1063, codified in several provisions of Titles 10 and 37, U.S. Code. Pursuant to the revision, members of the Senior Reserve Officers' Training Corps, and designated applicants for membership are authorized allowances for travel in connection with field training and at-sea training. It is noted in the Assistant Secretary's letter that per diem is authorized by the above-cited paragraph for members appointed as cadets or midshipmen under 10 U.S.C. 2107 who are performing training duty under certain circumstances and for temporary duty away from the place of training. Per diem is also authorized for cadets and midshipmen for temporary duty and travel performed under competent orders even though not in connection with field or at-sea training. It is noted that under the authority of 37 U.S.C. 422(c), cadets and midshipmen appointed under 10 U.S.C. 2107 are authorized travel allowances to the same extent as cadets and midshipmen of the service academies.

The Assistant Secretary also states that members of the Senior Reserve Officers' Training Corps appointed under the provisions of 10 U.S.C. 2104 and who perform training duty under the provisions of 10 U.S.C. 2109 are authorized the same travel allowances for field and at-sea training as cadets and midshipmen, with the exception of per diem. It is also stated that paragraph M6005-2 of the Joint Travel Regulations specifically prohibits the payment of per diem allowance to those members appointed under the provisions of 10 U.S.C. 2104.

The Assistant Secretary points out that the law upon which per diem entitlement for cadets and midshipmen appointed under 10 U.S.C. 2107 is based, 37 U.S.C. 422, does not specifically authorize the Secretaries to provide a per diem allowance and the language of that law is very broad. It is also pointed out that the language of 10 U.S.C. 2109 allows the Secretaries considerable latitude in prescribing allowances. Thus, the Assistant Secretary concludes that on the basis of the broad authority granted in these statutes it would appear that the Secretaries concerned have sufficient authority to prescribe per diem allowances for members of, and applicants for the Senior Reserve Officers' Training Corps who have not been appointed under the provisions of 10 U.S.C. 2107.

Section 422(c) of Title 37, U.S. Code, provides in pertinent part that a cadet or midshipman appointed under section 2107 of Title 10, U.S. Code, is entitled to the same allowances for travel under orders as are provided for cadets and midshipmen of the service academies. Subsection (a) of 37 U.S.C. 422 provides in part that cadets and midshipmen of the service academies are entitled to travel and transportation allowances prescribed under 37 U.S.C. 410 while traveling under orders as cadets or midshipmen. Section 410 of Title 37, U.S. Code, provides for entitlement to such travel and transportation allowances as are provided in 37 U.S.C. 404, which includes a per diem allowance.

Thus, entitlement to a per diem allowance authorized for cadets and midshipmen appointed under the provisions of 10 U.S.C. 2107 exists because they are entitled to the same allowances as those authorized for cadets and midshipmen of the service academies.

This, however, is not the case for members of, and applicants for, the Senior Reserve Officers' Training Corps. Subsection 2109(b)(1) specifically provides authority to the Secretary of the military department concerned for the payment to such members of a travel allowance in lieu of subsistence and transportation at the rate prescribed for cadets and midshipmen at the service academies. However, subsection 2109(b)(3) only provides authority for the furnishing of subsistence and does not authorize the payment of an allowance in lieu of subsistence while attending field training or practice cruises.

It is our view that had the Congress intended members of the Senior Reserve Officers' Training Corps serving under the provisions of 10 U.S.C. 2104 and 2109 to receive the same per diem allowances while on field or at-sea training as cadets and midshipmen appointed under 10 U.S.C. 2107, provision for such allowance would have been made at the time of enactment of the Reserve Officers' Training Corps Vitalization Act of 1964.

That act dealt with the Reserve Officers' Training Corps in general and, with regard to travel allowances, placed cadets and midshipmen appointed under 10 U.S.C. 2107 on equal footing with cadets and midshipmen of the service academies. Therefore, it appears conclusive that with regard to other categories of members of the Senior Reserve Officers' Training Corps, a similar relationship was not intended.

Accordingly, it is our view that the travel allowances for members of and applicants for the Senior Reserve Officers' Training Corps may not be extended to include per diem as currently prescribed for cadets and midshipmen in paragraph M6005 of the Joint Travel Regulations, in the absence of specific statutory authority for such allowances in 10 U.S.C. 2109.

With regard to the question concerning whether paragraph M6001 of the Joint Travel Regulations may be considered to authorize payment of per diem to members of, and applicants for the Senior Reserve Officers' Training Corps by virtue of the enlisted status in the Reserves, we note that while enlistment in a Reserve component is required for members of, or applicants for, the Senior Reserve Officers' Training Corps (10 U.S.C. 2104(b)(3)), the purpose of this requirement is to secure involuntary active military service as an enlisted member if the student fails to complete the course of instruction or refuses to accept appointment as a commissioned officer with its obligated service (10 U.S.C. 2105). Generally, members of the Senior Reserve Officers' Training Corps, although members of a Reserve component, are not required to attend drills or perform duty in their status as members of a Reserve component. Therefore, it is our view that the provisions of paragraph M6001 of the Joint Travel Regulations are not for application in the case of a member of, or an applicant for, the Senior Reserve Officers' Training Corps when on field or at-sea training and travel allowances payable in connection therewith are governed by the provisions of 10 U.S.C. 2109.

Accordingly, both questions are answered in the negative.

[B–176759]

Transportation — Dependents — Military Personnel — Advance Travel of Dependents—Divorce, etc., Prior to Employee's Eligibility

No objection is raised to a proposed amendment to Volume 1 of Joint Travel Regulations which would permit return travel to the United States of dependents of members of the uniformed services stationed overseas who traveled overseas as dependents but ceased to be dependents because of divorce or annulment of the marriage prior to the date the member became eligible for their return travel. Such amendment is similar to that concurred in for Foreign Affairs Manual in 52 Comp. Gen. 246.

In the matter of return travel to United States for certain dependents of uniformed services members, June 12, 1974:

The Department of the Army has requested a decision as to whether this Office would be required to object to an amendment to volume 1 of the Joint Travel Regulations (JTR), to permit the return travel at Government expense of a spouse and children transported overseas at Government expense although the marriage may have been terminated by divorce prior to the time the member becomes eligible for their return travel. The request has been assigned Control No. 73–42 by the Per Diem, Travel and Transportation Allowance Committee.

The question is submitted following our decision of October 30, 1972, 52 Comp. Gen. 246, wherein we stated that we would have no objection to a similar proposed amendment to the Uniform State/AID/USIA Foreign Service Travel Regulations. That amendment, now contained in section 126.2, volume 6, Foreign Affairs Manual, reads as follows:

> Reimbursement may be made for advance travel or return travel to the United States for a spouse and/or minor children of an employee who have traveled to the post as dependents even if, because of divorce or annulment, such spouse and/or minor children have ceased to be dependents as of the date the employee becomes eligible for travel (provided that such eligibility date occurs on or after January 10, 1973). Reimbursable travel may not be deferred more than 6 months after the employee completes personal travel pursuant to the authorization.

In concurring in the above-cited amendment we pointed out that current regulations in the Foreign Affairs Manual and in Office of Management and Budget Circular No. A–56 [now the Federal Travel Regulations] provide for the return transportation of an employee's children over the age of 21 if such children were transported overseas at Government expense when they were under 21. It was noted, therefore, that those regulations recognize to a partial degree an obligation on the part of the Government to return members of an employee's family who were transported overseas for the convenience of the Government although such members had ceased to be dependents of the employee when he became eligible for return travel. Therefore, we found that the proposed regulation would extend that principle to other members of an employee's family whose transportation to the overseas post was at Government expense. And although the wife would not be a member of the employee's family after a divorce, we noted that in many cases the employee would be responsible for her support and it would impose a financial hardship upon him to provide for her return travel. Thus, the providing of return travel would avoid a potential embarrassment to the United States caused by the presence overseas of ex-family members who are unable to return home due to lack of funds.

In the request for an advance decision regarding a similar provision in volume 1 of the Joint Travel Regulations, it is stated that the principles enunciated in 52 Comp. Gen. 246 would appear to be equally applicable to dependents of members of the uniformed services and that paragraph M7012 of volume 1, JTR, provides for transportation of a dependent child attaining age 21 while a member of the uniformed services is assigned to duty outside the United States. Accordingly, it is asked if we would be required to object to the proposed entitlement.

Section 406(h) of Title 37, U.S. Code, provides in pertinent part as follows:

> In the case of a member who is serving at a station outside the United States or in Hawaii or Alaska, if the Secretary concerned determines it to be in the best interest of the member or his dependents and the United States, he may, when orders directing a change of permanent station for the member concerned have not been issued, or when they have been issued but cannot be used as authority for the transportation of his dependents, baggage, and household effects—
>
> (1) authorize the movement of the member's dependents, baggage, and household effects at that station to an appropriate location in the United States or its possessions and prescribe transportation in kind, reimbursement therefor, or a monetary allowance in place thereof, as the case may be, as authorized under subsection (a) or (b) of this section; and
>
> * * * * * * * * *
>
> * * * For the purposes of this section, a member's unmarried child for whom the member received transportation in kind to his station outside the United States or in Hawaii or Alaska, reimbursement therefor, or a monetary allowance in place thereof, and who became 21 years of age while the member was serving at that station, shall be considered as a dependent of the member.

That subsection, which was added to Title 37 by the act of August 14, 1964, Public Law 88–431, 78 Stat. 439, considerably broadened the authority of the Secretaries of the uniformed services to authorize the advance return of dependents from overseas stations. Some of the situations contemplated under which advance return would be authorized are indicated in S. Report No. 1284, 88th Cong., 2d sess. 1, 2 as follows:

> For a member of the uniformed services who is serving at a station outside the United States or in Alaska or Hawaii, existing law provides authority for the advance return of dependents, baggage, household effects, and privately owned automobiles of members of the uniformed services in "unusual or emergency circumstances."
>
> The Department of Defense considers that advance movement is desirable under some conditions that do not qualify as unusual or emergency circumstances. *Unforeseen family problems*, changes in a member's status, and changed economic and political conditions in overseas areas at times *make the advance return of dependents in the best interest of the member and the United States. Specific examples of situations justifying advance return of dependents include marital difficulties*, financial problems brought about by confinement or reduction in grade of the member, and the death or serious illness of close relatives. [Italic supplied.]

It is clear that Congress was aware of the potential problems that could result for both a member and the United States if dependents were to remain overseas because the member could not afford to provide

for their return travel to the United States after marital difficulties had arisen. As pointed out in 52 Comp. Gen. 246, while an ex-wife would not technically be a dependent of the member following a final divorce, often the member would be responsible for her support and the providing of return travel would avoid a potential embarrassment to the United States caused by the presence overseas of ex-family members who are unable to return home due to lack of funds.

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

[B-180352]

Military Personnel—Termination of Active Service—Travel and Transportation Expenses—Reimbursement Denied to Home of Selection—Entitled to Reimbursement to Home of Record or Place of Entry

Members of the uniformed services who, on termination of active service otherwise qualify for travel and transportation to home or record or place of entry on active duty under 37 U.S.C. 404(a) and 406(a), are to be afforded such entitlements regardless of denial of travel and transportation to home of selection under 37 U.S.C. 404(c) and 406(g), in the absence of a statutory requirement that denial of travel and transportation to home of record or place of entry on active duty be made in such circumstances.

In the matter of uniformed services members' travel and transportation entitlements on termination of active service, June 14, 1974:

It has come to our attention that military members who are entitled to home of selection travel under 37 U.S. Code 404(c), and to travel and transportation of dependents and household effects under 37 U.S.C. 406(g) and who have been denied such entitlements because the member's travel was to a location at which he had no intention to establish his home, or because the member's travel to the home of selection was not within 1 year after termination of active duty, have not been afforted entitlements under 37 U.S.C. 404(a) and 37 U.S.C. 406 (a) and (b), to which they are otherwise eligible.

As an example, where a retired Army member's home of selection was Hato Rey, Puerto Rico, which also was his home of record, and allowances for the travel of the member and dependents to Hato Rey were denied because it was held that he did not travel with the intention of making his home there, payment of allowances for travel to that location, as his home of record, was not authorized.

Travel and transportation entitlements of members of the uniformed services are provided in Title 37, U.S. Code, and are implemented in accord therewith by the Joint Travel Regulations.

Section 404, Title 37, U.S. Code, states as follows:

(a) Under regulations prescribed by the Secretaries concerned, a member of a uniformed service is entitled to travel and transportation allowances for travel performed or to be performed under orders, without regard to the comparative costs of the various modes of transportation--

* * * * * * *

(3) Upon separation from the service, placement on the temporary disability retired list, release from active duty, or retirement, from his last duty station to his home or the place from which he was called or ordered to active duty, whether or not he is or will be a member of a uniformed service at the time the travel is or will be performed * * *

Section 404 also provides as follows:

(c) Under uniform regulations prescribed by the Secretaries concerned, a member who--

(1) is retired, or is placed on the temporary disability retired list, under chapter 61 of title 10; or

(2) is retired with pay under any other law, or, immediately following at least eight years of continuous active duty with no single break therein or more than 90 days, is discharged with severance pay or is involuntarily released from active duty with readjustment pay;

may, not later than one year from the date he is so retired, placed on that list, discharged, or released, except as prescribed in regulations by the Secretaries concerned, select his home for the purposes of the travel and transportation allowances authorized by subsection (a) of this section.

Section 406, Title 37, U.S. Code, provides that a member of a uniformed service who is ordered to make a change of permanent station is entitled to the transportation of his dependents (subsection (a)), and to the transportation of his baggage and household effects (subsection (b)), as prescribed by the Secretaries concerned (subsection (c)).

Additionally, section 406 provides as follows:

(g) Under uniform regulations prescribed by the Secretaries concerned, a member who—

(1) is retired or is placed on the temporary disability retired list, under chapter 61 of title 10; or

(2) is retired with pay under any other law, or, immediately following at least eight years of continuous active duty with no single break therein of more than 90 days, is discharged with severance pay or is involuntarily released from active duty with readjustment pay;

is, not later than one year from the date he is so retired, placed on that list, discharged, or released, except as prescribed in regulations by the Secretaries concerned, entitled to transportation for his dependents, baggage, and household effects to the home selected under section 404(c) of this title. * * *

Paragraph M4157–1a of the Joint Travel Regulations provides that for travel in the United States, a member on active duty who is separated from the service or relieved from active duty under certain conditions but excluding paragraph M4158–1a of the regulations, will be entitled to mileage from his last duty station to his home of record or the place from which he was ordered to active duty, as the member may elect. Under subparagraph 1b, a member who is separated from the service or relieved from active duty outside the United States, or is

entitled to travel allowances under this paragraph to home of record or place from which he was ordered to active duty which is located outside the United States, will be entitled to travel allowances as provided in paragraph M4159 (Permanent Change-of-station Travel To, From, or Between Points Outside the United States).

Paragraph M4158 (Retirement, Placement on Temporary Disability Retired List, Discharge with Severance Pay, or Involuntary Release to Inactive Duty with Readjustment Pay) provides in subparagraph 1a that a member on active duty may select his home and be entitled to travel and transportation allowances thereto from his last duty station. Subparagraph 2 provides, with certain exceptions, that travel to a selected home must be completed within 1 year after termination of active duty.

Similar provisions for the travel of dependents of members entitled to travel to the home of record or place from which the member was ordered to active duty are contained in paragraph M7009 of the regulations (with the additional requirement in subparagraph 6 that such travel be completed within 1 year following separation from the service or relief from active duty). Provision for dependent travel to the home of selection similar to that prescribed for eligible members is contained in paragraph M7010 of the regulations.

Shipment of household goods of members separated from the service or relieved from active service to the place elected for travel allowance under paragraph M4157 is provided for in paragraph M8259 of the regulations, subject to the 1-year limitations contained in subparagraph 7 thereof. Regulations regarding the shipment of household goods of members entitled to receive travel allowance to the home of selection under paragraph M4158 are contained in paragraph M8260 of the regulations, including a 1-year limitation for shipment to the selected home, subject to the stated exceptions.

We are aware of no intention on the part of the Congress in establishing the foregoing entitlements that a member who has basic entitlement to travel and transportation at Government expense to his home of selection, but whose claim for such entitlements is denied for the reasons previously indicated, also shall be ineligible for travel and transportation allowances to his home of record or the place from which he was called or ordered to active duty.

A member's right to choose a home upon being retired, after termination of active duty, is considered to be a greater benefit than is afforded to other members who are not permitted to choose their homes for entitlement purposes upon completion of active duty. Typically, a member retired after 20 years of service is entitled to this benefit, but a member who has served for only 3 years may not select his home.

In such circumstances, it would appear to be anonymous to deny a member with long service allowances to which he would have been entitled after completion of a short period of service, because he has been denied a greater benefit.

Consequently, a member who otherwise qualifies for travel and transportation allowances to his home of record or place from which he was ordered or called to active duty under 37 U.S.C. 404(a) and 406(a) is to be afforded such entitlements whenever his entitlement to travel and transportation to home of selection under 37 U.S.C. 404(c) and 406(g) is denied.

[B-180364]

Leaves of Absence—Annual—Maximum Limitation—Employees Outside United States—Canal Zone

Although employee, who entered service in Canal Zone, was given transportation agreement on basis of his travel to the Zone as dependent of employee with transportation agreement, he is not entitled to accumulate 45 days annual leave and home leave since he did not meet the requirement of 5 U.S.C. 6304(b) that he be recruited from the United States or a territory or possession of the United States outside the Zone. Further, home leave under 5 U.S.C. 6305(a) may not be granted since the employee is not entitled to accumulate 45 days annual leave.

Canal Zone—Status—"Territories and Possessions"

Although an employee, who entered service in the Canal Zone and was given a transportation agreement based on his former status as dependent of employee with a transportation agreement, was not entitled to accumulate 45 days annual leave and home leave while stationed in the Zone, he was entitled to such benefits upon transfer to Mexico since the Zone is considered within the phrase "territories and possessions" of the United States as used in 5 U.S.C. 6304(b)(1) covering the 45-day leave accumulation and employee entitled to such accumulation is entitled to home leave.

In the matter of 45-day maximum leave accumulation and home leave, June 17, 1974:

This is in response to a request for a decision as to whether Messrs. Donald M. Peterson and Albert W. Cherry, employees of the Defense Mapping Agency (DMA), are entitled to accumulate 45 days of annual leave and to the accrual and grant of home leave.

The record shows that Mr. Peterson came to the Canal Zone in May 1941, when he was 12 years old to reside with his father who was an employee of the Panama Canal Company. Except for the period June 1944 to May 1945, when he returned to the United States to attend school, documents in his personnel folder show his continuous residence in the Canal Zone from May 1941 to October 1948. On October 26, 1948, when he was 20 years old, he was employed by the United States Army Caribbean Command (now DMA, Inter American Geo-

detic Survey (IAGS)) in the Canal Zone and his status was determined to be that of a local hire. Since he was a minor, he was not permitted to sign a transportation agreement. When he became eligible, he was tendered an agreement and his annual leave accumulation was changed to 45 days on January 3, 1952. This action eventually permitted Mr. Peterson to accumulate home leave. On March 16, 1954, he was separated from his position to enter military service. On February 10, 1956, he was reinstated after being discharged from military service on January 12, 1956. On January 6, 1957, Mr. Peterson was transferred to Monterrey, Mexico, on a permanent change of station and since then he has been on various projects outside the Canal Zone including his current assignment effective February 27, 1969, to Mexico City, Mexico. By letter dated August 11, 1972, from the Acting Deputy Director of Civilian Personnel, he was advised that he had been erroneously receiving entitlement to the 45-day maximum leave accumulation and to the accrual and grant of home leave. The letter also notified Mr. Peterson that he was required to reduce his maximum annual leave accumulation by the end of the current leave year (1972) to 30 days and any leave in excess of that amount at that time would be forfeited. His entitlement to a transportation agreement was not affected. Such action was made as a result of advice from the Department of the Army that the presumption that a transportation agreement entitled an employee to a 45-day leave accumulation and home leave was erroneous.

Mr. Peterson initiated an appeal through administrative grievance procedures as a result of the August 11, 1972 determination. On July 20, 1973, the grievance examiner assigned to the case made a determination and reached a conclusion that:

1. When initially appointed for employment within the Canal Zone, Mr. Peterson was a minor residing with his parents within the Canal Zone. Consequently, he was not subject to the provisions of Section 6304(b), since he was employed within the area of recruitment. As a minor living with his parents, however, he was entitled to negotiate an initial transportation agreement under JTR C4002–3, establishing residence within the United States.

2. On 6 January 1957, Mr. Peterson began a series of permanent duty tours in various countries outside the area of recruitment and on 27 February 1969 was assigned to his current permanent duty station in Mexico City, Mexico. Since we have established the fact that the employee was a recruitment within the Canal Zone, we cannot consider him, in his current area of employment, as employed locally.

3. Grievant's transfers to areas outside the Canal Zone must be construed as having been from the United States since, under the terms of JTR C4002–3, he was considered to have residence in the United States when employed.

4. Subject employee is entitled to a 45-day maximum annual leave accumulation and to the accrual and grant of home leave since (a) he is not a local hire in the Mexico area, (b) he was transferred by the Government of the United States from the United States or its territories or possessions for employment outside the area of recruitment or from which transferred, and (c) Commission regulation 630.302 provides that an employee becomes subject to Section 6304(b) on the date he begins to perform duty in an area outside the United States and the area of recruitment or from which transferred.

III. *CONCLUSIONS*

A. That management's determination Mr. Peterson does not meet the eligibility criteria for the leave entitlements, based on a review of the circumstances and regulatory requirements, was incorrect.

B. That Mr. Peterson's request for reconsideration of the CPO decision is appropriate.

C. That management's action to withdraw Mr. Peterson's entitlement to a 45-day maximum leave accumulation and to the accrual and grant of home leave was improper.

The facts and information concerning the employment of Mr. Cherry in 1949 at the age of 20 in the Canal Zone by IAGS and his subsequent transfers within IAGS to Chile and Paraguay are contained in his grievance file which was attached to the submission. The submission states that, while the facts surrounding Mr. Cherry's employment vary slightly from those surrounding Mr. Peterson's employment, the questions submitted in the case of Mr. Peterson are believed pertinent in the case of Mr. Cherry. We agree and, therefore, the determinations herein are applicable to his case.

The following questions are submitted:

1. What are Mr. Peterson's entitlements under 5 U.S. Code 6304(b) while employed by DMA in the Canal Zone?

2. Are Mr. Peterson's entitlements under 5 U.S.C. 6304(b) affected as a result of his transfer by DMA to a country outside the Canal Zone?

Under the facts as presented we are unable to disagree with the administrative view that Mr. Peterson was originally in the Canal Zone because of his father's employment there and, since he was employed within the area of his recruitment, he was a local hire. The regulation pertaining to the accumulation of annual leave at the time Mr. Peterson was employed was contained in 5 CFR 30.202 and provided as follows:

§ 30.202 *Accumulated annual leave.* Accumulated annual leave may be carried forward for use in succeeding years until it totals not exceeding 60 days: *Provided,* That additional leave up to 30 days which was accumulated during the emergency period from September 8, 1939, to July 25, 1947, and which remains unused, may be carried forward into succeeding years until used.

Thus at the time of his employment Mr. Peterson in 1948 was entitled to accumulate no more than 60 days annual leave.

Under the Annual and Sick Leave Act of 1951, Public Law 233, effective January 6, 1952, 65 Stat. 679, the accumulation of annual leave was limited to 60 days for employees in the continental United States and to 90 days for certain employees outside the continental United States. The Annual and Sick Leave Act of 1951 was amended by Public Law 102, approved July 2, 1953, 67 Stat. 137, which reduced the accumulation of annual leave to 30 days for employees in the continental United States and 45 days for certain employees outside the continental United States. Since Mr. Peterson was a local hire and in

the Canal Zone at the time of his employment, he was entitled only to the 30-day accumulation of annual leave under Public Law 102 while stationed in the Canal Zone. The accumulation and granting of home leave is dependent upon an employee being eligible to accumulate 45 days of annual leave. *See* 5 CFR 630.602 implementing section 203(f) of the Annual and Sick Leave Act of 1951, 65 Stat. 680, as amended by section 401 of Public Law 86–707, 74 Stat. 799, now codified in 5 U.S.C. 6305(a). Since Mr. Peterson was not eligible to accumulate 45 days of annual leave he was not entitled to home leave.

The separation from military service on March 16, 1954, and his subsequent restoration on February 10, 1956, is not considered a break in service and his reappointment did not meet the criteria of paragraph (d)(3) of section 203 of the Annual and Sick Leave Act of 1951 (65 Stat. 680) providing that persons who are not normally residents of the area concerned and who are discharged from the military service of the United States to accept employment with an agency of the Federal Government are eligible to accumulate 45 days annual leave. *See* 26 Comp. Gen. 488 (1946).

In view of the above our determination is that Mr. Peterson was not entitled to accumulate 45 days leave while stationed in the Canal Zone or to the accumulation and granting of home leave incident to assignment in the Canal Zone.

Regarding question 2 section 203(d) of the Annual and Sick Leave Act of 1951, as amended, now codified in section 6304(b) of Title 5 of the U.S. Code provides as follows:

> (b) Annual leave not used by an employee of the Government of the United States in one of the following classes of employees stationed outside the United States accumulates for use in succeeding years until it totals not more than 45 days at the beginning of the first full biweekly pay period, or corresponding period for an employee who is not paid on the basis of biweekly pay periods, occurring in a year:
>
> (1) Individuals directly recruited or transferred by the Government of the United States from the United States or its territories or possessions including the Commonwealth of Puerto Rico for employment outside the area of recruitment or from which transferred.
>
> (2) Individuals employed locally but—
>
> (A)(i) who were originally recruited from the United States or its territories or possessions including the Commonwealth of Puerto Rico but outside the area of employment;
>
> (ii) who have been in substantially continuous employment by other agencies of the United States, United States firms, interests, or organizations, international organizations in which the United States participates, or foreign governments; and
>
> (iii) whose conditions of employment provide for their return transportation to the United States or its territories or possessions including the Commonwealth of Puerto Rico; or
>
> (B)(i) who were at the time of employment temporarily absent, for the purpose of travel or formal study, from the United States, or from their respective places of residence in its territories or possessions including the Commonwealth of Puerto Rico; and

(ii) who, during the temporary absence, have maintained residence in the United States or its territories or possessions including the Commonwealth of Puerto Rico but outside the area of employment.

(3) Individuals who are not normally residents of the area concerned and who are discharged from service in the armed forces to accept employment with an agency of the Government of the United States.

Since Mr. Peterson was not directly recruited or transferred by the Government from the United States for employment in Monterrey, Mexico, on January 6, 1957, and Mexico City, Mexico, on February 27, 1969, his present duty station, there is for consideration whether the transfer from the Canal Zone may be considered as being made from its "territories or possessions" as the phrase is used in subsection (b) (1), *supra.*

The term "territory" does not have a fixed and technical meaning which must be accorded it in all circumstances. As used in acts of Congress, it may have different meanings, so that the same political entity may be included in one but excluded in another. The use of the term "territory" by Congress may sometimes be meant to be synonymous only with the "place" or "area." Thus the meaning of the word, as used in the Federal statute, will depend upon the character and aim of the act. Where Congress intended to exert all the power it possessed in respect to the subject matter, the word will be held to have been used in its most comprehensive sense and will include even an unorganized territory. However, a statute excepting territories from its operation has been held to except only territories proper, and not the unorganized public domain. 72 Am Jur 2d, States, Territories, and Dependencies, § 131.

The word "possession" as used in an act of Congress, has been held not to be a word of art, descriptive of a recognized geographical or governmental entity, but rather a term which should be construed, if reasonably possible, to effectuate the intent of the lawmakers. 72 Am Jur 2d, *supra*, *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377 (1948).

The treaty with the Republic of Panama grants to the United States in perpetuity the use, occupation, and control of the Canal Zone for the construction, operation, maintenance, and protection of the Canal, and gives the United States the same rights, power, and authority within the Canal Zone as it would have if it were the sovereign, to the entire exclusion of the exercise of any such rights, power, and authority, by the Republic of Panama. *Wilson* v. *Shaw*, 204 U.S. 24 (1907). The Canal Zone Government is an independent agency of the United States, administered under the supervision of the President of the United States by a Governor appointed with the advice and consent of the Senate. 72 Am Jur 2d, States, Territories, and Dependencies, § 135.

As set forth in the case of *Luckenbach S.S.* v. *United States*, 280 U.S. 173 (1930), the Canal Zone has been treated by the Congress, the courts and the administrative and accounting officers of the Government, at different times and for different purposes, as a foreign territory, as an organized territory or possession of the United States. For additional instances of such varied treatment, which need not be detailed here, *see* 16 Comp. Gen. 515 (1936) and cases cited therein.

In *United States* v. *Husband R.* (*Roach*), 453 F. 2d 1054 (1971), a case concerning the authority of the Governor of the Canal Zone to issue traffic regulations generally, it was held that the Canal Zone is an unincorporated territory of the United States. *See* convention between United States and Republic of Panama, November 18, 1903, 33 Stat. 2234, articles 2, 3; General Treaty between United States and Panama, March 2, 1936, 53 Stat. 1807; 2 C.Z.C. 1 *et seq.* It was also held that Congress has complete and plenary authority to legislate for an unincorporated territory such as the Canal Zone, pursuant to article IV, § 3, cl. 2, of the Constitution, empowering it "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

In 15 Comp. Gen. 36 (1935) it was held that the Canal Zone "must be considered as included in the broad terms 'territories and possessions' of the United States as used in section 2 of the Emergency Relief Act of 1935." Since the rights of the United States with respect to the Canal Zone are all inclusive, and the territory is subject to such laws as may be made applicable thereto by the Congress, it must be considered as included in the broad term "territories and possessions" of the United States as used in 5 U.S.C. 6304(b) (1).

Inasmuch as we consider the Canal Zone to come within the phrase "territories or possessions" of the United States as used in 5 U.S.C. 6304(b) (1), Mr. Peterson upon transfer to Mexico, a foreign country, became eligible to accumulate 45 days annual leave and to accumulate and be granted home leave. Question number 2 is answered accordingly.

[B–179018]

Military Personnel—Retirement—Temporary Disability Retirement—Removal From List—Member Not Bound by Prior Survivor Benefit Plan Election

Where a service member exercised his option regarding participation in the Survivor Benefit Plan, 10 U.S.C. 1447–1455, and made an election for the purpose of being placed on the Temporary Disability Retired List and whose name is removed from that list for the purpose of either resuming full active duty or retirement for length of service under another provision of law, since 10 U.S.C. 1448(c) terminates his participation in the Plan at that time, any option exercised and election made prior to placement on that list is limited to that purpose and such member may not be bound thereafter by those actions.

Pay—Retired—Subsequent to Temporary Disability Retired List Removal—Member Not Bound by Prior Survivor Benefit Plan Election

When a service member's name is removed from the Temporary Disabiilty Retired List and is returned to the active list for the purpose of retirement for length of service under another provision of law, since there may exist significant changes in the member's circumstances subsequent to his initial decision to participate or not participate in the Survivor Benefit Plan, he is to be treated as a new prospective participant and must be given the opportunity to fully review his future participation in the Plan prior to such retirement with positive action to be taken administratively to insure that the details and costs are fully understood by him.

In the matter of Survivor Benefit Plan coverage for Temporary Disability Retired List members, June 18, 1974:

This action is in response to a letter from the Acting Assistant Secretary of Defense (Comptroller), requesting a decision concerning the application of the Survivor Benefit Plan, 10 U.S. Code 1447-1455, to a service member whose name is removed from the Temporary Disability Retired List (TDRL) in the circumstances discussed in Department of Defense Military Pay and Allowance Committee Action No. 480, which was enclosed with the request.

The questions set forth in the Committee Action are:

What is the proper application of the Survivor Benefits Plan (SBP) to a member removed from the Temporary Disability Retired List (TDRL) and restored to active duty for one or more days and then retired for length of service under another provision of law? Would—

a. A prior election be terminated and maximum coverage become automatic under the new retirement status; or

b. An election in effect while on the TDRL be continued in force with cost and annuity recomputed, as applicable, based on the retired pay entitlement of the new retirement status?

c. A member who indicated he did not desire to participate in the Plan while on the TDRL be permitted to make an election to be covered during the new retirement status?

The discussion in the Committee Action recognizes that under 10 U.S.C. 1448(c), the application of the Survivor Benefit Plan to a person whose name is on the Temporary Disability Retired List terminates when his name is removed from that list and he is no longer entitled to retired pay. It is stated in the discussion that paragraph 3e(3), section III, appendix of DA Circular 608-41, October 20, 1972, provides that for a person who is removed from the Temporary Disability Retired List and restored to active duty, any Survivor Benefit Plan coverage will end and the costs will not be refunded and that for such restored members, the Survivor Benefit Plan will apply in the future as for other active duty members.

In this regard, the discussion points out that a member removed from the Temporary Disability Retired List also includes those who are eligible for retirement under another provision of law when they

were placed on the list, and that, except for reservists eligible for retirement under 10 U.S.C. 3911, 47 Comp. Gen. 141 (1967) held that members must be in an active status following removal from the Temporary Disability Retired List in order to be retired for length of service. Further, it is stated that while such required active status could be for a minimum period of one day, nothing can be found in regulations or statutory material that provides instructions concerning the application of coverage under the Survivor Benefit Plan for these individuals.

Subsection 1448(a) of Title 10, U.S. Code, provides in pertinent part:

> (a) The Plan applies to a person who is married or has a dependent child when he becomes entitled to retired or retainer pay unless he elects not to participate in the Plan before the first day for which he is eligible for that pay. If a person who is married elects not to participate in the Plan at the maximum level, that person's spouse shall be notified of the decision. An election not to participate in the Plan is irrevocable if not revoked before the date on which the person first becomes entitled to retired or retainer pay. * * *

In our decision of May 10, 1974, 53 Comp. Gen. 847, we said with regard to subsection 1448(a) that:

> * * * in a situation where a member retires and is in an inactive status having previously elected to participate in the Plan and becomes entitled to retired or retainer pay, the basic coverage under the Plan for the eligible survivors is by virtue of the provisions of 10 U.S.C. 1448(a), with payment to be made in accordance with 10 U.S.C. 1450 * * *.

The Survivor Benefit Plan was designed to build on the income maintenance foundation of the Social Security system in order to provide survivor coverage to military widows and dependent children in a stated amount from retirement income derived by a member from his past military service. This contemplates generally the existence of a final type retirement where a member, when placed in an inactive status which entitles him to retired pay, would remain in that status until he dies. If, however, a member is recalled to active duty subsequent to such a retirement, upon release from that period of active duty he would resume his earlier inactive status with retired pay recomputed under the provisions of 10 U.S.C. 1402.

With regard to the application of the Survivor Benefit Plan to this type of situation, we expressed the view in 53 Comp. Gen. 847, *supra*, in connection with the answer to question 4 that where a member became entitled to retired pay having previously elected to participate in and has contributed to the Plan, the basic rights of the designated and otherwise eligible survivors continue irrespective of subsequent changes in the member's status.

Such is not the case with respect to members whose names are placed on the Temporary Disability Retired List. While there is no question that the Survivor Benefit Plan is for application to such members at

the time their names are placed on that list (they are entitled to retired pay computed under 10 U.S.C. 1401 during that time), subsection 1448(c) of Title 10, U.S. Code, provides:

(c) The application of the Plan to a person whose name is on the temporary disability retired list terminates when his name is removed from that list and he is no longer entitled to retired pay.

The purpose for establishing the Temporary Disability Retired List (10 U.S.C. 1202 and 1205) was to authorize a limited retirement status for members of the Armed Forces called or ordered to active duty and who become unfit to perform such duty because of a physical disability incurred while entitled to basic pay, but where such disability is not determined to be of a permanent nature, with the maximum period of retention on that list limited to five years (10 U.S.C. 1210(b). Other than situations involving immediate transfer to the permanent disability retired list, members whose names are removed from the Temporary Disability Retired List are returned to the active list either for the purpose of resuming full active duty or in order to qualify them for retirement for length of service under other provisions of law. *See* 47 Comp. Gen. 141 (1967) and 50 *id.* 677 (1971).

There is no extensive legislative history regarding the application of the Plan to members whose names are on the Temporary Disability Retired List. However, for members whose names have been removed from that list the legislative policy is clearly and unequivocally stated on page 33 of House Report No. 92–481, Committee on the Armed Forces, House of Representatives, dated September 16, 1971, to accompany H.R. 10670, which eventually became Public Law 92–425, 86 Stat. 761, as follows:

* * * A person removed from the temporary disability retired list ceases to participate in the plan when he is no longer entitled to retired pay. A member transferred from the temporary disability retired list to the permanent disability retired list continues in the plan subject to changes in the base amount * * *.

Similar wording is contained on page 51 of Senate Report No. 92–1089, Committee on Armed Services, United States Senate, dated September 6, 1972.

From the foregoing, it is apparent that it was congressionally recognized that members on the Temporary Disability Retired List are to be afforded the opportunity to obtain survivor protection as in all other retirement cases, but that it was also recognized that such a status on that list would be for a limited duration. Thus, with the mandate that the Plan is no longer applicable to a member whose name is removed from that list and returned to the active list, it is our view that the option to participate in the Plan exercised by the member and his election made prior to his name being placed on the Temporary Disability Retired List would also be of limited applicability, since his return to

the active list would be for the purpose of either resuming full active duty or retiring for length of service under another provision of law.

Therefore, where a member, whose name is on the Temporary Disability Retired List, is being returned to the active list for the purpose of retirement for length of service, any option exercised by the member with regard to the Plan and election made prior to placement on that list is limited to that purpose and such member may not be bound thereafter by those actions. Further, since changed circumstances may have occurred subsequent to the time his name was placed on the Temporary Disability Retired List and since subsection 1448(a) provides in part that, "If a person who is married elects not to participate in the Plan at the maximum level, that person's spouse shall be notified of the decision," the member must be treated as a new prospective participant and must be given the opportunity to fully review his future participation in the Plan, with positive action to be taken by administrative officers to insure that the details of the Plan, its benefits and the cost of participation are again fully explained and understood by the member. *Cf.* 53 Comp. Gen. 192 (1973).

Your questions are answered accordingly.

[B-181234]

Statutory Construction—Legislative Intent—Foreign Assistance Act of 1973—Effective Date—Enactment Date *v.* Current Fiscal Year

Provision in Foreign Assistance Act of 1973 which amends earlier statute which permitted specified amount of excess defense items (domestic and foreign generated) to be furnished to foreign countries without charge to Military Aid Program (MAP) funds so as to, in effect, require domestic excess defense items to be charged to MAP funds, is applicable on and after July 1, 1973, even though amendment was enacted subsequent thereto since latter act provides authorizations of funds for current fiscal year, provision contains the worlds "during each fiscal year," and such effective date appears consistent with legislative history of such provision and manner in which it had been applied in prior fiscal years.

In the matter of excess defense articles furnished foreign countries, June 20, 1974:

This decision is in response to a request by the Assistant Secretary of Defense (Comptroller) concerning the applicable date of section 26 of the Foreign Assistance Act of 1973, Public Law 93-189, approved December 17, 1973, 87 Stat. 731.

The question presented for decision is whether or not section 8 as now amended applies to excess defense articles ordered after the beginning of fiscal year 1974 (July 1, 1973) but before enactment of Public Law 93-189 (December 17, 1973).

Insofar as pertinent here section 26 amended section 8(b) of Public Law 91-672 (22 U.S. Code 2321b), approved January 12, 1971, 84 Stat. 2053, as amended, by adding the language italicized below so that it now reads as follows:

(b) *In the case of excess defense articles which are generated abroad,* the provisions of subsection (a) of this section shall apply during any fiscal year only to the extent that the aggregate value of excess defense articles ordered during the year exceeds $150,000,000.

Subsection (a) referred to in subsection (b) above provides that—

Subject to the provisions of subsection (b), the value of any excess defense article granted to a foreign country or international organization by any department, agency, or independent establishment of the United States Government (other than the Agency for International Development) shall be considered to be an expenditure made from funds appropriated under the Foreign Assistance Act of 1961 for military assistance. Unless such department, agency, or establishment certifies to the Comptroller General of the United States that the excess defense article whose stock status is excess at the time ordered, a sum equal to the value thereof shall (less amounts to be transferred under section 632(d) of the Foreign Assistance Act of 1961) (1) be reserved and transferred to a suspense account, (2) remain in the suspense account until the defense article is either delivered to a foreign country or international organization or the order therefor is cancelled, and (3) be transferred from the suspense account to (A) the general fund of the Treasury upon delivery of such article, or (B) to the military assistance appropriation for the current fiscal year upon cancellation of the order. Such sum shall be transferred to the military assistance appropriation for the current fiscal year upon delivery of such article if at the time of delivery the stock status of the article is determined, in accordance with subsections (g) and (m) of section 2403 of this title, to be nonexcess.

Prior to enactment of section 8 of Public Law 91-672, excess defense articles granted to foreign countries were not charged against the Military Aid Program (MAP) funds. The effect of section 8 was to require all excess defense articles to be charged against MAP funds except that subsection (b) requires such charge to MAP funds only after a specified ceiling had been reached in any fiscal year.

The Assistant Secretary transmitted with his request memoranda of the Department of State and the Department of Defense, dated March 21 and April 4, 1974, respectively. Both agree that section 8(b) applies to defense articles generated abroad effective July 1, 1974. However, the State memorandum takes the further position that section 8(b) applies to excess defense articles generated in the United States only on and after the date of enactment of Public Law 93-189.

As indicated above, the language of section 8 was enacted into law on January 12, 1971, approximately 6 months following the beginning of fiscal year 1971. The ceiling then specified in subsection (b) was $100,000,000. Subsection 8(b) subsequently was amended by section 402 of Public Law 92-226 approved February 7, 1972, 86 Stat. 33, by changing the ceiling amount to $185,000,000—such amendment again occurring more than 6 months after the beginning of the fiscal year.

State Department, in its memorandum, points out that neither in 1971 nor in 1972 was the ceiling less than the value of excess articles ordered prior to enactment or amendment of section 8 and that section 8 thus has never had a retroactive effect. Further, it is urged that—

> In the absence of anything to the contrary in its terms of legislative history, the amendment should be construed in accordance with normal rules of statutory construction as having effect only from and after the date of its enactment. Retroactivity should not be presumed.

While it may be true that section 8 has never had a retroactive effect, it is also true that in each of fiscal years 1971 and 1972, and although more than 6 months of each of the fiscal years had elapsed at the time section 8 was enacted or amended, the ceiling was applied to excess articles ordered during the entire fiscal year involved.

We see no valid basis to now construe section 8(b) as it relates to excess defense articles generated abroad as being applicable as and of July 1, 1973, and at the same time to construe it as being applicable only on and after December 17, 1973, as now urged, in effect, in the State memorandum, with respect to excess defense articles generated in the United States.

Each of the three Public Laws mentioned above authorized the making of Foreign Assistance appropriations for the applicable fiscal year, and either delete, limit, or expand existing programs or provide for additional ones. The Department of Defense memorandum after reviewing the legislative history of section 8 observes that section 8—

> * * * has been perceived by the Congress as an integral part of the annual authorization process; a process by which it authorizes funds to be appropriated for foreign aid for a whole fiscal year, even though a portion of such fiscal year has generally elapsed prior to enactment.

While a construction such as that now urged by State would not be unreasonable, we are of the view that the legislative history of section 8 and the manner in which it has heretofore been applied, together with the wording of subsection (b) stating that it "shall apply during any fiscal year," indicates a clear intent by the Congress that the amendments made to section 8 by Public Law 93–189 were to apply during the entire fiscal year to excess defense articles whether generated abroad or in the United States.

[B–173677]

Contracts—Research and Development—Space Shuttle Program—Solid Rocket Motor Project

On basis of General Accounting Office review of National Aeronautics and Space Administration (NASA) evaluation of cost-plus-award-fee proposals for Solid Rocket Motor Project of Space Shuttle Program covering 15-year period in esti-

mated price range of $800 million, it is recommended that NASA determine whether, in view of substantial net decrease in probable cost between two lowest proposers, selection decision should be reconsidered.

Contracts—Negotiation—Awards—Propriety—Evaluation of Proposals

NASA Procurement Regulation 3.805–2, which deemphasizes cost in favor of quality of expected performance, is not violated by selection of contractor for Solid Rocket Motor Project of Space Shuttle Program on basis of admitted uncertain cost proposal estimates covering 15-year contract period, General Accounting Office having found that cost proposals were conservatively adjusted; cost uncertainties as between proposers generally balanced out; and proposers were ranked essentially equal in mission suitability and other related factors.

Contracts—Negotiation—Evaluation Factors—Standard Items—Normalization of Prices

In absence of standardized request for proposals estimate for non-Government propellant component demand, NASA should have normalized proposed prices for propellant component since any proposer, if successful, would obtain component from same sources in essentially same quantities for delivery from same locations.

Contracts—Negotiation—Requests for Proposals—Omissions—Standardized Projection of Non-Government Demand for Item

NASA request for proposals should have furnished proposers standardized projection of non-Government demand for propellant component which would be essentially same and would be satisfied from same limited sources regardless of contractor selected. In absence of standard demand projection, proposers were required individually to predict non-Government demand over which they had no control, with significant effect on proposal evaluation.

Contracts—Negotiation—Requests for Proposals—Escalation—Definition

In light of the RFP's definition of escalation—inflation plus variables resulting from dissimilar company business policies—to be used in converting 1972 dollars to real year dollars (dollars expected to be expended in performance of program), inflation can be considered a persistent and appreciable rise in general level of prices for both labor and materials which should be uniform for all proposers.

Contracts—Negotiation—Requests for Proposals—Dollar *v.* Real Year or Escalation Costs—Normalization

Because NASA's RFP required proposers to make informed judgments in converting 1972 dollar costs to real year or escalated dollar costs over 15-year period for purpose of most probable cost assessment (proposed escalation rates having reflected company unique factor), escalation over 15-year period need not be normalized where to do so might prejudice proposer with dissimilarly constructed 1972 dollar labor base which was higher.

Contracts—Negotiation—Requests for Proposals—Escalation—Inflation Element

Inflation element of escalation which, as distinguished from other elements of escalation, is beyond proposer's control should have been stated in NASA cost-reimbursement RFP as rate common to all proposers; but, since proposers in compliance with RFP included escalation rates in their proposals as to which it is not possible to break out controllable features of escalation, failure to normalize escalation is not unreasonable; any attempt to obtain refined cost

data to normalize inflation would be inappropriate after-the-fact restructuring of cost proposals.

Contracts—Negotiation—Cost, etc., Data—NASA Procedures—Normalization of Proposed Costs

Under NASA procedures, proposed costs are normalized—establishing "should have bid" common cost estimates—only when no logical reasons exist for cost differences between proposers or where insufficient cost data is furnished with proposals.

Contracts—Negotiation—Cost, etc., Data—NASA Evaluation Factors—GAO Review

GAO review confirmed NASA evaluation findings that facilities cost difference in favor of successful proposer was substantial. Protester planned to modify existing and construct new Government facilities while successful proposer offered to modify existing facilities as necessary. GAO examined: (1) minor adjustment to protester's costs due to unavailability of Government test stand; (2) best and final offer facility cost reductions; (3) comparison of subcontractor facility costs; (4) acquisition of Government plant by successful offeror; (5) Government support for protester; (6) residual value of facilities; (7) launch site support costs; (8) maintenance costs; and (9) other evaluators' adjustments.

Contracts—Negotiation—Evaluation Factors—Delivery Provisions, Freight Rates, etc.—Acceptance Reasonable

Acceptance for evaluation purposes of special Government freight rate quotations from railroads under section 22 of the Interstate Commerce Act (49 U.S.C. 22) significantly lower than existing or similar rates for same commodity and subject to cancellation on 30 days' notice was reasonable since (1) rates were agreed to by railroads and type of traffic proposed has generally moved on section 22 rates; (2) volume and frequency of traffic justifies low rates; (3) railroads have been reliable in maintaining reasonable rate levels; and (4) all rates are compensatory using available cost information.

Contracts—Negotiation—Evaluation Factors—Delivery Provisions, Freight Rates, etc.—Agency Evaluation Approximates GAO's

Agency cost evaluation resulting in $36 million advantage to protester offering water transportation by barge of solid rocket motors from proposed production facility in Southeast to launch sites approximates GAO evaluation even though (1) there was no anticipated cost or contractual agreement between protester and potential barge transporter; (2) barge transporter has no record of offering freight rates to Government; and (3) no historical cost data exists because no barge of type proposed to transport solid rocket motors exists in the U.S. fleet at present.

Contracts—Negotiation—Cost, etc., Data—Escalation—Rate—Freight Costs

While proposer planning to use rail transportation may be able to mitigate future freight rate increases, GAO believes agency should have assessed additional cost uncertainty in evaluation against proposal selected for negotiations which, as evaluated, had a lower escalation rate for freight costs in the principal production increment (1981–1988) than in the developmental and initial probduction increments (1973–1981). Lack of verifiable cost information made uncertain escalation rate used by protester who planned to transport solid rocket motors by water.

Contracts—Negotiation—Cost, etc., Data—Price Adjustment—Savings—Speculative

Where RFP is silent concerning co-shipment by water of solid rocket motors and external tanks with attendant possible cost savings, and agency gave protester partial credit therefor, protester should have received appropriate further credit for such savings as positive cost uncertainty rather than a reduction in most probable costs since actual savings are extremely speculative.

Contracts—Negotiation — Evaluation Factors — Labor Costs—Hourly and Salaried Personnel

Although hourly labor rates are lower where protester proposes to perform contract than where selected proposer will perform, agency properly concluded that composite direct labor rates, which include hourly and salaried personnel, were lower for selected proposer since protester's composite rates included higher paid salaried personnel. Also, protester elected to charge salaried personnel rates to direct labor cost because of performance in facility dedicated to program while selected proposer who planned to use facility where several other Government programs would be performed properly charged salaried personnel rates to overhead.

Contracts—Negotiation—Evaluation Factors—Labor Costs—Upward Adjustment

Protester's contention that upward adjustment of labor costs in cost evaluation should have decreased overhead and general and administrative (G&A) rates in computing adjusted labor costs is supported by accounting principles. However, protester's proposal did not contain enough data to permit agency to derive lower overhead and G&A rates; and procedure employed in this regard was consistently applied to all proposers.

Contracts—Negotiation—Cost, etc., Data—Labor Costs—Evaluation—Not Prejudicial

While agency used own techniques to estimate protester's labor costs because protester's computations contained error detected by Defense Contract Audit Agency, no prejudice ensued since agency's adjustments to proposed labor costs were significantly lower than claimed by protester and substantially lower than labor costs recalculated by protester voluntarily during consideration of protest. Had labor costs been evaluated consistent with recalculation, protester's most probable costs may well have been increased by $15 million.

Contracts—Negotiation—Evaluation Factors—Facilities—"Tailored"

Contention that proposed new "tailored" facilities to perform contract would require 2.9 million less labor hours than needed by selected proposer performing in existing facilities is not supported. Agency's acceptance of comparable labor hours of both proposers was reasonable despite fact that labor hour estimates were based on subjective judgment.

Contracts—Negotiation—Cut-Off Date—Termination of Proposal Evaluation—Reasonable

Shift in manufacturing site of key component submitted 5 days before final cost evaluation need not be evaluated for potential savings since savings were contingent on availability and assignment of floor space at proposed alternate Government site, information presented as to *quantum* of savings was insufficient, and time for evaluation was limited. Procurement agency may terminate proposal evaluation at some reasonable point after final cutoff date.

Contracts—Research and Development—Evaluation Factors—Design—Deficiencies—Potential Costs

NASA design evaluation correction process, whereby design weaknesses are ferreted out and potential cost to correct is assessed against proposed costs, which uniformly treated weaknesses in all proposals and reflected advantages in protester's proposal, is procedurally proper. Design deficiencies in successful proposal cannot be fairly categorized as major. While omission of assessments of additional weakness in alternate water entry load case design and refurbishment was questioned, any resulting cost impact and increase in point spread between proposers is insufficient to provide basis to question evaluation conclusion that proposers were essentially equal in technical scoring.

Contracts—Research and Development—Technical Deficiencies of Proposals—Evaluation Propriety

Since successful proposer possesses at least basic expertise in fabrication of key component, offer to fabricate component in-house was properly treated in technical evaluation as only a minor weakness not in conflict with RFP provision discouraging development of new expertise by prime contractors. Moreover, decision to use unconventional material in key component does not deviate from overall RFP objective of minimum developmental risk, since successful proposer offered low risk alternative program to which it can convert in early phase of program.

Contracts—Negotiation—Request for Proposals—Early Year Funding—Evaluation Propriety

Contention that early year funding factor in NASA RFP should have been treated as unimportant in management evaluation is contradicted by preproposal reviews stressing need to minimize such funding, terms of RFP, and protester's own proposal which incorporated low early year funding in management commitment. Agency's independent evaluation and judgment of protester's high early year funding was not without reasonable foundation; and record does not support contention that successful proposer should have received management penalty for inferior design since penalty was assessed in technical scoring and cost.

Contracts — Negotiation — Competition — Use of Government Facilities

Unsuccessful proposer's plan to use Government facilities to be constructed would enhance competition for later production increment of space program, but GAO review shows that adequate competition for later increment may be achieved without using such facilities. In any case, possible increase in competition cannot be translated into amount to be included in probable cost evaluation.

Contracts—Research and Development—Evaluation Factors—Design—Superiority, Deficiencies, etc.

Allegation that unsuccessful proposer's "superior design" will be transfused under interim contracts awarded by NASA to another proposer selected for final negotiations is not supported; but each proposer should be furnished maximum amount of nonproprietary contract-generated data and apprised of its design weaknesses to assure maximum future competitive opportunity in subject program.

Contracts—Negotiation—Competition—Discussion With All Offerors Requirement—Transfusion

Where evaluation process has been concluded with selection of one offeror over another, term "transfusion" relates to receipt of an advantageous, unique concept

which might not have accrued to selected proposer but for its performance under interim contracts covering studies, planning and design preliminary to award of development phase of overall program.

Contracts—Negotiation—Competition—Discussion With All Offerors Requirement—Technical Transfusion or Leveling

"Technical transfusion" in context of competitive negotiation normally connotes transfer of unique concept from one proposer to another with result that latter obtains unfair evaluation advantage based on the other's ingenuity.

In the matter of Lockheed Propulsion Company; Thiokol Corporation, June 24, 1974:

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INTRODUCTION

This decision deals with a protest by Lockheed Propulsion Company against the selection by the National Aeronautics and Space Administration (NASA) of Thiokol Corporation for final negotiations leading to the award of a contract for the Solid Rocket Motor (SRM) Project of the Space Shuttle Program.

In accordance with NASA's established procedures, on June 15, 1973, the Associate Administrator for Manned Space Flight designated a Source Evaluation Board (SEB) for the SRM Project for the purpose of establishing evaluation criteria, preparing the request for proposals, evaluating proposals, conducting written and oral discussions, submitting a written report, reporting its findings and making an accompanying oral presentation to the Administrator in his capacity as the Source Selection Official (SSO). On November 20, 1973, the Administrator of NASA, with the concurrence of the Deputy Administrator, and the Associate Administrator for Organization and Management, selected Thiokol Corporation.

The Space Shuttle System consists of a reusable, orbiter vehicle, an external oxygen/hydrogen/tank and reusable twin solid rocket boosters of which the solid rocket motor is the major portion. The orbiter will be boosted into space through the simultaneous operation of two solid propellant motors and three high pressure liquid oxygen/hydrogen main engines located in the rear of the orbiter. The booster solid rocket motors will burn in parallel with the orbiter main engines during lift-off and initial flight. The boosters will then be separated from the external tank for earth landing by parachutes for recovery and reuse. Just prior to achieving orbital velocity, the main engines will be shut down and the external tank jettisoned with the orbiter then proceeding into its orbital track.

Each SRM is composed of the following major components: a case, solid propellant, insulation, liner, and maneuverable or flexible nozzle.

The SRM, when recovered after launch, will be transported to the contractor's facility for refurbishment, refueling and reuse. The process will reduce substantially the cost of space operations through the continuous reuse of a limited amount of hardware.

This procurement for Phase C/D of the SRM program followed the performance of four parallel Phase B study contracts for SRM motor definition. These contracts were awarded to Thiokol Corporation, Lockheed Propulsion Company, Aerojet Solid Propulsion Company, and United Technology Center. Because of the research and development nature of the Space Shuttle Program and the degree of programmatic uncertainty involved, NASA decided to award a cost-plus-award-fee contract.

REQUEST FOR PROPOSALS

The request for proposals (RFP No. 8-1-4-94-98401) was issued for a cost-plus-award-fee contract to be negotiated under the authority of 10 U.S. Code 2304(a)(11) which permits the negotiation of contracts for research and developmental work. The contemplated contract is for the design, development, test, production, acceptance, operation and refurbishment of the SRM and its ancillary equipment, post-flight analysis and support functions.

The RFP, as amended, emphasized that the design and manufacture of the SRM was to be devised so as to insure the high reliability of the finished product. Moreover, since the SRM is the largest element in computing total cost per flight, the RFP provided that "* * * design to cost for every item and operation is a critical aspect of the SRM project." The RFP further emphasized the unique aspects of refurbishment and reuse and the fact that these processes must also be cost-effective.

Each proposer was required to submit a proposal encompassing the entire SRM Project for three increments. Cost proposals were requested for Increments 1 and 2 which covered all efforts required for the total design, development, test and evaluation (DDT&E) of the SRM, including six developmental flights, and all efforts necessary to manufacture, test, and deliver new and refurbished SRM's for 54 flights (108 SRM's). Increment 3 cost estimates were to comprise all efforts necessary to manufacture, test, and deliver new and refurbished SRM's for 385 flights (770 SRM's).

However, the RFP further stated that:

* * * for contracting purposes, the Government intends to procure the total DDT&E, that is, Increment 1 as the initial contract coverage. The Government, at its option, may negotiate for Increment 2 and adjust the time and/or quantities for the Second and Third Increments. The Government contemplates a separate procurement for Increment 3.

The first 2 increments encompassed the years 1973-1981, and the third increment 1981-1988. All cost details were to be displayed in calendar year 1972 dollars ($72) and real year dollars ($RY), the latter defined as those dollars expected to be expended in the performance of the program or calendar year 1972 dollars adjusted for escalation.

The RFP established the following evaluation factors: mission suitability, cost, and other factors. The factors to be evaluated by the SEB with their respective criteria and relative importance are quoted below:

Mission Suitability Factors

2.2.1 Mission suitability factors are those factors which will be employed to evaluate the quality of work or product that is offered, the ability of the proposer to actually produce what is offered, and the applicability of the total concept of the mission. Proposals will be evaluated and scored according to the criteria set forth herein. The evaluation of the work or product offered will deal primarily with what the proposer will do to meet the established requirements and why he proposes his approach as the best approach.

2.2.2 The rating of proposers under the mission suitability factors will be substantially determined by the extent to which the proposed approaches are expected to contribute to low production and low operating costs. Predicated upon proposed DDT&E efforts at reasonable levels of cost, risk, and technical adequacy, the proposer's scores under mission suitability factors will be related to the Government's projection of his Solid Rocket Motor proposal's impact on Space Shuttle System cost per flight.

2.2.3 The mission suitability factors are:
Factor 1—Manufacturing, Refurbishment, and Product Support
Factor 2—Design, Development, and Verification
Factor 3—Management

2.2.3.1 *Criteria*

For purposes of evaluation, criteria have been established under each mission suitability factor as follows:

Factor 1: Manufacturing, Refurbishment, and Product Support

Criterion 1: Manufacturing, Safety, and Product Assurance. Evaluated under this criterion will be the proposer's planning, innovation, and technical excellence in producing high quality, low cost SRM's. This includes manufacturing and tooling approach, efficiency, safety, and rate flexibility.

Criterion 2: Refurbishment and Product Support. Evaluated under this criterion will be the proposer's planning, innovation and technical excellence in achieving low project risk with consideration of such areas as adequacy and effectivity of facilities to support the work as proposed, cost-effective refurbishment, logistics, transportation, handling, support equipment, and launch site operations and support.

Factor 2: Design, Development and Verification

Criterion 1: Solid Rocket Motor Design. Evaluated under this criterion will be the proposer's innovation and technical excellence in achieving a minimum development risk and highly reliable design at a reasonable DDT&E cost which will provide reusability, refurbishability, and low cost production and operations, including its influence on facilities, handling and transportation, as well as the achievement of performance requirements.

Criterion 2: Solid Rocket Motor Development and Verification. Evaluated under this criterion will be the proposer's innovation and technical excellence in achieving a cost-effective development, test and verification program that minimizes risk and early year funding requirements.

Factor 3: Management

Criterion 1: Management Approach and Organization. Evaluated under this criterion will be the proposer's management effectiveness in achieving project goals and requirements, the overall logic, approach and organization selected for this procurement, and methods for management control and integration.

Criterion 2: Key Personnel. Evaluated under this criterion will be the qualifications and experience of key personnel as related to their proposed assignments and their demonstrated capability to achieve effective and economical management.

2.2.3.2 *Relative Importance of Criteria*

For evaluation purposes, the relative importance of the criteria is as follows:

Most Important

Manufacturing, Safety and Product Assurance
Refurbishment and Product Support
SRM Design
Management Approach and Organization

Very Important

Key Personnel
SRM Development and Verification

The Most Important are of equal value, and the Very Important are of equal value and are significantly less in value than the Most Important.

2.3 *Cost Factors*

2.3.1 Cost factors are those factors which indicate the adequacy and realism of the cost proposal and the probable costs that will be incurred. The evaluation of cost factors will include an assessment of the cost of doing business with each proposer and the possible growth in proposed costs during the course of the program. It will also include a comparison with NASA's estimates of the probable development cost, as well as the probable cost per flight.

2.3.2 Cost factors as such will not be numerically scored by the SEB. They will be reported by the SEB to the Source Selection Official. The importance of cost factors in the selection will depend on such considerations as the magnitude of the cost differentials between the proposers, the credibility of such differentials, the keenness of the competition in mission suitability factors, and the impact (if any) of other factors.

2.3.3 *Cost Relationship to Mission Suitability Factors.* The cost proposal will be used extensively in the Government's evaluation and scoring of mission suitability factors to determine realism, understanding of requirements, and whether the design and production approach being taken will lead to the lowest production and operational cost consistent with reasonable development cost.

2.4 *Other Factors*

2.4.1 Factors in this grouping are those which have not been included in either the "Mission Suitability" or "Cost" grouping but which will be considered by the Source Selection Official in making his selection. Their nature does not permit a meaningful numerical pre-determination of relative significance or impact on the selection decision; they are not, therefore, numerically scored by the SEB.

2.4.2 The Other Factors listed below have been identified as being such that they bear on a proposer's ability to meet the requirements and objectives of this procurement and will be considered by the Source Selection Official:

a. *Financial Capability.* A proposer's financial capability to properly execute a program of this type and magnitude.

b. *Past Performance.* A proposer's performance on prior and current programs for the Government.

c. *Related Experience.* A proposer's related experience on relevant, prior, or current programs.

d. *Utilization of Small Business.* A proposer's plans to utilize small business enterprises as subcontractors or suppliers.

e. *Utilization of Minority Owned Enterprises.* A proposer's plans to utilize minority owned enterprises as subcontractors or suppliers.

f. *Proposed Contract.* The acceptability of the proposed contract.

g. *Proposed Fee Structure.* A proposer's plan or arrangements made with regard to Base and Award Fee.

h. *Facilities.* Flexibility inherent in the proposed facilities plan and its adaptability to NASA's plan to separately contract for Increment 3.

2.4.3 The foregoing do not constitute an all-inclusive listing of Other Factors which may be considered in the selection decision. If important additional factors evolve or surface during the source evaluation and selection process which also bear upon a proposer's ability to meet the requirements and objectives of this procurement, they, too, will be given appropriate consideration.

In addition, the RFP's introduction provided:

4.4 *Facilities Policy*

The general policy of the National Aeronautics and Space Administration is that contractors will furnish those facilities that are required for the performance of Government research and development contracts. Nevertheless, the proposer should select the facility approach considered the most efficient from a cost standpoint and may propose existing or new contractor or Government facilities in any combination. It is expected that existing facilities will be utilized as long as they are cost-effective.

SEB EVALUATION PLAN

As established by the Source Evaluation Plan developed by the SEB, the evaluation effort was divided into four primary areas each corresponding to either a mission suitability or cost factor. A designated team undertook the detailed evaluation in each of these areas. The four teams, each chaired by an SEB voting member were the cost team, design, development and verification team, management team, and manufacturing, refurbishment and product support team.

Individual team members were advised to note that the RFP had stressed the importance of economic considerations in this procurement. Just as the proposers were being requested to "design to cost," the evaluators were advised to "evaluate to cost." Each evaluator was to examine the resource estimates for his respective area and ascertain the validity of the estimates. Where changes were warranted, the evaluator would recommend adjustments.

The teams were further broken down into panels, each dealing with an area within the team's topical area. Moreover, each panel was similarly divided into subpanels. Subpanel chairmen had to assess proposal material specifically related to their subpanels and also to

review and consolidate the information provided by the subpanel evaluators. Each subpanel made at least one direct oral report to the SEB. The panel chairmen in consultation with subpanel chairmen consolidated the findings of each subpanel and submitted this material to the team chairmen who, in turn, were responsible for reviewing and consolidating the panel findings and assigning one of the following adjective ratings for each criterion:

Excellent, Very good, Good, Fair, Poor

In addition to pointing out strengths, it was the function of the design team to ferret out design weaknesses, to propose programs or methods to correct the weaknesses, and refer them to the manufacturing team to estimate manhours and materials required to correct the weaknesses. This input was then given to the cost team to apply labor rates, overhead, material costs, and escalation factors as required. The cost team presented the end result of the proposed adjustment to the SEB for approval. If the adjustment was approved, it was integrated into the proposer's cost tabulation.

The foregoing approach to design evaluation comports with NASA Procurement Regulation Directive (PRD) No. 70–15 (Revised) which states in part that:

> The [SEB] report should state also the Board's estimate of the approximate impact on cost or price that will result from the elimination of correctible weaknesses during negotiations after selection.
>
> * * * * * * *
>
> * * * where the meaning of a proposal is clear, and where the Board has enough information to assess its validity, and the proposal contains a weakness which is inherent in a proposer's management, engineering, or scientific judgment, or is the result of its own lack of competence or inventiveness in preparing its proposal, the contracting officer shall not point out the weaknesses. Discussions are useful in ascertaining the presence or absence of strengths and weaknesses. The possibility that such discussions may lead an offeror to discover that it has a weakness is not a reason for failing to inquire into a matter where the meaning is not clear or where insufficient information is available, since the understanding of the meaning and validity of the proposed approaches, solutions, and cost estimates is essential to a sound selection. Proposers should not be informed of the relative strengths or weaknesses of their proposals in relation to those of other proposers. To do so would be contrary to other regulations which prohibit the use of "auction techniques." In the course of discussions, Government participants should be careful not to transmit information which could give leads to one proposer as to how its proposal may be improved or which could reveal a competitor's ideas.

The other teams evaluating mission suitability factors functioned in essentially similar manners although the individual areas within which they concentrated did not necessarily lend themselves to the same treatment afforded to design. The cost team was charged with performing a comprehensive analysis of the proposed costs in accordance with the RFP evaluation factors.

The teams reported their detailed findings to the SEB. Essentially, teams were to act as fact-finding arms of the SEB. The SEB did not,

however, delegate its evaluation responsibility either in whole or in part, since the team reports were carefully reviewed and the SEB applied its own collective judgments to the team findings. No scoring was recognized below the SEB level.

Each SEB member independently gave a percentile score for each proposer for each mission suitability criterion. These scores were then averaged by criteria and a consensual score arrived at by the SEB after discussion. The consensus value in percent was multiplied by the points allocated to the respective criterion. This established the Board score for each mission suitability criterion for each proposal.

CHRONOLOGY OF PROCUREMENT AND SELECTION

The RFP was issued on July 16, 1973, to four prospective sources—Thiokol, Lockheed, UTC, and Aerojet. Technical and cost proposals were submitted on August 27 and 30, 1973, respectively, by the four firms. From the latter date until October 20, 1973, the SEB, according to the Source Evaluation Plan, evaluated and scored the proposals and established preliminary rankings for the offerors. During the period from September 24 through October 10, 1973, oral and written discussions were conducted with all of the offerors. All offerors filed timely best and final offers by the cut-off date of October 15, 1973. After the cut-off date, final reports of the SEB's evaluation teams were submitted to the SEB.

The four proposers were ranked and scored in mission suitability as follows:

	Score	Overall Adjective Rating
Lockheed	714	Very Good
Thiokol	710	Very Good
UTC	710	Very Good
Aerojet	655	Good

The SEB was of the opinion that all proposers had the requisite capability and experience to accomplish the SRM project. Furthermore, the SEB evaluated Thiokol as the lowest most probable cost performer by $122 million ($RY) with Lockheed evaluated second lowest. Both proposers estimated total program cost to be in the $800 million ($RY) range. The SEB compiled a report of its findings which was presented to the SSO and was the basis of its oral presentation to the SSO on November 19, 1973. The SSO, after selecting Thiokol for final negotiations, issued a selection statement on December 12, 1973, which states, in pertinent part, as follows:

In considering the results of the Board's evaluation, we first noted that in Mission Suitability scoring the summation resulted essentially in a stand-off amongst the top three scorers (Lockheed, Thiokol and UTC) though with a varying mix of advantages and disadvantages contributing to the total. Within this group, Lockheed's main strengths were in the technical categories of scoring, while they trailed in the management areas. Thiokol led in the management areas but trailed in the technical areas, and UTC fell generally between these two. We noted that Aerojet ranked significantly lower than the other three competitors in the Mission Suitability evaluation, and the proposal offered no cost advantages in relation to the higher ranked firms. Accordingly, we agreed that Aerojet should no longer be considered in contention for selection.

We noted that the Board's analysis of cost factors indicated that Thiokol could do a more economical job than any of the other proposers in both the development and the production phases of the program; and that, accordingly, the cost per flight to be expected from a Thiokol-built motor would be the lowest. We agreed with the Board's conclusion that this would be the case. We noted also that a choice of Thiokol would give the agency the lowest level of funding requirements for SRM work not only in an overall sense but also in the first few years of the program. We, therefore, concluded that any selection other than Thiokol would give rise to an additional cost of appreciable size.

We noted that within the project logic and the cost proposals, there was a substantial difference in basic approach caused by the varying amount of new facilities needed by the several proposers. Their situations ranged from Thiokol, who needed little new facilities investment to do the job, to Lockheed, who proposed creation of a new facility complex on the Gulf Coast to handle the program, commencing at an early date and building up to full size by the production phase. The prospect of such a major new facility raises a question regarding the basic operational economics involved, and also a question of what other important benefits or drawbacks there might be to such a plan. In regard to the economics proper, the Board's evaluation made it clear that such an investment could not at this time, under any reasonable view of the forecasted economic factors, be considered likely to pay its way as against Thiokol's existing facility. As regards other considerations, we recognized that it may well be advantageous, when the major production phase arrives, to plan to have two or more suppliers in the country capable of competing for the manufacture of SRM's in quantity; however, there is no need to embark upon the construction of a new major facility at this time in order to secure these benefits in a timely manner.

We found no other factors bearing upon the selection that ranked in weight with the foregoing.

We reviewed the Mission Suitability factors in the light of our judgment that cost favored Thiokol. We concluded that the main criticisms of the Thiokol proposal in the Mission Suitability evaluation were technical in nature, were readily correctable, and the cost to correct did not negate the sizeable Thiokol cost advantage. Accordingly, we selected Thiokol for final negotiations.

Award of the contract has been withheld pending resolution of this protest.

CHRONOLOGY OF PROTEST

Lockheed filed notices of protest by letters dated December 5, 6, and 14, 1973. On January 9 and 21, 1974, Lockheed furnished protest details which were forwarded promptly to NASA requesting a complete report responsive to the protest. By this time, Thiokol, UTC, and Aerojet had expressed active interest in the protest. On or about February 15, NASA awarded a 90-day interim contract to Thiokol for studies, analysis, planning and design in support of the integration of the SRM into the Space Shuttle System. Lockheed protested the award of the interim contract shortly thereafter. NASA filed a report, through the Assistant Administrator for Procurement, on March 11, 1974. The report was distributed to all interested parties for comment.

The report revealed to the protester and interested parties previously unknown significant cost information and other evaluation details upon which the selection of Thiokol was based. Prior to this, Lockheed had been unsuccessful in obtaining such information from NASA. Lockheed filed extensive comments on the NASA report on April 9, 1974, wherein, for the first time, specific contentions based on the previously unavailable significant cost information and other details were made. On April 23, a bid protest conference was held at GAO attended by all interested parties and NASA. The formal record was then closed except for possible questions GAO might have to ask of Lockheed, Thiokol, and NASA. On May 8, questions were posed to Lockheed, Thiokol and NASA, all of whom responded to GAO by the May 15 deadline. About that time, Lockheed protested any possible extension by NASA of the interim contract to Thiokol. NASA extended the interim contract for 45 days or until approximately July 1. On May 20, further questions were raised with NASA by GAO. A response was received on May 24 and Lockheed filed comments thereon on May 30, 1974.

DECISION

This decision was reached after a thorough and comprehensive review of the voluminous documentation submitted by Lockheed, Thiokol and NASA, as well as presentations made at the bid protest conference. To assist in the resolution of the many issues raised by the protest, GAO assembled an audit team at the Marshall Space Flight Center where the procurement file is located. NASA's workpapers and other material were reviewed by the GAO team. From shortly after the protest was filed, the GAO review was performed at the Center simultaneously with the procedural steps in the bid protest process. Site visits were made to Lockheed and Thiokol. While, in the interest of clarity of presentation, this decision does not respond specifically to each matter brought to our attention, we thoroughly considered all available information and documentation.

The Lockheed protest charges that the entire NASA evaluation was marred by plain mistakes, inconsistency, arbitrary judgments, and improper procedures. Lockheed states an adequate and proper cost evaluation would have resulted in its proposal being evaluated low by an amount significantly in excess of $100 million and conceivably in excess of $200 million. Furthermore, Lockheed argues that it was prejudiced by improper correction in Thiokol's design, improper crediting of Thiokol proposal features not conforming to the RFP, improper reliance on uncertain cost estimates, and improper disregard of future competition as a factor. The effect of these alleged prej-

udicial occurrences in combination with the alleged improprieties in the evaluation of cost made the selection of Thiokol improper, and is said to have wrongfully denied Lockheed the ward of the SRM contract.

On the other hand, NASA vigorously defends the selection of Thiokol as the lowest cost proposer citing a most probable cost difference of $122 million ($RY) which "must be regarded by NASA as the potential savings attainable by contracting with Thiokol." NASA maintains that the SEB evaluation as adopted by the SSO properly concluded that both Thiokol and Lockheed were essentially equal in the mission suitability scoring and "other factors" evaluation.

GAO's examination and review revealed no reasonable basis to question the SSO's decision based on scored mission suitability and unscored "other factors" evaluations. Nor did the review find that the reliance on cost represented an unreasonable exercise of discretion. However, as set forth in more detail below, we recommend that the SSO determine whether, in light of the GAO findings that the most probable cost differences between Lockheed and Thiokol were significantly less than those reported by the SEB and relied upon by the SSO, the selection decision should be reconsidered.

Before proceeding with a discussion of the issues, it is noted that a substantial amount of information and documents furnished GAO with the NASA report of March 11 and in its answers to GAO questions of May 8 were withheld from the protester and interested parties at the request of NASA. According to NASA, that material contains business confidential material and descriptions of confidential proprietary manufacturing processes, the disclosure of which would be in violation of law. Also not released to the protester and interested parties were SEB analyses of probable cost based on the proposals submitted to be further used by NASA in the negotiation of the SRM contract and material generated prior to final negotiations. In addition, while NASA has publicly released the significant evaluated cost differences where the SEB made adjustments to proposed costs between Thiokol and Lockheed, the specific amounts of the adjustments have not been released except in rare instances.

The discussions of the protest issues that follow are presented in a context which safeguards the confidential or proprietary aspects of the data.

COST EVALUATION

Lockheed contends that a proper evaluation of proposals must result in the conclusion that the Lockheed proposal would result in substantially lower probable cost by an amount significantly in excess of $100 million and conceivably exceeding $200 million rather than the $122

million most probable cost difference in favor of Thiokol reported by the SEB to the SSO. The SEB's cost evaluation, it is claimed, contains mistakes, inconsistent and unfair comparisons, omissions of necessary costs, and a failure to assess cost realism. With respect to cost realism, *inter alia*, Lockheed maintains the SEB improperly left unquestioned and unadjusted between the two proposals a $73 million difference in the estimated cost of purchasing ammonium perchlorate (AP) when the material is to be purchased from the same suppliers in the same quantities. Also, the SEB is said to have left an unjustified difference in the projected escalation of 1972 dollars to real year dollars amounting to a $60 million prejudice. By allowing these differentials to remain, which reflected widely varying estimates of common cost items, Lockheed alleges that NASA abandoned cost realism, negating the value of cost comparisons which ultimately became determinative.

GAO has reviewed and examined all the major cost areas Lockheed claims were improperly evaluated by the SEB and relied upon by the SSO. We found the SEB evaluation to have been reasonable except for its evaluation of ammonium perchlorate. Any disagreements we may have in specific cost areas do not obviate the overall reasonableness of the SEB evaluation; in any event, the disagreements have only a minimal effect on the overall cost picture.

In its evaluation, the SEB adjusted proposed costs to reflect the dollars necessary to correct for weaknesses, omissions, errors, and over- or under-estimates. Adjustments were made only when, according to NASA, the basis for the adjustment could be substantiated and all members of the SEB agreed. In addition, the SEB conducted an analysis of cost uncertainty with respect to each proposal. Within the adjustment process, the SEB normalized certain costs. That evaluation exercise is performed when at least two proposers are measured against the same cost standard either because there was no logical reason for differences or insufficient information was provided with the proposals so that common "should have bid" estimates had to be established.

AMMONIUM PERCHLORATE

All proposers offered a propellant formulation comprised largely of ammonium perchlorate (AP), which is currently manufactured in the United States by only two sources—Kerr-McGee Chemical Corporation and Pacific Engineering & Products Company of Nevada (PEPCON). All proposers recognized that the current combined capacity of the Kerr-McGee and PEPCON plants, both located at Henderson, Nevada, would be insufficient to supply AP for the SRM and non-SRM programs and still provide an acceptable additional

capacity, especially during Increment 3 (1981–1988). To determine the amount of additional production capacity which would be required, the proposers estimated (1) capacity of the existing plants, (2) amount of AP required for the SRM program, and (3) amount of AP required for all other programs.

Although both Lockheed and Thiokol worked closely with the known AP suppliers, Lockheed's proposed AP costs were $76 million more in real year dollars than the costs proposed by Thiokol. Most of the difference was in Increments 2 and 3 when 98 percent of the AP will be used. Although there were differences in the proposers' estimates of current AP plant capacity and the amount of AP required for the SRM program, the greatest difference was apparent in the estimates of AP required for other programs.

Lockheed's propellant formulation requires about one percent more AP than Thiokol's which accounts for differences in the estimates of SRM program AP requirements. In addition, Lockheed estimated current AP plant capacity at about 38 percent less than Thiokol. The Lockheed estimate was based on a letter from Kerr-McGee, currently the largest AP supplier.

With respect to the anticipated demand for non-SRM programs, Lockheed projected a continuation of the current 12,000 tons a year demand throughout the life of the SRM program. In sharp contrast, Thiokol projected substantially lower non-SRM demand (about 2,500 tons a year) during the peak program years. The SEB independent study concluded that non-SRM demand would materialize at about the level predicted by Thiokol. Aerojet and UTC also projected the non-SRM demand at about this same level.

To meet the total AP needs, Lockheed proposed that Kerr-McGee build a new AP plant in the Gulf Coast area which would be dedicated essentially to the SRM program needs. Non-SRM requirements and any excess capacity would be met from the existing Nevada plants. Lockheed selected the Gulf Coast location because of the availability of lower cost raw materials, electrical power, labor, and decreased transportation costs to Lockheed's proposed Gulf Coast production site. The cost of the new plant was estimated at about $44 million ($RY) and would be amortized into the price of the AP. Thiokol proposed only a moderate expansion of the current Nevada plants at a cost of about $10.645 million ($RY). This cost would also be amortized into the AP prices.

Data contained in the Lockheed proposal clearly showed that the decision to build a large new AP facility resulted primarily from Lockheed's high estimate of non-SRM program demand. NASA characterized the influence of non-SRM demand on Lockheed's decision as speculative and at best uncertain because Lockheed chose a new,

essentially dedicated site, even though by the firm's own estimates substantial excess AP capacity would result. We believe, however, that the SEB misinterpreted Lockheed's proposal since the excess AP capacity remaining in both Lockheed's and Thiokol's proposals is almost exactly the same after subtracting out SRM and non-SRM requirements. In addition, Lockheed's response to an SEB question made clear that the size of the proposed AP facility would be reduced if the non-SRM demand decreased. This further illustrates the relationship between the proposed facility and the non-SRM demand projection.

Lockheed contends that NASA should have provided a Government estimate of the expected non-SRM demand in the RFP. Having failed to do so, Lockheed claims NASA should have normalized the proposed AP prices. Lockheed also believes its most probable cost was prejudiced because NASA made an adjustment for AP cross-blending when this cost was already included in the proposed AP prices.

The SEB did not evaluate or normalize proposers to a common cost per pound because, in its view, normalization would destroy a unique feature of the Lockheed proposal—the AP siting decision. According to NASA, directly or indirectly restructuring a proposal by altering the basic siting decision would be presumptuous and unfair and would, in effect, dictate the f.o.b. manufacturing site. NASA stated that power, raw material, and capitalization costs are dependent on the plant location and valid real differences could reasonably be expected in the AP prices. According to NASA, normalization of the AP prices would have broken its basic ground rules for normalization by altering the uniqueness of a proposal and eliminating a valid cost discriminator.

We found the NASA arguments to be without foundation. In our view, the RFP should have apprised offerors of the Government's estimate for non-SRM demand since demand would materialize at the same level for any SRM contractor. Because proposers were required to project the non-SRM demand, Lockheed was forced into a situation where its prediction influenced a proposal approach which resulted in substantially higher facility expense.

In the absence of a standardized RFP estimate of non-SRM demand, the SEB should have normalized the proposed AP prices. Based on the GAO review, any proposer selected to perform the SRM contract would obtain AP from the same sources and the AP subcontractor would expand or construct new facilities only as needed. If Lockheed were awarded the contract and the non-SRM demand did not materialize at the projected level, NASA, with its contractual control over subcontracts, probably would not authorize construction of a new plant if moderate expansion of existing facilities would satisfy SRM needs at a substantially lower cost. The failure to compute and apply a common cost per pound for AP was unreasonable.

Differences in the proposed AP prices were magnified by the application of different escalation factors by the two proposers. Although it is not unreasonable to expect different escalation factors among the proposers (see discussion below), escalation of the AP prices should have been normalized by the SEB since proposers would be buying essentially the same quantities from the same sources at the same locations. Because SRM requirements will dominate the AP market in the peak years, any discounts available will go to the SRM contractor whoever that may be.

To eliminate an unreasonable penalty in Lockheed's most probable cost, GAO has normalized Lockheed's proposed AP prices to the prices proposed by Thiokol. As a result of normalization, Lockheed's cost would be reduced by about $22 million ($72) and approximately $73 million ($RY).

Because of the AP price normalization, however, Lockheed would obtain AP from Nevada rather than the Gulf Coast area and therefore would incur higher transportation costs. Using Lockheed's estimate of transportation costs from Nevada to the Gulf Coast area, GAO computed this additional cost as about $5.430 million ($72) and $6.254 million ($RY).

GAO also reviewed Lockheed's claim that its most probable cost was prejudiced by the NASA adjustment for AP cross-blending. The review showed that cross-blending costs were included in Lockheed's proposed AP prices and, therefore, the SEB adjustment should be eliminated. The adjustment for cross-blending totaled $2.784 million ($72) and $4.029 million ($RY).

We noted, however, that when AP prices are normalized the Lockheed cost does not include the cost of grinding AP. Lockheed proposed that AP be ground at its subcontractor's plant while Thiokol proposed grinding AP at its plant. For safety reasons, the SEB determined that AP cannot be ground at the subcontractor's plant but for evaluation purposes did not adjust Lockheed's cost because the grinding costs were included in the AP prices. However, when normalized to the Thiokol proposed AP prices, grinding costs are not included. AP grinding costs, as proposed by Lockheed, would total $2.271 million ($72) and $3.305 million ($RY).

In summary, the result of our normalizing AP prices is a reduction in Lockheed's most probable cost of about $17 million ($72) and $68 million ($RY). The $51 million difference is attributable to our normalization of escalation. In our view, Lockheed's probable costs should have been evaluated by the SEB on this basis.

ESCALATION

The RFP requested proposals for the entire SRM Project and provided for evaluation based on the entire project rather than any particular segment or increment. Cost factors to be evaluated were defined as "those factors which indicate the adequacy and realism of the cost proposals and probable costs that will be incurred. The evaluation of cost factors will include an assessment of the cost of doing business with each proposer and the possible growth in proposed costs during the course of the program." The RFP stated:

> All cost details and substantiation data shall be displayed in calendar year 1972 and real year dollars as specified in the applicable section. Real year dollars are defined as those dollars expected to be expended in the performance of this program; that is, calendar year 1972 dollars adjusted for escalation. *Escalation are those changes to calendar year 1972 dollars caused by such things as inflation, union agreements, merit increases, increased material cost, changes in the business base, etc.* Accompanying methodology and rationale shall be provided for conversion from calendar year 1972 to real year dollars as well as the proposer's definition of calendar year 1972 dollars. [Italic supplied.]

Based on the initial proposals, about one-half of the $122 million ($RY) difference in most probable costs between the two proposers would be eliminated if the varying escalation rates (except for AP escalation discussed above and transportation escalation discussed below) used to convert 1972 dollars to real year dollars were normalized. Lockheed claims that the different escalation rates introduced uncontrollable factors into the competition since escalation rates are virtually independent of the contractor selected. Normalization of escalation within the various cost elements, Lockheed contends, would provide a valid means for comparison between the two proposers. In the alternative, Lockheed states that, since future escalation is an unknown, the SEB should have used the proposed 1972 dollar costs as the basis for evaluation. In support of its argument, Lockheed cites the following passage from the Nathan Report—a NASA-funded study on evaluating cost proposals for the SRM:

> Where there is no clear evidence or reasons for using different rates of price increase for different proposers, it may be best to use the same rate (or set of rates) for each proposer to avoid giving an unfair advantage to proposers who submit or propose costs based on lower rates of increase than do the others.

In rebuttal, NASA points to the definition of escalation in the RFP, which, it is alleged, introduced unique and valid competitive differences which are based on variables resulting from dissimilar company policies. In addition to the factors noted in the RFP, at the bid protest conference NASA referred to other variables resulting from dissimilar company policies, such as changes in the structure of the labor force (skill mix changes, retirement rate, etc.), influence of quantity buys, method used to construct the 1972 dollar bases, and anticipated performance of subcontractors.

At the bid protest conference, NASA also said that some components of escalation are general and therefore subject to normalization, noting that inflation for labor rates was normalized to 5-percent by the SEB. Furthermore, in response to a later question concerning normalization, NASA stated:

> Re-estimating of the labor cost utilizing an effective 5% inflation resulted in a cost adjustment for Thiokol since it had proposed 2.5%. However, since Lockheed stated it had used 5% (NASA could not confirm this) the magnitude of any adjustment resulting from the NASA application of an effective 5% inflation is indeterminable. Justification: Since inflation is recognized as the "fictitious variable" element of escalation, the [Nathan Report] advice of recognizing an inflation value in the 4–5% range rather than 3% or less was undertaken.

From the above NASA recognizes, and we have no basis to disagree, that the inflation element of escalation should not differ between proposers. In this regard, inflation can be considered as a persistent and appreciable rise in the general level or average of prices for both labor and materials.

The NASA report and contemporaneous SEB documents in the labor rate area refer only to increasing escalation rates, rather than to inflation rates. Furthermore, NASA in answer to the GAO normalization question stated:

> Thiokol's inflation rate was increased to 5%, plus additional support requirements were added to the Section 22 quotations for Increments I and II rail transportation of the SRM to and from the launch sites resulting in an increase of $ * * * (real year). Justification: Normalization for inflation and added support requirements was necessary due to the higher anticipated inflation in the Section 22 rail rates and a need for increased support compatible with previous rocket programs (i.e., Titan).

As with labor rates, escalation only, rather than inflation, is mentioned in the NASA report and contemporaneous SEB documents.

The inflation element of escalation is not within the control of the individual proposers. GAO examined the proposals of Lockheed and Thiokol, and asked specific questions relative to which elements of escalation, if any, were uniquely within their respective controls. GAO's analysis disclosed that various factors which comprised the escalation rates of the two proposers reflected company policies in areas where individual controls could be exercised. In this regard, the SEB asked both proposers to summarize the rationale for the escalation rates used in preparing their respective proposals and their positions if the low escalation proposed did not materialize. Lockeed responded, in part, as follows:

> While projections of future events which are principally determined by national (or even international) socioeconomic trends is certainly not as exact as say, a direct labor progress curve, we believe the 1973 forward projections are a reasonable "middle of the road" projection from the available backsight and current conditions.

* * * * * * *

Although the labor rates and unit material values steadily increase by reason of escalation, they are more than offset by effect of learning curves, production rate, labor classification mix, material usage reduction and such other factors.

* * * * * * *

Reference to the figures indicates that they appear to be reasonable extensions from recent history. Whatever the actuals incurred in the future may be on an area or national basis, we certainly have, and fully accept the responsibility to mitigate their impact on this project. This we can do, principally by:

a. hard bargaining on our labor and material contracts
b. buying the minimum amount of material required to do the job, and employing the minimum personnel required to perform the task
c. firm and fair wage and salary administration, avoiding general increases in favor of awarding merit increases to demonstrated performers.

If future events beyond either our or NASA's control cause significant cost detrimental departure from the projections we have used, it is beyond the power of LPC, or any industrial contractor, to exercise meaningful control.

Thiokol answered as follows:

In light of the above, Thiokol believes that the escalation factors selected and used in our proposal will be achieved based upon our past experience. In summary, we have granted average merit increases and promotions in each year of operation, but we have managed to minimize the escalation effect by intelligent management of the labor force mix. We have used turnover, retirements, and new hires to effect promotion from within to the maximum, and have made replacements at the low end of the labor range. We have managed our subcontractors so that their escalation was offset by competition, negotiation, and learning. We have always taken advantage of the most cost effective transportation mode. We will continue to do all of these things in the future.

Our proposal is based upon our best judgment after reviewing the history available to us and evaluating the economic factors which will bear on the problem in the future. We have demonstrated our management ability to reduce cost in both declining and increasing periods of business and we will continue to control costs during the period of the SRM project.

These answers and other responses highlight the difficulty the GAO experienced in attempting to ascertain exactly what portions of escalation were uniquely within the control of the respective proposers. In its answer to GAO, Lockheed takes the position that its plan offers unique escalation control benefits over another proposer and that a small percentage of its escalation rates reflects factors known, firmly established, and uniquely controllable by Lockheed. Thiokol appears to relate more of its elements of escalation to unique company-controllable factors. Subjective judgment played a significant role in how each proposer arrived at its respective escalation rates.

The SEB did not consider escalation to be the same as inflation at least with respect to labor rates and transportation. The GAO review of contemporaneous SEB documents shows that several elements other than inflation were used to arrive at adjusted and escalated transportation and labor rates. For example, in labor rates, the SEB examined not only inflation, but skill mixes and employment variations.

Furthermore, from our review of the proposals we agree with NASA that Lockheed and Thiokol not only utilized different escalation rates which reflected in some measure factors that were company

unique, but also constructed the 1972 dollar bases, to which escalation rates were applied, dissimilarly. We concur with NASA's representation at the bid protest conference that an example of this dissimilarity was Thiokol's constant 1972 dollar labor rates and Lockheed's de-escalated 1972 dollar labor rates for all program years. Inclusion of different variables in deriving 1972 dollar labor rates made questionable the normalization of escalation of the 1972 labor rates. In addition, normalization of escalation, at least with respect to labor rates, from these different 1972 dollar bases may have unfairly increased the cost of the proposer having a high 1972 dollar labor rate base.

From the foregoing, we conclude that escalation was a significant factor in the estimated costs under each proposal. As noted, escalation differences on elements other than AP and transportation could account for about half of the difference the SEB found between the two contending proposals. Escalation includes inflation, which is outside the control of the proposer, and other factors which are to a greater or lesser extent within the proposer's control. We believe it would have been preferable for the RFP to provide common inflation rates for use by all proposers. However, as required by the RFP, proposers included escalation rates in their cost proposals. In order to normalize inflation, it would be necessary to remove controllable factors from the proposed escalation rates. Because of the requirements of the RFP relating to escalation, this has not been done by either Lockheed or Thiokol; nor are we convinced that it is possible to do so on the basis of the information submitted in the cost proposals. Given these conditions, the SEB's failure to normalize escalation was not unreasonable. If the procurement was being offered for competition at this time, it would be desirable to call for proposers to submit refined cost data, which includes all controllable factors in 1972 dollars, and applying common inflation rates in converting to the real year dollars. However, any attempt to obtain refined cost data would result in a restructuring of the cost proposals; in addition, cost data is inherently tied to technical proposals. Therefore, we believe it would be inappropriate to permit after-the-fact restructuring.

In so concluding, we recognized that our finding that the proposed AP material prices should have been normalized, resulted in a normalization of the differing escalation factors used by the proposers. Our calculations there are not affected by the 1972 dollar bases. We uncovered no other situation similar to AP where the proposers would predictably have to purchase essentially the same quantities, from the same sources under the same relationships, at the same location, at the same price, for purchase in the same periods of time.

FACILITY COSTS

Lockheed contends that its actual facility costs to perform the contract are nearly the same as Thiokol's and computes the difference as approximately $17 million ($RY) in favor of Thiokol. On the other hand, the SEB found that the difference between the two proposers in terms of facilities costs was $113 million ($RY) in favor of Thiokol after NASA adjustments, and $103 million ($RY) as proposed. The importance of the facility cost evaluated difference is evident since the SEB found that Thiokol's most probable costs for the total program were $122 million ($RY) less than Lockheed's. Moreover, the SSO pointed to the differences in facilities investment required of the two proposers in making his selection. For purposes of clarity, we deal elsewhere with three of the Lockheed facility cost contentions. They are $33.6 million ($RY), $6.9 million ($RY), and $3.2 million ($RY) covering normalization of ammonium perchlorate facilities, nozzle facility requirements, and cost of a rail spur from Corinne, Utah, to the Thiokol plant, respectively.

Lockheed and Thiokol proposed totally different facility plans for developing and manufacturing SRM's. Lockheed proposed to modify certain existing, available, Government-owned buildings at the Michoud Assembly Facility (MAF) in Louisiana and at the Mississippi Test Facility (MTF) in Mississippi, and to construct new facilities at MTF tailored for certain phases of SRM production. Thiokol proposed to use, and to modify as necessary, existing facilities at its Wasatch Division Plant site near Brigham City, Utah.

Lockheed planned to use MAF for manufacturing processes and operations involving inert SRM components, such as final machining of the motor case, grit blasting, insulation, and refurbishment. The company planned to use the MTF site and the new tailored facilities for live motor processing operations, such as grinding, blending and mixing the propellant; casting and curing; and testing operations. The RFP, at section 4.4, already quoted, encourages proposers to utilize that combination of facilities, whether owned by the Government or otherwise, which would be most efficient from a cost standpoint. Parenthetically, we agree that it is appropriate to select facilities solely on the basis of cost effectiveness rather than provide an evaluation preference for either Government-owned or privately owned facilities.

Lockheed proposed that the Government fund under a separate facilities contract, $37 million ($RY) of non-severable facility items at MAF/MTF, such as buildings housing the propellant mixers, and that Lockheed and its subcontractors capitalize the remaining $84 million ($RY) of facility items consisting of severable facilities at

MAF/MTF, such as mixers, as well as the facility items at subcontractor plants.

Thiokol proposed to develop and produce the SRM through all increments at its existing Wasatch Division Plant after considering various alternative sites. It planned to use its corporate-owned research and development plant, on which several Government-owned buildings are located, and Air Force Plant 78, an adjacent Government-owned, contractor-operated production plant. Thiokol chose its existing Utah site to achieve cost savings during the DDT&E increment and the production increments.

Thiokol capitalized all improvements, modifications, and additions to its existing facilities at $25.30 million ($RY) except certain improvements estimated at $1.1 million ($RY) which Thiokol planned to charge direct to the SRM program. The only major facility expansion identified in Thiokol's proposal is new production capacity for manufacturing ammonium perchlorate (AP). According to the proposal, the AP subcontractors (PEPCON and Kerr-McGee) will capitalize these expenditures.

The facilities cost evaluators used their professional judgment in determining whether proposed facility costs were credible, but in Lockheed's case, they were able to compare Lockheed's MTF and MAF facility plans with a preproposal in-house NASA study on SRM facility needs at MTF and MAF. The costs proposed by Lockheed's original proposal closely approximated the NASA in-house study.

In our review, we noted that the SEB did not include rental equivalents for the use of Government property in assessing the most probable costs of any proposer.

MTF TEST STAND

Lockheed contends that the SEB unfairly adjusted its proposal cost by $2 million ($RY) for the construction of a new test facility at MTF. Lockheed proposed test firings of the SRM during Increment 1 using one-half of an existing test stand containing two bays at MTF which was constructed and used for the Saturn program. Because the Saturn program never developed to its planned level, one side of the stand was never used. Lockheed proposed to use this side. According to a preproposal NASA–MTF memorandum from the Director-MTF to the Space Shuttle Project Manager, pertaining to information on MTF facilities and support services available for the SRM project, this test position was reserved for SRM testing.

Lockheed's proposal said that:

> Although the B–2 side of the S–IC test stand will be used for Space Shuttle Main Engine testing no schedule conflicts are foreseen. We have discussed opera-

tion of two sides of the stand with Rockwell and NASA Engineering representatives and have planned SRM operations to prevent schedule impact on either program.

The SEB adjusted Lockheed's facility costs upward to represent the difference between the cost of a new test stand and the modification costs included in the proposal for special test equipment on the existing stand. The SEB justified the adjustment because the SRM testing and the main engine cluster testing would be conducted at about the same time and contrary to what Lockheed claims would most likely cause schedule conflicts.

The SEB disallowed Lockheed's use of the stand primarily because of the potential problem of schedule delays and cost impacts caused by concurrent construction and testing. For example, while one contractor is involved in hazardous operations, such as mounting the SRM in the stand, other workers would have to cease work resulting in delays. So, the SEB decided that it would be more practical and cost-effective to construct a relatively inexpensive horizontal test stand and thus alleviate the potential interference problems.

In addition, Lockheed said in its proposal that the test stand required no modifications. As independent NASA-funded study indicated that the existing stand would require additional modification costs because of the way Lockheed proposed to test fire the SRM. SEB evaluators used the study in determining a Government estimate of modifications needed.

The GAO review reveals no reason to question the SEB's justification in requiring a new test stand because of potential schedule conflicts. The additional modification costs are not sufficient to equal the costs of a new horizontal test stand, but these additional costs do somewhat reduce the net effect of the horizontal stand adjustment which was minor overall.

CONSTRUCTION OF FACILITIES (C of F) COST REDUCTION IN BEST AND FINAL OFFER

Lockheed proposed that the Government fund, under a separate facilities contract, the non-severable facility items at MAF/MTF totaling $42 million ($RY) in its original contract proposal, and $37 million ($RY) in its best and final offer. The NASA report showed proposed C of F costs of $42 million ($RY), not $37 million ($RY). In its cost evaluation, the SEB did not accept Lockheed's $5.7 million ($RY) best and final reduction. We found no contemporaneous documentation to support the nonacceptance. The justification according to SEB personnel was that the reduction was unsubstantiated and unacceptable.

We found that although the SEB rejected the non-severable C of F reduction, it accepted a $2.61 million ($RY) reduction in the severable MTF facility items. Lockheed substantiated its severable facility reduction in the best and final offer exactly like the non-severable reduction, but while one was accepted, the other was rejected.

The SEB's acceptance of the $2.61 million ($RY) best and final offer reduction and rejection of the $5.7 million ($RY) was inconsistent since the degree of support was the same. However, we note that the support for the C of F cost in the initial proposal was far more extensive than that in support of the best and final offer. Also, the NASA in-house study closely approximated the originally proposed Lockheed costs for MTF/MAF construction. Therefore, the SEB could reasonably not have accepted the $5.7 million ($RY) C of F best and final offer reduction or even the $2.61 million ($RY) severable reduction.

COMPARISON OF SUBCONTRACTOR FACILITY COST

Lockheed claims that the SEB incorrectly compared subcontractor equipment costs among proposers to its facilities cost detriment of approximately $3 million ($RY). According to Lockheed, the SEB included items of its subcontractor equipment costs in the facility cost analysis, and did not include similar subcontractor equipment costs in Thiokol's facility cost analysis. Even if this were so, the effect upon the overall cost evaluation is academic because the total project most probable cost included all categories of the equipment to be used by Thiokol's and Lockheed's subcontractors—and both firms proposed substantial subcontracting.

The SEB cost team chairman considered the evaluation a valid comparison of facilities which did not include equipment for Lockheed and exclude the same type of equipment for Thiokol. To examine each piece of equipment and verify equal categorization would require an extensive audit unwarranted in view of the rather insignificant dollar reduction from the facilities cost difference. Based upon our examination of documentation in this area, we believe that the SEB facility evaluation did not prejudice Lockheed.

ACQUISITION OF AIR FORCE PLANT 78

Lockheed contends that because Thiokol plans to purchase AF Plant 78, the SEB should include the acquisition costs of the plant in the Thiokol overhead costs. Lockheed estimated the acquisition cost of the plant as $41 million; and since the NASA report stated a 30 percent utilization for the SRM program, an additional $12.3 million ($RY) should be assessed against Thiokol's most probable cost. The SEB did not add any acquisition costs to the Thiokol overhead costs

because the SEB was not certain whether the sale would ever take place.

On August 3, 1973, Thiokol offered to purchase all Government-owned facilities at the Wasatch Division, a portion of which included Air Force Plant 78. The offer was much less than stated by Lockheed. According to information submitted in its proposal, Thiokol planned that the SRM program would account for about 21 percent of the total workload of the Wasatch Division. Therefore, assuming Thiokol's offer is ultimately accepted, we estimate that Thiokol's SRM project overhead would be increased by only a small portion of the acquisition cost, and would be a relatively insignificant amount.

According to SEB records, the SEB contacted the Thiokol Air Force Plant Representative Office (AFPRO) to determine the effects of this proposed sale on the SRM project. The AFPRO could give no impact because the details of the sale were not firm at that time. Rather than speculate, the SEB decided to evaluate the plant based upon it remaining Government property, and no cost was added to the Thiokol cost tabulation.

We agree with the SEB's decision not to include allocable costs of Plant 78 in Thiokol's overhead costs since the SEB had insufficient data at that time to predict the disposition of the plant. In any event, based on available data, the costs chargeable to the SRM program in the event AF Plant 78 is purchased would be minimal.

GOVERNMENT SUPPORT

Lockheed in its April 9 submission to GAO contends that the SEB incorrectly included an additional $3 million ($RY) for Government-furnished equipment and supplies (Government support) in the Lockheed cost tabulation displayed in the NASA report. According to Lockheed, the SEB should have included only $31 million ($RY) rather than the $34 million ($RY) used by the SEB.

Lockheed's original proposal included $20.9 million ($72) for Government support. The proposal did not show the equivalent amount in real year dollars. SEB evaluators, in determining Lockheed's most probable cost, calculated the Government support costs in real year dollars by escalating the proposed amount at a rate of 5 percent which Lockheed agreed should have been applied.

Our analysis disclosed two basic reasons for the difference in the SEB and Lockheed calculations.

First, the SEB did not accept the Lockheed best and final offer reduction for office equipment because Lockheed did not furnish adequate substantiation justifying the reduction. Lockheed proposed originally that the Government purchase $781,000 ($72) of office supplies and equipment for MTF and MAF operations. The company

changed its approach in the best and final offer to propose using existing supplies and equipment as Government-furnished. As such, it excluded the items from the originally proposed Government support costs. Lockheed did not establish that the proposed office equipment existed at MTF, and the SEB did not independently attempt to determine its availability.

The second reason for the differences in Lockheed and SEB calculations is that the SEB evaluators apparently did not use the exact proposed Lockheed schedule to allocate the Government support costs by year. This resulted in a $1.8 million ($RY) difference from computations shown in the NASA report. Since Lockheed did not provide real year dollars in its proposal, the SEB was justified in using its own method of computing escalation in determining the real cost of the Government support. We agree also with the SEB decision not to accept the best and final reduction for office equipment because of the lack of adequate support. However, rather than using original proposal data, the SEB should have displayed best and final data and added an adjustment for the office equipment. In any event, the difference here is also minimal.

RESIDUAL VALUE OF FACILITIES

In its April 9 submission, Lockheed states that the SEB incorrectly included in the project cost comparison $3.030 million ($RY) of MTF severable facilities which were not depreciated against the SRM program. According to our analysis, Lockheed's statement is erroneous because the costs of the undepreciated facilities were not included in the most probable cost analysis. We were unable to determine how Lockheed planned to recover the costs of those undepreciated facilities. However, the effect was to further reduce Lockheed's proposed facilities costs.

Lockheed feels the SEB should have followed the Nathan Report which states that the residual value of new Government-owned (nonseverable) facilities should be estimated and deducted as a negative cost from total facilities costs. The residual value and future use of the Government-owned facilities used for SRM manufacture are unpredictable at the present. We were unable to determine the value of the proposed Government-owned facilities at program completion or what value the facilities would have. As a result, we have no basis to say that the SEB should have considered residual value of Government-owned facilities in its cost evaluation.

LAUNCH SITE SUPPORT

Lockheed contends that the SEB should have included launch site facility and operations costs in the most probable cost evaluation. The

SEB decided that launch operations were not well enough defined to include in most probable costs but credited Lockheed with cost savings associated with its launch operational concepts in the mission suitability scoring.

The RFP required proposers to discuss the effort necessary to support launch site operations. The RFP called for a total view of the influence of the proposer's design of launch site facilities, equipment and operations, including sensitivity manpower and cost data. However, it also stated that the support effort would be procured at a later date under a separate contract.

In support of its position, the NASA report points out that it was not possible to develop a meaningful cost for launch site operational needs because the launch operational concepts at the two launch sites were not fully defined. While the SEB adjusted the proposed sensitivity costs which reflected the potential cost minimization of Lockheed's launch site cost, the SEB felt that the uncertainties existing at the time of the evaluation precluded meaningful cost conclusions. In a letter to GAO, NASA further elaborated on the uncertainties existing even today in Space Shuttle Program planning and the ultimate effect on launch site operational costs. Our review of contemporaneous SEB records, the RFP with emphasis on the sensitivity of proposed launch site operational concepts, and the separate contracting aspects, confirms NASA's judgment as to the inadvisability of considering the launch site operational costs in most probable cost.

MAINTENANCE COSTS

Lockheed contends that facility maintenance costs are facility-associated and should be combined with construction and equipment costs for a valid comparison, thus detracting from the evaluated facility cost difference in favor of Thiokol. The facility cost comparison presented to the SSO did not include the $9 million ($RY) maintenance expense differential in favor of Lockheed found by the SEB.

The RFP definition of facilities and the instructions for preparing the facilities cost proposal did not require including maintenance expenses as a facility-related cost. Rather than including maintenance in the facilities cost proposal, both proposers treated maintenance as part of overhead expenses and charged the costs to the total program based upon a percentage of direct labor dollars.

Although the SEB did not add maintenance expenses in the facility cost evaluation, it did perform a facilities cost effectiveness sensitivity analysis which included maintenance costs along with facilities costs. This analysis which was presented to the SSO showed the Lockheed advantage in maintenance. The analysis also showed that adding a

higher maintenance cost for Thiokol than for Lockheed made no appreciable difference in the facility comparison.

We conclude that although maintenance expenses are facility associated, the SEB was not required to include maintenance expenses in the facilities cost comparison because, by definition, maintenance expenses and facility costs are separate. We also conclude that these expenses have only a minor effect on the facility comparison and that, because maintenance costs are included in both proposers' total cost, there is no impact on most probable cost.

OTHER SEB ADJUSTMENTS

The SEB adjusted Lockheed's proposed costs because of omissions in costs associated with modifying MTF property. Lockheed did not refute these adjustments in its April 9 submission. Based on the SEB documents, Lockheed omitted costs for the on-plant railroad spur called for in its proposal, a security fence and guard house, and additional sitework needed to prepare the MTF area.

Lockheed proposed to build an AP grinding and blending facility at MTF to meet SRM demands for Increment 1, but also it proposed to abandon this facility and build a larger grinding and blending facility at a vendor location in northeast Mississippi to meet demands for Increments 2 and 3. This would save manhours and eliminate steps in the manufacturing process. The SEB decided that this plan created too great a risk; so, for purposes of evaluation, it relocated the grinding and blending process to MTF and adjusted Lockheed's cost upward for additional grinding facilities at MTF. Our review found no basis to disagree with this minor adjustment.

As stated previously, in addition to the capitalization of facilities by Lockheed and its subcontractors, Lockheed proposed that the Government furnish the non-severable facilities at MTF through a separate facilities contract. Lockheed showed these costs in its proposal and escalated to real year dollars using a 7 percent per year escalation factor. The SEB adjusted Lockheed's escalation to 8 percent, the same percentage NASA used in its budget request for C of F funds and applied equally to all proposers who proposed C of F funding. This resulted in the largest facilities adjustment.

In summary, we concur with the SEB adjustments made to the Lockheed proposed facility cost. All adjustments were adequately justified, documented in the SEB records, and constituted a minimal increase in its most probable cost.

The SEB found no deficiencies worthy of adjustment in the Thiokol facilities plan. Our review included many Thiokol weaknesses identified during the evaluation process as possibly requiring cost adjust-

ments. We found that all potential Thiokol adjustments were properly eliminated or classified as cost uncertainties by the SEB. We believe the SEB conducted the facilities evaluation in a reasonable and thorough manner and its results fairly reflect the facilities cost differences between the proposers.

Our conclusion that ammonium perchlorate costs should have been normalized has the effect of reducing the facilities cost differential in favor of Thiokol ($113 million ($RY)) by about $34 million ($RY). The two proposers' facilities costs were amortized into the cost per pound of AP. By normalizing to a common cost per pound, proposed AP facility costs differences—$44 million ($RY) for Lockheed and $10.6 million ($RY) for Thiokol—are, therefore, eliminated.

TRANSPORTATION COSTS

The SEB found a most probable cost difference of $36 million ($RY) in favor of Lockheed in the transportation cost area. Lockheed believes this difference should have been substantially increased.

The RFP required that each proposer submit a detailed proposal setting forth its methods of shipment. The terms of delivery of the finished product, the SRM, were free on board (FOB) destination, the eventual contractor having total responsibility for shipment costs between production and test or launch sites. The Source Evaluation Plan called for the SEB to evaluate the transportation area under the RFP evaluation factors of mission suitability and cost.

THIOKOL TRANSPORTATION PLAN

Thiokol proposed a distribution plan based on railroad transportation. Raw materials and parts would be shipped from subcontractors to its production facility near Brigham City, Utah. Finished SRM's and refurbishable cases and nozzles would be shipped between its production facility and the test site at Huntsville, Alabama, and launch sites at Cape Canaveral, Florida, and Vandenberg Air Force Base, California.

All line-haul railroad equipment, principally the rail cars, would be supplied by the various railroad carriers or secured from the Department of Defense (DOD) rail car fleet. Until 1979—the last year in Increment 1, all shipments would have to be transferred between rail cars and over-the-road trailers for shipment to or from the closest railheads at Corinne, and Brigham City, Utah. Transport between the railheads and the production facility would be provided by motor truck carriers using existing or new equipment.

For shipments beginning in 1979, Thiokol would have the Union Pacific Railroad build a rail spur of approximately 20 miles between the closest railhead, Corinne, Utah, and the production facility. In a letter to the SEB, the railroad indicated that it would build the spur dependent on the total industrial development activity within the industrial complex area and the eventual award of the SRM contract to Thiokol.

Thiokol substantiated its transportation cost proposal with commercial freight rate tariffs, special Government freight rate quotations (Section 22 tenders), and letters of intent from a commercial motor carrier and a railroad freight rate bureau. On the basis of our analysis of Thiokol's proposed shipping plan, 64 percent of the overall shipping costs would be based on Section 22 rates. About 43 percent of the overall shipping costs would be based on a $2.50 per hundred-weight Section 22 rate for shipping the SRM's from Utah to the principal launch site at Cape Canaveral.

Rates and charges for surface freight transportation within the United States are regulated by the Interstate Commerce Commission (ICC) under authority of the Interstate Commerce Act, 49 U.S.C. 1, *et seq.* These rates and charges must be filed with the ICC and published in tariff or schedule form, or, if offered solely for the use of the Government, in tender or rate quotation form.

Special rates to the Government are offered voluntarily by common carriers, such as railroads, under Section 22 of the Act (49 U.S.C. 22) which provides as follows:

> * * * nothing in this chapter shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States * * *.

Unlike tariff rates, which are available to the public as well as to the Government and which must be filed with the ICC generally a minimum of 30 days before they can be made effective, Section 22 rates can be made effective immediately and even retroactively. Whereas increases or decreases in tariff rates may be suspended by the ICC, Section 22 rates are not subject to ICC suspension and may be increased, decreased, or even canceled at the discretion of the carrier offering the rates, subject to any agreements made between the carrier and shipper using or planning to use the rates.

All of Thiokol's transportation charges for the finished SRM's and fired hardware between the Utah production facility and the two launch sites were based on Section 22 rates. All have been filed with the ICC and are open to public inspection. The principal Section 22 rate objected to by Lockheed is to Cape Canaveral with finished SRM's, $2.50 per hundredweight, subject to a minimum charge of 1,000,000 pounds loaded on not more than five rail cars.

The Section 22 rate quotation to be utilized by Thiokol states:

This Quotation may be cancelled by written notice of not less than thirty (30) days by either party to the other, except as to shipments made from original point of shipment (or port of importation where involved) before the effective date of such notice, and except as to any accrued rights and liabilities of either party hereunder, and further such cancellation may be accomplished upon shorter notice by mutual agreement of the parties concerned. Modification of the Quotation may be accomplished by the railroads parties to this Quotation upon shorter notice subject to mutual agreement of the parties hereto.

We note here that the Section 1.1313-2 of the NASA Procurement Regulations (NASA PR) specifically provides for and permits the use of Section 22 quotations in the performance of cost-reimbursement contracts.

LOCKHEED TRANSPORTATION PLAN

Lockheed proposed a distribution plan based on a combination of railroad and barge transportation. Raw materials and parts would be shipped by railroad from subcontractors to its SRM production facilities at MAF and MTF. Finished SRM's and refurbishable cases and nozzles would be shipped by barge between the production facilities and the test and launch sites.

All line-haul equipment, principally the rail cars and barges, would be supplied by either the railroads, Lockheed's subcontractors, or NASA. Until 1980—midway through Increment 2—Lockheed would use NASA's existing Saturn barges, strengthened to carry the SRM weights. The barges would be towed by commercial carriers.

Beginning in 1980, Lockheed would transport the rocket motors in a motorized barge built by a private contractor. The barge would also be used to ship the external tanks—expendable fuel tanks for the Space Shuttle orbiter vehicles—from the tank manufacturer at the MAF. As the production schedules warranted, the motorized barge would be supplemented by the NASA barges until the need for a second motorized barge was justified. The second barge would be necessary about 1983, a third of the way through Increment 3.

LOCKHEED CONTENTIONS

Lockheed contends that NASA's acceptance of Thiokol's Section 22 rate of $2.50 per hundredweight to the principal launch site in Florida was unreasonable. In support thereof, Lockheed states that the rate is less than one-third of the going rate for a similar commodity, the Titan-III solid rocket motor currently being produced by UTC for the Air Force. Furthermore, Lockheed claims the rate is destructive of competition and, as such, unlawful under the Interstate Commerce Act. It is pointed out that Section 22 rates are not reliable bases to establish probable costs to the Government over this 15-year program because the railroads can withdraw them at any time with only 30 days

notice. If the rate were withdrawn, any possibility of achieving an equivalent alternative published tariff, such as a point-to-point commodity rate, is questionable. Also, Lockheed questions the escalation rate proposed by Thiokol as finally adjusted by the SEB in view of recent rail rate escalation history.

Lockheed further claims that Thiokol's transportation costs should have been increased to account for (1) the construction of the rail spur between Corinne and the production facility, (2) additional cases and nozzles because Thiokol's round trip transit times are insufficient to meet the launch rate requirements, and (3) an extensive test program to verify the safety aspects. Finally, Lockheed questions NASA's failure to fairly credit the benefits of its plan insofar as its calls for shared transportation with the external tank to be transported to the launch sites by a separate Government contractor or the Government.

SECTION 22 RATES

A substantial amount of Government traffic moves on Section 22 rates. In a recent study of shipping practices of DOD, we found that 81 percent of DOD's railroad carload traffic, in terms of dollars spent, moved on Section 22 rates. Almost 100 percent (99.4) of the ammunition and explosive traffic, which would include solid rocket motors, moved on Section 22 rates.

We analyzed the Section 22 rates used by Thiokol in its proposal, and we conclude that NASA's acceptance of those rates was reasonable, even though they were significantly lower than existing or similar rates for the same commodity. For instance, the existing solid rocket motors rate as of August 1, 1973, from Corinne, Utah, to the railhead nearest Cape Canaveral was $7.62 per hundredweight, subject to a minimum chargeable weight of 36,000 pounds. This was a commercial class tariff rate, available to any and all shippers. We are not aware of any traffic actually having moved at this rate.

The largest-sized rocket motors presently shipped are the 120-inch diameter, Titan-III motors (as compared to the approximate 146-inch diameter of the SRM's) from California to Cape Canaveral. On August 1, 1973, about 3 weeks before proposals were submitted, the Titan motors were moving on Section 22 rates of $8.24 per hundredweight with a minimum chargeable weight of 40,000 pounds. If the Section 22 rate had not been available, the motors would have moved at a class tariff rate of $9.20 per hundredweight minimum chargeable weight of 36,000 pounds.

Comparatively, the Thiokol Section 22 rate of $2.50 per hundredweight is a reduction of about 67 percent of the existing class rate ($7.62) while the Titan Section 22 rate ($8.24) is only a 10-percent reduction of its class rate ($9.20). However, the minimum chargeable

weight of 1,000,000 pounds for the Thiokol rate is almost 28 times greater than the minimum chargeable weight of 36,000 pounds for its class rate. The minimum of 40,000 pounds for the Titan rate is only a tenth greater than the minimum of 36,000 pounds for its class rate. Thus, any evaluation of a rate per hundredweight must be examined with reference to the applicable minimum chargeable weight.

Our calculations show that, when a set of SRM's is shipped from Utah to Florida, the railroads will receive revenues of almost $60,000 or 1.9¢ per ton-mile. The Titan solid rocket motors will provide revenues of about 94,000 or 5.1¢ per ton-mile. However, over the last 10 years only 50 Titan motors have been shipped, yielding about $348,000 in revenue per year. During the primary shipping years, 80 SRM's will be shipped annually, producing revenues for the railroads of over $3 million a year. Thus, it can be concluded that although the rate per hundredweight for the SRM's is comparatively low, the expected revenues over the life of the procurement are comparatively high.

In the course of its evaluation, the SEB asked the two prime Government traffic managing agencies whether the Section 22 rate was reasonable in view of the significant reduction from the corresponding class rate. The substance of the replies was that it is not unusual for a Section 22 rate to be 67 percent below its corresponding class rate. Similarly, we believe that Section 22 rates are essentially the same rates that a commercial shipper would receive in like situations under commodity rates filed with the ICC.

Other factors were considered in our determination. For example, Section 20(11) of the Interstate Commerce Act generally makes the railroads liable for the full value of the commodities shipped. The Section 22 rate to Cape Canaveral applies only when the released value of the SRM's does not exceed 50¢ per pound. The class rate applies only when the carriers assume full liability. According to our estimates, the value of the SRM's is well above 50¢ per pound. A reduction in the carrier's liability is a valid and necessary reason for a reduction in freight rate.

Perhaps most significant is the fact that according to our calculations all the various Section 22 rates proposed by Thiokol yield a profit to the carriers offering them. Based on ICC cost data, the Section 22 rate to Cape Canaveral is 125 percent above cost. Without making any statement whether these profits are comparatively high or low, we conclude that any statement to the effect that these rates are unprofitable is without merit.

The Section 22 rates used by Thiokol can be canceled upon 30 days notice. A 30-day cancellation provision is fairly standard with such rates but it is unusual for any railroad to cancel rates if the traffic for which they were offered still exists. Officials at Union Pacific, the

railroad which offered the rates to Thiokol, represented to Thiokol that they could not find any Section 22 cancellations for traffic that still existed. They also stated they would support the same level of rates in a commercial tariff if Section 22 was repealed by Congress. However, it is noted that such new commercial tariff would be subject to the provisions of the Interstate Commerce Act.

Many attempts to repeal Section 22 of the Act have been made in the Congress since 1950. At present, three bills are pending. There is no indication what action Congress may take.

Over the years, the position of the principal Government shippers has been that rates offered under Section 22 are merely those rates which any shipper would negotiate in similar circumstances, given the volume and frequency of the Government's shipments. Were Section 22 not available, we believe, the Government would probably be able to negotiate similar tariff rates, but the ability to obtain those rates as quickly or retroactively, as is possible under Section 22, would be lost since any new commercial tariff rate would be subject to the provisions of the Interstate Commerce Act.

Within the framework of the Interstate Commerce Act, the ICC can suspend tariff rates which are unjust or unreasonable, unjustly discriminatory, or which give undue or unreasonable preference or advantage. The term "destructive" is found in the National Transportation Policy, which precedes each of the four Parts of the Interstate Commerce Act. In that Policy it is stated:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation * * * so administered as to * * * encourage the establishment and maintenance of reasonable charges for transportation services without unjust discriminations, undue preferences or advantages, or unfair or *destructive* competitive practices * * *.

Questions of a rate being "destructive" can be raised before the ICC. However, since the landmark decision about Section 22 rates before the ICC (*Tennessee Products and Chemical Corp.* v. *Louisville & Nashville R.R. Co.*, 319 I.C.C. 497 (1963), the ICC has taken the position that it lacks power to suspend Section 22 rates as being unjust or unreasonable, unjustly discriminatory, or giving undue or unreasonable preference or advantage. Thus, it is apparently the ICC's position that it lacks power to find Section 22 rates "destructive."

A party may contend that Section 22 rates are too low in relation to existing rates or to rates which non-Government shippers must pay. And a party may contend that such rates require other shippers to subsidize the Government's traffic or subject competing carriers to operate at an extreme disadvantage. However, Congress, with the enactment of Section 22, authorized the carriage of Government prop-

erty *free* or at reduced rates. Only Congress has the power to modify or repeal Section 22.

TRANSPORTATION COST ESCALATION

Having discussed the reasonableness of the basic rate, we turn to the projection of the level of future freight costs to be incurred over a 14-year period, from 1975 through 1988, which was a major problem for the SEB. The RFP did not specify levels of escalation to be used nor did the Board attempt to normalize the various levels proposed.

In its proposal, Thiokol stated it had escalated its transportation costs at a rate of 2½ percent per year for the finished SRM's and 2 percent for all other parts and raw materials. The SEB adjusted Thiokol's proposed rate of escalation for the SRM's from 2½ percent to 5 percent, but only for Increments 1 and 2. In so doing, the SEB admits that it inadvertently failed to adjust Thiokol's Increment 3 costs.

The SEB's rationale for its adjustment of the Thiokol escalation rate was that in evaluating transportation costs, it was determined that the 2½ percent per year escalation proposed by Thiokol was insufficient. The SEB assumed that the economy in the long range during Increment 3 would stabilize and that 2½ percent per year in that timeframe would be adequate.

It was felt that the negative effect of a transportation cost growth greater than the SEB projected escalation of 5 percent would be primarily an Increment 3 consideration and could be factored into the competition for that increment. The SEB further relied on the following: (1) the General Services Administration (GSA) uses a projection of 5 percent per year and, for its studies, anywhere from 4.5 to 5.2 percent; (2) the president of the Union Pacific Railroad, which offered the Section 22 rates, believes Thiokol's use of 2½ percent would appear to "reasonably cover" increases through 1988 based on history; and (3) the Defense Contract Audit Agency took no significant exceptions to the proposed costs.

No informed source has been willing to provide us with a figure to use in projecting transportation freight rate increases over the life of this procurement. Certain Government officials involved in procurement stated they had no experience with contracts of a 15-year duration. Most of their contracts were for only 1 year.

As far as historical increases in rail rates are concerned, since 1944 (through December 31, 1973), there have been 28 general, or across-the-board, increases in railroad freight rates which essentially have applied to Section 22 rates. Over the past 7 years, from January 1, 1967, to December 31, 1973, freight rates have increased an average

of 5.6 percent per year. Over the past 15 years, freight rates have experienced an average increase of 2.7 percent per year. Since December 31, 1973, cumulative increases of 17.9 percent have been approved by the ICC, including a 10-percent increase granted on June 5, 1974 (it should be noted that these increases occurred after the SEB evaluation and the selection).

In the last 25 years, no year has had increases exceeding 17.9 percent. However, 17.0 of the 17.9 percent is scheduled to expire in early 1975, although there is no assurance that the increase may not be extended or even increased.

A further concern with Thiokol's escalation was the fact that Thiokol stated during the discussions that it would be cost-effective to manufacture the SRM's for launch from Cape Canaveral at an East Coast site, such as its plant at Brunswick, Georgia, if the rate from Utah to Cape Canaveral was increased from $2.50 to $5.94 per hundredweight. According to Thiokol, an increase of that magnitude was unreasonable, but if it appeared that the rate would be reached, it could start construction to increase the size of its Brunswick plant as late as July 1, 1980. Using a percent rate of escalation recommended by Lockheed for Thiokol of 6 percent, the $5.94 rate would not be reached until 1988, or the end of the SRM program.

Based on history, Thiokol appears to have understated its projected freight rate increases. The SEB increased the escalation rate to 5 percent in the first two increments, but failed to consider the effect that increase would have in Increment 3 and, thus, also failed to adjust Increment 3 costs upward by about $6 million ($RY), which NASA acknowledges.

While Thiokol may be able to hold its freight rate increases to below the average of future general increases, given the possibilities of negotiating lower rates, we believe there is at least $6 million ($RY) of additional cost uncertainty related to its freight rates for the SRM using the SEB's 5 percent rate of escalation throughout the program. This would also mean another $6 million ($RY) of additional cost uncertainty for shipments of the raw materials and parts for all three increments.

Since the cost evaluation was performed on the basis of most probable costs for the entire program, the impact of Increment 3 competition should not have been a consideration.

Accordingly, the SEB's adjustment to Thiokol's proposed transportation costs should reflect the $6 million ($RY) admitted error and additional cost uncertainty should reasonably have been about $12 million ($RY). Although the SEB could have shown the $12 million as an adjustment, we note that Lockheed claims that any escalation

rise should impact upon cost uncertainty, rather than cost adjustment, which NASA should have considered.

We observe that the SEB accepted Lockheed's escalation rate applicable to its water shipment of the finished SRM's and refurbishable hardware. Approximately 58 percent of proposed costs relate to barge costs and 42 percent to railroad charges. While the Lockheed proposal is silent as to its SRM escalation rate, we believe that 3 percent approximates what was used.

With respect to Lockheed's base level barge rates, Lockheed based its costs on a subcontractor's bid—but adjusted that bid approximately 60 percent downward to compensate for change in construction site, longer amortization period, and smaller operating crew. In response to an SEB question, Lockheed submitted a letter from its proposed subcontractor which stated in part, as follows:

> Realize your best estimates are significantly less than our proposal dated August 9, 1973, nevertheless, am willing to negotiate on the basis of 1972 dollars.

Lockheed did not state in its proposal what contractual arrangement it would have with that subcontractor if it won the SRM contract. Unlike Thiokol, which was proposing to use the ICC-regulated railroads at rates required to be open to public inspection, Lockheed was proposing a system based on an entirely new mode of transportation for which we have no historical rate patterns.

While the proposed transportation would be interstate commerce, the nature of the commodities to be shipped and its freedom from meaningful competing modes of transport could possibly mean that it would be exempt from ICC regulation. See 49 U.S.C. 903. Because of these facts, there was no way to verify Lockheed's proposed barge costs. The SEB recognized this and made no adjustment.

Regulated water transportation charges have traditionally been set at levels related to rail rates. Increases have also been related to rail increases and have often been the same. Water carriers have encountered increases in operating costs comparable to those experienced by the rail carriers. However, for the type of transportation Lockheed is proposing, increases will be directly related to increases in barge construction costs and crew and bunker fuel charges, which may or may not bear any real relation to rail cost increases or regulated water carrier increases. Because of the lack of verifiable cost information, we have no cost data to refute Lockheed's base or escalated costs. Yet, we believe the SEB should have found substantial cost uncertainty in this area. We believe that, whatever the difference between what the potential supplier apparently proposed and what Lockheed adjusted that to, should reasonably have been shown as an uncertainty on the record at that time. That reasonably would have been several million dollars.

ADDITIONAL TRANSPORTATION CONSIDERATIONS

The SEB made no cost adjustments or assessments of cost uncertainty in relation to Thiokol's need for (1) special, heavy-duty rail cars, (2) shock-resistant shipping containers, or (3) a rail spur between the railhead at Corinne, Utah, and the Thiokol production facility. We believe the Board was correct in not making cost adjustments, but should have found some additional cost uncertainty.

Thiokol stated in its proposal that the railroads would provide the necessary heavy-duty rail cars without additional cost. The SEB verified this information with Thiokol which provided backup information from the railroads involved. We believe the SEB was correct in relying on the verification.

However, the SEB cited Thiokol for a weakness in failing to propose shipping containers which would meet NASA's RFP requirement to use containers sufficient to resist railroad bumps and shocks. Thiokol responded that the RFP requirements were excessively high and said it would run a test with its SRM containers to substantiate that. The SEB made no cost adjustment even though if the test proved negative, the possible additional cost would be $950,000 ($72). The Board indicated that this was an item for negotiation after award of the contract. We believe the Board would have been justified in listing the $950,000 ($72) as a cost uncertainty.

Thiokol also proposed that the railroad (Union Pacific) would build a rail spur the 20 miles from the nearest railhead Corinne, Utah, to the plant site. It stated that it had held discussions with the railroad about the spur and the cost of construction was estimated at $3 million ($RY). When the SEB queried Thiokol about the rail spur, Thiokol had the railroad respond directly to the Board. The president of Union Pacific Railroad replied:

> In January 1972, a group of our people visited Thiokol and discussed the possibilities of Union Pacific constructing track to the plant site to accommodate the Space Shuttle program. We estimated the cost of building the railroad at three million dollars. Any decision on the part of the railroad to construct the industrial track at its expense would necessarily depend on the total industrial development activity within the area and the award of the SRM Space Shuttle program to Thiokol. However, we must see some progress in the development phase before we make any investment for industrial trackage.
>
> Let me assure you that Union Pacific is extremely interested in participating in the Space Shuttle program. The Section 22 rates we developed for the program provide us with an adequate profit, and while the railroad stands ready to build the necessary industrial track, decision as to who will fund this project depends on the future development of the industrial complex.

While there is no assurance that the railroad will build the spur, Thiokol has offered as much substantiation as was possible at the time of the proposal. Accordingly, we find no basis for cost adjustment, although a cost uncertainty of $3 million ($RY) may have been appro-

priate, since there is a possibility that Thiokol would have to fund the spur.

The SEB found both of the proposed transportation plans suitable for the planned procurement. Safety factors were considered and it was agreed that the barge system presented fewer problems than the rail system. Admittedly, rail transportation would subject the SRM's to the harshest transportation shock and vibration. Because the railroads would traverse populated areas, the public along the rail routes would be subjected intermittently to a substantial volume of potentially hazardous explosives. Although the SRM is classified as an explosive, its greatest danger is fire, not explosion. Unlike the recent rail disasters referred to by Lockheed which related to the explosion of bombs in California and Arizona, the SRM's in a rail disaster would create a large, fast-burning fire. On the other hand, if a disaster befalls Lockheed's motorized barge, it would have a substantial impact on Lockheed's overall distribution system.

We believe both plans are satisfactory from the standpoint of safety and no adjustments or assessments of uncertainty were necessary.

Thiokol's proposed round trip transit times between the production facility and launch sites were as follows:

To Cape Canaveral—22 days (7 days each way and 8 days for on/off loading)

To Vandenberg—7 days (1.5 days each way and 4 days for on/off loading)

The SEB's refurbishment and product support panel considered the transit time of 7 days between Utah and Cape Canaveral very optimistic. It felt that 12 days each way was more realistic. Thus the round trip time is 32 days. Plotting the transportation time required against the number of additional cases which would be required, the panel estimated a requirement for two additional sets of case containers (eight containers total). The SEB authorized an adjustment and increased Thiokol's proposed charges to cover this.

Three of the four rail carriers who were party to the original Section 22 route (Union Pacific to Kansas City, Missouri; Missouri Pacific to Memphis, Southern to Jacksonville; Florida East Coast to Titusville, Florida) told the SEB that a transit time of 7 to 9 days was realistic. Missouri Pacific, the fourth carrier, indicated that 46 hours over its routes was expected. Since the Missouri Pacific route is only 539 of the total 2,606 miles between Corinne and Titusville, without adding the highway mileage to and from railheads (approximately 22 and 14 miles, respectively), the 7 to 9 transit day times appear to be slightly optimistic. However, Union Pacific said the 7 to 9 transit day times were based on an October 1972 test simulating the anticipated

SRM weights and dimensions. Since Missouri Pacific's 46 hours were included in that time, we believe 7 to 9 days between the railheads was a reasonable, though somewhat optimistic, estimate.

At the present time, there are 14 other possible routes in the Utah to Florida Section 22 quotation. We do not know what transit times are possible on those routes. Because the SEB increased the round trip transit time for Thiokol, the SEB adjusted Thiokol's case requirements by eight. Upon review, we find the transit times estimated by Thiokol were reasonably accepted by the SEB. The SEB did not add the costs for transportation of the additional eight cases due to a previous overadjustment in the number of cases required.

Another part of the Space Shuttle hardware is the external tank. The contract for the tanks has been awarded by NASA to Martin-Marietta who will manufacture them at MAF. NASA will provide the transportation of the completed tanks to the launch sites.

Although NASA's preproposal transportation study had recommended the initiation of a transportation cost study for integrating external tank and SRM transportation requirements if the selected SRM production location was accessible by water, the RFP contained no statements about the possible savings of co-shipment. There was no indication that NASA would compute savings in external tank transportation with the SRM procurement in its evaluation.

In its proposal, Thiokol stated it had examined transportation by barge from the Gulf Coast and Mississippi River and found that it was entirely feasible to deliver loaded SRM's to MAF or MTF for carriage by barge to Canaveral. It felt that co-shipment with the tanks might be cost-effective, but presented no cost savings data.

Lockheed based its cost proposals on the co-shipment feature. Lockheed's barge costs were proposed at 50 percent of its actual costs, with the other 50 percent shown as a savings to the Government for not having to provide all the external tank transportation. The SEB accepted the data and credited Lockheed with its proposed savings to the Government of about $10 million. In addition, the SEB performed a sensitivity analysis wherein it was presumed that all SRM costs associated with external tank co-shipment or $10 million were eliminated.

If the external tanks are not shipped with the SRM's, there will be a substantial additional cost. However, the SEB cited no basis in its reports to judge what those additional costs would be. To have given Lockheed credit for savings related to the tank transportation when the RFP did not ask Thiokol or any of the proposers to offer a plan to minimize the total transportation costs of the two procurements was questionable. Lockheed claims that the additional $10 million credited in the sensitivity analysis should have been included as a further re-

duction in its most probable costs. Furthermore, Lockheed believes that an additional $6 million savings would accrue to the external tank program based on the Government's estimated costs.

NASA's treatment of the Lockheed plan for shared transportation of the SRM's and external tanks was inconsistent. The SEB's own evaluation gave partial credit for such savings but, for no apparent reason, considered potential additional savings in a different manner. In our view, Lockheed should have received credit in its most probable cost for either all definable savings or none at all. Since the decision as to how the external tanks will be shipped has not been made and therefore, its cost is uncertain at present, it is difficult to quantify what penalty Lockheed suffered from NASA's failure to credit full savings to its shared transportation plan. Our estimate closely parallels the Lockheed estimate of $16 million. But even attempting to estimate what actual savings might occur is extremely speculative. This is so because NASA's estimate of external tank transportation cost was made in March 1973 before either the external tank or SRM RFP's were issued. It is conceivable that the NASA estimate relied upon by Lockheed for full savings credit might be revised substantially prior to the actual shipment of any external tanks if Lockheed is awarded the contract. Also, in fairness, the ground rules for competition did not provide for factoring savings on the external tank into the SRM most probable costs.

In view of the above, we believe that Lockheed should have received appropriate credit for external tank savings as a positive cost uncertainty keeping in mind that NASA's actions might very well be viewed as an unwarranted positive adjustment to Lockheed's proposal and an undue reliance upon a proposed cost savings.

CONCLUSION

We believe the SEB correctly took a conservative approach in making several relatively small cost adjustments. We found only one major error in mathematics, a failure to adjust Thiokol's escalated costs properly. The SEB did assess greater cost uncertainty against the Thiokol proposal than the Lockheed proposal, but the amounts were insignificant. Were the SEB to reevaluate the transportation area, we doubt that any major differences would be uncovered from what it had originally done, except perhaps in a new approach to evaluating shared external tank/SRM transportation costs.

Railroad charges are subject to the Interstate Commerce Act while barge charges are probably free to float subject to agreements between the parties involved. Because of the difference, there appears to be no overriding reason to have normalized escalation here.

We believe NASA could have more adequately evaluated the SRM transportation costs if it had either examined these costs together with the costs for shipping the external tanks, or totally rejected any reference to the shared tank transportation costs. As it turned out, the SEB essentially accepted each proposal. Lockheed was given the benefit of a savings for sharing costs with the tank shipments even though there was no firm RFP statement providing for evaluation of these savings.

We believe the freight rates proposed by Thiokol were reasonable and properly accepted by the SEB, notwithstanding that they were Section 22 rates subject to a 30-day notice cancellation provision. Our bases of finding are that: (1) the rates were actually negotiated and agreed to between Thiokol and the railroads; (2) the type of traffic proposed has generally moved on Section 22 rates; (3) the volume and frequency of the proposed traffic justifies lower than existing or comparative rates; (4) the railroads have been considered reliable in the past in offering and maintaining reasonable rate levels; and (5) using available cost information, all the proposed Section 22 rates are compensatory.

We believe the costs proposed by Lockheed, particularly the barge transportation costs, were somewhat less certain than Thiokol's. This is because: (1) there was no agreement in the proposal between Lockheed and the potential subcontractor as to the anticipated costs; (2) the proposal did not state what contractual arrangement Lockheed would have with the potential subcontractor; (3) the potential subcontractor has no record, to our knowledge, of offering or maintaining any freight rates to the Government; and (4) there is no historical cost data to evaluate the proposed costs since no barge of the type proposed exists in the U.S. fleet today. Despite an after-the-fact concurrence with Lockheed's reduction of the subcontractor quote, there is no guarantee that Lockheed's potential subcontractor will agree to the changes Lockheed proposed much less maintain them when shipments are actually made.

In the matter of escalation of transportation costs, using history as a guide, we find Thiokol's escalation basis not unreasonable for purposes of the most probable cost evaluation. However, recent increases in freight rates, since the proposal was submitted, have been far above the average past increases. Yet, there is no assurance that over the 15 years of the procurement, the average as proposed will not be met. Nor is there any assurance that history will prove reliable. Lockheed's proposed escalation of transportation costs was not clearly stated. Because the actual basis of charges has never been firmly established, no escalation factor could be applied with certainty.

Lockheed's evaluated $36 million ($RY) transportation advantage in most probable costs resulting from utilization of water transportation at the proposed location of its production facility in the Southeast closely approximates our conclusions. We did find further areas where we might have assessed additional cost uncertainties against Thiokol and favorable and unfavorable cost uncertainty to Lockheed. However, we do not believe that the net uncertainty from our evaluation would serve to call for a conclusion on our part of unreasonableness in the transportation evaluation by the SEB.

LABOR RATES

Lockheed challenges the SEB's labor rate evaluation maintaining that a penalty was assessed against it of $21.1 million ($RY) in direct labor costs and an additional $20.4 ($RY) when overhead and general and administrative (G&A) rates are applied for a total of $41.5 million ($RY). Lockheed states the major issues are that the SEB (1) questioned Lockheed labor rate survey data in the Gulf Coast area (Mississippi and Louisiana), (2) incorrectly determined its starting composite labor rate, (3) used an arbitrary method for adjusting post-1975 labor rates, and (4) failed to decrease Lockheed's overhead and G&A rate to account for the upward adjustments in its direct labor costs.

The GAO review found that the total adjustment for Lockheed was well below $41.5 million ($RY). Lockheed's total claimed penalty analysis was based on several incorrect assumptions derived from the NASA report.

A short explanation of how labor rates were developed and proposed is necessary to fully understand the issues raised by Lockheed. Composite labor rates were shown in Lockheed's and Thiokol's proposals for Increments 1 and 2 as required by the RFP. Lockheed proposed seven composite direct labor rate categories (e.g., engineering and operations), each of which included direct hourly and direct salary rates. The individual rates were weighted to reflect the number of hourly and salaried personnel and their various individual rates included in each composite rate. Thiokol proposed four categories of composite direct labor rates.

Lockheed developed its proposed composite labor rates by (1) conducting a survey of hourly rates in the Mississippi-Louisiana area where its production sites were to be located, (2) assembling the survey data into labor categories it planned to use, and (3) adding to the hourly rate, through weighting described above, the rates for salaried personnel it planned to transfer from California to the Gulf Coast area in 1975 for the duration of the program and the rates for salaried

personnel it planned to hire in the Gulf Coast area. Lockheed included factors in its calculations to reflect the changes in the labor force and escalation of rates for each succeeding year of the program.

Thiokol developed its composite labor rates from its historical data and projected it over the succeeding years of the program using escalation factors.

It is important to point out that Lockheed planned on a facility dedicated to the SRM program whereas Thiokol planned to use a facility housing other solid rocket motor programs. Under these conditions, Lockheed's labor costs are considered direct and are included in the composite labor rates. In Thiokol's case, a significant percentage of labor cost is considered indirect—chargeable to several contracts—and is not included in the composite labor rates. These differing circumstances tend to increase Lockheed's composite labor rate and reduce Thiokol's composite labor rate. However, the differences tend to be balanced in the total program costs since Lockheed's indirect labor cost is excluded from its overhead cost while Thiokol's overhead costs include indirect labor cost.

LOW MISSISSIPPI–LOUISIANA HOURLY LABOR RATES

We examined statistical data from the Bureau of Labor Statistics (BLS) and the basis for Lockheed's and Thiokol's proposed rates. The BLS statistics for Louisiana and Mississippi (Lockheed's proposed sites for the SRM) and Utah (Thiokol's proposed site) show the following average, state-wide hourly rate for employees working on transportation equipment which includes guided missile and space vehicle propulsion units and propulsion unit parts:

	1972	1973
Mississippi	$3.86	$4.03
Louisiana	3.80	4.16
Utah	4.39	4.46

Using the above combined Mississippi-Louisiana figures for 1972–73 the average rate would be $3.96 per hour. For Utah, it would be $4.43, or 47 cents higher than Mississippi-Louisiana.

The GAO review also included an examination of Lockheed's survey data for hourly employees for the Mississippi-Louisiana area and Thiokol's actual hourly rates for about the same period of time which substantiates, within an acceptable range, the published BLS data.

Regarding the MTF area labor rate survey conducted by Lockheed, DCAA stated, "The exact use of the data obtained by the contractor could not be determined as no documentation was maintained demonstrating the weight given to the various inputs." According to DCAA, the contractor stated that the information was used subjectively to ar-

rive at the proposed rates for the Gulf Coast area. As discussed below, GAO believes that, even with the survey information provided by Lockheed in its April 9 submission, the SEB could not have determined the extent to which Lockheed used this data in developing its proposed composite rates.

LOCKHEED'S PROPOSED COMPOSITE LABOR RATES FOR 1975

According to NASA and DCAA, Lockheed's method of computing proposed composite labor rates contained a mathematical error which distorted the starting composite labor rate Lockheed applied after relocation at the MTF in 1975 and the remaining composite labor rates over the life of the program. DCAA detected the error during its review of Lockheed's proposal. DCAA discussed the error with Lockheed's cost analysts and computer programmer to obtain clarification of the method Lockheed used in developing the proposed composite labor rates. The company representatives, according to DCAA, stated that Lockheed's method was not incorrect. DCAA, after correcting the mathematical error in Lockheed's formula did not recommend its use because of defects in the formula's underlying assumptions. Therefore, the SEB did not use the formula. Instead the SEB used DCAA-recommended 1974 composite rates based on the California facility reduced by 10 percent to reflect lower labor rates in the Gulf Coast area. In this way, the 1975 composite direct labor rates were established for Lockheed.

GAO conducted an analysis in conjunction with Lockheed as to the basis for its proposed direct labor costs. Several errors were detected in Lockheed's calculations with respect to its composite labor rates which indicated that its labor costs should have been higher. After discussion, Lockheed, in a document submitted to GAO, recalculated the direct labor costs that appeared in its proposal. The recalculation resulted in a correction of those costs upward by an amount considerably greater than the SEB's adjustment to Lockheed's proposal. If the SEB had evaluated Lockheed's labor costs consistent with the Lockheed recalculation, the SEB may well have increased Lockheed's most probable cost by about $15 million ($RY). In providing GAO with its direct labor cost, Lockheed essentially corrected the DCAA discovered defects in its labor rates formula.

During our review, the SEB personnel involved in the evaluation of Lockheed's labor cost said, and we verified, that the error detected by DCAA during its review caused Lockheed's quoted composite labor rates to be low (understated). In its evaluation, the SEB found that Lockheed had higher composite direct labor rates than Thiokol.

We note that the labor rates for the salaried personnel Lockheed would transfer from California to MTF were based on 1973 rates for similar job categories at Lockheed's California facility. Also, Lockheed's proposed composite rates apparently include salaried personnel receiving higher salaries than proposed by Thiokol. In addition, as noted above, a significant percentage of Thiokol's labor costs are not included in its composite labor rates. While Mississippi-Louisiana hourly labor rates are lower than comparable rates in Utah, and Lockheed properly estimated these rates, the combination of the above factors support the SEB's conclusion that Lockheed's composite direct labor rates are higher than Thiokol's.

LOCKHEED'S POST-1975 COMPOSITE LABOR RATES

Lockheed alleges the SEB's method of adjusting post-1975 composite labor rates is arbitrary, stating:

> The correct procedure is to build the composite rate from its elements treating escalation, staffing changes, and starting rates for new hires independently. Lockheed used this approach, but made an error in application in the proposal costs. The Lockheed Best and Final Offer was correct, however, and did not contain the application error.

DCAA reviewed Lockheed's proposed composite rates and determined them to be incorrect because of an error in the formula Lockheed used to establish the 1975 and post-1975 rates. If the SEB had used the Lockheed formula as corrected by DCAA, the resulting rates after 1975 would significantly increase Lockheed's composite labor rates, and, therefore, labor costs. Also, Lockheed's best and final offer did not correct the error as alleged since the composite labor rates quoted remained the same.

The SEB had two alternatives, either utilize the composite labor rates proposed by Lockheed determined by DCAA to be in error, or establish new composite rates from the best information available from DCAA. The SEB chose to rely on DCAA to establish the starting point for purposes of applying escalation (NASA's term used in the evaluation—see the above discussion on escalation) of 5 percent as proposed by Lockheed and modified downward for staffing variances.

LOCKHEED'S OVERHEAD AND GENERAL AND AMINISTRATIVE COSTS

Lockheed states that when the SEB adjusted its direct labor costs upward, the SEB applied the same overhead and slightly adjusted G&A rates to the new higher labor costs. Lockheed contends the SEB's position represents an incompatible set of conditions in that if labor costs are increased, overhead and G&A rates must be decreased.

In this regard, it is claimed, the increased labor cost would not affect certain fixed overhead costs (taxes and insurance); therefore, the method employed by the SEB resulted in a cost penalty to Lockheed of $20.4 million ($RY). The SEB did, in essence, apply the Lockheed proposed overhead and G&A rates, which were approved by DCAA, to Lockheed's adjusted direct labor cost without adjusting the rates downward.

Lockheed's contention is supported by accounting principles. However, Lockheed's proposal did not contain sufficient data from which new lower overhead and G&A rates could be developed to the adjusted direct labor cost. Moreover, although Thiokol's proposal did furnish information to adjust Thiokol's overhead and G&A rates, the SEB, to keep the proposers on a comparable basis, did not reduce Thiokol's rates to reflect the increased direct labor costs. The procedure employed by the SEB was consistently applied to all proposers.

THIOKOL'S COMPOSITE LABOR RATES

With respect to Thiokol's labor rates, the SEB essentially adopted a DCAA audit report. DCAA reviewed proposed labor rates and supporting historical data, evaluated the reasonableness of the escalation percentages, and took no exception to proposed labor rates for Increments 1 and 2. Based on the DCAA report, NASA accepted Thiokol's proposed labor rates through 1975.

DCAA reported to the SEB that Thiokol used a 5-percent rate of escalation for 1973. The DCAA resident auditor further said the proposed labor force stabilizes in 1979 for the balance of the SRM program, and, in a stable employment atmosphere, 5 percent had been experienced by Thiokol. Thiokol from 1976 forward used a 2½ percent escalation, but DCAA recommended escalation of from 4 to 5 percent annually. The SEB, based upon the DCAA audit report, increased to 5 percent Thiokol's labor escalation rate from 1976 forward. With respect to Thiokol's overhead and G&A, the SEB accepted the rates as proposed and approved by DCAA.

CONCLUSION

Although Lockheed's contentions and GAO findings thereon could be elaborated, it is sufficient to state that the Gulf Coast area hourly labor rates are lower than those in Utah. However, the effect of these lower hourly rates are more than offset by Lockheed's inclusion in its composite labor rates of higher paid salaried personnel and by Lockheed's election to charge these salaried rates to direct rather than indirect labor costs.

Under these circumstances and in light of Lockheed's errors in its proposal, the SEB's use of its own techniques to estimate Lockheed's labor cost based, in part, on Lockheed's historical data, was not prejudicial to the firm. In any event, the SEB's adjustments were significantly lower than alleged by Lockheed and also lower than Lockheed's recalculated labor costs developed during the latter part of our review.

LABOR HOURS

Lockheed claims that substantial cost savings result from its proposed facility approach to perform the SRM contract. Lockheed proposed to construct a new facility tailored specifically to the design, size, and scale of the SRM and designed to achieve maximum plant efficiency. Thiokol proposed to use its existing Wasatch Division and nearby Government-owned facilities. Because of its facility approach and proposed SRM design, Lockheed contends that manufacturing labor hours for each motor will be substantially less than required by Thiokol. Specifically, Lockheed cited the larger mixers proposed for propellant formulation and the fewer casting segments of the Lockheed SRM design, and concluded that Thiokol would need at least 2.9 million labor hours more than Lockheed for propellant processing, motor finishing and inspection. Using an estimate of an average labor rate for Thiokol, which is higher than that proposed for the Gulf Coast area, Lockheed computed a cost savings of about $48 million ($RY) resulting substantially from the larger mixes and fewer segments.

In its facility evaluation, the SEB found no overriding quantifiable advantage to be gained from Lockheed's "tailored" facilities. Although Lockheed received significant credit for its facility approach in mission suitability scoring, the SEB concluded that both Lockheed and Thiokol were effective in minimizing labor hours. The SEB found that labor hours for deliverable SRM's was about equal for the two proposers and concluded that Thiokol had effectively overcome any inherent limitations in its older facility. Although Lockheed requires fewer mixes due to its larger mixers, Thiokol's mix cycle is shorter. The 14,500 pound mixer proposed by Lockheed requires a propellant mix cycle of 90 minutes while the smaller mixers proposed by Thiokol require only 75 minutes. NASA points out that, although the Lockheed design contains fewer casting segments, it contains more case segments. Case segments are combined into a casting segment for the propellant processing operations. For example, the Lockheed design includes 9 case segments which are combined into 3 casting segments for propellant processing. In summary, NASA stated that the Lockheed approach concentrated on achieving greater mechanization of line operations and

standardization of the casting segments, while Thiokol concentrated on decreased time lines and plant flow times, fewer case segments, and high plant utilization.

Direct and support labor hours for SRM manufacturing tasks which are an issue in this protest constitute about one-third of the total proposed labor hours, and tasks encompassed by these labor hours are performed almost completely in-house by both parties.

Both Lockheed and Thiokol prepared detailed manhour estimates for each task to be performed and applied learning curves to reflect the efficiency to be gained from repeated performance of the same tasks. In addition, Lockheed estimated some tasks using "crew sizing" techniques. Labor hours estimated from the "crew sizing" techniques are a function of preestablished equipment capabilities, the number of operators required, and cycle time. Historical experience with manufacturing solid rocket motors was used subjectively by both proposers to substantiate their manhour estimates and learning curves.

At the SEB's request, the Thiokol Air Force Plant Representative Office (AFPRO) conducted a review of part of Thiokol's support for direct labor hour estimates. The AFPRO report states that, even though the historical data was accurately presented, labor hour projections were made mainly using judgmental estimates and historical data to test the reasonableness of the projections. The AFPRO also compared the estimate of overall labor hours for the SRM with Thiokol's previous labor hours incurred in Fiscal Year 1972 on the Minuteman solid rocket motor program. AFPRO concluded that, although the proposed labor hours were tight, the SRM could probably be produced for the hours proposed.

A similar evaluation of Lockheed's proposed labor hours was not performed. Instead, the SEB relied on its technical evaluators.

In our view, uncertainties exist in the labor hours proposed by both proposers because the estimates necessarily included subjective judgments. In addition, in its best and final offer, Lockheed substantially reduced its proposed labor hours without significant substantiation and did not relate the reductions to the work to be performed. The "tailored" facilities, including the larger propellant mixers proposed by Lockheed, have not yet been built and therefore resultant efficiencies are speculative.

Despite these uncertainties, the SEB's acceptance of labor hours as proposed by either Lockheed or Thiokol was not unreasonable. Both proposers used different estimating methodologies to arrive at expected labor hour totals and we were unable to independently verify the accuracy of either projection. The proposals presented a complex assortment of differing designs, efficiencies, and facility approaches and were substantiated to some degree with historical data. Although

the varying degrees to which the SEB attempted to verify the respective proposers' labor hours may have increased the cost uncertainty, examination of the records showed that no prejudice inured to Lockheed from the SEB's evaluation. In our view, the SEB probably should have questioned Lockheed's significant learning curve reduction in the best and final offer. Lockheed supported the reduction by references, without further substantiation, to supposed lower learning curves achieved on its small solid rocket motor program and two larger solid rocket motor programs of other companies.

Lockheed maintains that the SEB should have normalized all proposers to Thiokol's acceptable schedule risk plan, including a 7-day work week. Lockheed's schedule was based on a 5-day work week. We believe Thiokol took this approach to overcome the relative limitations in its older facility. To credit Lockheed with the Thiokol approach would have no more credence than transfusing, for example, Lockheed's proposed use of larger mixers to Thiokol and evaluating both proposers on that basis. Our review has shown that the SEB considered the schedule risks of both proposers and we have no basis to question the SEB's acceptance of either production schedule.

NOZZLE COSTS

Lockheed asserts it was prejudiced by numerous SEB errors in evaluating estimated nozzle costs of the two proposals.

Lockheed contends that Thiokol's proposal costs should have been adjusted upward to reflect the real possibility that Thiokol would have to convert from low cost nozzle ablative material to conventional, higher cost ablative material. The SEB did make such an adjustment. While the exact amount of the adjustment may not be stated, we believe that this adjustment would fall within a range acceptable to the protester.

As to the SEB's alleged failure to utilize the Lockheed best and final offer in adjusting nozzle costs, the SEB did, prior to best and final offers, increase Lockheed's nozzle costs, in part, by $14.63 million ($RY) to account for a misapplication of the learning curve for refurbished nozzles. However, upon receipt of Lockheed's best and final offer, the SEB subtracted its $14.63 million ($RY) figure from Lockheed's adjusted costs because Lockheed corrected the error and increased its best and final offer by $14.63 million ($RY). Thus, the SEB utilized only the nozzle adjustment figure stated in the Lockheed best and final offer.

Lockheed contends that the SEB failed to take into account suggested potential savings related to shifting manufacture of the nozzle from the subcontractor's plant in California to MAF after Increment

1. The Lockheed best and final offer suggested a reduction of $19.1 million ($RY) for this relocation, and, in its April 9 submission, Lockheed claimed an additional $6.9 million ($RY) reduction because proposed facility construction at the subcontractor's plant would not be required if the nozzle were manufactured at MAF.

The GAO review found that Lockheed's best and final offer did not formally propose nozzle production at MAF, but merely listed this plan as an option for cost savings which NASA should accept. Lockheed acknowledged that such a shift would require NASA approval in that the assignment of sufficient floor space at MAF was prerequisite to any such move. We further note that Lockheed did not include any additional costs to be incurred in nozzle fabrication relocation from California to MAF after Increment 1.

The SEB was presented the best and final offer on October 15, 1973, just 5 days prior to the final cost evaluation. It contained an optional approach which was contingent on the availability of floor space at MAF and NASA headquarters assignment of this space to Lockheed; it did not provide a complete assessment of, or support for, the suggested savings. The SEB did not accept the potential reduction because of uncertainty of space availability, uncertainty of cost savings, and time constraints.

NASA PRD No. 70-15 (Revised) states that "The contracting officer shall give each offeror a reasonable opportunity (with a common cut-off date for all) to support and clarify its proposal. An offeror may, on its own initiative, revise its proposal and make corrections or improvements until the established cut-off."

We do not take this to mean, however, that the agency does not have the discretion to terminate evaluation of a proposal at some point subsequent to the common cut-off which is reasonable under the circumstances. In an analogous situation in B-176311(2), October 26, 1973, our Office concurred in an agency's decision not to reopen negotiations upon receipt of an alternate design proposal in a proposer's best and final offer which contained inadequate data. Similarly, in the instant case the SEB was not required to evaluate a completely new alternate approach proposed in Lockheed's best and final offer since (1) Lockheed had presented insufficient information relative to the quantum of savings; (2) the savings were contingent on the availability of floor space at MAF and assignment of that space by NASA headquarters; (3) the Lockheed potential savings would have had to be reduced by the cost of retooling, requalification, moving expenses, retraining, etc., none of which were readily quantifiable; and (4) there existed substantial time constraints.

Lockheed believes the SEB should have adjusted Thiokol's costs upward by at least $23 million ($RY) to account for Thiokol's need to eventually buy the nozzles since Thiokol's proposal to fabricate nozzles in-house represented a development of new expertise. Lockheed's nozzle contention relative to the Thiokol decision to fabricate its nozzles in-house is addressed below where we conclude that Thiokol is not developing new expertise. In view of our conclusion, no basis exists to hold that such an adjustment should have been made.

MISSION SUITABILITY EVALUATION

In the mission suitability evaluation, both Lockheed and Thiokol were given "very good" adjective ratings on point scores of 714 and 710, respectively, out of 1,000 points. According to the selection statement, the SSO noted that the mission suitability scoring resulted essentially in a standoff between Lockheed and Thiokol. The statement further states that "Lockheed's main strengths were in the technical categories of scoring, while they trailed in the management areas. Thiokol led in the management areas but trailed in the technical areas, * * *." The SSO concluded that "the main criticisms of the Thiokol proposal in the Mission Suitability evaluation were technical in nature, were readily correctable, and the cost to correct did not negate the sizeable Thiokol cost advantage."

Lockheed claims its superiority in the mission suitability evaluation was greater than the scoring indicates and should have been determinative of award. Lockheed alleges that defective evaluation procedures improperly reduced Lockheed's superiority and resulted in the SEB's determination that the two proposers were essentially equal. It is claimed Lockheed should have been selected because of its superiority, particularly in view of the uncertainty of costs as evaluated by NASA. Lockheed's superiority in mission suitability is said to have been minimized by (1) an improper and unfair design correction process, (2) granting credit to Thiokol for proposal concepts that did not conform to the RFP, and (3) improperly considering a cost factor—early year funding—in the management evaluation.

IMPROPER AND UNFAIR DESIGN CORRECTION PROCESS CONTENTION

Lockheed contends that the NASA design evaluation procedures improperly provide for design correction which vitiates competition. The design correction procedures, it is contended, eliminate the necessity for each competitor to respond to those technical deficiencies in its proposal noted by the agency since the SEB design team (1) identified design weaknesses; (2) proposed methods of curing the weaknesses

and; (3) submitted these proposals to both the manufacturing and cost teams for assessment of the total cost impact of the correction.

As stated above, one of the SEB design team's function was to ferret out and note design weaknesses, propose methods for their correction, and refer these matters to the manufacturing team for an estimate of the manning and material required to correct each deficiency. The subsequent data was sent to the cost team for application of labor rates, overhead, material costs and escalation factors as required. The resulting proposed cost adjustment was then presented to the SEB for approval and if approved, was integrated into the proposer's cost tabulations. NASA PRD No. 70–15 (Revised) requires the SEB to report to the SSO the Board's estimate of the potential for correction of the principal weaknesses identified and "the Board's estimate of the approximate impact on cost or price that will result from the elimination of correctable weaknesses during negotiations after selection."

Lockheed contends that when applied to a design-deficient proposal such as Thiokol's the process puts "NASA expertise to work in behalf of Thiokol." Lockheed further alleges that "The contract NASA had in mind when it selected Thiokol is materially different from the contract proposed by Thiokol." Specifically, Lockheed points out that NASA's own reasons for not pointing out design weaknesses during oral or written discussions prior to selection were to eliminate the following undesirable results:

(a) the design correction process results in a leveling process

(b) the proposals as finally evaluated become combinations of efforts of the offerors and the Government

(c) independent efforts as the determining factor in the competition are discouraged and diluted

(d) actual or suspected technical transfusion result

(e) there is an obliteration of technical distinctions with a resulting unrealistic emphasis on cost estimates as the decisive factor.

As we stated in B–173677, March 31, 1972, at page 31, the manner of complying with the statutory requirements for discussions in competitive negotiations, set forth in 10 U.S.C. 2304(g), is primarily a matter of judgment for determination by the agency, and that determination will not be questioned by our Office unless clearly arbitrary or without a reasonable basis. Therefore, as there is no contention as to the unreasonableness of NASA's determination not to have discussions of design deficiencies, we will confine ourselves to an examination of the administration of the NASA design correction process.

It is implicit in the arguments set forth by Lockheed that there has been some NASA input into correcting Thiokol's proposed design. Specifically, Lockheed claims that Thiokol could not have been selected without the NASA process of "conceiving and evaluating design corrections."

The SEB design team had the primary task of reviewing each offeror's proposal for suspected design strengths and weaknesses and the additional task of proposing methods to correct any definiencies found. A distinction must, however, be drawn between these functions. First, each specific design strength and weakness, and the relative magnitude of it, was reported by the design team to the SEB as an aid in numerically scoring the proposals in the design area. It should be noted that no SEB-corrected design features were submitted to the SEB for scoring since only the proposals together with the design team's listing of each proposer's independent design strengths and weaknesses were used in the SEB design evaluation. Furthermore, the impact of the design team's second function—design correction—went ultimately only to cost adjustment—both directly (e.g., where additional material is required) and indirectly (e.g., where an additional manufacturing step is required to effect the change indicated as necessary by the design team).

The cost proposal of each of the proposers was adjusted for each design deficiency. Certain deficiency corrections resulted in a decrease in the proposer's cost. This generally occurred where the proposer had included in its design greater safety margins than the SEB deemed reasonably required. However, the more usual impact of proposer deficiency corrections was to increase proposed costs.

Lockheed asserts that, under the narrative rating system, Thiokol should have been given either a rating of fair or poor in design due to major design shortcomings. In this regard, the Source Evaluation Plan sets out the following:

FAIR—This rating should be assigned to a proposal that is marginal in meeting RFP requirements. The proposal contains areas of unsatisfactory features although weaknesses can probably be improved during negotiations. Strengths in other areas do not offset these weaknesses.

POOR—This rating should be assigned to a proposal that contains major unacceptable features which could be expected to provide considerable difficulty to correct during negotiations, if at all.

Additionally, the Source Evaluation Plan provided that a proposal which contained major technical or business deficiencies, omissions or out-of-line costs may have been considered unacceptable prior to final evaluation. In that event evaluation could be discontinued.

Lockheed asserts that the SSO's selection statement establishes that the Thiokol design deficiencies were major and not readily correctable.

The pertinent portion of the statement says:

> The Thiokol case design met the general SRM requirements; however, the cylindrical segment [for alternate water impact loads] was close to the upper limits of size capability of the case fabricator. The nozzle design included ablative materials not currently developed or characterized. This offered potential savings in program cost, but with attendant technical and program risk. An expanded characterization and development program would be required. The thickness of the nozzle material was insufficient to meet required safety factors and thus degraded reliability. The amount of material required to correct the deficiency was substantial and the deficiency could require a redesign of the metal portions as well as the ablative portions. The design was complex and would contribute to difficulty in manufacturing. The Thiokol motor case joints utilized dual O-rings and test ports between seals, enabling a simple leak check without pressurizing the entire motor. This innovative design feature increased reliability and decreased operations at the launch site, indicating good attention to low cost DDT&E and production. The thickness of the internal insulation in the case aft dome was marginal and created a technical risk.

Lockheed also maintains that:

> NASA diminished the extent of the Thiokol design deficiencies by labeling them readily correctable weaknesses and of minor cost impact. For a solid propellant rocket motor, a minor change to any major component such as the nozzle has major impact on the other components and in the total motor design.

It is true, as noted by the SSO, the SEB and the design team, that there were deficiencies in the Thiokol design. Nevertheless, we do not feel that the Thiokol proposal contained major design deficiencies.

Pursuant to the sense of the Source Evaluation Plan, major design deficiencies envisage only those weaknesses which have a significant impact on the SRM's ability to perform acceptably within the RFP parameters and are not within, or are marginally within, the proposer's capability to correct in a timeframe consistent with project milestones. Deficiencies of the magnitude noted above clearly are not readily correctable by the proposer and may not be correctable. Accordingly, any projection of correction cost of a major design deficiency would be an exercise in uncertainty, with a resulting degradation of the viability of the entire evaluation process. Additionally, a major design deficiency would clearly imply that, in the absence of an input of NASA expertise, the proposer could not readily modify its design so as to have it considered acceptable.

While we note the impact of both the quantity and the significance of Thiokol's design deficiencies, we do not feel that any single deficiency, or even the weaknesses taken as a whole, can fairly be categorized as major design deficiencies so as to cast doubt on the propriety of the SEB design evaluating correction process. We agree with Lockheed that "it is improbable that NASA could have selected a proposal *per se* with major technical weaknesses * * * " and we conclude that NASA did not do so.

Thus, with reference to specifics of the Thiokol design—the proposed use of low-cost ablative material in the nozzle; the inadequate thickness of Thiokol's proposed nozzle material and possible design repercussions thereof; the complexity of its nozzle design; and the marginal thickness of its internal insulation in the case aft dome—we feel that the NASA design evaluation correction process could have functioned effectively.

Precisely, both the design team and the SEB characterized Thiokol's low-cost material as a design weakness of some import and made a cost adjustment for additional developmental testing deemed necessary to allow for the possible use of this low-cost material and made another adjustment relative to the contingency that only conventional material (a Thiokol proposed alternate approach) could be used. The inadequate thickness of Thiokol's nozzle material also resulted in an evaluated weakness with cost impact. Furthermore, Thiokol's nozzle complexity was established as a weakness both in design and in manufacturing as the Thiokol nozzle design was considered to be one of the most difficult of the nozzles proposed to manufacture. An adjustment to the appropriate Thiokol learning curve was made by the SEB to more accurately reflect this difficulty of manufacturing the Thiokol nozzle. Of course, this adjustment to the Thiokol learning curve had the additional effect of increasing the number of man-hours required to manufacture the nozzle and hence the cost of manufacture.

With regard to the allegedly inadequate and unproducible Thiokol design for a case meeting alternate water entry load conditions, we note that the RFP asked offerors to address in a "special topic" how they would modify their baseline case designs to assure that the case could survive an ocean splashdown of greater force than contemplated in the baseline approach. In its proposed alternate water entry load condition design, Thiokol suggested the use of certain segments whose design configuration size requirements exceeded the case fabricator's capacity to manufacture the segments.

The SEB, after assessing a weakness against Thiokol in manufacturing, recognized that the problem could be solved by either a major case redesign utilizing a greater number of smaller segments, a utilization of ingots larger than those currently being produced, or through a redesign of the segment to optimize material utilization while maintaining the structural properties required to meet the alternate water impact loads. However, no cost adjustment was made for the correction of this deficiency or any deficiency in this area to any of the proposers since the SEB felt that the problem which it had posed as a "special topic" was merely intended to give the Government insight as to how the proposer would design its case should these specific

water impact factors become a program requirement. The special topic was apparently meant to be primarily a further test of the proposer's design and manufacturing abilities, and was not "costed out" since the necessity for, or the parameters of, a case to meet the precise special topic conditions was at that juncture uncertain. Moreover, SEB records confirm the NASA report in that Thiokol included in its early development schedules and planned tasks a design period for incorporating design changes if and when they would be required in this area.

The SEB gave Thiokol's proposal weaknesses both in design and in manufacturing because its complex nozzle contained a large number of parts which would not lend itself to easy fabrication. On the other hand, for its submission of an unmanufacturable alternate case, Thiokol was given a deficiency *only* in manufacturing for its response to the alternate water impact load.

Since the failure to submit a readily producible end product is likewise a design error which leads to problems in manufacturing, we believe that the SEB, consistent with its evaluation of nozzle complexity, should have assessed Thiokol with an additional weakness in design. We note that, in another area, Thiokol was assessed favorably in both design and product support for its proposed use of a certain type and design of case segment seals. Consistency would seem to require that design details which impact on manufacturing, refurbishment and/or product support should be reflected, either as strengths or weaknesses, or both, in design and in the other areas affected.

We therefore question the SEB's failure to assess Thiokol a weakness relative to alternate case design. Moreover, where the design team has recognized as a weakness the fact that Thiokol proposed the use of a certain type of metal for parts of the nozzle which could have an impact on the refurbishability of these parts, it would appear that a concurrent notation of weakness would also become necessary in refurbishment.

While we question the above-noted omissions, we are unable to quantify the impact, if any, of the inclusion of these deficiencies on the scorings in mission suitability at that time. Even if the mission suitability scoring should have been adjusted on the basis of the SEB omissions to increase the present four-point spread between Lockheed and Thiokol, we do not believe that the impact would be of sufficient significance to distinguish this situation from those instances where the question of whether the given point spread between two competing proposals under the circumstances presented indicates the significant superiority of one proposal over another. This is primarily a matter within the discretion of the procuring agency. *See* 52 Comp. Gen. 686 (1973).

Moreover, we find that the SEB scoring reflected the weaknesses found in Thiokol's proposal and all other proposals and, as the NASA report states, "The Lockheed proposed design was determined to have significant advantages over Thiokol's proposed design." The SEB was charged, and did report, to the SSO the correction potential of principal proposal weaknesses and the cost or price impact resulting from the elimination of these weaknesses after selection in accordance with the NASA PRD. Therefore, in the light of the uniformity of treatment between proposers, we find that the design correction process was in conformity with NASA procedures and was not improper or unfair. Moreover, the omissions in the design evaluation do not cause us to conclude that Lockheed should have had a greater scoring edge or that the omissions detracted, in the overall, from the SEB's conclusion that both firms were essentially equal in mission suitability.

CREDIT FOR NONCONFORMANCE TO RFP CONTENTION

Lockheed objects to the SEB giving Thiokol affirmative credit for proposal concepts not conforming to the RFP. Lockheed views Thiokol's decision to fabricate the critical nozzles in-house to be in direct contravention of the following RFP provisions:

> NASA considers that a prime contractor's use of established expertise in the private sector is an essential approach toward the objective of maximum economic effectiveness. Proposals from joint ventures will not be accepted, and the development of new expertise by a prime contractor, either in-house or elsewhere in the private sector, is to be avoided to the extent possible, since the latter course detracts from the stated objective.
>
> * * * * * * * * * In order to meet the objective * * * [in the above quote] to achieve maximum economic effectiveness, proposers should seek to maximize the use of existing expertise in establishing make-or-buy plans.

These provisions, together with the selection statement's finding that Thiokol had a "lack of experience in fabricating nozzles of this size," in Lockheed's opinion, supports its objection. It is claimed that the NASA report rewrote the selection statement by stating that "the SEB's opinion was that Thiokol's proposal to build the nozzle in-house did not represent the development of a new expertise but capitalization on existing expertise."

The affirmative credit for Thiokol's nozzle decision appeared in the evaluation of management factors which formed a part of the rationale of the selection statement.

> The tentative decision to make the molded and tape wrapped nozzle in-house was considered a strength in this area. It would contribute to the low cost-per-flight goal by using available resources, avoiding subcontract fees, lowering overhead rates, and taking advantage of lower cost labor. The inherent risk management aspects were also considered.

Moreover, Lockheed points out, and the NASA report confirms, that the above decision was considered a plus under the management

factor. Lockheed argues that there should be no merit given to a proposal concept which deviates from the RFP. Therefore, credit for this "nonresponsive" aspect of the proposal from the management and cost standpoints compounds the offense against the RFP since it instructed offerors that use of established expertise with the resulting minimization of risks was essential to maximum economic effectiveness.

Lockheed maintains that Thiokol lacks experience in fabricating nozzles, particularly nozzles of the size and quantity necessary to satisfy the product or requirements of the contract. Lockheed contrasts the Thiokol limited experience to the extensive experience of several qualified vendors on production programs and on large development nozzles.

We questioned NASA and Thiokol on the extent to which Thiokol and other fabricators have expertise in nozzle production. We also examined Thiokol's proposal and the SEB records. We conclude that no nozzle manufacturer has fabricated nozzles in a production program in any way comparable to the size, type, and quantity required for the SRM. This observation is supported by the following passage from a letter of May 13, 1974, to Lockheed from a qualified nozzle vendor stating in part:

> Since a nozzle production program comparable to the SRM in size, complexity, duration, and delivery requirements has not been accomplished to date, actual cost curve data is not available.

Therefore, it appears that whichever "experienced" nozzle fabricator would produce the nozzle, some development of new expertise and a new experience base would be required.

The selection statement reference to Thiokol's lack of experience in fabricating nozzles of this size was as follows:

> A minor weakness in the manufacturing approach was the decision to fabricate nozzles in-house due to Thiokol's lack of experience in fabricating nozzles of this size.

A review of Thiokol's proposal, the SEB records, and the supplementary data submitted supports the SEB's conclusion that Thiokol possesses basic expertise and experience in the fabrication of nozzles. We are particularly impressed by Thiokol's (1) fabrication experience with flexible bearings—a key component in the SRM nozzle; (2) extensize nozzle design participation; (3) manufacture of various small nozzles and plastic nozzles; and (4) experience in Poseidon and Trident test nozzles, as well as anticipated production follow-on contracts which are expected to be completed before the SRM nozzles are scheduled for fabrication.

In view thereof, we find a reasonable application of judgment by the SEB in treating Thiokol's nozzle size experience as only a minor weakness in manufacturing. While some vendors might have more produc-

tion experience with nozzles larger than those previously manufactured by Thiokol, we cannot say that nozzle fabrication by Thiokol would represent the development of new expertise. In any event, the RFP did not prohibit the development of new expertise, but provided that new expertise "is to be avoided to the extent possible." Therefore, we believe that Thiokol's decision to fabricate the nozzle in-house did not deviate from any RFP requirement. Consequently, the credit given for this cost-saving decision by the SEB in management evaluation appears proper. In any event, the SEB records reveal that the Thiokol nozzle decision, while rated a management strength, was not among the principal reasons for Thiokol's significant advantage attained in the management evaluation.

Lockheed further asserts that the Thiokol decision to utilize in its design unproven low-cost nozzle ablative material was a clear deviation from the RFP's overall objective of "achieving a minimum development risk and highly reliable design." The fact that Thiokol's use of these low-cost ablatives was viewed by the SSO as a significant design weakness with concomitant cost implications is taken to support the allegation that Thiokol's decision to use low-cost materials increased risk and decreased reliability.

We might be inclined to agree with Lockheed but for the fact that Thiokol recognized the developmental risk and proposed a parallel development effort based solely on the use of conventional material. In fact, Thiokol contemplated the possibility that within the early phase of the contract the use of low-cost ablatives would not prove feasible, and that conventional materials would be required. The SEB adjustment of Thiokol's costs to be incurred as a result of any changeover does not detract from the fact that Thiokol proposed both an approach containing some risk and a low-risk alternate program to which it could convert.

EARLY YEAR FUNDING AND THE MANAGEMENT EVALUATION

With regard to the management evaluation factor, the scoring difference between Lockheed and Thiokol was minimal on key personnel, but Thiokol scored significantly better than Lockheed on management approach and organization. This overall Thiokol superiority in management contributed greatly to the virtually equal mission suitability scores of the two proposers.

The RFP provided that:

> Evaluated under this criterion [management approach and organization] will be the proposer's management effectiveness in achieving project goals and requirements, the overall logic, approach and organization selected for this procurement, and methods for management control and integration.

The Thiokol advantage in management approach and organization resulted from two significant strengths--low programmatic risk and low early year funding—in direct contrast to Lockheed's two significant weaknesses—high programmatic risk and high early year funding. Lockheed cites the following passages from the selection statement which, it is alleged, demonstrates the impropriety and unfairness of this evaluation in regard to early year funding:

> The new facility approach [of Lockheed] resulted in high early year funding which is contrary to one of the key project goals.
>
> * * * * * * *
>
> Thiokol structured the development program so that all major costs were deferred to the latest practicable date. This resulted in low early year funding, which is a key program objective.
>
> * * * * * * *
>
> Thiokol had the most favorable cost posture in the facility area due to the fact that the additional facility capability required was minimal in comparison with the other proposers. This has the effect of minimizing early year funding requirements which is one of the SRM program goals.

Simply stated, Lockheed's high early year funding stemmed in large measure from its substantial construction of new facilities funded by the Government in the first few years of the program.

Lockheed argues that the SEB's reliance and inordinate emphasis on early year funding to detract from Lockheed's management and therefore mission suitability scoring is a deviation from the RFP's emphasis on the total program cost benefits of the various proposals, exemplified as follows:

> Evaluation of proposals will be accomplished in accordance with provisions and procedures described in Section I and II of this RFP, and will be based on each proposer's proposals for the entire project duration rather than on any particular segment or increment thereof.

While acknowledging RFP references to "early year funding constraints," Lockheed contends that they are never stated apart from the long range costs, never referred to as a primary objective or evaluation factor, and constitute a minimal percentage of total program cost. Furthermore, Lockheed questions the infusion of this particular cost factor, but not others specified by the RFP such as the cost risk of Thiokol's marginal design, into the management evaluation.

In rebuttal, NASA points to the general knowledge throughout the industry of its desire and need to minimize early year funding as Space Shuttle and SRM program goals. On at least three occasions, Lockheed representatives attended preproposal Space Shuttle quarterly reviews where early year funding restrictions were stressed. NASA states that Lockheed was warned that its facility approach resulted in a tight schedule because of the unavailability of facility funds in an early fiscal year.

Moreover, NASA refers to several RFP provisions specifically encouraging minimization of costs consistent with early year funding constraints and requirements. Based on the above, NASA contends, it cannot fairly be stated that early year funding was a secondary, subordinated or incidental matter relative to other goals and requirements. As a project goal, NASA believed that it would have been negligent had it not evaluated the early year funding posture of the proposals under the management approach and organization criterion of the management evaluation factor as to the "proposer's management effectiveness in achieving project goals and requirements * * *." While Lockheed denies that its early year funding requirements are any higher than Thiokol's, our examination of the SEB's cost evaluation supports NASA's judgment to the contrary.

Lockheed's characterization of early year funding as an unimportant matter or a mere constraint is not borne out by a review of its proposal. Lockheed proposed facility modifications and new construction to be modular with facilities added only as required to meet production rates necessary to accommodate the flight schedule. Lockheed stated that: "Only essential buildings will be constructed during DDT&E to minimize funding requirements during the early phases of the program." Moreover, the fact that Lockheed viewed this early year funding "cost" factor as a proper subject for management consideration is amply demonstrated by this statement from its management proposal:

> Lockheed Propulsion Company proposes to meet the demanding cost challenge and technical responsibilities of the Space Shuttle SRM in a fully responsive manner. To accomplish this, *our Corporate Management makes the following commitments.*
>
> * * * * * * *
>
> To apply a management plan that incorporates our proven systems and techniques for effective program systems and techniques for effective program direction and control leading to *low early year funding* and lowest cost per flight. [Italic supplied].

In view of the above, we find no fault with the SEB's treatment of the high early year funding feature of the Lockheed proposal in its evaluation of the RFP's management factor. Moreover, with respect to the cost implications of Thiokol's marginal design in management, we believe that, as previously discussed, Thiokol was adequately penalized in design and by upward adjustments to its proposed costs by the SEB.

The SEB judged the Thiokol proposal to offer a low programmatic risk because of intended utilization of existing facilities with a mature, stable, in-place organization. In comparison, Lockheed, to complete the project, would have to accomplish simultaneously the following three activities: (1) build a multimillion dollar facility at the

Mississippi Test Facility (MTF), in 1974 and 1975 with a schedule considered overly optimistic by the SEB; (2) relocate, without a logistics plan, the entire Lockheed project team from California to MTF during 1974 and 1975; and (3) increase the MTF work force by 88 percent in 1975 and 43 percent in 1976.

Three independent evaluations of Lockheed's proposed construction schedule were performed by the SEB. Each evaluation reached the same conclusion—Lockheed's MTF construction schedule was unrealistic and probably would not be met. Lockheed presented studies that independently evaluated the MTF construction schedule as accurate and reasonable. In the end, the SEB followed its own judgment and expertise, and, although penalizing Lockheed in the management scoring, assessed no cost penalty for the scheduling problem.

We found no evidence indicating a dissenting opinion within the SEB on the construction schedule decision. Also, a review of the SEB scoring by individual members, including secret ballots, showed a strong consensus in the management approach and organization criterion which took this crucial matter into account. We are, therefore, not in a position to say that the SEB's judgment in this area lacked a reasonable foundation.

In general, we found that the documentation supports the significant findings of the SEB in the management area. Lockheed believes that Thiokol's deficient design and other proposal decisions which purportedly increase project risk should have resulted in a penalty against Thiokol in the management category. This fails to recognize the substantial penalties from both a mission suitability and cost standpoint (discussed elsewhere) assessed against Thiokol in evaluated areas other than management. Moreover, we cannot say that Thiokol's design deficiencies and other program development risks warrant a management penalty for failure to achieve project goals.

In sum, we do not find a basis to conclude that Lockheed's alleged superiority was improperly reduced by virtue of defective evaluation procedures. In our judgment, there is a reasonable basis for NASA's conclusions that Lockheed and Thiokol were essentially equal in mission suitability.

OTHER FACTORS EVALUATION

Lockheed contends that NASA improperly ignored the feasibility of competition for Increment 3 as a factor, thereby depriving Lockheed of superiority in the "other factors" evaluation. As stated above, the RFP advised that proposals would be evaluated in accordance with eight stipulated "other factors" not numerically scored. These factors, according to the RFP, "have been identified as being such that they

bear on a proposer's ability to meet the requirements and objectives of this procurement and will be considered by the Source Selection Official." This contention deals with the following "other factor" which, it is claimed, NASA did not properly take into account in the evaluation process:

Facilities. Flexibility inherent in the proposed facilities plan and its adaptability to NASA's plan to separately contract for Increment 3.

It is contended that Lockheed's facilities plan makes competition feasible in Increment 3 by providing complete Government-owned facilities available for all potential competitors to use. Lockheed quotes from the selection statement as supportive of its argument that performance of Increments 1 and 2 at the Thiokol plant makes it economically impracticable for any other firm to compete for Increment 3 without significant added costs to NASA and writes off the possibility of Increment 3 competition.

In regard to the economics proper, the Board's evaluation made it clear that such an investment could not *at this time,* under any reasonable view of the forecasted economic factors, be considered likely to pay its way as against Thiokol's existing facility. As regards other considerations, we recognized that it may well be advantageous, when the major production phase arrives, to plan to have two or more suppliers in the country capable of competing for the manufacture of SRM's in quantity; however, *there is no need to embark upon the construction of a new major facility at this time in order to secure these benefits in a timely manner.* [Italic supplied by Lockheed and GAO.]

In addition, Lockheed argues that Increment 3 competition cannot be obtained without significant facilities investment as the Selection Statement anticipates from the underlined portion of the above quote. Therefore, it is claimed that—even assuming that NASA was not required to give Lockheed significant credit in the evaluation—the cost of obtaining Increment 3 competition should have been evaluated and assessed against Thiokol.

The selection statement acknowledged that Lockheed's facility plan enhanced beneficial competition for Increment 3. The statement accurately reflects the findings of the manufacturing team and a subpanel of the management team on this matter. In fact, the manufacturing team included the matter in its formal evaluation of the Lockheed proposal which, it appears, contributed to the Lockheed scoring advantage under that RFP criterion.

The SEB record reveals that no significant discriminators were developed in evaluating facilities flexibility. The SEB found that all proposed incremental facility plans of the competitors provided flexibility to a varying degree. More specifically, the SSO was advised that all facilities plans could accommodate competition in Increment 3, a reduced launch rate, and a second source for Increment 3. The SEB further noted that all proposers except Thiokol had a feature providing

for another proposer to take over production in a Government plant in the third increment.

Also, the SEB reported to and the SSO considered a closely-related "other factor," raised on the SEB's initiative, of facility cost effectiveness where a comparison of benefits and costs was done in several areas taking into account transportation and maintenance. As the selection statement reports, Lockheed's favorable transportation and maintenance position did not extinguish its high facility expenses over the life of the program.

The varying degrees of facility flexibility among the proposers were preserved through the SEB's consideration of this "other factor." The record shows that SEB evaluators considered Thiokol's facility plan to offer a significantly lesser approach to beneficial competition in Increment 3. However, according to NASA, a completely Government-owned plant is not prerequisite to a separate procurement for Increment 3. All proposers except Lockheed possess differing amounts of facilities which, with some expansion, could support Increment 3 production requirements and have sufficient sales bases to maintain an operating status through the beginning of Increment 3. Lockheed's own facilities plan would include several million dollars in undepreciated equipment which would have to be accounted for prior to production competition.

Moreover, we note that construction of the bulk of the facilities needed for a Government plant to perform Increment 3 can be delayed until about 1979 or well into Increment 2. UTC premised its proposal on such a basis, and even the majority of Thiokol's facility expenses might be incurred at a new location in the Southeast as late as 1980.

Of particular significance, we note that this "other factor" does not preclude the possibility of a sole-source procurement or the division of the production increment into two sources. The circumstances extant at the beginning of Increment 3 will dictate the most advantageous course for the Government to follow. The options which will be available to NASA coupled with the multiple facilities postures of the principal solid rocket motor contractors, in our view, negates meaningful quantification of any costs being assessed for or against Thiokol, Lockheed, or, for that matter, any other firm in the competition. Finally, we note that the SSO might very well have found discriminators in favor of Thiokol in the "other factors" evaluation. Based on the above, we find no unreasonableness or unfairness in the SSO's consideration of the facilities flexibility "other factor."

INTERIM CONTRACTS

Lockheed has also protested both NASA's award to Thiokol on a sole-source basis of an interim contract and the extension of that contract. The contract in question calls for studies, analyses, planning and design relative to integration of the SRM with the entire Space Shuttle system.

Lockheed asserts that there has been or will be a transferal or transfusion of its superior design through the correction and revision of Thiokol's design. Moreover, the protester claims that whether or not the specific Lockheed design has been transfused, NASA is spending money on work which is meant to merely improve Thiokol's design and cannot therefore benefit Lockheed in any way because Lockheed already has a superior design.

In our decision regarding a similar interim contract issued pending the protest of the award of the Space Shuttle main engine contract, we did not question the award even where:

> * * * NASA concedes that because of the work done under the interim contract Rocketdyne [NASA's proposed contractor] has refined its design and retained an experienced staff. Therefore, it is expected that Rocketdyne would be in a position to prepare a better proposal in the event of further competition. * * * (B-173677, December 29, 1971.)

We concluded there that since the work was within the general scope of Rocketdyne's proposal and "much of it could possibly be of use to other competitors," there was no basis to disturb the award of the interim contract.

In the present situation NASA did, however, state in its justification for the sole-source award that, "the results of the contract effort, in addition to being critically needed by NASA and the other Space Shuttle major prime contractors, will be of value to whoever is selected as the Solid Motor contractor."

Our Office has examined the work done under the study contract and has concluded that no technical transfusion has occurred in the sense that Thiokol has obtained the advantage of Lockheed's "superior design." We think it is important here to note that technical transfusion is normally used to connote the transfer of a unique concept from one offeror to another with the result that the latter's proposal receives an evaluation advantage based on the former's ingenuity. For reasons which are readily apparent, such transfusion would be patently unfair and should be scrupulously avoided in a procurement of this kind. Since the evaluation process has been concluded, we employ the term "transfusion" in a more general sense—as we assume that Lockheed's counsel did—to mean the receipt of an advantageous idea which might otherwise not have occurred to the recipient.

Specifically, we feel the development through the interim contract of a new baseline design, geared for the NASA dictated angled SRM water entry (similar in nature to that stated in the RFP special topic regarding alternate water impact loads) came about as a natural design evolution. In establishing the new baseline Thiokol did not appear to have or need any technical transfusion. The use of essentially shorter and thicker segments than contemplated in the original baseline configuration appears to be an elementary solution to the problem of providing the greater strength necessary for the case to withstand the greater forces to which it would be subjected. Therefore, we do not see any basis for concluding that any technical transfusion has occurred in this regard. Moreover, the data that has been generated as a result of more specific delineation of the SEB operational parameters, much of which could be made available to other competitors, should be of value to all participants in any further competition.

In one instance NASA asked Thiokol to perform a study task which is of no appreciable benefit to any other proposer. In the area in question only Thiokol proposed design approach "A," about which the SEB had some doubt, while all other proposers offered design approach "B," yet Thiokol was asked to study the possible use of approach "B." However, on the whole, NASA has generally adhered to the statements made in its justification. Since we have found no attempt either to transfuse technology or allow Thiokol to enhance its design to the disadvantage of any other proposer, we cannot object to the interim contracts. We recommend that all proposers, consistent with the rules regarding proprietary data, be furnished the maximum amount of useful information generated under the interim contracts.

CONCLUSION

In considering the results of the SEB evaluation presented to him, the SSO, in his selection statement, first noted that the mission suitability scoring resulted essentially in a stand-off among Lockheed, Thiokol, and UTC. The SSO agreed with the SEB's conclusion that "Thiokol could do a more economical job than any of the other proposers in both the development and the production phases of the program; and that accordingly, the cost per flight to be expected from a Thiokol-built motor would be the lowest." In addition, the SSO noted that "a choice of Thiokol would give the agency the lowest level of funding requirements for SRM work not only in the overall sense but also in the first few years of the program." He concluded "that any selection other than Thiokol would give rise to an additional cost of appreciable size." He further noted that the extensive facilities investment needed by Lockheed could not, under any reasonable

view of the forecasted economic factors, be considered likely to pay its way against Thiokol's existing facility. He found no other factors bearing on selection ranking in weight with the above. He concluded "that the main criticisms of the Thiokol proposal in the Mission Suitability evaluation were technical in nature, were readily correctable, and the cost to correct did not negate the sizeable Thiokol cost advantage." As a result, the SSO "selected Thiokol for final negotiations."

In support of the stated basis for selection, the NASA report invites our attention to the following passage from our decision at 50 Comp. Gen. 246, 249 (1970):

> Where * * * two offerors are essentially equal as to technical ability and resources to successfully perform a research and development effort, the only consideration remaining for evaluation is price. In such a situation, we believe that the lower priced offer represents an advantage to the Government which should not be ignored.

As is evident from our conclusions set forth above, we found no overriding basis to disagree with the SSO's reliance on the virtual equality of Lockheed and Thiokol based on the SEB's evaluation of mission suitability and other factors. Therefore, it becomes necessary to discuss Lockheed's allegation that making a selection decision on the basis of admitted uncertain cost proposal estimates covering a 15-year contract period is violative of the governing procurement regulation, NASA PR 3.805–2 which provides as follows:

> In selecting the contractor for a cost-reimbursement type contract, estimated costs of contract performance and proposed fees should not be considered as controlling, since in this type of contract advance estimates of cost may not provide valid indicators of final actual costs. There is no requirement that cost-reimbursement type contracts be awarded on the basis of either (a) the lowest proposed cost, (b) the lowest proposed fee, or (c) the lowest total estimated cost plus proposed fee. The award of cost-reimbursement type contracts primarily on the basis of estimated costs may encourage the submission of unrealistically low estimates and increase the likelihood of cost overruns. * * * the primary consideration in determining to whom the award shall be made is: Which contractor can perform the contract in a manner most advantageous to the Government.

The RFP placed considerable emphasis on the importance of constraining cost to reflect one of the primary objectives of the Space Shuttle Program—reduce substantially the cost of space operations. Innovative ideas in design, engineering, production, and management were sought to achieve minimum production and operational costs at reasonable development costs and to provide assurance that the proposed cost will not be exceeded. To this end, proposers were advised it is imperative that effort be made to minimize production and operating costs while maintaining reasonable development costs. Design and production approaches were to be utilized that would result in the lowest possible cost per flight consistent with early year funding con-

straints and design, performance, and reliability requirements. Mission suitability ratings were to be determined substantially by anticipated contributions to low production and low operating costs.

Proposals were to be evaluated on those factors indicating the adequacy and realism of the cost proposals and the probable costs that will be incurred. Included in the evaluation was an assessment of the cost of doing business with each proposer and possible cost growth during the course of the program. While not numerically scored, these factors were to be reported by the SEB to the SSO. The importance of the criteria was made dependent on such considerations as the magnitude and credibility of the cost differentials, the keenness of competition in mission suitability and impact, if any, of other factors. The cost proposal was to be used extensively in the evaluation and scoring of mission suitability factors to determine realism, understanding of requirements and whether the design and production approach being taken would lead to lowest production and operational cost consistent with reasonable development cost.

From the above, it is clear that NASA apprised all offerors of the significance and relative importance of cost, and was obligated to evaluate the cost proposals submitted. We find no conflict between the RFP cost evaluation criteria and NASA PR 3-805.2 which, in our view, was intended to preclude undue reliance on proposer cost estimates in a cost-reimbursement procurement. The regulation does not preclude consideration of cost projections verified or proposed by the Government; in fact, they may become controlling if all other factors are substantially equal. 52 Comp. Gen. 686, 689 (1973).

Of course, consistent with the RFP, the SEB reasonably had to assess the cost realism of the proposals, the estimated cost differences between proposers, and the probable costs that would be incurred to reflect the possible growth of cost over the term of program. 52 Comp. Gen., *supra*.

We reviewed the NASA cost evaluation process in terms of assessment of cost realism and most probable costs. We do not find it necessary to relate the details of the Source Evaluation Plan developed by the SEB for evaluating cost proposals. It is sufficient to say that the SEB, particularly through its cost team, conducted extensive analyses and sensitivity studies into cost realism and most probable cost in arriving at its conclusion that Thiokol would be the probable low cost performer of the SRM contract by $122 million ($RY).

The SEB started from the proposed costs. Taking into account the construction of facilities funding and Government support required by Lockheed, Thiokol's proposed costs were lower than Lockheed's by about $95 million. To comport with NASA PRD 70-15 (Revised)

which requires the SEB to report to the SSO the approximate impact on cost or price that will result from the elimination of correctable weakness in proposals and other pricing adjustments, the SEB then employed an adjustment process. The SEB further performed analyses of cost uncertainties still remaining in proposals where adjustments could not be fully substantiated. As the NASA report states:

In summary, the Board made adjustments in a proposer's cost where adequate substantiation and/or rationale was found. For items which "looked low" but for which an inadequate historical basis existed from which to estimate an adjustment, or for items where, in the SEB's judgment, the most probable program outcome did not indicate the cost would likely be incurred, adjustments were not made. Uncertainty analyses were conducted to determine a probable range of uncertainty, as well as to determine if there were significant differences in uncertainty of the "Most Probable" cost among the proposers. No significant differences in the uncertainties among the proposers were noted. Though analytical techniques were utilized in some of the uncertainty analyses, the final position taken by the Board can be best described as subjective judgment tempered with advice of knowledgeable key individuals.

Normalization of proposals to common cost baselines directly or indirectly resulted in adjustments because there was no logical reason for differences or because the proposals did not contain sufficient information and "should have bid" estimates were prepared. We have examined the SEB's "quantifications" of the uncertainties and agree that the SEB's evaluation showed that the uncertainties balanced out. Also, the adjustments made by the SEB for both Lockheed and Thiokol were within the same range, as reflected by the $122 ($RY) difference in favor of Thiokol after adjustments. An adjustment was approved only upon agreement of all 13 SEB members.

According to NASA, the uncertainty analyses were conducted to test if the most probable cost difference fairly represented the respective proposals and the relative standing of the proposals. Uncertainties evolved from areas where confidence was low in the proposal estimate but a valid basis for adjustment could not be found, or where the SEB's confidence in internally generated estimates was no greater than in the proposal. To a large extent, the SEB used Government estimates, proposer to proposer variations, and subjective judgment in the various areas examined.

The SEB reported to the SSO its estimate of the most probable costs, a detailed analysis of the adjustments made, and its methodology of uncertainty analysis along with the typical uncertainties in most probable cost for each proposer. The SEB also reported:

All three approaches indicate approximately same range of uncertainty for all proposers ($300K–$400K) in cost per flight.

The SEB relied on the uncertainty balance to attest to the real differences in cost which might be expected to occur depending on which proposer performed the contract.

Based on our examination and review of the SEB adjustment and uncertainty evaluation as reported to the SSO, we find no basis to question the SEB's procedures and methodology in its assessment of the realism of costs. While the SEB relied to a great extent on the proposal estimates submitted and took a conservative approach in adjusting the proposals, our review of the process found no unreasonableness or unfairness in the process itself. Had the SEB relied solely on the estimated costs, we would question the reliability of the evaluated cost differences. However, an adjustment evaluation and an uncertainty analysis were superimposed on the proposed costs. Our review of the cost evaluation upon which the SSO based his decision confirmed the SEB's conclusion that uncertainty in varying degrees in probable cost of performance would occur, and for different reasons, among the proposers. Also, we found additional uncertainties which, where "quantifiable," did not favor one proposer over the other. To the extent that cost realism and most probable costs can be predicted over a 15-year period, we found the cost evaluation process to adequately and fairly reflect anticipated differences in costs. Except for one area, we found the evaluation to have been performed reasonably.

In view of our findings in the ammonium perchlorate area, we believe that the SSO should determine whether the validity of his selection is materially affected by the substantial reduction in the cost difference. A proper and reasonable evaluation of AP would have reduced by about $68 million ($RY) the most probable cost difference as evaluated by the SEB and reported to the SSO. In addition, as already noted, NASA has admitted to understating Thiokol's transportation costs by about $6 million ($RY). Moreover, the SSO may also wish to consider whether Lockheed's labor costs should be increased by about $15 million ($RY) over the SEB's evaluated labor costs with adjustments in light of our previous discussions in the labor rate area. We note that, in a prior statement concerning the selection of a contractor for another component of the Space Shuttle System via a cost-plus-award-fee contract extending over a 7-year period, the SSO stated:

> As a result of adjustments to the proposed costs made by the Board as part of its evaluation, Pratt & Whitney's cost were considered the lowest. The estimated costs for the three contractors, both as proposed and adjusted are within the range of uncertainty that is inevitable in estimating for cost-type research and development contracts, in which the period of performance extends over many years. (Quoted from B-173677, March 31, 1972, at page 4.)

The cost estimates in that selection (the Government estimate was $851 million) were within an 8 percent range and, in not selecting Pratt & Whitney, the low cost proposer, for award the SSO stated: "* * * It was evident that the technical competition was close and that the estimated or adjusted costs did not give any of the proposers a significant advantage."

By referring to the prior selection, we do not intend to question the SSO's reliance on costs here; projected costs were obviously and properly a significant factor. Each procurement must be awarded in consideration of the attendant facts and circumstances. However, that selection statement indicates that the SSO looked to whether estimated or adjusted costs gave any proposer a "significant advantage" where, as here, technical competition is close.

We recognize that the selection remains the function of the SSO. Our role is to test the reasonableness of the result. However, the circumstances appear to call for the SSO to determine whether the net significant decrease in the probable cost difference between the proposals of Thiokol and Lockheed, in light of the four point difference in mission suitability scoring, calls for a reconsideration. In the event the SSO determines that a reconsideration is called for, the proposals of each should be considered as they and the attendant circumstances existed as of the time of the original selection decision except for the above-stated difference in probable cost.

By a separate letter of this date, we are drawing the attention of the NASA Administrator to our recommendation and requesting that we be advised of the actions taken as a result thereof.

[B-176759]

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

While the principles in 52 Comp. Gen. 246, wherein the Comptroller General had no objection to a proposed amendment to the Foreign Service Travel Regulations permitting Government payment of return travel of an employee's dependents, who traveled at Government expense to overseas posts of duty, although they were no longer dependents as of the date employee was eligible for return travel because of divorce or annulment, would apply to dependents of all overseas employees, Volume 2 of the Joint Travel Regulations may not be amended to provide for such travel for a former spouse since the statutory regulations in the Federal Travel Regulations do not provide for such payment.

In the matter of advance return of dependents of civilian employees of Department of Defense assigned overseas, June 25, 1974:

The Department of the Army requested our decision as to whether Volume 2 of the Joint Travel Regulations (JTR) may be amended to authorize reimbursement to an employee for the return travel of a spouse and children transported overseas at Government expense although the marriage has been terminated by divorce prior to the time the employee becomes eligible for return travel. The amendment is proposed as a result of our decision of October 30, 1972, 52 Comp. Gen. 246, wherein we stated that we would have no objection to a similar proposed amendment to the Uniform State/AID/USIA Foreign Service Travel Regulations.

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The Department of the Army points out that the principles enunciated in 52 Comp. Gen. 246 in favor of the proposed amendment would appear to be equally applicable to dependents of employees of the Department of Defense assigned overseas but notes that Volume 2 of the Joint Travel Regulations is an implementation of the Federal Travel Regulations promulgated by the General Services Administration which do not contain specific authority for such return travel. Accordingly, there is doubt as to the propriety of issuing such a regulation in the absence of express authority in the Federal Travel Regulations. The request has been assigned Control No. 73 45 by the Per Diem, Travel and Transportation Allowance Committee.

The amendment proposed by the Department of State which was the subject of our decision in 52 Comp. Gen. 246 is now contained in section 126.2, volume 6, Foreign Affairs Manual, and reads as follows:

Reimbursement may be made for advance travel or return travel to the United States for a spouse and/or minor children of an employee who have traveled to the post as dependents even if, because of divorce or annulment, such spouse and/or minor children have ceased to be dependents as of the date the employee becomes eligible for travel (provided that such eligibility date occurs on or after January 10, 1973). Reimbursable travel may not be deferred more than 6 months after the employee completes personal travel pursuant to the authorization.

In concurring in the above-cited amendment we pointed out that current regulations in the Foreign Affairs Manual and in Office of Management and Budget Circular No. A-56 [now the Federal Travel Regulations] provide for the return transportation of an employee's children over the age of 21 if such children were transported overseas at Government expense when they were under 21. It was noted, therefore, that those regulations recognized to a partial degree an obligation on the part of the Government to return members of an employee's family who were transported overseas for the convenience of the Government although such members had ceased to be dependents of the employee when he became eligible for return travel. Therefore, we found that the proposed regulation would extend that principle to other members of an employee's family whose transportation to the overseas post was at Government expense. We noted in that regard that, although the wife would not be a member of the employee's family after a divorce, in many cases the employee would be responsible for her support and it would impose a financial hardship upon him to provide for her return travel. Moreover, the providing of return travel would avoid a potential embarrassment to the United States caused by the presence overseas of ex-family members who were unable to return home due to lack of funds. In addition, providing such return travel would help alleviate mental distress on the part of ex-family members who found themselves divorced, overseas with no family, and unable to afford a return trip home.

The basic statutory provisions authorizing advance return of the immediate family of civilian employees not in the Foreign Service from overseas posts of duty is contained in section 5729 of Title 5, U.S. Code. That section provides, in part, as follows:

§ 5729. *Transportation expenses; prior return of family*

(a) Under such regulations as the President may prescribe, an agency shall pay from its appropriations, not more than once before the return to the United States or its territories or possessions of an employee whose post of duty is outside the continental United States, the expenses of transporting his immediate family and of shipping his household goods and personal effects from his post of duty to his actual place of residence when—

(1) he has acquired eligibility for that transportation; or

(2) the public interest requires the return of the immediate family for compelling personal reasons of a humanitarian or compassionate nature, such as may involve physical or mental health, death of a member of the immediate family, or obligation imposed by authority or circumstances over which the individual has no control.

The President, by Executive Order 11609, July 22, 1971, has delegated his authority to issue regulations under that section to the Administrator of General Services of the General Services Administration. Those regulations are contained in chapter 2 of the Federal Travel Regulations, FPMR 101–7, May 1, 1973. Currently they provide for Government payment of return transportation expenses for members of an employee's immediate family only after the employee has completed an agreed period of service except that in circumstances involving compelling personal reasons, Government payment for return of the immediate family may be authorized without regard to the employee's completion of the agreed period of service. "Immediate family" is defined in section 2–1.4d of the Federal Travel Regulations as follows:

d. *Immediate family.* Any of the following named members of the employee's household at the time he reports for duty at his new permanent duty station or performs authorized or approved overseas tour renewal agreement travel or separation travel: spouse, children (including step-children and adopted children (unmarried and under 21 years of age or physically or mentally incapable of supporting themselves regardless of age, or dependent parents of the employee and of the employee's spouse.

Under that regulation a divorce or annulment would not change the authority of the department to approve advance travel for the employee's children and in those circumstances we believe the allowance of advance travel for children who traveled overseas as members of the employee's immediate family would be appropriate. Further, we agree with the Department of the Army that the principles upon which we based our decision in 52 Comp. Gen. 246 are equally applicable to the spouses of Department of Defense employees assigned overseas and, in fact, believe that such principles apply to the spouses of all civilians assigned overseas. A regulation similar to the one now applicable to dependents of employees in the Foreign Service covering the

spouses of all Government employees assigned overseas would recognize that both the best interests of the United States and the personal well-being of the children and former spouse would be served by authorizing Government payment for the return of the spouse as well as the children from an overseas post of duty after a marriage has been terminated due to divorce or annulment. This would also place all employees overseas on an equal basis whether they are subject to the Federal Travel Regulations or to the Foreign Service Travel Regulations. Further, we believe such a regulation may be promulgated under 5 U.S.C. 5729(a).

However, notwithstanding the above, since the General Services Administration is the agency charged with the implementation of regulations under 5 U.S.C. 5729(a) and since Volume 2 of the Joint Travel Regulations, an implementation of the Federal Travel Regulations, cannot provide greater benefits for Department of Defense employees than are authorized by the Federal Travel Regulations, it is our view that such an amendment may not be added to the Joint Travel Regulations until the Federal Travel Regulations are amended by the General Services Administration.

[B-179711]

Arbitration—Award—Grant of Administrative Leave—Implementation by Agency—No Legal Authority

Employee who was injured and unable to perform his regular duties but who could perform other limited duties submitted grievance alleging that agency did not comply with labor-management agreement in that it did not "make every effort" to find a limited duty position for him. Recommendation of arbitrator who upheld grievance that employee be granted 30 days administrative leave may not be implemented by agency since there is no legal authority to grant administrative leave in the circumstances.

Arbitration—Award—Implementation by Agency—Of Purpose—Grant of Back Pay

Although agency may not properly implement arbitrator's award granting employee whose grievance was upheld 30 days administrative leave since no legal authority exists for such leave, it may implement the purpose of award by granting employee back pay under 5 U.S.C. 5596 if it is found that had the agency not violated collective bargaining agreement by not making every effort to find the employee an alternate job when he was incapacitated for performance of his regular duties a job would have been found for the employee. However, arbitrator's award is advisory only and may be implemented at the discretion of the agency.

In the matter of the grant of administrative leave under arbitration award, June 25, 1974:

This matter involves a request for an advance decision as to whether an arbitration award granting administrative leave on a retroactive

basis to Mr. Gerald L. Mitchell, an employee of the Puget Sound Naval Shipyard, may properly be implemented.

The facts in the matter as stated in the arbitrator's advisory opinion indicate that Mr. Mitchell was employed by the Shipyard as an "outside machinist-marine" and that on May 7, 1971, while working aboard a nuclear submarine, he sprained his lower back and as a result was on sick leave for a period of one week. Upon returning to work, the Shipyard dispensary placed limitations on the type of work he could perform, in general precluding him from working in confined or restricted locations and limiting the weight he could lift. These work limitations made it impossible for Mr. Mitchell to perform his normal job, although he was fit to perform other less demanding work. When he sought such duty from the personnel department, he was informed that no limited duty job was available and he was sent home, where he remained on leave for about 1 month. He returned to work on June 17, 1971, with the same work restrictions, and his immediate supervisor found him a desk job and the personnel department arranged for him to perform this limited duty from June 17, 1971, to June 30, 1971, when Mr. Mitchell returned to his regular position.

Subsequently, on August 15, 1972, the same back injury caused the dispensary to again restrict Mr. Mitchell to limited duty. He reported to the personnel department and requested a limited duty assignment. That department made a short phone call to the administrative office of Mr. Mitchell's shop and was advised that no such duty was available. He was once again sent home. On September 15, 1972, he again reported to the personnel department seeking limited duty work and was again advised after a short telephone call to his shop that no limited duty work was available and he was once more sent home. On September 19, 1972, he returned to his machinist job on a regular basis.

Thereafter, Mr. Mitchell and his union filed a grievance claiming that the Shipyard had violated the provisions of section 8 of article XII of a collective-bargining agreement between the Union and the Shipyard. That section provides that the employer will "make every effort" to place an employee, assigned a temporary restricted work classification, on a job, if available, within the prescribed restriction. The matter was submitted to arbitration and the arbitrator in an advisory opinion concluded that the Shipyard had violated the terms of the agreement in that it was not shown that the Shipyard had made every effort to place the employee in a limited duty position. However, the arbitrator did not find that a limited duty position for which Mr. Mitchell was qualified was available at any time during the period he was in a limited duty category and on leave. The arbitrator then made the following award:

It is the judgment of the Arbitrator that Mitchell should be placed on administrative leave status from August 15, 1972, through September 15, 1972, in settlement of this grievance. It is the Arbitrator's understanding that this result is the equivalent of "being made whole" for one month's wage and benefits.

The agency has accepted the finding of the arbitrator that the terms and conditions of the agreement providing that the employer would make every effort to place an employee on a job when assigned a temporary restricted work classification had been violated. However, the agency questions whether under applicable law and regulations it may properly implement the award remedy that has been fashioned by the arbitrator by retroactively placing Mr. Mitchell in an administrative leave status for a period of 30 days.

There is no general statutory authority under which Federal employees may be excused from their official duties without loss of pay or charge to leave. However, excused absences have been authorized in specific situations both by law, as in section 6322 of Title 5, U.S. Code, which authorizes an absence of up to 4 hours in any one day for a veteran to participate in funeral services under certain circumstances, and by Executive order, such as E.O. 10529, April 22, 1954, which provides that employees may be excused for a reasonable amount of time up to a maximum of 40 hours in a calendar year to participate in Federally recognized civil defense programs. In addition, over the years it has been recognized that in the absence of a statute controlling the matter, the head of an agency may in certain situations excuse an employee for *brief periods of time* without charge to leave or loss of pay. Some of the more common situations in which agencies generally excuse absence without charge to leave are discussed in Federal Personnel Manual Supplement 990-2, Book 630, subchapter S11. These include (1) registration and voting, (2) blood donations, (3) tardiness and brief absences, (4) taking examinations, (5) attending conferences or conventions and (6) representing employee organizations.

From the foregoing it is evident that in those situations where law and Executive order provide for excused absences as well as in those where the agency head has discretion to excuse employees from duty without charge to leave, the amount of excused time is limited to relatively short periods. Similarly, Civil Service Commission regulations provide that authority to grant groups of employees administrative leave in connection with the temporary closing of an installation or with the interruption of activities is limited to "* * * short periods of time not generally exceeding 3 consecutive work days in a single period of excused absence." 5 CFR 610.302.

In light of the aforementioned limitations on the duration for which administrative leave may be granted and in light of the situations in which such leave may be granted we cannot find that authority exists

for granting an extended period of excused absence such as the 30 days of administrative leave contained in the arbitration award in this case based on an agency's violation of a provision in a labor-management agreement. Therefore we must hold that the arbitrator exceeded his authority in recommending the grant of administrative leave. An arbitrator's award is void and unenforceable to the extent it exceeds the arbitrator's authority to fashion it, *Nuest* v. *Westinghouse Air Brake Co.*, 313 F. Supp. 1228 (1970). Accordingly the award of 30 days administrative leave on a retroactive basis to Mr. Mitchell in this case is void and unenforceable.

However, notwithstanding the agency's lack of authority to implement the part of the award pertaining to administrative leave, it may be legally possible for the agency to carry out the arbitrator's stated purpose of compensating Mr. Mitchell for lost wages and benefits during all or part of the period he was erroneously placed in an enforced leave status as a result of the agency's admitted failure to use its best efforts to find suitable employment for him. Authority under which an agency may retroactively adjust an employee's compensation is contained in the Back Pay Act of 1966, codified in 5 U.S.C. 5596, which provides, in part, as follows:

> (b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—
>
> (1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and
>
> (2) for all purposes, is deemed to have performed service for the agency during that period, except that the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of the leave authorized for the employee by law or regulation.

The Civil Service Commission has promulgated implementing regulations to that act in title 5 of the Code of Federal Regulations, part 550, subpart H. As to whether those regulations permit an agency head to take cognizance of an arbitrator's finding that an employee has been subjected to an erroneous personnel action by his agency and pay the employee under the Back Pay Act, the Civil Service Commission has stated, in a letter set forth, in part, in Attachment 2 to FPM Letter No. 711-71, June 3, 1973, as follows:

> The regulation (5 C.F.R. 550.803) says in effect the employee is entitled to back pay when the . . . [agency head] or other appropriate authority makes a decision on his own initiative that the adverse personnel action was unjustified or unwarranted. The context of the regulation shows that the expression *on his own*

initiative does not prevent him from acting on the award of an arbitrator, but only distinguishes this case from the case in which he acts on an appellate decision.

Thus, where an arbitrator has made a finding that an agency has violated a collective bargaining agreement to the detriment of an employee, the agency head may accept that finding and award the employee back pay for the period of the erroneous personnel action so long as the circumstances surrounding the erroneous action fall within the criteria set forth in the Back Pay Act and the implementing regulations. The criteria for an unjustified or unwarranted personnel action are set forth in 5 CFR 550.803 (d) and (e) which provide:

(d) To be unjustified or unwarranted, a personnel action must be determined to be improper or erroneous on the basis of either substantive or procedural defects after consideration of the equitable, legal, and procedural elements involved in the personnel action.

(e) A personnel action referred to in section 5596 of title 5, United States Code, and this subpart is any action by an authorized official of an agency which results in the withdrawal or reduction of all or any part of the pay allowances, or differentials of an employee and includes, but is not limited to, separations for any reason (including retirement), suspensions, furloughs without pay, demotions, reductions in pay, and priods of enforced paid leave whether or not connected with an adverse action covered by Part 752 of this chapter.

In the present case, under the provisions of the above-quoted regulations the agency head or his representative may determine that an unjustified or unwarranted personnel action has occurred on the basis of the arbitrator's finding that the agency breached its bargaining agreement with respect to Mr. Mitchell by failing to make sufficient effort to find him a limited duty position which resulted in his being placed in an enforced leave status if it is also determined that it was probable that a position compatible with Mr. Mitchell's physical limitations could have been located had every effort been made for all or part of the period Mr. Mitchell was in a leave status. It is not necessary that the period or periods of job availability established by the agency coincide with the 30-day period awarded by the arbitrator since the arbitrator did not base his 30-day award on the probable availability of a limited duty position during the period. After determining the position availability period(s), the agency would then be required to apply the corrective action procedures outlined in 5 CFR 550.804.

Although there is legal authority for the agency to implement the purpose of the arbitrator's advisory opinion and award if it is found that in all likelihood a limited duty job could have been found for Mr. Mitchell, the agency may not do so if such a determination cannot be made. In that connection it is noted that the arbitrator's award was advisory and may therefore be implemented at the discretion of the agency. 50 Comp. Gen. 708 (1971).

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Leaves of absence. (*See* **LEAVES OF ABSENCE**)

ADMINISTRATIVE DETERMINATIONS

Arbitrary and capricious

Standard of proof

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

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

Conclusiveness

Contracts

Disputes

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Where there is no dispute as to facts, but rather question raised is one of law—that is whether contract came into existence—it is not inappropriate for GAO to consider protest of contractor alleged to have defaulted under contract awarded by AF, notwithstanding contractor also appealed contracting officer's determination to terminate alleged contract for default to Armed Services Board of Contract Appeals 167

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Administrative determination that criteria established by sec. 7 of Standardized Government Travel Regs. and par. C8151–8154 of Joint Travel Regs. providing for payment of 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 basis of actual expenses is a determination that may not be set aside in absence of evidence it was not made in accordance with governing law and regulations, or that it was arbitrary or capricious. Authorization for payment of actual expenses does not create entitlement to expenses since approval was outside scope of official's authority and those dealing with Govt. personnel are deemed to have notice of limitations on authority 11

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

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Civilian personnel

Salary rates

Employee whose promotion was delayed as result of President's freeze on promotions and administrative delay in perfecting promotion recommendation due to erroneous view that promotion could not be made until freeze was lifted is not entitled to retroactive promotion pursuant to recommendation of Grievance Examiner because error involved was misinterpretation of instructions and the type of administrative error which will permit retroactive promotion is an error which involves ministerial action not accomplished through inadvertence or failure to implement mandatory provisions of laws and regulations 926

ADVERTISING Page

Advertising *v.* negotiation

Negotiation propriety

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

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Administrative determination that criteria established by sec. 7 of Standardized Government Travel Regs. and par. C8151–8154 of Joint Travel Regs. providing for payment of actual expenses prescribed by

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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 basis of actual expenses is a determination that may not be set aside in absence of evidence it was not made in accordance with governing law and regulations, or that it was arbitrary or capricious. Authorization for payment of actual expenses does not create entitlement to expenses since approval was outside scope of official's authority and those dealing with Govt. personnel are deemed to have notice of limitations on authority..... 11

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National Labor Relations Board (Board) may not use appropriated funds to pay claims for monies mistakenly deducted from backpay award to two discriminatees due to erroneous instructions of Board agent, since in absence of specific statutory authority U.S. is not liable for negligent or erroneous acts of its officers, agents, or employees committed in performance of official duties, but may pay discriminatees such amounts as Board may collect from employer. B-134763, Feb. 14, 1958, overruled..... 834

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

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While language contained in Agriculture-Environmental and Consumer Protection Appropriation Act, 1974, that "loans may be insured, or made to be sold and insured * * * as follows: * * * operating loans, $350,000,000 * * *" would, standing alone, normally be construed as binding upon the Agriculture Dept. and establishing a limit upon amount of loans, legislative history indicates that amount specified was not intended to be a limitation..... 560

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ALASKA RAILROAD

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Concessions

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Members without dependents
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Air-conditioning disabled veteran's home

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

Construction, etc.

Improvements

Private property

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

Court costs and attorney fees

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

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Since holding of dedication ceremonies and laying of cornerstones connected with construction of public buildings and public works are traditional practices, costs of which are chargeable to appropriation for construction of building or works, expense of engraving and chrome plating of ceremonial shovel used in ground breaking ceremony would be reimbursable and chargeable in same manner as any reasonable expense incurred incident to cornerstone laying or dedication ceremony but for fact evidence has not been furnished as to who authorized the chrome plating and engraving of shovel; where shovel originated; subsequent use to be made of shovel; and why there was 1-year lag between ground breaking ceremony and plating and engraving of shovel..... 119

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Cost of providing food to Federal Protective Services officers of GSA who were kept in readiness pursuant to 40 U.S.C. 318 in connection with unauthorized occupation of Bureau of Indian Affairs building is reimbursable on basis of emergency situation which involved danger to human life and destruction of Federal property, notwithstanding that expenditure is not "necessary expense" within meaning of Independent Agencies Appropriation Act of 1973; that 31 U.S.C. 665 precludes one from becoming voluntary creditor of U.S.; and general rule that in absence of authorizing legislation cost of meals furnished to Govt. employees may not be paid with appropriated funds. However, payment of such expenses in future similar cases will depend on circumstances in each case..... 71

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Funds appropriated or made available to Forest Service for construction and maintenance of forest roads and trails to carry out provisions of 23 U.S.C. 205 and 16 U.S.C. 501 may not be used to close such roads and trails or return them to natural state for pursuant to 31 U.S.C. 628 appropriations are required to be applied solely to objects for which they are made unless otherwise provided by law, and according to definitions of "construction" and "maintenance" in 23 U.S.C. 101(a), legislative purpose of both 23 U.S.C. 205(a) and 16 U.S.C. 501 pertains

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Federal aid, grants, etc.
School assistance in federally affected areas
The Second Supplemental Appropriations Act, 1973, P.L. 93–50, approved July 1, 1973, although not specifically providing funds for the increase from 54 to 68 percent authorized for sec. 3(b) School Assistance in Federally Affected Areas, is considered by reason of raising limitation on fund availability for sec. 3(b) students during fiscal year 1973, as having appropriated the additional funds, thus bringing the availability for obligation of 1973 funds, notwithstanding prohibition against availability of appropriations beyond current year, and failure to extend availability of impact aid funds, prescribed for 1973 by so-called "Continuing Resolution," P.L. 92–334, approved July 1, 1972, within intent of the Public Works for Water and Power Appropriation Act, 1974, approved Aug. 16, 1973, P.L. 93–97, extending period for obligation of appropriations contained in Second Supplemental Appropriations Act, 1973, for period of 20 days following enactment of 1974 act 129
Judgments
Indefinite appropriation availability. (*See* APPROPRIATIONS, Permanent indefinite, Judgments)
Necessary expenses availability. (*See* APPROPRIATIONS, Availability Expenses incident to specific purposes, Necessary expenses)
Permanent indefinite
Judgments
Against officers and employees
Judgments and costs (or compromise settlements) assessed against individual Internal Revenue Service employees determined to have been acting within the scope of their employment are payable from the indefinite appropriation established by 31 U.S.C. 724a if not over $100,000 in each case, but funds must be appropriated specifically for that purpose if the amount exceeds $100,000, and in either case, judgment must be regarded as obligation of the United States 782
United Nations Children's Fund (UNICEF)
Authorization *v.* appropriation differences
Where Foreign Assistance Act of 1973 earmarked $18 million for UNICEF while appropriation act earmarked only $15 million, the lesser figure is controlling, since from legislative histories it appears that in authorizing funding at higher level Congress did not intend to reduce funding of other international organizations and that lesser amount in appropriation act, representing the latest expression of Congress, was intended to constitute both maximum and minimum amount available for UNICEF 695

ARBITRATION Page

Award

Compliance

Restoration of leave and payment of per diem

Two Navy employees remained at temporary duty station on Sunday, after completing assignment on Saturday, in order to perform return travel during regular workweek. Each was charged 8 hours leave and denied per diem in connection with the deferred travel. Navy may comply with arbitration award directing restoration of leave and payment of per diem since per diem costs for less than 2 days are considered reasonable for compliance with travel policy expressed at 5 U.S.C. 6101 (b)(2) and Navy is, thus, not precluded under E.O. 11491, sec. 12, by applicable law or regulations, from accepting such award ---------- 882

Grant of administrative leave

Implementation by agency

No legal authority

Employee who was injured and unable to perform regular duties but who could perform other limited duties submitted grievance alleging that agency did not comply with labor-management agreement in that it did not "make every effort" to find a limited duty position for him. Recommendation of arbitrator who upheld grievance that employee be granted 30 days administrative leave may not be implemented by agency since there is no legal authority to grant administrative leave in the circumstances ---------- 1054

Implementation by agency

Of purpose

Grant of back pay

Although agency may not properly implement arbitrator's award granting employee whose grievance was upheld 30 days administrative leave since no legal authority exists for such leave, it may implement purpose of award by granting employee back pay under 5 U.S.C. 5596 if it is found that had agency not violated collective bargaining agreement by not making every effort to find employee an alternate job when he was incapacitated for performance of his regular duties a job would have been found for employee. However, arbitrator's award is advisory only and may be implemented at discretion of agency ---------- 1054

ATTORNEYS

Fees

Overhead expenses part of fee

As normally an attorney appointed under Criminal Justice Act of 1964, 18 U.S.C. 3006A, is expected to use his office resources, including secretarial help, to take dictated statements, and these overhead expenses are reflected in attorney's statutory fee, he may not be separately reimbursed for expenses except in unusual situations where extraordinary overhead-type expenses are incurred in order to prepare and conduct adequate defense, in which case such services, if otherwise eligible, may be considered "other services necessary for an adequate defense" under 18 U.S.C. 3006A(e) and be paid accordingly ---------- 638

ATTORNEY—Continued Page
Fees—Continued
Suits against judicial officers and entities

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

Government
Leaves of absence

U.S. attorneys who are compensated at Executive Schedule rates are excluded from coverage of Annual and Sick Leave Act since 5 U.S.C. 6301(2)(x) exempts from coverage all officers appointed by President whose basic rates of pay exceed highest General Schedule (GS) level and although 5 U.S.C. 6301(2)(x) refers to individual whose rate of pay "exceeds" highest GS level, intent of Act can be effected only if those whose salaries are intended to exceed highest GS level by virtue of assignment to Executive Schedule are exempted even though GS–18 and Executive Level V officials may at times receive equal pay. Furthermore, while discretionary exemption authority in 5 U.S.C. 6301(2)(xi) prohibits President from excluding any U.S. attorney from coverage under the leave act, clause does not operate to nullify statutory exclusion required by 5 U.S.C. 6301(2)(x) 577

Hire
Reemployed annuitants

In view of funds provided in its current appropriation for "special counsel fees," Federal Communications Commission may procure services of a retired Govt. attorney in connection with investigation and proceedings he directed prior to retirement, and amount payable to him is not subject under 5 U.S.C. 8344(a) to set-off by amount of his retirement annuity since retiree's expertise and thorough knowledge in matter will enable him to perform functions described in "Statement of Work" contained in proposed contract independently rather than under an employer-employee relationship 702

AUTOMATIC DATA PROCESSING SYSTEMS (*See* EQUIPMENT, Automatic Data Processing Systems)

AUTOMOBILES
Transportation. (*See* TRANSPORTATION, Automobiles)

AWARDS Page

Contract awards. (*See* **CONTRACTS, Awards**)

Finders of Government property

Alien

In absence of specific authority for paying rewards, a reward may not be paid to law enforcement official of Thailand for recovery of stolen U.S. Air Force property. However, Secretary of Air Force may authorize payment of reward from amount designated for emergencies and extraordinary expenses in current appropriation "Operation and Maintenance of the Air Force," an amount which may only be expended upon approval or authority of Secretary 707

Informers

Violations of customs laws

Comprehensive Drug Abuse Prevention and Control Act

Since sec. 511(d) of Comprehensive Drug Abuse Prevention and Control Act incorporates 19 U.S.C. 1619 only in connection with forfeitures of property, payment to an informer on basis of forfeited bail bond, which is treated as fine under 19 U.S.C. 1619, is not authorized under sec. 511(d) of act. However, sec. 516(a) of act, which authorizes payments to informers by Attorney General, appears applicable 693

BAILMENTS

Liability of bailee

Property losses in transit

Bidder's claim for incidental expenses that resulted from loss of unendorsed cashier's check, payable to the order of GSA and submitted as bid deposit incident to sale of real property and which was lost in mail when returned after all bids were rejected is denied because GSA, as pledgee, is only obligated to use ordinary care and its use of certified mail, return receipt requested, conforms with customary practice and pledgees need not insure pledged property 607

Long-term leased vehicles

Member with motor vehicle under long-term lease is not entitled to shipment of leased vehicle overseas at Govt. expense since 10 U.S.C. 2634 and para. M11000-1, JTR, provide vehicle must be owned by member, and long-term lease is bailment agreement in which lessee is given possession, but lessor retains ownership 924

BANKS

Loans

Participation with Small Business Administration

Interest rates

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

BIDDERS Page

Debarment

Authority of General Accounting Office

Allegation of noncompetitive practices because of communality of ownership and financial interests between two bidders is referred to DSA for consideration in accordance with ASPR 1-111 and ASPR 1-600. GAO has discontinued practice of reviewing bid protests of contracting officer's affirmative responsibility determination, except for actions by procuring officials which are tantamount to fraud, and GAO has no authority to administratively debar or suspend other than for violations of Davis-Bacon Act, which is not relevant here 931

Qualifications

Administrative determinations

Acceptance

Contracting officer's determination that successful bidder was responsible was not arbitrary, capricious, or unsupported by substantial evidence 767

Current determination of rejected bidder

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

Capacity, etc.

Plant facilities, etc.

Review of record concerning determination of bidder's nonresponsibility to perform contract for provision of hard copies and microfiche of educational literature indicates that although bidder has equipment capability, with exception of backup copier, contracting officer's finding on this responsibility factor, as well as finding that bidder lacks necessary personnel, is not patently unreasonable 932

What constitutes

Although determination that a small business concern submitting low offer under request for proposals to perform refrigerated warehouse services, involving receipt, storage, assembly, and distribution of food, including export transportation, was nonresponsible in areas of health, safety, and sanitation should have been promptly referred, pursuant to par. 1-705.4(c)(iv) of Armed Services Procurement Reg., to Small Business Admin. for certificate of competency consideration since deficiencies relate to "capacity" defined as "overall ability * * * to meet quality, quantity, and time requirements," issuance of certificate of urgency in lieu was justified and reasonable as delay was not administratively created, and continuation of services was essential. Furthermore, rule is that responsibility determination unless arbitrary, capricious, or not based on substantial evidence is acceptable 15

BIDDERS—Continued Page

Qualifications—Continued

Experience

Effect of requirement on subcontracting

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

Financial responsibility

Improvement after contract award

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

Joint venture agreement effect

Where low bidder entered into joint venture agreement to obtain necessary resources to perform a janitorial service contract prior to denial by SBA of request for certificate of competency (COC), request which upon resubmission to SBA was not accepted because SBA questioned impact of joint venture on bidder's responsiveness and stated it would not accept referral unless new information was developed relative to bidder's financial condition, and additionally that if joint venture was allowed bidder if still considered responsive could possibly perform, contracting officer should not have ignored joint venture agreement, and agreement should be reassessed and if bidder is found to be responsible, contract awarded incumbent contractor should be terminated for convenience of Govt. and award made to low bidder 496

Geographical location requirement

Although basic principle underlying Federal procurement is to maximize full and free competition, legitimate restrictions on competition may be imposed when needs of procuring agency so require, and Home Port Policy to perform ship repairs in vessel's home port to minimize family disruption is not illegal restriction since useful or necessary purpose is served. Therefore low bidder under two invitations to perform dry-

BIDDERS—Continued Page

Qualifications—Continued

Geographical location requirement—Continued

docking and repair of utility landing craft in San Diego area who offered to perform at Terminal Island properly was denied contract awards. However, where all or most of vessel's crew are unmarried, home port restriction does not serve to foster Home Port Policy, and therefore, if feasible determination can be made prior to issuance of solicitation that geographical restriction has no applicability, it should not be imposed---- 102

Contention that contracting agency's needs do not justify scope of 75-mile geographical restriction in IFB and allegations that protester's past experience shows it can meet requirements of specifications do not furnish basis to conclude use of limitation was an abuse of discretion, since stating restriction in terms of mileage radius rather than highway miles represents reasonable approach, and fact that protester might be able to meet requirements does not *per se* render restriction unreasonable, as determining whether certain needs justify particular restriction is matter of agency judgment, and adequate competition was apparently generated---- 522

License requirement

Administrative determination

Requirement in several invitations for bids that bidder have license to conduct guard service business in State of N.Y. or that contractor be licensed as qualified guard service company in Va., County of Fairfax, and Md., Montgomery County, is not restrictive of competition but proper exercise of procurement responsibility for when contracting officer is aware of local licensing requirements, he may take reasonable step of incorporating them into solicitation to assure that bidder is legally able to perform contract by requiring bidder to comply with specific known State or local license requirements in order to establish bidder responsibility. While it may be possible for unlicensed company to provide adequate guard service, it is not unreasonable for contracting officer to believe that appropriate performance of guard service could be obtained only from licensed agencies---- 51

Contractor not authorized carrier

Amount claimed for movement of tug and barge under canceled contract because contractor did not have required ICC authority is not reimbursable as agent of Govt. may not waive requirement that a water carrier in interstate commerce is subject to regulation under Interstate Commerce Act, and since no benefit accrued to Govt., payment on a *quantum meruit* basis may not be made---- 620

ICC certification

ICC decision in *Kingpak, Investigation of Operations*, 103 M.C.C. 318, requiring motor carriers providing transportation under contracts for packing and containerization of used household goods to have ICC operating authority, permits carriers to act as freight forwarders of used household goods exempt from requirement for having such authority, but since bidder was low only on portion of IFB calling for services relating to unaccompanied baggage, which is not regarded as used household goods, contracting officer properly rejected bid because of lack of ICC operating authority---- 750

BIDDERS—Continued Page
Qualifications—Continued
License requirement—Continued
Time for compliance

There is no basis for concluding that award was improperly made because Army did not allow sufficient time for ICC to process low bidder's application for temporary authority, since award was not made until 2 months after application was filed with ICC---------- 750

License requirement in a Govt. solicitation is matter of bidder responsibility since bidder has duty to ascertain its legal authority to perform Govt. contract within a State, and requirement not relating to bid evaluation need not be submitted before bid opening. Therefore, low bidder who did not submit licensing and registration information with its bid to furnish taxi and pick-up services is considered to be responsive bidder. A State may enforce its license requirements provided State law is not opposed to or in conflict with Federal policies or laws, or does not interfere with execution of Federal powers. Also, equipment information intended to determine bidder capacity and ability to perform service contract is matter of bidder responsibility, not bid responsiveness, as is fact that bidder was in the ambulance business and not taxi business at time bids were opened---------- 36

Manufacturer or dealer
Administrative determination
Labor Department

Bidder's qualification as "regular dealer" or "manufacturer" under Walsh-Healey Act is determination vested in contracting officer, subject to final review by Dept. of Labor, and GAO is without authority to review; and where bid represents bidder is "regular dealer," protester's contention that bidder actually is "manufacturer" provides no basis to question bid responsiveness---------- 932

Prior unsatisfactory service
Administrative determination

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

Qualified Offerors List

Although protest against award of contract under RFP issued by National Highway Traffic Safety Admin. will not be considered as it was untimely filed pursuant to sec. 20.2 of GAO Interim Bid Protest Procedures and Standards, exception is taken to establishment and operation of Qualified Offerors List (QOL) by Admin. to curtail excessive production of solicitation packages, but which in fact is presolicitation procedure for determining prospective bidder's or offeror's responsibility,

BIDDERS—Continued Page

Qualifications—Continued

Qualified Offerors List—Continued

and as procedure unduly restricts competition it should be eliminated. Furthermore, Federal Procurement Regs., relied upon as authority to establish QOL, merely permit establishment of mailing list to assure adequate source of supply and to spell out necessary procedures for reasonable restriction on number of solicitations available..... 209

Small business concerns

Nonreferral for certification justification

Time of the essence

Although determination that a small business concern submitting low offer under request for proposals to perform refrigerated warehouse services, involving receipt, storage, assembly, and distribution of food, including export transportation, was nonresponsible in areas of health, safety, and sanitation should have been promptly referred, pursuant to par. 1-705.4(c)(iv) of Armed Services Procurement Reg., to Small Business Admin. for certificate of competency consideration since deficiencies relate to "capacity" defined as "overall ability * * * to meet quality, quantity, and time requirements," issuance of certificate of urgency in lieu was justified and reasonable as delay was not administratively created, and continuation of services was essential. Furthermore, rule is that responsibility determination unless arbitrary, capricious, or not based on substantial evidence is acceptable..... 15

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

Status determination

Determination by Small Business Administration (SBA) that bidder is small business is conclusive upon Federal agencies and any appeal from determination must be filed with SBA..... 775

State, etc., licensing requirements

License requirement in a Govt. solicitation is matter of bidder responsibility since bidder has duty to ascertain its legal authority to perform Govt. contract within a State, and requirement not relating to bid evaluation need not be submitted before bid opening. Therefore, low bidder who did not submit licensing and registration information with its bid to furnish taxi and pick-up services is considered to be responsive bidder. A State may enforce its license requirements provided State law is not opposed to or in conflict with Federal policies or laws, or does not interfere with execution of Federal powers. Also, equipment information intended to determine bidder capacity and ability to perform service contract is matter of bidder responsibility, not bid responsiveness, as is fact that bidder was in the ambulance business and not taxi business at time bids were opened..... 36

BIDDERS—Continued Page

Qualifications—Continued

State, etc., licensing requirements—Continued

Requirement in several invitations for bids that bidder have license to conduct guard service business in State of N.Y. or that contractor be licensed as qualified guard service company in Va., County of Fairfax, and Md., Montgomery County, is not restrictive of competition but proper exercise of procurement responsibility for when contracting officer is aware of local licensing requirements, he may take reasonable step of incorporating them into solicitation to assure that bidder is legally able to perform contract by requiring bidder to comply with specific known State or local license requirements in order to establish bidder responsibility. While it may be possible for unlicensed company to provide adequate guard service, it is not unreasonable for contracting officer to believe that appropriate performance of guard service could be obtained only from licensed agencies 51

Subcontractors

Insurance, affirmative action plans, percentage of work

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

Responsibility *v.* bid responsiveness

Bid deviations

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

Bid rejection erroneous

Failure of low bidder to list buses it would use in performing transportation service contracts did not render bid nonresponsive as omission relates to responsibility of bidder rather than to responsiveness of bid,

BIDDERS—Continued Page

Responsibility *v.* bid responsiveness—Continued

Bid rejection erroneous—Continued

since procurement requirement was for furnishing of services and not for furnishing buses, except as incident to furnishing services, and since bidder is legally obligated to furnish buses having acceptable minimum characteristics. Therefore bid should not have been rejected without specific determination that company was nonresponsive 396

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

Bidder ability to perform

Bid that failed to list subcontractors which was submitted under solicitation for retreading of pneumatic tires that limited subcontracting to not more that 50 percent of work and that called for listing of subcontors for purpose of establishing bidder responsibility may be considered. It is only when subcontractor listing relates to material requirement of solicitation that bid submitted without listing is nonresponsive, and fact that invitation imposed 50 percent limitation on subcontracting does not convert subcontracting listing requirement to matter of bid responsiveness since purpose of listing is to determine bidder capability to perform, information that may be submitted subsequent to bid opening. Furthermore, "Firm Bid Rule" was not violated since bidder may not withdraw its bid and bid acceptance will result in binding contract 27

License requirement in a Govt. solicitation is matter of bidder responsibility since bidder has duty to ascertain its legal authority to perform Govt. contract within a State, and requirement not relating to bid evaluation need not be submitted before bid opening. Therefore, low bidder who did not submit licensing and registration information with its bid to furnish taxi and pick-up services is considered to be responsive bidder. A State may enforce its license requirements provided State law is not opposed to or in conflict with Federal policies or laws, or does not interfere with execution of Federal powers. Also, equipment information intended to determine bidder capacity and ability to perform service contract is matter of bidder responsibility, not bid responsiveness, as is fact that bidder was in the ambulance business and not taxi business at time bids were opened 36

Review of record concerning determination of bidder's nonresponsibility to perform contract for provision of hard copies and microfiche of educational literature indicates that although bidder has equipment capability, with exception of backup copier, contracting officer's finding on this responsibility factor, as well as finding that bidder lacks necessary personnel, is not patently unreasonable 932

BIDDERS—Continued Page

Responsibility *v.* bid responsiveness—Continued

Equal Opportunity Certification

Under IFB for hydraulic turbines, bidder's failure to complete Equal Opportunity Certification and its insertion of words "NOT APPLICABLE" under Equal Employment Compliance representation do not render bid nonresponsive, since both provisions relate to bidder responsibility and, therefore, it is considered that no exception was taken in bid to any material requirement of IFB. To extent B–161430, July 25, 1967 is inconsistent with this and other cited decisions, it will no longer be followed 487

Information

License requirement in a Govt. solicitation is matter of bidder responsibility since bidder has duty to ascertain its legal authority to perform Govt. contract within a State, and requirement not relating to bid evaluation need not be submitted before bid opening. Therefore, low bidder who did not submit licensing and registration information with its bid to furnish taxi and pick-up services is considered to be responsive bidder. A State may enforce its license requirements provided State law is not opposed to or in conflict with Federal policies or laws, or does not interfere with execution of Federal powers. Also, equipment information intended to determine bidder capacity and ability to perform service contract is matter of bidder responsibility, not bid responsiveness, as is fact that bidder was in the ambulance business and not taxi business at time bids were opened 36

Licensing-type requirements

Rejection of low bidder as nonresponsive because it failed to provide evidence of ICC operating authority regarded by Army as necessary for performance of packing and containerization contract was improper, since licensing-type requirements are matters of responsibility 750

Waiver of misdescription

Execution

Revival of bid

Bidder's execution of waiver of misdescription in a solicitation upon agency's request after bid expired may be viewed as revival of bid. Since all other bids were rejected, Govt. may accept revived bid rather than readvertise if such action is in Govt.'s best interest 737

BIDS

Acceptance

Notice

Contention that no contract came into existence under second step of two-step procurement conducted pursuant to 10 U.S.C. 2305(c) for housing construction because bid accepted orally was not effective before expiration of Davis-Bacon Wage Rate Determination and bid itself, or alternative allegation that bid was nonresponsive and also contained bid price error and, therefore, there was no contract to terminate for default is refuted by record which evidences oral notification of contract approval made subsequent to written notification of award made subject to such approval was in compliance with IFB. Furthermore, failure to

BIDS—Continued Page

Acceptance—Continued

Notice—Continued

describe actual amount of work to be performed by contractor did not make its bid nonresponsive as invitation did not require this information, and variances between price bid and Govt.'s estimate and other bids submitted was insufficient to place contracting officer on constructive notice of error 167

Acceptance time limitation

Extension

Effect not prejudicial to other bidders

Low bidder's failure to formally extend bid in writing prior to expiration date does not preclude acceptance of bid subsequently extended, notwithstanding fact that another bidder extended its bid prior to expiration date, since low bidder's participation in bid protest filed by other bidder shows intention to keep bid open for duration of protest and there is no indication that acceptance of low bid would have detrimental effect on competitive bidding system or be prejudicial to other bidders 775

Protest determination

Bid protest filed after bid opening and challenging estimates and other alleged defects in solicitation is untimely under 4 CFR 20.2(a), notwithstanding protester's assertion that defects became apparent only after incumbent contractor's bid was opened, since record indicates that alleged defects were or should have been apparent to protester prior to bid opening 775

All or none

Award to one bidder advantageous

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

Ambiguous

Bid modification

Award for transportation services evaluated on basis of oral announcement at bid opening instead of evaluation method provided in IFB which would have resulted in different bidder being successful should be terminated for the convenience of Govt. and requirement resolicited, since oral statement was not binding on bidders; moreover, bids may not be evaluated on different basis than stated in IFB. Bidders were effectively denied opportunity to consider whether bids should be modified and FPR 1-2.207(d) precludes award in such circumstance 797

Bidders, generally. (*See* **BIDDERS**)

BIDS—Continued Page

Bonds. (*See* **BONDS, Bid**)

Brand name or equal. (*See* **CONTRACTS, Specifications, Restrictive, Particular make**)

Buy American Act

Buy American Certificate

Omission

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

Evaluation

Post-delivery requirements

Exclusion of cost of travel for post-delivery "no charge" services to be performed by installation engineer in evaluation by Bonneville Power Admin. of low foreign bid to furnish power circuit breakers for purpose of determining Buy American Act (41 U.S.C. 10a–10c) differential to be added to bid was correct application of holding in 41 Comp. Gen. 70 to the effect cost of post-delivery services was for exclusion from differential computation, and this method of evaluation is in accord with sec. 14–6.104–4(f) of Dept. of Interior Procurement Regs. and is consistent with E.O. 10582, Dec. 17, 1954, as amended, and FPR 1–6.1. Furthermore, services of engineer and his travel costs properly were not considered components of delivered circuit breakers within meaning of FPR 1–6.101 (b) that components are those articles, materials, and supplies which are directly incorporated in end product---------- 259

Foreign product determination

New items and trade-in allowances

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

Competitive

Two-step procurement. (*See* **BIDS, Two-step procurement**)

BIDS—Continued Page

Competitive system

Administrative discretion to negotiate

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

Alternate, etc., bids

Award for separate contract line items of fork lift trucks on basis of permitted alternate delivery schedule that offered delivery 90 days earlier than prescribed by invitation for bids and, therefore, was nonresponsive to mandatory requirement that first production units be delivered no earlier than a minimum of 365 days after approval of first article test report—requirement intended to assure delivery of spares, repair parts, and publication concurrently with first production units—should be terminated, procurement resolicited with delivery provisions informing bidders as to permissible deviations and consequences of nonconformity in accordance with competitive bidding system, and appropriate congressional committees informed, pursuant to sec. 236 of the Legislative Reorganization Act, of action taken on this recommendation. Furthermore, solicitation makes no provision that in event an alternate delivery schedule is unacceptable required schedule will govern. Modified by 53 Comp. Gen. 320 32

Federal aid, grants, etc.

Equal Employment Opportunity programs

Under invitation issued by Federal grantee required by HEW regulation to conform with competitive system in construction of classroom building, low bidder who executed certificate relating to part I of bid conditions that required listing of trades to be employed and coverage that would be extended by New Orleans affirmative action plan but failed to sign part II certificate that involved commitment to various goals and specific steps contained in bid conditions or submit alternative affirmative action plan nevertheless submitted a responsive bid since in signing part I certification bidder is committed to comply with terms and conditions of New Orleans Plan and to submit alternative plan for trades not signatory to New Orleans Plan, thus meeting material requirements of invitation 451

Geographical location restriction

Although basic principle underlying Federal procurement is to maximize full and free competition, legitimate restrictions on competition may be imposed when needs of procuring agency so require, and Home Port Policy to perform ship repairs in vessel's home port to minimize family disruption is not illegal restriction since useful or necessary purpose is served. Therefore low bidder under two invitations to perform drydocking and repair of utility landing craft in San Diego area who offered to perform at Terminal Island properly was denied contract awards. However, where all or most of vessel's crew are unmarried, home port

BIDS—Continued Page
Competitive system—Continued
Geographical location restriction—Continued
restriction does not serve to foster Home Port Policy and, therefore, if feasible determination can be made prior to issuance of solicitation that geographical restriction has no applicability, it should not be imposed-- 102

Preservation of system's integrity
Invitation canceled and reinstated
Where readvertising of procurement would create auction atmosphere, because all prior bidders would participate in resolicitation and all bidders would most likely offer products previously offered, but at reduced prices, there was no cogent and compelling reason to justify cancellation of invitation and as cancellation was prejudicial to competitive system as award under initial solicitation would have served needs of Govt., original invitation for bids should be reinstated---------- 586

Restriction on competition
Legitimacy
Although visual inspection of carlot quantities of produce at growing areas is unduly restrictive of competition, use of such source inspection by Defense Supply Agency in its solicitation issued under negotiating authority of 10 U.S.C. 2304(a)(9), concerned with procurement of perishable or nonperishable subsistence supplies, was justified in view of wide latitude in prescribed standards and, therefore, rejection of noncomplying low bidder under two solicitations for carlot quantities of fresh vegetables was proper. However, attention of Director of agency is being drawn to the June 25, 1973 GAO audit report in which recommendation is made that consideration be given to possibility of drafting more exacting specifications so that number of items requiring field inspection might be reduced---------- 112

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

Delivery provisions
Alternate schedule
Nonresponsive
Bidder may not "fall back" on required schedule
Upon reconsideration of 53 Comp. Gen 32, which directed termination of contract award to low bidder under second step of two-step formally advertised procurement for fork lift trucks and line items because alternate delivery schedule offered by bidder did not provide for required delivery concurrency of first production units and of spares and and repair parts, low bid is still considered nonresponsive, notwith-

BIDS—Continued Page
Delivery provisions—Continued
Alternate schedule—Continued
Nonresponsive—Continued
Bidder may not "fall back" on required schedule—Continued
standing argument that low bidder can "fall back" on commitment in required delivery schedule since at best bid is amibguous, or viewed in light most favorable to bidder, bid to subject to two reasonable interpretations—under one it would be nonresponsive, and under the other responsive. However, in absence of clear indication of prejudice to other bidders, and since contractor will comply with the Govt.'s delivery schedule, decision is modified with respect to contract termination requirement and, therefore, reporting matter to appropriate congressional committees is no longer necessary 320

Erroneous award

Award for separate contract line items of fork lift trucks on basis of permitted alternate delivery schedule that offered delivery 90 days earlier than prescribed by invitation for bids and, therefore, was nonresponsive to mandatory requirement that first production units be delivered no earlier than a minimum of 365 days after approval of first article test report—requirement intended to assure delivery of spares, repair parts, and publication concurrently with first production units—should be terminated, procurement resolicited with delivery provisions informing bidders as to permissible deviations and consequences of nonconformity in accordance with competitive bidding system, and appropriate congressional committees informed, pursuant to sec. 236 of the Legislative Reorganization Act, of action taken on this recommendation. Furthermore, solicitation makes no provision that in event an alternate delivery schedule is unacceptable required schedule will govern. Modified by 53 Comp. Gen. 320 32

Evaluation. (*See* **BIDS, Evaluation, Delivery provisions**)
Deviations from advertised specifications. (*See* **CONTRACTS, Specifications, Deviations**)
Discarding all bids
Administrative determination
Faulty

Rejection under Nov. 29, 1972 solicitation for construction of anchored concrete retaining wall to provide erosion protection at Chalk Island, S.D., and all birds after bid opening on Jan. 4, 1973, because phases of work had to be performed in Dec. While water was at its lowest level was within scope of borad authority granted agencies in discard bids and readvertise procurement. Although contracting agency should have recognized before bids were exposed that ideal time to start work was in Dec. to allow contractor to work during entire non-navigation season and should have issued invitation early enough to make award by Dec., to to proceed with procurement solely because of administrative deficiencies would be contrary to sound procurement principles. 92

BIDS—Continued Page
Discarding all bids—Continued
Compelling reasons only
Fact that specifications are inadequate, ambiguous, or otherwise deficient is not a compelling reason, absent showing of prejudice, to cancel invitation and, therefore, invitation for Radiographic Polyester Film, canceled to correct salient characteristics, should be reinstated, since contradiction between salient characteristic and brand name product alone is not compelling reason for cancellation ---------- 586
Where readvertising of procurement would create auction atmosphere, because all prior bidders would participate in resolicitation and all bidders would most likely offer products previously offered, but at reduced prices, there was no cogent and compelling reason to justify cancellation of invitation and as cancellation was prejudicial to competitive system as award under initial solicitation would have served needs of Govt., original invitation for bids should be reinstated ---------- 586
Negotiation in lieu of advertising
Although deletion of total set-aside for small business concerns from IFB for hamsters without verification of potential bidders' intentions will not be questioned in view of concurrence of SBA representative to deletion, it is recommended that in future procurements decisions to make or delete total set-aside be carefully considered, potential sources of small business interest be thoroughly investigated, and basis of determination be fully explained and documented. Furthermore, discarding all bids under amended invitation that deleted set-aside and negotiation of procurement under 41 U.S.C. 252(c)(10) were improper actions since deviations in three bids received affected bidder responsibility and not bid responsiveness. However, negotiations currently being conducted may be continued as needs of contracting agency have changed since opening of bids and use of negotiations will not negate maximum possible competition which advertised procurements attempt to further ---------- 221
Not a mandatory requirement
Bidder's execution of waiver of misdescription in a solicitation upon agency's request after bid expired may be viewed as revival of bid. Since all other bids were rejected, Govt. may accept revived bid rather than readvertise if such action is in Govt.'s best interest ---------- 737
Readvertisement justifications
General Accounting Office direction
An IFB which only stated in general terms the nature and extent of descriptive literature desired was defective because it failed to comply with sec. 1-2.202-5 of Federal Procurement Regs. (FPR) that a descriptive data clause detail those components of data and type of data desired. As the industrial exhauster solicited is still required, and cannot be procured without submission of descriptive data, canceled invitation should be readvertised in consonance with FPR descriptive literature requirements ---------- 622

BIDS—Continued Page

Discarding all bids—Continued

Readvertisement justifications—Continued

Nonresponsiveness of bids

Bidder, which by its bid on water purification system transformed design specification for membrane with required pH range of 1–13 into performance specification for its entire system and offered membrane having range of only pH 4.5–5.0, should have been declared nonresponsive since transformation of specification should have been accomplished by (1) IFB amendment, or (2) rejection of all bids and readvertisement... 909

Reinstatement

Where readvertising of procurement would create auction atmosphere, because all prior bidders would participate in resolicitation and all bidders would most likely offer products previously offered, but at reduced prices, there was no cogent and compelling reason to justify cancellation of invitation and as cancellation was prejudicial to competitive system as award under initial solicitation would have served needs of Govt., original invitation for bids should be reinstated..... 586

Discounts

Mistake alleged

Offer of a 10-day discount is not such an apparent mistake that contracting officer was required to verify bid since offer was not precluded by solicitation and, furthermore, Govt. may take advantage of discount when nondiscounted bid is low as provided by ASPR 2-407.3(d)..... 502

Where protester contends that it either intended to offer a 20-day discount but indicated a 10-day discount or mistakenly believed a 10-day discount could have been evaluated under IFB, a 20-day discount cannot be considered since it would cause displacement of another bidder without protester's actual intent being evident on face of bid.... 502

Modification after bid opening

Offer to change a 10-day discount to a 20-day discount after bid opening is considered a late bid modification, acceptance of which is precluded by ASPR 2-305 and par. 8(a) of solicitation instructions and conditions since bid involved is not low bid..... 502

Evaluation

Conformability of equipment, etc. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered**)

Delivery provisions

Lowest overall cost to Government

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

BIDS—Continued Page

Evaluation—Continued

Delivery provisions—Continued

Lowest overall cost to Government—Continued

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

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

Estimates

Requirements contract

Invitation for bids is defective where no estimated quantities of services advertised are stated as required by FPR 1-3.409(b)(1) and prior GAO decisions ---------- 797

Factors other than price

Criteria inherent in solicitation

When similarly priced bids are received, phrase in Federal Procurement Regs. sec. 1-2.407-6(a) that "other factors properly to be considered" in determining equality of bids means those criteria which are inherent in solicitation and not those extraneous circumstances which may become significantly attractive to procurement activity only because tie bids have been received, and incumbent contractor's past performance record is just such an extraneous circumstance ---------- 466

Manuals

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

BIDS—Continued Page

Evaluation—Continued

Method of evaluation

Propriety

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

Negotiated procurement. (*See* **CONTRACTS, Negotiation, Evaluation factors**

On basis other than on invitation

Information deviating from specifications

Award for transportation services evaluated on basis of oral announcement at bid opening instead of evaluation method provided in IFB which would have resulted in different bidder being successful should be terminated for the convenience of Govt. and requirement resolicited, since oral statement was not binding on bidders; moreover, bids may not be evaluated on different basis than stated in IFB. Bidders were effectively denied opportunity to consider whether bids should be modified and FPR 1–2.207(d) precludes award in such circumstance 797

Failure to furnish something required. (*See* **CONTRACTS, Specifications, Failure to furnish something required)**

"Firm Bid Rule"

Application of rule

Bid that failed to list subcontractors which was submitted under solicitation for retreading of pneumatic tires that limited subcontracting to not more than 50 percent of work and that called for listing of subcontractors for purpose of establishing bidder responsibility may be considered. It is only when subcontractor listing relates to material requirement of solicitation that bid submitted without listing is nonresponsive, and fact that invitation imposed 50 percent limitation on subcontracting does not convert subcontracting listing requirement to matter of bid responsiveness since purpose of listing is to determine bidder capability to perform, information that may be submitted subsequent to bid opening. Furthermore, "Firm Bid Rule" was not violated since bidder may not withdraw its bid and bid acceptance will result in binding contract 27

Additional cost due to devaluation of dollar to corporation in business of producing drafting and engineering instruments, measuring devices and precision tools to obtain supplies from abroad to meet contractual commitments to Govt. may not be reimbursed to corporation by increasing any bid price open for acceptance or any contract price since devaluation of dollar is attributable to Govt. acting in its sovereign capacity and Govt. is not liable for consequences of its acts as a sover-

BIDS—Continued Page
"Firm Bid Rule"——Continued
Application of rule—Continued
eign; no provision was made for price increase because cost of performance might be increased; and under "firm-bid rule," bid generally is irrevocable during time provided in IFB for acceptance of a bid..... 157

Labor stipulations. (*See* CONTRACTS, Labor stipulations)
Late
Mail delay evidence
Agency obtained evidence effect
Contracting officer acted in accordance with advice of postal officials in accepting late registered mail bid on basis that lateness was due solely to delay in mails for which bidder was not responsible. Award will not be disturbed because it later appears that postal officials' advice may have been erroneous..... 767

Procedure to obtain
It was not improper for contracting officer, rather than low bidder, to have gathered information upon which determination to accept late bid was made. Contracting officer was not obligated to conduct hearing prior to making his determination..... 767

Modification
Discount terms
Offer to change a 10-day discount to a 20-day discount after bid opening is considered a late bid modification, acceptance of which is precluded by ASPR 2-305 and par. 8(a) of solicitation instructions and conditions since bid involved is not low bid..... 502

Proposals and quotations. (*See* CONTRACTS, Negotiation, Late proposals and quotations)
Mistakes
Allegation after award. (*See* CONTRACTS, Mistakes)
Correction
Still lowest bid
Worksheets submitted to substantiate allegation of error in low lump-sum bid to perform janitorial services having established error occurred in bid preparation by subtracting rather than adding profit item, the bid may be corrected. Furthermore, although bidder made no claim of error for other items the agency contends were omitted in bid preparation that does not preclude consideration of bid as corrected since corrected bid approximates Govt.'s estimate for job and evidence indicates bid would be low even if omitted items were to be added to bid..... 597

Discount terms
Offer of a 10-day discount is not such an apparent mistake that contracting officer was required to verify bid since offer was not precluded by solicitation and, furthermore, Govt. may take advantage of discount when nondiscounted bid is low as provided by ASPR 2-407.3(d).. 502

Evidence of error
"Clear and convincing evidence" of error
While GAO has right of review, authority to correct mistakes alleged after bid opening but prior to award vests in procuring agency, and as weight to be given evidence submitted in support of error is question

BIDS—Continued Page
Mistakes—Continued
Evidence of error—Continued
"Clear and convincing evidence" of error—Continued
of fact, determination by designated evaluator of evidence, to whom matter was referred pursuant to ASPR 2-406.3(b)(1) and (e)(3), to correct error since work sheets of low bidder established by clear and convincing evidence that alleged error occurred, showed how it occurred, and that price bid was only approximately 35 percent of price intended, will not be disturbed by GAO, for work sheets alone can constitute clear and convincing evidence of error, and fact that procuring activity determined evidence was not clear and convincing in no way bound evaluator or reflected on independent consideration of evidence. Furthermore, ASPR 2-406 procedure for evaluating bid mistakes applies whether procurement is routine or complicated 232

Determination procedure
Apparent computation of certain individual items on worksheets furnished in support of error in bid after total price was determined rather than before is a logical if not an optimum procedure and does not reasonably put authenticity of worksheets into question 597

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

Intended bid price uncertainty
Bid rejection
Where protester contends that it either intended to offer a 20-day discount but indicated a 10-day discount or mistakenly believed a 10-day discount could have been evaluated under IFB, a 20-day discount cannot be considered since it would cause displacement of another bidder without protester's actual intent being evident on face of bid 502

Unconscionable to take advantage
Rule
Fact that low bidder under IFB to furnish fitting assemblies verified its bid price prior to award does not preclude relief after award from mistake in bid where it would be unconscionable to require contract performance, even though contractor's potential loss would not be very great or that mistake was due to negligence in obtaining complete set of specifications and, therefore, contract awarded may be canceled. Furthermore, under ASPR 2-406.3(e)(2), contracting officer is not required

BIDS—Continued Page

Mistakes—Continued

Unconscionable to take advantage—Continued

Rule—Continued

to accept low bid which is very far below other bids or Govt.'s estimated price, notwithstanding bid verification, and as low bid was approximately 26 percent of next two higher bids for production unit and one-twelfth of next higher bid for first article, for application is unconscionability theory that where mistake is so great it could be said Govt. was obviously getting something for nothing relief should be allowed..... 187

Verification

Basis of low bid verification

Acceptance of bid at aggregate amount quoted—bid which stated "Bid based on award of all items" and offered prompt payment discount—under invitation for 37 items of electrical parts and equipment to be bid on individually and bid to show total net amount, without verification of aggregate bid although it was substantially below total net amounts shown in other bids and next lowest bid was verified, entitles supplier of items, pursuant to purchase order issued, to adjustment in price to next lowest aggregate bid, less discount offered, since contracting officer considered there was possibility of error in higher bid he should have suspected lower bid likewise was erroneous, and supplier having been overpaid on basis of item pricing, refund is owing Govt. for difference between amount paid supplier and next lowest bid..... 190

Modification

Ambiguous

Award for transportation services evaluated on basis of oral announcement at bid opening instead of evaluation method provided in IFB which would have resulted in different bidder being successful should be terminated for the convenience of Govt. and requirement resolicited, since oral statement was not binding on bidders; moreover, bids may not be evaluated on different basis than stated in IFB. Bidders were effectively denied opportunity to consider whether bids should be modified and FPR 1-2.207(d) precludes award in such circumstances.... 797

Negotiated procurement. (*See* **CONTRACTS, Negotiation**)

Offer and acceptance. (*See* **CONTRACTS, Offer and acceptance**)

Omissions

Information

Essentiality

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

BIDS—Continued Page

Preparation

Costs

Recovery

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

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

GAO is aware of no authority to support bidder claim for "damages and a reward for our valuable suggestions." However, it may be, we do not decide, that protester would have valid claim for bid preparation costs under criteria of *Excavation Construction Inc.* v. *United States*, No. 408–71, U.S. Ct. Cl., Apr. 17, 1974; *Keco Industries, Inc.* v. *United States*, No. 173–69, U.S. Ct. Cl., Feb. 20, 1974; and *Keco Industries* v. *United States*, 192 Ct. Cl. 773, 428 F. 2d 1233 (1970). Should protester choose to file such claim GAO would be obliged to consider it under above-noted case law and make determination at that time 909

Prices

Unreasonably low

Even though low bid under two-step procurement for pump testing system was substantially less than other bids, award to low bidder was proper since bidder verified its bid was correct, agency determined that proposal would meet specifications at price bid, and "buying in" allegation does not constitute basis to preclude award to an otherwise acceptable bidder 509

Protests. (*See* **CONTRACTS, Protests**)

Qualified

Acceptance of bid

Prejudicial to other bidders

Where IFB sets out maximum time for service and maintenance for water purification unit and procurement agency does not refute contention that system bid by successful bidder could not meet these service and maintenance requirements but merely states that with post-award change in chemicals to be used contractor will meet specification requirement, GAO concludes action was "waiver" of specification and was prejudicial in material respect to other bidders 909

BIDS—Continued Page

Qualified—Continued

Bid nonresponsive

Bidder, which by its bid on water purification system transformed design specification for membrane with required pH range of 1–13 into performance specification for its entire system and offered membrane having range of only pH 4.5–5.0, should have been declared nonresponsive since transformation of specification should have been accomplished by (1) IFB amendment, or (2) rejection of all bids and readvertisement. 909

Cover letter. (*See* **BIDS, Qualified, Letter, etc.**)

Letter, etc.

Containing conditions not in invitation

Bid submitted with cover letter which (1) clearly conditions bidder's performance on presence of certain physical site conditions which did not exist, and (2) attempts to reduce bidder's obligation to meet specifications as written is unacceptable qualified bid 909

Listing production facilities

Cover letter included with bid which lists bidder's production facilities in several cities and describes new facility to be opened in Washington, D.C., is responsibility information which does not qualify or condition bid or limit basis of responsibility determination 932

Qualified products. (*See* **CONTRACTS, Specifications, Qualified products**)

Rejection

Discarding all bids. (*See* **BIDS, Discarding all bids**)

Erroneous basis

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

Fact that an amendment to IFB which extended bid opening date and made material change in specifications was not formally acknowledged by low bidder did not require rejection of low bid where the bid was dated just 2 days before extended bid opening date evidencing bidder was aware of existence of amendment, and where bid date constituted implied acknowledgment of receipt of amendment, and since low bid should not have been rejected as nonresponsive, it is recommended that if low bidder is a responsible firm and contracting agency's operational capability will not be disrupted, the erroneously awarded contract should be terminated for convenience of Govt. and award made to low bidder at its bid price 569

Requests for proposals. (*See* **CONTRACTS, Negotiation, Requests for proposals**)

Samples. (*See* **CONTRACTS, Specifications, Samples**)

Specifications. (*See* **CONTRACTS, Specifications**)

BIDS—Continued Page

Subcontracts

Applicability of Federal procurement rules

Under invitation issued by Federal grantee required by HEW regulation to conform with competitive system in construction of classroom building, low bidder who executed certificate relating to part I of bid conditions that required listing of trades to be employed and coverage that would be extended by New Orleans affirmative action plan but failed to sign part II certificate that involved commitment to various goals and specific steps contained in bid conditions or submit alternative affirmative action plan nevertheless submitted a responsive bid since in signing part I certification bidder is committed to comply with terms and conditions of New Orleans Plan and to submit alternative plan for trades not signatory to New Orleans Plan, thus meeting material requirements of invitation 451

Submission

Time extension for submission

Amended invitation requirement

Late receipt of amendment

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

Surplus property. (*See* **SALES**)

Tie

Procedure for resolving

Where two equal bids were received to perform international freight forwarding services and award was made to incumbent firm rather than drawing lots as required by Federal Procurement Regs. sec. 1–2.407–6(b), recommendation is made that contracting agency now draw lots and, if protester wins drawing, that award made be terminated for convenience of Govt. and that award be made to previously unsuccessful bidder for the remaining services. Modifies 37 Comp. Gen. 330 466

Trade-in allowances

Foreign product offered

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

BIDS—Continued Page

Two-step procurement

Bid protest procedures applicability

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

Evaluation

Costs

"Life cycle" *v.* "cost of ownership"

Deletion of "life cycle" costing evaluation factor and addition of "cost of ownership to the Government" factor in a reinstated solicitation after submission of oscilloscopes for qualification under step one of two-step negotiated procurement without giving offerors opportunity to modify their step one proposals in light of new introduced factors into procurement is sustained since there is no evidence of real prejudice to position of protester 632

Price acceptability

Even though low bid under two-step procurement for pump testing system was substantially less than other bids, award to low bidder was proper since bidder verified its bid was correct, agency determined that proposal would meet specifications at price bid, and "buying in" allegation does not constitute basis to preclude award to an otherwise acceptable bidder 509

Second step

Contract subject to approval

Contention that no contract came into existence under second step of two-step procurement conducted pursuant to 10 U.S.C. 2305(c) for housing construction because bid accepted orally was not effective before expiration of Davis-Bacon Wage Rate Determination and bid itself, or alternative allegation that bid was nonresponsive and also contained bid price error and, therefore, there was no contract to terminate for default is refuted by record which evidences oral notification of contract approval made subsequent to written notification of award made subject to such approval was in compliance with IFB. Furthermore, failure to describe actual amount of work to be performed by contractor did not make its bid nonresponsive as invitation did not require this information, and variances between price bid and Govt.'s estimate and other bids submitted was insufficient to place contracting officer on constructive notice of error 167

BIDS—Continued Page

Two-step procurement—Continued

Specifications

Revision

Propriety

Deletion of "life cycle" costing evaluation factor and addition of "cost of ownership to the Government" factor in a reinstated solicitation after submission of oscilloscopes for qualification under step one of two-step negotiated procurement without giving offerors opportunity to modify their step one proposals in light of new introduced factors into procurement is sustained since there is no evidence of real prejudice to position of protester 632

Technical proposals

Criteria sufficiency

Where specifications for two-step procurement of high takeoff angle antennas and ancillary items did not call for separate ladder and low bidder under Step II proposed to furnish ladder that would be integral part of antenna structure and only other bidder offered separate ladder on basis of prior experience, bidders were not competing on equal basis and contracting agency's acceptance of low bid without issuing amendment to specifications to establish criteria requires cancellation of Step II of invitation for bids and reopening of Step I phase of procurement on basis of amended specifications to assure equal bidding basis. Fact that two-step procedure combines benefits of competitive advertising with feasibility of negotiation does not obviate necessity for adherence to stated evaluation criteria and basis or essential specification requirements 47

Preparation costs, anticipated profits, etc.

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

BOARDS, COMMITTEES, AND COMMISSIONS

Compensation. (*See* **COMPENSATION, Boards, committees, and commissions**)

BONDS

Bid

Excessive amount

Minor informality

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

BUY AMERICAN ACT
Applicability
Contractors purchases from foreign sources
End product *v.* components
For purposes of Buy American Act (41 U.S.C. 10a–d), General Services Admin. properly evaluated general mechanics' tool kits being procured as domestic source end products, since each kit as an entirety—not individual tools contained therein—is an "end product" and cost of forcign component tools constituted less than 50 percent of cost of all components 726

Bids. (*See* **BIDS, Buy American Act**)
Small business concerns
Buy American Act *v.* small business requirements
Requirement of small business definition that end items to be furnished shall be manufactured or produced in U.S. is separate and distinct from Buy American Act requirements that preference be given to domestic source end products. Therefore, term "manufactured or produced" as used in small business definition is not regarded as "manufacturing" processes within contemplation of Buy American Act 463

CANAL ZONE
Employees
Hired locally
Home leave
Although employee, who entered service in Canal Zone, was given transportation agreement on basis of his travel to the Zone as dependent of employee with transportation agreement, he is not entitled to accumulate 45 days annual leave and home leave since he did not meet requirement of 5 U.S.C. 6304(b) that he be recruited from U.S. or territory or possession of U.S. outside the Zone. Further, home leave under 5 U.S.C. 6305(a) may not be granted since the employee is not entitled to accumulate 45 days annual leave 966
Status
"Territories and possessions"
Although employee, who entered service in Canal Zone and was given transportation agreement based on his former status as dependent of employee with transportation agreement, was not entitled to accumulate 45 days annual leave and home leave while stationed in the Zone, he was entitled to such benefits upon transfer to Mexico since the Zone is considered within the phrase "territories and possessions" of U.S. as used in 5 U.S.C. 6304(b)(1) covering the 45-day leave accumulation and employee entitled to such accumulation is entitled to home leave 966

CARRIERS
Common
State regulated
In evaluation of bids to furnish field desks to be shipped f.o.b. origin to several destinations, carriers whose rates were used by contracting agency in computing transportation costs may be regarded as "regulated common carriers" within meaning of ASPR 2–201(a)D(vi), whether they

CARRIERS—Continued Page

Common—Continued

State regulated—Continued

are regulated by ICC or State in which bidder's production facilities and delivery points are located since purpose of regulation is to insure that award is made to bidder offering lowest evaluated overall cost including transportation costs as required by ASPR 19-100 and ASPR 19-301. Furthermore, U.S. may utilize tenders issued by State-regulated carriers for intrastate shipments 443

Operating authority

I.C.C. or State

Status of carrier

Amount claimed for movement of tug and barge under canceled contract because contractor did not have required ICC authority is not reimbursable as agent of Govt. may not waive requirement that a water carrier in interstate commerce is subject to regulation under Interstate Commerce Act, and since no benefit accrued to Govt., payment on a *quantum meruit* basis may not be made 620

CEREMONIES AND CORNERSTONES

Dedication

Expense reimbursement

Since holding of dedication ceremonies and laying of cornerstones connected with construction of public buildings and public works are traditional practices, costs of which are chargeable to appropriation for construction of building or works, expense of engraving and chrome plating of ceremonial shovel used in ground breaking ceremony would be reimbursable and chargeable in same manner as any reasonable expense incurred incident to cornerstone laying or dedication ceremony but for fact evidence has not been furnished as to who authorized the chrome plating and engraving of shovel; where shovel originated; subsequent use to be made of shovel; and why there was 1-year lag between ground breaking ceremony and plating and engraving of shovel 119

CHECKS

Delivery

Banks

Retired pay

Although permissive authority in 31 U.S.C. 492(b) for issuance by disbursing officers, in accordance with regulations prescribed by Secretary of the Treasury, of composite checks to banks or financial institutions for credit to accounts of persons requesting in writing that recurring payments due them be handled in this manner includes issuance of Military Retired Pay checks, composite checks should not be issued without determination, pursuant to regulations to be prescribed by Secretary, of continued existence and/or eligibility of persons covered, and if provided by regulation deposits may be made to joint accounts as well as single accounts 75

CHECKS—Continued Page

Forgeries

Endorsement

Rubber-stamp

Reclamation action for proceeds of original check endorsed by unauthorized use of rubber-stamp imprint of payee's name should be continued against the cashing bank, a Georgia institution, since check issued to an out-of-State payee was negotiated on an endorsement made by an "unauthorized signature" within meaning of that term as prescribed by Uniform Commercial Code adopted by Georgia, and improper negotiation was due to no fault of payee who had been issued and cashed a substitute check and, therefore, passage of valid title to bank was precluded. Fraudulent negotiation was made possible by bank's failure to identify negotiator of check rather than by unauthorized endorsement. Use of rubber stamp—a rarity for individuals—and fact that check was drawn to out-of-State payee required greater degree of care to identify endorser than was exercised by endorsing bank 19

Nonreceipt

Expenses incidental to loss

Bidder's claim for incidental expenses that resulted from loss of unendorsed cashier's check, payable to the order of GSA and submitted as bid deposit incident to sale of real property and which was lost in mail when returned after all bids were rejected is denied because GSA, as pledgee, is only obligated to use ordinary care and its use of certified mail, return receipt requested, conforms with customary practice and pledgees need not insure pledged property 607

CIVIL SERVICE COMMISSION

Jurisdiction

Compensation matters

Determination of applicability of sec. 7(d)(1)(A) of Federal Advisory Committee Act to Executive Director of National Advisory Council on Vocational Education who is paid $36,000 per year plus yearly contribution of $6,888 towards retirement is not necessary, since authority of Council to hire without regard to civil service laws does not authorize Council to compensate him without regard to Classification Act. However, matter should be submitted to CSC which has jurisdiction to make final determinations as to applicability of Classification Act, and upon determination of proper rate of pay, request for waiver of any erroneous payments, if over $500, may be submitted to GAO 531

Retirement

National Guard technicians who are separated from civilian positions as result of loss of enlisted military status due to failure on part of National Guard to accept their reenlistment applications, although qualified, are considered to have been involuntarily separated and, therefore, entitled to severance pay provided under 5 U.S.C. 5595, except when it is reasonably established that failure to accept application for reenlistment is for cause based on charges of misconduct, delinquency, or inefficiency on part of enlisted member. Although GAO has no jurisdiction to determine whether qualified technician who is separated from civilian position because application for reenlistment is not accepted is precluded from receiving civil service retirement benefits based on involuntary separation, it is suggested reference in legislative history of National Guard Technicians Act of 1968 to "involuntary retirement" should be narrowly construed 493

CLAIMS Page

Assignments

Checks. (*See* **CHECKS, Delivery, Banks**)

Contracts

Business operation sold, etc.

Proposed novation agreement among contractor—wholly owned subsidiary of large concern—awarded two Govt. contracts for hydraulic turbines and other items, subcontractor who assumed responsibility to complete contracts upon the closing down of subsidiary plant and sale to foreign corporation of those assets not needed to perform contracts, and the Govt. may be approved if in best interest of Govt. Although novation agreement will contravene Anti-Assignment Act, 41 U.S.C. 15, since exception in ASPR 26-402(a) that permits recognition of third party as successor in interest to Govt. contract is not applicable as subcontractor's interests in contracts are not "incidental to the transfer" of subsidiary, there is no objection to recognition of assignment if it is administratively determined to be in best interests of Govt. 124

Personal property losses

Claims against carrier

Claim acquired by assignment pursuant to Military Personnel and Civilian Employees' Claims Act, 31 U.S.C. 240, against carrier for loss of antique Imari and Kutani Japanese porcelains in transit of Air Force officer's household goods properly was recovered by setoff against carrier who has denied liability because porcelains were not declared to have extraordinary value; loss was not listed at time of delivery; and shipment being only one in van it could not have been misdelivered. However, although of high value, antique porcelains are not articles of extraordinary value and since valuation placed on shipment was intended to include porcelains, separate bill of lading listing was not required, clear delivery receipt may be rebutted by parol evidence; and carrier's receipt of more goods at origin than delivered establishes *prima facie* case of loss in transit 61

Damages

Contracts

Valuable suggestions submitted with bid

GAO is aware of no authority to support bidder claim for "damages and a reward for our valuable suggestions." However, it may be, we do not decide, that protester would have valid claim for bid preparation costs under criteria of *Excavation Construction Inc.* v. *United States*, No. 408-71, U.S. Ct. Cl., Apr. 17, 1974; *Keco Industries, Inc.* v. *United States*, No. 173-69, U.S. Ct. Cl., Feb. 20, 1974; and *Keco Industries* v. *United States*, 192 Ct. Cl. 773, 428 F. 2d 1233 (1970). Should protester choose to file such claim GAO would be obliged to consider it under above-noted case law and make determination at that time 909

Doubtful

Military matters

Court's interpretation in *Edward P. Chester, Jr., et al.* v. *United States*, 199 Ct. Cl. 687, that words "shall if not earlier retired be retired on June 30," which are contained in mandatory retirement provision, 14 U.S.C. 288(a), did not absolutely forbid Coast Guard officers mandatorily retired on June 30 in 1968 or 1969, as well as officers held on active

CLAIMS—Continued Page
Doubtful—Continued
Military matters—Continued
duty beyond mandatory June 30 date, from retiring voluntarily under 14 U.S.C. 291 or 292, and that officers were entitled to compute their retired pay on higher rates in effect on July 1, will be followed by GAO. Therefore, under *res judicata* principle, payment to claimants for periods subsequent to court's decision may be made at higher rates in effect July 1. Payments to other claimants in similar circumstances, in view of fact court's decision is original construction of law changing GAO's construction, may be made both retroactively and prospectively, subject to Oct 9, 1940 barring act, and submission of doubtful cases to GAO. Overrules B–165038 and other contrary decisions ---------- 94
Submission to General Accounting Office
On bases of Supreme Court ruling in *Frontiero* v. *Richardson*, decided May 14, 1973, to effect that differential treatment accorded male and female members of uniformed services with regard to dependents violates Constitution, and P.L. 93–64, enacted July 9, 1973, which deleted from 37 U.S.C. 401 sentence causing differential treatment, regulations relating to two types of family separation allowances authorized in 37 U.S.C. 427 should be changed to authorize family separation allowances to female members for civilian husbands under same conditions as authorized for civilian wives of male members, and for other dependents in same manner as provided for male members with other dependents. Since *Frontiero* case was original construction of constitutionality of 37 U.S.C. 401 and 403, payments of family allowance may be made retroactively by services concerned, subject to Oct. 9, 1940 barring act, and submission of doubtful claims to GAO ---------- 148
As *Frontiero* decision, decided May 14, 1973, in which Supreme Court ruled on inequality between male and female military members with regard to quarters allowances, was original construction of constitutionality of 37 U.S.C. 401 and 403, decision is effective as to both active and former members from effective date of statute, subject to barring act of Oct. 9, 1940 (31 U.S.C. 71a). Documentation required from female members to support their claims should be similar to that required of male members under similar circumstances and should be sufficient to reasonably establish member's entitlement to increased allowances. Although claims for 10-year retroactive period may be processed by services concerned, since filing claim in administrative office does not meet requirements of barring act, claims about to expire should be promptly submitted to GAO for recording, after which they will be returned to service for payment, denial or referral back to GAO for adjudication. Doubtful claims should be transmitted to GAO for settlement ---------- 148
Since act of July 9, 1973, P.L. 93–64, repealed provision of 37 U.S.C. 401 relating to proof of dependency by female member, quarters allowance prescribed in 37 U.S.C. 501(b) for inclusion in computation of male member's unused accrued leave that is payable at time of discharge, may be allowed female members on basis they are entitled to same treatment accorded male members who are not normally required to establish that their wives or children are in fact dependent on them for over one-half their support. Allowance may be paid retroactively by

CLAIMS—Continued Page
Doubtful—Continued
Submission to General Accounting Office—Continued
service concerned, subject to Oct. 9, 1940 barring act, but claims about to expire should be transmitted to GAO pursuant to Title 4, GAO 7, as should doubtful claims 148
Evidence. (*See* **EVIDENCE**)
Evidence to support
Best evidence available
Acceptability
Veterans Administration (VA) employee claimed environmental differential under FPM Supp. 532–1, S8–7 and Appendix J, for cold work. Fact that VA furnished protective clothing for work in cold storage area does not defeat entitlement since employee performed work which Appendix J lists as qualifying for differential and no provision is made for alleviating discomfort. Where VA does not have past records of actual periods of exposure, which normally constitute basis for payment of cold work differential, payment may be based on most reasonable estimate after consideration of all available records 789
Reporting to Congress
Limitation on use of act of Apr. 10, 1928
Extraordinary circumstances
Reporting claim to Congress under Meritorious Claims Act of 1928 (31 U.S.C. 236) for additional cost to corporation to meet its contractual commitments to Govt. by reason of devaluation of dollar would not be justified because claim contains no elements of unusual legal liability or equity. Remedy afforded by act is limited to extraordinary circumstances, and cases reported by GAO to Congress generally have involved equitable circumstances of unusual nature and which are unlikely to constitute recurring problem, since to report to Congress a particular case when similar equities exist or are likely to arise with respect to other claimants would constitute preferential treatment over others in similar circumstances 157
Set-off. (*See* **SET-OFF**)
Statutes of limitation. (*See* **STATUTES OF LIMITATION**)
Transportation
Improper packing charges
Disallowed
Disallowance of claims presented by motor carrier for improper packing charges under Rule 687 of National Motor Freight Classification relating to shipments known to be classified materials transported under control of Armed Forces Courier Service is sustained where only evidence relating to manner of packing is inference drawn from fact that GBL contained no description of packing and where motor carrier is estopped from asserting that shipments were improperly packed because it had knowledge of the security packing 784
COLLECTIONS (*See* **DEBT COLLECTIONS**)
COLLEGES, SCHOOLS, ETC.
Grants-in-aid
Educational programs. (*See* **STATES, Federal aid, grants, etc., Educational institutions**)

COMMODITY CREDIT CORPORATION

Price-support programs

Wool

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

COMPENSATION

Aggregate limitation

GS–18 General Schedule

Application

Determination of applicability of sec. 7(d)(1)(A) of Federal Advisory Committee Act to Executive Director of National Advisory Council on Vocational Education who is paid $36,000 per year plus yearly contribution of $6,888 towards retirement is not necessary, since authority of Council to hire without regard to civil service laws does not authorize Council to compensate him without regard to Classification Act. However, matter should be submitted to CSC which has jurisdiction to make final determinations as to applicability of Classification Act, and upon determination of proper rate of pay, request for waiver of any erroneous payments, if over $500, may be submitted to GAO 531

Allotments. (*See* **COMPENSATION, Assignment**)

Assignment

Banking facilities for deposit, etc.

Commercial insurance premium payments

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

Boards, committees, and commissions

Technology Assessment Advisory Council members

Reemployed annuitant

Limitation on pay of public members of Technology Assessment Advisory Council contained in sec. 7(c)(2), Pub. L. 92–484, operates to limit amount of pay fixed for members and that fixed rate may not vary because Council member will receive less pay by virtue of restriction in 5 U.S.C. 8344(a) 654

Ceiling. (*See* **COMPENSATION, Aggregate limitation**)

COMPENSATION—Continued Page

Double

Concurrent military retired and civilian service pay

Exemptions

Reserve Officers' Training Corps programs

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

Increases

Promotions. (*See* **COMPENSATION, Promotions**)

Jury duty

Fees. (*See* **COURTS, Jurors, Fees**)

Limitation. (*See* **COMPENSATION, Aggregate limitation**)

Method of computation

Overtime

Preliminary and postliminary duties

Payment of overtime claims presented by past or present members of Federal Protective Service, GSA, Region III, on basis of *Eugie L. Baylor et al.* v. *United States*, 198 Ct. Cl. 331, is authorized except that time for uniform changing should be allowed in accordance with GSA test determination rather than time reflected in the holding, and allowance of individual claim in excess of 10 minutes per day after set off of duty-free lunch periods, subsequent to period covered by court case, depends upon whether particular guard was required to carry a gun, location of his locker, control point, if any, and post or posts of duty, reasonable walking or travel time between points, and, in case of supervisors, particular preliminary and postliminary duties performed, and method for computing amount due is made part of this decision by incorporation. Modified by 54 Comp. Gen. 11..... 489

Past or present GSA Federal Protective Service members who have presented no evidence to support their claims for preliminary and postliminary duties on basis of *Eugie L. Baylor et al.* v. *United States*, 198 Ct. Cl. 331, may only be allowed uniform changing time, and then only upon submission of release of any claim arising out of performance of additional preliminary and postliminary duties commencing from point in time 10 years prior to date upon which their claims were received in Transportation and Claims Div. of U.S. GAO, even though use of releases generally is not favored. However, use of releases is warranted to insure that claimants present their claims in full at one time and that they do not later claim additional amounts. Modified by 54 Comp. Gen. 11..... 489

COMPENSATION—Continued Page

Military pay. (*See* **PAY**)

Night work

Regularly scheduled night duty

Leaves of absence

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

Wage board employees. (*See* **COMPENSATION, Wage board employees, Night differential**)

Overpayments

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

Overtime

Aggregate limitation

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

Compensatory time

Failure to use

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

Early reporting and delayed departure

Administrative approval requirement

Preliminary and postliminary duties being compensable as overtime under 5 U.S.C. 5542 only if performance of overtime had been approved by official properly delegated in writing to authorize duties—mere tacit

COMPENSATION—Continued Page

Overtime—Continued

Early reporting and delayed departure—Continued

Administrative approval requirement—Continued

expectation that work will be performed is insufficient approval— and if amount of time involved is not considered *de minimus*, time spent by security policemen and guards in preliminary and postliminary duties of changing into and out of uniform, picking up and replacing belt, ammunition, and revolver, standing inspection for physical fitness, receiving special instructions and assignments, and walking to assigned post, although considered work, is not compensable as overtime where record does not evidence approval of work by proper authority and establishes duties not only did not follow consistent pattern but were so nominal they must be considered to be within *de minimus* rule 181

Guards

Claims on basis of *Eugie L. Baylor* case

Payment of overtime claims presented by past or present members of Federal Protective Service, GSA, Region III, on basis of *Eugie L. Baylor et al.* v. *United States*, 198 Ct. Cl. 331, is authorized except that time for uniform changing should be allowed in accordance with GSA test determination rather than time reflected in the holding, and allowance of individual claim in excess of 10 minutes per day after set off of duty-free lunch periods, subsequent to period covered by court case, depends upon whether particular guard was required to carry a gun, location of his locker, control point, if any, and post or posts of duty, reasonable walking or travel time between points, and, in case of supervisors, particular preliminary and postliminary duties performed, and method for computing amount due is made part of this decision by incorporation. Modified by 54 Comp. Gen. 11 489

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Employees other than Federal

Payment for overtime services provided by Guam customs and quarantine officers at Andersen AFB, Guam, on 24-hour, 7-days-a-week rotating basis to accommodate incoming foreign traffic, plus overhead surcharge, which is claimed by Territory of Guam, pursuant to P.L. 9–47 that imposes basic charge equivalent to hourly wage rate of officer performing service, plus administrative surcharge of 25 percent, on "all air and sea carriers and other persons" may be paid, irrespective of laws and regulations enforced by officers as Federal agencies are subject as other carriers to charges imposed for overtime Federal customs inspections under 19 U.S.C. 267, to extent that their operations are subject to

COMPENSATION—Continued Page
Overtime—Continued
Employees other than Federal—Continued
customs inspections generally. However, determination should be made that surcharge is reasonable and does not constitute an unconstitutional tax upon U.S. Government 173
Premium pay
Sunday work regularly scheduled. (*See* **COMPENSATION, Premium pay, Sunday work regularly scheduled**)
Preliminary and postliminary duties
Overtime. (*See* **COMPENSATION, Overtime, Early reporting and delayed departure**)
Regular
Not within purview of compensatory time provisions
Sunday and holiday work performed on regular and recurring basis is not work within purview of compensatory provisions of 5 U.S.C. 5543 and 5 CFR 550.114, and employee who from Aug. 1, 1955, through Jan. 10, 1970, maintained reservoir records, as well as other employees similarly situated, is entitled as provided by 5 CFR 550.114(c) to overtime compensation prescribed by 5 U.S.C. 5542 for period not barred by 31 U.S.C. 71a. Overtime is compensable on basis of actual time worked Sundays and minimum of 2 hours for holidays, payable without interest in absence of statute so providing, and at grade limitation prescribed by 5 U.S.C. 5542(a)(1). Employees who took compensatory time may be paid difference between value of that time and overtime; claims affected by 31 U.S.C. 71a should be forwarded to GAO for recording and return; overtime is payable when compensatory time is not requested 264
Premium pay
Environmental differential
Entitlement
Veterans Administration (VA) employee claimed environmental differential under FPM Supp. 532-1, S8-7 and Appendix J, for cold work. Fact that VA furnished protective clothing for work in cold storage area does not defeat entitlement since employee performed work which Appendix J lists as qualifying for differential and no provision is made for alleviating discomfort. Where VA does not have past records of actual periods of exposure, which normally constitute basis for payment of cold work differential, payment may be based on most reasonable estimate after consideration of all available records 789
Sunday work regularly scheduled
Leaves of absence
Employee on 8 hour regular shift of duty, which included 2 a.m. on last Sunday in Apr. when standard time was advanced 1 hour to daylight saving time (15 U.S.C. 260a(a), who was placed on annual leave for 1 hour so 1 hour of pay would not be lost may not be paid Sunday premium pay for 1 hour of annual leave since 5 U.S.C. 5546 does not authorize premium pay for leave status during any part of regularly scheduled tour of duty on Sunday. However, night differential prescribed by 5 U.S.C. 5545(a) is payable for paid leave period that is less than 8

COMPENSATION—Continued Page

Premium pay—Continued

Sunday work regularly scheduled—Continued

Leaves of absence—Continued

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

Prevailing rate employees. (*See* **COMPENSATION, Wage board employees**)

Promotions

Delayed

Freeze on promotions

Employee whose promotion was delayed as result of President's freeze on promotions and administrative delay in perfecting promotion recommendation due to erroneous view that promotion could not be made until freeze was lifted is not entitled to retroactive promotion pursuant to recommendation of Grievance Examiner because error involved was misinterpretation of instructions and the type of administrative error which will permit retroactive promotion is an error which involves ministerial action not accomplished through inadvertence or failure to implement mandatory provisions of laws and regulations 926

Effective date

Approval by authorized official

Practice of National Labor Relations Board (NLRB) of making promotions effective at beginning of pay period following date "notice" of promotion is received in personnel office, which delays pay increase for 13 days, may not be corrected by changing beginning of workweek to Monday since word "following" as used in NLRB procedure for making promotions effective means "after" and change proposed would further delay increase to 14 days. Also, retroactive corrective regulation would violate rule that personnel action may not be made retroactively effective to increase right of employee to compensation in absence of administrative error. However, to avoid time lag in promotion under policy of making promotion effective at beginning of pay period following "notice" NLRB should provide by regulation that promotion be made effective at beginning of the pay period following approval by the official authorized to approve promotions 460

Retroactive

Rule

Retroactive promotion of an employee as recommended by Grievance Examiner on basis that employees similarly situated in other locations were promoted may not be followed since employees are not entitled to identical treatment in promotion actions compared to other employees .. 926

Salary increase adjustment

Claim of civilian employee for retroactive promotion and salary differential between grades GS–12 and GS–13 on basis position he was serving in overseas was reclassified on July 3, 1970, to GS–13, and that although he was legally qualified for promotion administrative office failed to act timely, is justifiable claim and employee should be retro-

COMPENSATION—Continued Page

Promotions—Continued

Retroactive—Continued

Salary increase adjustment—Continued

actively promoted to GS–13 to date not earlier than July 3, 1970, nor later than beginning of fourth pay period after July 3, 1970, in accordance with 5 CFR 511.701 and 511.702, and paid salary differential to Aug. 28, 1972, date he returned from overseas. Rule is that when position is reclassified to higher grade, agency must within reasonable time after date of final position reclassification, unless employee is on detail to position, either promote incumbent, if qualified, or remove him, and time frame for "reasonable time" is prescribed in 5 CFR 511.701 and 5 CFR 511.702 216

Removals, suspensions, etc.

Deductions from back pay

Outside earnings

Basis for deduction

Where income was generated from part-time teaching, lecturing, and writing activities prior to unjustified separation action only the added increment from such activities during the interim period between separation and reinstatement need be deducted from backpay. The determination as to the amount of such added increment may be based upon comparison of amount of outside work performed on hourly basis or frequency of occurrence, or upon income received prior to separation with that of interim period. Income from publication of book during interim period need not be deducted from backpay provided the employee was engaged substantially in writing a book prior to his separation and publication would probably have occurred even if he had not been separated 824

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

Wage board employees

Coordinated Federal Wage System

Compensation adjustments

Upon conversion to Federal Wage System under P.L. 92–392, which established uniform rate of 7½ percent night shift differential for second shift workers, employees who had previously received 10 percent night shift differential would not suffer reduction of basic pay but would be entitled to receive higher differential under new pay scale until reassigned to other duties not involving night work, or until entitled to higher rate of basic pay than retained rate by reason of wage schedule adjustment, higher premium pay, or any other action in normal operation of the System 744

Environmental differential

Veterans Administration (VA) employee claimed environmental differential under FPM Supp. 532–1, S8–7 and Appendix J, for cold work. Fact that VA furnished protective clothing for work in cold storage area does not defeat entitlement since employee performed work which Appendix J lists as qualifying for differential and no provision is made for alleviating discomfort. Where VA does not have past records of actual periods of exposure, which normally constitute basis for payment of cold work differential, payment may be based on most reasonable estimate after consideration of all available records 789

COMPENSATION—Continued Page

Wage board employees—Continued

Night differential

Fractional hours

Provisions of 5 U.S.C. 5343(f), as added by Pub. L. 92-392, state that shift differential is payable when prevailing rate employee works majority of hours during certain hours of the day. Under that language, employee may be paid differential only when 5 or more hours of his regularly scheduled 8-hour shift occur during the hours specified since phrase "majority of hours" must be given its obvious meaning—a number of whole hours greater than one-half 814

Meal breaks

Included

In determining whether prevailing rate employee works majority of hours during periods covered by night shift differential as provided in 5 U.S.C. 5343(f) meal breaks of 1 hour or less will be included. Employee's entitlement to differential and his entitlement to 7½ percent or 10 percent differential will be based on hours of his assigned shift including such breaks 814

Prevailing rate employees

Wage reductions

Indefinite wage retention

General regulation to provide indefinite wage retention for all prevailing rate employees when wage reductions are based upon decreases in prevailing rates as determined by wage surveys, regardless of particular wage area or circumstances involved, would not be proper since it would be contrary to statutory provisions of Federal Wage System .. 665

What constitutes

Intergovernmental Personnel Act detail reimbursment

When State or local Govt. employee is detailed to executive agency of Federal Govt. under Intergovernmental Personnel Act, reimbursement under 5 U.S.C. 3374(c) for "pay" of employee may not include fringe benefits, such as retirement, life and health insurance, and costs for negotiating assignment agreement required under 5 CFR 334.105, and for preparing payroll records and assignment report prescribed under 5 CFR 334.106. The word "pay" as used in act has reference according to legislative history to salary of State or local detailee, and there is no basis for ascribing to term a different meaning than used in Federal personnel statutes, that is that term refers to wages, salary, overtime and holiday pay, periodic within-grade advancements and other pay granted directly to Federal employees. Overruled, in part, by 54 Comp. Gen.—(B-157936, Sept. 16, 1974) 355

CONCESSIONS

Contracts

Term

Extension

Initial term of lease for operation of concession lapsed midway through agency's 90-day termination notice required by lease, which also gives agency right to extend on year-to-year basis. Although lapse caused

CONCESSIONS—Continued Page
Contracts—Continued
Term—Continued
Extension—Continued
controversy concerning notice's legal effect, agency termination is valid since notice provision is intended to give parties time to prepare for transition necessitated by termination and lessee's continued operation of concession for duration of notice period despite lapse caused agency's action to have the practical effect of providing necessary transition time 902
CONFERENCES
Consider protests of bidders, etc. (*See* **CONTRACTS, Protests, Procedures, Interim Bid Protest Procedures and Standards, Conferences**)
CONTRACTORS
Labor stipulations
"Successor employer" doctrine
Since congressional purpose underlying sec. 4(c) of 1972 Service Contract Act amendments appears to be that the "successorship" principle—obligation that successor service contractor pay employees no less than rates in predecessor's collective bargaining agreement—was intended to apply with respect to successor contracts to be performed in same geographical area. Labor Dept.'s application of 4(c) to procurements of services regardless of place of performance is subject to question. However, because practice is not prohibited by act, the protest is denied, but matter should be presented to Congress by Secretary of Labor to obtain clarifying legislation 646
Responsibility
Contracting officer's affirmative determination accepted
Exceptions
Fraud
Allegation of noncompetitive practices because of communality of ownership and financial interests between two bidders is referred to DSA for consideration in accordance with ASPR 1-111 and ASPR 1-600. GAO has discontinued practice of reviewing bid protests of contracting officer's affirmative responsibility determination, except for actions by procuring officials which are tantamount to fraud, and GAO has no authority to administratively debar or suspend other than for violations of Davis-Bacon Act, which is not relevant here 931
Successors
Novation agreement requirement
Status of agreement
Proposed novation agreement among contractor—wholly owned subsidiary of large concern—awarded two Govt. contracts for hydraulic turbines and other items, subcontractor who assumed responsibility to complete contracts upon the closing down of subsidiary plant and sale to foreign corporation of those assets not needed to perform contracts, and the Govt. may be approved if in best interest of Govt. Although novation agreement will contravene Anti-Assignment Act, 41 U.S.C. 15, since exception in ASPR 26-402(a) that permits recognition of third party as successor in interest to Govt. contract is not applicable as subcontractor's interests in contracts are not "incidental to the transfer" of subsidiary, there is no objection to recognition of assignment if it is administratively determined to be in best interests of Govt 124

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CONTRACTORS—Continued Page

Successors—Continued

Wages

Union agreement *v.* wage determination

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

CONTRACTS

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

Amounts

Estimates

Improper

Protest alleging that estimated quantities in IFB to prepare personal property for shipment or storage and to handle intra-city/intra-area shipments for 1-year period were improper and specifications were therefore defective was untimely filed since sec. 20.2(a) of interim Bid Protest Procedures and Standards requires protests based upon alleged improprieties in solicitation which are apparent prior to bid opening to be filed prior to bid opening, and although protestant had no actual knowledge of protest regulations, publication of procedures in Federal Register is constructive notice of Regulations 533

Whether refusal of contracting agency to permit bidder to examine basis for estimated annual quantities of personal property to be prepared for shipment or storage violates Freedom of Information Act, 5 U.S.C. 552(a)(3), and implementing regulations, is not for consideration by GAO since GAO has no authority to determine what information must be disclosed under act by other Govt. agencies 533

Man-hours for mess attendant services

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

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Indefinite
Requirements contracts. (*See* **CONTRACTS, Requirements**)
Assignments. (*See* **CLAIMS, Assignments**)
Automatic Data Processing Systems. (*See* **EQUIPMENT, Automatic Data Processing Systems**)
Awards
Abeyance
Pending General Accounting Office decision
Award for continuing janitorial services to incumbent contractor during pendency of low bidder's protest on basis award would be advantageous to Govt. as required by par. 2-407.8(b)(3)(iii) of ASPR was not inappropriate and did not deprive low bidder of contract as contracting agency was prepared to terminate awarded contract for convenience of Govt. and to make award to bidder if its protest was upheld and if it is found to be responsible ---------- 496
Failure of procuring agency to comply with sec. 20.4 of Interim Bid Protest Procedures and Standards did not constitute violation of par. 1-403 of ASPR re specifying factors which will not permit delay in making award until issuance of Comptroller General decision, and failure is not significant since 20.4 is not binding on contracting agencies ---------- 632
Approval
Higher authority approval
Although contracting officer is not required by ASPR to withhold contract award after his agency denies protest of offeror pending possible appeal of protest to GAO, where he is on notice that offeror has deferred filing protest with GAO pending agency action but exigencies of situation require immediate award, if time permits, it is reasonable for contracting officer to obtain approval of higher authority to make award, as in case of preaward protest filed directly with GAO pursuant to ASPR 2-407.8(b)(2) ---------- 509
Cancellation
Effoneous awards
Bidder responsibility
Amount claimed for movement of tug and barge under canceled contract because contractor did not have required ICC authority is not reimbursable as agent of Govt. may not waive requirement that a water carrier in interstate commerce is subject to regulation under Interstate Commerce Act, and since no benefit accrued to Govt., payment on a *quantum meruit* basis may not be made ---------- 620
Mistakes in bid, etc. (*See* **CONTRACTS, Mistakes, Cancellation**)
Effective date
Delayed
Determination that prospective contractor failed to meet minimum financial standards required by sec. 1-1.1203 of FPR to be eligible for award of Federal Supply Service contract for film is upheld as basis SBA's denial of bidder's application for certificate of competency (COC), although approved by regional office, is final and conclusive since in procurements that exceed $250,000, determination to issue or deny COC is vested in SBA Central Office (15 U.S.C. 637(b)(7)) and is not

CONTRACTS—Continued Page

Awards—Continued

Effective date—Continued

Delayed—Continued

subject to review, and on basis improvement in bidder's financial condition after award, and fact award was made a month before it was to take effect, in order to timely distribute Federal Supply Schedule to agencies, has no effect on propriety or validity of award 344

Equal or tie bids

Drawing of lots

Where two equal bids were received to perform international freight forwarding services and award was made to incumbent firm rather than drawing lots as required by Federal Procurement Regs. sec. 1–2.407–6(b), recommendation is made that contracting agency now draw lots and, if protester wins drawing, that award made be terminated for convenience of Govt. and that award be made to previously unsuccessful bidder for the remaining services. Modifies 37 Comp. Gen. 330 466

Erroneous

Nonresponsive bidder

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

Government estopped from denying contract

Govt. is estopped from denying existence of contract where, acting under its own mistake and believing that protester would commence work the following week, it told the protester, apparent but not actual low bidder, contract number 6 days before contract was to have commenced and protester without knowledge of true facts acted to its detriment 502

Although Govt. is estopped to deny existence of contract with other than low bidder, even though entering into contract was outside scope of contracting officer's authority, contract is not illegal, as contractor neither directly contributed to underlying mistake nor was on direct notice of mistake, however, award made to other than lowest responsive bidder should be terminated for convenience of Govt 502

Termination of contract

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

CONTRACTS—Continued Page
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Erroneous—Continued
Termination of Contract—Continued
responsibility of rejected bidder, and if found responsible, terminate existing contract(s) for those schedule(s) on which rejected company was low bidder and make award to company, if its bid is otherwise acceptable for award 396
Legality
Where there is no dispute as to facts, but rather question raised is one of law—that is whether contract came into existence—it is not inappropriate for GAO to consider protest of contractor alleged to have defaulted under contract awarded by AF, notwithstanding contractor also appealed contracting officer's determination to terminate alleged contract for default to Armed Services Board of Contract Appeals 167
Contention that no contract came into existence under second step of two-step procurement conducted pursuant to 10 U.S.C. 2305(c) for housing construction because bid accepted orally was not effective before expiration of Davis-Bacon Wage Rate Determination and bid itself, or alternative allegation that bid was nonresponsive and also contained bid price error and, therefore, there was no contract to terminate for default is refuted by record which evidences oral notification of contract approval made subsequent to written notification of award made subject to such approval was in compliance with IFB. Furthermore, failure to describe actual amount of work to be performed by contractor did not make its bid nonresponsive as invitation did not require this information, and variances between price bid and Govt.'s estimate and other bids submitted was insufficient to place contracting officer on constructive notice of error 167
Mechanism basis used
Contentions against propriety of award "to develop fully the automated analysis of chromosomes" do not require cancellation of award where successful offeror was selected only after on-site approval of facilities and favorable *ad hoc* technical evaluation of its proposal by panel of scientists on basis of presenting most advantageous offer, price and other factors considered, notwithstanding doubt as to validity of cost and best buy analysis and failure to clarify statistical program offered. Furthermore, contracting officer is satisfied that performance of contract meets the RFP requirements; that subcontracting of laboratory work is proper; and that no diversion of grant funds is occurring. Fact that mechanism for award was interagency agreement between HEW and NASA (42 U.S.C. 2473(b) (5) and (6)), and incorporation of project as task order under existing contract between NASA and contractor does not reflect on legality of contract 278
Low bidder
Award to low bidder not required
Fact that low bidder under IFB to furnish fitting assemblies verified its bid price prior to award does not preclude relief after award from mistake in bid where it would be unconscionable to require contract performance, even though contractor's potential loss would not be very great or that mistake was due to negligence in obtaining complete set of specifications and, therefore, contract awarded may be canceled.

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Awards—Continued

Low bidder—Continued

Award to low bidder not required—Continued

Furthermore, under ASPR 2-406.3(e)(2), contracting officer is not required to accept low bid which is very far below other bids or Govt.'s estimated price, notwithstanding bid verification, and as low bid was approximately 26 percent of next two higher bids for production unit and one-twelfth of next higher bid for first article, for application is unconscionability theory that where mistake is so great it could be said Govt. was obviously getting something for nothing relief should be allowed 187

Negotiated contracts. (*See* **CONTRACTS, Negotiation, Awards**)

Propriety

Acceptance of award

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

COCO *v.* GOCO plants

Cancellation of request for proposals for cartridges on basis out-of-pocket costs for performance in a contractor-owned and -operated (COCO) plant compared unfavorably with out-of-pocket costs incurred in Govt-owned contractor-operated (GOCO) plants, and award to GOCO facility was in accord with terms of solicitation that conformed with par. 1-300.91(a) of Army Ammunition Command Procurement Instruction, which in turn is consistent with 10 U.S.C. 4532(a), "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; internal records of GOCO plant are not within disclosure provisions of 5 U.S.C. 552; and as GOCO activity is not Govt. commercial or industrial activity for purposes of BOB Cir. A-76, Federal taxes, depreciation, insurance, and interest are not for inclusion in GOCO cost estimates. 40

Government agency

Transfer of activity pending

Award by AF of domestic cargo airlift contract negotiated under 10 U.S.C. 2304(a)(16) pursuant to Class Determinations and Findings to Govt. corporation that is to be transferred to individual to whom award is contemplated and who is currently operating the activity pending Civil Aeronautics Board approval is not improper in view of fact contract will contain termination provision in event approval is withheld; OMB Cir. A-76 and implementing Defense Directives although favoring contracting with private, commercial enterprises allow

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Awards—Continued
Propriety—Continued
Government agency—Continued
Transfer of activity pending—Continued
Govt. operation of commercial activity "to maintain or strengthen mobilization readiness;" services of intended buyer during Govt. control does make him "officer or employee" within conflict of interest statutes, 18 U.S.C. 205, 18 U.S.C. 207–208; there is no evidence of unfair competition; and contracting agency has broad discretionary authority to award contract in interest of national defense ---- 86
Incumbent contractor
Award for continuing janitorial services to incubent contractor during pendency of low bidder's protest on basis award would be advantageous to Govt. as required by par. 2–407.8(b)(3)(iii) of ASPR was not inappropriate and did not deprive low bidder of contract as contracting agency was prepared to terminate awarded contract for convenience of Govt. and to make award to bidder if its protest was upheld and if it is found to be responsible ---- 496
Upheld
Where IFB to design, fabricate, and erect window walls, entrances, and rolling and sliding doors did not restrict contract performance to single firm nor restrict subcontracting because of 5-year minimum experience requirement, and bidder took no exception to requirement that at least 12 percent of work would be performed by its own force, fact that subcontractor was listed, although not required, is not construed to mean all work would be subcontracted; where subcontractor's insurance experience modification factor for Workmen's Compensation permitted Govt. to take into consideration cost of Govt-provided insurance, failure of prime contractor to submit its own insurance factor is minor informality; and where subcontractor is bound by prime contractor's commitment to Washington Plan providing minority hiring goals, bid as submitted was responsive and was properly considered for contract award ---- 331
Small business concerns
Adequate competition
Low bidder's failure to formally extend bid in writing prior to expiration date does not preclude acceptance of bid subsequently extended, notwithstanding fact that another bidder extended its bid prior to expiration date, since low bidder's participation in bid protest filed by other bidder shows intention to keep bid open for duration of protest and there is no indication that acceptance of low bid would have detrimental effect on competitive bidding system or be prejudicial to other bidders -- 775
Buy American Act application
Requirement of small business definition that end items to be furnished shall be manufactured or produced in U.S. is separate and distinct from Buy American Act requirements that preference be given to domestic source end products. Therefore, term "manufactured or produced" as used in small business definition is not regarded as "manufacturing" processes within contemplation of Buy American Act ---- 463

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Small business concerns—Continued

Certifications

Capacity

Although determination that a small business concern submitting low offer under request for proposals to perform refrigerated warehouse services, involving receipt, storage, assembly, and distribution of food, including export transportation, was nonresponsible in areas of health, safety, and sanitation should have been promptly referred, pursuant to par. 1–705.4(c)(iv) of Armed Services Procurement Reg., to Small Business Admin. for certificate of competency consideration since deficiencies relate to "capacity" defined as "overall ability * * * to meet quality, quantity, and time requirements," issuance of certificate of urgency in lieu was justified and reasonable as delay was not administratively created, and continuation of services was essential. Furthermore, rule is that responsibility determination unless arbitrary, capricious, or not based on substantial evidence is acceptable 15

Conclusiveness

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

Denial

Where low bidder entered into joint venture agreement to obtain necessary resources to perform a janitorial service contract prior to denial by SBA of request for certificate of competency (COC), request which upon resubmission to SBA was not accepted because SBA questioned impact of joint venture on bidder's responsiveness and stated it would not accept referral unless new information was developed relative to bidder's financial condition, and additionally that if joint venture was allowed bidder if still considered responsive could possibly perform, contracting officer should not have ignored joint venture agreement, and agreement should be reassessed and if bidder is found to be responsible, contract awarded incumbent contractor should be terminated for convenience of Govt. and award made to low bidder 496

Failure to request

Under IFB for food services for 1 year with two 1-year options that was restricted to small business concerns, award of contract without referring the nonresponsibility of four low bidders to SBA under certificate of competency procedures because of urgency or procurement was proper determination under ASPR1–705.4(c)(iv). However, refusal of administrative agency to attend informal conference on protest held pursuant to sec. 20.9 of Interim Bid Protest Procedures and Standards is policy that should be reconsidered. Furthermore, U.S. GAO will not

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substitute its judgment in matter for that of contracting officer unless it is shown by convincing evidence of record that finding of nonresponsibility was arbitrary, capricious, or not based on substantial evidence. 434
End items manufactured or produced in the United States
Requirement of small business definition that end items to be furnished shall be manufactured or produced in U.S. is separate and distinct from Buy American Act requirements that preference be given to domestic source end products. Therefore, term "manufactured or produced" as used in small business definition is not regarded as "manufacturing" processes within contemplation of Buy American Act 463
End product contributor
Bid of small business concern under formally advertised small business set-aside that represented contract end item would not be manufactured or produced by small business concerns properly was rejected, since even though bidder contemplated subcontracting portion of the work to large business, it should have made affirmative representation that its contribution to end item would be significant 463
Self-certification
Erroneous
Acceptance by contracting officer of self-certification submitted by successful bidder that it is a small business concern on basis that contrary determination by SBA district office was not final as it had been appealed to SBA Size Appeals Board was improper as district director's decision remains in full force and effect unless reversed or modified by Board, and fact that ASPR 1–703(b)(3)(iv) permits suspension of full size determination cycle when urgency of procurement so requires does not negate regional size determination made prior to award. Because contracting officer was not misled by self-certification but acted with full knowledge of facts in reliance on reading of applicable ASPR provisions, and because of urgency of procurement, contract awarded should be terminated for convenience of Govt. and resolicited, and this recommendation requires actions prescribed by secs. 232 and 236 of Legislative Reorganization Act of 1970 434
Set-asides
Competition sufficiency
Modification of RFQ to restrict procurement to small business concerns was proper exercise of authority by contracting officer under ASPR 3-505, which provides for amendment of solicitation prior to closing date for receipt of quotations to effect necessary changes since change of procurement to small business set-aside was recommended by SBA representative and was accepted on basis sufficient number of small business concern offers could be obtained. Therefore, quotation submitted by large business concern which was prepared under original unrestricted RFQ may not be considered or even opened to compare reasonableness of prices submitted by small business concerns, and in absence of judiciary established criteria and standards, claim for preparation costs may not be settled by GAO 307

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Disputes
When appeal by Administrator, Small Business Adm. (SBA) to the Secretary of Navy, pursuant to 15 U.S.C. 644, of naval installation's disregard of recommendation to restrict solicitation for mess attendant services to small business concerns was upheld, amendment—after due notice to offerors—of unrestricted solicitation to restrict procurement to small business was proper since reversal of initial determination that there was no reasonable expectation that award could be made to small business concern at reasonable price (ASPR 1-706.5(a)(1)), as well as awarding fair proportion of Govt. purchases to small business concern (ASPR 1-702(a)) gave effect to 15 U.S.C. 644. Immaterial to SBA authority to appeal was lack of controversy between contracting officer and small business specialist, and fact that unrestricted solicitation had been released to public 58
Erroneous
Requirement in ASPR 1-701.1(a)(2)a that eligibility for award of small business set-aside dredging contract is dependent on use of small business dredge for at least 40 percent of dredging work is an unauthorized size standard since SBA has exclusive statutory jurisdiction in small business size matters 904
Restrictive of competition
Provision in ASPR 1-701.1(a)(2)a that small business dredging work be accomplished with small business dredge for at least 40 percent of work constitutes improper restriction on competition 904
Subsequent to unrestricted solicitation
Modification of RFQ to restrict procurement to small business concerns was proper exercise of authority by contracting officer under ASPR 3-505, which provides for amendment of solicitation prior to closing date for receipt of quotations to effect necessary changes since change of procurement to small business set-aside was recommended by SBA representative and was accepted on basis sufficient number of small business concern offers could be obtained. Therefore, quotation submitted by large business concern which was prepared under original unrestricted RFQ may not be considered or even opened to compare reasonableness of prices submitted by small business concerns, and in absence of judiciary established criteria and standards, claim for preparation costs may not be settled by GAO 307
Withdrawal
Procedural steps before withdrawal
Although deletion of total set-aside for small business concerns from IFB for hamsters without verification of potential bidders' intentions will not be questioned in view of concurrence of SBA representative to deletion, it is recommended that in future procurements decisions to make or delete total set-aside be carefully considered, potential sources of small business interest be thoroughly investigated, and basis of determination be fully explained and documented. Furthermore, discarding all bids under amended invitation that deleted set-aside and negotiation of procurement under 41 U.S.C. 252(c)(10) were improper actions since

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deviations in three bids received affected bidder responsibility and not bid responsiveness. However, negotiations currently being conducted may be continued as needs of contracting agency have changed since opening of bids and use of negotiations will not negate maximum possible competition which advertised procurements attempt to further..... 221
Size
Appeal
Acceptance by contracting officer of self-certification submitted by successful bidder that it is a small business concern on basis that contrary determination by SBA district office was not final as it had been appealed to SBA Size Appeals Board was improper as district director's decision remains in full force and effect unless reversed or modified by Board, and fact that ASPR 1–703(b)(3)(iv) permits suspension of full size determination cycle when urgency of procurement so requires does not negate regional size determination made prior to award. Because contracting officer was not misled by self-certification but acted with full knowledge of facts in reliance on reading of applicable ASPR provisions, and because of urgency of procurement, contract awarded should be terminated for convenience of Govt. and resolicited, and this recommendation requires actions prescribed by secs. 232 and 236 of Legislative Reorganization Act of 1970..... 434
Determination by Small Business Administration (SBA) that bidder is small business is conclusive upon Federal agencies and any appeal from determination must be filed with SBA..... 775
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Requirement in ASPR 1–701.1(a)(2)a that eligibility for award of small business set-aside dredging contract is dependent on use of small business dredge for at least 40 percent of dredging work is an unauthorized size standard since SBA has exclusive statutory jurisdiction in small business size matters..... 904
Validity
Failure to verify bid mistake
Bidder who mistakenly used page from previous year's Federal Supply Schedule as initial worksheet in preparing its bid to supply liquid oxygen and, therefore, failed to include in its bid price cost of storing oxygen due to fact Govt. had previously furnished storage facilities, submitted an erroneous bid, which because it was 70 percent higher than only other bid received should have been verified since contracting officer had "constructive notice" of error—the legal substitute for actual knowledge—and acceptance of bid failed to consummate valid and binding contract. Unfilled portion of contract may be rescinded and payment made for deliveries on a *quantum valebat* basis, limited to amount of next lowest bid. Holding that no fair comparison can be made where only two widely variant bids are received will longer be followed. 20 Comp. Gen. 280 and other similar cases overruled..... 30

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Subcontracting limitation
Bid of small business concern under formally advertised small business set-aside that represented contract end item would not be manufactured or produced by small business concerns properly was rejected, since even though bidder contemplated subcontracting portion of the work to large business, it should have made affirmative representation that its contribution to end item would be significant 463
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Generally. (*See* **BIDS**)
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Brand name or equal. (*See* **CONTRACTS, Specifications, Restrictive, Particular make**)
Cancellation
I.C.C. carrier authority lacking
Partial contract performance
Amount claimed for movement of tug and barge under canceled contract because contractor did not have required ICC authority is not reimbursable as agent of Govt. may not waive requirement that a water carrier in interstate commerce is subject to regulation under Interstate Commerce Act, and since no benefit accrued to Govt., payment on a *quantum meruit basis may not be made* 620
Mistakes in bid, etc. (*See* **CONTRACTS, Mistakes, Cancellation**)
Disputes
Settlement
Administrative resolution
Construction contractor's request for equitable adjustment in price, based on delay in completion caused by reduced availability of site, should be resolved pursuant to "Disputes" clause procedure. Contract contained "Changes" clause and disputes arising under specific contract provision are for administrative resolution 829
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Evaluation factors
"Realism" of costs and technical approach
Determination subsequent to discussion with all offerors not to award cost-plus-a-fixed-fee contract for development model of artillery locating radar to low offeror under RFP which contained criteria to evaluate Technical Proposal, Past Performance/Management, and Cost Proposal/Cost Realism factor is upheld where use of predetermined score, generally unacceptable, was not prejudicial in view of protester's low score; where acceptance of design implementation would involve high degree of risk, and discussion of design's deficiencies would subvert intent of procurement; where Govt.'s engineering man-hour estimates were not erroneous and their use to evaluate effort and cost realism did not mislead protester; where RFP contained sufficient statement of evaluation and award factors and record evidences meaningful discussions were held with all offerors; and where commonality features between contracts were not made evaluation factor 240

CONTRACTS—Continued Page

Cost-plus—Continued

Evaluation factors—Continued

"Realism" of costs and technical approach—Continued

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

Cost-reimbursement. (*See* **CONTRACTS, Cost-type**)

Cost-type

Pricing or technical uncertainty

Discussion with all offerors requirement

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

Damages

Claims. (*See* **CLAIMS, Damages, Contracts**)

Data, rights, etc.

"Technical Data—Withholding of Payment" clause

Propriety of use

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

CONTRACTS—Continued Page

Data, rights, etc.—Continued

Trade secrets

Protection

Repair process, alleged to be protectible trade secret, for removal and replacement of rear flange of J–57 engine combustion chamber outer rear case which was contained in RFP does not violate proprietary rights of former contractor who had been awarded prior contracts on sole source basis where evidence indicates contracting agency developed process independently from any information submitted in unsolicited proposal, and notwithstanding contractor initially implemented process. Even should process merit protection as trade secret, use of process is not precluded when it is obtained by means of independent development. Furthermore, under ASPR 4–106.1(e)(4), even though information in unsolicited proposal submitted without restrictive legend may only be used for evaluation of proposal, Govt. is not limited in its use of information if it is obtainable from another source without restriction 161

Default

Procurement from another source

Requirements contract

Where IRS placed purchase orders for memory units with protester under mandatory requirements contract it held with GSA, the subsequent partial termination for default and the reprocurement of item from another source is not proper matter for protest to GAO since the IRS actions taken to insure that its requirements would be satisfied was a matter of contract administration, propriety of which must be resolved by the contracting parties pursuant to any applicable contract provision rather than by the GAO 572

Delays in performance

Availability of site

Reduced

Construction contractor's request for equitable adjustment in price, based on delay in completion caused by reduced availability of site, should be resolved pursuant to "Disputes" clause procedure. Contract contained "Changes" clause and disputes arising under specific contract provision are for administrative resolution 829

Disputes

Contract Appeals Board decision

Jurisdictional question

Where there is no dispute as to facts, but rather question raised is one of law—that is whether contract came into existence—it is not inappropriate for GAO to consider protest of contractor alleged to have defaulted under contract awarded by AF, notwithstanding contractor also appealed contracting officer's determination to terminate alleged contract for default to Armed Services Board of Contract Appeals 167

Settlement

Administrative

Under disputes clause

Construction contractor's request for equitable adjustment in price, based on delay in completion caused by reduced availability of site, should be resolved pursuant to "Disputes" clause procedure. Contract contained "Changes" clause and disputes arising under specific contract provision are for administrative resolution 829

CONTRACTS—Continued Page

Equal employment opportunity requirements. *(See* **CONTRACTS, Labor stipulations, Nondiscrimination)**

Federal Supply Schedule

Mandatory use requirement

Contract default and reprocurement

Where IRS placed purchase orders for memory units with protester under mandatory requirements contract it held with GSA, the subsequent partial termination for default and the reprocurement of item from another source is not proper matter for protest to GAO since the IRS actions taken to insure that its requirements would be satisfied was a matter of contract administration, propriety of which must be resolved by the contracting parties pursuant to any applicable contract provision rather than by the GAO 572

Primary source *v.* multiple award contracts

Overlapping requirements

Since some overlap exists between film listed on primary source Federal Supply Schedule (FSS) contract and multiple-award FSS contract, it is recommended that General Services Admin. regulations be modified to prohibit use of multiple-award FSS contract where agency needs would be satisfied by purchase from primary source contractor 720

Requirements contracts

Primary source *v.* multiple-award contractors

When Govt. is obligated to purchase its normal requirements of film from primary source Federal Supply Schedule (FSS) contractor, if it can be shown that higher speed film was purchased from multiple-award FSS contractor to satisfy normal requirements which could be met by film specified in primary source FSS contract, the primary source contractor would be entitled to damages. However, purchase of high speed film from multiple-award FSS contractor was not breach of contract where record shows that purchase was necessitated by requirement for film that exceeded specification characteristics of film provided by primary source FSS contractor 720

Increased costs

Government activities

Sovereign capacity

Additional cost due to devaluation of dollar to corporation in business of producing drafting and engineering instruments, measuring devices and precision tools to obtain supplies from abroad to meet contractual commitments to Govt. may not be reimbursed to corporation by increasing any bid price open for acceptance or any contract price since devaluation of dollar is attributable to Govt. acting in its sovereign capacity and Govt. is not liable for consequences of its acts as a sovereign; no provision was made for price increase because cost of performance might be increased; and under "firm-bid rule," bid generally is irrevocable during time provided in IFB for acceptance of a bid 157

CONTRACTS—Continued Page

Labor stipulations

Nondiscrimination

"Affirmative action programs"

Grants-in-aid

Under invitation issued by Federal grantee required by HEW regulation to conform with competitive system in construction of classroom building, low bidder who executed certificate relating to part I of bid conditions that required listing of trades to be employed and coverage that would be extended by New Orleans affirmative action plan but failed to sign part II certificate that involved commitment to various goals and specific steps contained in bid conditions or submit alternative affirmative action plan nevertheless submitted a responsive bid since in signing part I certification bidder is committed to comply with terms and conditions of New Orleans Plan and to submit alternative plan for trades not signatory to New Orleans Plan, thus meeting material requirements of invitation 451

Minority manpower goals

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

Subcontractor's status

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

Compliance

Certification

Under IFB for hydraulic turbines, bidder's failure to complete Equal Opportunity Certification and its insertion of words "NOT APPLICABLE" under Equal Employment Compliance representation do not render bid nonresponsive, since both provisions relate to bidder responsibility and, therefore, it is considered that no exception was taken in bid to any material requirement of IFB. To extent B–161430, July 25, 1967 is inconsistent with this and other cited decisions, it will no longer be followed 487

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Labor stipulations—Continued
Service Contract Act of 1965
Administrative determinations
Finality
Although failure to question propriety of absence from solicitation for aircraft maintenance of Service Contract Act (SCA) clause until after award of contract renders protest untimely, since significant issue has been raised because it refers to principle of widespread interest and since court is interested in views of GAO, merits of protest have been considered and it is concluded that absence from contract of SCA clause does not render contract illegal if after contract award Dept. of Labor decides that SCA was applicable to procurement, since contracting officer acted in good faith and in accordance with regulations implementing SCA in determining Walsh-Healey Public Contracts Act pertaining to supplies, and not SCA, which affords service contract workers protection, was applicable, and, furthermore, it is primarily for contracting agencies to decide what provisions should or should not be included in particular contract 412
Questionable
Although practice of Labor Dept. in classifying as "service employees" keypunch operators and other clerical-type employees under Service Contract Act of 1965, 41 U.S.C. 351, *et seq.*, is questionable since statutory language of act and its legislative history as well as Dept. of Labor's regulations indicate "service employee" was intended to mean "blue collar" employee, practice is not specifically prohibited and, therefore, protest is denied. However, because of significant adverse impact on procurement procedures, department should present the matter to Congress and obtain clarifying legislation, and should submit statements of action taken to appropriate congressional committees as required by Legislative Reorganization Act of 1970 370
Bidder that is not located in Govt. facilities areas for which Service Contract Act wage determination has been provided is nevertheless bound by determination, since solicitation terms indicate that wage obligations are fixed by whatever determination is attached to solicitation, and exemption for "outside" bidder is lacking, and although the Dept. of Labor's view that "locality" means locality of Govt. installation in procurement of this type was criticized in 53 Comp. Gen. 370, this view remains the settled interpretation of issue at present 522
Amendments
Retroactive application
Although Congress intended, in enacting the Service Contract Act Amendments of 1972, that wage determination issued as result of hearings held pursuant to sec. 4(c) of Service Contract Act would be applicable to contracts awarded prior to issuance of wage determination, appropriate implementing regulations have not been promulgated and GAO urges issuance of regulations as soon as practicable to provide for required contract clauses 401

CONTRACTS—Continued Page

Labor stipulations—Continued

Service Contract Act of 1965—Continued

Applicability of act

Keypunch operators, etc.

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

Solicitations for keypunching, verifying services, document sorting, and source data conversion that have as their principal purpose providing services are not excluded from coverage of Service Contract Act as procurements of supplies, but applicability of act is doubtful for different reason, that is the workers covered by wage determinations are clerical employees, and according to holding in 53 Comp. Gen. 370 act and its legislative history indicate the "service employee" concept covers only "blue collar" workers. However, since act does not specifically prohibit classification of clerical workers as service employees, present protest also is denied 522

Minimum wage, etc., determinations

Locality basis for determination

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

Bidder that is not located in Govt. facilities areas for which Service Contract Act wage determination has been provided is nevertheless bound by determination, since solicitation terms indicate that wage obligations are fixed by whatever determination is attached to solicitation, and exemption for "outside" bidder is lacking, and although the Dept. of Labor's view that "locality" means locality of Govt. installation in procurement of this type was criticized in 53 Comp. Gen. 370, this view remains the settled interpretation of issue at present 522

Union agreement effect

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

CONTRACTS—Continued Page
Labor stipulations——Continued
Service Contract Act of 1965—Continued
Minimum wage, etc., determinations—Continued
Union agreement effect—Continued

reimbursable service contract between AF and Pan American World Airways, it was concluded that under 1965 act, which requires successor contractor to pay, as a minimum, wages and fringe benefits to which employees would have been entitled under predecessor contract, union is permitted to challenge its own collective bargaining agreement when predecessor and successor contractors are the same on basis that wages called for by agreement are substantially at variance with those prevailing in locality ---- 401

Omission of provision

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

"Successor employer doctrine"

Since congressional purpose underlying sec. 4(c) of 1972 service Contract Act amendments appears to be that the "successorship" principle—obligation that successor service contractor pay employees no less than rates in predecessor's collective bargaining agreement—was intended to apply with respect to successor contracts to be performed in same geographical area. Labor Dept.'s application of 4(c) to procurements of services regardless of place of performance is subject to question. However, because practice is not prohibited by act, the protest is denied, but matter should be presented to Congress by Secretary of Labor to obtain clarifying legislation ---- 646

Mistakes
Absence of contract
Payment. (*See* PAYMENTS, Absence or unenforceability of contracts)
Allegation before award. (*See* BIDS, Mistakes)
Cancellation
Unconscionable to take advantage of mistake

Fact that low bidder under IFB to furnish fitting assemblies verified its bid price prior to award does not preclude relief after award from mistake in bid where it would be unconscionable to require contract performance, even though contractor's potential loss would not be very great or that mistake was due to negligence in obtaining complete set of specifications and, therefore, contract awarded may be canceled. Furthermore, under ASPR 2-406.3(e)(2), contracting officer is not

CONTRACTS—Continued Page
Mistakes—Continued
Cancellation—Continued
Unconscionable to take advantage of mistake—Continued

required to accept low bid which is very far below other bids or Govt.'s estimated price, notwithstanding bid verification, and as low bid was approximately 26 percent of next two higher bids for production unit and one-twelfth of next higher bid for first article, for application is unconscionability theory that where mistake is so great it could be said Govt. was obviously getting something for nothing relief should be allowed 187

Contracting officer's error detection duty
Notice of error
Substantial

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

Contracting officer's error detection duty
Price variances

Contention that no contract came into existence under second step of two-step procurement conducted pursuant to 10 U.S.C. 2305(c) for housing construction because bid accepted orally was not effective before expiration of Davis-Bacon Wage Rate Determination and bid itself, or alternative allegation that bid was nonresponsive and also contained bid price error and, therefore, there was no contract to terminate for default is refuted by record which evidences oral notification of contract approval made subsequent to written notification of award made subject to such approval was in compliance with IFB. Furthermore, failure to describe actual amount of work to be performed by contractor did not make its bid nonresponsive as invitation did not require this information, and variances between price bid and Govt.'s estimate and other bids submitted was insufficient to place contracting officer on constructive notice of error 167

Price adjustment
Contracting officer's error detection duty

Acceptance of bid at aggregate amount quoted—bid which stated "Bid based on award of all items" and offered prompt payment discount—under invitation for 37 items of electrical parts and equipment to be bid on individually and bid to show total net amount, without verification of aggregate bid although it was substantially below total net amounts shown in other bids and next lowest bid was verified,

CONTRACTS—Continued Page

Mistakes—Continued

Price adjustment—Continued

Contracting officer's error detection duty—Continued

entitles supplier of items, pursuant to purchase order issued, to adjustment in price to next lowest aggregate bid, less discount offered, since contracting officer considered there was possibility of error in higher bid he should have suspected lower bid likewise was erroneous, and supplier having been overpaid on basis of item pricing, refund is owing Govt. for difference between amount paid supplier and next lowest bid---------- 190

Price variances

Two bids received

Bidder who mistakenly used page from previous year's Federal Supply Schedule as initial worksheet in preparing its bid to supply liquid oxygen and, therefore, failed to include in its bid price cost of storing oxygen due to fact Govt. had previously furnished storage facilities, submitted an erroneous bid, which because it was 70 percent higher than only other bid received should have been verified since contracting officer had "constructive notice" of error—the legal substitute for actual knowledge—and acceptance of bid failed to consummate valid and binding contract. Unfilled portion of contract may be rescinded and payment made for deliveries on a *quantum valebat* basis, limited to amount of next lowest bid. 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---------- 30

Two bids received. (*See* **CONTRACTS, Mistakes, Price variances, Two bids received**)

Modification

Intention of parties not expressed

Patent assignment

Assignment to Govt. of full domestic rights to an invention developed by private firm under Govt. contract may be corrected on basis of mutual mistake of fact to conform to intent of parties, as evidenced by preexisting contract that domestic title vest jointly. To accomplish this, corrected assignment executed by parties should be refiled---------- 653

Propriety

Amendment of contract shortly after award to cover a more expensive superior article (which had been offered as an alternate) than the one accepted at lowest offered price raises question whether major purpose of procurement system was thwarterd by that action and whether change was within general scope of contract---------- 838

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

Negotiated. (*See* **CONTRACTS, Negotiation**)

Negotiation

Auction technique prohibition

Disclosure of price, etc.

Award for aircraft to offeror who scored highest both as to price and technical factors upon reevaluation of price factor of proposals subsequent to erroneous public opening of proposals and disclosure of prices will not be disturbed because reevaluation of points accorded price was necessitated by use of erroneous technique in initial evaluation

CONTRACTS—Continued Page

Negotiation—Continued

Auction technique prohibition—Continued

Disclosure of price, etc.—Continued

that proportionally reduced points that exceeded lowest price used as datum level and accorded 40 points; because initial technical evaluation by composite board assured independent judgment and fairness; and because notwithstanding disclosure of prices and subsequent negotiating procedures amounted to use of auction tenchique in violation of FPR 1-3.805-1(b), sufficient justification has been shown for not canceling procurement. However, repetition of deficiencies reviewed should be avoided in future procurements 253

Protest

Allegation after award that the RFP established an "auction technique" that is prohibited by par. 3-805.1(b) of ASPR is dismissed as untimely protest under sec. 20.2(a) of Interim Bid Protest Procedures and Standards since improprieties in RFP are required to be filed prior to closing date for receipt of proposals 632

Awards

Advantageous to Government

Propriety of award

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

Requirement

Even assuming that protester is correct that there is no advantage in having a CATV system underground as lower offeror proposed, instead of above-ground as protester proposed, that fact is insufficient to affect award, because, under the RFP, award to other than lowest price offeror would be justified only if its proposed configuration offered material advantage 676

Initial proposal basis

Competition sufficiency

Determination to make award for airport surveillance radar equipment on basis of initial proposals—exception to requirement for discussions with all offerors within competitive rangeis discretionary in nature, and lacking adequate price competition, since only one of two offers submitted was fully acceptable, the procuring agency properly considered exceptions to discussion had not been satisfied and conducted negotiations with offeror whose initial proposal, although technically unacceptable overall was susceptible of being upgraded to acceptable level--a

CONTRACTS—Continued Page
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Awards—Continued
Initial proposal basis—Continued
Competition sufficiency—Continued

determination that was not influenced by the fact a reduction in initial price made offer the lowest submitted. Therefore, award to low offeror was not arbitrary, notwithstanding technical superiority of competing offer since request for proposals did not make technical considerations paramount 5

Propriety
Evaluation of proposals

While consideration of ability of weather/time unit to disseminate base-oriented information prescribed by Air Force Reg. would be prejudicial to protester if it influenced contracting officer's award decision, GAO is unable to conclude award made was improper in absence of showing this was a determinative factor in awarding CATV franchise 676

Normally, GAO will not substitute its judgment for that of contracting officials by making independent determination as to what areas should be considered during evaluation and thereby influence which offeror should be rated first and receive award; such determinations being questioned only upon clear showing of unreasonableness or favoritism, or upon clear showing of violation of procurement statutes and regulations 800

Award of use permits was not shown to have been arbitrary, capricious or without reasonable basis, because offers were impartially evaluated against factors set forth in Public Notice soliciting proposals 949

NASA Procurement Regulation 3.805–2, which deemphasizes cost in favor of quality of expected performance, is not violated by selection of contractor for Solid Rocket Motor Project of Space Shuttle Program on basis of admitted uncertain cost proposal estimates covering 15-year contract period, GAO having found that cost proposals were conservatively adjusted; cost uncertainties as between proposers generally balanced out; and proposers were ranked essentially equal in mission suitability and other related factors 977

Upheld

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

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Negotiation—Continued

Awards—Continued

Propriety—Continued

Upheld—Continued

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

"Transfusion" concept

Where evaluation process has been concluded with selection of one offeror over another, term "transfusion" relates to receipt of an advantageous, unique concept which might not have accrued to selected proposer but for its performance under interim contracts covering studies, planning and design preliminary to award of development phase of overall program 977

Technical

"Technical transfusion" in context of competitive negotiation normally connotes transfer of unique concept from one proposer to another with result that latter obtains unfair evaluation advantage based on the other's ingenuity 977

Competition

Competitive range formula

Formula basis

Low proposal to fabricate a Satellite Communication Earth Station that was technically totally deficient, and which omitted required detailed information that was not corrected by accompanying blanket offer of compliance as statement was an inadequate substitution for omitted information, was an unacceptable proposal that was not susceptible of being made acceptable without major revision. Fact that proposal was lowest offer submitted does not require 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 proposal is totally unacceptable 1

Manning information

In a 100 percent small business set-aside negotiated procurement for mess attendant services where RFP provided for possible rejection of offers submitting manning charts whose total hours fell more than 5 percent below Govt.'s estimated need for hours without substantiating deficiency, contracting officer's rejection of such offer, initially considered within competitive range, is not abuse of his discretion even though

CONTRACTS—Continued Page

Negotiation——Continued

Competition—Continued

Competitive range formula—Continued

Manning information—Continued

rejection was subsequent to receipt of best and final offers. While offeror's elimination from competitive range may have been based in part on elements going to responsibility, it was not a determination of non-responsibility that required Small Business Administration Certificate of Responsibility proceeding---------- 388

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

Upon reconsideration of holding in 53 Comp. Gen. 440 that offer which failed to include justification required by the RFP when man-hours proposed deviated by more than 5% from Govt.'s estimate was improperly rejected as no discussion was held with the offeror the holding is affirmed, since reliance on numerical deviation for rejection of proposal was inconsistent with the technically acceptable proposal which indicated offeror could adequately perform notwithstanding manhours deviation, and with ASPR 3-805.2, which requires inclusion of offers in competitive range that have reasonable chance of being selected for award or if there is doubt as to whether offers are in competitive range_ 584

Discussion with all offerors requirement

Consideration of additional evaluation factors not contained in RFP was proper in view of fact that additional factors are sufficiently correlated to general criteria shown in RFP to satisfy requirement that prospective offerors be advised of evaluation factors which will be applied to their proposals; however, failure to disclose additional factors raises question of impartiality of evaluation and weakens integrity of procurement system---------- 800

Actions not requiring

Determination to make award for airport surveillance radar equipment on basis of initial proposals—exception to requirement for discussions with all offerors within competitive range—is discretionary in nature, and lacking adequate price competition, since only one of two offers submitted was fully acceptable, the procuring agency properly considered exceptions to discussion had not been satisfied and conducted negotiations with offeror whose initial proposal, although technically unacceptable overall was susceptible of being upgraded to acceptable level—a determination that was not by the fact a reduction in initial price made offer the lowest submitted. Therefore, award to low offeror was not arbitrary, notwithstanding technical superiority of competing offer since request for proposals did not make technical considerations paramount--- 5

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Discussion with all offerors requirement—Continued
Cost-reimbursement contracts
Administrative view that there is no requirement for competitive discussion under FPR 1-3.805-1(a)(5) when cost-reimbursement contract is contemplated means that competitive discussions would not be required even when proposed costs of most technically acceptable offeror were unreasonable and unrealistic, and belief that discussions need not be held in any circumstances when cost-type award is involved conflicts with requirement in section that discussions be held prior to award where there is any uncertainty as to pricing or technical aspects of proposal. Fact that cost-type award need not necessarily be made at lowest estimated cost does not nullify general requirement for discussion prior to award of negotiated contract as requirement for discussions with competitive offerors for cost-type awards is mandatory unless one of enumerated exceptions to requirement is involved..... 201
Deficiencies in proposals
Rule in 53 Comp. Gen. 593, requiring that opportunity be given offeror to submit revised proposal before its proposal initially in competitive range can be eliminated from consideration, is modified to allow elimination from competitive range of proposals included because they might have been susceptible to being made acceptable or because there was doubt as to whether they were in competitive range and discussions relating to ambiguities or omissions make clear that proposals should not have been included in competitive range initially. Otherwise proposals initially determined to be within competitive range should not be rejected without providing offerors opportunity to submit revised proposals..... 860
"Meaningful" discussions
Determination subsequent to discussion with all offerors not to award cost-plus-a-fixed-fee contract for development model of artillery locating radar to low offeror under RFP which contained criteria to evaluate Technical Proposal, Past Performance/Management, and Cost Proposal/Cost Realism factor is upheld where use of predetermined score, generally unacceptable, was not prejudicial in view of protester's low score; where acceptance of design implementation would involve high degree of risk, and discussion of design's deficiencies would subvert intent of procurement; where Govt.'s engineering man-hour estimates were not erroneous and their use to evaluate effort and cost realism did not mislead protester; where RFP contained sufficient statement of evaluation and award factors and record evidences meaningful discussions were held with all offerors; and where commonality features between contracts were not made evaluation factor..... 240
Proposal revisions
Exceptions taken by low offeror to option provision in RFP to furnish reinforced plastic weathershields on multiyear basis was properly determined to make offer unacceptable at close of first round of negotiations since acceptance of offer to change option clause constituting discussion would require reopening of negotiations to carry on discussions with all offerors within competitive range. Furthermore,

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Discussion with all offerors requirement—Continued
Proposal revisions—Continued

canceling second round of negotiations and changing procurement procedure to formal advertising was a reasoned exercise of procurement judgment on basis that further negotiations after leak of low offeror's price would be improper and in view of fact that substantial changes made in specifications warranted formal advertising and made negotiation of procurement no longer feasible---- 139

Rejection of proposal initially determined to be within competitive range on basis of oral statements made by offeror during the course of discussion was improper since offeror was not afforded an opportunity to submit a revised proposal. While duration of negotiation session with offeror is not determinative of whether meaningful discussions were conducted, affording offeror opportunity to submit revised proposal is essential element of negotiating process required by 10 U.S.C. 2304(g). However, procurement should not be disturbed since record shows award was made to offeror submitting superior proposal and agency had serious doubts as to protester's ability to perform contract. Modified by 53 Comp. Gen. 860---- 593

Technical transfusion or leveling

"Technical transfusion" in context of competitive negotiation normally connotes transfer of unique concept from one proposer to another with result that latter obtains unfair evaluation advantage based on the other's ingenuity---- 977

Transfusion

Where evaluation process has been concluded with selection of one offeror over another, term "transfusion" relates to receipt of an advantageous, unique concept which might not have accrued to selected proposer but for its performance under interim contracts covering studies, planning and design preliminary to award of development phase of overall program---- 977

What constitutes discussion

Exceptions taken by low offeror to option provision in RFP to furnish reinforced plastic weathershields on multiyear basis was properly determined to make offer unacceptable at close of first round of negotiations since acceptance of offer to change option clause constituting discussion would require reopening of negotiations to carry on discussions with all offerors within competitive range. Furthermore, canceling second round of negotiations and changing procurement procedure to formal advertising was a reasoned exercise of procurement judgment on basis that further negotiations after leak of low offeror's price would be improper and in view of fact that substantial changes made in specifications warranted formal advertising and made negotiation of procurement no longer feasible---- 139

Formal competitive bidding rules

Although deletion of total set-aside for small business concerns from IFB for hamsters without verification of potential bidders' intentions will not be questioned in view of concurrence of SBA representative to deletion, it is recommended that in future procurements decisions to

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Negotiation—Continued
Competition—Continued
Formal competitive bidding rules—Continued
make or delete total set-aside be carefully considered, potential sources of small business interest be thoroughly investigated, and basis of determination be fully explained and documented. Furthermore, discarding all bids under amended invitation that deleted set-aside and negotiation of procurement under 41 U.S.C. 252(c)(10) were improper actions since deviations in three bids received affected bidder responsibility and not bid responsiveness. However, negotiations currently being conducted may be continued as needs of contracting agency have changed since opening of bids and use of negotiations will not negate maximum possible competition which advertised procurements attempt to further.. 221
"Grower/packers" *v.* independent growers
Propriety
Agency did not act unreasonably in permitting "grower/packers" to compete with independent growers for award of use permits for operation of citrus groves since matter was one for agency's discretion and agency believes it had adequate safeguards against possibility of receiving artificially low returns from "grower/packers"..... 949
Impracticable to obtain
Justification for negotiation
Where procurement records for purchase of refuse collection trucks and related equipment under invitations for bids reveal past problems in securing competition both because of existence of patents and inclusion of patent indemnification clause, needs of procurement agency may be obtained under negotiating authority in 10 U.S.C. 2304(a)(10) if it appears likely that persons or firms other than patent holder who are capable of performing in accordance with Govt.'s specifications would not presently be interested in submitting bids..... 270
While 10 U.S.C. 2304(a)(2) authorizes procurement by negotiation when public exigency will not permit delay incident to advertising, prospect of untimely performance arising from causes other than time required for formal advertising procedure may constitute justification for non-competitive procurement under negotiating authority of 10 U.S.C. 2304(a)(10)..... 670
Unavailability of specifications requirement
Contention after contract award that it was not impossible to draft specifications for procurement of airport surveillance radar equipment and that procurement should have been formally advertised rather than negotiated under 41 U.S.C. 252(c)(10) is an allegation of an impropriety in solicitation that was apparent prior to date for receipt of proposals, and protest not having been filed under U.S. General Accounting Office Interim Bid Protest Procedures and Standards prior to closing date for receipt of proposals to permit remedial action was untimely filed, particularly in view of fact protestant was uniquely qualified to call procuring agency's attention to reasons why it believed it was not impossible to draft adequate specifications..... 5

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Competition—Continued
Test demonstration
Performance
Where RFP required live test demonstration of computer terminal by "Contractor" (offeror) and procuring activity interpreted clause as requiring protester to perform test with its personnel, rejection of protester's proposal as nonresponsive because test was performed by supplier's personnel was improper under competitive negotiation procedures.
Use of Government facilities
Unsuccessful proposer's plan to use Govt. facilities to be constructed would enhance competition for later production increment of space program, but GAO review shows that adequate competition for later increment may be achieved without using such facilities. In any case, possible increase in competition cannot be translated into amount to be included in probable cost evaluation ---------- 977
Cost, etc., data
Cost comparisons
Cost reimbursement *v.* fixed-price contracts
Cancellation of request for proposals for cartridges on basis out-of-pocket costs for performance in a contractor-owned and -operated (COCO) plant compared unfavorably with out-of-pocket costs incurred in Govt.-owned contractor-operated (GOCO) plants, and award to GOCO facility was in accord with terms of solicitation that conformed with par. 1-300.91(a) of Army Ammunition Command Procurement Instruction, which in turn is consistent with 10 U.S.C. 4532(a), "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; internal records of GOCO plant are not within disclosure provisions of 5 U.S.C. 552; and as GOCO activitiy is not Govt. commercial or industrial activity for purposes of BOB Cir. A-76, Federal taxes, depreciation, insurance, and interest are not for inclusion in GOCO cost estimates ---------- 40
Escalation
Normalization
Inflation element of escalation which, as distinguished from other elements of escalation, is beyond proposer's control should have been stated in NASA cost-reimbursement RFP as rate common to all proposers; but, since proposers in compliance with RFP included escalation rates in their proposals as to which it is not possible to break out controllable features of escalation, failure to normalize escalation is not unreasonable; any attempt to obtain refined cost data to normalize inflation would be inappropriate after-the-fact restructuring of cost proposals ---------- 977
Rate
Freight costs
While proposer planning to use rail transportation may be able to mitigate future freight rate increases, GAO believes agency should have assessed additional cost uncertainty in evaluation against proposal selected for negotiations which, as evaluated, had lower escalation rate

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Rate—Continued
Freight costs—Continued

for freight costs in principal production increment (1981–1988) than in developmental and initial production increments (1973–1981). Lack of verifiable cost information made uncertain escalation rate used by protester who planned to transport solid rocket motors by water..... 977

Labor costs
Evaluation
Not prejudicial

While agency used own techniques to estimate protester's labor costs because protester's computations contained error detected by Defense Contract Audit Agency, no prejudice ensued since agency's adjustments to proposed labor costs were significantly lower than claimed by protester and substantially lower than labor costs recalculated by protester voluntarily during consideration of protest. Had labor costs been evaluated consistent with recalculation, protester's most probable costs may well have been increased by $15 million..... 977

NASA evaluation factors
GAO review

GAO review confirmed NASA evaluation findings that facilities cost difference in favor of successful proposer was substantial. Protester planned to modify existing and construct new Govt. facilities while successful proposer offered to modify existing facilities as necessary. GAO examined: (1) minor adjustment to protester's costs due to unavailability of Government test stand; (2) best and final offer facility cost reductions; (3) comparison of subcontractor facility costs; (4) acquisition of Govt. plant by successful offeror; (5) Govt. support for protester; (6) residual value of facilities; (7) launch site support costs; (8) maintenance costs; and (9) other evaluators' adjustments... 977

NASA procedures
Normalization of proposed costs

Under NASA procedures, proposed costs are normalized—establishing "should have bid" common cost estimates—only when no logical reasons exist for cost differences between proposers or where insufficient cost data is furnished with proposals..... 977

Price adjustment
Savings
Speculative

Where RFP is silent concerning co-shipment by water of solid rocket motors and external tanks with attendant possible cost savings, and agency gave protester partial credit therefor, protester should have received appropriate further credit for such savings as positive cost uncertainty rather than reduction in most probable costs since actual savings are extremely speculative..... 977

Price negotiation techniques

Under NASA procedures, proposed costs are normalized—establishing "should have bid" common cost estimates—only when no logical reasons exist for cost differences between proposers or where insufficient cost data is furnished with proposals..... 977

CONTRACTS—Continued Page
Negotiation—Continued
Cost, etc., data—Continued
"Realism" of cost
Determination subsequent to discussion with all offerors not to award cost-plus-a-fixed-fee contract for development model of artillery locating radar to low offeror under RFP which contained criteria to evaluate Technical Proposal, Past Performance/Management, and Cost Proposal/Cost Realism factor is upheld where use of predetermined score, generally unacceptable, was not prejudicial in view of protester's low score; where acceptance of design implementation would involve high degree of risk, and discussion of design's deficiencies would subvert intent of procurement; where Govt.'s engineering man-hour estimates were not erroneous and their use to evaluate effort and cost realism did not mislead protester; where RFP contained sufficient statement of evaluation and award factors and record evidences meaningful discussions were held with all offerors; and where commonality features between contracts were not made evaluation factor---- 240
Where RFP is silent concerning co-shipment by water of solid rocket motors and external tanks with attendant possible cost savings, and agency gave protester partial credit therefor, protester should have received appropriate further credit for such savings as positive cost uncertainty rather than reduction in most probable costs since actual savings are extremely speculative---- 977
Verification
While proposer planning to use rail transportation may be able to mitigate future freight rate increases, GAO believes agency should have assessed additional cost uncertainty in evaluation against proposal selected for negotiations which, as evaluated, had lower escalation rate for freight costs in principal production increment (1981–1988) than in developmental and initial production increments (1973–1981). Lack of verifiable cost information made uncertain escalation rate used by protester who planned to transport solid rocket motors by water---- 977
Cost-plus-award-fee contracts
Deficient proposals
In absence of standardized RFP estimate for non-Govt. propellant component demand, NASA should have normalized proposed prices for propellant component since any proposer, if successful, would obtain component from same sources in essentially same quantities for delivery from same locations---- 977
Evaluation
On basis of GAO review of NASA evaluation of cost-plus-award-fee proposals for Solid Rocket Motor Project of Space Shuttle Program covering 15-year period in estimated price range of $800 million, it is recommended that NASA determine whether, in view of substantial net decrease in probable cost between two lowest proposers, selection decision should be reconsidered---- 977

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Negotiation—Continued

Cut-off-date

Termination of proposal evaluation

Reasonable

Shift in manufacturing site of key component submitted 5 days before final cost evaluation need not be evaluated for potential savings since savings were contingent on availability and assignment of floor space at proposed alternate Govt. site, information presented as to *quantum* of savings was insufficient, and time for evaluation was limited. Procurement agency may terminate proposal evaluation at some reasonable point after final cutoff date 977

Determination and findings

Propriety of determination

Award by AF of domestic cargo airlift contract negotiated under 10 U.S.C. 2304(a)(16) pursuant to Class Determinations and Findings to Govt. corporation that is to be transferred to individual to whom award is contemplated and who is currently operating the activity pending Civil Aeronautics Board approval is not improper in view of fact contract will contain termination provision in event approval is withheld; OMB Cir. A-76 and implementing Defense Directives although favoring contracting with private, commercial enterprises allow Govt. operation of commercial activity "to maintain or strengthen mobilization readiness;" services of intended buyer during Govt. control does not make him "officer or employee" within conflict of interest statutes, 18 U.S.C. 205, 18 U.S.C. 207-208; there is no evidence of unfair competition; and contracting agency has broad discretionary authority to award contract in interest of national defense 86

Disclosure of price, etc.

Auction technique prohibition

Where agency intended to treat RFP as advertised solicitation, which intention was known to protester, and proposals are publicly opened and prices disclosed, lowest responsible offeror should be considered for award without invoking negotiation procedures 780

Discussion requirement

Competion. (*See* **CONTRACTS, Negotiation, Competition, Discussion with all offerors requirement**)

Reopening negotiation justification

Although procuring activity should have known of exceptions taken in protester's proposal prior to close of first round of negotiations and should have discussed such exceptions with protester prior to its submission of a best and final offer, since discovery of exceptions taken occurred subsequent to submission of best and final offers, procuring activity had no alternative but to institute a second round of negotiations, and failure to discover and discuss exceptions is not sufficient basis to reverse holding in 53 Comp. Gen. 139 564

Evaluation factors

Additional factors

Not in request for proposals

Consideration of additional evaluation factors not contained in RFP was proper in view of fact that additional factors are sufficiently correlated to general criteria shown in RFP to satisfy requirement that

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Negotiation—Continued

Evaluation factors—Continued

Additional factors—Continued

Not in request for proposals—Continued

prospective offerors be advised of evaluation factors which will be applied to their proposals; however, failure to disclose additional factors raises question of impartiality of evaluation and weakens integrity of procurement system 800

All offerors informed requirement

Consideration of reconnection and relocation fees in evaluation of proposals for furnishing on-base CATV services is prohibited where Air Force Reg. 70–3 specifically excludes them as evaluation factors and, furthermore, no correlation exists between such fees and general evaluation criteria stated in the RFP so as to satisfy requirement that offerors be advised of evaluation criteria 676

Best buy analysis

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

Commonality features of prior contracts

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

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Negotiation—Continued
Evaluation factors—Continued
Conformability of equipment, etc.
Technical deficiencies. (*See* CONTRACTS, Specifications, Conformability of equipment, etc., Technical deficiencies, Negotiated procurement)
Criteria
Use of adjusted Independent Government Cost Estimate (IGCE) in evaluation of proposals, and addition of 41 percent factor to all cost proposals appears proper as use of adjusted IGCE was neither arbitrary nor capricious and constituted exercise of proposal evaluation responsibility 800
Adequacy
Where RFP for mess attendant services required that offered price/hour be greater than offeror's basic labor expense, but agency failed to include realistic figure for vacation and holidays, award made is not considered improper since purpose of evaluation criteria to prevent unrealistically inflated manning charts and award at price so low that satisfactory performance would be jeopardized appears to have been met, and all offerors were evaluated on same basis, and contract awarded is being performed satisfactorily at offered price 388
Application of criteria
Consideration of reconnection and relocation fees in evaluation of proposals for furnishing on-base CATV services is prohibited where Air Force Reg. 70–3 specifically excludes them as evaluation factors and, furthermore, no correlation exists between such fees and general evaluation criteria stated in the RFP so as to satisfy requirement that offerors be advised of evaluation criteria 676
Deficient
Statement of evaluation criteria, contained in Public Notice soliciting proposals for use permits to operate citrus groves, was deficient in that it did not set forth minimum standards or provide reasonably definite information as to degree of importance to be accorded particular evaluation factors in relation to each other 949
Subcriteria
Although offerors under RFP should be informed of relative weights of main categories of evaluation factors, failure to disclose relative weights of subcriteria does not warrant question by GAO if subcriteria used are of such nature as to be "definitive" of main criteria as opposed to being essential characteristics or measurements of performance of end item being procured. 51 Comp. Gen. 272 modified 800
Delivery provisions, freight rates, etc.
Evaluation criteria under RFP must reflect the actual circumstances of resulting contract; therefore, it was improper to evaluate cost proposals for time period extending 2 months beyond contract term and also to allow 5 percent rental credit offered by one offeror if equipment was leased for 24 months because greatest length of time possible under contract terms was 22 months and therefore Govt. would never obtain benefit of rental credit 895

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Evaluation factors—Continued
Delivery provisions, freight rates, etc.—Continued

Acceptance reasonable

Acceptance for evaluation purposes of special Govt. freight rate quotations from railroads under sec. 22 of Interstate Commerce Act (49 U.S.C. 22) significantly lower than existing or similar rates for same commodity and subject to cancellation on 30 days' notice was reasonable since (1) rates were agreed to by railroads and type of traffic proposed has generally moved on section 22 rates; (2) volume and frequency of traffic justifies low rates; (3) railroads have been reliable in maintaining reasonable rate levels; and (4) all rates are compensatory using available cost information 977

Agency evaluation approximates GAO's

Agency cost evaluation resulting in $36 million advantage to protester offering water transportation by barge of solid rocket motors from proposed production facility in Southeast to launch sites approximates GAO evaluation even though (1) there was no anticipated cost or contractual agreement between protester and potential barge transporter; (2) barge transporter has no record of offering freight rates to Govt.; and (3) no historical cost data exists because no barge of type proposed to transport solid rocket motors exists in the U.S. fleet at present 977

Discount terms

While prompt payment discount was not included in section of RFP dealing with cost evaluation, SF 33A included in RFP made provision for offering such discount and Govt. therefore may evaluate discount along with other costs for it is presumed that Govt. will take advantage of any discount offered; moreover, argument that discount is too uncertain to be evaluated has no merit where agency sets minimum time which discount must remain available to allow taking advantage of discount 895

Present value method

While present value method (PVM) of cost evaluation need not be applied separately to 3 percent prompt payment discount, PVM should be calculated on monthly basis and not yearly basis, as was done in instant case, because contract payments will be made monthly 895

Early year funding

Contention that early year funding factor in NASA RFP should have been treated as unimportant in management evaluation is contradicted by preproposal reviews stressing need to minimize such funding, terms of RFP, and protester's own proposal which incorporated low early year funding in management commitment. Agency's independent evaluation and judgement of protester's high early year funding was not without reasonable foundation; and record does not support contention that successful proposer should have received management penalty for inferior design since penalty was assessed in technical scoring and cost .. 977

Erroneous evaluation

Award for aircraft to offeror who scored highest both as to price and technical factors upon reevaluation of price factor of proposals subsequent to erroneous public opening of proposals and disclosure of prices will not be disturbed because reevaluation of points accorded price was neces-

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Erroneous evaluation—Continued

sitated by use of erroneous technique in initial evaluation that proportionally reduced points that exceeded lowest price used as datum level and accorded 40 points; because initial technical evaluation by composite board assured independent judgment and fairness; and because notwithstanding disclosure of prices and subsequent negotiating procedures amounted to use of auction technique in violation of FPR 1–3.805–1(b), sufficient justification has been shown for not canceling procurement. However, repetition of deficiencies reviewed should be avoided in future procurements 253

Escalation
Including inflation

In light of RFP's definition of escalation—inflation plus variables resulting from dissimilar company business policies—to be used in converting 1972 dollars to real year dollars (dollars expected to be expended in performance of program), inflation can be considered a persistent and appreciable rise in general level of prices for both labor and materials which should be uniform for all proposers 977

Transportation costs

While proposer planning to use rail transportation may be able to mitigate future freight rate increases, GAO believes agency should have assessed additional cost uncertainty in evaluation against proposal selected for negotiations which, as evaluated, had lower escalation rate for freight costs in principal production increment (1981–1988) than in developmental and initial production increments (1973–1981). Lack of verifiable cost information made uncertain escalation rate used by protester who planned to transport solid rocket motors by water 977

Facilities
"Tailored"

Contention that proposed new "tailored" facilities to perform contract would require 2.9 million less labor hours than needed by selected proposer performing in existing facilities is not supported. Agency's acceptance of comparable labor hours of both proposers was reasonable despite fact that labor hour estimates were based on subjective judgment 977

Factors other than price

Use of adjusted Independent Government Cost Estimate (IGCE) in evaluation of proposals, and addition of 41 percent factor to all cost proposals appears proper as use of adjusted IGCE was neither arbitrary nor capricious and constituted exercise of proposal evaluation responsibility 800

NASA Procurement Regulation 3.805–2, which deemphasizes cost in favor of quality of expected performance, is not violated by selection of contractor for Solid Rocket Motor Project of Space Shuttle Program on basis of admitted uncertain cost proposal estimates covering 15-year contract period, GAO having found that cost proposals were conservatively adjusted; cost uncertainties as between proposers generally balanced out; and proposers were ranked essentially equal in mission suitability and other related factors 977

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Negotiation—Continued
Evaluation factors—Continued
Factors other than price—Continued

Employee absenteeism

Absenteeism of employees, which was not stated in the RFP as factor to be used in computing offerors' basic labor expense, was properly not considered in such computation ---------- 710

Experience

Awardee's previous experience as CATV constructor is factor for consideration under criteria for system configuration since it concerns responsibility of prospective contractor under 10 U.S.C. 2304(g) ------ 676

Greatest value to Government

Notwithstanding Air Force Reg. 70–3 prohibition against consideration of offer to provide program origination equipment in evaluation of CATV franchise award, ability of weather/time unit for program origination purposes proposed by successful offeror may be considered without prejudice to other offerors, since unit was included in low offer at no additional cost to subscribers ---------- 676

Manning information

Upon reconsideration of holding in 53 Comp. Gen. 440 that offer which failed to include justification required by the RFP when manhours proposed deviated by more than 5% from Govt.'s estimate was improperly rejected as no discussion was held with the offeror the holding is affirmed, since reliance on numerical deviation for rejection of proposal was inconsistent with the technically acceptable proposal which indicated offeror could adequately perform notwithstanding manhours deviation, and with ASPR 3–805.2, which requires inclusion of offers in competitive range that have reasonable chance of being selected for award or if there is doubt as to whether offers are in competitive range -- 584

Speculative factors

Failure of agency to consider protester's offer to provide additional channels as they became available via satellite to be orbited some time in future is unobjectionable since evaluation of most advantageous offer should be confined to matters whose occurrence were not subject to speculation ---------- 676

Technical acceptability

Low proposal to fabricate a Satellite Communication Earth Station that was technically totally deficient, and which omitted required detailed information that was not corrected by accompanying blanket offer of compliance as statement was an inadequate substitution for omitted information, was an unacceptable proposal that was not susceptible of being made acceptable without major revision. Fact that proposal was lowest offer submitted does not require 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 proposal is totally unacceptable -- 1

Proposal to furnish mess attendant services which deviated more than 5 percent from manning estimates in the RFP was improperly rejected since proposal was found to be technically satisfactory on basis of same manning charts that contained deviation and ASPR

COMPENSATION—Continued Page
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Technical acceptability—Continued
3-805.2 requires inclusion in competitive range of all offers which have reasonable chance of being selected for award and those offers where there is doubt they are in competitive range. Although offer should not have been regarded as outside competitive range without opportunity for offeror to submit documentation substantiating manning differences, interference with good-faith award is not warranted but it is recommended that renewal option in contract should not be exercised..... 440
Government property use
Award of use permits was not shown to have been arbitrary, capricious or without reasonable basis, because offers were impartially evaluated against factors set forth in Public Notice soliciting proposals..... 949
Effect on competition
Unsuccessful proposer's plan to use Govt. facilities to be constructed would enhance competition for later production increment of space program, but GAO review shows that adequate competition for later increment may be achieved without using such facilities. In any case, possible increase in competition cannot be translated into amount to be included in probable cost evaluation..... 977
Information
Failure to furnish
Low proposal to fabricate a Satellite Communication Earth Station that was technically totally deficient, and which omitted required detailed information that was not corrected by accompanying blanket offer of compliance as statement was an inadequate substitution for omitted information, was an unacceptable proposal that was not susceptible of being made acceptable without major revision. Fact that proposal was lowest offer submitted does not require 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 proposal is totally unacceptable..... 1
Inflation and escalation recovery costs
In light of RFP's definition of escalation—inflation plus variables resulting from dissimilar company business policies—to be used in converting 1972 dollars to real year dollars (dollars expected to be expended in performance of program), inflation can be considered a persistent and appreciable rise in general level of prices for both labor and materials which should be uniform for all proposers..... 977
Labor costs
Acceptance
Reasonable
Contention that proposed new "tailored" facilities to perform contract would require 2.9 million less labor hours than needed by selected proposer performing in existing facilities is not supported. Agency's acceptance of comparable labor hours of both proposers was reasonable despite fact that labor hour estimates were based on subjective judgment. 977

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Labor costs—Continued
Evaluation
Not prejudicial
While agency used own techniques to estimate protester's labor costs because protester's computations contained error detected by Defense Contract Audit Agency, no prejudice ensued since agency's adjustments to proposed labor costs were significantly lower than claimed by protester and substantially lower than labor costs recalculated by protester voluntarily during consideration of protest. Had labor costs been evaluated consistent with recalculation, protester's most probable costs may well have been increased by $15 million---- 977
Hourly and salaried personnel
Although hourly labor rates are lower where protester proposes to perform contract than where selected proposer will perform, agency properly concluded that composite direct labor rates, which include hourly and salaried personnel, were lower for selected proposer since protester's composite rates included higher paid salaried personnel. Also, protester elected to charge salaried personnel rates to direct labor cost because of performance in facility dedicated to program while selected proposer who planned to use facility where several other Govt. programs would be performed properly charged salaried personnel rates to overhead---- 977
Upward adjustment
Protester's contention that upward adjustment of labor costs in cost evaluation should have decreased overhead and general and administrative (G&A) rates in computing adjusted labor costs is supported by accounting principles. However, protester's proposal did not contain enough data to permit agency to derive lower overhead and G&A rates; and procedure employed in this regard was consistently applied to all proposers---- 977
Manning requirements
Government estimated basis
Under RFP for performance of mess attendant services that contained Govt. estimate of required man-hours and that stated 5 percent deviation below estimate may result in rejection of offer unless satisfactory performance could be substantiated, acceptance of proposal that was 15 percent below Govt.'s estimate would not constitute change in specifications without notice to offerors since solicitation indicated use of lesser man-hours than required which could reduce total cost would be desirable; five of eight offerors were without 5-percent range, thus evidencing equal opportunity to deviate; and feasibility of accepting 15-percent deviation is supported by fact deviation was based on study of degree to which mess facilities would be used and fact man-hours proposed exceeded man-hours utilized by incumbent contractor---- 198
Determination subsequent to discussion with all offerors not to award cost-plus-a-fixed-fee contract for development model of artillery locating radar to low offeror under RFP which contained criteria to evaluate Technical Proposal, Past Performance/Management, and Cost Proposal/Cost Realism factor is upheld where use of predetermined score,

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Manning requirements—Continued

Government estimated basis—Continued

generally unacceptable, was not prejudicial in view of protester's low score; where acceptance of design implementation would involve high degree of risk, and discussion of design's deficiencies would subvert intent of procurement; where Govt.'s engineering man-hour estimates were not erroneous and their use to evaluate effort and cost realism did not mislead protester; where RFP contained sufficient statement of evaluation and award factors and record evidences meaningful discussions were held with all offerors; and where commonality features between contracts were not made evaluation factor..... 240

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

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

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

Upon reconsideration of holding in 53 Comp. Gen. 440 that offer which failed to include justification required by the RFP when manhours proposed deviated by more than 5% from Govt.'s estimate was improperly rejected as no discussion was held with the offeror the holding is affirmed, since reliance on numerical deviation for rejection of proposal was inconsistent with the technically acceptable proposal which indicated offeror could adequately perform notwithstanding manhours deviation, and with ASPR 3-805.2, which requires inclusion of offers in competitive

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range that have reasonable chance of being selected for award or if there is doubt as to whether offers are in competitive range---- 584
Where successful offeror under RFP to furnish mess attendant services could be required to perform at manning levels above those stated on manning chart without any increase in contract price, statement made during negotiations that Govt. estimates were realistic and that satisfactory service could not be assured with lower maximum staffing level, did not prejudice any offerors since agency's interpretation that offeror's manning chart level was maximum staffing that Govt. would require of successful offeror was not used in evaluation of offers and offerors are required by terms of RFP to perform services satisfactorily even at levels above those stated in manning charts---- 656
Acceptance of offer to provide mess attendant services, which was based in part on offeror's additional guarantee to provide manning within Govt.'s estimated range should need arise, is irrelevant in that the RFP requires successful offeror to perform at that level or higher should need arise---- 656
Estimate of man-hours required to perform mess attendant work need not be revised merely because one offeror submitted a substantiated proposal below 95 percent of Govt. estimate, since all offerors had same opportunity, specifically stated in the RFP to submit justification for their lower figures and there has been no lessening of RFP requirements. Furthermore, successful offeror showed the reasonableness of Govt.'s representative day estimates and additionally showed that fewer hours are needed annually; that is the annual total need for man-hours and not the mathematical total of representative days---- 656
Award of mess attendant contract to offeror who submitted proposal which included only one manning chart that exhibited a manning level above 95 percent of Govt. estimate will not be questioned, notwithstanding allegation that Navy improperly interpreted governing RFP provision, as there is more than one reasonable interpretation of provision---- 710
Under mess attendant services solicitation an offeror who submitted two of three manning charts under 95 percent of the Govt.'s estimate, and a total offer of less than 95 percent of Govt.'s total estimate was improperly awarded contract since the RFP required conformance with the 95 percent level---- 710
Manning chart staffing level effect
Under RFP that required submission of manning charts for representative weekday and representative weekend/holiday to foster evaluation of offeror's overall understanding of food service operations, evaluation of total manning offered need not be restricted solely to level indicated in manning chart, and although the RFP apparently assumes that offeror's manning levels will be totally reflected rather than partially reflected, this assumption was not intended to be a condition precedent to the evaluation of offer---- 656

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Negotiation—Continued
Evaluation factors—Continued
Manning requirements—Continued
Noncompliance
In a 100 percent small business set-aside negotiated procurement for mess attendant services where RFP provided for possible rejection of offers submitting manning charts whose total hours fell more than 5 percent below Govt.'s estimated need for hours without substantiating deficiency, contracting officer's rejection of such offer, initially considered within competitive range, is not abuse of his discretion even though rejection was subsequent to receipt of best and final offers. While offeror's elimination from competitive range may have been based in part on elements going to responsibility, it was not a determination of nonresponsibility that required Small Business Administration Certificate of Responsibility proceeding 388
Price/hour less than basic labor expense
Where RFP for mess attendant services required that offered price/hour be greater than offeror's basic labor expense, but agency failed to include realistic figure for vacation and holidays, award made is not considered improper since purpose of evaluation criteria to prevent unrealistically inflated manning charts and award at price so low that satisfactory performance would be jeopardized appears to have been met, and all offerors were evaluated on same basis, and contract awarded is being performed satisfactorily at offered price 388
Since the RFP for mess attendant services mandates rejection of an offer whose dollar/hour ratio (price/hour) does not exceed offeror's basic labor expense, where successful offeror's basic labor expense exceeded its dollar/hour ratio, even when suggested variable factors are utilized, contract award made was improper 710
Absenteeism of employees, which was not stated in the RFP as factor to be used in computing offerors' basic labor expense, was properly not considered in such computation 710
Since no factor was stated in the RFP relative to calculating offerors' basic labor expense, even though Navy utilized 5-percent factor, another factor equal or superior in its realism could have been utilized, and successful offeror's basic labor expense could have been lowered thereby making it conform to the RFP limits 710
Propriety
Where successful offeror under RFP to furnish mess attendant services could be required to perform at manning levels above those stated on manning chart without any increase in contract price, statement made during negotiations that Govt. estimates were realistic and that satisfactory service could not be assured with lower maximum staffing level, did not prejudice any offerors since agency's interpretation that offeror's manning chart level was maximum staffing that Govt. would require of successful offeror was not used in evaluation of offers and offerors are required by terms of RFP to perform services satisfactorily even at levels above those stated in manning charts 656

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Evaluation factors—Continued
Out-of-pocket costs
COCO *v.* GOCO plants
Cancellation of request for proposals for cartridges on basis out-of-pocket costs for performance in a contractor-owned and -operated (COCO) plant compared unfavorably with out-of-pocket costs incurred in Govt-owned contractor-operated (GOCO) plants, and award to GOCO facility was in accord with terms of solicitation that conformed with par. 1-300.91(a) of Army Ammunition Command Procurement Instruction, which in turn is consistent with 10 U.S.C. 4532(a), "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; internal records of GOCO plant are not within disclosure provisions of 5 U.S.C. 552; and as GOCO activity is not Govt. commercial or industrial activity for purposes of BOB Cir. A-76, Federal taxes, depreciation, insurance, and interest are not for inclusion in GOCO cost estimates ---------- 40
Performance time
Contention that proposed new "tailored" facilities to perform contract would require 2.9 million less labor hours than needed by selected proposer performing in existing facilities is not supported. Agency's acceptance of comparable labor hours of both proposers was reasonable despite fact that labor hour estimates were based on subjective judgment- 977
Point rating
Evaluation guidelines
Although offerors under RFP should be informed of relative weights of main categories of evaluation factors, failure to disclose relative weights of subcriteria does not warrant question by GAO if subcriteria used are of such nature as to be "definitive" of main criteria as opposed to being essential characteristics or measurements of performance of end item being procured. 51 Comp. Gen. 272 modified ---------- 800
Predetermined score
Determination subsequent to discussion with all offerors not to award cost-plus-a-fixed-fee contract for development model of artillery locating radar to low offeror under RFP which contained criteria to evaluate Technical Proposal, Past Performance/Management, and Cost Proposal/Cost Realism factor is upheld where use of predetermined score, generally unacceptable, was not prejudicial in view of protester's low score; where acceptance of design implementation would involve high degree of risk, and discussion of design's deficiencies would subvert intent of procurement; where Govt.'s engineering man-hour estimates were not erroneous and their use to evaluate effort and cost realism did not mislead protester; where RFP contained sufficient statement of evaluation and award factors and record evidences meaningful discussions were held with all offerors; and where commonality features between contracts were not made evaluation factor ---------- 240

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Negotiation—Continued
Evaluation factors—Continued
Point rating—Continued

Reevaluation

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

Price consideration not mandatory

Low proposal to fabricate a Satellite Communication Earth Station that was technically totally deficient, and which omitted required detailed information that was not corrected by accompanying blanket offer of compliance as statement was an inadequate substitution for omitted information, was an unacceptable proposal that was not susceptible of being made acceptable without major revision. Fact that proposal was lowest offer submitted does not require 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 proposal is totally unacceptable 1

Price elements for consideration

Cost estimates

Use of adjusted Independent Government Cost Estimate (IGCE) in evaluation of proposals, and addition of 41 percent factor to all cost proposals appears proper as use of adjusted IGCE was neither arbitrary nor capricious and constituted exercise of proposal evaluation responsibility 800

While prompt payment discount was not included in section of RFP dealing with cost evaluation, SF 33A included in RFP made provision for offering such discount and Govt. therefore may evaluate discount along with other costs for it is presumed that Govt. will take advantage of any discount offered; moreover, argument that discount is too uncertain to be evaluated has no merit where agency sets minimum time which discount must remain available to allow taking advantage of discount 895

Propriety of evaluation

Contentions against propriety of award "to develop fully the automated analysis of chromosomes" do not require cancellation of award where successful offeror was selected only after on-site approval of facilities and favorable *ad hoc* technical evaluation of its proposal by

CONTRACTS—Continued Page

Negotiation—Continued

Evaluation factors—Continued

Propriety of evaluation—Continued

panel of scientists on basis of presenting most advantageous offer, price and other factors considered, notwithstanding doubt as to validity of cost and best buy analysis and failure to clarify statistical program offered. Furthermore, contracting officer is satisfied that performance of contract meets the RFP requirements; that subcontracting of laboratory work is proper; and that no diversion of grant funds is occurring. Fact that mechanism for award was interagency agreement between HEW and NASA (42 U.S.C. 2473(b) (5) and (6)), and incorporation of project as task order under existing contract between NASA and contractor does not reflect on legality of contract 278

Consideration of reconnection and relocation fees in evaluation of proposals for furnishing on-base CATV services is prohibited where Air Force Reg. 70–3 specifically excludes them as evaluation factors and, furthermore, no correlation exists between such fees and general evaluation criteria stated in the RFP so as to satisfy requirement that offerors be advised of evaluation criteria 676

Speculative factors

Where RFP is silent concerning co-shipment by water of solid rocket motors and external tanks with attendant possible cost savings, and agency gave protester partial credit therefor, protester should have received appropriate further credit for such savings as positive cost uncertainty rather than reduction in most probable costs since actual savings are extremely speculative 977

Standard items

Normalization of prices

In absence of standardized RFP estimate for non-Govt. propellant component demand, NASA should have normalized proposed prices for propellant component since any proposer, if successful, would obtain component from same sources in essentially same quantities for delivery from same locations 977

Superior product offered

Determination to make award for airport surveillance radar equipment on basis of initial proposals—exception to requirement for discussions with all offerors within competitive range—is discretionary in nature, and lacking adequate price competition, since only one of two offers submitted was fully acceptable, the procuring agency properly considered exceptions to discussion had not been satisfied and conducted negotiations with offeror whose initial proposal, although technically unacceptable overall was susceptible of being upgraded to acceptable level—a determination that was not influenced by the fact a reduction in initial price made offer the lowest submitted. Therefore, award to low offeror was not arbitrary, notwithstanding technical superiority of competing offer since request for proposals did not make technical considerations paramount 5

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Negotiation—Continued
Evaluation factors—Continued
Testing costs
Where RFP required live test demonstration of computer terminal by "Contractor" (offeror) and procuring activity interpreted clause as requiring protester to perform test with its personnel, rejection of protester's proposal as nonresponsive because test was performed by supplier's personnel was improper under competitive negotiation procedures 895
Late proposals and quotations
Shift in manufacturing site of key component submitted 5 days before final cost evaluation need not be evaluated for potential savings since savings were contingent on availability and assignment of floor space at proposed alternate Govt. site, information presented as to *quantum* of savings was insufficient, and time for evaluation was limited. Procurement agency may terminate proposal evaluation at some reasonable point after final cutoff date 977
Limitation on negotiation
Propriety
A request for proposals that was issued pursuant to 10 U.S.C. 2304(a)(16) for maintenance of defense mobilization base established for module type booster was not improperly restricted to base producers, even though configuration of booster had been radically changed, in view of fact skills and capital equipment used by base manufacturers of old style booster are readily adaptable to new style booster, and agency authorized to maintain viable industrial mobilization base in interest of national defense may limit negotiation under 10 U.S.C. 2304(a)(16) to present base producers. Therefore, return of unopened offer to firm that is not member of defense mobilization base is within scope of contracting agency's authority 348
Lowest offer
Award basis
Where agency intended to treat RFP as advertised solicitation, which intention was known to protester, and proposals are publicly opened and prices disclosed, lowest responsible offeror should be considered for award without invoking negotiation procedures 780
Manning requirements
Compliance
Where RFP for mess attendant services contemplated that offers would be in a certain format and successful offeror only partially complied stating that it would use representative day figures only a certain specified number of times during year, but on other specified days, it could and would use less manning due to lesser usage of mess halls, offeror did not depart from RFP requirements (ASPR 3-805.1(a)(5)) since use of calendar year containing 252 *representative* weekdays and 113 *representative* weekend/holidays was not RFP requirement 656

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Negotiation—Continued
Modification of contract
Change within scope of contract
Amendment of contract shortly after award to cover a more expensive superior article (which had been offered as an alternate) than the one accepted at lowest offered price raises question whether major purpose of procurement system was thwarted by that action and whether change was within general scope of contract ---- 838
National emergency authority
Restrictions on negotiations
A request for proposals that was issued pursuant to 10 U.S.C. 2304(a)(16) for maintenance of defense mobilization base established for module type booster was not improperly restricted to base producers, even though configuration of booster had been radically changed, in view of fact skills and capital equipment used by base manufacturers of old style booster are readily adaptable to new style booster, and agency authorized to maintain viable industrial mobilization base in interest of national defense may limit negotiation under 10 U.S.C. 2304(a)(16) to present base producers. Therefore, return of unopened offer to firm that is not member of defense mobilization base is within scope of contracting agency's authority ---- 348
Use propriety
Award by AF of domestic cargo airlift contract negotiated under 10 U.S.C. 2304(a)(16) pursuant to Class Determinations and Findings to Govt. corporation that is to be transferred to individual to whom award is contemplated and who is currently operating the activity pending Civil Aeronautics Board approval is not improper in view of fact contract will contain termination provision in event approval is withheld; OMB Cir. A-76 and implementing Defense Directives although favoring contracting with private, commercial enterprises allow Govt. operation of commercial activity "to maintain or strengthen mobilization readiness;" services of intended buyer during Govt. control does not make him "officer or employee" within conflict of interest statutes, 18 U.S.C. 205, 18 U.S.C. 207-208; there is no evidence of unfair competition; and contracting agency has broad discretionary authority to award contract in interest of national defense ---- 86
Notice to offeror of disqualification
Where award was not made under the RFP until 20 days after the protester's proposal was determined to be unacceptable, par. 3-508.2 of ASPR required agency to notify protester that its proposal was rejected. However, any violation of regulation is procedural and does not affect award ---- 593

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Negotiation—Continued
Prices
Additional features without cost increase
Notwithstanding Air Force Reg. 70-3 prohibition against consideration of offer to provide program origination equipment in evaluation of CATV franchise award, ability of weather/time unit for program origination purposes proposed by successful offeror may be considered without prejudice to other offerors, since unit was included in low offer at no additional cost to subscribers 676
Cost and pricing data evaluation
Present value method
While present value method (PVM) of cost evaluation need not be applied separately to 3 percent prompt payment discount, PVM should be calculated on monthly basis and not yearly basis, as was done in instant case, because contract payments will be made monthly 895
Disclosure
Exceptions taken by low offeror to option provision in RFP to furnish reinforced plastic weathershields on multiyear basis was properly determined to make offer unacceptable at close of first round of negotiations since acceptance of offer to change option clause constituting discussion would require reopening of negotiations to carry on discussions with all offerors within competitive range. Furthermore, canceling second round of negotiations and changing procurement procedure to formal advertising was a reasoned exercise of procurement judgment on basis that further negotiations after leak of low offeror's price would be improper and in view of fact that substantial changes made in specifications warranted formal advertising and made negotiation of procurement no longer feasible 139
Since question of propriety of cancellation of a RFP and subsequent solicitation of an invitation for bids (IFB) of plastic weathershields is not contingent upon whether or not changes in specifications were substantial but upon discovery of price leak of offer that was low at close of first round of negotiations prior to beginning second round of negotiations, cancellation of RFP and resolicitation by IFB was appropriate 564
Propriety
Initial proposal basis award
Determination to make award for airport surveillance radar equipment on basis of initial proposals—exception to requirement for discussions with all offerors within competitive range—is discretionary in nature, and lacking adequate price competition, since only one of two offers submitted was fully acceptable, the procuring agency properly considered exceptions to discussion had not been satisfied and conducted negotiations with offeror whose initial proposal, although technically unacceptable overall was susceptible of being upgraded to acceptable level—a determination that was not influenced by the fact a reduction in initial price made offer the lowest submitted. Therefore, award to low offeror was not arbitrary, notwithstanding technical superiority of competing offer since request for proposals did not make technical considerations paramount 5

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Negotiation—Continued
Public exigency
Certificate of urgency
Although determination that a small business concern submitting low offer under request for proposals to perform refrigerated warehouse services, involving receipt, storage, assembly, and distribution of food, including export transportation, was nonresponsible in areas of health, safety, and sanitation should have been promptly referred, pursuant to par. 1-705.4(c)(iv) of Armed Services Procurement Reg., to Small Business Admin. for certificate of competency consideration since deficiencies relate to "capacity" defined as "overall ability * * * to meet quality, quantity, and time requirements," issuance of certificate of urgency in lieu was justified and reasonable as delay was not administratively created, and continuation of services was essential. Furthermore, rule is that responsibility determination unless arbitrary, capricious, or not based on substantial evidence is acceptable---------- 15
Delivery schedules, prices, etc.
Allegations of favoritism to awardee on bases that (1) delivery schedule was unnecessarily short; (2) technical specifications were overly restrictive; and (3) procuring activity failed to give protester time to respond to protest by another offeror are without merit since (1) there was urgent need for item; (2) establishment of specifications is responsibility of procuring activity; (3) issues are questions of fact and administrative position is supported by a preponderence of the evidence; and (4) because protester failed to supply information to DCASD to refute allegations by other offeror that protester was not responsible---------- 838
Justification for negotiation
While 10 U.S.C. 2304(a)(2) authorizes procurement by negotiation when public exigency will not permit delay incident to advertising, prospect of untimely performance arising from causes other than time required for formal advertising procedure may constitute justification for non-competitive procurement under negotiating authority of 10 U.S.C. 2304(a)(10)---------- 670
Reevaluation of proposals
Award for aircraft to offeror who scored highest both as to price and technical factors upon reevaluation of price factor of proposals subsequent to erroneous public opening of proposals and disclosure of prices will not be disturbed because reevaluation of points accorded price was necessitated by use of erroneous technique in initial evaluation that proportionally reduced points that exceeded lowest price used as datum level and accorded 40 points; because initial technical evaluation by composite board assured independent judgment and fairness; and because notwithstanding disclosure of prices and subsequent negotiating procedures amounted to use of auction technique in violation of FPR 1-3.805-1(b), sufficient justification has been shown for not canceling procurement. However, repetition of deficiencies reviewed should be avoided in future procurements---------- 253

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Reopening
Exceptions in offer unnoticed
Although procuring activity should have known of exceptions taken in protester's proposal prior to close of first round of negotiations and should have discussed such exceptions with protestor prior to its submission of a best and final offer, since discovery of exceptions taken occurred subsequent to submission of best and final offers, procuring activity had no alternative but to institute a second round of negotiations, and failure to discover and discuss exceptions is not sufficient basis to reverse holding in 53 Comp. Gen. 139 564
Requests for proposals
Additional evaluation factors
Not in request for proposals
Consideration of additional evaluation factors not contained in RFP was proper in view of fact that additional factors are sufficiently correlated to general criteria shown in RFP to satisfy requirement that prospective offerors be advised of evaluation factors which will be applied to their proposals; however, failure to disclose additional factors raises question of impartiality of evaluation and weakens integrity of procurement system 800
Amendment
Required for changes in RFP
Upon determination by contracting agency that salient characteristic not listed in RFP was essential, agency should have issued amendment to RFP specifying requirement and providing opportunity for further proposals since par. 3-805.4(a) of ASPR provides for modification of RFP when decision is made to relax, increase or otherwise modify scope of work or statement of requirements. Furthermore, use of terms "rapidly" and "conveniently" in specifications without explanation of terms was ambiguous and provision should likewise have been made to indicate in RFP the requirement of Govt. in more precise terms 614
Cancellation
Cancellation of request for proposals for cartridges on basis out-of-pocket costs for performance in a contractor-owned and -operated (COCO) plant compared unfavorably with out-of-pocket costs incurred in Govt-owned contractor-operated (GOCO) plants, and award to GOCO facility was in accord with terms of solicitation that conformed with par. 1-300.91(a) of Army Ammunition Command Procurement Instruction, which in turn is consistent with 10 U.S.C. 4532(a), "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; internal records of GOCO plant are not within disclosure provisions of 5 U.S.C. 552; and as GOCO activity is not Govt. commercial or industrial activity for purposes of BOB Cir. A-76, Federal taxes, depreciation, insurance, and interest are not for inclusion in GOCO cost estimates 40
Exceptions taken by low offeror to option provision in RFP to furnish reinforced plastic weathershields on multiyear basis was properly determined to make offer unacceptable at close of first round of negotiations since acceptance of offer to change option clause constituting discussion

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Cancellation—Continued

would require reopening of negotiations to carry on discussions with all offerors within competitive range. Furthermore, canceling second round of negotiations and changing procurement procedure to formal advertising was a reasoned exercise of procurement judgment on basis that further negotiations after leak of low offeror's price would be improper and in view of fact that substantial changes made in specifications warranted formal advertising and made negotiation of procurement no longer feasible---- 139

Since question of propriety of cancellation of a RFP and subsequent solicitation of an invitation for bids (IFB) of plastic weathershields is not contingent upon whether or not changes in specifications were substantial but upon discovery of price leak of offer that was low at close of first round of negotiations prior to beginning second round of negotiations, cancellation of RFP and resolicitation by IFB was appropriate---- 564

Construction
More than one interpretation

Award of mess attendant contract to offeror who submitted proposal which included only one manning chart that exhibited a manning level above 95 percent of Govt. estimate will not be questioned, notwithstanding allegation that Navy improperly interpreted governing RFP provision, as there is more than one reasonable interpretation of provision---- 710

Defective
Ambiguous terms

Upon determination by contracting agency that salient characteristic not listed in RFP was essential, agency should have issued amendment to RFP specifying requirement and providing opportunity for further proposals since par. 3-805.4(a) of ASPR provides for modification of RFP when decision is made to relax, increase or otherwise modify scope of work or statement of requirements. Furthermore, use of terms "rapidly" and "conveniently" in specifications without explanation of terms was ambiguous and provision should likewise have been made to indicate in RFP the requirement of Govt. in more precise terms---- 614

Deficient

NASA RFP should have furnished proposers standardized projection of non-Govt. demand for propellant component which would be essentially same and would be satisfied from same limited sources regardless of contractor selected. In absence of standard demand projection, proposers were required individually to predict non-Govt. demand over which they had no control, with significant effect on proposal evaluation-- 977

Minimum standards

Statement of evaluation criteria, contained in Public Notice soliciting proposals for use permits to operate citrus groves, was deficient in that it did not set forth minimum standards or provide reasonably definite information as to degree of importance to be accorded particular evaluation factors in relation to each other---- 949

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Dollar *v.* real year or escalation costs
Normalization
Because NASA's RFP required proposers to make informed judgments in converting 1972 dollar costs to real year or escalated dollar costs over 15-year period for purpose of most probable cost assessment (proposed escalation rates having reflected company unique factors), excalation over 15-year period need not be normalized where to do so might prejudice proposer with dissimilarly constructed 1972 dollar labor base which was higher---- 977
Early year funding
Evaluation propriety
Contention that early year funding factor in NASA RFP should have been treated as unimportant in management evaluation is contradicted by preproposal reviews stressing need to minimize such funding, terms of RFP, and protester's own proposal which incorporated low early year funding in management commitment. Agency's independent evaluation and judgement of protester's high early year funding was not without reasonable foundation; and record does not support contention that successful proposer should have received management penalty for inferior design since penalty was assessed in technical scoring and cost---- 977
Escalation
Definition
In light of RFP's definition of escalation—inflation plus variables resulting from dissimilar company business policies—to be used in converting 1972 dollars to real year dollars (dollars expected to be expended in performance of program), inflation can be considered a persistent and appreciable rise in general level of prices for both labor and materials which should be uniform for all proposers---- 977
Inflation element
Inflation element of escalation which, as distinguished from other elements of escalation, is beyond proposer's control should have been stated in NASA cost-reimbursement RFP as rate common to all proposers; but, since proposers in compliance with RFP included escalation rates in their proposals as to which it is not possible to break out controllable features of escalation, failure to normalize escalation is not unreasonable; any attempt to obtain refined cost data to normalize inflation would be inappropriate after-the-fact restructuring of cost proposals---- 977
Late receipt of proposal. (*See* **CONTRACTS, Negotiation, Late proposals and quotations**)
Mess attendant services
Man-hour estimates
Under RFP for performance of mess attendant services that contained Govt. estimate of required man-hours and that stated 5 percent deviation below estimate may result in rejection of offer unless satisfactory performance could be substantiated, acceptance of proposal that was 15 percent below Govt.'s estimate would not constitute change in specifications without notice to offerors since solicitation indicated use

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

Offer
Deviations

Where offeror's proposal stated no minimum time for maintenance of computer terminals but offeror had incorporated prior contract provisions in its proposal, which stated 2-hour minimum, proposal was ambiguous and agency should have sought clarification pursuant to FPR 1-3.805. 1(a)..... 895

Omissions
Standardized projection of non-Government demand for item

NASA RFP should have furnished proposers standardized projection of non-Govt. demand for propellant component which would be essentially same and would be satisfied from same limited sources regardless of contractor selected. In absence of standard demand projection, proposers were required individually to predict non-Govt. demand over which they had no control, with significant effect on proposal evaluation. 977

Preparation costs

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

Proposal deviations

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

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Proposal deviations—Continued
Disqualification of offeror

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

Rejection of proposal initially determined to be within competitive range on basis of oral statements made by offeror during the course of discussion was improper since offeror was not afforded an opportunity to submit a revised proposal. While duration of negotiation session with offeror is not determinative of whether meaningful discussions were conducted, affording offeror opportunity to submit revised proposal is essential element of negotiating process required by 10 U.S.C. 2304(g). However, procurement should not be disturbed since record shows award was made to offeror submitting superior proposal and agency had serious doubts as to protester's ability to perform contract. Modified by 53 Comp. Gen. 860..... 593

Proposal submitted defective
Blanket offer of compliance

Low proposal to fabricate a Satellite Communication Earth Station that was technically totally deficient, and which omitted required detailed information that was not corrected by accompanying blanket offer of compliance as statement was an inadequate substitution for omitted information, was an unacceptable proposal that was not susceptible of being made acceptable without major revision. Fact that proposal was lowest offer submitted does not require 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 proposal is totally unacceptable..... 1

Public opening

Award for aircraft to offeror who scored highest both as to price and technical factors upon reevaluation of price factor of proposals subsequent to erroneous public opening of proposals and disclosure of prices will not be disturbed because reevaluation of points accorded price was necessitated by use of erroneous technique in initial evaluation that proportionally reduced points that exceeded lowest price used as datum level and accorded 40 points; because initial technical evaluation by composite board assured independent judgment and fairness; and because notwithstanding disclosure of prices and subsequent negotiating

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procedures amounted to use of auction technique in violation of FPR 1–3.805–1(b), sufficient justification has been shown for not canceling procurement. However, repetition of deficiencies reviewed should be avoided in future procurements---- 253

Qualified Offerors List

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

Requests for quotations
Use propriety

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

Sole-source basis
Justification

Determination that procurement of satellites from other than current source would entail unacceptable performance and schedule risks was not arbitrary or capricious---- 670

Propriety

While protester has not met burden of proving by clear and convincing evidence that sole-source award made for multipurpose simulators was not justified because multiple single purpose simulators could satisfy Navy's requirement, doubt has been cast on two or three main reasons administratively advanced to support multipurpose requirement, and, therefore, GAO recommends that Navy's needs be thoroughly reexamined to determine if multipurpose simulator is sole type that will satisfy Govt.'s needs---- 478

Specifications conformability. (*See* **CONTRACTS. Specifications, Conformability of equipment, etc., offered, Technical deficiencies, Negotiated procurement**)

CONTRACTS—Continued Page

Novation agreements

Propriety

Proposed novation agreement among contractor—wholly owned subsidiary of large concern—awarded two Govt. contracts for hydraulic turbines and other items, subcontractor who assumed responsibility to complete contracts upon the closing down of subsidiary plant and sale to foreign corporation of those assets not needed to perform contracts, and the Govt. may be approved if in best interest of Govt. Although novation agreement will contravene Anti-Assignment Act, 41 U.S.C. 15, since exception in ASPR 26-402(a) that permits recognition of third party as successor in interest to Govt. contract is not applicable as subcontractor's interests in contracts are not "incidental to the transfer" of subsidiary, there is no objection to recognition of assignment if it is administratively determined to be in best interest of Govt..... 124

Offer and acceptance

Bid status

Government acceptance mistake

Govt. is estopped from denying existence of contract where, acting under its own mistake and believing that protester would commence work the following week, it told the protester, apparent but not actual low bidder, contract number 6 days before contract was to have commenced and protester without knowledge of true facts acted to its detriment..... 502

Although Govt. is estopped to deny existence of contract with other than low bidder, even though entering into contract was outside scope of contracting officer's authority contract is not illegal, as contractor neither directly contributed to underlying mistake nor was on direct notice of mistake, however, award made to other than lowest responsive bidder should be terminated for convenience of Govt..... 502

Contract execution

What constitutes

Contention that no contract came into existence under second step of two-step procurement conducted pursuant to 10 U.S.C. 2305(c) for housing construction because bid accepted orally was not effective before expiration of Davis-Bacon Wage Rate Determination and bid itself, or alternative allegation that bid was nonresponsive and also contained bid price error and, therefore, there was no contract to terminate for default is refuted by record which evidences oral notification of contract approval made subsequent to written notification of award made subject to such approval was in compliance with IFB. Furthermore, failure to describe actual amount of work to be performed by contractor did not make its bid nonresponsive as invitation did not require this information, and variances between price bid and Govt.'s estimate and other bids submitted was insufficient to place contracting officer on constructive notice of error..... 167

Patents. (*See* **PATENTS**)

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Payments

Absence or unenforceability of contracts. (*See* **PAYMENTS, Absence or unenforceability of contracts**)

Assignments. (*See* **CLAIMS, Assignments, Contracts**)

Releases

"Reserve Pending Execution of Release" clause

Propriety of use

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

Preparation costs, etc.

Contract not consummated

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

Proprietary, etc., items. (*See* **CONTRACTS, Data, rights, etc.**)

Protests

Abeyance pending court action

Where material issues in protest before U.S. General Accounting Office are also involved in court action and are likely to be disposed of by court, GAO, pursuant to 4 CFR 20.11, will not render a decision on protest 730

Consideration nonetheless by General Accounting Office

Where protester filed complaint with U.S. District Court, District of Del., grounded on same contentions raised in protest, and sought *inter alia* a preliminary injunction, while court's order denying injunction did not specifically mention GAO, and GAO policy is not to issue decision on merits of protest where issues involved are likely to be disposed of in litigation before court of competent jurisdiction, protest is nonetheless for consideration on merits because court seeks GAO's expertise prior to further litigation developments. Similar issues in second protest, which are subject of separate suit in same court, are also for consideration on merits 522

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Protests—Continued

Administrative actions

Filing protest

"Adverse agency action" conclusion

Offeror's conference with agency above level of contracting officer against proposed adverse action is protest to agency and protest by offeror to GAO within 5 days of agency denial is timely 780

After award

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

Authority to consider

Appeal before Contract Appeals Board

Where there is no dispute as to facts, but rather question raised is one of law—that is whether contract came into existence—it is not inappropriate for GAO to consider protest of contractor alleged to have defaulted under contract awarded by AF, notwithstanding contractor also appealed contracting officer's determination to terminate alleged contract for default to Armed Services Board of Contract Appeals 167

Reprocurement due to requirements contract default

Where IRS placed purchase orders for memory units with protester under mandatory requirements contract it held with GSA, the subsequent partial termination for default and the reprocurement of item from another source is not proper matter for protest to GAO since the IRS actions taken to insure that its requirements would be satisfied was a matter of contract administration, propriety of which must be resolved by the contracting parties pursuant to any applicable contract provision rather than by the GAO 572

Award pending General Accounting Office decision

Award advantageous to Government

Award for continuing janitorial services to incubent contractor during pendency of low bidder's protest on basis award would be advantageous to Govt. as required by par. 2-407.8(b)(3)(iii) of ASPR was not inappropriate and did not deprive low bidder of contract as contracting agency was prepared to terminate awarded contract for convenience of Govt. and to make award to bidder if its protest was upheld and if it is found to be responsible 496

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Protests—Continued
Award withheld pending General Accounting Office decision—Continued
Urgency of procurement
Although contracting officer is not required by ASPR to withhold contract award after his agency denies protest of offeror pending possible appeal of protest to GAO, where he is on notice that offeror has deferred filing protest with GAO pending agency action but exigencies of situation require immediate award, if time permits, it is reasonable for contracting officer to obtain approval of higher authority to make award, as in case of preaward protest filed directly with GAO pursuant to ASPR 2-407.8(b)(2)---- 509
Contracting officer's affirmative responsibility determination
GAO review discontinued
Exceptions
Fraud
Allegation of noncompetitive practices because of communality of ownership and financial interests between two bidders is referred to DSA for consideration in accordance with ASPR 1-111 and ASPR 1-600. GAO has discontinued practice of reviewing bid protests of contracting officer's affirmative responsibility determination, except for actions by procuring officials which are tantamount to fraud, and GAO has no authority to administratively debar or suspend other than for violations of Davis-Bacon Act, which is not relevant here---- 931
Court action
Precedence over protest
While a party protesting contract award is not involved in pending court action, a decision will not be rendered on its protest under same solicitations involved before court since court's action would take precedence and U.S. General Accounting Office could not recommend remedial action---- 730
Filing before or after award
Where contention in protester's comments on administrative report challenging propriety of film types specification in solicitation for distribution of hard copies and microfiche of educational literature is presented to GAO 3 months after agency denial of protest on same issue and subsequent bid opening, it is untimely because issue was not brought to GAO's attention within 5 working days after adverse agency action; to extent issue of propriety of diazo film might be regarded as being raised initially in comments, it is untimely since alleged solicitation impropriety was apparent and should have been raised before bid opening 932
Procedures
Interim Bid Protest Procedures and Standards
Protester's objection to GAO's bid protest timeliness rules is without merit since, as indicated in preamble to 4 CFR 20, rules represent tested and proven principles providing parties fair opportunity to present cases consistent with need to resolve protests in reasonably speedy manner---- 932
Compliance requirement
Failure of procuring agency to comply with sec. 20.4 of Interim Bid Protest Procedures and Standards did not constitute violation of par. 1-403 of ASPR re specifying factors which will not permit delay in making award until issuance of Comptroller General decision, and failure is not significant since 20.4 is not binding on contracting agencies-- 632

CONTRACTS—Continued Page
Protests—Continued
Procedures—Continued
Interim Bid Protest Procedures and Standards—Continued
Conferences
Under IFB for food services for 1 year with two 1-year options that was restricted to small business concerns, award of contract without referring the nonresponsibility of four low bidders to SBA under certificate of competency procedures because of urgency of procurement was proper determination under ASPR 1-705.4(c)(iv). However, refusal of administrative agency to attend informal conference on protest held pursuant to sec. 20.9 of Interim Bid Protest Procedures and Standards is policy that should be reconsidered. Furthermore, U.S. GAO will not substitute its judgment in matter for that of contracting officer unless it is shown by convincing evidence of record that finding of nonresponsibility was arbitrary, capricious, or not based on substantial evidence---- 434
Constructive notice
Protest alleging that estimated quantities in IFB to prepare personal property for shipment or storage and to handle intra-city/intra-area shipments for 1-year period were improper and specifications were therefore defective was untimely filed since sec. 20.2(a) of Interim Bid Protest Procedures and Standards requires protests based upon alleged improprieties in solicitation which are apparent prior to bid opening to be filed prior to bid opening, and although protestant had no actual knowledge of protest regulations, publication of procedures in Federal Register is constructive notice of Regulations---- 533
Specifications defective
Timeliness of protest
Protest based on alleged improprieties in invitation which are apparent prior to bid opening must be filed with GAO prior to bid opening or within 5 days of notification of adverse agency action on protest; however, submission of bid during this period does not amount to waiver of right to protest after bid opening, as protester is only protecting its position, not having received written final decision from procuring agency on all issues protested---- 771
Timeliness
Where contention in protester's comments on administrative report challenging propriety of film types specification in solicitation for distribution of hard copies and microfiche of educational literature is presented to GAO 3 months after agency denial of protest on same issue and subsequent bid opening, it is untimely because issue was not brought to GAO's attention within 5 working days after adverse agency action; to extent issue of propriety of diazo film might be regarded as being raised initially in comments, it is untimely since alleged solicitation impropriety was apparent and should have been raised before bid opening---- 932

CONTRACTS—Continued Page
Protests—Continued
Timeliness—Continued

Adverse action basis determination

Protest filed with agency within 5 days of date basis of protest was known was timely filed with agency and protest to GAO 3 months later, but within 5 days of notification of adverse agency action, is timely under GAO Interim Bid Protest Procedures and Standards insofar as it relates to matters not apparent prior to closing date for receipt of proposals---- 676

Contract award notice effect

Where protest was not filed before receipt by protester of notification that it was not awarded contract, notification is not considered an adverse agency action under sec. 20.2(a) of GAO Interim Bid Protest Procedures and Standards and section may not serve as basis to question timeliness of protest---- 676

Determination

Offeror's conference with agency above level of contracting officer against proposed adverse action is protest to agency and protest by offeror to GAO within 5 days of agency denial is timely---- 780

Filing in other than General Accounting Office

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

Limitations

Protester's objection to GAO's bid protest timeliness rules is without merit since, as indicated in preamble to 4 CFR 20, rules represent tested and proven principles providing parties fair opportunity to present cases consistent with need to resolve protests in reasonably speedy manner---- 932

Overseas mailing

Even though request by disappointed bidder for review of procurement procedures need not contain exact words of protest to be characterized as bid protest, fact that protest was received more than 5 working days after protester knew basis for protest makes protest untimely, notwithstanding fact that late filing was caused by time required to mail letter from protester's overseas office, since 4 CFR 20.2(a) specifically cautions protesters to transmit protests in that manner which will assure earliest receipt---- 518

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Protests—Continued

Timeliness—Continued

Solicitation improprieties

Contention after contract award that it was not impossible to draft specifications for procurement of airport surveillance radar equipment and that procurement should have been formally advertised rather than negotiated under 41 U.S.C. 252(c)(10) is an allegation of an impropriety in solicitation that was apparent prior to date for receipt of proposals, and protest not having been filed under U.S. General Accounting Office Interim Bid Protest Procedures and Standards prior to closing date for receipt of proposals to permit remedial action was untimely filed, particularly in view of fact protestant was uniquely qualified to call procuring agency's attention to reasons why it believed it was not impossible to draft adequate specifications 5

Determination of the Comptroller General in 53 Comp. Gen. 139 that circumstances surrounding a price leak, reopening of negotiations, cancellation of the RFP and resolicitation by invitiation for bids (IFB) were significant to procurement practices and protest therefore was for consideration pursuant to sec. 20.2(b) of Interim Bid Protest Procedures and Standards although not timely filed, does not preclude present determination that contention raised in request for reconsideration that the Navy failed to amend the IFB to include a specification change allegedly known to it is untimely pursuant to sec. 20.2(a) of the Procedures 564

Allegation after award that the RFP established an "auction technique" that is prohibited by par. 3–805.1(b) of ASPR is dismissed as untimely protest under sec. 20.2(a) of Interim Bid Protest Procedures and Standards since improprieties in RFP are required to be filed prior to closing date for receipt of proposals 632

Allegation that the RFP and Air Force Reg. 70–3 discriminate against operators of on-base cable television systems is untimely filed protest under sec. 20.2 of GAO Interim Bid Protest Procedures and Standards because protests against alleged improprieties that are apparent prior to closing date for receipt of proposals must be filed prior to closing date for receipt of proposals 676

Protest based on alleged improprieties in invitation which are apparent prior to bid opening must be filed with GAO prior to bid opening or within 5 days of notification of adverse agency action on protest; however, submission of bid during this period does not amount to waiver of right to protest after bid opening, as protester is only protecting its position, not having received written final decision from procuring agency on all issues protested 771

Bid protest filed after bid opening and challenging estimates and other alleged defects in solicitation is untimely under 4 CFR 20.2(a), notwithstanding protester's assertion that defects became apparent only after incumbent contractor's bid was opened, since record indicates that alleged defects were or should have been apparent to protester prior to bid opening 775

CONTRACTS—Continued Page

Protests—Continued

Timeliness—Continued

Two-step procurements

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

Untimely protest consideration basis

Since improprieties alleged in solicitation procedures for furnishing of reinforced plastic weathershields on multiyear basis—price leak, reopening negotiations, and change from RFP to IFB for bids procedure—were apparent prior to opening of bids, exception taken after bid opening to procedure was untimely filed pursuant to GAO Interim Bid Protest Procedures and Standards, 4 CFR 20.2(a). However, in accordance with sec. 20.2(b), which provides that "The Comptroller General, for good cause shown, or where he determines that protest raises issues significant to procurement practices or procedures, may consider any protest which is not filed timely," merits of protest are for consideration..... 139

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

Although failure to question propriety of absence from solicitation for aircraft maintenance of Service Contract Act (SCA) clause until after award of contract renders protest untimely, since significant issue has been raised because it refers to principle of widespread interest and since court is interested in views of GAO, merits of protest have been considered and it is concluded that absence from contract of SCA clause does not render contract illegal if after contract award Dept. of Labor decides that SCA was applicable to procurement, since contracting

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Protests—Continued

Timeliness—Continued

Untimely protest consideration basis—Continued

officer acted in good faith and in accordance with regulations implementing SCA in determining Walsh-Healey Public Contracts Act pertaining to supplies, and not SCA, which affords service contract workers protection, was applicable, and, furthermore, it is primarily for contracting agencies to decide what provisions should or should not be included in particular contract 412

Wording

Even though request by disappointed bidder for review of procurement procedures need not contain exact words of protest to be characterized as bid protest, fact that protest was received more than 5 working days after protester knew basis for protest makes protest untimely, notwithstanding fact that late filing was caused by time required to mail letter from protester's overseas office, since 4 CFR 20.2(a) specifically cautions protesters to transmit protests in that manner which will assure earliest receipt 518

Purchase orders. (*See* **PURCHASES, Purchase orders**)

Qualified products. (*See* **CONTRACTS, Specifications, Qualified products**)

Requests for quotations

Amendment

Propriety

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

Negotiation of procurement. (*See* **CONTRACTS, Negotiation, Requests for quotations**)

Requirements

Contract default and reprocurement

Where IRS placed purchase orders for memory unit with protester under mandatory requirements contract it held with GSA, the subsequent partial termination for default and the reprocurement of item from another source is not proper matter for protest to GAO since the IRS actions taken to insure that its requirements would be satisfied was a matter of contract administration, propriety of which must be resolved by the contracting parties pursuant to any applicable contract provision rather than by the GAO 572

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Requirements—Continued
Indefinite quantity *v.* requirements
Conflict
Conflict between "Requirements" General Provision and "Indefinite Quantity" General Provision was not prejudicial to protester, as protester was aware of agency position prior to bid opening and prepared its bid in accordance with this position; therefore failure to issue amendment to clarify conflict does not affect legality of procurement..... 771
Research and development
Competition sufficiency
Unsuccessful proposer's plan to use Govt. facilities to be constructed would enhance competition for later production increment of space program, but GAO review shows that adequate competition for later increment may be achieved without using such facilities. In any case, possible increase in competition cannot be translated into amount to be included in probable cost evaluation..... 977
Contract cost principles and procedures
NASA design evaluation correction process, whereby design weaknesses are ferreted out and potential cost to correct is assessed against proposed costs, which uniformly treated weaknesses in all proposals and reflected advantages in protester's proposal, is procedurally proper. Design deficiencies in successful proposal cannot be fairly categorized as major. While omission of assessments of additional weakness in alternate water entry load case design and refurbishment was questioned, any resulting cost impact and increase in point spread between proposers is insufficient to provide basis to question evaluation conclusion that proposers were essentially equal in technical scoring..... 977
Contractor *v.* Government benefits
Allegation that unsuccessful proposer's "superior design" will be transfused under interim contracts awarded by NASA to another proposer selected for final negotiations is not supported; but each proposer should be furnished maximum amount of nonproprietary contract-generated data and apprised of its design weaknesses to assure maximum future competitive opportunity in subject program..... 977
Cost-plus contracts
"Cost-plus-award-fee" method of contracting
On basis of GAO review of NASA evaluation of cost-plus-award-fee proposals for Solid Rocket Motor Project of Space Shuttle Program covering 15-year period in estimated price range of $800 million, it is recommended that NASA determine whether, in view of substantial net decrease in probable cost between two lowest proposers, selection decision should be reconsidered..... 977
Evaluation
Determination subsequent to discussion with all offerors not to award cost-plus-a-fixed-fee contract for development model of artillery locating radar to low offeror under RFP which contained criteria to evaluate Technical Proposal, Past Performance/Management, and Cost Proposal/Cost Realism factor is upheld where use of predetermined score, generally unacceptable, was not prejudicial in view of protester's low score; where acceptance of design implementation would involve high degree of risk, and discussion of design's deficiencies would subvert intent of

CONTRACTS—Continued Page
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Cost-plus contracts—Continued
Evaluation—Continued
procurement; where Govt.'s engineering man-hour estimates were not erroneous and their use to evaluate effort and cost realism did not mislead protester; where RFP contained sufficient statement of evaluation and award factors and record evidences meaningful discussions were held with all offerors; and where commonality features between contracts were not made evaluation factor---------- 240
Increased costs
GAO study
GAO review confirmed NASA evaluation findings that facilities cost difference in favor of successful proposer was substantial. Protester planned to modify existing and construct new Govt. facilities while successful proposer offered to modify existing facilities as necessary. GAO examined: (1) minor adjustment to protester's costs due to unavailability of Government test stand; (2) best and final offer facility cost reductions; (3) comparison of subcontractor facility costs; (4) acquisition of Govt. plant by successful offeror; (5) Govt. support for protester; (6) residual value of facilities; (7) launch site support costs; (8) maintenance costs; and (9) other evaluators' adjustments---------- 977
Early year funding factor in proposals
Evaluation propriety
Contention that early year funding factor in NASA RFP should have been treated as unimportant in management evaluation is contradicted by preproposal reviews stressing need to minimize such funding, terms of RFP, and protester's own proposal which incorporated low early year funding in management commitment. Agency's independent evaluation and judgment of protester's high early year funding was not without reasonable foundation; and record does not support contention that successful proposer should have received management penalty for inferior design since penalty was assessed in technical scoring and cost---------- 977
Evaluation factors
Design
Deficiencies
Potential costs
NASA design evaluation correction process, whereby design weaknesses are ferreted out and potential cost to correct is assessed against proposed costs, which uniformly treated weaknesses in all proposals and reflected advantages in protester's proposal, is procedurally proper. Design deficiencies in successful proposal cannot be fairly categorized as major. While omission of assessments of additional weakness in alternate water entry load case design and refurbishment was questioned, any resulting cost impact and increase in point spread between proposers is insufficient to provide basis to question evaluation conclusion that proposers were essentially equal in technical scoring---------- 977
Superiority, deficiencies, etc.
Allegation that unsuccessful proposer's "superior design" will be transfused under interim contracts awarded by NASA to another proposer selected for final negotiations is not supported; but each proposer

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Evaluation factors—Continued
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should be furnished maximum amount of nonproprietary contract-generated data and apprised of its design weaknesses to assure maximum future competitive opportunity in subject program 977

Price factors

NASA Procurement Regulation 3.805-2, which deemphasizes cost in favor of quality of expected performance, is not violated by selection of contractor for Solid Rocket Motor Project of Space Shuttle Program on basis of admitted uncertain cost proposal estimates covering 15-year contract period, GAO having found that cost proposals were conservatively adjusted; cost uncertainties as between proposers generally balanced out; and proposers were ranked essentially equal in mission suitability and other related factors 977

Space Shuttle Program
Solid Rocket Motor Project

On basis of GAO review of NASA evaluation of cost-plus-award-fee proposals for Solid Rocket Motor Project of Space Shuttle Program covering 15-year period in estimated price range of $800 million, it is recommended that NASA determine whether, in view of substantial net decrease in probable cost between two lowest proposers, selection decision should be reconsidered 977

Technical deficiencies of proposals
Evaluation propriety

Since successful proposer possesses at least basic expertise in fabrication of key component, offer to fabricate component inhouse was properly treated in technical evaluation as only a minor weakness not in conflict with RFP provision discouraging development of new expertise by prime contractors. Moreover, decision to use unconventional material in key component does not deviate from overall RFP objective of minimum developmental risk, since successful proposer offered low risk alternative program to which it can convert in early phase of program 977

Sales. (*See* SALES)
Samples. (*See* CONTRACTS, Specifications, Samples)
Service Contract Act of 1965. (*See* CONTRACTS, Labor stipulations, Service Contract Act of 1965)
Small business concern awards. (*See* CONTRACTS, Awards, Small business concerns)
Sole source procurements. (*See* CONTRACTS, Negotiation, Sole source basis)
Specifications
Addenda acknowledgment
Failure to return. (*See* CONTRACTS, Specifications, Failure to furnish something required, Addenda acknowledgment)

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Specifications—Continued

Adequacy

Administrative determination

Since no reason is presented why protester did not bring objection to film types specification to GAO's attention until 3 months after bid opening, no good cause is shown why issue should now be considered; nor is ussue significant, since it merely involves propriety of agency's determination of minimum needs and drafting of specifications, and application of GAO standards of review to present facts does not involve procurement principle of widespread interest 932

Correction recommended

Although visual inspection of carlot quantities of produce at growing areas is unduly restrictive of competition, use of such source inspection by Defense Supply Agency in its solicitation issued under negotiating authority of 10 U.S.C. 2304(a)(9), concerned with procurement of perishable or nonperishable subsistence supplies, was justified in view of wide latitude in prescribed standards and, therefore, rejection of noncomplying low bidder under two solicitations for carlot quantities of fresh vegetables was proper. However, attention of Director of agency is being drawn to the June 25, 1973 GAO audit report in which recommendation is made that consideration be given to possibility of drafting more exacting specifications so that number of items requiring field inspection might be reduced 112

Minimum needs standard

Since no reason is presented why protester did not bring objection to film types specification to GAO's attention until 3 months after bid opening, no good cause is shown why issue should now be considered; nor is issue significant, since it merely involves propriety of agency's determination of minimum needs and drafting of specifications, and application of GAO standards of review to present facts does not involve procurement principle of widespread interest 932

Negotiated procurement

Allegations of favoritism to awardee on bases that (1) delivery schedule was unnecessarily short; (2) technical specifications were overly restrictive; and (3) procuring activity failed to give protester time to respond to protest by another offeror are without merit since (1) there was urgent need for item; (2) establishment of specifications is responsibility of procuring activity; (3) issues are questions of fact and administrative position is supported by a preponderence of the evidence; and (4) because protester failed to supply information to DCASD to refute allegations by other offeror that protester was not responsible 838

Administrative determination conclusiveness

Doubtful

While protester has not met burden of proving by clear and convincing evidence that sole-source award made for multipurpose simulators was not justified because multiple single purpose simulators could satisfy Navy's requirement, doubt has been cast on two or three main reasons administratively advanced to support multipurpose requirement, and, therefore, GAO recommends that Navy's needs be thoroughly reexamined to determine if multipurpose simulator is sole type that will satisfy Govt.'s needs 478

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Changes, revisions, etc.
Explanation, etc., requirement
Invitation for bids is defective where no estimated quantities of services advertised are stated as required by FPR 1-3.409(b)(1) and prior GAO decisions ... 797
Clarification
Requirement
Upon determination by contracting agency that salient characteristic not listed in RFP was essential, agency should have issued amendment to RFP specifying requirement and providing opportunity for further proposals since par. 3-805.4(a) of ASPR provides for modification of RFP when decision is made to relax, increase or otherwise modify scope of work or statement of requirements. Furthermore, use of terms "rapidly" and "conveniently" in specifications without explanation of terms was ambiguous and provision should likewise have been made to indicate in RFP the requirement of Govt. in more precise terms ... 614
Failure of all bidders to fully participate
Award for transportation services evaluated on basis of oral announcement at bid opening instead of evaluation method provided in IFB which would have resulted in different bidder being successful should be terminated for the convenience of Govt. and requirement resolicited, since oral statement was not binding on bidders; moreover, bids may not be evaluated on different basis than stated in IFB. Bidders were effectively denied opportunity to consider whether bids should be modified and FPR 1-2.207(d) precludes award in such circumstance ... 797
Amendments
Late receipt effect
Bidder who contends that failure to be timely notified of amendment to IFB to furnish field desks that extended bid opening date cost it more favorable quotes from suppliers is not considered to have been prejudiced by extension of bid opening date or failure to receive amendment prior to originally scheduled bid opening date where record evidences acknowledgment of amendment was received with letter modifying certain option prices by time of bid opening. Furthermore, there is no indication that apparent late receipt of amendment resulted from any deliberate act by contracting agency or that bidder raised any objection prior to extended bid opening ... 443
Prior to closing date of solicitation requirement
Modification of RFQ to restrict procurement to small business concerns was proper exercise of authority by contracting officer under ASPR 3-505, which provides for amendment of solicitation prior to closing date for receipt of quotations to effect necessary changes since change of procurement to small business set-aside was recommended by SBA representative and was accepted on basis sufficient number of small business concern offers could be obtained. Therefore, quotation submitted by large business concern which was prepared under original unrestricted RFQ may not be considered or even opened to compare reasonableness of prices submitted by small business concerns, and in absence of judiciary established criteria and standards, claim for preparation costs may not be settled by GAO ... 307

CONTRACTS—Continued Page

Payments—Continued

Specifications—Continued

Brand name or equal. (*See* **CONTRACTS, Specifications, Restrictive, Particular make**)

Changes, revisions, etc.

Amendment requirement

Bidder, which by its bid on water purification system transformed design specification for membrane with required pH range of 1–13 into performance specification for its entire system and offered membrane having range of only pH 4.5–5.0, should have been declared nonresponsive since transformation of specification should have been accomplished by (1) IFB amendment, or (2) rejection of all bids and readvertisement 924

Acknowledgment failure. (*See* **CONTRACTS, Specifications, Failure to furnish something required, Addenda acknowledgment**)

Changes within scope of contract

Amendment of contract shortly after award to cover a more expensive superior article (which had been offered as an alternate) than the one accepted at lowest offered price raises question whether major purpose of procurement system was thwarted by that action and whether change was within general scope of contract 838

Justification

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

What constitutes

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

Conformability of equipment, etc., offered

Administrative determination

The Comptroller General is aware of no basis for objecting to General Services Procurement Reg. 5A-2.408-71(b), which precludes General Services Administration from informing bidder, prior to award, of defects found in bid samples submitted 810

CONTRACTS—Continued Page
Specifications—Continued
Conformability of equipment, etc., offered—Continued
Noncompliance
Rejection of bid
Bid to furnish services, labor and material for installation of automated fuel handling system accompanied by descriptive literature required by invitation but containing proprictary data restriction was not submitted in accordance with par. 2-404.4 of Armed Services Procurement Reg. (ASPR), which provides that bids prohibiting disclosure of sufficient information to permit competing bidders to know essential nature and type of products offered on those elements of bid which relate to quantity, price, and delivery terms are nonresponsive bids, and regulation implementing 10 U.S.C. 2305 providing for public disclosure of bids has force and effect of law. In addition to nonresponsiveness of bid under standards of ASPR 2-404.4, bid was unacceptable on basis the phrase "or equal" in specification soliciting cable had been misinterpreted---------- 24
Samples, etc., deviating from specifications
Samples of knives and spoons submitted with bid on solicitation for carbon steel flatware were properly rejected for poor workmanship because knives contained grind marks and edge of one spoon was rough, and solicitation permitted rejection of bids accompanied by samples which did not conform to listed characteristics, including workmanship-- 810
The Comptroller General is aware of no basis for objecting to General Services Procurement Reg. 5A-2.408-71(b), which precludes General Services Administration from informing bidder, prior to award, of defects found in bid samples submitted---------- 810
Technical deficiencies
Acceptance
Prejudicial to other bidders
Where IFB sets out maximum time for service and maintenance for water purification unit and procurement agency does not refute contention that system bid by successful bidder could not meet these service and maintenance requirements but merely states that with post-award change in chemicals to be used contractor will meet specification requirement, GAO concludes action was "waiver" of specification and was prejudicial in material respect to other bidders---------- 909
Negotiated procurement
Low proposal to fabricate a Satellite Communication Earth Station that was technically totally deficient, and which omitted required detailed information that was not corrected by accompanying blanket offer of compliance as statement was an inadequate substitution for omitted information, was an unacceptable proposal that was not susceptible of being made acceptable without major revision. Fact that proposal was lowest offer submitted does not require 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 proposal is totally unacceptable---------- 1

CONTRACTS—Continued Page

Specifications—Continued

Conformability of equipment, etc., offered—Continued

Technical deficiencies—Continued

Negotiated procurement—Continued

Allegations of favoritism to awardee on bases that (1) delivery schedule was unnecessarily short; (2) technical specifications were overly restrictive; and (3) procuring activity failed to give protester time to respond to protest by another offeror are without merit since (1) there was urgent need for item; (2) establishment of specifications is responsibility of procuring activity; (3) issues are questions of fact and administrative position is supported by a preponderence of the evidence; and (4) because protester failed to supply information to DCASD to refute allegations by other offeror that protester was not responsible..... 838

NASA design evaluation correction process, whereby design weaknesses are ferreted out and potential cost to correct is assessed against proposed costs, which uniformly treated weaknesses in all proposals and reflected advantages in protester's proposal, is procedurally proper. Design deficiencies in successful proposal cannot be fairly categorized as major. While omission of assessments of additional weakness in alternate water entry load case design and refurbishment was questioned, any resulting cost impact and increase in point spread between proposers is insufficient to provide basis to question evaluation conclusion that proposers were essentially equal in technical scoring..... 997

Two-step procurement

Where specifications for two-step procurement of high take-off angle antennas and ancillary items did not call for separate ladder and low bidder under Step II proposed to furnish ladder that would be integral part of antennae structure and only other bidder offered separate ladder on basis of prior experience, bidders were not competing on equal basis and contracting agency's acceptance of low bid without issuing amendment to specifications to establish criteria requires cancellation of Step II of invitation for bids and reopening of Step I phase of procurement on basis of amended specifications to assure equal bidding basis. Fact that two-step procedure combines benefits of competitive advertising with feasibility of negotiation does not obviate necessity for adherence to stated evaluation criteria and basis or essential specification requirements..... 47

Tests

Under solicitation that called for furnishing new manufactured aircraft solenoid valves but contained provisions under which surplus dealers could participate, rejection of proposal offering to furnish new former Govt. surplus valves was proper in view of fact that the valves needed replacement of rubber "O" rings which constitutes refurbishment and would therefore require performance retesting that neither agency nor offeror was in position to perform..... 742

Defective

Corrective action recommended

An IFB which only stated in general terms the nature and extent of descriptive literature desired was defective because it failed to comply with sec. 1-2.202-5 of Federal Procurement Regs. (FPR) that a descriptive data clause detail those components of data and type of data

CONTRACTS—Continued Page
Specifications—Continued
Defective—Continued
Corrective action recommended—Continued
desired. As the industrial exhauster solicited is still required, and cannot be procured without submission of descriptive data, canceled invitation should be readvertised in consonance with FPR descriptive literature requirements ... 622
Estimated quantities
Protest alleging that estimated quantities in IFB to prepare personal property for shipment or storage and to handle intra-city/intra-area shipments for 1-year period were improper and specifications were therefore defective was untimely filed since sec. 20.2(a) of Interim Bid Protest Procedures and Standards requires protests based upon alleged improprieties in solicitation which are apparent prior to bid opening to be filed prior to bid opening, and although protestant had no actual knowledge of protest regulations, publication of procedures in Federal Register is constructive notice of Regulations ... 533
Timeliness of protest
Bid protest filed after bid opening and challenging estimates and other alleged defects in solicitation is untimely under 4 CFR 20.2(a), notwithstanding protester's assertion that defects became apparent only after incumbent contractor's bid was opened, since record indicates that alleged defects were or should have been apparent to protester prior to bid opening ... 775
Definiteness requirement
Invitation for bids is defective where no estimated quantities of services advertised are stated as required by FPR 1-3.409(b)(1) and prior GAO decisions ... 797
Delivery provisions
Sufficiency
Preparation and establishment of delivery provisions to reflect needs of Govt. are matters primarily within jurisdiction of procuring agency, subject to question by GAO only when not supported by substantial evidence ... 771
Descriptive data
Ambiguity of specification
Construed as affecting bid responsiveness
An IFB which only stated in general terms the nature and extent of descriptive literature desired was defective because it failed to comply with sec. 1-2.202-5 of Federal Procurement Regs. (FPR) that a descriptive data clause detail those components of data and type of data desired. As the industrial exhauster solicited is still required, and cannot be procured without submission of descriptive data, canceled invitation should be readvertised in consonance with FPR descriptive literature requirements ... 622
Disclosure requirement
Bid to furnish services, labor and material for installation of automated fuel handling system accompanied by descriptive literature required by invitation but containing proprietary data restriction was not submitted in accordance with par. 2-404.4 of Armed Services Procurement Reg. (ASPR), which provides that bids prohibiting disclosure of

CONTRACTS—Continued Page
Specifications—Continued
Descriptive data—Continued
Disclosure requirement.
sufficient information to permit competing bidders to know essential nature and type of products offered on those elements of bid which relate to quantity, price, and delivery terms are nonresponsive bids, and regulation implementing 10 U.S.C. 2305 providing for public disclosure of bids has force and effect of law. In addition to nonresponsiveness of bid under standards of ASPR 2-404.4, bid was unacceptable on basis the phrase "or equal" in specification soliciting cable had been misinterpreted 24
"Subject to change" qualification
An unsolicited submission of component supplier's catalog or product information sheet which contains pre-printed reservation that product is subject to change without notice does not relieve bidder from its underlying obligation to furnish acceptable brand name or equal component. B-156102, February 24, 1965, overruled 499
Sufficiency of details
Lacking
An IFB which only stated in general terms the nature and extent of descriptive literature desired was defective because it failed to comply with sec. 1-2.202-5 of Federal Procurement Regs. (FPR) that a descriptive data clause detail those components of data and type of data desired. As the industrial exhauster solicited is still required, and cannot be procured without submission of descriptive data, canceled invitation should be readvertised in consonance with FPR descriptive literature requirements 622
Voluntary submission
Acceptability
Fact that unsolicited literature accompanying protestant's bid did not include all purchase description requirements and that bidder failed to submit technical manuals with its bid and to execute Buy American Certificate does not make bid nonresponsive and bid should be considered for award. Literature entitled "General Description Portable Heil Refuse Pulverizing System" did not conflict with purchase description even though it did not include all purchase description requirements, and, moreover, descriptive data highlighted salient features of System rather than limiting what would be supplied; specifications bind bidder notwithstanding manuals were not furnished with bid; and in view of fact import duty paid applies to an insignificant part of end item and not end item itself, bidder is considered to have offered domestic product 399
Deviations
Descriptive literature
Brand name or equal item
An unsolicited submission of component supplier's catalog or product information sheet which contains pre-printed reservation that product is subject to change without notice does not relieve bidder from its underlying obligation to furnish acceptable brand name or equal component. B-156102, February 24, 1965, overruled 499

CONTRACTS—Continued Page
Specifications—Continued
Deviations—Continued
Informal *v.* substantive
Acceptability of deviation
Where IFB to design, fabricate, and erect window walls, entrances, and rolling and sliding doors did not restrict contract performance to single firm nor restrict subcontracting because of 5-year minimum experience requirement, and bidder took no exception to requirement that at least 12 percent of work would be performed by its own force, fact that subcontractor was listed, although not required, is not construed to mean all work would be subcontracted; where subcontractor's insurance experience modification factor for Workmen's Compensation permitted Govt. to take into consideration cost of Govt-provided insurance, failure of prime contractor to submit its own insurance factor is minor informality; and where subcontractor is bound by prime contractor's commitment to Washington Plan providing minority hiring goals, bid as submitted was responsive and was properly considered for contract award 331
"Affirmative action programs"
Failure of low bidder under IFB issued by Govt. of District of Columbia for roof rehabilitation at Spring Road Clinic to execute certificate of compliance with equal opportunity obligations provision included in solicitation until after bid opening was matter of form rather than substance and does not constitute basis for rejection of low bid as bid form submitted obligated bidder to comply with affirmative action requirements which were made part of bid documents and did not require submission or adoption of minority utilization goals but only that contractor take certain affirmative action steps 431
Under IFB for hydraulic turbines, bidder's failure to complete Equal Opportunity Certification and its insertion of words "NOT APPLICABLE" under Equal Employment Compliance representation do not render bid nonresponsive, since both provisions relate to bidder responsibility and, therefore, it is considered that no exception was taken in bid to any material requirement of IFB. To extent B-161430, July 25, 1967 is inconsistent with this and other cited decisions, it will no longer be followed 487
Bid bond requirement
Since furnishing of bid bond in excess of amount required by IFB does not constitute change that would give one bidder an advantage over another, deviation may be waived as minor informality 431
Information
Failure of low bidder to list buses it would use in performing transportation service contracts did not render bid nonresponsive as omission relates to responsibility of bidder rather than to responsiveness of bid, since procurement requirement was for furnishing of services and not for furnishing buses, except as incident to furnishing services, and since bidder is legally obligated to furnish buses having acceptable minimum characteristics. Therefore bid should not have been rejected without specific determination that company was nonresponsive 396

CONTRACTS—Continued Page
Specifications—Continued
Deviations—Continued
Informal *v.* substantive—Continued

Minority manpower utilization

Under invitation issued by Federal grantee required by HEW regulation to conform with competitive system in construction of classroom building, low bidder who executed certificate relating to part I of bid conditions that required listing of trades to be employed and coverage that would be extended by New Orleans affirmative action plan but failed to sign part II certificate that involved commitment to various goals and specific steps contained in bid conditions or submit alternative affirmative action plan nevertheless submitted a responsive bid since in signing part I certification bidder is committed to comply with terms and conditions of New Orleans Plan and to submit alternative plan for trades not signatory to New Orleans Plan, thus meeting material requirements of invitation 451

Waiver

Protest

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

Evaluation factors

"Life cycle" *v.* "cost of ownership"

Deletion of "life cycle" costing evaluation factor and addition of "cost of ownership to the Government" factor in a reinstated solicitation after submission of oscilloscopes for qualification under step one of two-step negotiated procurement without giving offerors opportunity to modify their step one proposals in light of new introduced factors into procurement is sustained since there is no evidence of real prejudice to position of protester 632

In deciding whether oscilloscopes should be purchased under open-end contract or new solicitation, it was not improper to add same Govt. cost of ownership rate to price offered on each manufacturer's equipment, since data was not available from which individual ownership rates could be fixed and rate used was based on average cost to the Govt. for introducing similar equipment into Govt. inventory 632

Contention that, in deciding whether to purchase Class III 15 MHz oscilloscopes by solicitation or under open-end contract, protester's Class III 50 MHz oscilloscope under open-end contract should have been used as basis of cost comparison instead of competitor's open-end contract Class II 15 MHz equipment is without merit, since determination of Govt.'s needs is vested in procuring activity which decided on 15 MHz equipment 632

CONTRACTS—Continued Page
Specifications—Continued
Failure to furnish something required
Addenda acknowledgment
Evidence
Failure to acknowledge amendment to invitation for construction of Naval and Marine Corps Reserve Center which is not considered to be minor informality or irregularity in bid to permit correction under par. 2-405(iv)(B) of Armed Services Procurement Reg. may not be waived on basis bidder's working papers establishes amendment was considered in bid computation since acknowledgment was required to be received before bid opening, nor does use of "may" in stating that failure to acknowledge amendment would consitute grounds for bid rejection mean contracting officer has waiver discretion, furthermore, to permit bidder to determine value of invitation amendment would be inappropriate as it would give him option to become eligible for award by citing costs that would bring him within the *de minimis* doctrine, or to avoid award by placing larger cost value on effects of amendment---------- 64
Waiver
Criteria
Fact that an amendment to IFB which extended bid opening date and made material change in specifications was not formally acknowledged by low bidder did not require rejection of low bid where the bid was dated just 2 days before extended bid opening date evidencing bidder was aware of existence of amendment, and where bid date constituted implied acknowledgment of receipt of amendment, and since low bid should not have been rejected as nonresponsive, it is recommended that if low bidder is a responsible firm and contracting agency's operational capability will not be disrupted, the erroneously awarded contract should be terminated for convenience of Govt. and award made to low bidder at its bid price---------- 569
Buy American Certificate
Fact that unsolicited literature accompanying protestant's bid did not include all purchase description requirements and that bidder failed to submit technical manauls with its bid and to execute Buy American Certificate does not make bid nonresponsive and bid should be considered for award. Literature entitled "General Description Portable Heil Refuse Pulverizing System" did not conflict with purchase description even though it did not include all purchase description requirements, and, moreover, descriptive data highlighted salient features of System rather than limiting what would be supplied; specifications bind bidder notwithstanding manuals were not furnished with bid; and in view of fact import duty paid applies to an insignificant part of end item and not end item itself, bidder is considered to have offered domestic product---------- 399
Information
Essentiality
Contention that no contract came into existence under second step of two-step procurement conducted pursuant to 10 U.S.C. 2305(c) for housing construction because bid accepted orally was not effective before expiration of Davis-Bacon Wage Rate Determination and bid itself, or alternative allegation that bid was nonresponsive and also contained bid

CONTRACTS—Continued Page

Specifications—Continued

Failure to furnish something required—Continued

Information—Continued

Essentiality—Continued

price error and, therefore, there was no contract to terminate for default is refuted by record which evidences oral notification of contract approval made subsequent to written notification of award made subject to such approval was in compliance with IFB. Furthermore, failure to describe actual amount of work to be performed by contractor did not make its bid nonresponsive as invitation did not require this information, and variances between price bid and Govt.'s estimate and other bids submitted was insufficient to place contracting officer on constructive notice of error 167

Invitation to bid attachments. (*See* **CONTRACTS, Specifications, Failure to furnish something required, Invitation to bid attachments**)

Minority manpower utilization

Under invitation issued by Federal grantee required by HEW regulation to conform with competitive system in construction of classroom building, low bidder who executed certificate relating to part I of bid conditions that required listing of trades to be employed and coverage that would be extended by New Orleans affirmative action plan but failed to sign part II certificate that involved commitment to various goals and specific steps contained in bid conditions or submit alternative affirmative action plan nevertheless submitted a responsive bid since in signing part I certification bidder is committed to comply with terms and conditions of New Orleans Plan and to submit alternative plan for trades not signatory to New Orleans Plan, thus meeting material requirements of invitation 451

Invitation to bid attachments

Bid which omits pages of IFB containing material provisions, but which on page 1 contains SF 33 "Solicitation" and "Offer" clauses, indicates it is page 1 of 13, and which on page 2 acknowledges all four amendments which altered every page of schedule contained in and work scope attached to 13 pages of solicitation as originally issued, is responsive because it clearly identifies complete solicitation and clauses contained or referenced therein are incorporated by specific reference in bid 932

License approval

License requirement in a Govt. solicitation is matter of bidder responsibility since bidder has duty to ascertain its legal authority to perform Govt. contract within a State, and requirement not relating to bid evaluation need not be submitted before bid opening. Therefore, low bidder who did not submit licensing and registration information with its bid to furnish taxi and pick-up services is considered to be responsive bidder. A State may enforce its license requirements provided State law is not opposed to or in conflict with Federal policies or laws, or does not interfere with execution of Federal powers. Also, equipment information intended to determine bidder capacity and ability to perform service contract is matter of bidder responsibility, not bid responsiveness, as is fact that bidder was in the ambulance business and not taxi business at time bids were opened 36

CONTRACTS—Continued Page

Specifications—Continued

Failure to furnish something required—Continued

License approval—Continued

ICC decision in *Kingpak, Investigation of Operations*, 103 M.C.C. 318, requiring motor carriers providing transportation under contracts for packing and containerization of used household goods to have ICC operating authority, permits carriers to act as freight forwarders of used household goods exempt from requirement for having such authority, but since bidder was low only on portion of IFB calling for services relating to unaccompanied baggage, which is not regarded as used household goods, contracting officer properly rejected bid because of lack of ICC operating authority 750

Manuals

Sufficiency determination

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

Military

Conformance requirement

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

Minimum needs requirement

Administrative determination

Contention that contracting agency's needs do not justify scope of 75-mile geographical restriction in IFB and allegations that protester's past experience shows it can meet requirements of specifictions do not furnish basis to conclude use of limitation was an abuse of discretion, since stating restriction in terms of mileage radius rather than highway miles represents reasonable approach, and fact that protester might be able to meet requirements does not *per se* render restriction unreasonable,

CONTRACTS—Continued Page
Specifications—Continued
Minimum needs requirement—Continued
Administrative determination—Continued

as determining whether certain needs justify particular restriction is matter of agency judgment, and adequate competition was apparently generated ---- 522

Basis for determination

Contention that, in deciding whether to purchase Class III 15 MHz oscilloscopes by solicitation or under open-end contract, protester's Class III 50 MHz oscilloscope under open-end contract should have been used as basis of cost comparison instead of competitor's open-end contract Class II 15 MHz equipment is without merit, since determination of Govt.'s needs is vested in procuring activity which decided on 15 MHz equipment ---- 632

Different approaches to achieve

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

Reexamination recommended

While protester has not met burden of proving by clear and convincing evidence that sole-source award made for multipurpose simulators was not justified because multiple single purpose simulators could satisfy Navy's requirement, doubt has been cast on two or three main reasons administratively advanced to support multipurpose requirement, and, therefore, GAO recommends that Navy's needs be throughly reexamined to determine if multipurpose simulator is sole type that will satisfy Govt.'s needs ---- 478

"New material" clause
Exception
New, unused surplus

Under solicitation that called for furnishing new manufactured aircraft solenoid valves but contained provisions under which surplus dealers could participate, rejection of proposal offering to furnish new former Govt. surplus valves was proper in view of fact that the valves needed replacement of rubber "O" rings which constitutes refurbishment and would therefore require performance retesting that neither agency nor offeror was in position to perform ---- 742

Proprietary data use. (*See* **CONTRACTS, Data, rights, etc.**)
Qualified Offerors List

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

CONTRACTS—Continued Page
Specifications—Continued
Qualified Offerors List—Continued
operation of Qualified Offerors List (QOL) by Admin. to curtail excessive production of solicitation packages, but which in fact is presolicitation procedure for determining prospective bidder's or offeror's responsibility, and as procedure unduly restricts competition it should be eliminated. Furthermore, Federal Procurement Regs., relied upon as authority to establish QOL, merely permit establishment of mailing list to assure adequate source of supply and to spell out necessary procedures for reasonable restriction on number of solicitations available---------- 209
Listing
Misrepresentation
In procurement of lighting panels to replace panel designed to support integrated electronics control equipment developed for F-4 aircraft where drawing stated panel must be in accordance with military specification that required qualified products listing (QPL), but RFQ did not evidence such requirement, although award to firm not on QPL will not be disturbed as award was not precluded by RFQ and contract is nearly completed, to require displaced initial low offeror to unnecessarily comply with QPL requirement was prejudicial, unfair and costly. Furthermore, although contracting officials erroneously failed to take action when it was recognized before award procurement should have been advertised utilizing applicable military specification, this approach will be used to procure panels in future---------- 295
Reevaluation
Changes requiring reevaluation
Bidder who failed to have product on Qualified Products List reevaluated pursuant to Qualified End Products clause (ASPR 1-1107.2(a)) included in IFB to furnish road graders, clause which requires reevaluation of product if any change occurred in location or ownership of plant at which previously approved product is, or was, manufactured, may, nevertheless, have its bid considered for award since change in circumstances of bidding concern was one of form, not substance—transfer of title to plant facility and change in corporate name with no accompanying change in employees, products, and manufacturing processes—and, therefore, reevaluation of product would be useless exercise and overly technical application of reevaluation requirement---------- 249
Restrictive
Delivery dates
Allegations of favoritism to awardee on bases that (1) delivery schedule was unnecessarily short; (2) technical specifications were overly restrictive; and (3) procuring activity failed to give protester time to respond to protest by another offeror are without merit since (1) there was urgent need for item; (2) establishment of specifications is responsibility of procuring activity; (3) issues are questions of fact and administrative position is supported by a preponderence of the evidence; and (4) because protester failed to supply information to DCASD to refute allegations by other offeror that protester was not responsible---------- 838

CONTRACTS—Continued Page
Specifications—Continued
Restrictive—Continued
Geographical location
Although basic principle underlying Federal procurement is to maximize full and free competition, legitimate restrictions on competition may be imposed when needs of procuring agency so require, and Home Port Policy to perform ship repairs in vessel's home port to minimize family disruption is not illegal restriction since useful or necessary purpose is served. Therefore low bidder under two invitations to perform drydocking and repair of utility landing craft in San Diego area who offered to perform at Terminal Island properly was denied contract awards. However, where all or most of vessel's crew are unmarried, home port restriction does not serve to foster Home Port Policy and, therefore, if feasible determination can be made prior to issuance of solicitation that geographical restriction has no applicability, it should not be imposed 102
Justification
Although visual inspection of carlot quantities of produce at growing areas is unduly restrictive of competition, use of such source inspection by Defense Supply Agency in its solicitation issued under negotiating authority of 10 U.S.C. 2304(a)(9), concerned with procurement of perishable or nonperishable subsistence supplies, was justified in view of wide latitude in prescribed standards and, therefore, rejection of noncomplying low bidder under two solicitations for carlot quantities of fresh vegetables was proper. However, attention of Director of agency is being drawn to the June 25, 1973 GAO audit report in which recommendation is made that consideration be given to possibility of drafting more exacting specifications so that number of items requiring field inspection might be reduced 112
Contention that contracting agency's needs do not justify scope of 75-mile geographical restriction in IFB and allegations that protester's past experience shows it can meet requirements of specifications do not furnish basis to conclude use of limitation was an abuse of discretion, since stating restriction in terms of mileage radius rather than highway miles represents reasonable approach, and fact that protester might be able to meet requirements does not *per se* render restriction unreasonable, as determining whether certain needs justify particular restriction is matter of agency judgment, and adequate competition was apparently generated 522
Particular make
Description availability
An unsolicited submission of component supplier's catalog or product information sheet which contains pre-printed reservation that product is subject to change without notice does not relieve bidder from its underlying obligation to furnish acceptable brand name or equal component. B-156102, February 24, 1965, overruled 499
Design *v.* performance criteria
In a brand name or equal formally advertised procurement the use of nonfunctional design rather than performance criteria is unduly restrictive and inconsistent with principles underlying 10 U.S.C. 2305 and par. 1-1206 of ASPR, thus preventing award for product that admittedly meets Govt. requirements 586

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Specifications—Continued
Restrictive—Continued
Particular make—Continued
Salient characteristics
Fact that specifications are inadequate, ambiguous, or otherwise deficient is not a compelling reason, absent showing of prejudice, to cancel invitation and, therefore, invitation for Radiographic Polyester Film, canceled to correct salient characteristics, should be reinstated, since contradiction between salient characteristic and brand name product alone is not compelling reason for cancellation ---- 586
System *v.* item method of procurement
Fact that one agency seeks to meet its minimum needs for efficient garbage removal system by purchasing entire system—that is grouping bodies, refuse containers, and trucks—while another agency plans to modify on-hand items and by only certain components of system is not determinative of propriety of either solicitation as both methods are reasonable in order to achieve desired ends. Therefore, all or nothing bidding requirement on refuse containers, trucks, and related equipment is not considered unduly restrictive of competition, even though manufacture of single component would be excluded, since question of compatibility of components is reasonable basis for procuring agency to require bids on entire system ---- 270
Samples
Defective
Notice to bidder
The Comptroller General is aware of no basis for objecting to General Services Procurement Reg. 5A-2.408-71(b), which precludes General Services Administration from informing bidder, prior to award, of defects found in bid samples submitted ---- 810
Workmanship requirements
Samples of knives and spoons submitted with bid on solicitation for carbon steel flatwear were properly rejected for poor workmanship because knives contained grind marks and edge of one spoon was rough, and solicitation permitted rejection of bids accompanied by samples which did not conform to listed characteristics, including workmanship ---- 810
Superior product offered
Negotiated procurement
Determination to make award for airport surveillance radar equipment on basis of initial proposals—exception to requirement for discussions with all offerors within competitive range—is discretionary in nature, and lacking adequate price competition, since only one of two offers submitted was fully acceptable, the procuring agency properly considered exceptions to discussion had not been satisfied and conducted negotiations with offeror whose initial proposal, although technically unacceptable overall was susceptible of being upgraded to acceptable level—a determination that was not influenced by the fact a reduction in initial price made offer the lowest submitted. Therefore, award to low offeror was not arbitrary, notwithstanding technical superiority of competing offer since request for proposals did not make technical considerations paramount ---- 5

CONTRACTS—Continued Page

Subcontractors

Listing

Bidder responsibility *v.* bid responsiveness

Bid that failed to list subcontractors which was submitted under solicitation for retreading of pneumatic tires that limited subcontracting to not more than 50 percent of work and that called for listing of subcontractors for purpose of establishing bidder responsibility may be considered. It is only when subcontractor listing relates to material requirement of solicitation that bid submitted without listing is nonresponsive, and fact that invitation imposed 50 percent limitation on subcontracting does not convert subcontracting listing requirement to matter of bid responsiveness since purpose of listing is to determine bidder capability to perform, information that may be submitted subsequent to bid opening. Furthermore, "Firm Bid Rule" was not violated since bidder may not withdraw its bid and bid acceptance will result in binding contract 27

Subcontracts

Limitation on subcontracting

Bid of small business concern under formally advertised small business set-aside that represented contract end item would not be manufactured or produced by small business concerns properly was rejected, since even though bidder contemplated subcontracting portion of the work to large business, it should have made affirmative representation that its contribution to end item would be significant 463

Propriety

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

Small Business Act authority. (*See* **SMALL BUSINESS ADMINISTRATION, Contracts, Subcontracting**)

"Successor employer" doctrine. (*See* **CONTRACTS, Labor stipulations, "Successor employer" doctrine**)

Tax matters

Contract provision *v.* sovereign immunity theory

Room rental transient tax included pursuant to sec. 84–33 of Montgomery Co. (Maryland) Code in invoices for housing and subsistence furnished under contract to outpatient participants in NIH Leukemia Program may not be certified for payment, even though Govt. is not exempt from tax on theory of sovereign immunity since relationship between Govt. and transients created under contract is insufficient to

CONTRACTS—Continued Page

Tax matters—Continued

Contract provision *v.* sovereign immunity theory—Continued

effectuate shift in burden of tax directly to Govt. in view of fact all applicable Federal, State, and local taxes and duties were included in contract price. However, future contracts for sleeping accommodations in Montgomery Co. may provide for Govt. to pay transient tax applicable to individuals furnished housing and subsistence as beneficiaries..... 69

Termination

Cancellation of requirement

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

Convenience of Government

Erroneous awards

Award for separate contract line items of fork lift trucks on basis of permitted alternate delivery schedule that offered delivery 90 days earlier than prescribed by invitation for bids and, therefore, was nonresponsive to mandatory requirement that first production units be delivered no earlier than a minimum of 365 days after approval of first article test report—requirement intended to assure delivery of spares, repair parts, and publication concurrently with first production units—should be terminated, procurement resolicited with delivery provisions informing bidders as to permissible deviations and consequences of nonconformity in accordance with competitive bidding system, and appropriate congressional committees informed, pursuant to sec. 236 of the Legislative Reorganization Act, of action taken on this recommendation. Furthermore, solicitation makes no provision that in event an alternate delivery schedule is unacceptable required schedule will govern. Modified by 53 Comp. Gen. 320..... 32

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

CONTRACTS—Continued Page

Termination—Continued

Convenience of Government—Continued

Erroneous awards—Continued

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

Where low bidder entered into joint venture agreement to obtain necessary resources to perform a janitorial service contract prior to denial by SBA of request for certificate of competency (COC), request which upon resubmission to SBA was not accepted because SBA questioned impact of joint venture on bidder's responsiveness and stated it would not accept referral unless new information was developed relative to bidder's financial condition, and additionally that if joint venture was allowed bidder if still considered responsive could possibly perform, contracting officer should not have ignored joint venture agreement, and agreement should be reassessed and if bidder is found to be responsible, contract awarded incumbent contractor should be terminated for convenience of Govt. and award made to low bidder 496

Award for continuing janitorial services to incumbent contractor during pendency of low bidder's protest on basis award would be advantageous to Govt. as required by par. 2-407.8(b)(3)(iii) of ASPR was not inappropriate and did not deprive low bidder of contract as contracting agency was prepared to terminate awarded contract for convenience of Govt. and to make award to bidder if its protest was upheld and if it is found to be responsible 496

Although Govt. is estopped to deny existence of contract with other than low bidder, even though entering into contract was outside scope of contracting officer's authority, contract is not illegal, as contractor neither directly contributed to underlying mistake nor was on direct notice of mistake, however, award made to other than lowest responsive bidder should be terminated for convenience of Govt 502

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

CONTRACTS—Continued Page
Termination—Continued
Convenience of Government—Continued
Erroneous awards—Continued

contract should be terminated for convenience of Govt. and award made to low bidder at its bid price---------- 569

Award for transportation services evaluated on basis of oral announcement at bid opening instead of evaluation method provided in IFB which would have resulted in different bidder being successful should be terminated for the convenience of Govt. and requirement resolicited, since oral statement was not binding on bidders; moreover, bids may not be evaluated on different basis than stated in IFB. Bidders were effectively denied opportunity to consider whether bids should be modified and FPR 1-2.207(d) precludes award in such circumstance---------- 797

Tie bids

Where two equal bids were received to perform international freight forwarding services and award was made to incumbent firm rather than drawing lots as required by Federal Procurement Regs. sec. 1-2.407-6(b), recommendation is made that contracting agency now draw lots and, if protester wins drawing that award made be terminated for convenience of Govt. and that award be made to previously unsuccessful bidder for the remaining services. Modifies 37 Comp. Gen. 330---------- 466

Timber sales. (*See* **TIMBER SALES**)

Trade secrets. (*See* **CONTRACTS, Data, rights, etc., Trade secrets**)

Types

Effect on legality of contract

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

Warranties

Implied

No warranty in solicitation

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

CORPORATIONS Page

Government

Claims settlement authority

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

COURTS

Costs

Government liability

Indigent persons

Appropriation chargeable

Since 39 Comp. Gen. 133 holds that expense of perpetuating and authenticating testimony given at deposition is payable from same funds as fees for witnesses, whereas 50 *id.* 128 holds that Criminal Justice Act of 1964, as amended, 13 U.S.C. 3006A, provides sole source of funds for eligible defendants to obtain expert services necessary for adequate defense, stenographic and notarial expenses incurred to perpetuate and authenticate testimony of expert witnesses for such defendants should henceforth be paid by Administrative Office of U.S. Courts from funds available to it, and not by Dept. of Justice. 39 Comp. Gen. 133 modified 638

Suits against judicial officers and entities

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

Criminal Justice Act of 1964

Attorneys fees

Extraordinary overhead

As normally an attorney appointed under Criminal Justice Act of 1964, 18 U.S.C. 3006A, is expected to use his office resources, including secretarial help, to take dictated statements, and these overhead expenses are reflected in attorney's statutory fee, he may not be separately

COURTS—Continued Page
Criminal Justice Act of 1964—Continued
Attorneys fees—Continued
Extraordinary overhead—Continued

reimbursed for expenses except in unusual situations where extraordinary overhead-type expenses are incurred in order to prepare and conduct adequate defense, in which case such services, if otherwise eligible, may be considered "other services necessary for an adequate defense" under 18 U.S.C. 3006A(e) and be paid accordingly 638

Civil rights actions *v.* habeas corpus proceedings

While not disputing position of Dept. of Justice that there are similarities in some cases between prisoner civil rights actions brought under 42 U.S.C. 1983 and habeas corpus proceedings, major similarity is that in both cases petitioners are in custody, and, therefore, for purposes of paying expenses under Criminal Justice Act of 1964, 18 U.S.C. 3006A, civil rights petitioner may not be brought within rationale of 39 Comp. Gen. 133, concerning payment of expenses for certain habeas corpus petitioners, in absence of authorizing legislation 638

Decisions

Acceptance as precedent by General Accounting Office. (*See* **COURTS, Judgments, decrees etc., Acceptance as precedent by General Accounting Office**)

Edward P. Chester, Jr. et al. *v.* United States, 199 Ct. Cl. 687. (*See* **PAY, Retired, Increases, Voluntary *v.* involuntary retirement**)

Judgments, decrees, etc.

Acceptance as precedent by General Accounting office

Edward P. Chester, et. al. *v.* United States, 199 Ct. Cl. 687

Court's interpretation in *Edward P. Chester, Jr., et al.* v. *United States*, 199 Ct. Cl. 687, that words "shall if not earlier retired be retired on June 30," which are contained in mandatory retirement provision, 14 U.S.C. 288(a), did not absolutely forbid Coast Guard officers mandatorily retired on June 30 in 1968 or 1969, as well as officers held on active duty beyond mandatory June 30 date, from retiring voluntarily under 14 U.S.C. 291 or 292, and that officers were entitled to compute their retired pay on higher rates in effect on July 1, will be followed by GAO. Therefore, under *res judicata* principle, payment to claimants for periods subsequent to court's decision may be made at higher rates in effect July 1. Payments to other claimants in similar circumstances, in view of fact court's decision is original construction of law changing GAO's construction, may be made both retroactively and prospectively, subject to Oct. 9, 1940 barring act, and submission of doubtful cases to GAO. Overrules B–165038 and other contrary decisions 94

Compromises

Permanent indefinite appropriations

Availability

Judgments and costs (or compromise settlements) assessed against individual Internal Revenue Service employees determined to have been acting within the scope of their employment are payable from the indefinite appropriation established by 31 U.S.C. 724a if not over $100,000 in each case, but funds must be appropriated specifically for that purpose if the amount exceeds $100,000, and in either case, judgment must be regarded as obligation of the United States 782

COURTS—Continued Page
Judgments, decrees, etc.—Continued
Payment
Proper release and satisfaction
Plaintiff in *Reale* v. *United States*, Ct. Cl. No. 334–65, July 16, 1969, who has accepted payment pursuant to court's judgment and record correction, is not entitled to additional amount for uniform allowance since he was not required to wear uniform (37 U.S.C. 417(c)). Also, under 28 U.S.C. 2517(b) and 2519 payment of judgment is full discharge to U.S. and further claim is barred, and under 10 U.S.C. 1552(c) acceptance of settlement pursuant to record correction "fully satisfies the claim concerned" 813
Jurors
Fees
Government employees in Federal Courts
Prorated fees
Federal employees in Washington, D.C., metropolitan area who served as jurors in U.S. District Court for D.C. during afternoon of Jan. 19, 1973, when half day holiday proclaimed by E.O. 11696 was in effect, and who on basis of 5 U.S.C. 5537 are not paid juror's fee while in pay status may be paid prorated fee in proportion number of hours served on jury duty after commencement of one-half day holiday bears to total number of hours of jury duty performed on that day since to do otherwise when Federal employees serve as jurors in Federal or D.C. Courts would be more restrictive than required under controlling statutes and inconsistent with prior C.G. decisions to the effect Federal employee is entitled to full jury fee when entire period of jury duty falls outside employee's work hours on any given day. Conflicting decisions are overruled 407
Supreme Court
Constitutionality of legislation construed
Effect on payment of claims
On bases of Supreme Court ruling in *Frontiero* v. *Richardson*, decided May 14, 1973, to effect that differential treatment accorded male and female members of uniformed services with regard to dependents violates Constitution, and P.L. 93–64, enacted July 9, 1973, which deleted from 37 U.S.C. 401 sentence causing differential treatment, regulations relating to two types of family separation allowances authorized in 37 U.S.C. 427 should be changed to authorize family separation allowances to female members for civilian husbands under same conditions as authorized for civilian wives of male members, and for other dependents in same manner as provided for male members with other dependents. Since *Frontiero* case was original construction of constitutionality of 37 U.S.C. 401 and 403, payments of family allowance may be made retroactively by services concerned, subject to Oct. 9, 1940 barring act, and submission of doubtful claims to GAO 148
As *Frontiero* decision, decided May 14, 1973, in which Supreme Court ruled on inequality between male and female military members with regard to quarters allowances, was original construction of constitutionality of 37 U.S.C. 401 and 403, decision is effective as to both active and former members from effective date of statute, subject of barring act of Oct. 9, 1940 (31 U.S.C. 71a). Documentation required from female members to support their claims should be similar to that required of

COURTS—Continued Page
Supreme Court—Continued
Constitutionality of legislation construed—Continued
Effect on payment of claims—Continued
male members under similar circumstances and should be sufficient to reasonably establish member's entitlement to increased allowances. Although claims for 10-year retroactive period may be processed by services concerned, since filing claim in administrative office does not meet requirements of barring act, claims about to expire should be promptly submitted to GAO for recording, after which they will be returned to service for payment, denial or referral back to GAO for adjudication. Doubtful claims should be transmitted to GAO for settlement 148

CREDIT UNIONS
Federal. (*See* **FEDERAL CREDIT UNIONS**)

CUSTOMS
Services in foreign ports
Performed by Guam employees
Overtime charges
Payment for overtime services provided by Guam customs and quarantine officers at Andersen AFB, Guam, on 24-hour, 7-days-a-week rotating basis to accommodate incoming foreign traffic, plus overhead surcharge, which is claimed by Territory of Guam, pursuant to P.L. 9–47 that imposes basic charge equivalent to hourly wage rate of officer performing service, plus administrative surcharge of 25 percent, on "all air and sea carriers and other persons" may be paid, irrespective of laws and regulations enforced by officers as Federal agencies are subject as other carriers to charges imposed for overtime Federal customs inspections under 19 U.S.C. 267, to extent that their operations are subject to customs inspections generally. However, determination should be made that surcharge is reasonable and does not constitute an unconstitutional tax upon U.S. Government 173

DAMAGES
Property. (*See* **PROPERTY**)

DEBT COLLECTIONS
Waiver
Civilian employees
Compensation overpayments
Determination
Determination of applicability of sec. 7(d)(1)(A) of Federal Advisory Committee Act to Executive Director of National Advisory Council on Vocational Education who is paid $36,000 per year plus yearly contribution of $6,888 towards retirement is not necessary, since authority of Council to hire without regard to civil service laws does not authorize Council to compensate him without regard to Classification Act. However, matter should be submitted to CSC which has jurisdiction to make final determinations as to applicability of Classification Act, and upon determination of proper rate of pay, request for waiver of any erroneous payments, if over $500, may be submitted to GAO 531

DEBT COLLECTIONS—Continued Page
Waiver—Continued
Military personnel
Annuity overpayments
Collection of overpayments that resulted when annuity payments under Retired Serviceman's Family Protection Plan were continued to be made to legal guardian of adopted, unmarried minor child of decrease officer after child attained age 18, may be waived pursuant to 10 U.S.C. 1442 since "undue hardship test"—or other good reasons—stated in 35 Comp. Gen. 401 as basis for waiver of overpayments under Plan is satisfied where legal guardian used monies erroneously paid, plus her own and estate funds to continue beneficiary's education, as well as providing good home for her, and where it would be against equity and good conscience to attempt to recover erroneous payments from legal guardian who financially depends on social security payments for support 228
Authority to waive
Public Law 92–453 (10 U.S.C. 2774)
Payment under 37 U.S.C. 307 of superior performance proficiency pay by AF at $30 per month and by Army at $50 per month to senior noncommissioned officers entitled to special pay rate provided in 37 U.S.C. 203(a) for such officers in Army, Navy, AF and Marine Corps should be discontinued since P.L. 90–207, effective Oct. 1, 1967, amended sec. 203(a) to provide new special pay rate, regardless of years of service, in lieu of basic pay at rate of E–9, with appropriate years of service, plus proficiency pay at rate of $150 per month, thus eliminating any award of proficiency pay. Improper payments of superior performance proficiency pay having been based on misinterpretation of law, and having been accepted in good faith, need not be collected and may be waived under provisions of 10 U.S.C. 2772 (P.L. 92–453) 184
Dual compensation
Establishment under 10 U.S.C. 2031 of Marine Corps Junior Reserve Officers' Training Corps unit at Indian High School funded by Federal Govt. is not precluded since establishment of corps in "public and private secondary educational institutions" is not restricted to nongovernmental institutions, and retired members of uniformed services employed as administrators and instructors are required to be paid under 10 U.S.C. 2031(d)(1), which provides for retention of retired or retainer pay by member and payment by school to member of additional amount of not more than difference between such pay and active duty pay and allowances, half of which is reimbursable by appropriate service. However, GS appointments of officer and Fleet Reservist, with CSC approval, need not be revoked, and any resultant dual compensation payments may be waived, but future payments to members are compensable under sec. 2031(d)(1), and incident to GS appointments, school may not be reimbursed for additional amounts paid members 377

DEPARTMENTS AND ESTABLISHMENTS Page
Commercial activities
Government-owned contractor-operated facility
Status
Cancellation of request for proposals for cartridges on basis out-of-pocket costs for performance in a contractor-owned and -operated (COCO) plant compared unfavorably with out-of-pocket costs incurred in Govt-owned contractor-operated (GOCO) plants, and award to GOCO facility was in accord with terms of solicitation that conformed with par. 1-300.91(a) of Army Ammunition Command Procurement Instruction, which in turn is consistent with 10 U.S.C. 4532(a), "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; internal records of GOCO plant are not within disclosure provisions of 5 U.S.C. 552; and as GOCO activity is not Govt. commercial or industrial activity for purposes of BOB Cir. A-76, Federal taxes, depreciation, insurance, and interest are not for inclusion in GOCO cost estimates---------- 40
Private *v.* Government procurement
Policy determination
Award by AF of domestic cargo airlift contract negotiated under 10 U.S.C. 2304(a)(16) pursuant to Class Determinations and Findings to Govt. corporation that is to be transferred to individual to whom award is contemplated and who is currently operating the activity pending Civil Aeronautics Board approval is not improper in view of fact contract will contain termination provision in event approval is withheld; OMB Cir. A-76 and implementing Defense Directives although favoring contracting with private, commercial enterprises allow Govt. operation of commercial activity "to maintain or strengthen mobilization readiness;" services of intended buyer during Govt. control does not make him "officer or employee" within conflict of interest statutes, 18 U.S.C. 205, 18 U.S.C. 207-208; there is no evidence of unfair competition; and contracting agency has broad discretionary authority to award contract in interest of national defense---------- 86
Although OMB Cir. A-76 expresses general policy preference for contracting with private, commercial enterprises, it also provides for use of Govt-furnished services when "service is available from another agency," and allows Govt. operation of a commercial activity "to maintain or strengthen mobilization readiness." Therefore, provisions of circular are regarded as matters of executive policy which do not establish such legal rights and responsibilities that would come within decision functions of GAO---------- 86
Heads
Authority
Request decisions from General Accounting Office
Even though U.S. Environmental Protection Agency (EPA) certifying officer (C.O.) is not entitled to decision as to availability of appropriated funds for payment of membership fees for employees in professional organizations because his request was not accompanied by voucher as required by 31 U.S.C. 82d, which limits the U.S. GAO to responding to question of law with respect to payment on specific voucher

DEPARTMENTS AND ESTABLISHMENTS—Continued Page
Heads—Continued
Authority—Continued
Request decisions from General Accounting Office—Continued

presented to C.O. for certification prior to payment, in view of fact question no doubt will recur, it is considered as having been submitted by head of EPA who is entitled to decision under sec. 8 of act of July 31, 1894, as amended (31 U.S.C. 74), under which GAO has authority to provide decisions to heads of executive departments or other establishments on any question involving payments which may be made by their agency 429

Salary payment basis

Determination of applicability of sec. 7(d)(1)(A) of Federal Advisory Committee Act to Executive Director of National Advisory Council on Vocational Education who is paid $36,000 per year plus yearly contribution of $6,888 towards retirement is not necessary, since authority of Council to hire without regard to civil service laws does not authorize Council to compensate him without regard to Classification Act. However, matter should be submitted to CSC which has jurisdiction to make final determinations as to applicability of Classification Act, and upon determination of proper rate of pay, request for waiver of any erroneous payments, if over $500, may be submitted to GAO 531

Services between
Procurement of supplies and services
Aircraft services

Procurement by GSA of chartered aircraft or blocked space on regularly scheduled aircraft prior to reimbursement by using Govt. agencies may be financed from General Supply Fund established by sec. 109(a) of Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. 756(a), for purpose of "procuring * * * nonpersonal services." Although nothing in applicable statute or its legislative history precludes use of Fund to procure chartered aircraft and/or blocked space on aircraft, since proposed program will be a major departure from present practices it is recommended that plan be initiated as an experimental one of limited scope and duration to test feasibility and desirability of program, and that plan be disclosed to interested committees of Congress before proceeding with an extensive program of chartering aircraft.. 558

DETAILS
Intergovernmental Personnel Act implementation
Federal employee benefit status

Under Intergovernmental Personnel Act of 1970 (5 U.S.C. 3371–3376), Federal employees temporarily assigned to State and local governments and institutions of higher education are not entitled to both per diem and change of station allowances for same assignment, even though 5 U.S.C. 3375 permits payment of both benefits associated with permanent change of station and those normally associated with temporary duty status, since nothing in statute or its legislative history suggests both types of benefits may be paid incident to same assignment. Therefore, on basis of interpretation of similar provisions in Government Employees Training Act, agency should determine, taking cost to Govt. into consideration, whether to authorize permanent change of station allowances or per diem in lieu of subsistence under 5 U.S.C. Ch. 57, subch. I to employees on intergovernmental assignment 81

DISASTER RELIEF Page

Disaster victims

Disaster unemployment assistance

Limitations

Department of Labor's interpretation of section 240 of Disaster Relief Act of 1970 to effect that it authorizes benefits to eligible disaster victims covered under State regular unemployment compensation program for period in addition to State program cannot be supported, since the paramount purpose of the section was to provide the equivalent of State unemployment compensation benefits to victims who were not eligible for State unemployment compensation 875

DISTRICT OF COLUMBIA

Contracts

Labor stipulations

Affirmative action programs

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

Firemen and policemen

Medical treatment

Section 4–124 of District of Columbia Code provides for appointment of police surgeons, and for treatment of non-service connected injuries and diseases suffered by D.C. policemen and firemen. While sec. 4–206 of D.C. Code extends same benefits to U.S. Park Police, there is no authority for payment of physician services, other than by the appointed police surgeons, for treatment of non-service connected injuries or diseases suffered by U.S. Park Police officers since statute makes no provision for other physician services 822

Retirement

Secret Service personnel coverage

Since under 18 U.S.C. 3056, Secret Service in addition to protecting President has numerous criminal investigation functions, security officers and specialists may count time spent in activities related to Presidential protection, as well as time spent in directly protecting President on temporary or intermittent assignments, toward accumulation of requisite 10 years prescribed by sec. 4–522 of title 4, D.C. Code, for entitlement to retirement annuities under Policemen and Firemen's Retirement and Disability Act, even though authority to transfer deposits from Civil Service Retirement and Disability Fund to general revenues of D.C. specifies full-time agents protecting President. Approval of future eligibility revisions to participate in D.C. Police Retirement Plan is responsibility, pursuant to sec. 4–535, of D.C. Commissioner, and should additional transfers affect integrity of Policemen and Firemen's Retirement and Disability Fund, this might be basis of remedial legislation 177

DISTRICT OF COLUMBIA—Continued Page

Redevelopment Land Agency

Land disposition

Failure of bidder to perform

Deposit forfeiture

When a limited partnership, the successor in interest to a joint venture, failed to perform obligation undertaken by initial partnership, forfeiture of original deposit is required as the D.C. Redevelopment Land Agency may not waive its right of forfeiture since no consideration passed to Agency to permit waiver of Govt.'s right, and furthermore, delay in seeking forfeiture does not constitute waiver of forfeiture right as delay was requested by successor partnership in order to find means to perform the original obligation 574

DONATIONS

Gifts

To officers and employees

Expenditure for distribution of decorative ashtrays to participants at SBA-sponsored conference of Govt. procurement officials with intent that SBA seal and lettering on ashtrays would generate conversation relative to conference and serve as reminder to participants of conference purposes, and thereby further SBA objectives, is unauthorized in that such items are in the nature of personal gifts and thus expenditures therefor do not constitute necessary and proper use of appropriated funds 770

Officers and employees

Gifts. (*See* **DONATIONS, Gifts, To officers and employees**)

EDUCATION

Federal aid, grants, etc., to States. (*See* **STATES, Federal aid, grants, etc., Educational institutions**)

Student assistance programs

Military record correction effect on allowance

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

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The Administrator of EPA having been informed that regulations promulgated pursuant to the Federal Water Pollution Control Act, Pub. L. 92–500, 33 U.S.C. (1970 ed., Supp II) 1251, are inconsistent with statute and must be revised, is required by sec. 236 of Legislative Reorganization Act of 1970 to report to the appropriate congressional committees as to action taken with respect to the corrective recommendations made by the GAO 547
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Where offeror's proposal stated no minimum time for maintenance of computer terminals but offeror had incorporated prior contract provisions in its proposal, which stated 2-hour minimum, proposal was ambiguous and agency should have sought clarification pursuant to FPR 1–3.805.1(a) 895
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Although Govt. is estopped to deny existence of contract with other than low bidder, even though entering into contract was outside scope of contracting officer's authority, contract is not illegal, as contractor neither directly contributed to underlying mistake nor was on direct notice of mistake, however, award made to other than lowest responsive bidder should be terminated for convenience of Government 502

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ESTOPPEL—Continued Page
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Rule
Govt. is estopped from denying existence of contract where, acting under its own mistake and believing that protester would commence work the following week, it told the protester, apparent but not actual low bidder, contract number 6 days before contract was to have commenced and protester without knowledge of true facts acted to its detriment 502
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EXPERTS AND CONSULTANTS
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Applicability
Contract to conduct study of labor management activity and processes proposed to be entered into between a retired Federal employee and OEO under the authority granted the Director in sec. 602 of Economic Opportunity Act of 1964 to obtain services of experts and consultants, either through direct employment or by contract, in accordance with 5 U.S.C. 3109, when construed on basis of whole arrangement existing between the parties and not only from the wording of the contract evidences the former employee will represent OEO in connection with labor-management grievances and arbitration proceedings that will require close working relationship with agency employees, relationship that is incompatable with an independent contractor relationship and should former employee accept employment under such arrangement his pay would have to be reduced in accordance with 5 U.S.C. 8344(a) by the amount of his civil service annuity 542

FAMILY ALLOWANCES Page

Separation

Female members

Entitlement to allowance

On bases of Supreme Court ruling in *Frontiero* v. *Richardson*, decided May 14, 1973, to effect that differential treatment accorded male and female members of uniformed services with regard to dependents violates Constitution, and P.L. 93–64, enacted July 9, 1973, which deleted from 37 U.S.C. 401 sentence causing differential treatment, regulations relating to two types of family separation allowances authorized in 37 U.S.C. 427 should be changed to authorize family separation allowances to female members for civilian husbands under same conditions as authorized for civilian wives of male members, and for other dependents in same manner as provided for male members with other dependents. Since *Frontiero* case was original construction of constitutionality of 37 U.S.C. 401 and 403, payments of family allowance may be made retroactively by services concerned, subject to Oct. 9, 1940 barring act and submission of doubtful claims to GAO 148

FEDERAL ADVISORY COMMITTEE ACT

Pay guidelines

Compensation limitation

Determination of applicability of sec. 7(d)(1)(A) of Federal Advisory Committee Act to Executive Director of National Advisory Council on Vocational Education who is paid $36,000 per year plus yearly contribution of $6,888 towards retirement is not necessary, since authority of Council to hire without regard to civil service laws does not authorize Council to compensate him without regard to Classification Act. However, matter should be submitted to CSC which has jurisdiction to make final determinations as to applicability of Classification Act, and upon determination of proper rate of pay, request for waiver of any erroneous payments, if over $500, may be submitted to GAO 531

FEDERAL CREDIT UNIONS

Presidential appointees

Confirmation travel

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

FEDERAL HOUSING ADMINISTRATION

Status

Corporation

Claim of Federal National Mortgage Assn. (FNMA) against Federal Housing Admin. (FHA) of Dept. of HUD for handling, as successor mortgagee, adjustments necessitated by conversion from insurance for housing for moderate income and displaced families under sec. 221(d)(3) of National Housing Act, as amended, to insurance for rental and cooperative housing for lower income families under sec. 223 of act may

FEDERAL HOUSING ADMINISTRATION—Continued Page
Status—Continued
Corporation—Continued

not be considered by U.S. GAO for the FHA while not specifically chartered as corporation is defined in Government Corporation Control Act (31 U.S.C. 846) as "wholly owned Govt. corporation," and as Govt. corporations are authorized to settle their own claims or to have their financial transactions treated as final, GAO is without authority to determine FNMA's entitlement to handling charges claimed..... 338

FEDERAL PROCUREMENT REGULATIONS
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The Federal Property and Administrative Services Act of 1949 and FPR are inapplicable to Bureau of Sport Fisheries and Wildlife's award of use permits for operation of ctirus groves located on wildlife refuge, because both 16 U.S.C. 715s(f) and 668dd(d)(2) authorize the Secretary of the Interior to permit use of refuges or disposal of products thereof upon conditions he determines are in best interests of United States.... 949

FEDERAL WATER POLLUTION CONTROL ACT
Grants-in-aid
Applications

The EPA's regulations that provide for approval of grant applications combining both design and construction stages of water treatment project are inconsistent with sec. 203(a) of Federal Water Pollution Control Act, Pub. L. 92–500, 33 U.S.C. (1970 ed., Supp II) 1283(a), which prescribes that Govt. is obligated to pay its share of project costs only upon approval of plans, specifications and estimates at each succeeding stage. Therefore, in absence of approval of plans, specifications and estimates for construction stage of water treatment project, there is no grant commitment by U.S. and no charge against a State's allotment.... 547

Limitations

Language in sec. 202(a) of the Federal Water Pollution Control Act as amended by Pub. L. 92–500, 33 U.S.C. (1970 ed., Supp II) 1251, that a grant for treatment works "shall be 75 per centum of the cost of construction thereof" and in conference report that Federal grant shall be "75 per centum of the cost of construction in every case" is mandatory and the EPA, despite assertions that the interests of the Federal Govt., of State in which project is to be placed, and grantee might best be served if Federal grant would be less than 75 percent of project cost, has no authority to make grants in lesser amounts..... 547

Implementation
Regulations inconsistent

The Administrator of EPA having been informed that regulations promulgated pursuant to the Federal Water Pollution Control Act, Pub. L. 92–500, 33 U.S.C. (1970 ed., Supp. II) 1251, are inconsistent with statute and must be revised, is required by sec. 236 of Legislative Reorganization Act of 1970 to report to the appropriate congressional committees as to action taken with respect to the corrective recommendations made by the GAO..... 547

FEES Page

Jury. (*See* COURTS, Jurors, Fees)

Membership

Appropriation availability

Although prohibition in 5 U.S.C. 5946 against use of appropriated funds to pay membership fees for individual employees in professional associations applies to employees of National Environmental Research Center of U.S. Environmental Protection Agency who join professional societies concerned with environment, notwithstanding such membership would be of primary benefit to agency rather than employee, there is no objection to use of funds for payment of membership fees in name of agency if expenditure is justified as necessary to carry out purposes of agency's appropriation 429

Services to public

Refund

Failure of Government to perform

Since applications for discharge permits under Refuse Act Permit Program, which were filed with the Corps of Engineers or EPA, were not processed because the authority to issue permits was given to the States pursuant to sec. 402 of Federal Water Pollution Control Act, as amended by Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1342, refund may be made by EPA of application fees charged, for although fees were properly received, deposit of fees into Treasury as miscellaneous receipts was erroneous. Therefore, amounts that are proper for refund should be transferred from receipt account to "suspense fund" for refund, and in future until properly for deposit into Treasury as miscellaneous receipts, fees should be deposited into Treasury as trust funds in accordance with 31 U.S.C. 725r 580

Witnesses

Government employees

Employees who were requested by U.S. Attorney to give testimony before Federal grand jury and in trial of criminal cases while suspended from their positions, were not placed in pay or duty status by reason of request even though testimony before grand jury was in regard to their official duties. Although employees are not entitled to salary for period of time they spent testifying, they may be paid and retain any witness fees that would be payable to non-Govt. employees appearing as witnesses in such proceedings 515

FOOD

Meals furnished

Reimbursement. (*See* MEALS, Furnishing, General rule)

FOREIGN CURRENCIES (*See* FUNDS, Foreign)

FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES

Foreign service personnel. (*See* FOREIGN SERVICE)

Tropical differentials

Basis for payment

Exceptions in 35 CFR 253.135 to payment of tropical differential to more than one spouse if both are employed by Federal Govt.; to payment of differential where job of spouse employed outside Federal Govt. reasonably is determinative of family's location; and to payment of differential to employee whose spouse is member of U.S. military forces.

FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES—Continued Page

Tropical differentials—Continued

Basis for payment—Continued

are equally applicable to male and female employees and, therefore, prohibitions are not susceptible to allegation of sex discrimination that violates legislation and governing regulations made effective Jan. 10, 1971, to eliminate sex discrimination in employment because of marital status. In case of claims submitted by Panama Canal Zone Govt. female employees, differential is payable only if positions occupied are determinative of family location, and future claims in view of varying factual circumstances should be judged individually 203

FOREIGN GOVERNMENTS

Employment of U.S. Government retirees

Agency rule to determine status

In determining existence of employer-employee relationship between retired member and foreign Govt. or instrumentality thereof, common law rules of agency will be applied in order to determine whether such instrumentality has right to control and direct employee in performance of his work and manner in which work is to be done 753

FOREIGN SERVICE

Medical treatment

Health insurance coverage of employee

Failure to file claim effect

Regulatory authority of Secretary of State provided by sec. 941 of Foreign Service Act of 1946, 22 U.S.C. 1156, to pay medical costs of officers and employees and their dependents is sufficiently broad to enable Secretary to require Foreign Service members having private health insurance to file claims with carriers for benefits to reimburse expenditures made on their behalf by Govt. for medical care incident to illness or injury. Therefore, Foreign Service member who negligently failed to timely file for health insurance benefits and thus did not obtain private health insurance benefits to which entitled for illness or injury, and for which medical care was provided at expense of Govt., is indebted for amount which he would have received had he recouped insurance 474

Travel expenses

Hotel expenses

United States

Hotel expenses incurred in U.S. incident to move to post of assignment abroad cannot be reimbursed under the transfer allowance authority of 5 U.S.C. 5924(2). While Congressional intent to extend transfer allowance to cover temporary lodging expenses incurred incident to employee's establishing himself at post in the U.S. between foreign assignments is clear, we find no such intent with regard to temporary lodging expenses incurred in U.S. incident to assignments abroad 861

FRAUD Page

False claims

False signatures

Checks

Reclamation action for proceeds of original check endorsed by unauthorized use of rubber-stamp imprint of payee's name should be continued against the cashing bank, a Georgia institution, since check issued to an out-of-State payee was negotiated on an endorsement made by an "unauthorized signature" within meaning of that term as prescribed by Uniform Commercial Code adopted by Georgia, and improper negotiation was due to no fault of payee who had been issued and cashed a substitute check and, therefore, passage of valid title to bank was precluded. Fraudulent negotiation was made possible by bank's failure to identify negotiator of check rather than by unauthorized endorsement. Use of rubber stamp—a rarity for individuals—and fact that check was drawn to out-of-State payee required greater degree of care to identify endorser than was exercised by endorsing bank---------- 19

FUNDS

Appropriated. (*See* APPROPRIATIONS)

Federal aid, grants, etc., to States. (*See* STATES, Federal aid, grants, etc.)

Federal grants, etc., to other than States

Applicability of Federal statutes

Competitive bidding system

Under invitation issued by Federal grantee required by HEW regulation to conform with competitive system in construction of classroom building, low bidder who executed certificate relating to part I of bid conditions that required listing of trades to be employed and coverage that would be extended by New Orleans affirmative action plan but failed to sign part II certificate that involved commitment to various goals and specific steps contained in bid conditions or submit alternative affirmative action plan nevertheless submitted a responsive bid since in signing part I certification bidder is committed to comply with terms and conditions of New Orleans Plan and to submit alternative plan for trades not signatory to New Orleans Plan, thus meeting material requirements of invitation---------- 451

Foreign

Exchange rate

Contract underpayments

Dollar devaluation

Additional cost due to devaluation of dollar to corporation in business of producing drafting and engineering instruments, measuring devices and precision tools to obtain supplies from abroad to meet contractual commitments to Govt. may not be reimbursed to corporation by increasing any bid price open for acceptance or any contract price since devaluation of dollar is attributable to Govt. acting in its sovereign capacity and Govt. is not liable for consequences of its acts as a sovereign; no provision was made for price increase because cost of performance might be increased; and under "firm-bid rule," bid generally is irrevocable during time provided in IFB for acceptance of a bid------- 157

FUNDS—Continued Page
Foreign—Continued
Exchange rate—Continued
Contract underpayments—Continued
Dollar devaluation—Continued

Reporting claim to Congress under Meritorious Claims Act of 1928 (31 U.S.C. 236) for additional cost to corporation to meet its contractual commitments to Govt. by reason of devaluation of dollar would not be justified because claim contains no elements of unusual legal liability or equity. Remedy afforded by act is limited to extraordinary circumstances, and cases reported by GAO to Congress generally have involved equitable circumstances of unusual nature and which are unlikely to constitute recurring problem, since to report to Congress a particular case when similar equities exist or are likely to arise with respect to other claimants would constitute preferential treatment over others in similar circumstances 157

Military Aid Program
Charge to
Excess defense items
Domestic and foreign generated

Provision in Foreign Assistance Act of 1973 which amends earlier statute which permitted specified amount of excess defense items (domestic and foreign generated) to be furnished to foreign countries without charge to MAP funds so as to, in effect, require domestic excess defense items to be charged to MAP funds, is applicable on and after July 1, 1973, even though amendment was enacted subsequent thereto since latter act provides authorizations of funds for current fiscal year, provision contains the words "during each fiscal year," and such effective date appears consistent with legislative history of such provision and manner in which it had been applied in prior fiscal years 975

Miscellaneous receipts. (*See* **MISCELLANEOUS RECEIPTS**)
Suspense accounts
Refund monies

Since applications for discharge permits under Refuse Act Permit Program, which were filed with the Corps of Engineers or EPA, were not processed because the authority to issue permits was given to the States pursuant to sec. 402 of Federal Water Pollution Control Act, as amended by Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1342, refund may be made by EPA of application fees charged, for although fees were properly received, deposit of fees into Treasury as miscellaneous receipts was erroneous. Therefore, amounts that are proper for refund should be transferred from receipt account to "suspense fund" for refund, and in future until properly for deposit into Treasury as miscellaneous receipts, fees should be deposited into Treasury as trust funds in accordance with 31 U.S.C. 725r 580

GENERAL ACCOUNTING OFFICE
Adversary hearings
No authority

Claimant's request that a hearing be held for purpose of taking testimony from witnesses is denied because the GAO is not vested with authority to hold adversary hearings for the purpose of obtaining sworn testimony and therefore decisions of the Comptroller General must be made upon evidence in the official record presented 824

GENERAL ACCOUNTING OFFICE—Continued Page

Contracts

Contractor's responsibility

Contracting officer's affirmative determination accepted

Exceptions

Allegation of noncompetitive practices because of communality of ownership and financial interests between two bidders is referred to DSA for consideration in accordance with ASPR 1–111 and ASPR 1–600. GAO has discontinued practice of reviewing bid protests of contracting officer's affirmative responsibility determination, except for actions by procuring officials which are tantamount to fraud, and GAO has no authority to administratively debar or suspend other than for violations of Davis-Bacon Act, which is not relevant here..... 931

Protest procedures. (*See* **CONTRACTS, Protests**)

Decisions

Advance

Voucher accompaniment

While no voucher as required by 31 U.S.C. 82d accompanied request from certifying officer for decision concerning propriety of reimbursing cost of providing food to protectors of life and Federal property in emergency situation, problem being a general one, requested decision is addressed to head of agency under broad authority of 31 U.S.C. 74, which directs U.S. GAO to provide decisions to heads of departments on any question involving propriety of making a payment..... 71

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

Jurisdiction

Agency records disclosure

Whether refusal of contracting agency to permit bidder to examine basis for estimated annual quantities of personal property to be prepared for shipment or storage violates Freedom of Information Act, 5 U.S.C. 552(a)(3), and implementing regulations, is not for consideration by GAO since GAO has no authority to determine what information must be disclosed under act by other Govt. agencies..... 533

Civil service matters

Retirement eligibility

National Guard technicians who are separated from civilian positions as result of loss of enlisted military status due to failure on part of National Guard to accept their reenlistment applications, although qualified, are considered to have been involuntarily separated and, therefore, entitled to severence pay provided under 5 U.S.C. 5595,

GENERAL ACCOUNTING OFFICE—Continued Page
Jurisdiction—Continued
Civil service matters—Continued
Retirement eligibility—Continued

except when it is reasonably established that failure to accept application for reenlistment is for cause based on charges of misconduct, delinquency, or inefficiency on part of enlisted member. Although GAO has no jurisdiction to determine whether qualified technician who is separated from civilian position because application for reenlistment is not accepted is precluded from receiving civil service retirement benefits based on involuntary separation, it is suggested reference in legislative history of National Guard Technicians Act of 1968 to "involuntary retirement" should be narrowly construed 493

Claims
Corporations

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

Commercial activities of Government

Although OMB Cir. A-76 expresses general policy preference for contracting with private, commercial enterprises, it also provides for use of Govt-furnished services when "service is available from another agency," and allows Govt. operation of a commercial activity "to maintain or strengthen mobilization readiness." Therefore, provisions of circular are regarded as matters of executive policy which do not establish such legal rights and responsibilities that would come within decision functions of GAO 86

Recommendations
Implementation

The Administrator of EPA having been informed that regulations promulgated pursuant to the Federal Water Pollution Control Act, Pub. L. 92-500, 33 U.S.C. (1970 ed., Supp II) 1251, are inconsistent with statute and must be revised, is required by sec. 236 of Legislative Reorganization Act of 1970 to report to the appropriate congressional committees as to action taken with respect to the corrective recommendations made by the GAO 547

When a GAO decision contains recommendation to agency for corrective action, copies of decision are transmitted to congressional committees named in sec. 232 of Legislative Reorganization Act of 1970, 31 U.S.C. 1172, and agency's attention is directed to sec. 236 of act, 31 U.S.C. 1176, which requires agency to submit written statements of action to be taken on recommendation to House and Senate Com-

GENERAL ACCOUNTING OFFICE—Continued Page
Recommendations—Continued
Implementation—Continued
mittees on Government Operations, not later than 60 days after date of decision, and to Committees on Appropriations in connection with first request for appropriations made by agency more than 60 days after date of decision ---- 646
Reporting to Congress
Award for separate contract line items of fork lift trucks on basis of permitted alternate delivery schedule that offered delivery 90 days earlier than prescribed by invitation for bids and, therefore, was nonresponsive to mandatory requirement that first production units be delivered no earlier than a minimum of 365 days after approval of first article test report—requirement intended to assure delivery of spares, repair parts, and publication concurrently with first production units—should be terminated, procurement resolicited with delivery provisions informing bidders as to permissible deviations and consequences of nonconformity in accordance with competitive bidding system, and appropriate congressional committees informed, pursuant to sec. 236 of the Legislative Reorganization Act, of action taken on this recommendation. Furthermore, solicitation makes no provision that in event an alternate delivery schedule is unacceptable required schedule will govern. Modified by 53 Comp. Gen. 320 ---- 32
Acceptance by contracting officer of self-certification submitted by successful bidder that it is a small business concern on basis that contrary determination by SBA district office was not final as it had been appealed to SBA Size Appeals Board was improper as district director's decision remains in full force and effect unless reversed or modified by Board, and fact that ASPR 1-703(b)(3)(iv) permits suspension of full size determination cycle when urgency of procurement so requires does not negate regional size determination made prior to award. Because contracting officer was not misled by self-certification but acted with full knowledge of facts in reliance on reading of applicable ASPR provisions, and because of urgency of procurement, contract awarded should be terminated for convenience of Govt. and resolicited, and this recommendation requires actions prescribed by secs. 232 and 236 of Legislative Reorganization Act of 1970 ---- 434

GENERAL SERVICES ADMINISTRATION
General Supply Fund
Aircraft services procurement
Procurement by GSA of chartered aircraft or blocked space on regularly scheduled aircraft prior to reimbursement by using Govt. agencies may be financed from General Supply Fund establisned by sec. 109(a) of Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. 756(a), for purpose of "procuring * * * nonpersonal services." Although nothing in applicable statute or its legislative history precludes use of Fund to procure chartered aircraft and/or blocked space on aircraft, since proposed program will be a major departure from present practices it is recommended that plan be initiated as an experimental one of limited scope and duration to test feasibility and desirability of program, and that plan be disclosed to interested committees of Congress before proceeding with an extensive program of chartering aircraft ---- 558

GRANTS Page

To other than States. (*See* **FUNDS, Federal grants, etc., to other than States**)

GRATUITIES

Reenlistment bonus

Critical military skills

Training in related skill in same occupational field

Marine Corps member serving in critical skill at time of his reenlistment is entitled to variable reenlistment bonus under 37 U.S.C. 308(g) notwithstanding fact that he reenlisted for purpose of being trained and serving in new critical skill since such new skill was within the same occupational field as old skill and new skill would require use of old skill plus additional training and, thus, old skill would continue to be utilized and not lost to the Marine Corps 794

GUAM

Employees

Customs and quarantine officers

Overtime services for Federal Government

Payment for overtime services provided by Guam customs and quarantine officers at Andersen AFB, Guam, on 24-hour, 7-days-a-week rotating basis to accommodate incoming foreign traffic, plus overhead surcharge, which is claimed by Territory of Guam, pursuant to P.L. 9-47 that imposes basic charge equivalent to hourly wage rate of officer performing service, plus administrative surcharge of 25 percent, on "all air and sea carriers and other persons" may be paid, irrespective of laws and regulations enforced by officers as Federal agencies are subject as other carriers to charges imposed for overtime Federal customs inspections under 19 U.S.C. 267, to extent that their operations are subject to customs inspections generally. However, determination should be made that surcharge is reasonable and does not constitute an unconstitutional tax upon U.S. Government 173

HIGHWAYS

Forest

Closing of roads and trails

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

HUSBAND AND WIFE Page

Divorce

Travel and transportation matters

Wife's travel prior to husband's eligibility

No objection is raised to proposed amendment to Vol. 1 of JTR which would permit return travel to U.S. of dependents of members of uniformed services stationed overseas who traveled overseas as dependents but ceased to be dependents because of divorce or annulment of marriage prior to date member became eligible for their return travel. Such amendment is similar to that concurred in for Foreign Affairs Manual in 52 Comp. Gen. 246 960

While principles in 52 Comp. Gen. 246, wherein the Comptroller General had no objection to proposed amendment to Foreign Service Travel Regs. permitting Govt. payment of return travel of employee's dependents, who traveled at Govt. expense to overseas posts of duty, although they were no longer dependents as of date employee was eligible for return travel because of divorce or annulment, would apply to dependents of all overseas employees, Vol. 2 of Joint Travel Regs. may not be amended to provide for such travel for former spouse since statutory regulations in the Federal Travel Regs. do not provide for such payment. 1051

Dual rights where both in Military or Federal service

Traveling expenses

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

INFORMERS

Awards. (*See* **AWARDS, Informers**)

INSURANCE

Health

Private

Government employee's failure to claim benefits

Regulatory authority of Secretary of State provided by sec. 941 of Foreign Service Act of 1946, 22 U.S.C. 1156, to pay medical costs of officers and employees and their dependents is sufficiently broad to enable Secretary to require Foreign Service members having private health insurance to file claims with carriers for benefits to reimburse expenditures made on their behalf by Govt. for medical care incident to illness or injury. Therefore, Foreign Service member who negligently failed to timely file for health insurance benefits and thus did not obtain private health insurance benefits to which entitled for illness or injury, and for which medical care was provided at expense of Govt., is indebted for amount which he would have received had he recouped insurance 474

INTEREST Page

Claims against United States

Federal employees

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

Rule

Claimant's request that interest be paid on backpay found due for period of his separation is denied because payment of interest by Govt. on its unpaid accounts or claims is permitted only when interest is provided for in legal and proper contracts or where allowance of interest is specifically directed by statute 824

Loans

Rates of interest

Participatory loans by public and private institutions

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

INTERGOVERNMENTAL PERSONNEL ACT

Assignment of Federal employees

Per diem *v.* station allowances

Under Intergovernmental Personnel Act of 1970 (5 U.S.C. 3371-3376), Federal employees temporarily assigned to State and local governments and institutions of higher education are not entitled to both per diem and change of station allowances for same assignment, even though 5 U.S.C. 3375 permits payment of both benefits associated with permanent change of station and those normally associated with temporary duty status, since nothing in statute or its legislative history suggests both types of benefits may be paid incident to same assignment. Therefore, on basis of interpretation of similar provisions in Government Employees Training Act, agency should determine, taking cost to Govt. into consideration, whether to authorize permanent change of station allowances or per diem in lieu of subsistence under 5 U.S.C. Ch. 57, subch. I to employees on intergovernmental assignment 81

INTERGOVERNMENTAL PERSONNEL ACT—Continued Page

Assignment of State employees

"Pay" reimbursement

When State or local Govt. employee is detailed to executive agency of Federal Govt. under Intergovernmental Personnel Act, reimbursement under 5 U.S.C. 3374(c) for "pay" of employee may not include fringe benefits, such as retirement, life and health insurance, and costs for negotiating assignment agreement required under 5 CFR 334.105, and for preparing payroll records and assignment report prescribed under 5 CFR 334.106. The word "pay" as used in act has reference according to legislative history to salary of State or local detailee, and there is no basis for ascribing to term a different meaning than used in Federal personnel statutes, that is that term refers to wages, salary, overtime and holiday pay, periodic within-grade advancements and other pay granted directly to Federal employees. Overruled, in part, by 54 Comp. Gen. — (B–157936, Sept. 16, 1974)---------- 355

INTERIOR DEPARTMENT

Bureau of Sport Fisheries and Wildlife

Permit issuances

Operation of citrus groves

The Federal Property and Administrative Services Act of 1949 and FPR are inapplicable to Bureau of Sport Fisheries and Wildlife's award of use permits for operation of citrus groves located on wildlife refuge, because both 16 U.S.C. 715s(f) and 668dd(d)(2) aufhorize the Secretary of the Interior to permit use of refuges or disposal of products thereof upon conditions he determines are in best interests of United States------ 949

National Park Service

Park police

Medical treatment

Section 4–124 of District of Columbia Code provides for appointment of police surgeons, and for treatment of non-service connected injuries and diseases suffered by D.C. policemen and firemen. While sec. 4–206 of D.C. Code extends same benefits to U.S. Park Police, there is no authority for payment of physician services, other than by the appointed police surgeons, for treatment of non-service connected injuries or diseases suffered by U.S. Park Police officers since statute makes no provision for other physician services---------- 822

INTERNAL REVENUE SERVICE

Employees

Judgments against

Liability of Government

Judgments and costs (or compromise settlements) assessed against individual Internal Revenue Service employees determined to have been acting within the scope of their employment are payable from the indefinite appropriation established by 31 U.S.C. 724a if not over $100,000 in each case, but funds must be appropriated specifically for that purpose if the amount exceeds $100,000, and in either case, judgment must be regarded as obligation of the United States---------- 782

INTERNATIONAL ORGANIZATIONS Page
UNICEF
Appropriations. (*See* APPROPRIATIONS, United Nations Children's Fund UNICEF)
JOINT VENTURES
Qualifications
Bid evaluation factor
Where low bidder entered into joint venture agreement to obtain necessary resources to perform a janitorial service contract prior to denial by SBA of request for certificate of competency (COC), request which upon resubmission to SBA was not accepted because SBA questioned impact of joint venture on bidder's responsiveness and stated it would not accept referral unless new information was developed relative to bidder's financial condition, and additionally that if joint venture was allowed bidder if still considered responsive could possibly perform, contracting officer should not have ignored joint venture agreement, and agreement should be reassessed and if bidder is found to be responsible, contract awarded incumbent contractor should be terminated for convenience of Govt. and award made to low bidder 496
LABOR DEPARTMENT
Unemployment compensation. (*See* UNEMPLOYMENT. Compensation)
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Termination
Notice
90-day requirement
Initial term of lease for operation of concession lapsed midway through agency's 90-day termination notice required by lease, which also gives agency right to extend on year-to-year basis. Although lapse caused controversy concerning notice's legal effect, agency termination is valid since notice provision is intended to give parties time to prepare for transition necessitated by termination and lessee's continued operation of concession for duration of notice period despite lapse caused agency's action to have the practical effect of providing necessary transition time 902
LEAVES OF ABSENCE
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Administrative determination
Retroactive grant of 8 hours administrative leave to employee by local Commander of Air Force Base for time he spent in cleaning and arranging for repair of damages to his home, that resulted from ammunition train explosion, was proper exercise of administrative authority since the CSC has not issued general regulations covering grant of administrative leave and, therefore, each agency, under general guidance of decisions of the Comptroller General, which are discussed in applicable FPM Supplement, has responsibility for determining situations in which excusing employees from work without charge to leave is appropriate 582
Authority
Employee who was injured and unable to perform regular duties but who could perform other limited duties submitted grievance alleging that agency did not comply with labor-management agreement in that it did not "make every effort" to find a limited duty position for him. Recommendation of arbitrator who upheld grievance that employee be granted

LEAVES OF ABSENCE—Continued Page
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30 days administrative leave may not be implemented by agency since there is no legal authority to grant administrative leave in the circumstances ---- 1054

Annual
Leave adjustment
Recredit to leave account

Two Navy employees remained at temporary duty station on Sunday, after completing assignment on Saturday, in order to perform return travel during regular workweek. Each was charged 8 hours leave and denied per diem in connection with the deferred travel. Navy may comply with arbitration award directing restoration of leave and payment of per diem since per diem costs for less than 2 days are considered reasonable for compliance with travel policy expressed at 5 U.S.C. 6101(b)(2) and Navy is, thus, not precluded under E.O. 11491, sec. 12, by applicable law or regulations, from accepting such award ---- 882

Maximum limitation
Employees outside United States
Canal Zone

Although employee, who entered service in Canal Zone, was given transportation agreement on basis of his travel to the Zone as dependent of employee with transportation agreement, he is not entitled to accumulate 45 days annual leave and home leave since he did not meet requirement of 5 U.S.C. 6304(b) that he be recruited from U.S. or territory or possession of U.S. outside the Zone. Further, home leave under 5 U.S.C. 6305(a) may not be granted since the employee is not entitled to accumulate 45 days annual leave ---- 966

Annual and Sick Leave Act
Coverage
Presidential appointees

U.S. attorneys who are compensated at Executive Schedule rates are excluded from coverage of Annual and Sick Leave Act since 5 U.S.C. 6301(2)(x) exempts from coverage all officers appointed by President whose basic rates of pay exceed highest General Schedule (GS) level and although 5 U.S.C. 6301(2)(x) refers to individual whose rate of pay "exceeds" highest GS level, intent of act can be effected only if those whose salaries are intended to exceed highest GS level by virtue of assignment to Executive Schedule are exempted even though GS–18 and Executive Level V officials may at times receive equal pay. Furthermore, while discretionary exemption authority in 5 U.S.C. 6301(2)(xi) prohibits President from excluding any U.S. attorney from coverage under the leave act, clause does not operate to nullify statutory exclusion required by 5 U.S.C. 6301(2)(x) ---- 577

Compensatory time
Overtime adjustment

Sunday and holiday work performed on regular and recurring basis is not work within purview of compensatory provisions of 5 U.S.C. 5543 and 5 CFR 550.114, and employee who from Aug. 1, 1955, through

LEAVES OF ABSENCE—Continued Page

Compensatory time—Continued

Overtime adjustment—Continued

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

Lump-sum payments

Limitations

Removal

Government employee, who at time of retirement (Dec. 31, 1973) was paid a lump sum for 240 hours of accrued and unused annual leave, is entitled to be paid for additional 148 hours of annual leave because Pub. L. 93-181 which amends 5 U.S.C. 5551(a) removes limitation on amount of accumulated annual leave that can be carried over for payment purposes..... 820

Sunday work

Effect on premium and night differential pay

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

LEGISLATION

Effective date

Provision in Foreign Assistance Act of 1973 which amends earlier statute which permitted specified amount of excess defense items (domestic and foreign generated) to be furnished to foreign countries without charge to MAP funds so as to, in effect, require domestic excess defense items to be charged to MAP funds, is applicable on and after July 1, 1973, even though amendment was enacted subsequent thereto since latter act provides authorizations of funds for current fiscal year, provision contains the words "during each fiscal year," and such effective date appears consistent with legislative history of such provision and manner in which it had been applied in prior fiscal years..... 975

LICENSES Page

Bidder qualifications. (*See* **BIDDERS, Qualifications**)

State and municipalities

Government contractors

License requirement in a Govt. solicitation is matter of bidder responsibility since bidder has duty to ascertain its legal authority to perform Govt. contract within a State, and requirement not relating to bid evaluation need not be submitted before bid opening. Therefore, low bidder who did not submit licensing and registration information with its bid to furnish taxi and pick-up services is considered to be responsive bidder. A State may enforce its license requirements provided State law is not opposed to or in conflict with Federal policies or laws, or does not interfere with execution of Federal powers. Also, equipment information intended to determine bidder capacity and ability to perform service contract is matter of bidder responsibility, not bid responsiveness, as is fact that bidder was in the ambulance business and not taxi business at time bids were opened 36

Requirement in several invitations for bids that bidder have license to conduct guard service business in State of N.Y. or that contractor be licensed as qualified guard service company in Va., County of Fairfax, and Md., Montgomery County, is not restrictive of competition but proper exercise of procurement responsibility for when contracting officer is aware of local licensing requirements, he may take reasonable step of incorporating them into solicitation to assure that bidder is legally able to perform contract by requiring bidder to comply with specific known State or local license requirements in order to establish bidder responsibility. While it may be possible for unlicensed company to provide adequate guard service, it is not unreasonable for contracting officer to believe that appropriate performance of guard service could be obtained only from licensed agencies 51

LOANS

Government insured

Limitations

Construction of statutory language

While language contained in Agriculture-Environmental and Consumer Protection Appropriation Act, 1974, that "loans may be insured, or made to be sold and insured * * * as follows: * * * operating loans, $350,000,000 * * *" would, standing alone, normally be construed as binding upon the Agriculture Dept. and establishing a limit upon amount of loans, legislative history indicates that amount specified was not intended to be a limitation 560

Participatory loans

Small Business Administration and private lending institutions

Interest rates

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

LOANS—Continued Page

Participatory loans—Continued

Small Business Administration and private lending institutions—Continued

Interest rates—Continued

made by lending institutions under sec. 7(g), even through SBA on its direct or participation loans is restricted to prescribed 3 percent interest rate. However, at opportune time SBA should seek appropriate legislative revision of language in question 422

MEALS

Furnishing

General rule

Cost of providing food to Federal Protective Services officers of GSA who were kept in readiness pursuant to 40 U.S.C. 318 in connection with unauthorized occupation of Bureau of Indian Affairs building is reimbursable on basis of emergency situation which involved danger to human life and destruction of Federal property, notwithstanding that expenditure is not "necessary expense" within meaning of Independent Agencies Appropriation Act of 1973; that 31 U.S.C. 665 precludes one from becoming voluntary creditor of U.S.; and general rule that in absence of authorizing legislation cost of meals furnished to Govt. employees may not be paid with appropriated funds. However, payment of such expenses in future similar cases will depend on circumstances in each case 71

MEDICAL TREATMENT

Officers and employees

Overseas employees

Medical service under Foreign Service Act

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

Private

Park police

Non-service connected injuries or diseases

Section 4–124 of District of Columbia Code provides for appointment of police surgeons, and for treatment of non-service connected injuries and diseases suffered by D.C. policemen and firemen. While sec. 4–206 of D.C. Code extends same benefits to U.S. Park Police, there is no authority for payment of physician services, other than by the appointed police surgeons, for treatment of non-service connected injuries or diseases suffered by U.S. Park Police officers since statute makes no provision for other physician services 822

MEDICAL TREATMENT—Continued Page

Public

Health insurance coverage of employee

Failure to file claim effect

Regulatory authority of Secretary of State provided by sec. 941 of Foreign Service Act of 1946, 22 U.S.C. 1156, to pay medical costs of officers and employees and their dependents is sufficiently broad to enable Secretary to require Foreign Service members having private health insurance to file claims with carriers for benefits to reimburse expenditures made on their behalf by Govt. for medical care incident to illness or injury. Therefore, Foreign Service member who negligently failed to timely file for health insurance benefits and thus did not obtain private health insurance benefits to which entitled for illness or injury, and for which medical care was provided at expense of Govt., is indebted for amount which he would have received had he recouped insurance..... 474

What constitutes

Air-conditioning of private homes

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

MEETINGS

Conferences

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

MILEAGE

Military personnel

Release from active duty

Last duty station outside United States

Normal *v.* approved separation point

Navy member who incident to his separation reported to Hickam AFB, Honolulu, Hawaii, and is authorized, at his request, to travel to Brooklyn, N.Y. Naval Station, located near his home of record, Niagara Falls, N.Y., for separation in lieu of Treasure Island, and who used commercial air although directed to travel by Govt. aircraft, if available, is considered to have terminated his overseas travel at Travis AFB, debarkation point for Treasure Island, and to be entitled to mileage allowance pursuant to M4157(1)(c) and M4150-1, JTR, for distance between Travis AFB and Treasure Island and then to his home of record, but not to reimbursement for his overseas travel since he was directed to use Govt. transportation, which was available at time he traveled..... 105

MILEAGE—Continued Page

Military personnel—Continued

Travel by privately owned automobile

Ferry transportation constitutes transoceanic travel

Since there is no highway system in Goose Bay area, Canada, over which member could drive his automobile to new U.S. duty station without using long distance ferries—Goose AFB to Lewisporte, Newfoundland, overland to Port-aux-Basques, then by ferry to Sydney, Nova Scotia—pars. M4159-3 and M7003-3c of JTR, pursuant to 37 U.S.C. 404 and 406, may be changed to treat long distance ferry transportation as transoceanic travel, thus necessitating amending distance tables used in computing mileage between AFB and bases on island portion of Newfoundland and continental U.S. duty stations to eliminate mileage over ferry routes. Furthermore, under 10 U.S.C. 2634(a), Canadian Pacific Railroad ferries may be used in absence of availability of American vessels, and if member must arrange for vehicle transportation, travel orders should authorize arrangement and his reimbursement voucher attest to nonavailability of U.S.-registered vessels..... 131

Travel by privately owned automobile

Accidents

Court prooeedings attendance

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

More than one employee traveling

Permanent duty travel

Although agency cannot require two or more employees to travel together in private automobile of one of the employees on permanent duty travel, if employees find it convenient to do so and proper administrative determination is made that arrangement is advantageous to Govt., pursuant to sec. 2.3c(2) of OMB Cir. A-56, higher mileage rate may be authorized up to 12 cents per mile on same basis rate scale is graduated in sec. 2.3b of Cir. when authorized members of employee's family accompany him. Therefore, employee on house-hunting trip incident to permanent change of station who transports another employee to same location for same purpose, even though separate travel was authorized and administrative regulation is silent concerning joint travel, may be paid at rate of 8 cents per mile, rate specified in sec. 2.3b for employee traveling with one member of his immediate family..... 67

MILITARY PERSONNEL Page

Acceptance of foreign presents, emoluments, etc.

Foreign Government employment

Retired officer

Retired pay adjustment

Retired Regular AF officer who is regarded as holding an "office of profit and trust" under Federal Govt. as those terms are used in Art. I, sec. 9, cl. 8 of U.S. Constitution which prohibits persons holding such offices from accepting emoluments from foreign states in absence of congressional consent, and who claims to be employed by American-based firm and receives civilian salary from that firm, where record shows that such firm is merely a conduit whereby he is detailed by that firm to work for instrumentality of foreign Govt. by virtue of contract between American-based firm and such instrumentality to supply professional personnel, acceptance by retired member of salary for such employment comes within Constitution prohibition, and, while lacking penalty, such provision will be given effect by withholding from member's retired pay amount equal to foreign salary received in violation of Constitution---- 753

Allowances

Family. (*See* **FAMILY ALLOWANCES**)

Quarters. (*See* **QUARTERS ALLOWANCE**)

Station. (*See* **STATION ALLOWANCES**)

Annuity elections for dependents. (*See* **PAY, Retired, Annuity elections for dependents**)

Cadets, midshipmen, etc.

Candidates for academy admission

Rejected

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

Contracting with Government

Retired members. (*See* **MILITARY PERSONNEL, Retired, Contracting with Government**)

Cost-of-living allowances. (*See* **STATION ALLOWANCES, Military personnel, Excess living costs outside United States, etc.**)

Dependents

Annuity elections for dependents. (*See* **PAY, Retired, Annuity elections for dependents**)

MILITARY PERSONNEL—Continued Page

Dependents—Continued

Transportation. (*See* **TRANSPORTATION, Dependents, Military personnel**)

Who is a dependent

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

Discrimination

Between the sexes

Removal

Distinction between dependents of male and female members of uniformed services having been removed by Supreme Court of U.S. in *Frontiero* v. *Richardson*, decided May 14, 1973, and by enactment of P.L. 93–64, effective July 1, 1973, language in par. M1150–9 of JTR reading "A person is not a dependent of a female member unless he is, in fact, dependent on her for over one-half of his support," may be deleted and made effective as of date of decision, May 14, 1973. Also recommended is amendment of par. M7151–2 by deleting reference to lawful "wife" and substituting the word "spouse," but since use of the term "dependent" in pars. M7151–2 and M7107 of JTR is not discriminatory in light of *Frontiero* decision, no change in language of paragraphs is required 116

Education. (*See* **EDUCATION**)

Enlistments

Bonus. (*See* **GRATUITIES, Enlistment bonus**)

Family separation allowances. (*See* **FAMILY ALLOWANCES, Separation**)

Felony convictions

Committee appointed to control member's estate

Status of pay

Retainer pay due member transferred to Fleet Reserve who was convicted of felony and sentenced to more than 1 year's confinement in correctional institution and who under statutes of State of Va. has committee appointed over his estate, both real and personal, is considered to be out of control of member who no longer may dispose of his estate, a situation comparable to one mentally incompetent, and, therefore, retainer pay may be paid over to court-appointed committee upon court certification that committee has not been removed 482

Gratuities. (*See* **GRATUITIES**)

Household effects

Transportation. (*See* **TRANSPORTATION, Household effects, Military personnel**)

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Junior Reserve Officer's Training Corps. (*See* **MILITARY PERSONNEL, Reserve Officers' Training Corps)**

Mileage. (*See* **MILEAGE, Military personnel)**

Overpayments

Adjustment to reflect Consumer Price Index

In computing retired or retainer pay, floor provided by 10 U.S.C. 1401a(e) must be limited to rate of pay in effect on day immediately before effective date of rate of monthly basic pay on which a member's retired or retainer pay would otherwise be based, plus appropriate Consumer Price Index increases from that date forward. Any inference in 51 Comp. Gen. 384 to contrary should be disregarded; inconsistent payments should be corrected immediately; and past overpayments need not be collected since they presumably were accepted in good faith by members and would be proper for waiver under 10 U.S.C. 2774 701

Annuity payments

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

Misinterpretation of the law

Payment under 37 U.S.C. 307 of superior performance proficiency pay by AF at $30 per month and by Army at $50 per month to senior noncommissioned officers entitled to special pay rate provided in 37 U.S.C. 203(a) for such officers in Army, Navy, AF and Marine Corps, should be discontinued since P.L. 90–207, effective Oct. 1, 1967, amended sec. 203(a) to provide new special pay rate, regardless of years of service, in lieu of basic pay at rate of E–9, with appropriate years of service, plus proficiency pay at rate of $150 per month, thus eliminating any award of proficiency pay. Improper payments of superior performance proficiency pay having been based on misinterpretation of law, and having been accepted in good faith, need not be collected and may be waived under provisions of 10 U.S.C. 2772 (P.L. 92–453) 184

Pay. (*See* **PAY)**

Retired. (*See* **PAY, Retired)**

Per diem. (*See* **SUBSISTENCE, Per diem, Military personnel)**

Quarters allowance. (*See* **QUARTERS ALLOWANCE)**

Record correction

Discharge change as entitlement to pay, etc.

Educational assistance allowances adjustment

Amount equal to educational assistance allowances paid to staff sergeant at rate prescribed for veterans while attending school from July 6, 1970, to Dec. 8, 1970, which was withheld from payment due him

MILITARY PERSONNEL—Continued Page
Record correction—Continued
Discharge change as entitlement to pay, etc.—Continued
Educational assistance allowances adjustment—Continued

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

Release of Government from additional claims

Plaintiff in *Reale* v. *United States*, Ct. Cl. No. 334-65, July 16, 1969, who has accepted payment pursuant to court's judgment and record correction, is not entitled to additional amount for uniform allowance since he was not required to wear uniform (37 U.S.C. 417(c)). Also, under 28 U.S.C. 2517(b) and 2519 payment of judgment is full discharge to U.S. and further claim is barred, and under 10 U.S.C. 1552(c) acceptance of settlement pursuant to record correction "fully satisfies the claim concerned"..... 813

Reenlistment bonus. (*See* **GRATUITIES, Reenlistment bonus**)

Reserve Officers' Training Corps
Programs at educational institutions
Marine Corps Junior Officers' Training Corps

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

Recruiting duties
Reimbursement entitlement

Cadet in ROTC at University of Detroit who under invitational orders performed recruiting duties at two Detroit high schools– matter of 2 hours and 3 hours duty on separate days—and returned each time to University is not entitled to per diem allowance, having used Govt. transportation and not having incurred any additional subsistence expenses. ROTC cadets have no military status nor are they Govt. employees, and unless utilized as consultants or experts, they are considered persons serving without pay and such person under 5 U.S.C. 5703 (c) may be allowed transportation expenses and per diem only while en

MILITARY PERSONNEL—Continued Page
Reserve Officers' Training Corps—Continued
Recruiting duties—Continued
Reimbursement entitlement—Continued

route and at his place of service or employment away from home or regular place of business. However, since cadet at University of Detroit incurred no additional subsistence expenses incident to recruiting duties he is not considered to have been in travel status within meaning of 5 U.S.C. 5703(c) 145

Travel allowance. (*See* **TRAVEL ALLOWANCE, Military personnel, Reserve Officers' Training Corps**)

Reservists
Training duty
Per diem

Reservists ordered to active duty training at permanent duty stations away from their homes or places from which ordered to active duty for periods of either less or more than 20 weeks who subsequently are required to perform temporary duty assignments away from permanent stations in areas where their homes or places from which they are ordered to active duty are located, are entitled to per diem under applicable provisions of Part E, Ch. 4 of Joint Travel Regs. since members having departed their permanent duty stations are in travel status, and fact that additional expenses are not incurred at temporary duty location does not preclude payment of per diem, as "per diem" is commutation of expenses and is payable without regard to whether expenses it is designed to reimburse are actually incurred 484

Retired

Annuity elections for dependents. (*See* **PAY, Retired, Annuity elections for dependents**)

Contracting with Government
Sales activities
Retired pay withholding

A retired regular AF officer engaged in sale of electrical equipment whose business activities included making calls on Dept. of Defense (DOD) agencies, as well as installation of National Oceanic and Atmospheric Admin., for purpose of rendering technical assistance, updating catalogue materials, providing information on companies he represented and their products, determining future markets, and contacting Govt. purchasing agents, is considered as actively participating in procurement process for purpose of obtaining business for his employer and such participation constitutes sales activities in violation of 37 U.S.C. 801(c) and DOD Directive 5500.7, Aug. 8, 1967, notwithstanding member's contention that majority of calls were made in response to inquiries for technical information and, therefore, payment of retired pay to member during period of participation in procurement process is precluded 616

Retirement

Involuntary *v.* voluntary

Court's interpretation in *Edward P. Chester, Jr., et al.* v. *United States*, 199 Ct. Cl. 687, that words "shall if not earlier retired be retired on June 30," which are contained in mandatory retirement provision, 14 U.S.C. 288(a), did not absolutely forbid Coast Guard officers mandatorily retired on June 30 in 1968 or 1969, as well as officers held on

MILITARY PERSONNEL—Continued Page

Retirement—Continued

Involuntary *v.* voluntary—Continued

active duty beyond mandatory June 30 date, from retiring voluntarily under 14 U.S.C. 291 or 292, and that officers were entitled to compute their retired pay on higher rates in effect on July 1, will be followed by GAO. Therefore, under *res judicata* principle, payment to claimants for periods subsequent to court's decision may be made at higher rates in effect July 1. Payments to other claimants in similar circumstances, in view of fact court's decision is original construction of law changing GAO's construction, may be made both retroactively and prospectively, subject to Oct. 9, 1940 barring act, and submission of doubtful cases to GAO. Overrules B–165038 and other contrary decisions..... 94

Holding in case of *Edward P. Chester et al.* v. *United States* (199 Ct. Cl. 687), which authorizes computation of retired pay based on rates effective July 1 rather than lower June 30 rates and accepted for Coast Guard officers in 53 Comp. Gen. 94, and for Air Force officers held beyond mandatory retirement date for physical evaluation, in 53 Comp. Gen. 135, is viewed as applicable to Marine Corps officers retired mandatorily pursuant to Pub. L. 86–155, 73 Stat. 333, in view of similarity between applicable statutes and/or Marine Corps, and therefore, officer's retired pay may be computed on rates in effect July 1 of year in which he retires. 48 Comp. Gen. 30 and other similar decisions are overruled... 610

Temporary disability retirement

Removal from list

Member not bound by prior Survivor Benefit Plan election

Where service member exercised his option regarding participation in Survivor Benefit Plan, 10 U.S.C. 1447–1455, and made election for purpose of being placed on Temporary Disability Retired List and whose name is removed from that list for purpose of either resuming full active duty or retirement for length of service under another provision of law, since 10 U.S.C. 1448(c) terminates his participation in Plan at that time, any option exercised and election made prior to placement on that list is limited to that purpose and such member may not be bound thereafter by those actions..... 971

Separation

Election of separation point

Navy member who incident to his separation reported to Hickam AFB, Honolulu, Hawaii, and is authorized, at his request, to travel to Brooklyn, N.Y. Naval Station, located near his home of record, Niagara Falls, N.Y., for separation in lieu of Treasure Island, and who used commercial air although directed to travel by Govt. aircraft, if available, is considered to have terminated his overseas travel at Travis AFB, debarkation point for Treasure Island, and to be entitled to mileage allowance pursuant to M4157(1)(c) and M4150–1, JTR, for distance between Travis AFB and Treasure Island and then to his home of record, but not to reimbursement for his overseas travel since he was directed to use Govt. transportation, which was available at time he traveled..... 105

MILITARY PERSONNEL—Continued Page

Separation—Continued

Status of permanent change of station orders

Military officer transferred under permanent change of station orders from overseas to Fort Benjamin Harrison for separation who moved dependents to new duty station where they resided in rented off-base housing until his discharge is not entitled to travel expenses and dislocation allowance for dependents since the Fort at no time was officer's permanent duty station, notwithstanding his transfer was deemed permanent change of station and he was reassigned to serve as executive officer, and member on temporary duty while at the Fort is entitled only to per diem for 90 days he was at the Fort. Whether duty assignment is permanent or temporary is determined by considering orders, and character, purpose, and duration of assignment, and officer's orders evidencing detachment from overseas duty for separation, permanent change of station orders and interim assignment as executive officer did not change character of separation transfer 44

Station allowances. (*See* **STATION ALLOWANCES, Military personnel**)

Telephone services

Army barracks

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

Termination of active service

Travel and transportation expenses

Reimbursement denied to home of selection

Entitled to reimbursement to home of record or place of entry

Members of uniformed services who, on termination of active service otherwise qualify for travel and transportation to home of record or place of entry on active duty under 37 U.S.C. 404(a) and 406(a), are to be afforded such entitlements regardless of denial of travel and transportation to home of selection under 37 U.S.C. 404(c) and 406(g), in absence of statutory requirement that denial of travel and transportation to home of record or place of entry on active duty be made in such circumstances 963

Transportation

Dependents. (*See* **TRANSPORTATION, Dependents, Military personnel**)

Household effects. (*See* **TRANSPORTATION, Household effects, Military personnel**)

MISCELLANEOUS RECEIPTS Page

Fees for services to public

Adjustment

Since applications for discharge permits under Refuse Act Permit Program, which were filed with the Corps of Engineers or EPA, were not processed because the authority to issue permits was given to the States pursuant to sec. 402 of Federal Water Pollution Control Act, as amended by Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1342, refund may be made by EPA of application fees charged, for although fees were properly received, deposit of fees into Treasury as miscellaneous receipts was erroneous. Therefore, amounts that are proper for refund should be transferred from receipt account to "suspense fund" for refund, and in future until properly for deposit into Treasury as miscellaneous receipts, fees should be deposited into Treasury as trust funds in accordance with 31 U.S.C. 725r 580

NATIONAL ADVISORY COUNCIL ON VOCATIONAL EDUCATION

Executive Director

Compensation

Determination of applicability of sec. 7(d)(1)(A) of Federal Advisory Committee Act to Executive Director of National Advisory Council on Vocational Education who is paid $36,000 per year plus yearly contribution of $6,888 towards retirement is not necessary, since authority of Council to hire without regard to civil service laws does not authorize Council to compensate him without regard to Classification Act. However, matter should be submitted to CSC which has jurisdiction to make final determinations as to applicability of Classification Act, and upon determination of proper rate of pay, request for waiver of any erroneous payments, if over $500, may be submitted to GAO 531

NATIONAL GUARD

Civilian employees

Technicians

Severance pay

National Guard technicians who are separated from civilian positions as result of loss of enlisted military status due to failure on part of National Guard to accept their reenlistment applications, although qualified, are considered to have been involuntarily separated and, therefore, entitled to severance pay provided under 5 U.S.C. 5595, except when it is reasonably established that failure to accept application for reenlistment is for cause based on charges of misconduct, delinquency, or inefficiency on part of enlisted member. Although GAO has no jurisdiction to determine whether qualified technician who is separated from civilian position because application for reenlistment is not accepted is precluded from receiving civil service retirement benefits based on involuntary separation, it is suggested reference in legislative history of National Guard Technicians Act of 1968 to "involuntary retirement" should be narrowly construed 493

NONDISCRIMINATION Page

Contracts. (*See* **CONTRACTS, Labor stipulations, Nondiscrimination**)

Discrimination alleged

Basis of sex

Removal of differential treatment

Distinction between dependents of male and female members of uniformed services having been removed by Supreme Court of U.S. in *Frontiero* v. *Richardson*, decided May 14, 1973, and by enactment of P.L. 93–64, effective July 1, 1973, language in par. M1150–9 of JTR reading "A person is not a dependent of a female member unless he is, in fact, dependent on her for over one-half of his support," may be deleted and made effective as of date of decision, May 14, 1973. Also recommended is amendment of par. M7151–2 by deleting reference to lawful "wife" and substituting the word "spouse," but since use of the term "dependent" in pars. M7151–2 and M7107 of JTR is not discriminatory in light of *Frontiero* decision, no change in language of paragraphs is required 116

On bases of Supreme Court ruling in *Frontiero* v. *Richardson*, decided May 14, 1973, to effect that differential treatment accorded male and female members of uniformed services with regard to dependents violates Constitution, and P.L. 93–64, enacted July 9, 1973, which deleted from 37 U.S.C. 401 sentence causing differential treatment, regulations relating to two types of family separation allowances authorized in 37 U.S.C. 427 should be changed to authorize family separation allowances to female members for civilian husbands under same conditions as authorized for civilian wives of male members, and for other dependents in same manner as provided for male members with other dependents. Since *Frontiero* case was original construction of constitutionality of 37 U.S.C. 401 and 403, payments of family allowance may be made retroactively by services concerned, subject to Oct. 9, 1940 barring act, and submission of doubtful claims to GAO 148

Although *Frontiero* decision has no effect on dependency status of service members married to each other as prescribed by 37 U.S.C. 420, since member may not be paid increased allowance on account of dependent for any period during which dependent is entitled to basic pay, differential treatment accorded male and female members in assigning quarters requires amendment of DOD Directive to prescribe entitlement to both male and female members to basic allowance for quarters at the without dependent rate when adequate public quarters for dependents are not available, notwithstanding availability of adequate single quarters; to reflect that neither husband nor wife occupying Govt. quarters for any reason who has only the other spouse to consider as dependent is entitled to basic allowance for quarters in view of 37 U.S.C. 420; and to provide that when husband and wife are precluded by distance from living together and are not assigned Govt. quarters, each is entitled to quarters allowance as prescribed for members without dependents 148

NONDISCRIMINATION—Continued Page

Discrimination alleged—Continued

Basis of sex—Continued

Removal of differential treatment—Continued

As *Frontiero* decision, decided May 14, 1973, in which Supreme Court ruled on inequality between male and female military members with regard to quarters allowances, was original construction of constitutionality of 37 U.S.C. 401 and 403, decision is effective as to both active and former members from effective date of statute, subject to barring act of Oct. 9, 1940 (31 U.S.C. 71a). Documentation required from female members to support their claims should be similar to that required of male members under similar circumstances and should be sufficient to reasonably establish member's entitlement to increased allowances. Although claims for 10-year retroactive period may be processed by services concerned, since filing claim in administrative office does not meet requirements of barring act, claims about to expire should be promptly submitted to GAO for recording, after which they will be returned to service for payment, denial or referral back to GAO for adjudication. Doubtful claims should be transmitted to GAO for settlement 148

Regulations relating to payment of basic allowances for quarters that require that female member of military service must provide more than one-half of support for dependent child before she may receive payment of basic allowances for quarters may be revised to authorize payment of allowance for dependent child of female member on same basis as that prescribed for male member in view of fact that although *Fronteiro* decision by Supreme Court was concerned with right of female member to receive allowances and benefits on behalf of civilian husband, rationale and language of decision connote intent by court that decision should be broadly applied 148

Since act of July 9, 1973, P.L. 93-64, repealed provision of 37 U.S.C. 401 relating to proof of dependency by female member, quarters allowance prescribed in 37 U.S.C. 501(b) for inclusion in computation of male member's unused accrued leave that is payable at time of discharge, may be allowed female members on basis they are entitled to same treatment accorded male members who are not normally required to establish that their wives or children are in fact dependent on them for over one-half their support. Allowance may be paid retroactively by service concerned, subject to Oct. 9, 1940 barring act, but claims about to expire should be transmitted to GAO pursuant to Title 4, GAO 7, as should doubtful claims 148

Under ruling in *Frontiero* v. *United States*, 411 U.S. 677 (1973), that certain portions of 37 U.S.C. 401 and 403, the statutory provisions that govern basic allowance for quarters (BAQ) entitlement, are unconstitutional, Dept. of Defense may not deny BAQ payments to current or former female service members who otherwise qualify for BAQ payments for periods antedating Sept. 13, 1973, issuance date of revised DOD instructions. However, claims which accrued more than 10 years prior to receipt in GAO are barred from consideration by act of Oct. 9, 1940, 31 U.S.C. 71a 539

NONDISCRIMINATION—Continued Page

Sex discrimination elimination

Compensation

Tropical differential

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

OFFICERS AND EMPLOYEES

Administrative leave. (*See* **LEAVES OF ABSENCE, Administrative leave**)

Appointments. (*See* **APPOINTMENTS**)

Canal Zone. (*See* **CANAL ZONE**)

Compensation. (*See* **COMPENSATION**)

Conflict of interest statutes

Award of Government contracts

Award by AF of domestic cargo airlift contract negotiated under 10 U.S.C. 2304(a)(16) pursuant to Class Determinations and Findings to Govt. corporation that is to be transferred to individual to whom award is contemplated and who is currently operating the activity pending Civil Aeronautics Board approval is not improper in view of fact contract will contain termination provision in event approval is withheld; OMB Cir. A–76 and implementing Defense Directives although favoring contracting with private, commercial enterprises allow Govt. operation of commercial activity "to maintain or strengthen mobilization readiness;" services of intended buyer during Govt. control does not make him "officer or employee" within conflict of interest statutes, 18 U.S.C. 205, 18 U.S.C. 207–208; there is no evidence of unfair competition; and contracting agency has broad discretionary authority to award contract in interest of national defense 86

Contracting with the Government

Former employees

In view of funds provided in its current appropriation for "special counsel fees," Federal Communications Commission may procure services of a retired Govt. attorney in connection with investigation and proceedings he directed prior to retirement, and amount payable to him is not subject under 5 U.S.C. 8344(a) to set-off by amount of his retirement annuity since retiree's expertise and thorough knowledge in matter will enable him to perform functions described in "Statement of Work" contained in proposed contract independently rather than under an employer-employee relationship 702

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OFFICERS AND EMPLOYEES—Continued Page

Death or injury

Transportation of remains

Cost of transporting remains of deceased Forest Service employee from Juneau, Alaska, where employee had completed agreed tour of duty, to Missoula, Mont., may not be reimbursed to decedent's widow in absence of specific authority for Govt. to assume expense. Since deceased employee had completed tour of duty 5 U.S.C. 5742(b)(1), authorizing Govt. to defray expense of preparing and transporting remains of civilian employees who die while in travel status, has no application, and furthermore, authority in secs. 1 or 7 of Administrative Expenses Act of 1946, which prescribes travel and transportation expenses in connection with transfer to and from duty station outside continental limits of U.S., and sec. 1.11d of OMB Cir. No. A-56, which provides for return travel and transportation of employees serving under agreements has application only to living individuals 120

Debt collections. (*See* **DEBT COLLECTIONS**)

Dependents

Advance travel

Overseas employees. (*See* **TRANSPORTATION, Dependents, Overseas employees, Advance travel of dependents**)

Details. (*See* **DETAILS**)

Disputes

Arbitration

Employee who was injured and unable to perform regular duties but who could perform other limited duties submitted grievance alleging that agency did not comply with labor-management agreement in that it did not "make every effort" to find a limited duty position for him. Recommendation of arbitrator who upheld grievance that employee be granted 30 days administrative leave may not be implemented by agency since there is no legal authority to grant administrative leave in the circumstances 1054

Dual compensation. (*See* **COMPENSATION, Double**)

Duties

What constitutes pay status

Employees who were requested by U.S. attorney to give testimony before Federal grand jury and in trial of criminal cases while suspended from their positions, were not placed in pay or duty status by reason of request even though testimony before grand jury was in regard to their official duties. Although employees are not entitled to salary for period of time they spent testifying, they may be paid and retain any witness fees that would be payable to non-Govt. employees appearing as witnesses in such proceedings 515

Executive Schedule rate employees

Leaves of absence

U.S. attorneys who are compensated at Executive Schedule rates are excluded from coverage of Annual and Sick Leave Act since 5 U.S.C. 6301(2)(x) exempts from coverage all officers appointed by President whose basic rates of pay exceed highest General Schedule (GS) level and although 5 U.S.C. 6301(2)(x) refers to individual whose rate of pay "exceeds" highest GS level, intent of Act can be effected only if those whose salaries are intended to exceed highest GS level by virtue of assignment to

OFFICERS AND EMPLOYEES—Continued Page

Executive Schedule rate employees—Continued

Leaves of absence—Continued

Executive Schedule are exempted even though GS–18 and Executive Level V officials may at times receive equal pay. Furthermore, while discretionary exemption authority in 5 U.S.C. 6301(2)(xi) prohibits President from excluding any U.S. attorney from coverage under the leave act, clause does not operate to nullify statutory exclusion required by 5 U.S.C. 6301(2)(x)---------- 577

Excusing from work

Purposes for excusing

Retroactive grant of 8 hours administrative leave to employee by local Commander of Air Force Base for time he spent in cleaning and arranging for repair of damages to his home, that resulted from ammunition train explosion, was proper exercise of administrative authority since the CSC has not issued general regulations covering grant of administrative leave and, therefore, each agency, under general guidance of decisions of the Comptroller General, which are discussed in applicable FPM Supplement, has responsibility for determining situations in which excusing employees from work without charge to leave is appropriate---------- 582

Experts and consultants. (*See* **EXPERTS AND CONSULTANTS**)

Fees for membership in organizations. (*See* **FEES. Membership**)

Foreign differentials and overseas allowances. (*See* **FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES**)

Foreign Service. (*See* **FOREIGN SERVICE**)

Health insurance

Carrier liability

Failure of employee to file claim

Regulatory authority of Secretary of State provided by sec. 941 of Foreign Service Act of 1946, 22 U.S.C. 1156, to pay medical costs of officers and employees and their dependents is sufficiently broad to enable Secretary to require Foreign Service members having private health insurance to file claims with carriers for benefits to reimburse expenditures made on their behalf by Govt. for medical care incident to illness or injury. Therefore, Foreign Service member who negligently failed to timely file for health insurance benefits and thus did not obtain private health insurance benefits to which entitled for illness or injury, and for which medical care was provided at expense of Govt., is indebted for amount which he would have received had he recouped insurance-------- 474

Household effects

Storage. (*See* **STORAGE, Household effects**)

Transportation. (*See* **TRANSPORTATION, Household effects**)

Jury duty

Fees. (*See* **COURTS, Jurors, Fees**)

Leaves of absence. (*See* **LEAVES OF ABSENCE**)

Membership fees. (*See* **FEES, Membership**)

Moving expenses

Relocation of employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)

OFFICERS AND EMPLOYEES—Continued Page

Overseas

Home leave

Locally hired employee

Canal Zone

Although employee, who entered service in Canal Zone, was given transportation agreement on basis of his travel to the Zone as dependent of employee with transportation agreement, he is not entitled to accumulate 45 days annual leave and home leave since he did not meet requirement of 5 U.S.C. 6304(b) that he be recruited from U.S. or territory or possession of U.S. outside the Zone. Further, home leave under 5 U.S.C. 6305(a) may not be granted since the employee is not entitled to accumulate 45 days annual leave 966

Travel expenses. (*See* **TRAVEL EXPENSES, Overseas employees, Home leave**)

Overtime. (*See* **COMPENSATION, Overtime**)

Per diem. (*See* **SUBSISTENCE, Per diem**)

Presidential appointees. (*See* **PRESIDENT, Presidential appointees**)

Promotions

Administrative determination

Employee whose promotion was delayed as result of President's freeze on promotions and administrative delay in perfecting promotion recommendation due to erroneous view that promotion could not be made until freeze was lifted is not entitled to retroactive promotion pursuant to recommendation of Grievance Examiner because error involved was misinterpretation of instructions and the type of administrative error which will permit retroactive promotion is an error which involves ministerial action not accomplished through inadvertence or failure to implement mandatory provisions of laws and regulations ... 926

Compensation. (*See* **COMPENSATION, Promotions**)

Reclassified positions

Incumbent's status

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

Reemployment or reinstatement

Travel and transportation expenses

Phrase "in the same manner" contained in 5 U.S.C. 5724a(c), which authorizes payment of travel, transportation, and relocation expenses to former employee separated by reduction in force or transfer of function and reemployed within 1 year, as though employee had been transferred

OFFICERS AND EMPLOYEES—Continued Page
Reemployment or reinstatement—Continued
Travel and transportation expenses—Continued

in interest of Govt. without break in service to reemployment location from separation location, when construed in conjunction with 5 U.S.C. 5724(e), which provides similar expenses for employees transferred from one agency to another because of reduction in force or transfer of function, permits payment of costs in whole or in part by gaining or losing agency, as agreed upon by agency heads. Therefore, whether relocation benefits are prescribed under sec. 5724a(c) or sec. 5724(e), they may be paid by gaining or losing agency within 1-year period. 51 Comp. Gen. 14, 52 *id.* 345, and B–172594, June 8, 1972, overruled 99

Relocation expenses
Transferred employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)

Removals, suspensions, etc.
Compensation. (*See* **COMPENSATION, Removals, suspensions, etc.**)

Retirement. (*See* **RETIREMENT, Civilian**)

Secret Service
Retirement under D.C. police plan

Since under 18 U.S.C. 3056, Secret Service in addition to protecting President has numerous criminal investigation functions, security officers and specialists may count time spent in activities related to Presidential protection, as well as time spent in directly protecting President on temporary or intermittent assignments, toward accumulation of requisite 10 years prescribed by sec. 4–522 of title 4, D.C. Code, for entitlement to retirement annuities under Policemen and Firemen's Retirement and Disability Act, even though authority to transfer deposits from Civil Service Retirement and Disability Fund to general revenues of D.C. specifies full-time agents protecting President. Approval of future eligibility revisions to participate in D.C. Police Retirement Plan is responsibility, pursuant to sec. 4–535, of D.C. Commissioner, and should additional transfers affect integrity of Policemen and Firemen's Retirement and Disability Fund, this might be basis of remedial legislation 177

Severance pay
Eligibility
National Guard technicians

National Guard technicians who are separated from civilian positions as result of loss of enlisted military status due to failure on part of National Guard to accept their reenlistment applications, although qualified, are considered to have been involuntarily separated and, therefore, entitled to severance pay provided under 5 U.S.C. 5595, except when it is reasonably established that failure to accept application for reenlistment is for cause based on charges of misconduct, delinquency, or inefficiency on part of enlisted member. Although GAO has no jurisdiction to determine whether qualified technician who is separated from civilian position because application for reenlistment is not accepted is precluded from receiving civil service retirement benefits based on involuntary separation, it is suggested reference in legislative history of National Guard Technicians Act of 1968 to "involuntary retirement" should be narrowly construed 493

OFFICERS AND EMPLOYEES—Continued Page

Subsistence

Per diem. (*See* **SUBSISTENCE, Per diem**)

Transfers

Relocation expenses

Effective date

Temporary *v.* permanent assignment

Employee who, incident to a detail under IPA of 1970, transferred her household goods, sold her house and purchased home at the station to which detailed when neither her travel order nor Assignment Agreement authorized reimbursement of such expenses, may not be reimbursed for such expenses upon a subsequent permanent change of station to the place where she was on detail 836

Houseboat as residence

Marine survey

Employee transferred from Las Vegas, Nev., to Bethesda, Md., who purchased and occupied houseboat as his new residence may be reimbursed cost of marine survey—a necessary condition for financing purchase of houseboat—since 5 U.S.C. 5724a(4) and Fed. Property Management Regs. 101–7 do not limit employee to reimbursement for expenses incurred incident to purchase of dwelling on land at new duty station in view of fact that there is ample judicial recognition that houseboat or boat used as living quarters is a dwelling, habitation, or residence.. 626

House sale

Title in wife's name

Employee who subsequent to receiving notice of transfer but prior to actual date of transfer marries and thereafter establishes residence in dwelling which was owned and occupied by his wife at time he was officially informed of transfer, and employee and his wife were occupying dwelling at time of transfer is not precluded under sec. 4.1 of OMB Cir. A–56 from being reimbursed expenses of selling the dwelling incident to move to new official station since literal language of sec. 4.1 permitting reimbursement of expenses of sale of dwelling at old official station only if employee acquired interest in dwelling and if dwelling was his actual residence at time he was informed of transfer is not for application where employee had established bona fide residence in his wife's home prior to transfer 90

Temporary quarters

Permanent dwelling occupancy

Employee who incident to transfer to new official station under travel orders that authorized temporary quarters and subsistence expenses quartered his family in motel 1 day, occupied newly purchased unfurnished house overnight, returned to motel for 2 days, reoccupied unfurnished house for 5 days, returned again to motel for 2 days, and then permanently occupied unfurnished house may be allowed temporary quarters and subsistence expenses for period prior to permanently moving into his house, notwithstanding rule against reimbursement to employee who occupies residence in which he intends to remain, since employee by his frequent return to motel manifested intent to occupy house only on temporary basis 508

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Relocation expenses—Continued
Transportation for house hunting
Employees traveling together
Although agency cannot require two or more employees to travel together in private automobile of one of the employees on permanent duty travel, if employees find it convenient to do so and proper administrative determination is made that arrangement is advantageous to Govt., pursuant to sec. 2.3c(2) of OMB Cir. A–56, higher mileage rate may be authorized up to 12 cents per mile on same basis rate scale is graduated in sec. 2.3b of Cir. when authorized members of employee's family accompany him. Therefore, employee on house-hunting trip incident to permanent change of station who transports another employee to same location for same purpose, even though separate travel was authorized and administrative regulation is silent concerning joint travel, may be paid at rate of 8 cents per mile, rate specified in sec. 2.3b for employee traveling with one member of his immediate family 67
Successive changes
Employee whose spouse did not perform round-trip house hunting travel authorized pursuant to 5 U.S.C. 5724a(a)(2) in connection with his Sept. 3, 1972 transfer to Atlanta, Ga., from Jackson, Miss., where his family remained until his second transfer in Mar. 1973 to Richmond, Va., to which point his wife was authorized and did travel on house hunting trip, may be reimbursed for entire round-trip air fare from Jackson to Richmond, notwithstanding cost exceeded round-trip fare between Atlanta and Richmond, determination that is in accord with 27 Comp. Gen. 267 and 48 *id.* 651, approving reimbursement to employees who before they moved their household goods or dependents to new station were transferred a second time 123
Travel expenses. (*See* **TRAVEL EXPENSES**)
Wage board
Compensation. (*See* **COMPENSATION, Wage board employees**)
Without compensation
ROTC personnel
Recruiting duties
Reimbursement entitlement
Cadet in ROTC at University of Detroit who under invitational orders performed recruiting duties at two Detroit high schools—matter of 2 hours and 3 hours duty on separate days—and returned each time to University is not entitled to per diem allowance, having used Govt. transportation and not having incurred any additional subsistence expenses. ROTC cadets have no military status nor are they Govt. employees, and unless utilized as consultants or experts, they are considered persons serving without pay and such person under 5 U.S.C. 5703(c) may be allowed transportation expenses and per diem only while en route and at his place of service or employment away from home or regular place of business. However, since cadet at University of Detroit incurred no additional subsistence expenses incident to recruiting duties he is not considered to have been in travel status within meaning of 5 U.S.C. 5703(c) 145
Witnesses. (*See* **WITNESSES, Government employees**)

ORDERS Pag

Canceled, revoked, or modified

Expenses prior to change

Reserve Marine officer detached from duty upon completion of basic training at Quantico and ordered to report for temporary duty on Apr. 15, 1970, at Camp Lejeune for 8 weeks of instruction, then to be attached to designated division at camp, whose orders were amended Apr. 9, 1970, to change his permanent duty station upon completion of temporary duty from Camp Lejeune to Okinawa were not received by him until Apr. 27, 1970, is entitled to per diem for entire period of temporary duty—Apr. 16 through June 4—since his entitlement to per diem became fixed upon issuance of amendatory order on Apr. 9, 1970, changing his permanent duty station, and since he was in temporary duty status while at Camp Lejeune, it is immaterial that he was not timely notified of amendatory order as he fully complied with basic order, as amended..... 7

Dependents' travel

Officer of uniformed services whose dependents traveled to selected retirement home prior to issuance of retirement orders that were canceled at his request prior to effective date, and then traveled to officer's new permanent duty station located in corporate limits of his old station is entitled to monetary allowance for both moves. When orders that direct permanent change of station, including orders directing release from active duty or retirement, are canceled or modified before their effective date for convenience of Govt. and/or in circumstances over which member has no control, benefits prescribed by 37 U.S.C. 406a accrue, and fact the officer withdraw retirement request is immaterial since Govt. was under no obligation to accept request and apparently did so primarily for convenience of Govt..... 5

Competent

Effect of subsequent orders

While initial orders of member of uniformed services assigning him to duty as "Unit of Choice" recruiter away from his permanent station did not specify "temporary duty," subsequent orders continuing the duty did and, therefore, member is considered to have been in temporary duty status for entire period in which he performed as "Unit of Choice" recruiter and to be entitled to travel and per diem allowances for entire period of recruiter duty, and member having been reimbursed at lesser per diem rate than prescribed in par. M4205–1 of Joint Travel Regs. without authority of Secretary concerned as required by par. M4205–7, JTR, is entitled to per diem provided for temporary duty..... 45

Intent determination

Permanent or temporary duty

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

ORDERS—Continued Page
Intent determination—Continued
Permanent or temporary duty—Continued
character, purpose, and duration of assignment, and officer's orders evidencing detachment from overseas duty for separation, permanent change of station orders and interim assignment as executive officer did not change character of separation transfer 44
PATENTS
Assignment
Intent of parties not expressed
Correction
Assignment to Govt. of full domestic rights to an invention developed by private firm under Govt. contract may be corrected on basis of mutual mistake of fact to conform to intent of parties, as evidenced by preexisting contract that domestic title vest jointly. To accomplish this, corrected assignment executed by parties should be refiled 653
PAY
Additional
Hazardous duty
Submarine crew members. (*See* **PAY, Submarine duty**)
Profficiency pay
Prohibition as to awards
Payment under 37 U.S.C. 307 of superior performance proficiency pay by AF at $30 per month and by Army at $50 per month to senior noncommissioned officers entitled to special pay rate provided in 37 U.S.C. 203(a) for such officers in Army, Navy, AF and Marine Corps, should be discontinued since P.L. 90–207, effective Oct. 1, 1967, amended sec. 203(a) to provide new special pay rate, regardless of years of service, in lieu of basic pay at rate of E–9, with appropriate years of service, plus proficiency pay at rate of $150 per month, thus eliminating any award of proficiency pay. Improper payments of superior performance proficiency pay having been based on misinterpretation of law, and having been accepted in good faith, need not be collected and may be waived under provisions of 10 U.S.C. 2772 (P.L. 92–453) 184
Submarine duty. (*See* **PAY, Submarine duty**)
Annuity elections deductions. (*See* **PAY, Retired, Annuity elections for dependents**)
Civilian employees. (*See* **COMPENSATION**)
Disability retired pay. (*See*, **PAY, Retired, Disability**)
Proficiency. (*See*, **Pay, Additional, Proficiency**)
Retainer
Withholding
Felony conviction of member
Retainer pay due member transferred to Fleet Reserve who was convicted of felony and sentenced to more than 1 year's confinement in correctional institution and who under statutes of State of Va. has committee appointed over his estate, both real and personal, is considered to be out of control of member who no longer may dispose of his estate, a situation comparable to one mentally incompetent, and, therefore, retainer pay may be paid over to court-appointed committee upon court certification that committee has not been removed 482

PAY—Continued Pag

Retired

Active duty

After retirement

Computation of retired pay

Officers of AF and other military services whose monthly basic pay increased while they were held on active duty beyond mandatory retirement for physical evaluation purposes are entitled, to extent feasible, to computation of disability retired pay at higher basic pay in effect on their respective dates of retirement and to adjustment for underpayments that resulted because retired pay had been computed at lower rates in effect on their mandatory retirement dates, and they also may have credit for the additional active duty for longevity purposes, in view of *Edward P. Chester et al.* v. *United States*, 199 Ct. Cl. 687, which held that Regular Coast Guard officers continued on active duty for physical evaluation were entitled to "no less" than members entitled to compute their retired pay at the July 1 higher rates because they were not precluded from voluntarily retiring on June 30, their mandatory retirement dates. Retroactive application of *Chester* case is restricted by Oct. 9, 1940 barring act, and doubtful cases should be submitted to GAO. Overrules 43 Comp. Gen. 742, B–153784, Sept. 17, 1969, B–172047, Feb. 23, 1972, and other similar decisions 13

Service credits. (*See* **PAY, Service credits. Active duty after retirement**)

Annuity elections for dependents

Administrative errors in handling

Correction

Initial election under Survivor Benefit Plan, Pub. L. 92–425 (10 U.S.C. 1447–1455) by member of uniformed services who was retired prior to Sept. 21, 1972, date Plan was enacted, and which was made on basis of insufficient information or misunderstanding, may be changed or revoked only during 18-month period prescribed (Pub. L. 93–155, which amended 1972 act), and failure of administrative office to provide adequate information necessary to make intelligent election constitutes administrative error within meaning of 10 U.S.C. 1454. However, where election under Plan was made on basis of adequate information within the 18-month period, no further election may be allowed, nor may conditional election be permitted in absence of provision in act to this effect, and, furthermore, statement of nonparticipation does not preclude member from electing coverage within the 18-month period 39

Beneficiary eligibility

Spouse newly acquired

Member of uniformed services—a widower—who remarries while serving on active duty may designate his newly acquired spouse as beneficiary effective as of date of marriage as she qualifies as eligible beneficiary under 10 U.S.C. 1448(d), and in event member should die while on active duty, widow automatically would be entitled to survivor benefit annuity without regard to length of marriage prior to member's death since special provisions contained in 10 U.S.C. 1448(d) were enacted to insure spouses of all active duty personnel automatically would be provided with coverage in event of member's death while serving on active duty, without necessity of having to specifically elect that coverage 47

PAY—Continued
Retired—Continued
Annuity elections for dependents—Continued
Beneficiary eligibility—Continued
Spouse newly acquired—Continued

Retired member who marries subsequent to retirement but prior to effective date of Survivor Benefit Plan under Pub. L. 92–425 (Sept. 21, 1972), may provide immediate coverage for his spouse regardless of 2-year limitation under 10 U.S.C. 1447(3)(A) provided election is made within the time limitation stated in sec. 3(b) of the act, as amended by sec. 804 of Pub. L. 93–155 818

Children
Dependency status

Children of deceased retired members who are under 18 years of age and serving on active duty in uniformed service, or are under 22 and serving as cadet or midshipman at service academy, or are enrolled in institute of higher learning under military subsistence scholarship program are considered eligible dependents to receive Survivor Benefit Plan annunity (10 U.S.C. 1447–1455), within meaning of 10 U.S.C. 1447(5), even though they are provided quarters and subsistence by Govt. since showing of actual dependency for individuals enumerated is not required as only valid restrictions on dependent eligibility are those limitations specifically mentioned in sec. 1447(5) 420

Grandchildren

The 10-year old grandchild of a member of uniformed services to whom Survivor Benefit Plan (10 U.S.C. 1447–1455) applies who has care and custody of child by court order which does not stipulate a support requirement qualifies as dependent child under 10 U.S.C. 1447(5) of Plan as "foster child," subject to general limitations on dependency contained in 10 U.S.C. 1447(5) (A) and (B). However, if court order stipulates support requirement in excess of one-half of total cost of foster parent's support, foster child would not qualify as dependent child under Plan 461

Payments after age 18

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

Death of member
Prior to receipt of election

Member of uniformed services retired prior to effective date of Survivor Benefit Plan, Pub. L. 92–425 as amended by Pub. L. 93–155, who executed election within 1 year to provide annuity for his widow but died prior to receipt of election in administrative office made valid election where election document had been signed in presence of witnesses

PAY—Continued Pag
Retired—Continued
Annuity elections for dependents—Continued
Death of member—Continued
Prior to receipt of election—Continued

and election form had passed from member's control prior to his death, and furthermore, secs. 3(b) and 3(e) provide that election made within 18 months of effective date of act is effective when received by Secretary concerned 51

Effect of judgment increasing retired pay

Since ruling in *Edward P. Chester, Jr., et al.*, v. *United States*, 199 Ct. Cl. 687, only establishes that higher active duty pay rate was required to be used in computing plaintiff's retired pay entitlement, and 10 U.S.C. 1436(b) makes no provision for voluntary reduction of annuity elected under Retired Serviceman's Family Protection Plan in circumstances of retroactive increase in active duty pay, only costs of annuity may be recomputed on basis of higher retired pay rate, and retroactive change in annuity elected, or withdrawal from Plan may not be retroactively authorized. However, pursuant to 10 U.S.C. 1436(b) retired member may apply prospectively for annuity reduction, or under 10 U.S.C. 1552 military records may be retroactively changed to correct error or remove injustice 9

Mandatory

Dependents denied

Legislative history of Survivor Benefit Plan, as added by P.L. 92–425, which provides for participation in Plan by members of Armed Forces when they become entitled to retired or retainer pay if they are married or have dependent child, discloses that administrative officers are required to fully explain details and benefits of Plan to retiring service personnel and their spouses, responsibility that implies officers should determine whether there is eligible spouse or dependent child. Therefore, where member states in his election certificate that he does not have spouse or child eligible for annuity under Plan, service records of member should be examined to verify representation, and if there is no contrary evidence, member's election may be accepted, and election being irrevocable, Govt. had good acquittance should it be posthumously discovered that member had eligible spouse or child at time of retirement. 19

Remarriage before retirement

Member of uniformed services—a widower—who remarries while serving on active duty may designate his newly acquired spouse as beneficiary effective as of date of marriage as she qualifies as eligible beneficiary under 10 U.S.C. 1448(d), and in event member should die while on active duty, widow automatically would be entitled to survivor benefit annuity without regard to length of marriage prior to member's death since special provisions contained in 10 U.S.C. 1448(d) were enacted to insure spouses of all active duty personnel automatically would be provided with coverage in event of member's death while serving on active duty, without necessity of having to specifically elect that coverage 47

When member of uniformed services remarries while serving on active duty and elects to provide coverage under Survivor Benefit Plan, 10 U.S.C. 1447–1455, for his newly acquired spouse, upon his

PAY—Continued
Page
Retired—Continued
Annuity elections for dependents—Continued
Remarriage before retirement—Continued

death after he was voluntarily or involuntarily released to inactive duty and became entitled to retired or retainer pay, spouse is considered fully qualified as eligible widow under 10 U.S.C. 1450(a)(1) to receive monthly annuity elected by member, since 2-year limitation on period of marriage prior to death of member to whom the Plan applies which is contained in 10 U.S.C. 1447(3)(A) is viewed as applicable only to post-retirement marriages 470

Survivor Benefit Plan
Cost deductions and coverage
Effective date

Since 10 U.S.C. 1448(a) provides that coverage under Survivor Benefit Plan commences when individual becomes entitled to retired or retainer pay, persons retired under provisions of 10 U.S.C. 1331, who become entitled to retired pay when application for retired pay is filed with department concerned, receive coverage under Plan at that time and deductions from retired pay commence correspondingly with the inception of coverage 832

Election status

Upon becoming entitled to retired or retainer pay, service member is bound by election he made under Survivor Benefit Plan, 10 U.S.C. 1447–1455, prior to his eligibility to such pay, unless member comes within specific exceptions provided in 10 U.S.C. 1450(f) governing after retirement marriages or after retirement acquisition of dependent child or children. However, until member becomes entitled to retired or retainer pay, any elections he may have made are ambulatory, that is, elections may be changed prior to his entitlement to retired or retainer pay and only last election made before such entitlement is binding as it is only at that time that class of eligible annuitants is set 470

Implementation of new plan

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

Remarriage of member
Spouse's annuity eligibility

When member of uniformed services remarries while serving on active duty and elects to provide coverage under Survivor Benefit Plan, 10 U.S.C. 1447–1455, for his newly acquired spouse, upon his death after he was voluntarily or involuntarily released to inactive duty and

PAY—Continued Pa
Retired—Continued
Annuity elections for dependents—Continued
Survivor Benefit Plan—Continued
Remarriage of member—Continued
Spouse's annuity eligibility—Continued

became entitled to retired or retainer pay, spouse is considered fully qualified as eligible widow under 10 U.S.C. 1450(a)(1) to receive monthly annuity elected by member, since 2-year limitation on period of marriage prior to death of member to whom the Plan applies which is contained in 10 U.S.C. 1447(3)(A) is viewed as applicable only to post-retirement marriages 47

Social Security offset

Offset of amount from annuity payable under Survivor Benefit Plan, 10 U.S.C. 1447 *et seq.* representing Social Security benefit payable to widow at age 62 and widow with one dependent child must be calculated on basis of wages attributable to military service only, and formula used to calculate wages attributable to military service may not include wages from nonmilitary employment 73

Two-year limitation
Effective date

Retired member who marries subsequent to retirement but prior to effective date of Survivor Benefit Plan under Pub. L. 92-425 (Sept. 21, 1972), may provide immediate coverage for his spouse regardless of 2-year limitation under 10 U.S.C. 1447(3)(A) provided election is made within the time limitation stated in sec. 3(b) of the act, as amended by sec. 804 of Pub. L. 93-155 81

Widower

For purposes of 10 U.S.C. 1451(a) which provides for deduction from survivor annuity under Survivor Benefit Plan of amount equal to Social Security survivor benefit computed on basis of member's military service only, widower's benefit is not subject to same reduction as widow's benefit when there is one dependent child since widower receives no Social Security benefit comparable to "mother's benefit" received by a widow under Social Security laws 75

Validity

Member of uniformed services retired prior to effective date of Survivor Benefit Plan, Pub. L. 92-425 as amended by Pub. L. 93-155, who executed election within 1 year to provide annuity for his widow but died prior to receipt of election in administrative office made valid election where election document had been signed in presence of witnesses and election form had passed from member's control prior to his death, and furthermore, secs. 3(b) and 3(c) provide that election made within 18 months of effective date of act is effective when received by Secretary concerned 51

Withdrawal from participation
Retroactive increase in retired pay

Since ruling in *Edward P. Chester, Jr., et al.* v. *United States*, 199 Ct. Cl. 687, only establishes that higher active duty pay rate was required to be used in computing plaintiff's retired pay entitlement, and 10 U.S.C. 1436(b) makes no provision for voluntary reduction of annuity elected under Retired Serviceman's Family Protection Plan in circumstances of

PAY—Continued Page
Retired—Continued
Annuity elections for dependents—Continued
Withdrawal from participation—Continued
Retroactive increase in retired pay—Continued

retroactive increase in active duty pay, only costs of annuity may be recomputed on basis of higher retired pay rate, and retroactive change in annuity elected, or withdrawal from Plan may not be retroactively authorized. However, pursuant to 10 U.S.C. 1436(b) retired member may apply prospectively for annuity reduction, or under 10 U.S.C. 1552 military records may be retroactively changed to correct error or remove injustice 94

Assignment
Banking facilities for deposit

Although permissive authority in 31 U.S.C. 492(b) for issuance by disbursing officers, in accordance with regulations prescribed by Secretary of the Treasury, of composite checks to banks or financial institutions for credit to accounts of persons requesting in writing that recurring payments due them be handled in this manner includes issuance of Military Retired Pay checks, composite checks should not be issued without determination, pursuant to regulations to be prescribed by Secretary, of continued existence and/or eligibility of persons covered, and if provided by regulation deposits may be made to joint accounts as well as single accounts 75

Cost-of-living increases. (*See* **PAY, Retired, Increases, Cost-of-living increases**)

Disability
Name on promotion list
Effect on retired pay

AF major who was retired for disability under 10 U.S.C. 1201 and 1372 after being recommended for promotion to grade of lieutenant colonel, although entitled under sec. 206(a) of Reserve Officer Personnel Act of 1954 to be placed on retired list in higher grade to which promoted (10 U.S.C. 1374(a)), is not entitled to retired pay based on higher grade (10 U.S.C. 1374(d)), but pursuant to 10 U.S.C. 1372(1) his retired pay must be computed on grade of major, grade he was actually serving in on date of retirement since disability for which officer was retired was not found as result of physical examination for promotion as required by 10 U.S.C. 1372(3). Furthermore, sec. 507(a)(7) of Officer Personnel Act of 1947, which permitted computation of an officer's retired pay on basis of his promotion to higher grade, is not for application as it was repealed prior to officer's placement on disability retired list 425

Effective date
Subsequent application effect
***Seagrave* case**

Where member who is otherwise entitled to retired pay under 10 U.S.C. 1331, but who does not file application for such pay until well after meeting age requirement, on basis of holding in case of *Seagrave* v. *United States*, 131 Ct. Cl. 790 (1955), and similar cases, such pay accrues from date of qualification or on first day of any subsequent month stipulated in application for such pay to begin, without regard to date such application is filed 921

PAY—Continued Pa
Retired—Continued
Fleet reservists
Retainer pay withholdings
Felony conviction of member
Retainer pay due member transferred to Fleet Reserve who was convicted of felony and sentenced to more than 1 year's confinement in correctional institution and who under statutes of State of Va. has committee appointed over his estate, both real and personal, is considered to be out of control of member who no longer may dispose of his estate, a situation comparable to one mentally incompetent, and, therefore, retainer pay may be paid over to court-appointed committee upon court certification that committee has not been removed 48
Foreign employment
Retired Regular AF officer who is regarded as holding an "office of profit and trust" under Federal Govt. as those terms are used in Art. I, sec. 9, cl. 8 of U.S. Constitution which prohibits persons holding such offices from accepting emoluments from foreign states in absence of congressional consent, and who claims to be employed by American-based firm and receives civilian salary from that firm, where record shows that such firm is merely a conduit whereby he is detailed by that firm to work for instrumentality of foreign Govt. by virtue of contract between American-based firm and such instrumentality to supply professional personnel, acceptance by retired member of salary for such employment comes within Constitution prohibition, and, while lacking penalty, such provision will be given effect by withholding from member's retired pay amount equal to foreign salary received in violation of Constitution 7
Increases
Cost-of-living increases
Adjustment of retired pay
Retired pay of a general (O–10) retired under 10 U.S.C. 8918, with over 30 years service is for computation based on floor provided by 10 U.S.C. 1401a(e), and in absence of specific language in statute and legislative history, floor provided by sec. 1401a(e) must be regarded as rate of pay in effect on day before effective date of rate of monthly basic pay on which the member's retired pay would otherwise be based, plus applicable Consumer Price Index increases from that date forward, and any inequities resulting from application of sec. 1401a(e) is matter for consideration by Congress 6
Retired pay floor provided by 10 U.S.C. 1401a(e) is for computation on rates of pay in effect on day before effective date of rates of pay on which a member's retired pay is based. Accordingly, a general (O-10) who was retired in Feb. 1973 may have his retired pay equated to pay of a similar general retired in 1972, plus Consumer Price Index increases, but not to pay of similar generals whose retired pay is computed on rates in effect prior to 1972, even though he will receive less pay than generals retiring in 1971 or 1972 69
In computing retired or retainer pay, floor provided by 10 U.S.C. 1401a(e) must be limited to rate of pay in effect on day immediately before effective date of rate of monthly basic pay on which a member's

PAY—Continued Page
Retired—Continued
Increases—Continued
Cost-of-living increases—Continued
Adjustment of retired pay—Continued

retired or retainer pay would otherwise be based, plus appropriate Consumer Price Index increases from that date forward. Any inference in 51 Comp. Gen. 384 to contrary should be disregarded; inconsistent payments should be corrected immediately; and past overpayments need not be collected since they presumably were accepted in good faith by members and would be proper for waiver under 10 U.S.C. 2774 701

Chief of staff

The rationale expressed concerning application of 10 U.S.C. 1401a(e) in case of a general (O–10) is equally applicable in computing the retired pay of officer who served as Chief of Staff 698

Members retained on active duty after retirement date

Officers of AF and other military services whose monthly basic pay increased while they were held on active duty beyond mandatory retirement for physical evaluation purposes are entitled, to extent feasible, to computation of disability retired pay at higher basic pay in effect on their respective dates of retirement and to adjustment for underpayments that resulted because retired pay had been computed at lower rates in effect on their mandatory retirement dates, and they also may have credit for the additional active duty for longevity purposes, in view of *Edward P. Chester et al.* v. *United States*, 199 Ct. Cl. 687, which held that Regular Coast Guard officers continued on active duty for physical evaluation were entitled to "no less" than members entitled to compute their retired pay at the July 1 higher rates because they were not precluded from voluntarily retiring on June 30, their mandatory retirement dates. Retroactive application of *Chester* case is restricted by Oct. 9, 1940 barring act, and doubtful cases should be submitted to GAO. Overrules 43 Comp. Gen. 742, B–153784, Sept. 17, 1969, B–172047, Feb. 23, 1972, and other similar decisions 135

Voluntary *v.* involuntary retirement

Court's interpretation in *Edward P. Chester, Jr., et al.* v. *United States*, 199 Ct. Cl. 687, that words "shall if not earlier retired be retired on June 30," which are contained in mandatory retirement provision, 14 U.S.C. 288(a), did not absolutely forbid Coast Guard officers mandatorily retired on June 30 in 1968 or 1969, as well as officers held on active duty beyond mandatory June 30 date, from retiring voluntarily under 14 U.S.C. 291 or 292, and that officers were entitled to compute their retired pay on higher rates in effect on July 1, will be followed by GAO. Therefore, under *res judicata* principle, payment to claimants for periods subsequent to court's decision may be made at higher rates in effect July 1. Payments to other claimants in similar circumstances, in view of fact court's decision is original construction of law changing GAO's construction, may be made both retroactively and prospectively, subject to Oct. 9, 1940 barring act, and submission of doubtful cases to GAO. Overrules B–165038 and other contrary decisions 94

Holding in case of *Edward P. Chester et al.* v. *United States* (199 Ct. Cl. 687), which authorizes computation of retired pay based on rates effective July 1 rather than lower June 30 rates and accepted for Coast

PAY—Continued Page
Retired—Continued
Increases—Continued
Voluntary *v.* involuntary retirement—Continued

Guard officers in 53 Comp. Gen. 94, and for Air Force officers held beyond mandatory retirement date for physical evaluation, in 53 Comp. Gen. 135, is viewed as applicable to Marine Corps officers retired mandatorily pursuant to Pub. L. 86–155, 73 Stat. 333, in view of similarity between applicable statutes and/or Marine Corps, and, therefore, officer's retired pay may be computed on rates in effect July 1 of year in which he retires. 48 Comp. Gen. 30 and other similar decisions are overruled 610

Subsequent to Temporary Disability Retired List removal
Member not bound by prior Survivor Benefit Plan election

When service member's name is removed from Temporary Disability Retired List and is returned to active list for purpose of retirement for length of service under another provision of law, since there may exist significant changes in member's circumstances subsequent to his initial decision to participate or not participate in Survivor Benefit Plan, he is to be treated as a new prospective participant and must be given opportunity to fully review his future participation in Plan prior to such retirement with positive action to be taken administratively to insure that details and costs are fully understood by him 971

Survivor Benefit Plan
Children

Where member who after retirement has contributed to Plan and after break in service is recalled to active duty and dies while serving on that duty, surviving spouse who is eligible to receive annuity elected under 10 U.S.C. 1448(a) would have alternate right to receive annuity authorized under 10 U.S.C. 1448(d), if such annuity would provide the greater benefit 847

Blind

When deceased service member's child is receiving welfare and Social Security payments based on a determination of blindness and that condition is indicated to have existed since birth, such payments may not be considered as constituting substantial gainful activity so as to disqualify child as eligible annuitant under 10 U.S.C. 1435(2)(B) to receive annuity under the RSFPP, 10 U.S.C. 1431, *et seq* 918

Whether child of deceased member of uniformed service, who is over 18 years of age, is or is not capable of self-support in blindness or other physical disability cases, where such condition antedated 18th birthday, for purposes of establishing eligibility as annuitant under 10 U.S.C. 1435(2)(B), such issue is for resolution based on all facts in each particular case and no specific guidelines can be established 918

Effect of Veterans Administration benefits

Where surviving spouse is eligible to receive survivor annuity under 10 U.S.C. 1448(d), such language contained therein which relates to eligibility of spouse to receive DIC payments from Veterans Admin., when considered in conjunction with other portions of subsec. (d), must be construed only as prohibiting payment of SBP annuity where amount of VA benefits under 38 U.S.C. 411(a) exceeds maximum annuity otherwise payable under 10 U.S.C. 1448(d) 847

PAY—Continued Page
Retired—Continued
Survivor Benefit Plan—Continued
Election status
Recalled to active duty
In case of a service member who is retired after passage of the Survivor Benefit Plan, 10 U.S.C. 1447–1455, is immediately recalled to active duty and then dies while serving on that duty, entitlement to survivor benefit annuity would accrue only under provisions of 10 U.S.C. 1448(d) 847
Where service member elects to provide coverage under Survivor Benefit Plan for spouse and children, is retired and recalled to active duty after break in service after contributing to Plan and then dies while serving on that duty, eligible spouse has basic right to coverage elected by member under 10 U.S.C. 1448(a) and payment under 10 U.S.C. 1450(a)(1) and upon the death of spouse the surviving dependent children would have basic continuation right to payment under 10 U.S.C. 1450(a)(2) during remaining period of their dependency as defined in 10 U.S.C. 1447(5) 847
Limitations
Spouse
Where entitlement to survivor benefit annuity accrues under 10 U.S.C. 1448(d) and that is the only basis for coverage under Plan, by virtue of limitations contained therein, only the otherwise eligible surviving spouse would be entitled to annuity and such annuity would terminate upon that spouse's death or loss of eligibility 847
Missing persons
Date of death determination
In cases where Survivor Benefit Plan annuity under 10 U.S.C. 1448(d) is established for survivor of member who entered MIA status before completing sufficient active service to qualify for retired or retainer pay but remained in such MIA status long enough to so qualify, inception date for payment of annuity under 10 U.S.C. 1450 is the day after the date the Secretary concerned makes determination of death so long as such date of determination occurs after Sept. 21, 1972, notwithstanding fact that a date earlier than date of determination may be used to establish date of death required under 37 U.S.C. 555 or 556 887
Status
In cases involving active duty service personnel who enter a missing in action status regardless of date when such member entered that status and are subsequently determined to have died in that status, since time in a MIA status under 37 U.S.C. 551–558 is treated as active service for purposes of pay, allowances and other benefits, such time shall be considered as qualifying service for purpose of establishing both the minimum eligibility retirement for years of service and retired pay computation within meaning of the Survivor Benefit Plan, 10 U.S.C. 1447–1455, for the purpose of establishing an annuity under 10 U.S.C. 1448(d) 887
Survivor Benefit Plan *v.* Civil Service Retirement Survivorship Plan
Under provisions of 10 U.S.C. 1450(d), Survivor Benefit Plan annuity elected by retiree who waives military retired pay for use of military credits to increase his Civil Service retirement benefits, is not payable

PAY—Continued Page
Retired—Continued
Survivor Benefit Plan—Continued
Survivor Benefit Plan *v.* Civil Service Retirement Survivorship Plan—Continued

unless retiree elects not to participate in Civil Service retirement survivorship plan; nor is it required under provisions of 10 U.S.C. 1452(e) that deposits be made under Survivor Benefit Plan in such circumstances unless retiree elects not to participate in Civil Service retirement survivorship plan 857

Withholding
Contracting with Government

A retired regular AF officer engaged in sale of electrical equipment whose business activities included making calls on Dept. of Defense (DOD) agencies, as well as installation of National Oceanic and Atmospheric Admin., for purpose of rendering technical assistance, updating catalogue materials, providing information on companies he represented and their products, determining future markets, and contacting Govt. purchasing agents, is considered as actively participating in procurement process for purpose of obtaining business for his employer and such participation constitutes sales activities in violation of 37 U.S.C. 801(c) and DOD Directive 5500.7, Aug. 8, 1967, notwithstanding member's contention that majority of calls were made in response to inquiries for technical information and, therefore, payment of retired pay to member during period of participation in procurement process is precluded 616

Felony conviction of member

Retainer pay due member transferred to Fleet Reserve who was convicted of felony and sentenced to more than 1 year's confinement in correctional institution and who under statutes of State of Va. has committee appointed over his estate, both real and personal, is considered to be out of control of member who no longer may dispose of his estate, a situation comparable to one mentally incompetent, and, therefore, retainer pay may be paid over to court-appointed committee upon court certification that committee has not been removed 482

Service credits
Active duty after retirement
Physical evaluation

Officers of AF and other military services whose monthly basic pay increased while they were held on active duty beyond mandatory retirement for physical evaluation purposes are entitled, to extent feasible, to computation of disability retired pay at higher basic pay in effect on their respective dates of retirement and to adjustment for underpayments that resulted because retired pay had been computed at lower rates in effect on their mandatory retirement dates, and they also may have credit for the additional active duty for longevity purposes, in view of *Edward P. Chester et al.* v. *United States*, 199 Ct. Cl. 687, which held that Regular Coast Guard officers continued on active duty for physical evaluation were entitled to "no less" than members entitled to compute their retired pay at the July 1 higher rates because they were not precluded from voluntarily retiring on June 30, their mandatory retirement

PAY—Continued Page
Service credits—Continued
Active duty after retirement—Continued
Physical evaluation—Continued

dates. Retroactive application of *Chester* case is restricted by Oct. 9, 1940 barring act, and doubtful cases should be submitted to GAO. Overrules 43 Comp. Gen. 742, B–153784, Sept. 17, 1969, B–172047, Feb. 23, 1972, and other similar decisions ---- 135
Severance
Effect on subsequent retirement benefits
Regular Air Force officer who was removed from active list under sec. 106 of Title I of Pub. L. 810, 80th Congress and who received severance pay under that section is not barred from being retired under 10 U.S.C. 1331, upon attaining age 60 so long as he is otherwise qualified to receive such retired pay ---- 921
Recoupment
Exception
Where certain provisions of law governing separation from active list authorize severance pay, and require refund of such pay upon retirement, but where other provisions such as 10 U.S.C. 3786 and 8786 do not state such requirement, in absence of such limiting statutory provision or clear indication of Congressional intent to the contrary refund of severance pay is not required as a condition precedent to receipt of retired pay under 10 U.S.C. 1331 ---- 921
Submarine duty
Absence periods
Training and rehabilitation
While the 14-man augmentation to crew of nuclear-powered attack submarines, which allows members of submarine to remain in port for periods of training and rehabilitation, is not, strictly speaking, comparable to the two-crew system as used in nuclear-powered ballistic missile submarines, legislative history of P.L. 86–635, July 12, 1960, which amended law relating to payment of incentive pay for periods of training and rehabilitation away from submarine in cases of off-ship crew of two-crew nuclear-powered submarines (37 U.S.C. 301(a)(2)), is not so restrictive so as to prohibit payments of incentive pay during periods of training and rehabilitation on continuous basis in case of augment crew of nuclear-powered attack submarines, so long as such training and rehabilitation periods bear reasonable relationship to periods of duty aboard the submarine and no severe imbalance of assignments occurs among crew members ---- 762

PAYMENTS
Absence or unenforceability of contracts
Quantum meruit
Benefit to Government requirement
Amount claimed for movement of tug and barge under canceled contract because contractor did not have required ICC authority is not reimbursable as agent of Govt. may not waive requirement that a water carrier in interstate commerce is subject to regulation under Interstate Commerce Act, and since no benefit accrued to Govt., payment on a *quantum meruit* basis may not be made ---- 620

PAYMENTS—Continued Pa

Absence or unenforceability of contracts—Continued

***Quantum meruit*—Continued**

Value of services and materials furnished

Although under ordinary circumstances contracting officer is not expected to anticipate possibility that bidder will claim mistake in bid after award, where he was on notice of possibility of bid error in alternative item to basic bid for electrical distribution system and where bidder had attempted to modify by late telegram both basic bid, Item 1, and alternative item, Item 1A, contracting officer should have been alerted to possibility of error on both items and it would have been prudent prior to award of Item 1 to inquire if attempted price increases reflected mistakes in both items, particularly since bidder had not acquiesced in award. Therefore, upon establishing existence of mistake, no contract having been effected at award price, and substantial portion of work having been completed, contractor may be paid on a *quantum valebat* or *quantum meruit* basis, that is, reasonable value of services and materials actually furnished ..... 3(

PERSONAL SERVICES

Arbitrators

Contract to conduct study of labor management activity and processes proposed to be entered into between a retired Federal employee and OEO under the authority granted the Director in sec. 602 of Economic Opportunity Act of 1964 to obtain services of experts and consultants, either through direct employment or by contract, in accordance with 5 U.S.C. 3109, when construed on basis of whole arrangement existing between the parties and not only from the wording of the contract evidences the former employee will represent OEO in connection with labor-management grievances and arbitration proceedings that will require close working relationship with agency employees, relationship that is incompatible with an independent contractor relationship and should former employee accept employment under such arrangement his pay would have to be reduced in accordance with 5 U.S.C. 8344(a) by the amount of his civil service annuity 54

Private contract *v.* Government personnel

In view of funds provided in its current appropriation for "special counsel fees," Federal Communications Commission may procure services of a retired Govt. attorney in connection with investigation and proceedings he directed prior to retirement, and amount payable to him is not subject under 5 U.S.C. 8344(a) to set-off by amount of his retirement annuity since retiree's expertise and thorough knowledge in matter will enable him to perform functions described in "Statement of Work" contained in proposed contract independently rather than under an employer-employee relationship 70

What constitutes

Arbitration proceedings

Contract to conduct study of labor management activity and processes proposed to be entered into between a retired Federal employee and OEO under the authority granted the Director in sec. 602 of Economic Opportunity Act of 1964 to obtain services of experts and consultants, either through direct employment or by contract, in accordance with 5 U.S.C. 3109, when construed on basis of whole arrangement exist-

PERSONAL SERVICES—Continued Page
What constitutes—Continued
Arbitration proceedings—Continued
ing between the parties and not only from the wording of the contract evidences the former employee will represent OEO in connection with labor-management grievances and arbitration proceedings that will require close working relationship with agency employees, relationship that is incompatible with an independent contractor relationship and should former employee accept employment under such arrangement his pay would have to be reduced in accordance with 5 U.S.C. 8344(a) by the amount of his civil service annuity ---------- 542
POSTAL SERVICE, UNITED STATES
Claims
Losses in the mails
Since under 39 U.S.C. 401(8) the Postal Service is authorized to settle and compromise claims against itself, GAO does not have jurisdiction to consider possible liability of Postal Service for a lost check ---------- 607
PRESIDENT
Appointments. (*See* **APPOINTMENTS, Presidential**)
Authority
Basis
Since protective services provided by the Secret Service for former Vice President Agnew at request of President are being furnished without authority of law they should be discontinued. 18 U.S.C. 3056 (a), the statute that authorizes Secret Service protection, does not provide for protection of a former Vice President, and the President does not have "inherent executive power" to order Secret Service protection for former Vice President as President's power must stem either from act of Congress or from the Constitution itself ---------- 600
Presidential appointees
Leaves of absence
Status
U.S. attorneys who are compensated at Executive Schedule rates are excluded from coverage of Annual and Sick Leave Act since 5 U.S.C. 6301(2)(x) exempts from coverage all officers appointed by President whose basic rates of pay exceed highest General Schedule (GS) level and although 5 U.S.C. 6301(2)(x) refers to individual whose rate of pay "exceeds" highest GS level, intent of Act can be effected only if those whose salaries are intended to exceed highest GS level by virtue of assignment to Executive Schedule are exempted even though GS–18 and Executive Level V officials may at times receive equal pay. Furthermore, while discretionary exemption authority in 5 U.S.C. 6301 (2) (xi) prohibits President from excluding any U.S. attorney from coverage under the leave act, clause does not operate to nullify statutory exclusion required by 5 U.S.C. 6301(2)(x) ---------- 577
Secret Service Protection
Annuities for Secret Service personnel
Since under 18 U.S.C. 3056, Secret Service in addition to protecting President has numerous criminal investigation functions, security officers and specialists may count time spent in activities related to Presidential protection, as well as time spent in directly protecting President on temporary or intermittent assignments, toward accumu-

PRESIDENT—Continued Page

Secret Service Protection—Continued

Annuities for Secret Service personnel—Continued

lation of requisite 10 years prescribed by sec. 4–522 of title 4, D.C. Code, for entitlement to retirement annuities under Policemen and Firemen's Retirement and Disability Act, even though authority to transfer deposits from Civil Service Retirement and Disability Fund to general revenues of D.C. specifies full-time agents protecting President. Approval of future eligibility revisions to participate in D.C. Police Retirement Plan is responsibility, pursuant to sec. 4–535, of D.C. Commissioner, and should additional transfers affect integrity of Policemen and Firemen's Retirement and Disability Fund, this might be basis of remedial legislation 177

PROPERTY

Private

Damage, loss, etc.

Carrier's liability

Articles of high *v.* extraordinary value

Claim acquired by assignment pursuant to Military Personnel and Civilian Employees' Claims Act, 31 U.S.C. 240, against carrier for loss of antique Imari and Kutani Japanese porcelains in transit of Air Force officer's household goods properly was recovered by setoff against carrier who has denied liability because porcelains were not declared to have extraordinary value; loss was not listed at time of delivery; and shipment being only one in van it could not have been misdelivered. However, although of high value, antique porcelains are not articles of extraordinary value and since valuation placed on shipment was intended to include porcelains, separate bill of lading listing was not required, clear delivery receipt may be rebutted by parol evidence; and carrier's receipt of more goods at origin than delivered establishes *prima facie* case of loss in transit 6

Federal funds for improvements, repairs, etc.

Limitation on expenditures

General rule prohibiting use of appropriated funds for permanent improvements of private property (5 Comp. Dec. 478) unless specifically authorized by law, and limited exception to that rule in sec. 322 of Economy Act (40 U.S.C. 278a) which, in effect, permits expenditures for alterations, repairs, and improvements of rented premises not in excess of 25 percent of first year's rent is for application to proposed alteration, repairs, and improvement of permanent nature to premises rented for housing flight service stations and other air navigation facilities operated by FAA in connection with air control facilities since sec. 207(b) of Federal Aviation Act concerning establishment and operation of air traffic control facilities does not constitute statutory authority for FAA to effect permanent improvements to private property without regard to limitation in 40 U.S.C. 278a 31

PROPERTY—Continued Page

Private—Continued

Repairs and improvements

Disabled veteran's home

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

Public

Damage, loss, etc.

Measure of damages

Restoration of claimant's position

Inclusion of overhead by AF installation in damages collected from REA Express for the Govt.'s repair of radar sets damaged in transit was not improper because overhead constituted 43 percent of damages assessed since law is concerned with restoration of claimant to position he would have occupied had there been no loss or damage to its shipment, and overhead cost assessed is sustained by cost accounting records. Moreover, courts in addition to direct cost of labor and materials have included overhead in damages allowed, and REA previously accepted overhead charged when overhead represented 20 percent of repair costs. Courts also require any enhancement of value by reason of repair to be proved defensively by competent evidence and, therefore, consideration may not be given to REA's unsupported allegation that value of radar sets was enhanced by repair job 109

Value of item

Deduction by Govt. of full value of goods damaged in transit, and subsequent denial of claim for amount deducted by GAO is sustained where contract of carriage is complete and unequivocal on its face as to the contracted rate, and where contracted rate was the only one available to the Government 747

Fire fighting services

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

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PROPERTY—Continued Page
Public—Continued
Surplus
Disposition
Sales. (*See* **SALES**)
Repurchase by Government
From surplus dealers
Under solicitation that called for furnishing new manufactured aircraft solenoid valves but contained provisions under which surplus dealers could participate, rejection of proposal offering to furnish new former Govt. surplus valves was proper in view of fact that the valves needed replacement of rubber "O" rings which constitutes refurbishment and would therefore require performance retesting that neither agency nor offeror was in position to perform 742
Real. (*See* **REAL PROPERTY**)
PUBLIC BUILDINGS
Dedication ceremonies
Expenses
Since holding of dedication ceremonies and laying of cornerstones connected with construction of public buildings and public works are traditional practices, costs of which are chargeable to appropriation for construction of building or works, expense of engraving and chrome plating of ceremonial shovel used in ground breaking ceremony would be reimbursable and chargeable in same manner as any reasonable expense incurred incident to cornerstone laying or dedication ceremony but for fact evidence has not been furnished as to who authorized the chrome plating and engraving of shovel; where shovel originated; subsequent use to be made of shovel; and why there was 1-year lag between ground breaking ceremony and plating and engraving of shovel 119
PURCHASES
Purchase orders
Mistakes
Correction
Acceptance of bid at aggregate amount quoted—bid which stated "Bid based on award of all items" and offered prompt payment discount—under invitation for 37 items of electrical parts and equipment to be bid on individually and bid to show total net amount, without verification of aggregate bid although it was substantially below total net amounts shown in other bids and next lowest bid was verified, entitles supplier of items, pursuant to purchase order issued, to adjustment in price to next lowest aggregate bid, less discount offered, since contracting officer considered there was possibility of error in higher bid he should have suspected lower bid likewise was erroneous, and supplier having been overpaid on basis of item pricing, refund is owing Govt. for difference between amount paid supplier and next lowest bid 190

QUARTERS ALLOWANCE Page

Civilian overseas employees

Awaiting transportation

Hotel expenses incurred in U.S. incident to move to post of assignment abroad cannot be reimbursed under the transfer allowance authority of 5 U.S.C. 5924(2). While Congressional intent to extend transfer allowance to cover temporary lodging expenses incurred incident to employee's establishing himself at post in the U.S. between foreign assignments is clear, we find no such intent with regard to temporary lodging expenses incurred in U.S. incident to assignments abroad..... 861

Dependents

Children

Female members

Regulations relating to payment of basic allowances for quarters that require that female member of military service must provide more than one-half of support for dependent child before she may receive payment of basic allowances for quarters may be revised to authorize payment of allowance for dependent child of female member on same basis as that prescribed for male member in view of fact that although *Frontiero* decision by Supreme Court was concerned with right of female member to receive allowances and benefits on behalf of civilian husband, rationale and language of decision connote intent by court that decision should be broadly applied..... 148

Female members

Entitlement restrictions removed

Claims procedure

As *Frontiero* decision, decided May 14, 1973, in which Supreme Court ruled on inequality between male and female military members with regard to quarters allowances, was original construction of constitutionality of 37 U.S.C. 401 and 403, decision is effective as to both active and former members from effective date of statute, subject to barring act of Oct. 9, 1940 (31 U.S.C. 71a). Documentation required from female members to support their claims should be similar to that required of male members under similar circumstances and should be sufficient to reasonably establish member's entitlement to increased allowances. Although claims for 10-year retroactive period may be processed by services concerned, since filing claim in administrative office does not meet requirements of barring act, claims about to expire should be promptly submitted to GAO for recording, after which they will be returned to service for payment, denial or referral back to GAO for adjudication. Doubtful claims should be transmitted to GAO for settlement..... 148

Husband's dependency

***Frontiero* case effect**

Distinction between dependents of male and female members of uniformed services having been removed by Supreme Court of U.S. in *Frontiero* v. *Richardson*, decided May 14, 1973, and by enactment of P.L. 93–64, effective July 1, 1973, language in par. M1150–9 of JTR reading "A person is not a dependent of a female member unless he is, in fact, dependent on her for over one-half of his support," may be deleted and made effective as of date of decision, May 14, 1973. Also recommended is amendment of par. M7151–2 by deleting reference to

QUARTERS ALLOWANCE—Continued Page
Dependents—Continued
Husband's dependency—Continued
Frontiero case effect—Continued
lawful "wife" and substituting the word "spouse," but since use of the term "dependent" in pars. M7151-2 and M7107 of JTR is not discriminatory in light of *Frontiero* decision, no change in language of paragraphs is required 116
Female members
Entitlement to allowance
Statutes of limitation
Under ruling in *Frontiero* v. *United States*, 411 U.S. 677 (1973), that certain portions of 37 U.S.C. 401 and 403, the statutory provisions that govern basic allowance for quarters (BAQ) entitlement, are unconstitutional, Dept. of Defense may not deny BAQ payments to current or former female service members who otherwise qualify for BAQ payments for periods antedating Sept. 13, 1973, issuance date of revised DOD instructions. However, claims which accrued more than 10 years prior to receipt in GAO are barred from consideration by act of Oct. 9, 1940, 31 U.S.C. 71a 539
Government quarters
Husband and wife service members
Although *Frontiero* decision has no effect on dependency status of service members married to each other as prescribed by 37 U.S.C. 420, since member may not be paid increased allowance on account of dependent for any period during which dependent is entitled to basic pay, differential treatment accorded male and female members in assigning quarters requires amendment of DOD Directive to prescribe entitlement to both male and female members to basic allowance for quarters at the without dependent rate when adequate public quarters for dependents are not available, notwithstanding availability of adequate single quarters; to reflect that neither husband nor wife occupying Govt. quarters for any reason who has only the other spouse to consider as dependent is entitled to basic allowance for quarters in view of 37 U.S.C. 420; and to provide that when husband and wife are precluded by distance from living together and are not assigned Govt. quarters, each is entitled to quarters allowance as prescribed for members without dependents 148
Leave or travel status
Unused accrued leave payments
Sex discrimination removal
Since act of July 9, 1973, P.L. 93-64, repealed provision of 37 U.S.C. 401 relating to proof of dependency by female member, quarters allowance prescribed in 37 U.S.C. 501(b) for inclusion in computation of male member's unused accrued leave that is payable at time of discharge, may be allowed female members on basis they are entitled to same treatment accorded male members who are not normally required to establish that their wives or children are in fact dependent on them for over one-half their support. Allowance may be paid retroactively by service concerned, subject to Oct. 9, 1940 barring act, but claims about to expire should be transmitted to GAO pursuant to Title 4, GAO 7, as should doubtful claims 148

QUARTERS ALLOWANCE—Continued Page

Temporary duty

Between completion of basic training and permanent duty assignment

Enlisted member without dependents in pay grade E–4 (less than 4 years' service) or below while performing temporary duty between date he completes basic training and date he receives orders naming permanent duty station to which he will report on completion of temporary duty is not in travel status and is entitled to basic allowance for quarters when Govt. quarters are not available to him while serving at place of performance of his basic duty assignment, which may be regarded as his permanent station for this purpose 740

Station allowance entitlement

Members of uniformed services without dependents assigned to two-crew nuclear-powered submarines who are receiving basic allowance for quarters and subsistence while performing temporary additional duty for training and rehabilitation ashore at overseas home port of submarine in excess of 15 days are entitled to housing and cost-of-living allowances authorized under 37 U.S.C. 405 and par. M4301 of Joint Travel Regs. notwithstanding fact submarine is permanent station of members and housing and cost-of-living allowances are payable only at permanent station, since Congress did not intend to preclude payment of such allowances to members actually experiencing higher cost for housing and cost of living 535

RATION COMMUTATION PAYMENTS

Increase

Public Law 90–207

Although sec. 8 of act of December 16, 1967, Pub. L. 90–207, 81 Stat. 654, provided for automatic increases in military basic pay based on percentage applied to "regular compensation" which includes subsistence allowance, neither that law nor any other law specifically or impliedly repealed provisions of 37 U.S.C. 402(b) which require that basic allowance for subsistence for enlisted members who are on leave, or are otherwise authorized to mess separately, shall be equal to cost of the ration as determined by Secretary of Defense, and adjustments made in such allowance are proper 853

REAL PROPERTY

Surplus Government property

Sale

Deposit

Contract default

When a limited partnership, the successor in interest to a joint venture, failed to perform obligation undertaken by initial partnership, forfeiture of original deposit is required as the D.C. Redevelopment Land Agency may not waive its right of forfeiture since no consideration passed to Agency to permit waiver of Govt.'s right, and furthermore, delay in seeking forfeiture does not constitute waiver of forfeiture right as delay was requested by successor partnership in order to find means to perform the original obligation 574

RECORDS Page

Contractors

Confidential nature

Contents of impact statement prepared by SBA prior to determining to set-aside subcontracting of mortuary services pursuant to contract entered into under authority of sec. 8(a) of Small Business Act with another Govt. agency are not for release since Comptroller General's Order No. 1.3, Jan. 4, 1968, exempts from disclosure commercial or financial information which is privileged or confidential, exemption that pertains to information which would not customarily be made public by person from whom it was obtained by Government 143

"Public Information Law"

Agency records

General Accounting Office authority to require disclosure

Whether refusal of contracting agency to permit bidder to examine basis for estimated annual quantities of personal property to be prepared for shipment or storage violates Freedom of Information Act, 5 U.S.C. 552(a)(3), and implementing regulations, is not for consideration by GAO since GAO has no authority to determine what information must be disclosed under act by other Govt. agencies 533

Application

Contractor records

Cancellation of request for proposals for cartridges on basis out-of-pocket costs for performance in a contractor-owned and -operated (COCO) plant compared unfavorably with out-of-pocket costs incurred in Govt-owned contractor-operated (GOCO) plants, and award to GOCO facility was in accord with terms of solicitation that conformed with par. 1-300.91(a) of Army Ammunition Command Procurement Instruction, which in turn is consistent with 10 U.S.C. 4532(a), "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; internal records of GOCO plant are not within disclosure provisions of 5 U.S.C. 552; and as GOCO activity is not Govt. commercial or industrial activity for purposes of BOB Cir. A-76, Federal taxes, depreciation, insurance, and interest are not for inclusion in GOCO cost estimates 40

REFUSE ACT PERMIT PROGRAM

Discharge permits

Fee refund

Since applications for discharge permits under Refuse Act Permit Program, which were filed with the Corps of Engineers or EPA, were not processed because the authority to issue permits was given to the States pursuant to sec. 402 of Federal Water Pollution Control Act, as amended by Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1342, refund may be made by EPA of application fees charged, for although fees were properly received, deposit of fees into Treasury as miscellaneous receipts was erroneous. Therefore, amounts that are proper for refund should be transferred from receipt account to "suspense fund" for refund, and in future until properly for deposit into Treasury as miscellaneous receipts, fees should be deposited into Treasury as trust funds in accordance with 31 U.S.C. 725r 580

REGULATIONS Page

Amendment

Overlapping requirements

Since some overlap exists between film listed on primary source Federal Supply Schedule (FSS) contract and multiple-award FSS contract, it is recommended that General Services Admin. regulations be modified to prohibit use of multiple-award FSS contract where agency needs would be satisfied by purchase from primary source contractor.. 720

Retroactive. (*See* **REGULATIONS, Retroactive**)

Applicability to laws

Requirement

The Administrator of EPA having been informed that regulations promulgated pursuant to the Federal Water Pollution Control Act, Pub. L. 92-500, 33 U.S.C. (1970 ed., Supp II) 1251, are inconsistent with statute and must be revised, is required by sec. 236 of Legislative Reorganization Act of 1970 to report to the appropriate congressional committees as to action taken with respect to the corrective recommendations made by the GAO..... 547

Construction

Agency determination

Acceptance

Under SBA regulation that provided procurements will not be selected pursuant to sec. 8(a) of Small Business Act program—authority to subcontract contracts entered into by SBA with other Govt. agencies—"where small business concerns are dependent in whole or in significant part on recurring Govt. contracts," reliance of SBA on use of sales rather than profit as measuring standard to determine contractor under expiring contract for mortuary services was ineligible for sec. 8(a) subcontract award must be accorded greatest deference in line with *Allen M. Campbell Co.* v. *Lloyd Wood Construction Co.*, 446 F. 2d 261, even though Administration's interpretation of its regulation was merely one of several reasonable alteratives and may not appear as reasonable as some other..... 143

Force and effect of law

Armed Services Procurement Regulation

Bid to furnish services, labor and material for installation of automated fuel handling system accompanied by descriptive literature required by invitation but containing proprietary data restriction was not submitted in accordance with par. 2-404.4 of Armed Services Procurement Reg. (ASPR), which provides that bids prohibiting disclosure of sufficient information to permit competing bidders to know essential nature and type of products offered on those elements of bid which relate to quantity, price, and delivery terms are nonresponsive bids, and regulation implementing 10 U.S.C. 2305 providing for public disclosure of bids has force and effect of law. In addition to nonresponsiveness of bid under standards of ASPR 2-404.4, bid was unacceptable on basis the phrase "or equal" in specification soliciting cable had been misinterpreted..... 24

REGULATIONS—Continued Pc

Implementing procedures

Service Contract Act of 1965

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

Modification

General Accounting Office instigation

Practice of National Labor Relations Board (NLRB) of making promotions effective at beginning of pay period following date "notice" of promotion is received in personnel office, which delays pay increase for 13 days, may not be corrected by changing beginning of workweek to Monday since word "following" as used in NLRB procedure for making promotions effective means "after" and change proposed would further delay increase to 14 days. Also, retroactive corrective regulation would violate rule that personnel action may not be made retroactively effective to increase right of employee to compensation in absence of administrative error. However, to avoid time lag in promotion under policy of making promotion effective at beginning of pay period following "notice" NLRB should provide by regulation that promotion be made effective at beginning of the pay period following approval by the official authorized to approve promotions ..... 4(

Procurement

General Services Administration

The Comptroller General is aware of no basis for objecting to General Services Procurement Reg. 5A–2.408–71(b), which precludes General Services Administration from informing bidder, prior to award, of defects found in bid samples submitted 8:

Retroactive

Administrative policy revision

Under well established rule that substantive statutory regulations have effect of law and cannot be waived, Commodity Credit Corp. lacks authority to adopt proposed amendment to regulations promulgated under National Wool Act to extent that would permit retroactive waiver of regulatory requirement that wool price support payments be based on actual net sales proceeds. However, in view of broad administrative discretion afforded by sec. 706 of act in formulating program terms and conditions, there is no objection to prospective adoption and application of provision for varying actual net sales proceeds requirement under limited and clearly defined circumstances and subject to determination that provision is consistent with purposes of act ..... 3(

RELEASES

Requirement

Avoidance of future claims

Past or present GSA Federal Protective Service members who have presented no evidence to support their claims for preliminary and postliminary duties on basis of *Eugie L. Baylor et al.* v. *United States*, 198 Ct. Cl. 331, may only be allowed uniform changing time, and then

RELEASES—Continued Page
Requirement—Continued
Avoidance of future claims—Continued
only upon submission of release of any claim arising out of performance of additional preliminary and postliminary duties commencing from point in time 10 years prior to date upon which their claims were received in Transportation and Claims Div. of U.S. GAO, even though use of releases generally is not favored. However, use of releases is warranted to insure that claimants present their claims in full at one time and that they do not later claim additional amounts. Modified by 54 Comp. Gen. 11 ---------- 489

REPORTS
Administrative
Contract protest
Basis of report doubtful
While protester has not met burden of proving by clear and convincing evidence that sole-source award made for multipurpose simulators was not justified because multiple single purpose simulators could satisfy Navy's requirement, doubt has been cast on two or three main reasons administratively advanced to support multipurpose requirement, and, therefore, GAO recommends that Navy's needs be thoroughly reexamined to determine if multipurpose simulator is sole type that will satisfy Govt.'s needs ---------- 478

RETIREMENT
Civilian
Annuities
Secret Service personnel
Since under 18 U.S.C. 3056, Secret Service in addition to protecting President has numerous criminal investigation functions, security officers and specialists may count time spent in activities related to Presidential protection, as well as time spent in directly protecting President on temporary or intermittent assignments, toward accumulation of requisite 10 years prescribed by sec. 4-522 of title 4, D.C. Code, for entitlement to retirement annuities under Policemen and Firemen's Retirement and Disability Act, even though authority to transfer deposits from Civil Service Retirement and Disability Fund to general revenues of D.C. specifies full-time agents protecting President. Approval of future eligibility revisions to participate in D.C. Police Retirement Plan is responsibility, pursuant to sec. 4-535, of D.C. Commissioner, and should additional transfers affect integrity of Policemen and Firemen's Retirement and Disability Fund, this might be basis of remedial legislation ---------- 177
Involuntary retirement, etc.
National Guard technicians
National Guard technicians who are separated from civilian positions as result of loss of enlisted military status due to failure on part of National Guard to accept their reenlistment applications, although qualified, are considered to have been involuntarily separated and, therefore, entitled to severance pay provided under 5 U.S.C. 5595, except when it is reasonably established that failure to accept application for reenlistment is for cause based on charges of misconduct, delinquency,

RETIREMENT—Continued Pa
Civilian—Continued
Involuntary retirement, etc.—Continued
National Guard technicians—Continued
or inefficiency on part of enlisted member. Although GAO has no jurisdiction to determine whether qualified technician who is separated from civilian position because application for reenlistment is not accepted is precluded from receiving civil service retirement benefits based on involuntary separation, it is suggested reference in legislative history of National Guard Technicians Act of 1968 to "involuntary retirement" should be narrowly construed 4
Reemployed annuitant
Annuity deduction
Mandatory
Retired annuitant who is member of Technology Assessment Advisory Council is not exempt from requirements of 5 U.S.C. 8344(a) that an amount equal to the annuity allocable to period of employment be deducted from pay of annuitant, because that provision covers all positions not specifically exempted, and Congress has not exempted Council members 6
Limitation on pay of public members of Technology Assessment Advisory Council contained in sec. 7(c)(2), Pub. L. 92-484, operates to limit amount of pay fixed for members and that fixed rate may not vary because Council member will receive less pay by virtue of restriction in 5 U.S.C. 8344(a) 6
Services under contract
Contract to conduct study of labor management activity and processes proposed to be entered into between a retired Federal employee and OEO under the authority granted the Director in Sec. 602 of Economic Opportunity Act of 1964 to obtain services of experts and consultants, either through direct employment or by contract, in accordance with 5 U.S.C. 3109, when construed on basis of whole arrangement existing between the parties and not only from the wording of the contract evidences the former employee will represent OEO in connection with labor-management grievances and arbitration proceedings that will require close working relationship with agency employees, relationship that is incompatible with an independent contractor relationship and should former employee accept employment under such arrangement his pay would have to be reduced in accordance with 5 U.S.C. 8344(a) by the amount of his civil service annuity 5
In view of funds provided in its current appropriation for "special counsel fees," Federal Communications Commission may procure services of a retired Govt. attorney in connection with investigation and proceedings he directed prior to retirement, and amount payable to him is not subject under 5 U.S.C. 8344(a) to set-off by amount of his retirement annuity since retiree's expertise and thorough knowledge in matter will enable him to perform functions described in "Statement of Work" contained in proposed contract independently rather than under an employer-employee relationship ..... 7(

REWARDS (*See* AWARDS) Page
ROADS AND TRAILS (*See* HIGHWAYS)
SALES
Bids
Deposits
Checks lost
Government liability
Bidder's claim for incidental expenses that resulted from loss of unendorsed cashier's check, payable to the order of GSA and submitted as bid deposit incident to sale of real property and which was lost in mail when returned after all bids were rejected is denied because GSA, as pledgee, is only obligated to use ordinary care and its use of certified mail, return receipt requested, conforms with customary practice and pledgees need not insure pledged property ---- 607
Forfeiture. (*See* SALES, Bids, Deposits, Retention, Contract default)
Retention
Contract default
When a limited partnership, the successor in interst to a joint venture, failed to perform obligation undertaken by initial partnership, forfeiture of original deposit is required as the D.C. Redevelopment Land Agency may not waive its right of forfeiture since no consideration passed to Agency to permit waiver of Govt.'s right, and furthermore, delay in seeking forfeiture does not constitute waiver of forfeiture right as delay was requested by successor partnership in order to find means to perform the original obligation ---- 574
Timber. (*See* TIMBER SALES)
SET-OFF
Authority
Common law right
Right to recover erroneous payment made to carrier for a transportation service claimed to have been performed for the U.S., but which in fact had not been performed for U.S., is not subject to time limitation in 49 U.S.C. 66; after review and reconsideration, prior decision affirmed-- 866
SMALL BUSINESS ADMINISTRATION
Authority
Small business concerns
Set-asides appeal authority
When appeal by Administrator, Small Business Adm. (SBA) to the Secretary of Navy, pursuant to 15 U.S.C. 644, of naval installation's disregard of recommendation to restrict solicitation for mess attendant services to small business concerns was upheld, amendment—after due notice to offerors—of unrestricted solicitation to restrict procurement to small business was proper since reversal of initial determination that there was no reasonable expectation that award could be made to small business concern at reasonable price (ASPR 1-706.5(a)(1)), as well as awarding fair proportion of Govt. purchases to small business concern (ASPR 1-702(a)) gave effect to 15 U.S.C. 644. Immaterial to SBA authority to appeal was lack of controversy between contracting officer and small business specialist, and fact that unrestricted solicatation had been released to public ---- 58

SMALL BUSINESS ADMINISTRATION—Continued Pa

Contracts

Awards to small business concerns. (*See* **CONTRACTS, Awards, Small business concerns**)

Subcontracting

Contractor eligibility determination

Under SBA regulation that provided procurements will not be selected pursuant to sec. 8(a) of Small Business Act program—authority to subcontract contracts entered into by SBA with other Govt. agencies—"where small business concerns are dependent in whole or in significant part on recurring Govt. contracts," reliance of SBA on use of sales rather than profit as measuring standard to determine contractor under expiring contract for mortuary services was ineligible for sec. 8(a) subcontract award must be accorded greatest deference in line with *Allen M. Campbell Co.* v. *Lloyd Wood Construction Co.*, 446 F. 2d 261, even though Administration's interpretation of its regulation was merely one of several reasonable alternatives and may not appear as reasonable as some other---------- 1

Legality

Legality of SBA's determination that concerns owned and controlled by socially or economically disadvantaged persons should be beneficiaries of subcontracting of contracts entered into with other Govt. agencies pursuant to sec. 8(a) of Small Business Act was sustained in *Ray Baillie Trash Hauling, Inc.* v. *Kleppe*, in which U.S. Court of Appeals, 5th Circuit, on Apr. 18, 1973, held that sec. 8(a) "clearly constitutes specific authority to dispense with competition," and since determination to initiate subcontracting set-aside is matter within jurisdiction of SBA and contracting agency, GAO is unable to object to proposed award for mortuary services to eligible disadvantaged concern---------- 1

Set-asides

Impact statement to justify set-aside

Contents of impact statement prepared by SBA prior to determining to set-aside subcontracting of mortuary services pursuant to contract entered into under authority of sec. 8(a) of Small Business Act with another Govt. agency are not for release since Comptroller General's Order No. 1.3, Jan. 4, 1968, exempts from disclosure commercial or financial information which is privileged or confidential, exemption that pertains to information which would not customarily be made public by person from whom it was obtained by Government---------- 1

Loans

Participation

With private lending institutions

Interest rates

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

SMALL BUSINESS ADMINISTRATION—Continued Page
Loans—Continued
Participation—Continued
With private lending institutions—Continued
Interest rates—Continued
sec. 7(g), even though SBA on its direct or participation loans is restricted to prescribed 3 percent interest rate. However, at opportune time SBA should seek appropriate legislative revision of language in question 422

SOCIAL SECURITY
Military personnel
Retired
Survivor Benefit Plan
Offset
Formula
Offset of amount from annuity payable under Survivor Benefit Plan, 10 U.S.C. 1447 *et seq.* representing Social Security benefit payable to widow at age 62 and widow with one dependent child must be calculated on basis of wages attributable to military service only, and formula used to calculate wages attributable to military service may not include wages from nonmilitary employment 733
Widower
For purposes of 10 U.S.C. 1451(a) which provides for deduction from survivor annuity under Survivor Benefit Plan of amount equal to Social Security survivor benefit computed on basis of member's military service only, widower's benefit is not subject to same reduction as widow's benefit when there is one dependent child since widower receives no Social Security benefit comparable to "mother's benefit" received by a widow under Social Security laws 758

STATES
Employees
Detail to Federal Government
"Pay" reimbursement
When State or local Govt. employee is detailed to executive agency of Federal Govt. under Intergovernmental Personnel Act, reimbursement under 5 U.S.C. 3374(c) for "pay" of employee may not include fringe benefits, such as retirement, life and health insurance, and costs for negotiating assignment agreement required under 5 CFR 334.105, and for preparing payroll records and assignment report prescribed under 5 CFR 334.106. The word "pay" as used in act has reference according to legislative history to salary of State or local detailee, and there is no basis for ascribing to term a different meaning than used in Federal personnel statutes, that is that term refers to wages, salary, overtime and holiday pay, periodic within-grade advancements and other pay granted directly to Federal employees. Overruled, in part, by 54 Comp. Gen. — (B–157936, Sept. 16, 1974) 355

STATES—Continued Page

Federal aid, grants, etc.

Airport development costs

Facilities use by Government

Payment by civilian agency of landing fees assessed by Missoula County Airport Commission who had received Federal assistance under 1946 Federal Airport Act is not prohibited since sec. 11(4) of act only exempted military aircraft from paying landing and take-off fees, and then only if use of facilities was not substantial. Furthermore, Commission received no Federal assistance under 1970 Airport and Airway Development Act, sec. 18(5) of which replaced sec. 11(4) of 1946 act to exempt all Govt. aircraft from paying for use of airport facilities developed with Federal financial assistance and to authorize, if use was substantial, payment of charge based on reasonable share, proportional to use, of cost of operating and maintaining facilities used 84

Construction projects

Approval creates contractual obligation of U.S.

The EPA's regulations that provide for approval of grant applications combining both design and construction stages of water treatment project are inconsistent with sec. 203(a) of Federal Water Pollution Control Act, Pub. L. 92–500, 33 U.S.C. (1970 ed., Supp II) 1283(a), which prescribes that Govt. is obligated to pay its share of project costs only upon approval of plans, specifications and estimates at each succeeding stage. Therefore, in absence of approval of plans, specifications and estimates for construction stage of water treatment project, there is no grant commitment by U.S. and no charge against a State's allotment 547

Educational institutions

Student assistance programs

The Second Supplemental Appropriations Act, 1973, P.L. 93-50, approved July 1, 1973, although not specifically providing funds for the increase from 54 to 68 percent authorized for sec. 3(b) School Assistance in Federally Affected Areas, is considered by reason of raising limitation on fund availability for sec. 3(b) students during fiscal year 1973, as having appropriated the additional funds, thus bringing the availability for obligation of 1973 funds, notwithstanding prohibition against availability of appropriations beyond current year, and failure to extend availability of impact aid funds, prescribed for 1973 by so-called "Continuing Resolution," P.L. 92–334, approved July 1, 1972, within intent of the Public Works for Water and Power Appropriation Act, 1974, approved Aug. 16, 1973, P.L. 93–97, extending period for obligation of appropriations contained in Second Supplemental Appropriations Act, 1973, for period of 20 days following enactment of 1974 act 129

Percentage limitation

Language in sec. 202(a) of the Federal Water Pollution Control Act as amended by Pub. L. 92–500, 33 U.S.C. (1970 ed., Supp II) 1251, that a grant for treatment works "shall be 75 per centum of the cost of construction thereof" and in conference report that Federal grant shall be "75 per centum of the cost of construction in every case" is mandatory and the EPA, despite assertions that the interests of the Federal Govt., of State in which project is to be placed, and grantee might best be served if Federal grant would be less than 75 percent of project cost, has no authority to make grants in lesser amounts 547

STATES—Continued Page

Fire fighting services

Government reimbursement liability

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

STATION ALLOWANCES

Intergovernmental Personnel Act assignments

Under Intergovernmental Personnel Act of 1970 (5 U.S.C. 3371–3376), Federal employees temporarily assigned to State and local governments and institutions of higher education are not entitled to both per diem and change of station allowances for same assignment, even though 5 U.S.C. 3375 permits payment of both benefits associated with permanent change of station and those normally associated with temporary duty status, since nothing in statute or its legislative history suggests both types of benefits may be paid incident to same assignment. Therefore, on basis of interpretation of similar provisions in Government Employees Training Act, agency should determine, taking cost to Govt. into consideration, whether to authorize permanent change of station allowances or per diem in lieu of subsistence under 5 U.S.C. Ch. 57, subch. I to employees on intergovernmental assignment .. 81

Military personnel

Dependents

Maintained overseas at place other than at member's station

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

Excess living costs outside United States, etc.

Additional to quarters allowances

Members of uniformed services without dependents assigned to two-crew nuclear-powered submarines who are receiving basic allowance for quarters and subsistence while performing temporary additional duty for training and rehabilitation ashore at overseas home port of

STATION ALLOWANCES—Continued Page
Military personnel—Continued
Excess living costs outside United States, etc.—Continued
Additional to quarters allowances—Continued
submarine in excess of 15 days are entitled to housing and cost-of-living allowances authorized under 37 U.S.C. 405 and par. M4301 of Joint Travel Regs. notwithstanding fact submarine is permanent station of members and housing and cost-of-living allowances are payable only at permanent station, since Congress did not intend to preclude payment of such allowances to members actually experiencing higher cost for housing and cost of living 53

STATUTES OF LIMITATION
Claims
Compensation
Status of claim
Claim of reservoir superintendent of Bureau of Reclamation for 2 hours overtime for Sundays and holidays he was required to work during period Aug. 1, 1955, through Jan. 10, 1970, to take weather and reservoir operation records—overtime claimed on basis of not taking advantage of compensatory time arrangement before its discontinuance—is not within purview of 5 U.S.C. 5596 regarding timely appeal to unwarranted personnel action and is for consideration pursuant to 31 U.S.C. 71a, and claim having been received in U.S. GAO on May 23, 1973, only that portion of claim for period prior to May 23, 1963, is barred 26
General Accounting Office
Civil service matters
Overtime claims
Sunday and holiday work performed on regular and recurring basis is not work within purview of compensatory provisions of 5 U.S.C. 5543 and 5 CFR 550.114, and employee who from Aug. 1, 1955, through Jan. 10, 1970, maintained reservoir records, as well as other employees similarly situated, is entitled as provided by 5 CFR 550.114(c) to overtime compensation prescribed by 5 U.S.C. 5542 for period not barred by 31 U.S.C. 71a. Overtime is compensable on basis of actual time worked Sundays and minimum of 2 hours for holidays, payable without interest in absence of statute so providing, and at grade limitation prescribed by 5 U.S.C. 5542(a)(1). Employees who took compensatory time may be paid difference between value of that time and overtime; claims affected by 31 U.S.C. 71a should be forwarded to GAO for recording and return; overtime is payable when compensatory time is not requested 26
Sex discrimination removed
On bases of Supreme Court ruling in *Frontiero* v. *Richardson*, decided May 14, 1973, to effect that differential treatment accorded male and female members of uniformed services with regard to dependents violates Constitution, and P.L. 93–64, enacted July 9, 1973, which deleted from 37 U.S.C. 401 sentence causing differential treatment, regulations relating to two types of family separation allowances authorized in 37 U.S.C. 427 should be changed to authorize family separation allowances to female members for civilian husbands under same conditions as authorized for civilian wives of male members, and for other dependents in same manner as provided for male members with other dependents. Since *Frontiero* case was original construction of constitutionality of 37

STATUTES OF LIMITATION—Continued Page

Claims—Continued

General Accounting Office—Continued

Sex discrimination removed—Continued

U.S.C. 401 and 403, payments of family allowance may be made retroactively by services concerned, subject to Oct. 9, 1940 barring act, and submission of doubtful claims to GAO 148

As *Frontiero* decision, decided May 14, 1973, in which Supreme Court ruled on inequality between male and female military members with regard to quarters allowances, was original construction of constitutionality of 37 U.S.C. 401 and 403, decision is effective as to both active and former members from effective date of statute, subject to barring act of Oct. 9, 1940 (31 U.S.C. 71a). Documentation required from female members to support their claims should be similar to that required of male members under similar circumstances and should be sufficient to reasonably establish member's entitlement to increased allowances. Although claims for 10-year retroactive period may be processed by services concerned, since filing claim in administrative office does not meet requirements of barring act, claims about to expire should be promptly submitted to GAO for recording, after which they will be returned to service for payment, denial or referral back to GAO for adjudication. Doubtful claims should be transmitted to GAO for settlement.. 148

Since act of July 9, 1973, P.L. 93–64, repealed provision of 37 U.S.C. 401 relating to proof of dependency by female member, quarters allowance prescribed in 37 U.S.C. 501(b) for inclusion in computation of male member's unused accrued leave that is payable at time of discharge, may be allowed female members on basis they are entitled to same treatment accorded male members who are not normally required to establish that their wives or children are in fact dependent on them for over one-half their support. Allowance may be paid retroactively by service concerned, subject to Oct. 9, 1940 barring act, but claims about to expire should be transmitted to GAO pursuant to Title 4, GAO 7, as should doubtful claims 148

Under ruling in *Frontiero* v. *United States*, 411 U.S. 677 (1973), that certain portions of 37 U.S.C. 401 and 403, the statutory provisions that govern basic allowance for quarters (BAQ) entitlement, are unconstitutional, Dept. of Defense may not deny BAQ payments to current or former female service members who otherwise qualify for BAQ payments for periods antedating Sept. 13, 1973, issuance date of revised DOD instructions. However, claims which accrued more than 10 years prior to receipt in GAO are barred from consideration by act of Oct. 9, 1940, 31 U.S.C. 71a 539

Transportation

Set-off reclaims

Right to recover erroneous payment made to carrier for a transportation service claimed to have been performed for the U.S., but which in fact had not been performed for U.S., is not subject to time limitation in 49 U.S.C. 66; after review and reconsideration, prior decision affirmed 866

STATUTORY CONSTRUCTION Pa

Conflicting provisions

Rule

Where Foreign Assistance Act of 1973 earmarked $18 million for UNICEF while appropriation act earmarked only $15 million, the lesser figure is controlling, since from legislative histories it appears that in authorizing funding at higher level Congress did not intend to reduce funding of other international organizations and that lesser amount in appropriation act, representing the latest expression of Congress, was intended to constitute both maximum and minimum amount available for UNICEF 69

Legislative history, title, etc.

Examination by General Accounting Office

While language contained in Agriculture-Environmental and Consumer Protection Appropriation Act, 1974, that "loans may be insured, or made to be sold and insured * * * as follows: * * * operating loans, $350,000,000 * * *" would, standing alone, normally be construed as binding upon the Agriculture Dept. and establishing a limit upon amount of loans, legislative history indicates that amount specified was not intended to be a limitation ..... 5(

Legislative intent

Although sec. 8 of act of December 16, 1967, Pub. L. 90–207, 81 Stat. 654, provided for automatic increases in military basic pay based on percentage applied to "regular compensation" which includes subsistence allowance, neither that law nor any other law specifically or impliedly repealed provisions of 37 U.S.C. 402(b) which require that basic allowance for subsistence for enlisted members who are on leave, or are otherwise authorized to mess separately, shall be equal to cost of the ration as determined by Secretary of Defense, and adjustments made in such allowance are proper 8

Foreign Assistance Act of 1973

Effective date

Enactment date *v.* current fiscal year

Provision in Foreign Assistance Act of 1973 which amends earlier statute which permitted specified amount of excess defense items (domestic and foreign generated) to be furnished to foreign countries without charge to MAP funds so as to, in effect, require domestic excess defense items to be charged to MAP funds, is applicable on and after July 1, 1973, even though amendment was enacted subsequent thereto since latter act provides authorizations of funds for current fiscal year, provision contains the words "during each fiscal year," and such effective date appears consistent with legislative history of such provision and manner in which it had been applied in prior fiscal years 97

Night differential hours

Provisions of 5 U.S.C. 5343(f), as added by Pub. L. 92–392, state that shift differential is payable when prevailing rate employee works majority of hours during certain hours of the day. Under that language, employee may be paid differential only when 5 or more hours of his regularly scheduled 8-hour shift occur during the hours specified since phrase "majority of hours" must be given its obvious meaning—a number of whole hours greater than one-half 81

STATUTORY CONSTRUCTION—Continued Page

Strict construction

Defeat purpose of act

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

STORAGE

Household effects

Commercial storage

Truck rental in lieu

Employee who incident to moving his household goods to his first duty station rents van in lieu of storing goods in warehouse may be reimbursed expenses incurred up to maximum amount authorized by GSA Commuted Rate Schedule if he can produce documentation that meets requirements for temporary storage; that is, a receipted copy of a warehouse or other bill for storage costs which shows storage dates, storage location, and actual weight of household goods stored 513

SUBSISTENCE

Per diem

Actual expenses

Indian Arts And Crafts Board members

Although Pub. L. 87–23 provides that members of Indian Arts and Crafts Board are entitled to per diem in lieu of subsistence they may be paid travel expenses on an actual expense basis when circumstances warrant such payment since they are also authorized same travel allowances as those for other employees serving the Federal Govt. without pay and those employees may be paid on an actual expense basis 893

Delays

To avoid travel after duty hours

Two Navy employees remained at temporary duty station on Sunday, after completing assignment on Saturday, in order to perform return travel during regular workweek. Each was charged 8 hours leave and denied per diem in connection with the deferred travel. Navy may comply with arbitration award directing restoration of leave and payment of per diem since per diem costs for less than 2 days are considered reasonable for compliance with travel policy expressed at 5 U.S.C. 6101(b)(2) and Navy is, thus, not precluded under E.O. 11491, sec. 12, by applicable law or regulations, from accepting such award 882

SUBSISTENCE—Continued Page

Per diem—Continued

Headquarters

Prohibition against payment

Employee who incident to being assigned temporary duty as escort to accompnay group of National Education Assn. representatives on tour of Indian reservations stayed in hotel at his headquarters, Sante Fe, N.M., with the group, may not be allowed per diem since pursuant since pursuant to par. 6.6(a) of Standardized Government Travel Regs. (SGTR) payment of per diem is precluded when employee performs temporary duty within confines of his permanent duty station. But, for for hotel stay in Albuquerque, N.M., located 15 miles from employee's residence, determination may be made to allow per diem, subject to direction and caution contained in par. 6.3(a) of SGTR, as no provision of law or SGTR precludes payment of per diem to an employee in an authorized travel status simply because he is assigned at a place which happens to be his home 45

Military personnel

Headquarters

Permanent or temporary

Military officer transferred under permanent change of station orders from overseas to Fort Benjamin Harrison for separation who moved dependents to new duty station where they resided in rented off-base housing until his discharge is not entitled to travel expenses and dislocation allowance for dependents since the Fort at no time was officer's permanent duty station, notwithstanding his transfer was deemed permanent change of station and he was reassigned to serve as executive officer, and member on temporary duty while at the Fort is entitled only to per diem for 90 days he was at the Fort. Whether duty assignment is permanent or temporary is determined by considering orders, and character, purpose, and duration of assignment, and officer's orders evidencing detachment from overseas duty for separation, permanent change of station orders and interim assignment as executive officer did not change character of separation transfer 4

Reserve Officers' Training Corps

Recruiting duties

Cadet in ROTC at University of Detroit who under invitational orders performed recruiting duties at two Detroit high schools—matter of 2 hours and 3 hours duty on separate days—and returned each time to University is not entitled to per diem allowance, having used Govt. transportation and not having incurred any additional subsistence expenses. ROTC cadets have no military status nor are they Govt. employees, and unless utilized as consultants or experts, they are considered persons serving without pay and such person under 5 U.S.C. 5703(c) may be allowed transportation expenses and per diem only while en route and at his place of service or employment away from home or regular place of business. However, since cadet at University of Detroit incurred no additional subsistence expenses incident to recruiting duties he is not considered to have been in travel status within meaning of 5 U.S.C. 5703(c) 14

SUBSISTENCE—Continued Page
Per diem—Continued
Military personnel—Continued
Reserve Officers' Training Corps
Travel allowance
Paragraph M6005 of JTR may not be revised to authorize per diem allowances for members of, and applicants for, Senior Reserve Officers' Training Corps to same extent as prescribed for cadets and midshipmen appointed under 10 U.S.C. 2107, in absence of specific statutory authority for such allowance in 10 U.S.C. 2109 for members not appointed under 10 U.S.C. 2107 957
Members of, and applicants for, Senior Reserve Officers' Training Corps may not be authorized per diem under par. M6001 of JTR by virtue of enlisted status in Reserve component, since requirement that such members enlist in Reserve component is for purpose of securing involuntary active military service as enlisted member if student fails to complete course of instruction or refuses to accept appointment as commissioned officer with its obligated service and these members do not attend drills or perform duty other than that prescribed in 10 U.S.C. 2109, which specifically provides travel allowances incident thereto 957
Temporary duty
Near home of record
Reservists ordered to active duty training at permanent duty stations away from their homes or places from which ordered to active duty for periods of either less or more than 20 weeks who subsequently are required to perform temporary duty assignments away from permanent stations in areas where their homes or places from which they are ordered to active duty are located, are entitled to per diem under applicable provisions of Part E, Ch. 4 of Joint Travel Regs. since members having departed their permanent duty stations are in travel status, and fact that additional expenses are not incurred at temporary duty location does not preclude payment of per diem, as "per diem" is commutation of expenses and is payable without regard to whether expenses it is designed to reimburse are actually incurred 484
"Unit of Choice" recruiter
While initial orders of member of uniformed services assigning him to duty as "Unit of Choice" recruiter away from his permanent station did not specify "temporary duty," subsequent orders continuing the duty did and, therefore, member is considered to have been in temporary duty status for entire period in which he performed as "Unit of Choice" recruiter and to be entitled to travel and per diem allowances for entire period of recruiter duty, and member having been reimbursed at lesser per diem rate than prescribed in par. M4205-1 of Joint Travel Regs. without authority of Secretary concerned as required by par. M4205-7, JTR, is entitled to per diem provided for temporary duty 454
Training duty periods
Entitlement to per diem
Reserve Marine officer detached from duty upon completion of basic training at Quantico and ordered to report for temporary duty on Apr. 15, 1970, at Camp Lejeune for 8 weeks of instruction, then to be attached to designated division at camp, whose orders were amended Apr. 9, 1970,

SUBSISTENCE—Continued Page

Per diem—Continued

Military personnel—Continued

Training duty periods—Continued

Entitlement to per diem—Continued

to change his permanent duty station upon completion of temporary duty from Camp Lejeune to Okinawa were not received by him until Apr. 27, 1970, is entitled to per diem for entire period of temporary duty—Apr. 16 through June 4—since his entitlement to per diem became fixed upon issuance of amendatory order on Apr. 9, 1970, changing his permanent duty station, and since he was in temporary duty status while at Camp Lejeune, it is immaterial that he was not timely notified of amendatory order as he fully complied with basic order, as amended 78

Excess of 20 weeks

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

Temporary duty

At permanent post

Employee who incident to being assigned temporary duty as escort to accompany group of National Education Assn. representatives on tour of Indian reservations stayed in hotel at his headquarters, Sante Fe, N.M., with the group, may not be allowed per diem since pursuant to par. 6.6(a) of Standardized Government Travel Regs. (SGTR) payment of per diem is precluded when employee performs temporary duty within confines of his permanent duty station. But, for hotel stay in Albuquerque, N.M., located 15 miles from employee's residence, determination may be made to allow per diem, subject to direction and caution contained in par. 6.3(a) of SGTR, as no provision of law or SGTR precludes payment of per diem to an employee in an authorized travel status simply because he is assigned at a place which happens to be his home 457

Intergovernmental Personnel Act assignments

Under Intergovernmental Personnel Act of 1970 (5 U.S.C. 3371–3376), Federal employees temporarily assigned to State and local governments and institutions of higher education are not entitled to both per diem and change of station allowances for same assignment, even though 5 U.S.C. 3375 permits payment of both benefits associated with premanent change of station and those normally associated with temporary duty status, since nothing in statute or its legislative history suggests both types of benefits may be paid incident to same assignment. There-

SUBSISTENCE—Continued Page
Per diem—Continued
Temporary duty—Continued
Intergovernmental Personnel Act assignments—Continued
fore, on basis of interpretation of similar provisions in Government Employees Training Act, agency should determine, taking cost to Govt. into consideration, whether to authorize permanent change of station allowances or per diem in lieu of subsistence under 5 U.S.C. Ch. 57, subch. I to employees on intergovernmental assignment 81
Military personnel. (*See* SUBSISTENCE, Per diem, Military personnel, Temporary duty)
New employee prior to reporting to first duty station
Resident of Syracuse, N.Y., who at time of hire by Internal Revenue Service was assigned 30 days temporary training duty in Philadelphia, Pa., thus preventing him from establishing residence at designated official station at Newburgh, N.Y., is entitled incident to his voluntary return to Syracuse over 4 weekends to have Syracuse considered as residence for purpose of sec. 6.5c., OMB Cir. A–7, and to be reimbursed in amount that will not exceed per diem and other expenses that would have been allowed had he remained at temporary duty station, but inasmuch as employee was not in subsistence status on weekends, 8 nights involved should not be included in average lodging cost comparison 313
SUBSISTENCE ALLOWANCE
Military personnel
Increase
Public Law 90–207
Although sec. 8 of act of December 16, 1967, Pub. L. 90–207, 81 Stat. 654, provided for automatic increases in military basic pay based on percentage applied to "regular compensation" which includes subsistence allowance, neither that law nor any other law specifically or impliedly repealed provisions of 37 U.S.C. 402(b) which require that basic allowance for subsistence for enlisted members who are on leave, or are otherwise authorized to mess separately, shall be equal to cost of the ration as determined by Secretary of Defense, and adjustments made in such allowance are proper 853
SURPLUS PROPERTY (*See* PROPERTY, Public, Surplus)
TAXES
Guam taxation of Federal Government
Constitutionality
Payment for overtime services provided by Guam customs and quarantine officers at Andersen AFB, Guam, on 24-hour, 7-days-a-week rotating basis to accommodate incoming foreign traffic, plus overhead surcharge, which is claimed by Territory of Guam, pursuant to P.L. 9–47 that imposes basic charge equivalent to hourly wage rate of officer performing service, plus administrative surcharge of 25 percent, on "all air and sea carriers and other persons" may be paid, irrespective of laws and regulations enforced by officers as Federal agencies are subject as other carriers to charges imposed for overtime Federal customs inspections under 19 U.S.C. 267, to extent that their operations are subject to customs inspections generally. However, determination should be made that surcharge is reasonable and does not constitute an unconstitutional tax upon U.S. Government 173

TAXES—Continued Page

State

Government immunity

Rule

Reimbursement by GSA to St. Louis Community Fire Protection District (CFPD) and other separate district and local fire departments for supplemental expenses incurred due to equipment losses and payroll costs for personnel called to duty to respond to fire at Military Personnel Records Center is not authorized since Center is located within area covered by St. Louis CFPD, which as political subdivision under Missouri law has statutory duty to render fire fighting services without cost, duty that extends to property of U.S. in view of Govt.'s sovereign immunity from taxation. Although Record Center lay outside boundaries of surrounding district and local fire departments, and GSA has authority to contract for their services, their obligation to respond to Center fire arose out of mutual agreements with CFPD ..... 41(

Tax clause in contract effect

Room rental transient tax included pursuant to sec. 84-33 of Montgomery Co. (Maryland) Code in invoices for housing and subsistence furnished under contract to outpatient participants in NIH Leukemia Program may not be certified for payment, even though Govt. is not exempt from tax on theory of sovereign immunity since relationship between Govt. and transients created under contract is insufficient to effectuate shift in burden of tax directly to Govt. in view of fact all applicable Federal, State, and local taxes and duties were included in contract price. However, future contracts for sleeping accommodations in Montgomery Co. may provide for Govt. to pay transient tax applicable to individuals furnished housing and subsistence as beneficiaries 6

TELEPHONES

Army barracks

Public and private use

Prohibition in 31 U.S.C. 679 that appropriated monies shall not be expended for telephone services in private residence or apartment, except for long-distance calls on public business, reflects general policy against furnishing telephone service at Govt. expense for personal benefit of employees and is not intended to apply to Govt-owned facility that is not set aside for exclusive personal use and where sufficient official use for telephone exists, such as in Army barracks. Therefore, local-service telephone may be installed and operated at Govt. expense in Army barracks, notwithstanding availability of telephones for personal use without means of apportioning costs between official and personal calls since telephone availability will improve soldier morale, and operation and maintenance appropriation, Army, is available for welfare and recreation of military personnel 19

TIMBER SALES Page

Contracts

Surveys

Cost recovery

Proposal that Forest Service timber sale contracts require timber sale purchasers to make property line surveys to establish boundaries of sale, with cost thereof to be recovered through reduced sales prices, which costs heretofore have been paid from appropriated funds, would, in effect, improperly augment appropriated funds by use of timber sale receipts and would be contrary to intent of 16 U.S.C. 500 which provides for payment to States of 25 percent of national forest receipts derived from sales of timber within State boundaries 872

TIME

Standard advanced to daylight saving

Compensation effect

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

TORTS

Claims under Federal Tort Claims Act

Private property damage, etc.

Scope of employment

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

TRAILER ALLOWANCES Page

Military personnel

"Cents a mile" rate

Mileage computation

Where member of uniformed services is entitled under provisions of 37 U.S.C. 409 to movement of housetrailer between two points not connected by highway the distance for purpose of "cents a mile" provision of sec. 709 may be computed by means other than highway mileage provided in par. M10007, Joint Travel Regs. Commercial shipment of trailer may be authorized, payment being limited to 74 cents per mile for official distance computed without reference to highway mileage 760

TRANSPORTATION

Additional costs

Parking penalty

Disallowed

Disallowance of claims presented by motor carrier for improper packing charges under Rule 687 of National Motor Freight Classification relating to shipments known to be classified materials transported under control of Armed Forces Courier Service is sustained where only evidence relating to manner of packing is inference drawn from fact that GBL contained no description of packing and where motor carrier is estopped from asserting that shipments were improperly packed becausc it had knowledge of the security packing 784

Automobiles

Ferry transportation

Constitutes transoceanic travel

Since there is no highway system in Goose Bay area, Canada, over which member could drive his automobile to new U.S. duty station without using long distance ferries—Goose AFB to Lewisporte, Newfoundland, overland to Port-aux-Basques, then by ferry to Sydney, Nova Scotia—pars. M4159–3 and M7003–3c of JTR, pursuant to 37 U.S.C. 404 and 406, may be changed to treat long distance ferry transportation as transoceanic travel, thus necessitating amending distance tables used in computing mileage between AFB and bases on island portion of Newfoundland and continental U.S. duty stations to eliminate mileage over ferry routes. Furthermore, under 10 U.S.C. 2634 (a), Canadian Pacific Railroad ferries may be used in absence of availability of American vessels, and if member must arrange for vehicle transportation, travel orders should authorize arrangement and his reimbursement voucher attest to nonavailability of U.S.-registered vessels ... 131

TRANSPORTATION—Continued Page
Automobiles—Continued
Military personnel—Continued
Long-term leased vehicles
No authority for shipment
Member with motor vehicle under long-term lease is not entitled to shipment of leased vehicle overseas at Govt. expense since 10 U.S.C. 2634 and para. M11000-1, JTR, provide vehicle must be owned by member, and long-term lease is bailment agreement in which lessee is given possession, but lessor retains ownership 924
Bills of lading
Commercial converted to Government
Failure to convert
Right to recover erroneous payment made to carrier for a transportation service claimed to have been performed for the U.S., but which in fact had not been performed for U.S., is not subject to time limitation in 49 U.S.C. 66; after review and reconsideration, prior decision affirmed 866
Description
Presumption of correctness
Presumption of correctness of bill of lading description of article is rebutted by administrative report supported by carrier's descriptive inventory lists 868
Notations
Evidential value
Where carrier's section 22 tender for special vehicle services requires service to be ordered by shipper and that shipping documents be marked to so indicate and the administrative office advises the services were not ordered, carrier is not entitled to special charges notwithstanding shipping documents were properly marked. Modified by 53 Comp. Gen. 868 603
Exclusive use service
When a shipper orders special service provided in carrier's section 22 tender, issued pursuant to 49 U.S.C. 22 and 317(b), which covers electronic equipment and instruments, and annotations on shipping document are in compliance with provisions of tender and are not disputed by administrative report, constructive weight of space of each vehicle ordered or used is proper basis for computing carrier's charges. Furthermore, under tender should each vehicle be loaded to the full visible capacity of vehicle, even if shipper failed to annotate Govt. Bill of Lading or did not intend to request special service, carrier would be entitled to charges based on constructive weight 628

TRANSPORTATION—Continued Page

Boats

Components and accessories

Definition of term "household goods" contained in par. M8000-2 of JTR, promulgated under authority in 37 U.S.C. 406 (b), may not be revised to enlarge term to include boat components, such as outboard motors, seat cushions, life jackets, and other boat gear, as acceptable items for shipment as household goods. Notwithstanding lack of preciseness of term "household goods," term in its ordinary and usual usage is generally understood as referring to furniture and furnishings or equipment—articles of permanent nature—used in and about place of residence for comfort and accommodation of members of family, and term is not viewed as encompassing such items as boats, airplanes, and housetrailers 159

Carriers

Common. (*See* **CARRIERS, Common**)

Dependents

Military personnel

Advance travel of dependents

Amendment or revocation of orders

Officer of uniformed services whose dependents traveled to selected retirement home prior to issuance of retirement orders that were canceled at his request prior to effective date, and then traveled to officer's new permanent duty station located in corporate limits of his old station is entitled to monetary allowance for both moves. When orders that direct permanent change of station, including orders directing release from active duty or retirement, are canceled or modified before their effective date for convenience of Govt. and/or in circumstances over which member has no control, benefits prescribed by 37 U.S.C. 406a accrue, and fact the officer withdrew retirement request is immaterial since Govt. was under no obligation to accept request and apparently did so primarily for convenience of Govt 55

Divorce, etc., prior to employee's eligibility

No objection is raised to proposed amendment to Vol. 1 of JTR which would permit return travel to U.S. of dependents of members of uniformed services stationed overseas who traveled overseas as dependents but ceased to be dependents because of divorce or annulment of marriage prior to date member became eligible for their return travel. Such amendment is similar to that concurred in for Foreign Affairs Manual in 52 Comp. Gen. 246 960

Change of station status

Member's separation

Military officer transferred under permanent change of station orders from overseas to Fort Benjamin Harrison for separation who moved dependents to new duty station where they resided in rented off-base housing until his discharge is not entitled to travel expenses and dislocation allowance for dependents since the Fort at no time was officer's permanent duty station, notwithstanding his transfer was deemed permanent change of station and he was reassigned to serve as executive

TRANSPORTATION—Continued Page
Dependents—Continued
Military personnel—Continued
Change of station status—Continued
Member's separation—Continued
officer, and member on temporary duty while at the Fort is entitled only to per diem for 90 days he was at the Fort. Whether duty assignment is permanent or temporary is determined by considering orders, and character, purpose, and duration of assignment, and officer's orders evidencing detachment from overseas duty for separation, permanent change of station orders and interim assignment as executive officer did not change character of separation transfer 44
Dependents delayed travel
Member transferred twice
Since dependents of member of uniformed services did not exercise right to Govt. transporation when member was transferred from his old permanent duty station in Hawaii to new permanent duty station in Tex., upon member's permissive transfer to subsequent permanent station in Calif., although par. M7055, Joint Travel Regs. (JTR), is not for application, dependents may be afforded transportation at Govt. expense from Hawaii to Calif. for distance that does not exceed distance from Hawaii to Tex. However, member is not entitled, pursuant to par. M7000–13, JTR, to Govt. transportation for dependent who subsequent to permanent change of station from Hawaii to Tex. traveled to Fla. to attend school and for health and welfare reasons, in absence of indication that travel was for purpose of establishing residence not of temporary nature 667
Dislocation allowance
Marital status disruption
Where at time of member's permanent change of station, divorce action against member's wife was pending in the court, and child was in legal custody of wife under temporary court order, member is entitled to dislocation allowance pursuant to 37 U.S.C. 407, as "member without dependents" as defined by par. M9001–2, Vol. 1, Joint Travel Regs. (JTR), since he would not be entitled to travel expenses of his dependents for purpose of changing their place of residence under par. M7000–12, Vol. 1, JTR (now item 13), and he was not assigned Govt. quarters 787
Husband and wife both members of the uniformed services
Fact that spouse of Army major who was transferred effective June 12, 1972, from Palo Alto to Fort Sill is an Army nurse does not deprive major to entitlement for dependent travel allowance since par. M7000 of JTR which prohibits reimbursement for travel of dependent who is member of uniformed services on active duty on effective date of spouse's station change, and for travel of dependents receiving any other type of travel allowance from Govt. in their own right, is not for application as major's wife traveled from Palo Alto to Fort Sill during period that she was in an excess leave status between graduating from Stanford Univ. on June 11, 1972, and reporting to Fort Sam Houston on July 12, 1972, to

TRANSPORTATION—Continued Page
Dependents—Continued
Military personnel—Continued
Husband and wife both members of the uniformed services—Con.
attend Army Nurse Officer Basic Course, period during which she was not entitled in her own right to basic pay and allowances prescribed by 37 U.S.C. 204 for active duty 289
Release from active duty
Payment basis
Entitlement to expenses incurred for travel of Navy member's wife who accompanied him via commercial air from his overseas station in Hawaii, where his orders made no provision for her travel and authorized him to proceed to Brooklyn, N.Y. Naval Station for separation to his home of record, Niagara Falls, N.Y., depends on whether her presence overseas was command sponsored. If so, reimbursement may be made for cost of Govt. air from Hickam AFB to Travis AFB, the initially contemplated debarkation point, and for mileage from Hawaii residence to Hickam AFB, and from Travis AFB to home of record. If not command sponsored, there is no entitlement to overseas transportation at Govt. expense and transportation within continental U.S. is limited in view of par. M7003-3b(3), JTR, to monetary allowance for distance between New York, N.Y., aerial port of debarkation, and Niagara Falls 105
Overseas employees
Advance travel of dependents
Divorce, etc., prior to employee's eligibility
While principles in 52 Comp. Gen. 246, wherein the Comptroller General had no objection to proposed amendment to Foreign Service Travel Regs. permitting Govt. payment of return travel of employee's dependents, who traveled at Govt. expense to overseas posts of duty, although they were no longer dependents as of date employee was eligible for return travel because of divorce or annulment, would apply to dependents of all overseas employees, Vol. 2 of Joint Travel Regs. may not be amended to provide for such travel for former spouse since statutory regulations in the Federal Travel Regs. do not provide for such payment 1051
Household effects
Damage, loss, etc. (*See* **PROPERTY, Private, Damage, loss, etc.**)
Delivery
Attempted first delivery
Supplemental billing for alleged attempted first delivery of employee's household effects, where alleged advance notice of consignee's inability to accept delivery as originally scheduled is not rebutted by record that does not suggest telephonic cancellation of original delivery date was inadequate or not in compliance with any tariff provision relating to formal requisites of notice, may not be certified for payment. Furthermore, hold-up delivery message left with employee of transfer and storage concern presenting supplemental billing is imputed to concern, and also no Govt. agent was at fault; no notice of attempted delivery, as required by bill of lading, was left at designated place of delivery; no inquiry was made as to when redelivery should be made, and no request was made for further instructions 127

TRANSPORTATION—Continued Page

Household effects—Continued

Limitation on definition of term

Definition of term "household goods" contained in par. M8000-2 of JTR, promulgated under authority in 37 U.S.C. 406(b), may not be revised to enlarge term to include boat components, such as outboard motors, seat cushions, life jackets, and other boat gear, as acceptable items for shipment as household goods. Notwithstanding lack of preciseness of term "household goods," term in its ordinary and usual usage is generally understood as referring to furniture and furnishings or equipment—articles of permanent nature—used in and about place of residence for comfort and accommodation of members of family, and term is not viewed as encompassing such items as boats, airplanes, and house-trailers 159

Military personnel

Trailer allowances. (*See* **TRAILER ALLOWANCES, Military personnel**)

Military personnel

Release from active duty

Rights

Members of uniformed services who, on termination of active service otherwise qualify for travel and transportation to home of record or place of entry on active duty under 37 U.S.C. 404(a) and 406(a), are to be afforded such entitlements regardless of denial of travel and transportation to home of selection under 37 U.S.C. 404(c) and 406(g), in absence of statutory requirement that denial of travel and transportation to home of record or place of entry on active duty be made in such circumstances 963

Rates

Classification

Packing requirements

Disallowance of claims presented by motor carrier for improper packing charges under Rule 687 of National Motor Freight Classification relating to shipments known to be classified materials transported under control of Armed Forces Courier Service is sustained where only evidence relating to manner of packing is inference drawn from fact that GBL contained no description of packing and where motor carrier is estopped from asserting that shipments were improperly packed because it had knowledge of the security packing 784

Exclusive use of vehicle

Constructive weight basis

Constructive weight of vehicles used is proper basis for charges under carrier's tender when vehicles are fully loaded, even though special service is not ordered. 53 Comp. Gen. 603, modified in part 868

Released value quotations

Acceptance

Lower rates in carrier's sec. 22 rate tender covering office equipment apply, and valuation charges provided in governing tender are not assessable where shipments moved on commercial bills of lading marked for conversion to Govt. bills of lading (GBL), since shipments are deemed released to value not exceeding 60 cents per pound per article under terms of governing tender and Condition 5 of GBL selects lower rates in absence of tender requirement for declaration of value 868

TRANSPORTATION—Continued Page

Rates—Continued

Section 22 quotations

Effective date for bid evaluation purposes

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

Exclusive vehicle use shipments

Where carrier's section 22 tender for special vehicle services requires service to be ordered by shipper and that shipping documents be marked to so indicate and the administrative office advises the services were not ordered, carrier is not entitled to special charges notwithstanding shipping documents were properly marked. Modified by 53 Comp. Gen. 868..... 603

When a shipper orders special service provided in carrier's section 22 tender, issued pursuant to 49 U.S.C. 22 and 317(b), which covers electronic equipment and instruments, and annotations on shipping document are in compliance with provisions of tender and are not disputed by administrative report, constructive weight of space of each vehicle ordered or used is proper basis for computing carrier's charges. Furthermore, under tender should each vehicle be loaded to the full visible capacity of vehicle, even if shipper failed to annotate Govt. Bill of Lading or did not intend to request special service, carrier would be entitled to charges based on constructive weight..... 628

"Freight, all kinds"

Deduction by Govt. of full value of goods damaged in transit, and subsequent denial of claim for amount deducted by GAO, is sustained where contract of carriage is complete and unequivocal on its face as to the contracted rate, and where contracted rate was the only one available to the Government..... 747

Tender applicable

Shipments due to military activities closing

Carrier's section 22 tender covering office furniture, files and equipment is not applicable on shipments of BOQ furnishings and equipment, general commodities and household goods in connection with closing of Floyd Bennett Air Field, but rather for application is tender that covers household goods since shipments of establishment moving from one location to another meets the ICC definition of household goods..... 603

Utilization

Contention that preferential "section 22" rates tendered by carriers regulated by ICC to Govt. cannot be used in computing transportation costs for evaluation of f.o.b. origin bids to furnish field desks, since clause in ASPR 7-103.25 was not included in IFB, is not valid because wording

TRANSPORTATION—Continued Page
Rates—Continued
Section 22 quotations—Continued
Utilization—Continued
of clause appears verbatim in invitation. Moreover, ASPR 19-217.1(a), which protestant views as requiring inclusion of clause, only requires inclusion if contractor may be required by Govt. to ship desks under prepaid commercial bills of lading 443
Remains
Death of employee other than on temporary duty
Cost of transporting remains of deceased Forest Service employee from Juneau, Alaska, where employee had completed agreed tour of duty, to Missoula, Mont., may not be reimbursed to decedent's widow in absence of specific authority for Govt. to assume expense. Since deceased employee had completed tour of duty 5 U.S.C. 5742(b)(1), authorizing Govt. to defray expense of preparing and transporting remains of civilian employees who die while in travel status, has no application, and furthermore, authority in secs. 1 or 7 of Administrative Expenses Act of 1946, which prescribes travel and transportation expenses in connection with transfer to and from duty station outside continental limits of U.S., and sec. 1.11d of OMB Cir. No. A-56, which provides for return travel and transportation of employees serving under agreements has application only to living individuals 120
Vessels
Foreign
American vessel availability
Automobiles, household effects, etc.
Since there is no highway system in Goose Bay area, Canada, over which member could drive his automobile to new U.S. duty station without using long distance ferries—Goose AFB to Lewisporte, Newfoundland, overland to Port-aux-Basques, then by ferry to Sydney, Nova Scotia—pars. M4159-3 and M7003-3c of JTR, pursuant to 37 U.S.C. 404 and 406, may be changed to treat long distance ferry transportation as transoceanic travel, thus necessitating amending distance tables used in computing mileage between AFB and bases on island portion of Newfoundland and continental U.S. duty stations to eliminate mileage over ferry routes. Furthermore, under 10 U.S.C. 2634(a), Canadian Pacific Railroad ferries may be used in absence of availability of American vessels, and if member must arrange for vehicle transportation, travel orders should authorize arrangement and his reimbursement voucher attest to nonavailability of U.S.-registered vessels 131

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

TRAVEL ALLOWANCE—Continued Page

Military personnel—Continued

Husband and wife both members of the uniformed service—Continued

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

Reserve Officers' Training Corps

Per diem allowance

Paragraph M6005 of JTR may not be revised to authorize per diem allowances for members of, and applicants for, Senior Reserve Officers' Training Corps to same extent as prescribed for cadets and midshipmen appointed under 10 U.S.C. 2107, in absence of specific statutory authority for such allowance in 10 U.S.C. 2109 for members not appointed under 10 U.S.C. 2107 957

Members of, and applicants for, Senior Reserve Officers' Training Corps may not be authorized per diem under par. M6001 of JTR by virtue of enlisted status in Reserve component, since requirement that such members enlist in Reserve component is for purpose of securing involuntary active military service as enlisted member if student fails to complete course of instruction or refuses to accept appointment as commissioned officer with its obligated service and these members do not attend drills or perform duty other than that prescribed in 10 U.S.C. 2109, which specifically provides travel allowances incident thereto 957

Subsistence

Per diem. (*See* **SUBSISTENCE, Per diem, Military personnel**)

TRAVEL EXPENSES

Actual expenses

Reimbursement basis

Criteria

Administrative determination that criteria established by sec. 7 of Standardized Government Travel Regs. and par. C8151–8154 of Joint Travel Regs. providing for payment of 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 basis of actual expenses is a determination that may not be set aside in absence of evidence it was not made in accordance with governing law and regulations, or that it was arbitrary or capricious. Authorization for payment of actual expenses does not create entitlement to expenses since approval was outside scope of official's authority and those dealing with Govt. personnel are deemed to have notice of limitations on authority 11

WOC employees

Although Pub. L. 87–23 provides that members of Indian Arts and Crafts Board are entitled to per diem in lieu of subsistence they may be paid travel expense on an actual expense basis when circumstances warrant such payment since they are also authorized same travel allowances as those for other employees serving the Federal Govt. without pay and those employees may be paid on an actual expense basis 893

TRAVEL EXPENSES—Continued Page

Circuitous routes

Personal convenience

Leave

Employee authorized to return from a temporary duty (TDY) assignment via circuitous route for purpose of taking annual leave who while on leave is notified to return to TDY point for additional duty before returning to official station is entitled to reimbursement for travel expenses and per diem relating to circuitous return travel completed prior to notification of additional duty, but travel expenses should be reduced by excess costs that would have been incurred incident to proposed circuitous return. Furthermore, other costs such as mileage and parking fees related to the indirect travel for leave purposes are for disallowance 556

First duty station

Training duty prior to reporting

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

Military personnel

Candidates for military academies

Rejected for admission

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

Dependents

Transportation. (*See* **TRANSPORTATION, Dependents, Military personnel**)

Release from active duty

Expenses, generally

Military officer transferred under permanent change of station orders from overseas to Fort Benjamin Harrison for separation who moved dependents to new duty station where they resided in rented off-base housing until his discharge is not entitled to travel expenses and dislocation allowance for dependents since the Fort at no time was officer's permanent duty station, notwithstanding his transfer was deemed perma-

TRAVEL EXPENSES—Continued Page

Military personnel—Continued

Release from active duty—Continued

Expenses, generally—Continued

nent change of station and he was reassigned to serve as executive officer, and member on temporary duty while at the Fort is entitled only to per diem for 90 days he was at the Fort. Whether duty assignment is permanent or temporary is determined by considering orders, and character, purpose, and duration of assignment, and officer's orders evidencing detachment from overseas duty for separation, permanent change of station orders and interim assignment as executive officer did not change character of separation transfer 44

Normal v. approved debarkation point

Navy member who incident to his separation reported to Hickman AFB, Honolulu, Hawaii, and is authorized, at his request, to travel to Brooklyn, N.Y. Naval Station, located near his home of record, Niagara Falls, N.Y., for separation in lieu of Treasure Island, and who used commercial air although directed to travel by Govt. aircraft, if available, is considered to have terminated his overseas travel at Travis AFB, debarkation point for Treasure Island, and to be entitled to mileage allowance pursuant to M4157(1)(c) and M4150–1, JTR, for distance between Travis AFB and Treasure Island and then to his home of record, but not to reimbursement for his overseas travel since he was directed to use Govt. transportation, which was available at time he traveled 105

Rights

Members of uniformed services who, on termination of active service otherwise qualify for travel and transportation to home of record or place of entry on active duty under 37 U.S.C. 404(a) and 406(a), are to be afforded such entitlements regardless of denial of travel and transportation to home of selection under 37 U.S.C. 404(c) and 406(g), in absence of statutory requirement that denial of travel and transportation to home of record or place of entry on active duty be made in such circumstances 963

Official business

Compliance with court orders

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

Presidential appointees

National Credit Union Board

National Credit Union Board Presidential appointee whose appointment is subject to Senate confirmation may not be reimbursed expenses incurred to travel to Washington to appear before Senate Banking

TRAVEL EXPENSES—Continued Page
Official business—Continued
Presidential appointees—Continued
National Credit Union Board—Continued
Committee in connection with his confirmation unless Administrator of National Credit Union Admin. determines appointee performed official business such as conferences with officials of Administration that were of substantial benefit to Administration and Administrator approves travel performed by nominee---- 424
Overseas employees
Home leave
Time at or near residence
Substantial amount requirement
Civilian employee on home leave as provided by 5 U.S.C. 5728, who spent 16 out of total of 61 days leave in U.S., his country of actual residence, has met requirement in par. C4152–2d of Joint Travel Regs. and par. 2–1.5h(2)(c) of Federal Travel Regs. that substantial amount of home leave be spent in U.S. since it is apparent employee did not intend that his visit to U.S. be a mere stopover and, therefore, employee is entitled to reimbursement in connection with his Renewal Agreement Travel---- 468
Reemployment after separation
Liability for expenses
Phrase "in the same manner" contained in 5 U.S.C. 5724a(c), which authorizes payment of travel, transportation, and relocation expenses to former employee separated by reduction in force or transfer of function and reemployed within 1 year, as though employee had been transferred in interest of Govt. without break in service to reemployment location from separation location, when construed in conjunction with 5 U.S.C. 5724(e), which provides similar expenses for employees transferred from one agency to another because of reduction in force or transfer of function, permits payment of costs in whole or in part by gaining or losing agency, as agreed upon by agency heads. Therefore, whether relocation benefits are prescribed under sec. 5724a(c) or sec. 5724(e), they may be paid by gaining or losing agency within 1-year period. 51 Comp. Gen. 14, 52 *id.* 345, and B–172594, June 8, 1972, overruled---- 99
Temporary duty
Additional duty
Return to duty from leave point
Employee authorized to return from a temporary duty (TDY) assignment via circuitous route for purpose of taking annual leave who while on leave is notified to return to TDY point for additional duty before returning to official station is entitled to reimbursement for travel expenses and per diem relating to circuitous return travel completed prior to notification of additional duty, but travel expenses should be reduced by excess costs that would have been incurred incident to proposed circuitous return. Furthermore, other costs such as mileage and parking fees related to the indirect travel for leave purposes are for disallowance---- 556

TRAVEL EXPENSES—Continued Page

Temporary duty—Continued

New employee prior to reporting to first duty station

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

Transfers

Separation and reappointment

Liability for expenses

Phrase "in the same manner" contained in 5 U.S.C. 5724a(c), which authorizes payment of travel, transportation, and relocation expenses to former employee separated by reduction in force or transfer of function and reemployed within 1 year, as though employee had been transferred in interest of Govt. without break in service to reemployment location from separation location, when construed in conjunction with 5 U.S.C. 5724(e), which provides similar expenses for employees transferred from one agency to another because of reduction in force or transfer of function, permits payment of costs in whole or in part by gaining or losing agency, as agreed upon by agency heads. Therefore, whether relocation benefits are prescribed under sec. 5724a(c) or sec. 5724(e), they may be paid by gaining or losing agency within 1-year period. 51 Comp. Gen. 14, 52 *id.* 345, and B–172594, June 8, 1972, overruled 99

WOC employees

Reimbursement basis for expenses

Local duty

Cadet in ROTC at University of Detroit who under invitational orders performed recruiting duties at two Detroit high schools—matter of 2 hours and 3 hours duty on separate days—and returned each time to University is not entitled to per diem allowance, having used Govt. transportation and not having incurred any additional subsistence expenses. ROTC cadets have no military status nor are they Govt. employees, and unless utilized as consultants or experts, they are considered persons serving without pay and such person under 5 U.S.C. 5703(c) may be allowed transportation expenses and per diem only while en route and at his place of service or employment away from home or regular place of business. However, since cadet at University of Detroit incurred no additional subsistence expenses incident to recruiting duties he is not considered to have been in travel status within meaning of 5 U.S.C. 5703(c) 145

TRAVEL EXPENSES—Continued Page
WOC employees—Continued
Use of section 5, Administrative Expenses Act of 1946, authority
Although Pub. L. 87–23 provides that members of Indian Arts and Crafts Board are entitled to per diem in lieu of subsistence they may be paid travel expenses on an actual expense basis when circumstances warrant such payment since they are also authorized same travel allowances as those for other employees serving the Federal Govt. without pay and those employees may be paid on an actual expense basis ---- 893

TRUST FUNDS (*See* FUNDS, Trust)

UNEMPLOYMENT
Compensation
Disaster victims
Diaster unemployment assistance *v.* unemployment compensation
Department of Labor's interpretation of section 240 of Disaster Relief Act of 1970 to effect that it authorizes benefits to eligible disaster victims covered under State regular unemployment compensation program for period in addition to State program cannot be supported, since the paramount purpose of the section was to provide the equivalent of State unemployment compensation benefits to victims who were not eligible for State unemployment compensation ---- 875

UNIFORMS
Military personnel
Officers
Uniform allowance
Requirements
Plaintiff in *Reale* v. *United States*, Ct. Cl. No. 334–65, July 16, 1969, who has accepted payment pursuant to court's judgment and record correction, is not entitled to additional amount for uniform allowance since he was not required to wear uniform (37 U.S.C. 417(c)). Also, under 28 U.S.C. 2517(b) and 2519 payment of judgment is full discharge to U.S. and further claim is barred, and under 10 U.S.C. 1552(c) acceptance of settlement pursuant to record correction "fully satisfies the claim concerned" ---- 813

UNITED NATIONS CHILDREN'S FUND
Appropriations. (*See* APPROPRIATIONS, United Nations Children's Fund (UNICEF))

VEHICLES
Transportation. (*See* TRANSPORTATION, Automobiles)

VESSELS
Transportation. (*See* TRANSPORTATION, Vessels)

VETERANS Page

Compensation payments

Retired pay

Dependency and indemnity compensation

Where surviving spouse is eligible to receive survivor annuity under 10 U.S.C. 1448(d), such language contained therein which relates to eligibility of spouse to receive DIC payments from Veterans Admin., when considered in conjunction with other portions of subsec. (d), must be construed only as prohibiting payment of SBP annuity where amount of VA benefits under 38 U.S.C. 411(a) exceeds maximum annuity otherwise payable under 10 U.S.C. 1448(d)..... 847

Education

Overpayments

Educational assistance allowances to veterans

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

Rehabilitation

Noninstitutional setting

Air-conditioning of private home

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

VICE-PRESIDENT

Protection after resignation

Since protective services provided by the Secret Service for former Vice President Agnew at request of President are being furnished without authority of law they should be discontinued. 18 U.S.C. 3056(a), the statute that authorizes Secret Service protection, does not provide for protection of a former Vice President, and the President does not have "inherent executive power" to order Secret Service protection for former Vice President as President's power must stem either from act of Congress or from the Constitution itself..... 600

VOLUNTARY SERVICES Page

Meals, etc.

Appropriation availability

Cost of providing food to Federal Protective Services officers of GSA who were kept in readiness pursuant to 40 U.S.C. 318 in connection with unauthorized occupation of Bureau of Indian Affairs building is reimbursable on basis of emergency situation which involved danger to human life and destruction of Federal property, notwithstanding that expenditure is not "necessary expense" within meaning of Independent Agencies Appropriation Act of 1973; that 31 U.S.C. 665 precludes one from becoming voluntary creditor of U.S.; and general rule that in absence of authorizing legislation cost of meals furnished to Govt. employees may not be paid with appropriated funds. However, payment of such expenses in future similar cases will depend on circumstances in each case 71

VOUCHERS AND INVOICES

Accompanying decision request. (*See* **GENERAL ACCOUNTING OFFICE, Decisions, Advance, Voucher accompaniment**)

WAIVERS

Gold flow

Negotiated procurement

Gold flow waivers, properly obtained through Army channels, are not subject to question at this time, as request for waiver is within discretion of procuring agency and even though reasonable men may differ as to soundness of rationale behind request, GAO will not substitute its own judgment when no error has been committed in obtaining waivers 800

WITNESSES

Fees. (*See* **FEES, Witnesses**)

Government employees

Status

Employees who were requested by U.S. Attorney to give testimony before Federal grand jury and in trial of criminal cases while suspended from their positions, were not placed in pay or duty status by reason of request even though testimony before grand jury was in regard to their official duties. Although employees are not entitled to salary for period of time they spent testifying, they may be paid and retain any witness fees that would be payable to non-Govt. employees appearing as witnesses in such proceedings 515

Testimony perpetuation

Appropriation chargeable

Since 39 Comp. Gen. 133 holds that expense of perpetuating and authenticating testimony given at deposition is payable from same funds as fees for witnesses, whereas 50 *id.* 128 holds that Criminal Justice Act of 1964, as amended, 13 U.S.C. 3006A, provides sole source of funds for eligible defendants to obtain expert services necessary for adequate defense, stenographic and notarial expenses incurred to perpetuate and authenticate testimony of expert witnesses for such defendants should henceforth be paid by Administrative Office of U.S. Courts from funds available to it, and not by Dept. of Justice. 39 Comp. Gen. 133 modified 638

WORDS AND PHRASES Page

"Escalation"

In light of RFP's definition of escalation—inflation plus variables resulting from dissimilar company business policies—to be used in converting 1972 dollars to real year dollars (dollars expected to be expended in performance of program), inflation can be considered a persistent and appreciable rise in general level of prices for both labor and materials which should be uniform for all proposers 977

"Household goods"

Definition of term "household goods" contained in par. M8000-2 of JTR, promulgated under authority in 37 U.S.C. 406(b), may not be revised to enlarge term to include boat components, such as outboard motors, seat cushions, life jackets, and other boat gear, as acceptable items for shipment as household goods. Notwithstanding lack of preciseness of term "household goods," term in its ordinary and usual usage is generally understood as referring to furniture and furnishings or equipment—articles of permanent nature—used in and about place of residence for comfort and accommodation of members of family, and term is not viewed as encompassing such items as boats, airplanes, and housetrailers 159

"Locality"

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

"Normalization"

Under NASA procedures, proposed costs are normalized—establishing "should have bid" common cost estimates—only when no logical reasons exist for cost differences between proposers or where insufficient cost data is furnished with proposals 977

"Per diem"

Reservists ordered to active duty training at permanent duty stations away from their homes or places from which ordered to active duty for periods of either less or more than 20 weeks who subsequently are required to perform temporary duty assignments away from permanent stations in areas where their homes or places from which they are ordered to active duty are located, are entitled to per diem under applicable provisions of Part E, Ch. 4 of Joint Travel Regs. since members having departed their permanent duty stations are in travel status, and fact that additional expenses are not incurred at temporary duty location does not preclude payment of per diem, as "per diem" is commutation of expenses and is payable without regard to whether expenses it is designed to reimburse are actually incurred 484

WORDS AND PHRASES—Continued Page

"Service employees"

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

"Tailored" facilities

Contention that proposed new "tailored" facilities to perform contract would require 2.9 million less labor hours than needed by selected proposer performing in existing facilities is not supported. Agency's acceptance of comparable labor hours of both proposers was reasonable despite fact that labor hour estimates were based on subjective judgment 977

"Technical transfusion"

"Technical transfusion" in context of competitive negotiation normally connotes transfer of unique concept from one proposer to another with result that latter obtains unfair evaluation advantage based on the other's ingenuity 977

"Territories and possessions"

Although employee, who entered service in Canal Zone and was given transportation agreement based on his former status as dependent of employee with transportation agreement, was not entitled to accumulate 45 days annual leave and home leave while stationed in the Zone, he was entitled to such benefits upon transfer to Mexico since the Zone is considered within the phrase "territories and possessions" of U.S. as used in 5 U.S.C. 6304(b)(1) covering the 45-day leave accumulation and employee entitled to such accumulation is entitled to home leave 966

"Transfusion"

Where evaluation process has been concluded with selection of one offeror over another, term "transfusion" relates to receipt of an advantageous, unique concept which might not have accrued to selected proposer but for its performance under interim contracts covering studies, planning and design preliminary to award of development phase of overall program 977

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