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COMPTROLLER GENERAL OF THE UNITED STATES

Elmer B. Staats

DEPUTY COMPTROLLER GENERAL OF THE UNITED STATES

Robert F. Keller

GENERAL COUNSEL

Paul G. Dembling

DEPUTY GENERAL COUNSEL

Milton J. Socolar

ASSOCIATE GENERAL COUNSELS

F. Henry Barclay, Jr.

James M. Campbell

John W. Moore

Paul Shnitzer

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

[B-180707]

Patents—Assignment—Intent of Parties Not Expressed—Correction

The assignment to the Government of the full domestic rights to an invention developed by a private firm under a Government contract may be corrected on the basis of mutual mistake of fact to conform to the intent of the parties, as evidenced by the preexisting contract that the domestic title vest jointly. To accomplish this, a corrected assignment executed by the parties should be refiled.

In the matter of Department of the Interior, March 5, 1974:

An invention, entitled "Use of Carbon Monoxide and Steam in the Solvent Refined Coal Process," was developed by employees of the Pittsburg & Midway Coal Mining Co. (Pittsburg) under contract No. 14–01–0001–496 with the Department of the Interior (Government). As an incident of employment, the inventors were required to assign the invention to Pittsburg. By virtue of article III A(2)(a) of contract –496, domestic title to the invention was to be held jointly by Pittsburg and the Government.

Application for Letters Patent, Serial No. 297,093, was filed October 12, 1972, by Pittsburg. Thereafter, an assignment of interest prepared by the Government and executed on November 6, 1972, by the inventors and Pittsburg, was recorded in the United States Patent Office on November 16, 1972 (reel 2909, frame 892, 893). With respect to domestic patent rights, the assignment provided that Pittsburg did sell, assign and transfer to the Government the entire domestic right, title and interest in the invention subject to retention by Pittsburg of a royalty-free, nonexclusive license in accordance with the terms of contract 14–01–0001–496.

On February 15, 1974, Pittsburg notified the Government that the assignment was in error and requested that it be reformed to reflect the terms of contract 14–01–0001–496, i.e., that the domestic rights be held jointly by Pittsburg and the Government. The requests for authority to reform the assignment was referred to GAO by letter dated February 22, 1974, from the Deputy Assistant Secretary of the Interior.

35 U.S. Code 261 provides that patents shall have attributes of personal property and that applications for patents, or any interest therein shall be assignable in law by an instrument in writing. An assignment is the only means by which legal title of a patent passes. *Marshall* v. *Colgate-Palmolive-Peet Co.*, 175 F. 2d 215 (1949). In this case, the assignment was intended to be the written evidence of the discharge of the contract obligation that domestic title to the invention would vest jointly with Pittsburg and the Government. The action proposed would conform the assignment of record to the actual intent of the parties as

clearly expressed in the contract. Therefore, our Office will not object to the proposed correction. See *Nicholson Pavement Company* v. *Jenkins*, 81 U.S. 452 (1871); *Baldwin* v. *National Hedge & Wire-Fence Co.*, 73 F. 574 (1896). In this vein, we believe that the proper course of action should be the refiling of a corrected assignment, executed by the parties. Concerning the proposed form of the corrected assignment, informal consultation with an Associate Solicitor of the Patent Office leads us to believe that reference to the prior agreement and a statement covering the reason for the correction should be included in, or appended to, the corrected assignment.

[B-58911, B-177806]

Retirement—Civilian—Reemployed Annuitant—Annuity Deduction—Mandatory

A retired annuitant who is a member of the Technology Assessment Advisory Council is not exempt from the requirements of 5 U.S.C. 8344(a) that an amount equal to the annuity allocable to a period of employment be deducted from the pay of an annuitant, because that provision covers all positions not specifically exempted, and Congress has not exempted Council members.

Compensation—Boards, Committees, and Commissions—Technology Assessment Advisory Council Members—Reemployed Annuitant

The limitation on the pay of public members of the Technology Assessment Advisory Council contained in section 7(e)(2), Public Law 92-484, operates to limit the amount of pay fixed for members and that fixed rate may not vary because a Council member will receive less pay by virtue of the restriction in 5 U.S.C. 8344(a).

In the matter of the pay of an employed annuitant, March 11, 1974:

The Office of Technology Assessment (OTA), an arm of Congress established under the Technology Assessment Act of 1972, Public Law 92-484, 86 Stat. 797, October 13, 1972, (2 U.S. Code 471 note) submits for decision the question whether a Civil Service annuitant who is appointed as one of the ten public members of the Technology Assessment Advisory Council is subject to the provision in 5 U.S. Code 8344(a) requiring that the pay of a reemployed annuitant be reduced by the amount of his annuity. The request points to the fact that the Council is a body established under the Congress which might constitute an adeqaute basis for distinguishing it from similar bodies in the executive branch insofar as concerns the application of the aforesaid requirement. Section 7(e)(2) of that Public Law (2 U.S.C. 476 (e)(2)) is as follows:

(2) The members of the Council appointed under subsection (a)(1) shall receive compensation for each day engaged in the actual performance of duties vested in the Council at rates of pay not in excess of the daily equivalent of the

highest rate of basic pay set forth in the General Schedule of section 5332(a) of title 5, United States Code, and in addition shall be reimbursed for travel, subsistence, and other necessary expenses in the manner provided for other members of the Council under paragraph (1) of this subsection.

The legislative history of Public Law 92-484 sheds no light on this matter and hence affords no assistance in resolving the issue before us.

Annuities and pay on reemployment of annuitants is governed by 5 U.S.C. 8344(a) which provides in pertinent part as follows:

§ 8344. *Annuities and pay on reemployment.*

(a) If an annuitant receiving annuity from the Fund, except—

(1) a disabiilty annuitant whose annuity is terminated because of his recovery or restoration of earning capacity;

(2) an annuitant whose annuity is based on an involuntary separation from the service other than an automatic separation; or

(3) a Member receiving annuity from the Fund;

becomes employed after September 30, 1956, or on July 31, 1956 was serving, in an appointive or elective position, his service on and after the date he was or is so employed is covered by this subchapter. Deductions for the Fund may not be withheld from his pay. *An amount equal to the annuity allocable to the period of actual employment shall be deducted from his pay, except for lump-sum leave payment purposes under section 5551 of this title.* * * *
[Italic supplied.]

Under authority contained in 5 U.S.C. 8347, the Civil Service Commission has promulgated implementing regulations for the above-quoted statute, published in 5 CFR 831.801(d), which read in pertinent part as follows:

(d) When an annuitant, other than an annuitant described in the first sentence of paragraph (c) of this section, becomes employed after September 30, 1956, in an appointive or elective position:

(1) The Commission shall continue his annuity;

(2) The department or agency shall not take retirement deductions from his pay; and

(3) *The department or agency shall deduct from his pay, except for lump-sum leave purposes, an amount equal to the annuity allocable to the period of actual employment.* [Italic supplied.]

With the exception contained in 5 U.S.C. 8344(a) and one other contained in subsection (c) of that section, the statute and regulations are applicable to all annuitants reemployed in Federal positions regardless by which agency or in which branch of the Government they are reemployed. The exception in subsection (c) that Congress has seen fit to make in the coverage of the law provides:

(c) This section does not apply to an individual appointed to serve as a Governor of the Board of Governors of the United States Postal Service.

It is a cardinal rule of statutory construction that where a statute specifically designates those who are to be excluded from its operation, the maxim "*expressio unius est exclusio alterius*" gives rise to an inference that all those not specifically mentioned by the statute were intentionally omitted by the Congress. *United States* v. *Robinson*, 359 F. Supp. 52, 58 (SD. Fla., 1973); *Knowles* v. *Holly*, 513 P. 2d 18, 22 (1973); *Geohagan* v. *General Motors Corp.*, 279 S. 2d 436 (1973).

Applying this rule of statutory construction, we must conclude that since Congress has not specifically exempted the public members of the Council from the operation of 5 U.S.C. 8344, it did not intend that they should be excluded from the operation of the statute.

Accordingly, it is determined that a member of the Technology Assessment Advisory Council who is receiving an annuity from the Civil Service Retirement Fund must have his pay in that position reduced as required by 5 U.S.C. 8344(a).

There may be some question whether the limitation on the daily rate of pay contained in section 7(e)(2) applies only to the pay actually received by the Council member or whether it applies to restrict the rate of pay that may be fixed for the position of Council member.

In the absence of some clear expression of legislative intent to the contrary it is our opinion that the better view is that the limitation is intended to prescribe a ceiling on the pay that may be fixed for the position of Council member and that such ceiling is not intended to vary depending upon the actual pay the member otherwise may be entitled to receive. Thus, pay fixed for a Council member should not be increased on the basis that the pay he will receive must be reduced under 5 U.S.C. 8344(a).

[B-178955]

Contracts—Negotiation—Evaluation Factors—Manning Requirements—Propriety

Where the successful offeror under a request for proposals (RFP) to furnish mess attendant services could be required to perform at manning levels above those stated on the manning chart without any increase in contract price, the statement made during negotiations that the Government estimates were realistic and that satisfactory service could not be assured with a lower maximum staffing level, did not prejudice any of the offerors since the agency's interpretation that the offeror's manning chart level was the maximum staffing that the Government would require of a successful offeror was not used in the evaluation of offers and offerors are required by terms of RFP to perform services satisfactorily even at levels above those stated in manning charts.

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

The acceptance of an offer to provide mess attendant services, which was based in part on the offeror's additional guarantee to provide manning within the Government's estimated range should need arise, is irrelevant in that the request for proposals requires the successful offeror to perform at that level or higher should need arise.

Contracts—Negotiation—Evaluation Factors—Manning Requirements—Manning Chart Staffing Level Effect

Under a request for proposals (RFP) that required the submission of manning charts for a representative weekday and a representative weekend/holiday to foster evaluation of offeror's overall understanding of food service operations, the evaluation of total manning offered need not be restricted solely to the level

indicated in the 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 the offer.

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

The 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 the Government estimate, since all offerors had the same opportunity, specifically stated in the request for proposals (RFP) to submit a justification for their lower figures and there has been no lessening of the RFP requirements. Furthermore, the successful offeror showed the reasonableness of the Government'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.

Contracts—Negotiation—Evaluation Factors—Manning Requirements—Compliance

Where a request for proposals (RFP) for mess attendant services contemplated that offers would be in a certain format and the successful offeror only partially complied stating that it would use representative day figures only a certain specified number of times during the year, but on other specified days, it could and would use less manning due to lesser usage of mess halls, the offeror did not depart from the RFP requirements (ASPR 3-805.1(a)(5)) since use of a calendar year containing 252 *representative* weekdays and 113 *representative* weekend/holidays was not a RFP requirement.

In the matter of ABC Management Services, Inc.; Tidewater Management Services, Inc.; Chemical Technology, Inc., March 11, 1974:

Request for proposals (RFP) N66314-73-R-2745 was issued on March 30, 1973, by the Naval Regional Procurement Office, Oakland, California.

Section D1(a) of the RFP states that:

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

Section "D" further states that:

(2) the hours shown in the manning charts must be supported by the price offered when compared as follows. The total hours reflected in the manning charts for the contract period (i.e., based on a contract year containing 252 weekdays and 113 weekend days/holidays) will be divided into the total offered price (less any evaluated prompt payment discount) to assure that this dollar/hour ratio is at least sufficient to cover the following basic labor expenses:

(i) the basic wage rate;

(ii) if applicable, fringe benefits (health and welfare, vacation, and holidays); and

(iii) other employee-related expenses as follows:

(A) FICA (including Hospital Insurance) at the rate of 5.2%;

(B) Unemployment Insurance at the rate set forth by the offeror in the provision in Section B of this solicitation entitled "Offeror's Statement as to Unemployment Insurance Rate and Workmen's Compensation Insurance Rate Applicable to His Company"; and

(C) Workmen's Compensation Insurance at the rate set forth by the offeror in the provision referred to in (B) above.

Failure of the price offered to thus support the offeror's manning chart may result in rejection of the proposal without further negotiations.

(c) *Award* will be made to the responsible offeror whose proposal, meeting the criteria set forth in (a) and (b) above, offers the lowest evaluated total price.

Note to Offeror: The purpose of the above price-to-hours evaluation is to assure:

(i) that manning charts submitted are not unrealistically inflated in hopes of securing a more favorable proposal evaluation; and

(ii) that award is not made at a price so low in relation to basic payroll and related expenses established by law as to jeopardize satisfactory performance.

Nothing in this Section D shall be construed as limiting the contractor's responsibility for fulfilling all of the requirements set forth in this contract.

Section "J" of the RFP states in pertinent part:

The staffing levels entered by the Contractor on the Manning Charts (Attachment E) shall become an integral part of the contract, and the Contracting Officer may require that this staffing level be fulfilled should performance on this contract fall below acceptable standards. The Contractor may be required to make monetary adjustments for any manhours less than those specified, should the Contracting Officer determine that a less than satisfactory level of performance is caused by personnel staffing below that set forth in Attachment E, Manning Charts. Notwithstanding the foregoing, the Contractor is responsible in any event for supplying sufficient personnel to perform the contract satisfactorily.

Thus, the Navy sought by section "D" of the RFP the assurance that the successful offeror would be able to cover its most basic expenses (labor) at what initially appeared to be a work level guaranteeing adequate performance (its manning chart levels). However, section "J" of the RFP also authorized the contracting officer to require the contractor to supply sufficient personnel to perform the contract satisfactorily, even at levels above its manning charts with a resultant increase in costs to the contractor. (Note: Subject contract is of firm fixed-price type.)

All 13 firms responding to the RFP were considered within the competitive range. Tidewater and at least one other offeror, ABC (incumbent contractor), initially submitted proposals showing manhours of less than 95 percent of the Government's estimate. (Tidewater's hours were 85 percent and unsubstantiated; ABC's hours were also under 95 percent of the estimate. Integrity's initial offer exceeded 95 percent of the Government's estimate.)

Concerning negotiations the Navy stated in its report that:

* * * all [offerors] were advised that the Government's estimated hours (minus the 5% allowance) were realistic and that it was the judgment of the Food Service Officer that satisfactory service could not be assured with a lower maximum staffing level as written into the contract under Section J, "Staffing Levels" * * *.

(As noted above, we do not construe the language in section "J" of the RFP as making the manning chart level the maximum staffing level. The procuring activity, on the other hand, construes section "J" as providing that the manning chart is the maximum level the contractor is obligated to furnish.)

In response to this advice, Tidewater's best and final offer included manning above the 95-percent level. ABC, on the other hand, submitted a manning chart which indicated a 92-percent manning level but otherwise guaranteed to perform at 99 percent of the Government's estimated hours should its performance at any time be less than satisfactory. Similarly, Integrity's manning chart was revised to indicate exactly 95 percent, while in an accompanying letter Integrity indicated that it could satisfactorily perform at 84 percent of the Government estimate. Integrity offered substantiation for the 84-percent figure which the contracting officer accepted.

Prices received on best and final offers were:

	Prices	Discount	Hrs. stated on manning chart
Integrity	$385, 143. 73	(1. 5%)	106, 343
ABC	437, 656. 00	(1. 1%)	103, 162
Tidewater	462, 549. 00	(2%)	108, 029

The contract was thereafter awarded to Integrity on the basis of its 84-percent offer.

It is contended that: (1) Integrity's manning chart hours are not supported by its price and that, in essence, Integrity proposed one figure (106,343 hours) for evaluation vis-a-vis the paragraph D1(a) of the RFP (manning) and another for evaluation under paragraph D1(b) (dollars/hour); (2) the Government did not evaluate Integrity's offer based on its response to the RFP; and (3) the other offerors were not given an opportunity to submit offers for evaluation on the same basis as that upon which award to Integrity was made; that is, the basis of a man-hour figure below that supposedly announced in the discussions with all offerors as the minimum acceptable (95 percent) for award evaluation purposes.

The agency states that Integrity's 84-percent man-hour figure was used both in regard to the requirements of paragraph D1(a) (manning) and D1(b) (dollar/hour). In making the award, however, the Government accepted the additional "guarantee" it asserts was offered by Integrity to perform up to the 106,343-hour (95 percent) manning level whenever necessary, and for that purpose included such manning charts in the award. (The contracting officer concluded that because Integrity's offer contained the required two manning charts and each indicated a figure 95 percent of the Government's corresponding daily estimate, Integrity's total *manning chart level*, what the Government took as a "guarantee," could be computed by multiplying the daily manning chart figures by 252 and 113, respectively, and summing the results. Thus, Integrity's total manning chart level was computed to be 106,343 hours or 95 percent of the Government's total annual esti-

mate.) This guarantee acceptance is indicative of the contracting activity's underlying and improper interpretation of the RFP that the level of performance indicated on the offeror's manning charts constitutes the maximum staffing level the contractor is obligated to furnish. As stated earlier, section "J" of the RFP requires the offeror to perform the specified services adequately even at levels exceeding its manning charts. This would bind a successful offeror to perform, should it become necessary, at or even above its manning chart level without any increase in contract price, irrespective of any "guarantee" given by the offeror. (Upward adjustments of the contract price are contemplated by section J(a) of the RFP only in the event that the actual number of meals served per month varies significantly from the number estimated.) Therefore, the guarantee aspect of Integrity's manning charts becomes irrelevant for award purposes.

Moreover, we feel that no offeror was prejudiced by the procuring activity's determination that some sort of a 95-percent (or above) "guarantee" was required, since the successful offeror was bound by section "J" to assure adequate performance even if levels above any "guarantee" were required.

The RFP did, however, seek an assurance by paragraph D1(b) that the offeror could meet its basic labor costs at what was considered to be an adequate level of performance which was to have been indicated on the offeror's manning charts. Integrity apparently demonstrated to the contracting officer that the job could be adequately performed with 84 percent of the Government's estimated manning and has offered a dollar/hour ratio at that level supportive of its offered hours even though this level of performance cannot be derived from reviewing the manning charts alone.

Integrity's manning charts, submitted under section B3(a) of the RFP, showed the number of personnel proposed for each half hour of a representative weekday and of a representative weekend day/holiday, which personnel figures were equal to 95 percent of the Government's estimates. Integrity, in a letter accompanying its offer, went on to state that it would use the number of hours set forth on its weekday chart 137 times during the year and use the representative weekend day chart figure on only 52 occasions. On the remaining 176 days, it would use manning figures which it had established by examining the troop utilization of the mess facilities on certain days of the week (i.e., Fridays, paydays, etc.). Such an arrangement, when accompanied by a time and motion study, has been recognized by our Office in 53 Comp. Gen. 198 (1973) to be a valid method for substantiating a deficiency from the 95-percent manning level.

Counsel for Tidewater questions the adequacy of Integrity's justification for its 84-percent figure. However, we feel that he answers his

own question by saying that: "The reduced hours required for Fridays, Saturdays, holidays, paydays, and 'Premium' days are no secret to other contractors in this business." As such, we can see how the contracting officer accepted such a proposal without requiring further justification. Next, counsel questions Integrity's justification on the basis that Tidewater's justification for its initial 85-percent proposal was rejected although it is asserted that its justification was superior to that of Integrity. We have reviewed each offeror's justification and note the lack of specificity vis-a-vis Tidewater's approach to furnishing fewer than 95 percent of the Government's estimated man-hours. Tidewater, in essence, relies on its alleged superior management to justify its figures. Integrity, on the other hand, proposed a definite plan which demonstrated a reduced need for manning. As such, we feel that neither the contracting officer's determination to reject Tidewater's justification nor his determination to accept Integrity's justification was unreasonable. *See* 53 Comp. Gen., *supra;* B–179041, October 26, 1973.

Section B3(b) of the RFP states that:

> * * * [M]anning charts are required in order to *foster* evaluation of:
> (i) the offeror's understanding of Navy food service operations in general and of the specific services required; and
> (ii) the soundness and acceptability of the offeror's approach to performance of the services required. [Italic supplied.]

We do not feel that such language limits evaluation of an offeror's proposed man-hours to the manning charts which are but one aid to the contracting officer in determining the degree to which an offeror understands the problem and the feasibility of its proposed approach thereto. Accordingly, the contracting officer could within the terms of the RFP examine extraneous material, such as Integrity's letter, at least with regard to the above-noted criteria.

Indeed, in 53 Comp. Gen., *supra*, we necessarily construed the RFP there involved as requiring that the offeror's total manning level be sufficient to perform the required services. There, we did not feel that it would be proper to constrain an obviously ingenious proposal, such as Integrity's, by requiring that only the levels indicated on its manning charts could be evaluated. True, both RFP's assumed that an offeror's manning levels will be totally reflected, rather than partially, in its manning charts. However, we do not believe that the substance of this assumption was intended to be a condition precedent to evaluation of the total offer. Once a manning chart is evaluated vis-a-vis manning distribution, so that the offeror's management approach can be established for a representative day, the charts offer little more for evaluation purposes. The total manning figures stated thereon, which are to be used in the section "D" evaluation, might just as well be sep-

arately listed, as Integrity did in its letter. Accordingly, we think the agency properly evaluated Integrity's offered manning level rather than its manning charts *per se* under section "D" criteria, especially since the manning charts themselves were evaluated under section B3(b).

Counsel for the protesters further contend that when an offeror, such as Integrity, submits a substantiated proposal substantially below the 95-percent manning level, the Government estimate is therefore rendered defective because it does not accurately reflect the services required. Consequently, the Government, it is asserted, has the obligation to notify all offerors that its requirements have been substantially changed. This notification can be accomplished by merely revising the Government estimate downward. If no lessening of the requirements is accomplished, the contention is made that the Government has then not allowed all offerors the same opportunity to compete.

In regard to a similar situation, we stated in 53 Comp. Gen. 198, *supra*, that:

> It is clear from the language of the solicitation that any proposal which could lessen the number of man-hours required and thus reduce the total cost was desirable. However, should any such proposal have exhibited low manning levels (that is, below 5 percent of the Government's estimate), the Government then required that the offeror substantiate its claim that the job could be accomplished at the number of hours it had offered. This unambiguous provision of the solicitation allowed all participants the same opportunity to submit offers deviating from the Government estimate of man-hours. * * *.

The cases cited by counsel for ABC in support of ABC's position deal with situations wherein the same evaluation factors were either not used in evaluating all offers or an essential basis for evaluation of proposals was not made known to all offerors. In the present case, we iterate our position of 53 Comp. Gen. 198, wherein we said that no offeror was bound irrevocably to the Government estimate and could indeed have offered a less than 95-percent manning level. Where the Government's estimate is made in good faith, but certain offerors indicate that they can perform with substantially fewer hours than the Government has estimated, we do not believe that other offerors have been competitively disadvantaged where all offerors had the same opportunity to submit lower hour proposals, with the knowledge that the fewer hours proposed could translate into lower costs. Unlike the situation in B–170324, April 19, 1971, cited by counsel for ABC, we feel that this RFP clearly implied the "evaluation" factor presently complained of—that it was desirable for offerors to propose fewer hours if those hours could be justified. Therefore, all offerors were or should have been aware of all elements upon which their proposals would be evaluated.

As noted above, however, the RFP contemplated that an offer would be proposed in the following format: demonstration of the hours to be utilized on 252 representative weekdays and a further demonstration of the numbr of hours to be used on 113 representative weekend/holiday days. Integrity partially complied with this format in noting that the representative days manning figures would be used a portion of the time, but that specified lesser figures would be used on other days.

Paragraph 3-805.1(a)(5) of the Armed Services Procurement Regulation (ASPR) states that:

> * * * [W]hen the proposal most advantageous to the Government involves a material departure from the stated requirements, consideration shall be given to offering the other firms which submitted proposals an opportunity to submit new proposals on a technical basis which is comparable to that of the most advantageous proposal * * *.

The offering of a low manning level (below 95 percent of the Government estimate) is not a departure from the RFP requirements since it is reasonably contemplated by the RFP. *See* 53 Comp. Gen., *supra*. However, whether or not an offer submitted in a different format (here, a further breakdown of various days of the week from that which the Government had reasonably contemplated) constitutes a departure from the RFP requirements is a more difficult question.

As we construe section D1(2) of the RFP, it sets forth the requirement that the offeror's price support its offered hours for the contract period; that is, based on a contract year containing 252 weekdays and 113 weekend days/holidays. We believe, as shown above, that Integrity's offered price does support its 84-percent manning figure. However, we take note of the contention that in reaching this position, Integrity should be held to have redefined the contract year and, for that reason, deviated from the stated requirements of the RFP.

The required contract year as stated in the RFP is as follows:

Weekdays		Weekends/holidays	
252		113	(9 holidays)

Integrity's contract year is:

Weekdays		Weekends/holidays	
137	Mondays, Tuesdays, Wednesdays, Thursdays (representative weekday)	52	Saturdays
52	Fridays	52	Sundays (representative weekend/holidays)
26	Paydays	9	Holidays
37	Days related to paydays, holidays, and December leave period		
252		113	

Section B3(a) required the submissions of one manning chart for a representative weekday and one for a representative weekend/holiday, as Integrity did. However, we do not believe that the RFP should be construed to require that the contract year consist of 252 *representative* weekdays and 113 *representative* weekend/holidays even though the RFP contemplated that the manning charts would totally reflect the number of offered hours. Such a rigid construction of the contract year would not however allow the Navy to consider the fact that on certain days during the year manpower levels significantly variant from those needed on representative days would be required. The RFP, we believe, requires that the offerors fashion their proposals around a year consisting of nine holidays, 104 weekend days and 252 weekdays.

The fact that the Government has happened to establish its total man-hour need, relative to section D1(a), and consequently the 95-percent manning level cutoff point, by multiplying its estimated man-hour figure for a representative weekday by 252 and its estimated hour figure for a representative weekend/holiday times 113, does not make the use of a rigidly defined contract year an absolute requirement. Indeed, the RFP does not require such a rigid definition and the "multiplication" method adopted by the Government to establish total need provides only an initial "guide" to the agency's overall man-hour requirement. Moreover, each offeror has the opportunity to demonstrate in its justification of its sub-95-percent offer any discrepancy in this "guide" over and above the 5-percent discrepancy factor already provided. This is precisely what Integrity did both in this procurement and in 53 Comp. Gen., *supra*.

Integrity was able to show that the agency's individual representative day estimates were credible but that adequate performance could be assured within the tests set out in the RFP at a total level more than 5 percent below that level used by the agency as a guide. In this sense, Integrity has proven the reasonableness of the agency's representative daily estimate but the grossness of converting this daily estimate into an annual estimate by using the rigid definition of contract year (252 *representative* weekdays—113 *representative* weekend/holidays). The use of such a rigid definition as an RFP requirement in evaluating offers would lead to equally gross results and, for this reason as well, reading the RFP as a whole we cannot construe the RFP so as to mandate such a definition.

Accordingly, the protests are denied.

We have been informally advised by the Navy that it is in the process of revising its standard solicitations for mess attendant services so as to possibly reduce the great number of protests that these solicitations have encountered. We suggest that the Navy seriously consider formally advertising all future procurements for mess attendant services.

In making this suggestion, we note the Navy's arguments relative to the problem of adequately defining the quantity of services required. However, the problem of task definitions is not unique to the Navy and must surely exist with respect to similar Army and Air Force procurements; yet, both of these services presently formally advertise for mess attendant services essentially on an estimated number of meals basis. With adequate investigation and planning, we see no reason why the Navy cannot do so as well.

[B-140583]

Compensation—Wage Board Employees—Prevailing Rate Employees—Wage Reductions—Indefinite Wage Retention

A general regulation to provide an 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 the particular wage area or circumstances involved, would not be proper since it would be contrary to the statutory provisions of the Federal Wage System.

In the matter of wage retention for prevailing rate employees, March 13, 1974:

The Chairman of the Civil Service Commission seeks a decision as to the propriety of amending Federal Personnel Manual (FPM) Supplement 532–1 to provide that a prevailing rate employee will retain his existing rate of pay for an indefinite period when an area wage survey produces a wage schedule containing lower rates than those of the present wage schedule for the area.

The Federal Prevailing Rate Advisory Committee has proposed that a policy be established providing that no prevailing rate employee be required to suffer a reduction in his existing rate of pay in situations where an area wage survey results in a wage schedule containing lower rates than those of the present wage schedule for the area. Specifically, the Committee recommends and the Civil Service Commission has approved, subject to the approval of the Comptroller General of the United States, that FPM Supplement 532–1 be amended to include the following policy statement:

No employee should suffer a loss in pay as a result of implementing a new, lower wage schedule. If an employee's step rate within his grade on the new wage schedule would result in a lower rate of basic pay than he is presently receiving, he will be entitled to a retained rate of pay for an indefinite period of time. The employee shall receive one-half of the amount of each later prevailing rate increase applicable to the rate of his grade until the retained rate of pay is terminated. An employee's retained rate of pay will also be terminated if (1) there is a break in service of one or more work days; (2) the employee transfers out of the agency; (3) there is subsequent change to lower grade or reassignment, either of which is effected for personal cause, at the employee's own request, or in a reduction-in-force due to lack of funds or curtailment of work; or (4) the employee is entitled to a scheduled rate of pay which is equal to or higher than the retained rate by reason of the normal operation of the wage system, or any other personnel action.

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Under the Federal Wage System as enacted by Public Law 92–392, 5 U.S. Code 5341 (Supp. II) *et seq.*, the pay of prevailing rate employees is required to be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates. Under prior statutory provisions, it was held that such language did not require the pay of prevailing rate employees to be adjusted in every case to conform exactly with prevailing locality wage rates, but required the wages to be adjusted "as nearly as is consistent with the public interest in accordance with prevailing rates." 34 Comp. Gen. 563 (1955). Thus it was recognized in 44 Comp. Gen. 476 (1965) that heads of departments and agencies had discretionary authority to make reasonable deviations from the prevailing rate criteria when the public interest requires an exception to the rule, particularly when a basis for such deviations is to be found in commercial or industrial practice or may be derived from acts of Congress in analogous situations. In that decision it was held that agency regulations providing pay saving for prevailing rate employees who are demoted, or whose pay would otherwise be reduced because of a change in pay-fixing methods, etc., through no fault of their own were not invalid *per se*. This holding was primarily made on the basis that enactment by Congress of salary retention benefits for other employees in particular circumstances indicated a congressional recognition that in equitable situations salary retention was not *per se* contrary to the public interest. The enactment by Congress of salary retention for other employees set forth the policy of Congress concerning the circumstances and limitations under which Congress considered it to be in the public interest to allow salary retention. Therefore, 44 Comp. Gen. 476 held that the conditions and limitations in such enactments should be given the most serious consideration in determining when and to what extent the public interest justifies salary retention to prevailing rate employees. However, where, as covered by the proposed regulations, wage reductions are based upon decreases in prevailing industry rates as disclosed by wage surveys, it was held in 44 Comp. Gen. 476, that wage retention is not authorized.

Although there is authority under the Federal Wage System to make reasonable deviations from the prevailing rate criteria when the public interest requires, the primary consideration in adjusting the pay of prevailing rate employees is the prevailing rate. The proposed regulation would in effect limit adjustments in the pay of prevailing rate employees to increases disclosed by prevailing rate surveys. Since 5 U.S.C. 5343 states that the pay of prevailing rate employees shall be adjusted in accordance with prevailing rates, such pay should be adjusted downward as well as upward as a result of wage surveys. Accordingly, it appears that the proposed wage retention regulation,

which is of general application to all prevailing rate employees who would receive a wage reduction based upon decreases in the prevailing rates regardless of the wage area or specific circumstances of that area, must be justified on the basis of a policy of Congress that it is in the public interest to preserve the compensation of prevailing rate employees in such circumstances.

In this regard 5 U.S.C. 5345 (Supp. II) provides that under certain circumstances and limitations wage retention benefits shall be granted to prevailing rate employees who are demoted or reassigned to a lower-pay position. Congress has not, however, provided for wage retention where reductions in pay are based on decreases in the prevailing rates. The wage retention benefits authorized by 5 U.S.C. 5345 and those which had been administratively authorized before the enactment of that provision generally relate to situations where specific employees receive wage reductions due to demotions or reassignments or where certain groups of employees receive wage reductions due to changes in the system by which their wage rates are established. Moreover, the statute prescribes a 2-year pay retention period. The proposed regulation not only would provide wage retention benefits for all prevailing rate employees in situations where the wage reductions are a result of the normal operation of the Federal Wage System but would prescribe indefinite wage retention. Thus, the proposed regulation may not be regarded as being sufficiently analogous to the statutory pay retention provisions for the purpose of concluding that the public interest justifies preserving the compensation of prevailing rate employees when wage surveys disclose lower wage rates.

In view of the above, we are of the opinion that the proposed general regulation would not be proper.

[B-178859]

Transportation—Dependents—Military Personnel—Dependents Delayed Travel—Member Transferred Twice

Since the dependents of a member of the uniformed services did not exercise the right to Government transportation when the member was transferred from his old permanent duty station in Hawaii to a new permanent duty station in Texas, upon the member's permissive transfer to a subsequent permanent station in California, although par. M7055, Joint Travel Regulations (JTR), is not for application, the dependents may be afforded transportation at Government expense from Hawaii to California for a distance that does not exceed the distance from Hawaii to Texas. However, the member is not entitled, pursuant to par. M7000-13, JTR, to Government trransportation for a dependent who subsequent to his permanent change of station from Hawaii to Texas traveled to Florida to attend school and for health and welfare reasons, in the absence of an indication that the travel was for the purpose of establishing a residence not of a temporary nature.

To R. V. Byars, Department of the Navy, March 13, 1974:

Further reference is made to your letter of April 23, 1973 (file reference FFC (RVB) FT (OLF:iq) 4650 (H)), with enclosures, requesting an advance decision concerning the legality of making payment of dependent travel claims in the case Roy H. Heckers, ENC, USN, 155-28-0701, in the described circumstances. Your request has been assigned PDTATAC Control No. 73-28 by the Per Diem, Travel and Transportation Allowance Committee, which forwarded your request to this Office by endorsement dated June 7, 1973.

You say that in October 1971 the member was ordered from U.S.S. *Sailfish*, SS-572 (homeport Pearl Harbor, Hawaii) to the Naval Amphibious School, Coronado Detachment, Biggs Field, Ft. Bliss, Texas, for duty under instruction and that his dependents remained in Honolulu, Hawaii. You indicate further that in December 1971 stepdaughter Michelle A. Lafayette traveled to Key West, Florida, and that Chief Petty Officer Hecker stated that this dependent's travel was for the purpose of attending school as well as for health and welfare reasons.

In March 1972, pursuant to Chief Heckers' request, permissive type orders were issued, authorizing his transfer to the Defense Language Institute at Naval Postgraduate School, Monterey, California, for 22 weeks. It was stated in the orders that no expense to the Government was authorized in connection with them and that if the member did not desire to bear the expense, he was to regard the orders as revoked. In June 1972 his wife and remaining dependent stepchildren moved from Hawaii to Monterey, California.

Under the circumstances set forth above, you express doubt as to whether the move of one dependent to Key West, Florida, could be considered as incident to the permanent change of station as prescribed in paragraph 7000-2 of the Navy Travel Instructions. You also question whether the member would be entitled to transportation for the remaining dependents under the provisions of paragraph M7055 of the Joint Travel Regulations.

The statutory authority for transportation of dependents of military personnel is contained in 37 U.S.C. 406 which expressly provides that transportation of dependents at Government expense upon a member's ordered change of permanent station shall be under such conditions and limitations, for such ranks, grades, or ratings, and to and from such places as the Secretaries concerned may prescribe.

Chapter 7, Joint Travel Regulations (JTR), issued by the Secretaries to implement this statutory authority, provides generally in paragraph M7000 that members of the uniformed services are entitled to transportation of dependents at Government expense upon a per-

manent change of station for travel performed from the old permanent station to the new permanent station, or between points otherwise authorized in these regulations, subject to certain exceptions including (subparagraph 13, formerly 12) :

for any travel of dependents between points otherwise authorized in this volume to a place at which they do not intend to establish a residence; travel expense of dependents for pleasure trips or for purposes other than with intent to change the dependents' residence as authorized by this volume may not be considered an obligation of the Government.

In this regard paragraph 7000–2 of the Navy Travel Instructions states that the travel performed must be for the purpose of establishing residence at a new location not of a temporary nature.

We have held consistently that the expense of travel of dependents merely for the purpose of visiting a member, for pleasure trips or for other purposes not contemplating a change of the dependents' primary residence in connection with a change of the member's permanent station is not an obligation of the Government. *See* 33 Comp. Gen. 431 (1954) and cases cited therein. Consequently, in the described circumstances, in the absence of indication that Michelle A. Lafayette's travel was for the purpose of establishing a residence not of a temporary nature, the travel of the member's stepdaughter to Key West, Florida, may not be considered as incident to a permanent change of station from Pearl Harbor, Hawaii, to Biggs Field, Fort Bliss, Texas.

Paragraph M7055, JTR, provides in pertinent part that if a member, upon receipt of permanent change-of-station orders, retains his dependents at the place at which they were located when such orders were received, and he receives assignment to some subsequent permanent station, he shall be entitled (upon assignment to such subsequent permanent station) to transporation for his dependent at Government expense not in excess of the distance from the station for which he traveled when his dependents were so retained to such subsequent permanent station or from his last permanent station to his new permanent station, whichever is the greater.

In circumstances where a subsequent change of station is not on public business and it is at the member's expense, no additional travel entitlements are available to the member because of such assignment. *See* decision B–147646, July 11, 1962, copy enclosed.

Clearly, the permissive orders received by the member in March 1972 which authorized transfer from Biggs Field, Fort Bliss, Texas, to the Naval Postgraduate School, Monterey, California, which provided that the transfer was to be at the member's expense and that they were to be regarded as revoked if he did not desire to do so, did not contemplate travel on public business, and therefore, did not provide entitlement to the travel of his dependents at Government expense. *See* decision B–172848, July 27, 1971, copy enclosed.

Consequently, in our opinion, paragraph M7055, JTR, is not for application in the present circumstances, as such provision apparently contemplates that the subsequent permanent change of station, *itself*, provide transportation entitlements based on a direction to travel on public business, as under this regulation dependents could be provided with transportation to the subsequent permanent station at Government expense for a distance *in excess* of that from the place where the dependents were retained, to the permanent duty station to which the member was initially assigned. *See* 34 Comp. Gen. 467 (1955).

However, as the dependents have not exercised the right to Government transportation to the first permanent duty station at the time of the subsequent permissive transfer, it appears that they may be afforded transportation at Government expense not to exceed the distance from the place of retention to the first permanent duty station, upon permissive assignment to a subsequent station.

Accordingly, since the distance from Honolulu, Hawaii, to Monterey, California, is less than from Honolulu to Fort Bliss, Texas, payment for dependent travel from Honolulu to Monterey may be authorized if otherwise proper, and voucher for this travel is returned herewith. The travel voucher for Michelle A. Lafayette is retained here.

[B-179815]

Contracts—Negotiation—Sole-Source Basis—Justification

The determination that the procurement of satellites from other than the current source would entail unacceptable performance and schedule risks was not arbitrary or capricious.

Contracts—Negotiation—Competition—Impracticable to Obtain—Justification for Negotiation

While 10 U.S.C. 2304(a)(2) authorizes procurement by negotiation when the public exigency will not permit the delay incident to advertising, the prospect of untimely performance arising from causes other than the time required for formal advertising procedure may constitute justification for noncompetitive procurement under the negotiating authority of 10 U.S.C. 2304(a)(10).

In the matter of Hughes Aircraft Company, March 14, 1974:

The issue presented by this protest is whether the National Aeronautics and Space Administration's (NASA's) determination to negotiate a procurement of satellites solely with the Philco-Ford Corporation (Philco-Ford) was arbitrary and capricious. We conclude that it was not.

The instant procurement is a portion of a joint effort by NASA and the National Oceanic and Atmospheric Administration (NOAA), Department of Commerce, to create an operational geostationary

satellite system. NOAA is responsible for determining the system's needs and for its operation, while NASA is responsible for the design and development of the spacecraft and ground system, for procurement of the launch vehicle, for launch operations, and for initial satellite checkout and evaluation in orbit. NASA reports that the goals of the satellite program:

> * * * include the improvement of environmental warning services, weather forecasts, and the forecasting of solar disturbances, as well as the extension of knowledge and understanding of the atmosphere and its processes by viewing atmospheric phenomena.

The prototypes of these satellites are known as synchronous meteorological satellites (SMS) and the operational versions are called geostationary operational environmental satellites (GOES). As a result of an earlier negotiated procurement, in which Philco-Ford and Hughes Aircraft Company (Hughes) were competitors, Philco-Ford was awarded a contract for three satellites, designated SMS–A, SMS–B and SMS–C. SMS–C is also known as GOES–A.

NASA reports that these three satellites, which are to be launched prior to the fourth quarter of 1974, have a useful life expectancy of two years. NASA and NOAA contemplate an operational two-satellite system with the third satellite being held in orbit as a replacement. NASA has described the possible deployment of the satellites as follows:

> Because SMS–A is the prototype, not yet flight-tested, it cannot be counted on to be part of the operational system. Any changes necessary as a result of SMS–A flight-testing will be incorporated into SMS–B and –C (GOES–A), which are envisioned as constituting the two-satellite system. In the fortunate event that SMS–A fully meets operational requirements, it and SMS–B will form the initial system, and SMS–C (GOES–A) will be launched and stored in orbit, available for almost immediate use when satellite replacement is required. Notwithstanding that possibility, it has been determined that, to ensure operational continuity, two spacecraft must be available for replacement purposes at the end of two years' useful life expectancy of the first two operational spacecraft.

The two repacement spacecraft which NASA states must be available in mid-1976, are designated GOES–B and GOES–C. In its protest, Hughes questions the propriety of NASA's decision to procure GOES–B and –C from Philco-Ford on a noncompetitive basis. In this connection, we note that NASA has expressed its intention to competitively procure subsequent spacecraft.

NASA's reasons for negotiating solely with Philco-Ford are enumerated in detail in a "Justification for Non-Competitive Procurement," quoted and discussed more extensively below. We think these reasons are fairly summarized in the following "Determination and Findings" executed by the contracting officer to support this noncompetitive procurement:

DETERMINATION AND FINDINGS

Decision to Negotiate an Individual Contract Under 10 U.S. Code 2304 (a) (10) (PCN 490-67917)

FINDINGS

1. The proposed contract is to provide for the fabrication and delivery of two (2) flight model Geostationary Operational Environmental Satellite (GOES) spacecraft. In addition, all necessary ground support equipment, test equipment, spare parts, launch support, experiment integration (primary payload is the Visible Infrared Spin-Scan Radiometer (VISSR)), drawings, specifications and test plans for all items will be required along with periodic and final program reports. Duration of the proposed effort is envisioned as 29 months.

2. The Geostationary Operational Environmental Satellite system will be a geosynchronous spin stabilized satellite to provide the capability of mapping earth and cloud cover conditions to obtain such geophysical data as cloud height and temperature, cloud motion, and wind velocities. Both daylight and nighttime infrared mapping will be provided. The two operational flight spacecraft will be designated GOES-B and GOES-C for use by the National Oceanic and Atmospheric Administration (NOAA). The first generation of spacecraft are being built by Philco-Ford Corporation and are designated SMS-A, SMS-B and GOES-A. While Philco-Ford has produced certain drawings and specifications, they do not convey a total understanding and familiarity with the GOES spacecraft and thus are not sufficient for another firm to produce a duplicate spacecraft. Further, the existing design assures meeting the operational launch readiness requirement of CY 1976 and compatibility with the ground equipment developed for SMS and GOES-A.

3. Formal advertising is not feasible nor practicable as (1) the existing drawings and specifications are not suitable in that the nature of the work cannot be precisely described, and (2) only Philco-Ford, with an existing spacecraft design, can satisfy the technical and schedule requirements of a continuing operational system.

DETERMINATION

On the basis of the above Findings, I hereby determine that the proposed procurement is for work for which it is impractical to obtain competition by formal advertising.

Upon the basis of the Determination and Findings above, I hereby decide that this contract will be negotiated pursuant to 10 U.S. Code 2304(a)(10).

Much of Hughes' protest is constructed upon the meaning and interrelationship of 10 U.S. Code 2304(a)(2), (a)(10) and 2304(g). As Hughes observes, 10 U.S.C. 2304(g) reflects a general policy favoring the obtaining of competition in negotiated procurements:

> In all negotiated procurements in excess of $2,500 in which rates or prices are not fixed by law or regulation and in which time of delivery will permit, proposals, including price, shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured * * *.

Authority to procure by negotiation is conferred, *inter alia*, by 10 U.S.C. 2304(a)(2) when "the public exigency will not permit the delay incident to advertising" and similarly, by 10 U.S.C. 2304(a)(10) when it is "impracticable to obtain competition."

Hughes also points out that the thrust of 10 U.S.C. 2304(a)(10) is to permit negotiation when it is impracticable to secure competition through formal advertising, which does not necessarily preclude a competitively negotiated procurement.

Placing emphasis upon the schedule requirement that the two spacecraft be delivered in mid-1976, Hughes then constructs a two-step argument:

> 1. A concern for timely performance justifies the use of competitive negotiation in lieu of formal advertising only when the existence of a "public exigency" (10 U.S.C. 2304(a)(2)) and the impracticability of formal advertising are clearly and convincingly established by written findings;
>
> 2. Similarly, in view of the requirement for competition contained in 10 U.S.C. 2304(g), no lesser justification should be accepted for moving from competitive to noncompetitive negotiation.

Since NASA does not contend that the "public exigency" exception applies to the instant procurement, Hughes argues that NASA's concern for timely performance does not support negotiation of a sole-source contract with Philco-Ford under 10 U.S.C. 2304(a)(10).

We think Hughes' argument fails to recognize the scope of the "public exigency" exception contained in 10 U.S.C. 2304(a)(2) and illustrated by NASA PR 3.202-2. The statute provides that purchases and contracts may be negotiated if "the public exigency will not permit *the delay incident to advertising.*" [Italic supplied.] NASA PR 3.202-2 states:

> This authority may be used only where the need is compelling and of unusual urgency, as when the Government would be seriously injured, financially or otherwise, if the supplies or services were not furnished by a certain date, *and when they could not be procured by that time by means of formal advertising.* * * *. [Italic supplied.]

It is clear that the "public exigency" exception is confined to situations where the timely delivery of urgently needed supplies or services would be precluded by the delay attendant to the drafting, reproducing, synopsizing and distribution of an invitation for bids, and the receipt and formal opening of the responses thereto.

The time required to conduct a formally advertised procurement is not the only circumstance which may jeopardize timely performance, nor is it the only circumstance in which "time of delivery" may not permit the conduct of competitive negotiations (10 U.S.C. 2304(g)). We think it also should be recognized that certain situations which justify the use of 10 U.S.C. 2304(a)(10) necessarily entail a noncompetitive procurement. One such circumstance which is illustrated by NASA PR 3.210-2(i) is "when supplies or services can be obtained from only one person or firm ('sole source of supply')." For this reason, we think it appropriate to measure the propriety of this procurement against 10 U.S.C. 2304(a)(10) and (g) independently of the "public exigency" exception in 10 U.S.C. 2304(a)(2).

In our decision B-178179, July 27, 1973, which concerned the propriety of a sole-source procurement negotiated under the authority of 10 U.S.C. 2304(a) (10), we stated:

> * * * It has been the policy of our Office not to question a contracting officer's decision to make a sole-source award unless it is clear from the record before our Office that he acted in an arbitrary or capricious manner in abuse of that discretion. * * *.

That is the test to be employed in this case.

NASA's rationale for negotiating with Philco-Ford on a sole-source basis is set forth in two documents, one of which is the contracting officer's "Determination and Findings," quoted above. Additionally, NASA PR 3-802.3(a) requires a proposed noncompetitive procurement to be supported by a written "Justification for Non-Competitive Procurement," which is to "set forth full and complete justification for the selection * * *." The "Justification" applicable to the instant procurement states in part:

> 1. I recommend that we negotiate with Philco-Ford Corporation, Western Development Laboratories (WDL), Palo Alto, California, only, for the procurement of two Geostationary Operational Environmental Satellites (GOES B&C).
> 2. The satellites are to be identical in configuration and perform in the same manner as the synchronous meteorological satellites SMS-A, SMS-B, and SMS-C (GOES-A), which are currently being procured from Philco-Ford under Contract NAS5-21575. The GOES-B and -C are being procured for the National Oceanic and Atmospheric Administration (NOAA) for operational replacement use to assure continuous cloud cover imaging for severe storm forecasting and tracking.
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> * * * * * * *
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> 3. Another critical feature of this program is the requirement for GOES B&C to be compatible with the ground equipment to be developed by Philco-Ford and demonstrated in the SMS and GOES-A program. NOAA requires that GOES B&C present the same look to its ground equipment that the earlier SMS satellites will. (See attached letter).
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> * * * * * * *
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> 4. Only Philco-Ford has an actual spacecraft design already developed and nearly completely tested which meets the design and schedule requirements. For example, Philco-Ford has designed, developed, and tested the SMS antenna which is an advanced state of the art electronically despun communication antenna. This antenna design does not exist with any other contractor and even though manufacturing drawings and specifications could be transferred to another contractor, it is very unlikely that such contractor could build a reliable system within the time available.
> 5. Philco-Ford presently is using approximately two million dollars of previously developed NASA ground test equipment in the SMS program. This equipment would pose, if transferred to a new contractor, a difficult problem of usage, understanding, and logic interpretation.
> 6. Philco-Ford has a technical team readily available that can be logically phased into the follow-on project from the existing Contract NAS5-21575. The availability of this team of experienced engineers and technicians obviates the necessity of training personnel and further has the advantage of minimizing mistakes typical of the learning process that are almost certain to occur in a development program.
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> * * * * * * *
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> 8. In summary, it would be possible for one or more other manufacturers either to learn to make a close copy of the GOES spacecraft, or to develop an alternative spacecraft that would be electronically compatible with the ground

equipment. The Government would, however, have to embark on either of these courses without adequate assurance that such an effort would succeed within the time required, and with little possibility of retrieval in the event of technical reversal. Thus, the short lead time available to support the NOAA requirements, the experience, knowledge and familiarity of Philco-Ford with the GOES program and the additional risk of electronic incompatibility or schedule failure if another contractor were to do the job, indicate that it is in the best interests of the government that Philco-Ford perform the required follow-on GOES–B and –C effort.

The "attached letter" referred to in the "Justification" was written by NOAA's Associate Administrator and states:

* * * that NOAA places prime importance on meeting established schedules for GOES B&C. Our analysis of projected spacecraft reliability shows that we are on the ragged edge of being able to maintain the required two operational GOES satellites in orbit through mid 1976, at which time we are planning on GOES B being in orbit. Our work has all been done on the assumption of a higher reliability rate for the Delta than has been our recent experience. If we have any Delta failures in the first three launches, we will have an emergency on our hands. A slip in the current GOES B&C schedules is simply unacceptable to NOAA. It introduces too high a risk.

Another aspect of the follow-on GOES procurement that is of concern to us is compatibility with NOAA ground equipment. During 1976 we will be operating Philco/Ford satellites. When the follow-on GOES B is launched it must look no different whatsoever to our ground equipment. Any failure here would put us in an untenable position.

The basic premise for this procurement is that NOAA has a need for two GOES-type spacecraft during 1976. In its protest, Hughes states that the redundancy of and the design lifetime goals for these satellites eliminate any real need for them in 1976. However, we are not in a position to dispute NASA's judgment in this regard.

The "Justification for Non-Competitive Procurement" and "Determination and Findings," quoted above, advance a number of reasons why, in NASA's judgment, the instant procurement must be negotiated solely with Philco-Ford. These reasons, which to a significant degree are technical in nature, have been exhaustively discussed during the course of the protest. From our review of the record, we believe the following considerations are determinative:

1. This procurement is not for experimental, but for operational satellites, the proper functioning of which significantly affects the operation of a Government agency. The importance of this satellite system has been described as follows by NOAA's Director of the National Environmental Satellite Service:

NOAA, and the entire meteorological community, have been able to develop the uses of meteorological satellite data to the extent that its absence has a serious impact on the analysis and forecast systems, and consequently upon the public. This situation will become increasingly intense after the SMS/GOES system has added the capability for continuous viewing of the atmosphere, with high reliability, both day *and* night, not now possible with the use of the ATS type satellite. This capability of continuous viewing will be a major step forward in continuous monitoring of weather events so essential for issuing timely and accurate warnings to the public for its safety. This has been demonstrated repeatedly with ATS with respect to hurricanes and tornado/thunderstorm type activity. Discontinuities in such service, once fully established, will be unac-

ceptable to NOAA, and indeed, to the public. While one cannot place quantitative measures on lives that might be lost and on property damage due to severe weather less accurately forecast during a satellite service outage, we believe it would be very significant. Availability of the GOES B and C satellites at the times indicated continues to be a firm requirement; as you know, if there are any launch failures or a premature spacecraft failure, we will be in serious difficulty in maintaining the continuity of the operational system even with the presently planned dates for the availability of GOES B and C.

2. The three satellites now being completed by Philco-Ford and GOES–B and –C must all "look" the same (in an electronic sense) to the system's ground stations.

Hughes asserts that it can achieve this compatibility by the scheduled delivery date, and has expressed willingness to accept price penalties for any failure to meet technical or schedule requirements. The basic fact remains, however, that Hughes would have to independently design certain components of the satellite which affect signal compatibility. We are not prepared to question NASA's judgment that this introduces an unacceptable technical risk, nor do we think it unreasonable for NOAA to consider monetary penalties as an unsatisfactory substitute for proper performance of this operational system.

3. Hughes has also not controverted the statement in the "Justification for Non-Competitive Procurement" that "Only Philco-Ford has an actual spacecraft design already developed and nearly completely tested which meets the design and schedule requirements."

4. We believe the record establishes that complete specifications for the spacecraft are not now available.

Thus NASA's determination to procure on a sole-source basis reflected technical judgments involving certain performance and schedule requirements. Although we have carefully examined Hughes' submissions, we conclude that NASA has clearly and convincingly established that formal advertising is not feasible and practicable (10 U.S.C. 2304(a)(10)); and that the "time of delivery" and "the nature and requirements of the supplies * * * to be procured" (10 U.S.C. 2304(g)) preclude competitive negotiations. Accordingly, we do not regard as arbitrary or capricious the determination to negotiate with Philco-Ford on a sole-source basis.

[B–178684]

Contracts—Protests—Timeliness—Contract Award Notice Effect

Where a protest was not filed before receipt by the protester of notification that it was not awarded a contract, the notification is not considered an adverse agency action under section 20.2(a) of GAO Interim Bid Protest Procedures and Standards and the section may not serve as a basis to question the timeliness of the protest.

Contracts—Protests—Timeliness—Adverse Action Basis Determination

A protest filed with an agency within 5 days of the date the basis of the protest was known was timely filed with the agency and the protest to GAO 3 months later, but within 5 days of notification of the adverse agency action, is timely under GAO Interim Bid Protest Procedures and Standards insofar as it relates to matters not apparent prior to the closing date for receipt of proposals.

Contracts—Protests—Timeliness—Solicitation Improprieties

The allegation that the request for proposals and Air Force Regulation 70-3 discriminate against operators of on-base cable television systems is an untimely filed protest under section 20.2 of GAO Interim Bid Protest Procedures and Standards because protests against alleged improprieties that are apparent prior to the closing date for receipt of proposals must be filed prior to the closing date for the receipt of proposals.

Contracts—Negotiation—Evaluation—Propriety of Evaluation

Consideration of reconnection and relocation fees in the evaluation of proposals for furnishing on-base CATV services is prohibited where the Air Force Regulation 70-3 specifically excludes them as evaluation factors and, furthermore, no correlation exists between such fees and the general evaluation criteria stated in the request for proposals so as to satisfy the requirement that offerors be advised of the evaluation criteria.

Contracts—Negotiation—Awards—Advantageous to Government—Requirement

Even assuming that the 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 request for proposals, an award to other than the lowest price offeror would be justified only if its proposed configuration offered material advantage.

Contracts—Negotiation—Evaluation—Factors Other Than Price—Experience

Awardee's previous experience as CATV constructor is a factor for consideration under criteria for system configuration since it concerns responsibility of prospective contractor under 10 U.S.C. 2304(g).

Contracts—Negotiation—Evaluation—Factors Other Than Price—Greatest Value to Government

Notwithstanding the Air Force Regulation 70-3 prohibition against the consideration of an offer to provide program origination equipment in the evaluation of a CATV franchise award, the ability of the weather/time unit for program origination purposes proposed by the successful offeror may be considered without prejudice to other offerors, since the unit was included in the low offer at no additional cost to subscribers.

Contracts—Negotiation—Awards—Propriety—Evaluation of Proposals

While consideration of the ability of the weather/time unit to disseminate base-oriented information prescribed by Air Force Regulation would be prejudicial to the protester if it influenced the contracting officer's award decision, the GAO is unable to conclude the award made was improper in the absence of a showing this was a determinative factor in awarding the CATV franchise.

Contracts—Negotiation—Evaluation—Factors Other Than Price—Speculative Factors

The failure of an agency to consider a protester's offer to provide additional channels as they became available via satellite to be orbited some time in the future is unobjectionable since the evaluation of the most advantageous offer should be confined to matters whose occurrence were not subject to speculation.

In the matter of Frontier Broadcasting Co. d/b/a Cable Colorvision, March 21, 1974:

Request for proposals (RFP) F48608-73-R-0122 was issued by the Base Procurement Division, Frances E. Warren Air Force Base, Wyoming, on September 29, 1972, to secure cable television (CATV) services for the base. The RFP specified the clauses required by Air Force Regulation (AFR) 70-3 to be included in the procurement of CATV systems. The contract grants exclusive right to the contractor to provide CATV services to the base for a 10-year term.

Amendment No. 1 to the RFP provided the basis upon which award would be made:

> Award shall, as a general rule, be made to that responsible, responsive offeror submitting the lowest annual price (for the shortest period) for that portion of Schedule A entitled "Estimated Total (Items 1-4)," except that award may be made to other than the lowest offeror if justified by material differences in the configurations of the proposed systems, the quality of the equipment offered, the nature of supplementary services offered above and beyond specified minimums, repair capabilities, or the demands that will be made with regard to Government-furnished property (offerors may make these additional factors known by listing them on the appropriate Schedule and/or by attaching a letter to their proposal). * * *.

Schedule "A" provided:

CATV Contractor's Fees

	Amount	Estimated Number		Estimated *Year Total
1. User fee per month for initial outlet in individual residence or viewing area	_____	700	X**	_____
2. User fee per month for additional outlets in individual residence or viewing area	_____	50	X**	_____
ESTIMATED TOTAL (Items 1 & 2)				_____

	Amount	Estimated Number	Estimated Total
3. Connection fee for initial hookup of subscriber's receiver to CATV System			
a. Individual residences and viewing areas	_____	500	_____
b. Bachelor Quarters/Airmen's dormitories	_____	200	_____
4. Connection fee for additional outlets at individual residences or viewing areas	_____	50	_____
ESTIMATED TOTAL (Items 3 & 4)			_____
ESTIMATED TOTAL (Items 1–4)			_____

	Amount
5. Connection fee for reconnecting a receiver to the CATV system at a subscriber's location at which service has previously been terminated	
a. Individual residences or viewing areas	_____
b. Bachelor Quarters/Airmen's dormitories	_____
6. Connection fee for relocating an outlet at subscriber's location	_____
7. Circumstances, if any, in which CATV contractor proposes to offer discounts in Items 3a and 3b, above; amount of such discounts (Specify) _____	

*Enter number of years, not to exceed 10.
**Enter number of months (based upon year figure entered above and multiplied by 12), not to exceed 120.

Of the two proposals received by the November 10, 1972, deadline, the Pate Electronics, Inc. (Pate) proposal was lower than that of the Frontier Broadcasting Company, doing business as Cable Colorvision

(Cable). The respective total amounts for the 10-year term were $519,600 and $523,265. The price breakdowns were:

Item	Cable monthly/10 year total	or Pate rate monthly/ 10 year total
1	$5. 95/$499, 800	$5. 95/$499, 800
2	1. 50/9, 000	1. 00/6, 000
3a	19. 95/9, 975	19. 00/9, 500
b	19. 95/3, 990	19. 00/3, 800
4	10. 00/500. 00	10. 00/500. 00
Estimated total	$523, 265	$519, 600
5a	12. 95	5. 00
b	12. 95	5. 00
6	6. 00	5. 00

In response to item 7, Cable offered free initial connection, provided the subscriptions were ordered during the initial subscription drive and a 1-month fee was paid in advance. However, the duration of the offer was not specified. With regard to programming, Cable offered, in addition to the commercial stations outlined in schedule "C," comprehensive stock market reports, programs presented by the Cheyenne School Systems (Laramie County School District), plus programs originated by the Wyoming State Library, if presented. Pate, in response to item 7, offered 3 free months of CATV upon the payment of the $19 fee for original hook-up during construction.

Both proposals were determined to be within the competitive range and, accordingly, negotiations ensued. As a result of negotiations and responses to the questions generated, Pate's proposal was deemed most advantageous to the Government. By letter dated January 16, 1973, the contracting officer informed Cable that its proposal would not be accepted and information regarding the successful offeror would be supplied if desired. In response to a January 26, 1973, request from Cable, the contracting officer informed Cable by letter dated February 1, 1973, of the awardee's identity and the factors considered in the award decision: (1) quality of equipment offered; (2) configuration of the proposed system; (3) nature of the supplementary services offered; (4) repair capabilities; and (5) fees charged.

As noted in the February 1 letter, the quality of equipment offered was considered substantially equal. Slight differences that favored Pate were found in the heterodyne amplifiers and the switching equipment. Pate offered a self-adjusting temperature control heterodyne amplifier, while Cable's equipment would require biannual adjustments. This was concluded to be a slight advantage to Pate in the form of better service and reduced maintenance costs. Also Pate offered automatic switching, whereas Cable offered manual switching as a part of its nonduplication of programming. This was considered to

create added expense to the Cable proposal since a full-time monitor would be required for its operation.

Concerning the configuration of the proposed system, Pate's offer was considered more advantageous because its system would be totally self-contained within the perimeters of the base and completely underground. The weather service unit would be located in the Command Post (Building 250) and is a type which may be used for broadcasting purposes over the weather channel. Further, Pate had constructed and installed some 20 previous CATV systems.

On the other hand, Cable proposed to utilize its existing facilities which are approximately 7 miles from the base and serve as the basis for its CATV service for the City of Cheyenne. As a result, Cable's system is partially above ground and would only be underground within the base confines. Consequently, the base services would be subjected to the hazards of the prevailing weather conditions thereby exposing the system to possible failures. Also, since Cable's signal would be required to travel further, a more complex amplification system would be required to achieve on-base signal strength equal to that of Cheyenne. Lastly, since Cable proposed separate locations for the news/weather service and the mechanical switching equipment, the Government would not have the benefit of the use and control of these additional channels.

The third factor stated to have been considered in the evaluation was the nature of the supplementary services offered. Pate's offer was considered more advantageous because the weather unit proposed was a telemation unit which permits program origination. Additional use of the weather unit was expected for programs concerning fire prevention, safety winter survival and general dissemination of base-oriented information. Evidently, the foregoing considerations outweighed Cable's offer to provide FM radio stations because extra connection and monthly fees were to be charged. Also, since Pate indicated it could pick up additional channels as they became available, Cable was not accorded any advantage for its proposed showing of the Laramie School District No. 1 programs and stock reports.

Repair capabilities was the next factor considered. Cable employs eight people, including four full-time technicians, and has three service trucks available. Pate offered at least one crew located on base, including a full-time technically qualified manager. Noting that Cable must service its Cheyenne subscribers (approximately 4000) as well as the base (approximately 700), it was concluded that Pate's offer presented better on-base service. It was also concluded in this regard that since Pate's underground system was less extensive and included self-adjusting temperature controls, it would not be as prone to functional failures as Cable's.

Lastly, fees were considered. It is clear that Pate's offer was lower for items 1–4 of Schedule "A." However, considering that the difference over 10 years was only $3,665, Pate's advantage was viewed as minimal. It was noted that Pate's proposed fee for reconnection for individual residences and dormitories was substantially lower than Cable's, $5 versus $12.95. Despite a disclaimer by Cable that the fee would not constitute windfall profits and an expressed willingness to renegotiate the fee should it amount to a windfall in the future, Cable's charge was not considered to be in the best interest of the subscriber. Moreover, consideration was placed on the fact that Cable was not offering any discount from the rates charged to its Cheyenne subscribers. It was the opinion of the contracting officer that since Cable was established and much of its equipment costs were attributable to its Cheyenne operation, that lower on-base rates should have been proposed. Noting that AFR 70–3 prohibits charging franchise fees, its absence should have resulted in lower on-base fees than off-base.

The initial question is whether the protest of Cable is timely filed under our Interim Bid Protest Procedures and Standards (Standards). It is pointed out by the Air Force that Cable first received notice it would not receive the contract on January 16, 1973. The correspondence exchange of January 16 through February 1 transpired before Cable protested to the Air Force by letter dated February 9, 1973. Final Air Force denial of the protest was May 9, 1973. Thereafter, Cable protested to GAO on May 16, 1973.

The Air Force contends that Cable's protest is untimely under that portion of section 20.2(a) of our Standards that requires a protest to GAO be filed within 5 days of notification of adverse agency action if the protest is initially timely filed with the agency. The Air Force considers the January 16 letter that Cable had not been successful as initial notification of adverse agency action. Notification that a firm has not been successful may qualify as adverse agency action after a protest has been filed. However, Cable had not protested as of January 16, 1973. Therefore, the above portion of section 20.2(a) may not serve as a basis to question the timeliness of the protest.

The Air Force also contends that the Cable protest to the Air Force was not timely filed. It is noted that AFR 70–3 provides for processing protests against the award of a CATV Franchise Agreement in accordance with Armed Services Procurement Regulation (ASPR) 2 407.8 which does not delineate specific deadlines for protesting. However, it is contended that the 5-day time limit of section 20.2(a) should be applied to protests to the agency to avoid circumvention of the GAO Standards by belatedly protesting to an agency.

In this case, the basis for protest was communicated to Cable by the letter dated February 1, which was received February 6. Cable protested to the Air Force by letter dated February 9, received February 12. Therefore, the protest was timely filed with the Air Force. Further, the protest was denied by the May 9 response from the Deputy Director, Procurement Policy. The protest to GAO was then filed May 16, or 5 days after notification of adverse agency action. Therefore, the protest is timely as it relates to matters which were not apparent prior to the closing date for receipt of proposals.

The protest from Cable may be categorized into four areas: (1) the evaluation of proposals considered factors proscribed by AFR 70–3; (2) the evaluation was prejudicial to Cable because it ignored material advantageous to Cable while at the same time considering material advantageous to Pate, both of which were not specifically stated in the RFP as evaluation criteria; (3) the conduct of negotiations violated 10 U.S. Code 2304(g) by the failure to point out deficiencies in Cable's proposal; and (4) the AFR discriminated against proposers with local off-base CATV systems.

While there is a dispute as to which of the various documents submitted by the Air Force reflects what actually occurred and the dissemination of some have been restricted by the Air Force, we look to the contemporaneous documents as providing the most probative statement of the facts. We refer, in this regard, to the memoranda of negotiations with Cable and Pate and the December 5, 1972, Evaluation for Award Memorandum detailing the contracting officer's considerations in reaching the award decision. Since these are the three documents that have been restricted from release by the Air Force, we can understand the protester's reluctance to accept the Air Force's statements as to their contents. However, since the determination concerning what is protected from the public domain is initially that of the agency involved, we cannot substitute our opinion. We have reviewed these documents and our decision is reached with full knowledge of them.

Paragraph 1 of AFR 70–3 makes its terms applicable to all Air Force bases in the United States and sets forth the CATV Franchise Agreement requirement to be used whenever right of access to provide CATV services on a base is granted or renewed. Paragraph 6(b) provides the method of evaluation of proposals:

> Evaluation of Proposals. In addition to such standard determinations as establishing the competitive range or the responsiveness and responsibility of offerors, contracting officers shall take the following matters into account in evaluating proposals:
>
> (1) Award shall, as a general rule, be made to the offeror submitting the lowest proposal, except that award may be made to other than the lowest offeror if

justified by material differences in the configurations of the proposed systems, the quality of the equipment offered, the nature of supplementary services offered above and beyond specified minimums, repair capabilities, or the demands that will be made with regard to Government-furnished property. The lowest offeror shall be that offeror submitting the lowest price in the "Estimated Total (Items 1 to 4)" blank of Schedule A to Attachment 1.

(2) Offers to provide the base with program origination equipment shall not be considered in evaluating proposals. Program origination equipment necessary to enable the base to utilize its reserved CATV channel, should the base decide to put the channel to use, shall be procured under a separate contract and with appropriated funds as available in accordance with the provisions of Air Force Regulation 100–1. Such equipment may not be acquired indirectly under the CATV Franchise Agreement, since it would then be acquired at the expense of on-base subscribers.

(3) In the ordinary case, the absence of on-base franchise, pole rental, or other fees for the privilege of doing business on an Air Force Base should result in proposed user and connection fees lower than those charged by a nearby off-base CATV system, if any. There may be instances, however, in which a utility company will own on-base poles and thus be able to charge pole rental fees on-base or in which a nearby community will having taxing power over commercial activities on-base. Contracting officers should take these factors into account in evaluating fee proposals, particularly when only one contractor responds to the request for proposals. In no event shall the CATV franchise be awarded to an offeror if that offeror operates a nearby off-base CATV system and its on-base user and connection fees are to exceed those charged off-base, unless the contracting officer finds that the construction, installation, operating, and other actual costs of providing CATV services to the base materially exceed those required with regard to the nearby off-base system. Where award of the CATV franchise will result in on-base user or connection fees greater than the fees charged by the contractor in a nearby off-base CATV system, the contracting officer shall insert in the contract file a documented explanation of the material on-base cost differences justifying the higher level of the on-base fees.

(4) In evaluating whether proposals meet the technical requirements set forth in the CATV Franchise Agreement, the contracting officer shall consult with the communications officer under whose jurisdiction the work under the CATV contract is to be performed. Evidence of clearance by the communications officer of the technical aspects of the CATV contractor's system shall be included in the contract file.

Protester relies upon the February 1 letter from the contracting officer as indicative of the disregard of the foregoing provisions in the evaluation process. In discussing the consideration of fees, paragraph "c" of the letter notes the similarity of fees for all services and then goes on to state:

* * * The most significant factor in the fee schedules is the Reconnection Charge. Pate's fee is $5.00 versus [Cable's] $12.95.

Both the AFR and RFP state that the lowest offer is that proposal offering the lowest price for items 1–4 of schedule "A." Reconnection and relocation fees were items 5 and 6 of schedule "A." Therefore, Cable asserts that inclusion of the reconnection fees in the evaluation was contrary to the express terms of the AFR and RFP and prejudicial to Cable.

The AFR and RFP establish the lowest cost as the primary evaluation factor. However, award may be made to other than the lowest cost proposer, under this evaluation scheme, if another offeror proposes technical aspects, itemized in the award evaluation provision, which

are materially better than those proposed by the low offeror. Necessarily, the determination whether the technical aspects offered justifies award to other than the low offeror is judgmental in nature and is entrusted to the discretion of the contracting officer.

Further, the RFP, at item 7, urged offerors to make their offer of additional factors known by listing them in the appropriate schedule or attaching a separate letter. Cable followed this advice and attached a rider in response to item 7 detailing the fee structure after the initial free connection offer expired, as well as other services. It was indicated that no connection fee would be charged only when a new subscriber moves into a location which previously was occupied by a subscriber, pays a one-month service charge in advance and it would not be necessary to send a technician. Cable recognized that item "g" of the Instructions for Schedule "A" contemplated that repeated full connection fees for items 5a and 5b may result in a windfall for the contractor because of rapid personnel turnover. Therefore, Cable indicated a willingness to negotiate a reduced schedule for these fees, but only if experience bore out the Government's expectations. While these fees, and the fees in general, were the subjects of discussions, Cable maintained it was unable to lower them because it could not charge the base subscribers less than its city customers without endangering its relationship with them. The memorandum of negotiation with Pate indicates that the only question concerning fees related to whether there would be connection charges in case of mass dormitory movements. Pate, considering that the moves were Government directed, indicated it may not charge connection fees in such a situation.

The Evaluation for Award Memorandum discusses the factors considered in arriving at the award recommendation. Under the general heading of "Fees to be charged," it was recognized that the $3,665 advantage to Pate over the 10-year period was minimal. It also indicated that the reconnection fees were the primary difference between the two proposals from a cost standpoint.

The Air Force contends that this situation is controlled by 51 Comp. Gen. 397 (1972). In that decision, two offerors were considered essentially equal after consideration of the factors stated in the RFP. Therefore, a final negotiation session was conducted with each offeror to consider 20 additional factors not specifically stated in the RFP. In response to a protest to our Office, against the validity of an award based upon factors not stated in the RFP, we stated at pages 402, 403

Although these additional criteria may not be easily categorized under the five criteria set forth in the RFP, we believe there is sufficient correlation between the additional evaluation factors used and the generalized criteria shown in the RFP to satisfy the requirement that prospective offerors be advised of the evaluation criteria which will be applied to their proposals. See 50 Comp. Gen.

565, 574 (1971). In addition, both offerors received the same evaluation information and each proposal was evaluated according to the same criteria. It is also relevant that utilization of these additional criteria did not result in a change in the ranking of the two offerors. In view of the above-cited factors we cannot say that this second evaluation was unfair or unreasonable.

The Air Force states that both Pate and Cable were treated equally in this regard: both were on notice of the possible significance of the fees because prices were required for them; the evaluation considered the proposed fees equally; fees were the subject of negotiations; and the relative standing of the two offerors was not changed as a result of the fee consideration.

However, we believe the circumstances in this case are distinguishable from the cited decision. In that case, the additional factors were employed to break the deadlock of otherwise equal technical proposals. A sufficient correlation was found to exist between the broad criteria stated in the RFP and the additional factors to satisfy the requirement that offeror's be advised of the valuation criteria that will be applied to determine which offer is more advantageous to the Government. In the present case, there is no such correlation between the reconnection and relocation fees and the criteria stated in the RFP that would permit their consideration. Under the general evaluation scheme described in the RFP, there is no heading sufficiently broad to encompass the reconnection and relocation fee as a factor. In fact, the RFP specifically excluded their consideration in paragraph "d" of the Instruction for Schedule A: "Owing to the uncertainty of subscriber turnover, Items 5–7 [reconnection and relocation fees] are too speculative and difficult to administer to be included in the computation of lowest offer."

Moreover, it is important that Pate's offer was low, albeit minimally. Under the prescribed evaluation scheme, price was controlling and could only be overcome by material differences in the five specific areas stated in the RFP. In this light, we are not persuaded by the distinction the Air Force asserts to exist between the computation of lowest price and the offer most advantageous to the Government. It is the function of the evaluation process, as announced in the RFP, to arrive at the most advantageous offer. In accordance with the RFP, the most advantageous offer was primarily deemed the lowest priced, or one offering material advantages in one or more stated areas of preference. Therefore, we do not believe consideration of the reconnection and relocation fees as evaluation for award factors was proper.

However, we do not believe that consideration of these fees prejudiced Cable's selection for award. As we pointed out, Pate offered the lowest price and, absent a finding that Cable's proposal offered material advantages in one or more of the evaluation criteria, award

to Pate on the basis of its price alone would have been proper under the terms of the solicitation. In this vein, the contracting officer evaluated Pate's proposal as more advantageous from a technical standpoint primarily because Pate's proposed configuration was located entirely underground and on-base. Protester disputes this conclusion. Since this was considered the chief difference between the two proposals, protester submits that the contracting officer's preference for Pate's configuration must be disregarded absent any documentation for the conclusion that the underground system would be more reliable than protester's above-ground system. As protester notes, the reliability of a proposed system is a technical factor resulting from the engineering specifications of the system's components.

Even if we assume that the protester is correct and that there is no advantage to having the system underground, this would not be sufficient to warrant a conclusion that award should have been made to the protester. This is so, because under the evaluation plan, award to other than the lowest price offer would have been justified only if protester could show that its proposed configuration offered material advantages. A showing that Pate's proposal was not more advantageous in this regard would not satisfy this requirement.

This protest underscores the lack of clarity and specificity of the statement of evaluation factors in the RFP and, consequently, the AFR. GAO has often stated that a statement of the evaluation factors and their relative importance in the RFP is necessary if equal and intelligent competition is to be achieved. *See* 49 Comp. Gen. 229 (1969). Therefore, by separate letter of today, we are bringing the matter to the attention of the Secretary of the Air Force for remedial action.

Concerning the asserted value of protester's proposed use of manual switching equipment to avoid program duplication, the contracting officer determined that it was not an essential part of the CATV system. In the opinion of the contracting officer, the added expense for a full-time monitor required for its operation outweighed its advantages. The contracting officer further characterized it as merely a concession to the local channel which has programming problems because it is not affiliated with any one network. Protester contends that the manual switching capability is necessary to comply with Federal Communications Commission (FCC) regulation regarding nonduplication of programming. The Air Force has viewed the manual switching equipment from a technical standpoint, assuming that FCC regulation will be met. It is germane to note that AFR requires that the base communications officer and civil engineer review the proposals for CATV franchise awards. In this light, GAO will not substitute its technical opinion for that of the cognizant purchasing activity.

Cable next objects to the consideration of Pate's previous construction experience as a separate award criteria under the general heading of "configuration of proposed system" in the February 1 letter. The Air Force states at paragraph 2(e) of the March 16, 1973, Facts and Findings that prior experience was only one factor considered under "System Configuration." The other considerations were that Pate's system was totally self-contained, underground and on-base. Cable's answer is that since the memoranda of negotiation were not released to Cable, it must rely on the February 1 letter which Cable interprets to accord past experience separate status as an award criteria.

We do not think it determinative that the consideration of Pate's prior experience in constructing CATV systems was listed under "System Configuration." The consideration of an offeror's responsibility, i.e., ability and capability to perform the required task, is also an integral part of the evaluation process. This consideration is required by 10 U.S.C. 2304(g) where it is stated that "* * * written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price, and other factors considered." Also, the RFP stated that award shall, as a general rule, be made to the "responsible" responsive offeror submitting the lowest price for items 1-4. Therefore, consideration of Pate's prior experience was proper.

The next matter is the consideration in the evaluation of the proposed utilization of Pate's weather unit as program origination equipment. Also, in this vein, Cable objects to consideration of the proposed location of the weather unit in the Command Post (Building 250) as facilitating program origination as contrary to paragraph 14 of the AFR. In the February 1 letter, the sole announced factor of consideration under "Nature of supplementary services offered" was the dual use of the weather unit/telemation unit. As stated in the letter "We anticipate a wide range of application for this unit in areas as fire prevention, safety, winter survival and general dissemination of base-oriented information." In this regard, AFR 70-3(6)(b)(2) states:

> Offers to provide the base with program origination equipment shall not be considered in evaluating proposals. Program origination equipment necessary to enable the base to utilize its reserved CATV channel * * * shall be procured under a separate contract and with appropriated funds * * *. Such equipment may not be acquired indirectly under the CATV Franchise Agreement, since it would thus be acquired at the expense of on-base subscribers.

Paragraph 2(g) of the Required Clause of the CATV Franchise Agreement defines program origination equipment as "Studio-type equipment and facilities, such as cameras, amplifiers, microphones, lights, videotape equipment and analogous equipment, necessary to originate television or radio signals from a site within the contractor's CATV system. * * *"

The Air Force asserts that since the program origination capability was only an incident of the unit's prime function as a weather/time unit, the contracting officer "did not consider it as program origination equipment, especially since no additional cost to subscribers was attributed to its use. * * * In addition, the inclusion of the greater capability of the weather broadcasting unit in evaluation of Pate's proposal only had a negligible impact on the assessment of the supplementary service offered by Pate and Cable Colorvision."

From our reading of the November 30, 1972, Memorandum of Negotiations with Pate Electronics, and the December 5 Evaluation for Award Memorandum, we do not find substantiation for this view. The Memorandum of Negotiations with Pate indicates that the use of the weather unit will "* * * allow movies/slides to be shown (Pate will not provide any movies but will give us the addresses of several companies which distribute films on hunting, fishing, camping, etc., free of charge). Messages of local interest may also be broadcast on this channel. Since this unit will be located in Building 250, there will actually be two Government channels in the Pate Electronics offer." Also, the discussion of Pate's offer in the Evaluation for Award Memorandum was concerned exclusively with the availability in the Command Post (Building 250) of equipment which could be used to broadcast programs and information on both the Government reserved channel and weather channel.

The AFR contemplates consideration of the interests of both the potential subscribers and potential supplier of CATV services. AFR 70-3(3)(a). However, the primary interest of the Air Force in awarding a CATV franchise is that subscribers receive quality service at the lowest possible rates. AFR 70-3(3)(e). It is for this reason that AFR 70-3(6)(b)(2) proscribes the acquisition of program origination equipment by the award of the CATV franchise. The AFR does not proscribe the acquisition of program origination equipment *per se*, but only insofar as it represents an additional cost to the potential subscriber. Assuming program origination equipment can be acquired under the award of a CATV franchise at no cost to the subscriber, we do not believe that the AFR was intended to deprive the subscriber of such supplementary service.

We note that the telemation unit was the sole factor considered favoring Pate under the heading of supplementary services in the evaluation memorandum as well as the February 1 letter. It is clear that Cable offered more supplementary services (FM radio, Laramie School District programs, State library programs) than Pate, but the dual application of the weather unit was deemed to outweigh the Cable proposal. The concern in this matter is whether Cable and Pate were

competing equally. Cable offered a 24-hour weather service which satisfied the requirements of the RFP. We think it important that while Pate's offer also satisfied the technical requirements it did offer the extra feature while still maintaining its lower price. We do not perceive the consideration of the dual application of the weather unit as constituting an unfair competitive advantage to Pate.

In this vein, Pate's proposal was accorded superiority because the location of the weather unit in the Command Post allowed the Air Force access to the weather channel as well as the Government reserved channel. Pate proposed to reserve channel 10 for the Government's use in accordance with clause 16 of the RFP, "Reservation of On-Base Channel." This clause stated that one channel is reserved for the Government's use, but may be used by the contractor for ordinary programming until the base desires to use it. Schedule "C" of the RFP, the list of the stations required to be carried, provided the contractor the option of incorporating the Government reserved channel into the time and weather or news channel until the Government desires to use the channel. However, Pate offered a separate channel for the Government. In this regard, paragraph 14 of the AFR provided:

> Use of Other Channels for Internal Information Programming.' Air Force internal information programming must be kept wholly separate from civilian commercial or educational programming. Consequently, apart from the use of the on-base channel reserved for Government use, a base may not demand or use time on any other CATV channel for internal information activities. This restriction does not, however, prohibit brief "what's happening on base" type programs which are primarily designed to further base-community relations where such programs are voluntarily carried by local broadcasters as a public service, or the use of the emergency temporary broadcasting capability.

In the August 15 Memorandum of Points and Authorities, the Air Force asserted that the intended use of the telemation unit will not violate the foregoing AFR provision. The Memorandum stated:

> * * * the benefit found by the Contracting Officer to be derived from the additional capability of the weather unit is in broadcasting general public service items such as wildlife, winter survival, and safety features * * * Items which are related solely to the base will not be shown over the 24-hour Time and Weather Channel.

This position is not substantiated by the record. The Evaluation for Award Memorandum and the February 1 letter both indicated that the contracting officer contemplated "* * * general dissemination of base-oriented information" over the "news/weather" channels, as well as fire prevention, safety and winter survival. Such consideration is clearly prohibited by the AFR and to the extent that it influenced the contracting officer's decision to award to Pate was indeed prejudicial to Cable. However, we are unable to conclude that the contracting officer would not have reached the conclusion that Pate's offer was

more advantageous even without consideration of the dissemination of base-oriented procurements. In the absence of a conclusion that the consideration of this capability was the determinative factor in awarding the franchise to Pate, GAO cannot conclude that the award was illegal.

Protester next contends that the evaluation was arbitrary and capricious because the contracting officer ignored advantageous aspects of its proposal while improperly considering advantages of Pate's proposal. First, protester notes that it offered educational programs and full stock market reports, while Pate did not. The Air Force stated in its reports that Pate could pick up the additional channels as they become available, apparently referring to the educational programs. Further, the Air Force noted that the stock market reports would be part of the news service. While the Air Force's contentions regarding acquisition of future channels may be correct, our review of the memoranda of negotiation and evaluation for award, plus Pate's proposal, indicate that Pate is not committed to the broadcast of educational programs from the Laramie School District. Protester correctly points out that pursuant to clause 8 of the RFP, Adjustment in Contractor's Fees, that contractor is entitled to negotiate an equitable fee adjustment "where the contracting officer and the contractor enter a supplemental agreement for the provision of additional services beyond those called for in the request for proposals * * *."

Concerning the stock market reports, the contracting officer noted that stock market information is carried on the automated 24-hour news channel proposed by Pate, which is a contract requirement. However, we note that this information is contained in a supplement to the Facts and Findings dated May 1, 1973, and is prefaced by the statement "Further research by this office reveals." Indeed, the contracting officer stated originally in the Facts and Findings that the "services" offered by Cable were not included in the initial proposal and were not precisely identified. The only coverage of sports events, local public affairs and stock market reports known to the contracting officer at that time (March 1973) were those shown on the local television channel.

The Air Force stated that Pate has offered to provide educational programming, if feasible, but the Air Force will not negotiate an increase in fees for that service. However, this after-the-fact statement does not cure the conduct of the contracting officer in evaluating aspects of Pate's proposal which were not, on the record, a matter of discussion. Again, we cannot say that consideration of these aspects would have required or lead the contracting officer to conclude that

these supplementary services were sufficient to award the franchise to Cable and overcome Pate's lower price.

Protester also objects to the failure to consider its offer to provide additional channels as they become available via satellite transmission as too speculative. We agree in this regard with the Air Force decision. We have held that evaluation of the most advantageous offer should be confined to matters which are not subject to speculation whether they will occur or not and may be quantifiable. *See*, for example, B–173915, December 21, 1971; 43 Comp. Gen. 60 (1963).

Protester further contends that it should have received consideration for the fact that it is locally owned. Protester asserts that this should be considered in relation to the quality of service and repair capability over the ten-year period. The contractor is required to provide service and repair over the entire life of the contract. We are unable to perceive any advantage to the fact that the protester is located nearby the base inasmuch as any awardee would be contractually bound to provide satisfactory repair service or be subject to termination for default. Also, Cable asserts that its repair capabilities were superior to Pate's because Pate intended to subcontract for the operation and maintenance of the system. Protester contends that this fact was not considered by the contracting officer. However, Pate stated during negotiation that it intended to operate and maintain the system itself. Further, the contracting officer concluded that the service of one full-time crew of the estimated number of on-base subscribers (700) was more advantageous than Cable's proposal of 3 crews for the base and Cheyenne subscribers (4,700). We are unable to dispute this conclusion.

Protester next alleges that the contracting officer violated 10 U.S.C. 2304(g) by failing to point out deficiencies in its proposal during negotiations. In this vein, protester objects to the failure to note the contracting officer's preference for a totally underground system. The protester states that "* * * the contracting officer never informed Cable Colorvision of any potential concern with regard to the use of overhead wiring to connect Cable Colorvision's head end to the base." The Evaluation for Award Memorandum stated in this regard, "During negotiations, Pate Electronics was most receptive to an underground system while Cable Colorvision was reluctant to accept this requirement due to the extra cost involved." However, the memorandum of negotiations is devoid of any reference concerning the protester's use of overhead wiring. In any event, the immediate contention is academic, since as indicated above, an award to other than the low offeror on the same technical basis as the low offeror would not be appropriate.

Finally, GAO believes that the portion of the protest concerning whether the AFR discriminates against local CATV operators is untimely under that portion of section 20.2 of our Standards that requires protests based upon alleged improprieties apparent prior to the closing date for the receipt of proposals be filed prior to the closing date for receipt of proposals. Since the provisions of the AFR were incorporated in the RFP, their inclusion should have been protested prior to the closing date for the receipt of proposals. Therefore, this portion of the protest is untimely and will not be considered.

In view of the foregoing, the protest is denied.

[B-179701]

Awards—Informers—Violations of Customs Laws—Comprehensive Drug Abuse Prevention and Control Act

Since section 511(d) of the 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 the basis of a forfeited bail bond, which is treated as a fine under 19 U.S.C. 1619, is not authorized under section 511(d) of the act. However, section 516(a) of the act, which authorizes payments to informers by the Attorney General, appears applicable.

In the matter of payments to informers, March 22, 1974:

This decision to the Secretary of the Treasury is in response to the request by the Assistant Secretary of the Treasury for Enforcement, Tariff and Trade Affairs, and Operations (reference: ENF-2-02 CC JR). The question concerns the legal authority of the United States Customs Service to make an award of compensation to an informer who furnishes original information which leads to a recovery of fines, penalties or forfeited bail bonds, arising out of the detection and apprehension by Customs officers of individuals charged with violations of the Comprehensive Drug Abuse Prevention and Control Act of 1970, approved October 27, 1970, Public Law 91-513, 21 U.S. Code 801 *et seq.*, (hereafter referred to as the Drug Abuse Act).

The Customs Service is authorized to make payments to informers in customs and navigation cases under 19 U.S.C. 1619, which provides in part:

Any person * * * who furnishes to a United States attorney, to the Secretary of the Treasury, or to any customs officer original information concerning any fraud upon the customs revenue, or a violation of the customs laws or the navigation laws, perpetrated or contemplated, which * * * information leads to a recovery of any duties withheld, or of any fine, penalty, of forfeiture incurred, may be awarded and paid by the Secretary of the Treasury a compensation of 25 per centum of the net amount recovered, but not to exceed $50,000 in any case, which shall be paid out of any appropriations available for the collection of the revenue from customs. For the purposes of this section an amount recovered under a bail bond shall be deemed a recovery of a fine incurred. * * *.

Section 511(d) of the Drug Abuse Act, 21 U.S.C. 881(d), provides in part, quoting from the act:

> All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this title, insofar as applicable and not inconsistent with the provisions hereof * * *.

The specific question presented is whether the omission in section 511(d) of the Drug Abuse Act of any reference to fines and penalties precludes the Customs Service from making awards on the basis of amounts recovered as fines, penalties or bail bonds forfeited by suspects who are apprehended by Customs officers but are charged with violations of the Drug Abuse Act.

In the case which gives rise to this question, an informer furnished Customs officers with original information which resulted, after investigation by Customs officers, in the apprehension of several individuals and their subsequent indictment under various provisions of the Drug Abuse Act. One individual was released from custody after posting a $50,000 cash bond. When this individual failed to appear for trial, the $50,000 was declared forfeited and paid over to the United States Treasury. The informer later submitted a claim for an award based on recovery by the Government of the forfeited bail bond. There were no seizures of property involved in the case, but it is stated that there may be additional recoveries of fines and penalties assessed against the other individuals.

The Assistant Secretary states:

> If the indictments had charged violations of the customs laws, the United States Customs Service would clearly be within its statutory authority under 19 U.S.C. 1619 to make payment of the informant's claim of 25 percent of the $50,000 in forfeited bail recovered by the Government if the claim is otherwise substantiated as required by law. We do not believe that the Congress, in enacting 21 U.S.C. 881(d), intended to exempt the category of fines and penalties, including bail forfeitures from those recoveries under the drug laws from which payments to informers may be made by Customs. However, despite this belief that the omission of any reference to fines and penalties in section 881(d) was a legislative drafting over-sight and that Congress intended the section to incorporate and cover the entire scope of 19 U.S.C. 1619, we nevertheless have found nothing either in the relevant legislative history of the Comprehensive Drug Abuse Prevention and Control Act of 1970 * * * or in any case law which would support this interpretation of the intended thrust of 21 U.S.C. 881(d). In view of this lack of support and in light of the potentially large amounts of awards involved in such cases, we respectfully ask your opinion as to our authority to consider and pay the claim of the informant in this case, and our authority as to similar claims in the future.

While we are also unaware of anything in the legislative history or any other authority directly on point, we cannot agree with the conclusion that the absence of any reference in section 511(d) of the Drug Abuse Act to fines or penalties is an unintended drafting oversight. On

the contrary, since section 511(d)—and, in fact, section 511 (2 U.S.C. 881) as a whole—is concerned with seizures, forfeitures and disposition of property, the matter of fines or penalties has not apparent application under these provisions. A recovery under a forfeited bail bond is, of course, treated as a fine under 19 U.S.C. 1619.

Further doubt concerning the possibility of a drafting oversight arises in view of the fact that section 511(d) of the Drug Abuse Act is similar to, and in all likelihood patterned upon, several other statutory provisions which incorporate provisions of the customs laws, including those relating to informer payments, all with reference to forfeitures of property. *See* 18 U.S.C. 1963(c) (racketeer influenced and corrupt organizations); 18 U.S.C. 2513 (confiscation of wire or oral communication intercepting devices); 22 U.S.C. 401(b) (illegal exportation of war materials); 49 U.S.C. 784 (seizure and forfeiture of carriers transporting contraband articles).

For the reasons stated herein, we must conclude that the payments proposed in the instant circumstances are not authorized by section 511(d) of the Drug Abuse Act. At the same time, we note that section 516(a) of the act, 21 U.S.C. 886(a), authorizes the Attorney General to make payments for information concerning violations of the act in such sums as he deems appropriate. It appears that this authority would apply in the instant circumstances.

[B–180517]

Appropriations—United Nations Children's Fund (UNICEF)—Authorization *v.* Appropriation Differences

Where the Foreign Assistance Act of 1973 earmarked $18 million for UNICEF while the appropriation act earmarked only $15 million, the lesser figure is controlling, since from the legislative histories it appears that in authorizing funding at the higher level Congress did not intend to reduce the funding of other international organizations and that the lesser amount in the appropriation act, representing the latest expression of Congress, was intended to constitute both the maximum and the minimum amount available for UNICEF.

In the matter of earmarking of funds for the United Nations Children's Fund, March 22, 1974:

This decision to the Secretary of State is in response to the request of the General Counsel of the Agency for International Development (AID), Department of State. He requested our decision on an issue involving statutory construction arising from an apparent conflict between a provision of section 302(d) of the Foreign Assistance Act of 1961, 22 U.S. Code 2223(d), as amended by section 9(4) of the Foreign Assistance Act of 1973, Public Law 93–189, approved December 13, 1973, 87 Stat. 719, and a provision contained in title I of the For-

eign Operations and Related Programs Appropriation Act, 1974, Public Law 93-240, approved January 2, 1974, 87 Stat. 1050, with regard to the earmarking of funds for the United Nations Children's Fund (UNICEF). Section 302(d) of the Foreign Assistance Act of 1961 as amended by Public Law 93-189 reads as follows:

(d) Of the funds made available to carry out this chapter for each of fiscal years 1974 and 1975, $18,000,000 shall be available in each such fiscal year only for contributions to the United Nations Children's Fund.

This provision is to be contrasted with the pertinent provision in title I of the Foreign Operations and Related Programs Appropriation Act, 1974, which reads:

International organizations and programs: For necessary expenses to carry out the provisions of section 301, $125,000,000, of which $15,000,000 shall be available only for the United Nations Children's Fund * * *.

As is apparent, these two provisions are inconsistent in that the enabling act earmarks $18,000,000 for UNICEF while the appropriation act only earmarks $15,000,000 for UNICEF.

The General Counsel pointed out that it is possible to give full effect to each of these provisions of law by funding UNICEF at the $18,000,000 figure. He stated:

While the two provisions of law here under consideration appear inconsistent, we believe it is possible to give full effect to each by concluding that because the $18 million authorization figure encompasses the appropriation figure of $15 million, the $18 million earmarking would prevail. Both sections provide that the respective earmarking figures represent a floor rather than a ceiling on funding for UNICEF. It is therefore possible to comply with the requirements of the Appropriations Act provision by funding at the Authorization Act level of $18 million. To adopt the higher figure would be to give full effect to the language of both statutes in compliance with the commonly applied rule of statutory construction.

The General Counsel recognizes, however, that to give such effect to the provisions in question would be to ignore the intent of the House Appropriations Committee in its insertion of the lower figure in the appropriation act.

Concerning language similar to that contained in the appropriation act here in question we have held that—

It is a general rule of statutory construction that an appropriation for a specific object is available for that object to the exclusion of a more general appropriation and that the exhaustion of a specific appropriation does not authorize charging the excess payment to a more general appropriation. However, whether language making part of a larger appropriation "available only" for a particular purpose constitutes a maximum limitation on the amount which properly may be used for the particular purpose or whether it merely earmarks the part of the appropriation so as to assure the availability of the smaller sum for the particular purpose would depend upon the intent of the Congress in using the language. (*See* B-142190, March 23, 1960.)

The legislative history of Public Law 93–240 clearly shows that Congress, being fully cognizant of the $18,000,000 earmarking for UNICEF in Public Law 93–189, intended to reduce this earmarking to $15,000,000. The provision containing this reduction is referred to in the Conference Report on Public Law 93–240, which states in pertinent part:

> Amendment No. 14: Earmarks $15,000,000 for the United Nations Children's Fund as proposed by the House instead of $18,000,000 as proposed by the Senate. (*See* page 6 of House Report No. 93–742.)

The Committee on Appropriations of the House of Representatives, which originated this provision in Public Law 93–240, clearly showed its intent of reducing UNICEF's earmarking when it stated in its report on Public Law 93–240 that:

> While the Committee realizes the authorizing legislation earmarked $18,000,000 for the United Nations Children's Fund, it felt the budget request for UNICEF of $15,000,000 would provide sufficient funds for this organization. Accordingly, the committee recommends $15,000,000 for UNICEF in the accompanying bill. (*See* page 26 of House Report No. 93–694.)

If UNICEF were to be funded at the $18,000,000 authorization figure the funding available for other international organizations and programs would be reduced. However, it is clear that Congress did not intend to reduce requested amounts for other international organizations and programs in order to fund UNICEF at the $18,000,000 level as proposed in the enabling legislation rather than the $15,000,000 level requested by the President.

In this connection the General Counsel points out in his letter that:

> The President's request for voluntary contributions to international organizations and programs was $124.8 million of which $15 million was to be for UNICEF. In earmarking $18 million for UNICEF in the authorizing bill, Congress approved an additional $3 million to the total amount requested by the President for the international organization authorization in order to allow for the higher UNICEF earmarking. (House Report No. 93 388 at 32.) It seems clear, from the Senate floor debate on an amendment introduced by Senator McGee to increase the international organization authorization, that the Congress did not intend to reduce the amount requested for other international organizations when it added the additional $3 million in funding for UNICEF. (Cong. Rec. Oct. 3, 1973, at S. 18408 (daily ed.)).

Inasmuch as the appropriation act involved here represents the latest expression of the Congress in the matter, the $15 million earmarked for UNICEF must be controlling. Accordingly, such amount is available only for UNICEF and in light of the legislative histories of the two related acts considered herein it is our view that the $15 million earmarked for UNICEF in the appropriation act is the maximum amount available for such purpose for fiscal year 1974.

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[B-179191(1)]

Pay—Retired—Increases—Cost-of-Living Increases—Adjustment of Retired Pay

The retired pay of a general (0–10) retired under 10 U.S.C. 8918, with over 30 years service is for computation based on the floor provided by 10 U.S.C. 1401a(e), and in the absence of specific language in the statute and legislative history, the floor provided by section 1401a(e) must be regarded as the rate of pay in effect on the day before the effective date of the rate of monthly basic pay on which the member's retired pay would otherwise be based, plus the applicable Consumer Price Index increases from that date forward, and any inequities resulting from the application of section 1401a(e) is a matter for consideration by Congress.

Pay—Retired—Increases—Cost-of-Living Increases—Adjustment of Retired Pay

The retired pay floor provided by 10 U.S.C. 1401a(e) is for computation on the rates of pay in effect on the day before the effective date of the rates of pay on which a member's retired pay is based. Accordingly, a general (0-10) who was retired in February 1973 may have his retired pay equated to the pay of a similar general retired in 1972, plus Consumer Price Index increases, but not to the 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.

Pay—Retired—Increases—Cost-of-Living Increases—Chief of Staff

The rationale expressed concerning the application of 10 U.S.C. 1401a(e) in the case of a general (0–10) is equally applicable in computing the retired pay of an officer who served as Chief of Staff.

To N. R. Breningstall, Department of the Air Force, March 25, 1974:

Further reference is made to your letter dated July 3, 1973 (file reference RPTT), requesting an advance decision as to the propriety of making payment on a voucher in the amount of $337.21, in favor of General David A. Burchinal, USAF, Retired, SSAN 173 16 2570, representing the difference between the retired pay of a general (0–10), with more than 30 years of service who retired in 1971 and the retired pay of a general with comparable service who retired in 1973, for the period March 1 through July 31, 1973.

You say that General Burchinal was retired on February 28, 1973, under 10 U.S. Code 8918 with more than 30 years of service. Under the provisions of 10 U.S.C. 8991, Formula B, he was entitled to monthly retired pay in the amount of 75 percent of the monthly basic pay to which he was entitled on the date of his retirement.

As provided by 37 U.S.C. 203 and Executive Order 11692, effective January 1, 1973, the rate of basic pay for a general (0–10), with over 30 years of service was $3,394.20 per month, 75 percent of which would be $2,545.65. However, the maximum rate of active duty basic pay was limited to $3,000 per month (the rate of level V of the Executive Schedule) by 5 U.S.C. 5308. See in this connection our decision of

May 17, 1973, 52 Comp. Gen. 817. Thus, computed on the pay rates in effect on the date of his retirement, it appears General Burchinal's retired pay, effective March 1, 1973, would have been 75 percent of $3,000, or $2,250 per month.

You indicate, however, that General Burchinal's retired pay was and is being paid based on the provisions of 10 U.S.C. 1401a(e) which provides as follows:

(e) Notwithstanding subsections (c) and (d), the adjusted retired pay or retainer pay of a member or former member of an armed force retired on or after October 1, 1967, may not be less than it would have been had he become entitled to retired pay or retainer pay based on the same pay grade, years of service for pay, years of service for retired or retainer pay purposes, and percent of disability, if any, on the day before the effective date of the rates of monthly basic pay on which his retired pay or retainer pay is based.

Under that statute General Burchinal's retired pay was computed as 75 percent of the rates of basic pay of a general (0–10), which were in effect on the day before the effective date of the basic pay rates in effect at the time of his retirement. *See* Executive Order 11638, effective January 1, 1972. Under that computation method General Burchinal's retired pay was computed as $2,250 plus 1.0 percent Consumer Price Index (CPI) increase which became effective July 1, 1972, for a total of $2,272.50 per month at the time of his retirement. His retired pay was subsequently increased to $2,411.12 by the 6.1 percent CPI increase effective July 1, 1973.

You note, however, that without considering 10 U.S.C. 1401a(e), a general (0–10) with the same service as General Burchinal, who retired August 31, 1971, would currently be entitled to monthly retired pay of $2,489.67 computed based on the 1971 basic pay rates plus all CPI increases through July 1, 1973; a similar general retired April 30, 1972, would now be entitled to retired pay of $2,411.12 computed based on the 1972 basic pay rates plus all CPI increases through July 1, 1973; and a general, such as General Burchinal, retired on February 28, 1973, would now be entitled to $2,310.75 computed based on 1973 basic pay rates plus the CPI increase effective July 1, 1973. You further indicate that by applying 10 U.S.C. 1401a(e) it appears that the general who retired in 1972 is entitled to have his retired pay based on the retired pay he would have received had he retired in 1971, or $2,489.67, and the general who retired in 1973 is entitled to have his retired pay based on the retired pay he would have received had he retired in 1972, or $2,411.12. Under that interpretation of 10 U.S.C. 1401a(e), a general such as General Burchinal receives less retired pay now than a general who retired in 1971 or 1972.

You are, therefore, in doubt as to whether that is the correct interpretation of 10 U.S.C. 1401a(e) and ask whether the statute is broad

enough to permit equating the retired pay of General Burchinal with that of officers of the same grade and service retired before 1972 in order to entitle him to a higher rate of retired pay. You also ask whether the retired pay of an officer who has served as Chief of Staff may be similarly equated to that of previously retired officers who have served as Chief of Staff.

Subsection 1401a(e) of Title 10, U.S. Code, was added by section 2 of the act of December 16, 1967, Public Law 90-207, 81 Stat. 652, which became effective October 1, 1967. The purpose of adding subsection (e) of section 1401a is explained as follows in the legislative history of section 2 of Public Law 90-207 on page 19 of Senate Report No. 808 (to accompany H.R. 13510 which became Public Law 90-207):

> Clause I: New subsection (e) is a technical amendment recommended by the Department of Defense with respect to increases for retired personnel based on advances in the Consumer Price Index. Despite the provisions in the House version modifying the Consumer Price Index formula, there remained a possible inequity resulting from a combination of the upward movement of the Consumer Price Index's together with the transitional provisions contained elsewhere in the bill. Without the further amendment, there would have been situations where persons retiring after the effective date of this legislation in the same grade and basic pay would receive less than certain individuals in the same circumstances retiring prior to the effective date of this legislation. *The amendment adopted in committee will insure that those retiring after the effective date of this bill and before the next pay increase will receive as much in retired pay as comparable members retiring before the effective date of the bill.* [Italic supplied.]

While subsection (e) was enacted as permanent legislation, it is clear from its legislative history that it was adopted primarily to remedy an inequity which arose at the time Public Law 90-207 was still in the legislative process. Nowhere in its legislative history is there any indication that Congress intended that subsection (e) would authorize the computation of a member's retired pay based on rates of active duty pay in effect prior to those in effect "on the day before the effective date of the rates of monthly basic pay on which his retired or retainer pay is based."

Also, as noted previously, if the limitation imposed by 5 U.S.C. 5308 were not in effect, General Burchinal's retired pay would have been computed as 75 percent of $3,394.20 rather than 75 percent of $3,000. Thus, he would have been entitled to $2,545.65 in retired pay, which is more than the retired pay of a similar general retired in 1971 or 1972. Congress is aware of the limitations imposed by 5 U.S.C. 5308 (which apply to both military and civilian Government personnel), and is also aware that problems may arise in the system of applying cost-of-living increases to retirement benefits. See for example, the act of October 24, 1973, Public Law 93-136, 87 Stat. 490, which amended 5 U.S.C. 8340(c), relating to the application of similar increases to civil service employees' retirement annuities.

Accordingly, it is our view that in the absence of specific language in the statute or its legislative history to the contrary, the floor provided by 10 U.S.C. 1401a(e) must be regarded as the rate of pay in effect on the day before the effective date of the rate of monthly basic pay on which the member's retired pay would otherwise be based, plus the appropriate CPI increases from that date forward. Any inequities resulting from the application of section 1401a(e) is a matter for consideration by the Congress.

Since it appears that General Burchinal has been receiving retired pay based upon the proper interpretation of section 1401a(e), he is not entitled to any additional retired pay. The voucher submitted with your letter will be retained here.

Regarding your question concerning a retired officer who has served as Chief of Staff, the rationale applied in reaching the conclusion in General Burchinal's case would be equally applicable in computing the retired pay of an officer who served in that capacity.

[B-179191(2)]

Pay—Retired—Increases—Cost-of-Living Increases—Adjustment of Retired Pay

In computing retired or retainer pay, the floor provided by 10 U.S.C. 1401a(e) must be limited to the rate of pay in effect on the day immediately before the effective date of the rate of monthly basic pay on which a member's retired or retainer pay would otherwise be based, plus the appropriate Consumer Price Index increases from that date forward. Any inference in 51 Comp. Gen. 384 to the 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.

To the Secretary of Defense, March 25, 1974:

During our consideration of the issues involved in our decision 53 Comp. Gen. 698, of today's date, copy enclosed, it was informally brought to our attention by officials of the Department of Defense that our decision 51 Comp. Gen. 384 (1971) has apparently caused some confusion among the military services as to the application of 10 U.S.C. 1401a(e). Those officials indicated that the 1971 decision had been considered by them as implying that in the computation of retired pay for members who served as Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, or Commandant of the Marine Corps, such retired pay may be computed based on pay rates in effect *prior to* the rates of pay in effect on the day immediately before the effective date of the rate of monthly basic pay on which the member's retired pay

would otherwise be based, but for the application of 10 U.S.C. 1401a(e), plus the appropriate Consumer Price Increases from that date forward.

No such implication was to be intended by this Office.

It is our view, as expressed in today's decision, *supra*, to Mr. N. R. Breningstall, Accounting and Finance Officer, that in the absence of specific language in the statute or its legislative history to the contrary, the floor provided by subsection 1401a(e) must be limited to retired pay or retainer pay based on the rate of pay in effect on the day immediately before the effective date of the rate of monthly basic pay on which the member's retired pay or retainer pay would otherwise be based, plus the appropriate Consumer Price Increases from that date forward.

As to 51 Comp. Gen. 384, that decision dealt primarily with the application of 10 U.S.C. 1401a and 1402(a) to retired pay in the light of the wage/price freeze imposed by Executive Order 11615, August 15, 1971, and the enactment of section 201 of title II of the act of September 28, 1971, Public Law 92-129, 85 Stat. 355, which amended 37 U.S.C. 203(a) to provide for increases in basic pay for certain members of the uniformed services. Thus, any inference drawn from that decision concerning the application of 10 U.S.C. 1401a(e) which would be inconsistent with our views as expressed in the decision to Mr. Breningstall should be disregarded.

Any inequities which may result from our interpretation of 10 U.S.C. 1401a(e) would be a matter for consideration by Congress.

Payments of retired pay being made under any interpretation of 10 U.S.C. 1401a(e) inconsistent with our views as expressed in the enclosed decision should be corrected immediately. However, no action need be taken to collect past overpayments of retired or retainer pay made as a result of a misinterpretation of 10 U.S.C. 1401a(e), if such payments were otherwise correct, since such payments presumably were accepted in good faith by the members involved and would be proper for waiver under 10 U.S.C. 2774.

[B-180708]

Personal Services—Private Contract *v.* Government Personnel—Former Employees

Although the Federal Communications Commission lacks specific authority to employ experts and consultants pursuant to 5 U.S.C. 3109, in view of the funds provided in its current appropriation for "special counsel fees," the Commission may procure the services of a retired Government attorney in connection with the investigation and proceedings he directed prior to retirement, and the amount payable to him is not subject under 5 U.S.C. 8344(a) to set-off by the amount of his retirement annuity since the retiree's expertise and thorough

knowledge in the matter will enable him to perform the functions described in the "Statement of Work" contained in the proposed contract independently rather than under an employer-employee relationship.

In the matter of legal services of a retired annuitant, March 25, 1974:

By his letter dated February 22, 1974, the Chairman of the Federal Communications Commission (FCC) requests our opinion as to the propriety of a proposed contractual arrangement with the consulting firm of Asher Ende Associates. Specifically, our advice is sought in regard to the following three questions:

1. Whether, under the circumstances, the FCC is authorized to enter into a contract with the consulting firm to furnish reports and recommendations as well as certain specialized legal services consisting primarily of cross-examination of witnesses;

2. Whether the highest rate specified by the Classification Act is the maximum amount that may be paid for such services under the authorization of the Communications Act of 1934, as amended, 47 U.S. Code 154(g), as implemented by the current appropriation act, Public Law 93–137, October 26, 1973, 87 Stat. 491; and

3. Whether, in view of the fact that the proposed contractor is a Government annuitant, the amount awarded under the contract is subject to reduction by the amount of his retirement annuity.

The Chairman explains that the Commission is currently engaged in an investigation of Western Electric and its relationship to the operations of the Bell System Operating Companies and their parent corporation, AT&T, and that the Commission's AT&T Task Force has the basic responsibility for developing the record in the investigation and presenting it to the Commission for determination. Mr. Ende of Asher Ende Associates is the recently retired Managing Counsel for the Task Force, and his highly specialized technical assistance is considered critical to the continuity of the investigation.

As is explained by the Chairman, Mr. Ende is particularly qualified in the circumstances for which his services are sought. Among his extensive qualifications, the Chairman reports that:

> * * * Mr. Ende has had twenty seven years of experience in the telecommunications area. For the last 10 years he has been the Deputy Chief of the Common Carrier Bureau and during the past two years, he has also been the Managing Counsel of the AT&T Task Force. In addition to considerable experience in public utility regulation he has a complete mastery of the Commission's rate rules and procedures governing rate cases. He possesses a through knowledge of the background of the AT&T rate proceeding as well as detailed knowledge about the operations of the Western Electric Company and the relationship between Western Electric and the other elements of the Bell System.

The Statement of Work contained in the proposed contract, a copy of which is provided with the Chairman's letter, calls for the contractor's performance as follows:

1. Contractor will review and analyze draft report submitted by Touche Ross, Inc. under Contract RC-10195, and will prepare a critique of the draft report with such recommendations as may be necessary and appropriate.

Contractor will also review final report of Touche Ross when submitted, and will prepare recommendations as to the use to be made of such report in Docket No. 19129, including clarifying questions and other appropriate questions of courses of action.

2. In connection with the hearing stage of the proceeding, contractor will perform the following tasks:

a. Review and analyze the direct testimony and supplemental materials for the 8 witnesses addressing the Western Electric issues submitted by AT&T in its filing of November 15, 1973 as well as the direct testimony of the 7 witnesses originally addressing the Western Electric issues presented in AT&T's filing of November 20, 1970.

b. Prepare a written report analyzing the submissions and recommending the manner in which these submissions should be treated in the context of the hearings thereon.

c. Prepare and submit recommendations as to appropriate type, nature and number of exhibits to be offered by the staff.

d. Prepare and submit recommendations with regard to those issues to be addressed through direct testimony on behalf of the Trial Staff.

e. Prepare recommended cross-examination of the Bell System witnesses presented with respect to the Western Electric issues.

f. Assist the Managing Counsel in the actual conduct of cross-examination on Western Electric issues of such Bell System witnesses and other witnesses (e.g., ITT, Touche Ross).

g. Prepare suggestions and, if required, outlines of proposed rebuttal testimony and supporting exhibits to be submitted on behalf of Trial Staff with respect to Western Electric issues.

The work tasks shall be performed in a professional manner satisfactory to the COTR.

The Contractor shall provide an original and one copy of all analyses, recommendations with respect to exhibits, testimony, and other reports and documentation, in accordance with the following schedule:

a. Critique on the Touche Ross draft report within 20 days after receipt of such report, or 20 days after contract is signed, whichever is later.

b. Recommendations on the final Touche Ross report within 30 days after receipt of that report.

c. Recommendations with respect to exhibits and testimony 30 days before their scheduled submission to other parties.

d. Proposed cross-examination 15 days before such cross-examination is scheduled to start on direct case and one day before cross-examination is scheduled to start on rebuttal witnesses.

With regard to his first question concerning the authority of the FCC to enter into a contract for the above-described legal services, the Chairman explains that title II of the Department of Housing and Urban Development, Space, Science, Veterans, and Certain Other Independent Agencies Appropriation Act, 1974, Public Law 93-137, 87 Stat. 491, 494, provides for necessary expenses of the FCC including "special counsel fees." The Chairman states that he is unaware of any opinion of this Office dealing with the use of appropriated funds for payment of special counsel fees to procure legal services such as are here involved.

In our opinion the language contained in title II of the Appropriation Act, 1974, *supra*, appropriating funds for the payment of special counsel fees constitutes authority to enter into the proposed contract.

By sections 602, 603, and 604 of the Communications Act of 1934, Public Law 416, 48 Stat. 1064, 1102, and 1103, the Radio Act of 1927, Public Law 632, 44 Stat. 1162, was repealed and the FCC succeeded to the responsibilities of the Federal Radio Commission (FRC) and others. Since its creation in that year, annual appropriation acts for the Commission have consistently provided for payment of special counsel fees. See, for example, the Independent Offices Appropriation Act, 1936, Public Law 2, 49 Stat. 6, 9. We believe that the legislative purpose in including such a provision in the appropriation acts of the FCC and certain other agencies is clear.

In A-27566, June 29, 1929, copy enclosed, this Office addressed the issue of the FRC's authority to designate a former General Counsel of the Commission to act as special counsel in connection with a case which had been pending prior to his resignation. On the basis of the Radio Act of 1927, section 3, authorizing the Commission to appoint such special counsel as it might from "time to time" find necessary, as well as the appropriation contained in the Independent Offices Act, 1929, Public Law 400, 45 Stat. 573, 579, this Office found that express provision had been made for payment of such special counsel fees as were there involved. *See also* 24 Comp. Gen. 216 (1944).

Thereafter, appropriations for the FRC and its successor commission, the FCC, expressly provided for payment of special counsel fees. See, for example, FRC Appropriation, 1930, Public Resolution No. 35, 46 Stat. 63, and Independent Offices Appropriation Act, 1933, Public Law 228, 47 Stat. 452, 459, and 460. In view of this explicit history, we conclude that the language of the FCC's current appropriation providing funds for payment of special counsel fees is clearly addressed to the situation at hand and find that it constitutes authority to enter into the proposed contract with Asher Ende Associates.

The Chairman's second question concerns the maximum amount which may be paid under the proposed contract. Inasmuch as we have found authority for the FCC's procurement of legal services on an independent contract basis under its specific appropriation for the payment of special counsel fees and since as concluded hereafter the services were in fact procured on such basis neither the salary limitation in 5 U.S.C. 3109 nor any other statutory provision of which we are aware would limit the amount payable under the contract as proposed.

The Chairman's third question concerns possible setoff of Mr. Ende's retirement annuity against amounts due him under the proposed contract. Section 8344(a) of Title 5 of the U.S. Code restricts the pay an annuitant may receive if reemployed by the Government as follows:

> If an annuitant receiving annuity from the Fund * * * becomes employed after September 30, 1956, or on July 31, 1956 was serving, in an appointive or elective

position, his service on and after the date he was or is so employed is covered by this subchapter. * * * An amount equal to the annuity allocable to the period of actual employment shall be deducted from his pay * * *.

We have held that payments under a contract which, as between the Government and the contractor, creates a relationship tantamount to that of employer and employee, is within the purview of the above provision requiring setoff of annuity payments against amounts received under the contract. On the other hand, where, under a contract, the retired annuitant functions on a truly independent basis, contractual payments are not subject to setoff based upon the amount of his annuity. 39 Comp. Gen. 681 (1960), B–154204, September 4, 1964, B–176681, October 27, 1972, 53 Comp. Gen. 542 (1974).

Thus, whether the contract price to be negotiated is subject to setoff by the amount of Mr. Ende's annuity turns upon whether the contractual arrangement as proposed and as in fact executed evidences a true contractual relationship or whether thereunder Mr. Ende will function essentially as would an employee of the Government.

As discussed at length in 53 Comp. Gen. 542, *supra*, the most significant test of whether a particular contract contemplates or will in fact elicit the latter sort of relationship, is that of supervision of a contractor or contractor employee by a Federal officer or employee. In that decision, we quoted the "Mondello opinion" as follows:

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

We have reviewed the proposed contract with a view to determining whether the relationship contemplated thereby and the relationship it will elicit as between the contractor, Asher Ende Associates, and the FCC is likely to have those aspects of an employer-employee relationship as will necessitate setoff of Mr. Ende's annuity payments under the provisions of 5 U.S.C. 8344(a) quoted above. In doing so we have construed the contract in light of the entire arrangement existing between the parties which necessarily takes into account Mr. Ende's very thorough knowledge of all aspects of the investigation and proceedings to date.

The services which Asher Ende Associates would be required to provide under the contract as proposed are described in the Statement of Work quoted above. The Chairman states that the contract would also contain a provision stating that the contractor is expected to work on

his own without any supervision from the Commission or its staff and that it will remain the prerogative of the Managing Counsel to decide whether to use the contractor's report and recommendations.

While an attorney unfamiliar with the investigation would most likely be hard-pressed to perform the duties called for by the proposed Statement of Work in a manner essentially independent of the Task Force and without Government supervision, we feel satisfied that an attorney having such experience as Mr. Ende, who already has closely participated throughout the entire course of the investigation, would be capable of performing all tasks and services specified in the contract without the close and continuous supervision or direction that would tend to nullify his independence as a contractor. We therefore find that the contract price to be negotiated is not subject to setoff by the amount of the annuity payable to Mr. Ende as a retired annuitant.

[B-180420]

Awards—Finders of Government Property—Alien

In the absence of specific authority for paying rewards, a reward may not be paid to a law enforcement official of Thailand for the recovery of stolen U.S. Air Force property. However, the Secretary of the Air Force may authorize payment of a reward from the amount designated for emergencies and extraordinary expenses in the current appropriation "Operation and Maintenance of the Air Force," an amount which may only be expended upon approval or authority of the Secretary.

In the matter of reward to foreign law enforcement personnel, March 26, 1974:

This decision to the Directorate of Accounting Operations, AFAFC, is in response to a letter dated November 21, 1973, from Jackson E. Rendleman, Captain, USAF, Accounting and Finance Officer, 432nd Combat Support Group (PACAF), APO San Francisco, 96237. Captain Rendleman forwarded, with a request for an advance decision under authority of 31 U.S.C. 74, a voucher which would authorize payment of $500 to "Special Agent, AFOSI, Robert E. Cunniff 024-32-5945, for presentation to 1st Lt. Yos Lamon, Pvt. Chaleom Praviset and Pvt. Amnuay Riyasu * * * (Thai policemen) in the interest of the United States Air Force." He presented the question as to whether a monetary reward may be paid to "Foreign National Law Enforcement Officials for the recovery of stolen high valued U.S. property under unusual circumstances." His letter was forwarded here by letter dated January 8, 1974, from the Headquarters Air Force Accounting and Finance Center, 3800 York Street, Denver, Colorado, 80205.

A statement dated September 11, 1973, attached to the voucher reads, in part, as follows:

On 18 August 1973, one each Caterpiller Motor Road Grader, valued at $12,474.00 and belonging to the United States Air Force, was removed from Udorn Royal Thai Air Force Base, Thailand by a person or persons unknown at the time.

The Office of Special Investigation (OSI) was informed of the theft on 20 August 1973 and immediately began an investigation. On 21 August 1973, the OSI was provided with the name of a suspect by a confidential source. The OSI notified Udorn District, Thai National Police during the late afternoon of 21 August 1973. 1st Lt. Yos Lamon, Chief of Crime Suppression, Udorn District, Thai National Police, immediately accepted the case and utilized two of his men, Privates Chaleom Praviset and Amnuay Riyasu to assist him. No reward was, or has been, offered or hinted at on the part of the U.S. Air Force or any of its representatives.

Local Custom, which is consistent with Thai Law, is for the owner of stolen property to overtly offer the Law Enforcement personnel an Award of up to 20% of the value of the stolen property at the time the theft is formally reported to the local Law Enforcement Agency. The reward is paid to the Law Enforcement Representatives immediately upon recovery of the stolen propery without delay or bartering.

Not only was there no reward promised or alluded to, but there also was no formal report of the theft made to the local Law Enforcement Agency. Representatives of the 432nd Civil Engineering Squadron, custodian of the Road Grader, had failed to file a formal report or complaint with the local Law Enforcement Agency when they notified the 432nd Security Police Squadron of the theft of the item on 20 August 1973.

It is important here to note that Local Custom and Legal Procedures specify that the Thai National Police cannot conduct, assist in, or condone an investigation until a formal complaint has been properly filed by the owner or custodian of the property supposedly stolen. Furthermore, there is no Status of Forces, or Equivalent, Agreement between U.S. Forces and the Government of Thailand. U.S. Government Law Enforcement Representatives, including those assigned or associated with the Department of Defense and its Agencies, do not possess any local Legal Authority. Furthermore, they are not allowed to bear Arms off a military installation. Thus any and all cooperation between U.S. Law Enforcement personnel and Agencies and Thailand Law Enforcement personnel and Agencies is essential and is based purely and solely on Mutual Respect and Goodwill.

* * * * * * *

In Thailand, speedy efficient and effective action is essential to maintain at least a minimum probability of recovering stolen property. In the case of the Road Grader, if it could be painted and the chassis, identification plate removed before it is located by the Law Enforcement Officials, it would become the lawful property of the possessor.

* * * * * * *

It is important to note that Lt Lamon and his men were now out of their district. They possessed no formal or legal authority and had been working on the case full time for over twenty-four hours, much of which involved voluntary work during Off-Duty time.

Upon arrival in the Surin area, Lt Lamon coordinated with the local authorities and the group staked out the supposed hiding place of the Road Grader.

On the morning of 23 August 1973, the group attempted to recover the Road Grader. However, it had been moved and was not in the supposed location. Lt Lamon coordinated and worked feverishly with the local authorities. A new supposed location was determined and the group again attempted recovery of the Grader. This time the Grader was found. At the time it was located and recovered, the possessors were in the process of scraping off the paint. Luckily, the possessors had not yet removed the chassis plate.

The group then maintained control of the Road Grader until men and equipment arrived from Udorn RTAFB to take possession of the item and return it to Udorn. The Road Grader is now back under U.S. control at Udorn RTAFB, Thailand.

The group then proceeded back to Udorn, arriving at approximately 0300 hours on 24 August 1973.

This is the first known successful recovery of a stolen large piece of U.S. equipment in Thailand. The recovery was made possible only because of the outstanding cooperation of Lt Lamon, Pvt. Praviset and Pvt. Riyasu. These outstanding individuals disregarded Thai Customs, stretched Thai Government procedures, and gave of themselves for over three days without so much as a break. For their independent and collective assistance to the OSI, which materially benefited the U.S. Air Force, they should be monitarilly rewarded.

* * * * * * *

If the reward is not approved and presented in a timely manner, local Law Enforcement Representatives probably will not expend significant personal effort to again assist U.S. Forces in recovering stolen property. For example, two front end loaders valued at approximately $32,000.00 each have been stolen in the past from this base alone, and have not been recovered. This is the first time we have had such outstanding, efficient and effective cooperation from the local Law Enforcement Authorities with regards to the recovery of major item(s) stolen from Udorn RTAFB.

The approval and presentation of the requested reward may in fact be a precedent setter. However, it would only set a precedent for large, major items.

In his letter of November 21, 1973, Captain Rendleman states that Air Force Regulation 67-5, Rewards for Recovery of Lost Air Force Property, authorizes monetary rewards to individuals and organizations for the recovery of lost Air Force property but does not apply to stolen property. He also states that an extensive search of existing regulations, manuals and available Comptroller General decisions fails to reveal a way to effect payment, provide a precedent upon which to approve or deny payment, or to establish the propriety of paying a reward for recovered stolen property.

We also have been unable to find any specific authority for paying a reward under the circumstances. *See* 8 Comp. Gen. 613 (1929) in which we noted that Congress has frequently considered the wisdom and propriety of permitting public moneys to be used in paying rewards for the furnishing of helpful information or the rendering of other assistance to officials of the Government, and in certain instances has granted specific authority therefor. We stated:

There being grave doubt as to the propriety of regarding an appropriation general in terms available for the payment of such rewards, and the Congress having on many occasions accepted the matter as one for its consideration and expression, it appears the duty of this office to require those in administrative places who desire to offer rewards for information or other assistance to aid in the accomplishment of authorized work, to submit their requirements to the Congress for specific legislative authority with respect to all appropriations hereafter to be made.

In accordance with that decision and upon the basis of the present record it must be concluded that there is no authority for certifying the voucher.

However, your attention is invited to 6 Comp. Gen. 774 (1927) in which we noted that the 1927 and 1928 appropriations for "Contingencies of the Army" were "intended to cover such incidental, casual, and unforeseen expenses in connection with the operations of the Army as are necessary and appropriate to the execution of duties required by

law that are impossible to be anticipated or classified. Expenditures therefrom are to be made on the approval or authority of the Secretary of War and for such purposes as he may deem proper." We concluded that if in the exercise of the discretion vested in him under the appropriation, the Secretary of War should deem it advisable to offer a reward for the return of stolen platinum, there would be no objection upon the recovery of the material to the payment of a reward from the appropriation for "Contingencies of the Army" covering the fiscal year in which the offer was made.

It is noted that the current appropriation for "Operation and Maintenance of the Air Force," 87 Stat. 1026, 1029 has wording similar to that in "Contingencies of the Army" mentioned above in that it includes an amount "for emergencies and extraordinary expenses, to be expended on the approval or authority of the Secretary of the Air Force." In line with our decision, 6 Comp. Gen. 774, *supra*, the voucher might be processed for consideration by the Secretary of the Air Force for payment from that amount.

[B-179046, B-179061, B-179062]

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

An award of a mess attendant contract to the offeror who submitted a proposal which included only one manning chart that exhibited a manning level above 95 percent of the Government estimate will not be questioned, notwithstanding the allegation that the Navy improperly interpreted the governing request for proposals provision, as there is more than one reasonable interpretation of the provision.

Contracts—Negotiation—Evaluation Factors—Manning Requirements—Price/Hour Less Than Basic Labor Expense

Since the request for proposals for mess attendant services mandates the rejection of an offer whose dollar/hour ratio (price/hours) does not exceed the offeror's basic labor expense, where the successful offeror's basic labor expense exceeded its dollar/hour ratio, even when suggested variable factors are utilized, the contract award made was improper.

Contracts—Negotiation—Evaluation Factors—Factors Other Than Price—Employee Absenteeism

Absenteeism of employees, which was not stated in the request for proposals as a factor to be used in computing offerors' basic labor expense, was properly not considered in such computation.

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

Under a mess attendant services solicitation an offeror who submitted two of three manning charts under 95 percent of the Government's estimate, and a total offer of less than 95 percent of the Government's total estimate was improperly

awarded a contract since the request for proposals required conformance with the 95-percent level.

Contracts—Negotiation—Evaluation Factors—Manning Requirements—Price/Hour Less Than Basic Labor Expense

Since no factor was stated in the request for proposals (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.

In the matter of ABC Management Services, Inc., March 28, 1974:

Requests for proposals (RFP) N00204-73-R-0035, -0037 and -0038 for mess attendant services were issued on April 18, 27 and 25, 1973, respectively, by the Naval Air Station, Pensacola, Florida.

RFP -0035 (B-179061)

This solicitation sought offers for furnishing mess attendant services at the Naval Coastal Systems Laboratory, Panama City, Florida.

Section "D" of the RFP stated that:

SECTION D—EVALUATION FACTORS FOR AWARD
DISCOUNTS (1968 SEP)

In accordance with subparagraph (a) of the clause entitled "Discounts" in the Solicitation Instructions and Conditions (Standard Form 33A), prompt payment discounts will be considered in the evaluation of offers, *provided* the minimum period for the offered discounts is:

30 days where delivery and acceptance are at destination. The offered discount of a successful offeror will form a part of the award whether or not such discount was considered in the evaluation of his offer and such discount will be taken if payment is made within the discount period.

Evaluation of Offeror's Manning Charts and Prices

(a) The manning levels reflected in the offeror's manning charts must be sufficient to perform the required services. For the purpose of evaluating proposals and establishing a competitive range for the conduct of negotiations, the Government estimates that satisfactory performance will require total manning hours (including management/supervision) of approximately 47 on a representative weekday and approximately 31 on a representative weekend day/holiday. Submission of manning charts whose total hours fall more than 5% below these estimates may result in rejection of the offer without further negotiations *unless* the offeror clearly substantiates the manning difference with specific documentation demonstrating that the offeror can perform the required services satisfactorily with such fewer hours.

(b) Further evaluation of the offerors' manning charts will be based on the following criteria:

(1) the manning distribution in space/job categories prior to, during, and after meal hours and at peak periods must represent an effective, well planned management approach to the efficient utilization of manpower resources in performing the services required; and

(2) the hours shown in the manning charts must be supported by the price offered when compared as follows. The total hours reflected in the manning charts for the contract period (*i.e.*, based on a contract year containing 252 weekdays and 113 weekend days/holidays) will be divided into the total offered price (less any evaluated prompt payment discount) to assure that this dollar/hour ratio is at least sufficient to cover the following basic labor expenses:

(i) the basic wage rate;

(ii) if applicable, fringe benefits (health and welfare, vacation, and holidays); and
(iii) other employee-related expenses as follows:
(A) FICA (including Hospital Insurance) at the rate of 5.2%: [amended to 5.85%]
(B) Unemployment Insurance at the rate set forth by the offeror in the provision in Section B of this solicitation entitled "Offeror's Statement as to Unemployment Insurance Rate and Workmen's Compensation Insurance Rate Applicable to His Company"; and
(C) Workmen's Compensation Insurance at the rate set forth by the offeror in the provision referred to in (B) above.

Failure of the price offered to thus support the offeror's manning chart may result in rejection of the proposal without further negotiations.

(c) *Award* will be made to the responsible offeror whose proposal, meeting the criteria set forth in (a) and (b) above, offers the lowest evaluated total price.

Note to Offeror: The purpose of the above price-to-hours evaluation is to assure:
(i) that manning charts submitted are not unrealistically inflated in hopes of securing a more favorable proposal evaluation; and
(ii) that award is not made at a price so low in relation to basic payroll and related expenses established by law as to jeopardize satisfactory performance.

Nothing in this Section D shall be construed as limiting the contractor's responsibility for fulfilling all of the requirements set forth in this contract.

The Government's total estimated need was 15,347 man-hours. Space Services offered 95 percent of the Government's estimate based on either a contract year containing 250 representative weekdays and 115 representative weekend/holidays or one containing a 252/113 dispersion. As stated in section D(a) above, the Government estimated the manning required as 47 man-hours per representative weekday and 31 man-hours per representative weekend/holiday. Space Services offered 45 (95.7447 percent of the Government's estimate) and 29 (93.5484 percent of the Government estimate), respectively.

The agency initially stated that Space Services' total manning was within the allowed 5-percent variation of the Government's total manning requirement. Thus, it would appear that Space Services did not have to justify the submission of its figures. However, the protester subsequently argued that Space Services' sub-95-percent offer of representative weekend/holiday manning was accepted contrary to the terms of section "D," the sub-95 percent figure being without any substantiation. The Navy then replied that Space Services indeed had substantiated its manning deficiency with specific documentation demonstrating that it could perform at its offered weekend/holiday level. The content of this specific documentation was that Space Services' offer was close to the 95-percent level.

Section D(a) of the RFP states that:

* * * Submission of manning charts whose total hours fall more than 5% below * * * [the Government's] estimates may result in rejection of the offer without further negotiations * * *.

As we stated in B–179174, January 15, 1974:

> While there is uncertainty in the interpretation to be given this language, we believe that the most logical and reasonable construction to be made of it [section D(a)] contemplates making a comparison of each offeror's proposed manning level for each representative day with the Government's estimate for that respective representative day. The tenor of the section sought to require the submission of offers which demonstrated adequate staffing (manning levels close to the Government's estimates) on a representative weekday and a representative weekend/holiday.
>
> However, we note that the Navy generally has made a comparison of the offeror's total offered man-hours for the year vis-a-vis the Government total estimated man-hour needs for the year. See 53 Comp. Gen. 198 (B–178707, October 2, 1973). This method is not a proper one to achieve what we find to be the desired end of section * * * [D(a)]—assuring sufficient manning at all times—since it can lead to distorted offers which technically comply with the total 95-percent level. Indeed, it is possible that an extremely low man-hour figure for representative weekend/holiday may in essence be counter-balanced by a relatively high weekday figure; thus seemingly assuring adequate weekday performance but casting doubt on the offeror's weekend capabilities.
>
> While we disagree with the interpretation given this section by the Navy, we note that our interpretation is not the only reasonable one. Reading the RFP as a whole, we can see how the agency concluded that a comparison of total offered manning with total estimated need was contemplated. * * *.

While we continue to be of the view that such an interpretation is improper, we will not recommend termination of the instant award on this basis.

ABC also contends that Space Services' offered price does not support its offered man-hours since the criteria stated in section D(b)(2) were not met.

Space Services offered 45 hours per representative weekday and 29 hours per representative weekend/holiday. Based on the contract year adopted by the procurement activity, 250 representative weekdays and 115 representative weekend days, Space Services offered 14,585 hours. However, based on the contract year specified in the RFP, 252 and 113 respective type days, Space Services offered 14,617 hours.

Space Services' basic hourly labor expense as initially calculated by the agency was:

Basic wage	$2.91
Health & Welfare	.12
FICA (5.85%) [1]	.17
Unemployment (.07%) [1]	.002
Workmen's Comp. (1.4%) [1]	.04
Vacation/holiday	—
Total	$3.242

[1] Counsel for ABC asserts that the percentage for FICA, unemployment and workmen's compensation should be taken as a factor of basic wage and health and welfare benefits. We feel, however, that it is equally reasonable to take such percentages with reference merely to basic wage. Indeed, this is what the contracting officer did in the present situation.

The agency in its latest submission indicates that the calculation of basic labor expense requires the inclusion of a 5-percent factor for vacation/holiday benefits. Indeed, the inclusion of such a realistic factor has previously been recommended by our Office. See 53 Comp.

Gen. 388 (1973). With the additional of this factor Space Servics' basic labor expense is $3.39. We find, however, that Space Services' dollar/hour ratio is as follows:

$47,340.00 gross price (also net evaluated price since the contracting officer did not deduct .1% 10-day prompt payment discount)[2]
47,340/14,585 (250/115 contract year)=$3.25 (3.2458)
47,340/14,617 (252/113 contract year)= 3.24 (3.2387)

Here, Space Services computed basic labor expense ($3.39) exceeds its dollar/hour ratio (based on either number of offered hours).

The agency recognizes that Space Services' price did not support its offered hours but justifies award to Space Services on the basis that the highest probable amounts were used for the variable factors.

In this regard, Space Services indicates that a factor of 2.234 percent ($0.005/hour for vacation and $0.06/hour for holiday) is more realistic than the 5 percent used by the agency for vacation/holiday benefits. We have noted previously that such a 5-percent figure is not mandated by this RFP language. 53 Comp. Gen., *supra*. However, the agency by its own calculation indicates that for holidays *alone* a 3.1-percent factor is required. Therefore, even if the agency were to have utilized Space Services' own estimate of vacation costs in computing labor expense, the results would be as follows:

Basic wage	$2.91
Health & welfare	.12
FICA	.17
Unemployment	.002
Workmen's comp	.04
Holiday (3.1%)	.09
Vacation (per Space Services)	.005
Total	$3.337

[2] Section D(b)(2) indicates that each offeror's offered number of man-hours will be divided into its total price "less any evaluated prompt payment" discounts to determine the offeror's dollar/hour ratio. Section "D" also states that a discount of less than 30 days (as was Space Services') cannot be evaluated in terms of the offeror's proposal but that the Government may take advantage of any such discount should it so desire. This latter provision meant to preclude the dowaward adjustment of the price of an offeror giving less than a 30-day discount vis-a-vis the proposals of other offerors who offer prompt payment discounts of the length desired by the Government. Section D(b)(2), however, is meant to provide a method whereby the Government can assure itself that the price which would actually be paid to the contractor exceeded his costs. In this regard, we feel that since the agency may avail itself of a less than 30-day prompt payment discount, such a discount may and probably should have been deducted from the offeror's gross price in order to properly determine dollar/hour ratio under section D(b)(2). The failure to do so in this instance was not, however, improper as the contracting officer reasonably followed the stated requirements of the RFP although we feel that the RFP should not have excluded such prompt payment discounts from the evaluation formula.

Moreover, if, as Space Services additionally suggests, 2.06 percent ($0.06 per hour) were to also have been used by the agency in computing holiday expense (rather than the 3.1 percent ($0.09) actually used) Space Services' basic labor expense would still equal only $3.307 and would, therefore, not be supported by its dollar/hour ratio (maximum $3.25).

While we reiterate that a 5-percent vacation/holiday factor is not required and that a more realistic figure could have been used in determining basic labor expense, see B–179102, December 19, 1973, even had Space Services' recommended factor been applied, its basic labor expense cannot support its offered hours within the RFP criteria.

Space Services indicates that with reference to computing basic labor expense "* * * definite consideration must be given abstenteeism [of employees]." However, such was not a factor stated in the RFP and could not, therefore, be interjected without amending the RFP. Since this was not done in the present case, absenteeism *per se* was properly not considered in totaling basic labor expense.

Accordingly, for the above-noted reasons, we believe that ABC's protest should be sustained and we recommend that the Navy not exercise its option upon the completion of the first year's service.

RFP–0037 (B–179062)

The subject RFP sought proposals relative to furnishing mess attendant services at the Naval Communication Training Center, Corry Field, Pensacola, Florida.

Section "D" of this RFP differs from that set forth with regard to B–179061, above, only in respect to section D(a). Section D(a) of the present RFP reads as follows:

(a) The manning levels reflected in the offeror's manning charts must be sufficient to perform the required services. For the purpose of evaluating proposals and establishing a competitive range for the conduct of negotiations, the Government estimates that satisfactory performance will require total manning hours (including management/supervision) of approximately *288.5* for period 73JUL01 thru 73DEC16 and 74JAN07 thru 74JUN30 on a representative weekday and approximately 182.5 on a representative weekend day/holiday for period 73JUL01 thru 73DEC16 and 74JAN07 thru 74JUN30 and 190 for all days for period 73DEC17 thru 74JAN06. Submission of manning charts whose total hours fall more than 5% below these estimates may result in rejection of the offer without further negotiations *unless* offeror clearly substantiates the manning difference with specific documentation demonstrating that the offeror can perform the required services satisfactorily with such fewer hours.

Space Services, the successful offeror on this solicitation, offered:

Man-hours	Day	Period	Percent of Government estimate
274	Representative weekday	(7/1/73–12/16/73) (1/7/74–6/30/74)	94. 97
173	Representative weekend/holiday	(7/1/73–12/16/73) (1/7/74–6/30/74)	94. 78
180.5	All	12/17/73–1/6/74	95. 0

We also calculate the Government's total annual man-hour need as follows:

Daily estimated hour					
288. 5	(Rep. weekday)	×239	weekdays	(7/1/73–12/16/73) (1/7/74–6/30/74)	=68, 951. 5
182. 5	(Rep. weekend/ holiday)	×104	weekend/ holiday	(7/1/73–12/16/73) (1/7/74–6/30/74)	=18, 980
190. 0		× 22	(9 weekend/ holiday) (13 weekdays)	12/17/73–1/6/74	= 4, 180
		252	weekdays		92, 111. 5
		113	weekend/ holidays		

(The agency, using a 250-weekday, 115-weekend/holiday year, estimated 91, 793)

Space Services' total offer was, by our calculation—

Man-hours			Days	
274	(Rep. weekday)	×	239	=65, 486
173	(Rep. weekend/holiday)	×	104	=17, 992
180. 5		×	22	= 3, 971
				87, 449

(Space Services' offer by the agency's calculation equaled 87, 146)

Space Services' total offer was 94.9381 percent of our calculated total estimate and 94.93752 percent of the agency's.

In view of the language of section D(a), we do not feel that an award to an offeror exhibiting two sub-95-percent manning charts (of the three required) is proper where as in B–179061, *supra*, the alleged substantiation for doing so is merely the offeror's proximity to the 95-percent figure and where its total offer is less than 95 percent of the Government's total estimate. Accordingly, award to Space Services was improper.

ABC also contends that Space Services' price does not support its offered hours. The agency calculated that Space Services' evaluated price of $299,796, when divided by its total number of offered hours, indicates a dollar/hour ratio of $2.63 ($2.627771). As in B–179061,

above, Space Services' 10-day prompt payment discount was not considered in reaching this ratio. Our position, as in B–179061, is that under the language of the RFP this is permissible. *See* note [2], *supra.*

We calculate Space Services' basic labor expense, as did the agency, as follows:

Basic wage	$2.22
Health & welfare	.15
Vacation & holiday (5%)	.1110
FICA (5.85%)	.129870
Unemployment (.07%)	.001554
Workmen's comp. (1.40%)	.031080
Total (Approx. $2.64)	$2.643504

The president of Space Services states that "Upon reviewing the various factors used I feel they are fairly realistic," although he does suggest that a figure of 3.153 percent ($0.02/hour for vacation and $0.05/hour for holiday) would have been more realistic.

In B–179102, *supra*, where a 5-percent vacation-holiday factor was also used, and the low offeror's basic labor expense exceeded its dollar/hour ratio by $0.016 as a result, we held that award to that offeror was not improper. We stated that "Under these circumstances, it appears that the contracting officer could have reasonably concluded that the purpose of the RFP criterion would be met by acceptance of Federal's offer."

In the instant case, we see no reason why another factor equal or superior in its realism to the 5-percent factor could not have been utilized. Indeed, a factor of 4.291 percent (or less) would allow Space Services' dollar/hour ratio to equal (or exceed) its basic labor expense.

Accordingly, we believe the rationale expressed in B–179102, *supra*, is applicable in the present case and that the contracting officer could reasonably have concluded that the purposes of the RFP criterion would be met by award to Space Services.

However, in view of our conclusion that Space Services' sub-95-percent manning level was improperly accepted, we conclude that ABC's protest should be sustained. We recommend, therefore, that the Navy not exercise its option for continued service upon the competion of the first year of the instant contract.

RFP–0038 (B–179046)

The subject RFP sought offers for performing mess attendant services at the Naval Air Station, Pensacola, Florida.

Section D(a) of the solicitation provided that:

(a) The manning levels reflected in the offeror's manning charts must be sufficient to perform the required services. For the purpose of evaluating proposals

and establishing a competitive range for the conduct of negotiations, the Government estimates that satisfactory performance will require total manning hours (including management/supervision) of the following:

PERIOD 73JUL01 THROUGH 74JUN30

Building 680 (Butcher Shop)—Approximately 7 on a representative weekday and 0 on a representative weekend/holiday.

Building 601 —Approximately 144.5 on a representative weekday and approximately 101 on a representative weekend day/holiday.

Building 602 (Bake Shop)—Approximately 12.5 on a representative weekday and 0 on a representative weekend/holiday.

Building 1907—Approximately 126 on a representative weekday (Monday thru Saturday) and approximately 83 on a representative Sunday/holiday.

PERIOD 73SEP01 THROUGH 73MID-DEC and 74JAN01 THROUGH 74-MAY31

Building 602—Approximately 179.5 on a representative weekday and approximately 164.5 on a representative Saturday and approximately 145.5 on a representative Sunday/holiday.

PERIOD 73JUL01 THROUGH 73AUG31 and 74JUN01 THROUGH 74JUN30

Building 602—Approximately 201.5 on a representative weekday and approximately 169.5 on a representative Saturday and approximately 166 on a representative Sunday/holiday.

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

Space Services, the successful offeror, submitted the following proposed hours:

	Man hours		Government estimate	Offer's percent of Government estimate
	July 1, 1973–June 30, 1974			
Bldg. 680 (butcher shop)	7	rep. wkdy.	7	100
	0	rep. w/h	0	—
Bldg. 601	137	rep. wkdy.	144. 5	94. 8
	96	rep. w/h	101	95. 0
Bldg. 602 (bake shop)	12. 5	rep. wkdy.	12. 5	100
	0	rep. w/h	0	—
Bldg. 1907	120	rep. wkdy.*	126	95. 2
	79	rep. Sun./hol.	83	95. 18
	Sept. 1, 1973–Dec. 15, 1973 Jan. 1, 1973–May 31, 1973			
Bldg. 602	170. 5	rep. wkdy.	179. 5	94. 7
	138	rep. Sun./hol.	145. 5	94. 84
	156	rep. Saturday	164. 5	94. 83
	July 1, 1973–August 31, 1973 June 1, 1974–June 30. 1974			
Bldg. 602	191	rep. wkdy.	201	95. 0
	161	rep. Saturday	169. 5	94. 98
	158	rep. Sun./hol.	166	95. 18

*Including Saturdays.

ABC contends that Space Services' offer, which contains six sub-95-percent manning charts out of the 12 required, should have been rejected. The Navy states that Space Services substantiated these fractional manning differences with specific documentation as required by section "D" of the RFP. The substance of this documentation was, however, the mere fact that Space Services' figures were close to the 95-percent level. As previously noted, we do not consider this to be sufficient documentation.

We calculate the Government's total estimate and Space Services' total offer as follows:

Bldg.			Number of days	Government daily estimate	Government annual estimate	Space Services daily offer	Space Services annual offer
680	Weekday		252	7	1, 764	7	1, 764
601	Weekday		252	144. 5	36, 414	137. 0	34, 524
601	Weekend/holiday		113	101. 0	11, 413	96	10, 848
602	Weekday		252	12. 5	3, 150	12. 5	3, 150
1907	Wkdy. (Mon.-Sat.)		305	126. 0	38, 430	120	36, 600
1907	Sun./holiday		60	83	4, 980	79	4, 740
602	Wkdy.	9/1/73–12/15/73 1/1/74–5/31/74	178	179. 5	31, 951	170. 5	30, 349
602	Sat.	9/1/73–12/15/73 1/1/74–5/31/74	37	164. 5	6, 086. 5	156. 0	5, 772
602	Sun./ Hol.	9/1/73–12/15/73 1/1/74–5/31/74	42	145. 5	6, 111	138. 0	5, 796
602	Wkdy.	7/1/73–8/31/73 6/1/74–6/30/74	64	201. 5	12, 896	191. 0	12, 224
602	Sat.	7/1/73–8/31/73 6/1/74–6/30/74	13	169. 5	2, 203. 5	161. 0	2, 093
602	Sun./ Hol.	7/1/73–8/31/73 6/1/74–6/30/74	15	166. 0	2, 490	158. 0	2, 370
					157, 889		150, 230

Thus, by our calculation, Space Services actually offered 95.1491 percent of the Government's total estimate. The agency, however, found Space Services' total offer, based on a year containing 250 weekdays and 115 weekend holidays, to be 149,980 hours—95.148 percent of its calculation of the Government's total estimate (157,628). Although we feel that the calculations most probably should have been done on the basis of a 252-weekday, 113-weekend/holiday year as set out in the RFP, we believe that Space Services met the contracting officer's view of the criteria but, more importantly, did in fact meet the more appropriate criteria. Therefore, we conclude that, notwithstanding the fact that Space Services submitted a number of sub-95-percent manning charts, the contracting officer did not act improperly in not rejecting Space Services' offer as its number of offered hours was within 95 percent of the Government's total annual estimate.

The agency additionally calculates Space Services' basic labor expense as follows:

Basic wage	$2.15
Health & welfare	.12
Vacation/holiday (5%)	.11
FICA (5.85%)	.13
Unemployment (.07%)	.002
Workmen's comp. (1.40%)	.03
Total	$2.542

Space Services' dollar/hour ratio was calculated by the agency as follows:

(Gross price)[3]	$397,898.00
Agency calculation of Space Services' total offered hours	÷149,980
Total	$2.653

[3] See note [2], *supra*.

(Our calculation is $397,898.00/150,348 (our calculation of Space Services' offered hours) = $2.64651.)

Therefore, Space Services' dollar/hour ratio exceeds its basic labor expense (both by our calculation and the agency's) and its price does support its offered hours as required by the RFP.

For the reason stated above, ABC's protest on the instant solicitation is denied.

[B-177719]

Contracts—Federal Supply Schedule—Requirements Contracts—Primary Source *v.* Multiple-Award Contractors

When the Government is obligated to purchase its normal requirements of film from a primary source Federal Supply Schedule (FSS) contractor, if it can be shown that higher speed film was purchased from a multiple-award FSS contractor to satisfy normal requirements which could be met by film specified in the primary source FSS contract, the primary source contractor would be entitled to damages. However, purchase of high speed film from a multiple-award FSS contractor was not a breach of contract where the record shows that the purchase was necessitated by the requirement for film that exceeded the specification characteristics of film provided by the primary source FSS contractor.

Contracts—Federal Supply Schedule—Primary Source *v.* Multiple Award Contracts—Overlapping Requirements

Since some overlap exists between film listed on a primary source Federal Supply Schedule (FSS) contract and multiple-award FSS contract, it is recommended that the General Services Administration regulations be modified to prohibit the use of the multiple-award FSS contract where agency needs would be satisfied by purchase from the primary source contractor.

In the matter of Kalvar Corporation, March 29, 1974:

Kalvar Corporation (Kalvar) was awarded contract No. GS-OOS-12756, covering the Federal Supply Schedule (FSS) requirements for various types of vesicular microfilm under Federal Specification L-F-

320b, for the period July 1, 1972, through June 30, 1973. Insofar as is pertinent here, the Federal Specification, as amended, called for various sensitometric characteristics for the film, including a speed rating range of 1.05 to 1.45 for class 2, Subtype A film. The Scope of Contract provision in the solicitation stated that the ensuing contract would cover the normal supply requirements of all departments and independent establishments. The solicitation also provided that the following provision would be included in the resultant FSS contract:

> Where an agency required, under (a) of the Scope of Contract provision [all departments and independent establishments with certain exceptions not pertinent here], to use the contracts listed herein, finds that the specific articles or services contracted for will not meet a special requirement, articles or services having the same general characteristics needed to meet the special requirement may be procured: provided, that a prior written waiver of the requirement for using this Schedule is obtained from the General Services Administration. Requests for such waivers shall be submitted to the Commissioner, Federal Supply Service, General Services Administration, Washington, DC 20406, in accordance with Section 101-26.401-3 of the Federal Property Management Regulations and any implementing regulations of the requesting agency.

On October 19, 1972, the Internal Revenue Service (IRS) submitted a request to GSA to establish schedule arrangements for the supply of both Kalvar Mikrolith 200 vesicular film and Xidex HS-66 vesicular film for the remainder of fiscal year 1973. The reason for the request, as stated by IRS, was that the FSS contract for fiscal year 1973 listed film which would operate at a speed of 60 feet per minute whereas IRS' equipment operated most efficiently using film with a speed of 200 feet per minute. IRS stated that the prior FSS contract had listed film which ran at both 60 and 200 feet per minute and that IRS was presently purchasing "off schedule" to meet its requirements. In addition IRS informally advised GSA that the film provided by Kalvar under its primary source schedule contract was not suitable for use on late model IRS machines when operated at their maximum setting. Specifically, it was reported that the contract film did not provide a satisfactorily sharp and clear image at the maximum setting. This determination was made as a result of trial runs conducted by IRS with the contract film.

Thereafter, GSA's technical staff was requested to verify whether the Kalvar Mikrolith 200 film and the Xidex HS-66 film were outside the scope of specification L-F-320b. A memorandum dated November 7, 1972, indicates that GSA's technical staff concluded that the Xidex HS-66 film and Kalvar Mikrolith 200 film were outside the scope of the specification covered by Kalvar's FSS primary contract, based on data sheets furnished by these firms. The data sheets submitted by Xidex indicated that its HS-66-film had a speed rating of 1.50 and Kalvar's data sheets showed speed ratings of 1.75 and 2.00 for the Mikrolith 200 film. The finding of GSA's technical experts

was that all of these speed ratings fell outside of the speed range of 1.05 to 1.45 in the specification L–F–320b, for class 2, Subtype A film.

After receipt of the above advice from the technical staff, GSA's purchasing office requested Kalvar and Xidex to submit offers relating to the listing of their respective high speed film on a multiple-award FSS, and both Kalvar and Xidex submitted offers. GSA reports that the speed rating was the primary basis for establishing listings on the multiple-award FSS for the HS–66 film and the Mikrolith 200 film. GSA determined that these offers were suitable and reasonable as to price and commitment documents were issued by GSA to Xidex and Kalvar during the latter part of November 1972. The price listed for the Xidex HS–66 film was lower than the price of Kalvar's film covered under its primary FSS contract. Following the establishment of these commitments, Kalvar by telegram dated November 30, 1972, requested that the listing of the Mikrolith 200 film be canceled, By letter of December 11, 1972, Kalvar advised GSA that tests had been conducted on the Xidex HS–66 film in accordance with the methods in specification L–F–320b, which indicated that this film was within the range of the speed ratings in Kalvar's primary FSS contract. On December 18, 1972, GSA affirmed its decision that both the Xidex HS–66 film and the Kalvar Mikrolith 200 film could be listed on negotiated multiple-award FSS through June 30, 1973, since the films were outside the scope of specification L–F–320b.

Kalvar contends that the characteristics of the Xidex HS–66 film were within the parameters of its primary FSS contract and that by listing the Xidex HS–66 film on the multiple-award FSS, GSA breached the provision which stated that the normal supply requirements of the agencies would be purchased from Kalvar. It is urged that GSA's breach entitles Kalvar to damages.

The arguments made by Kalvar in support of its claim and GSA's responses thereto are set forth below as follows:

(1) Kalvar urges that tests it conducted on the Xidex HS–66 film in accordance with the Federal Specification established that the film was within the scope of Kalvar's primary FSS contract.

GSA has not furnished our Office with any actual test results since at the time that the Xidex HS–66 film was listed on the multiple-award FSS, GSA did not have the facilities to make such tests. However, GSA has forwarded a letter from Xidex which states that the sample of Xidex HS–66 film which Kalvar tested was not representative of the film actually sent to the IRS, and that the film it furnished IRS was 35 percent faster than the samples tested by Kalvar. GSA has also forwarded a memorandum prepared by its technical staff which provides the following account with respect to the "diffusion" method of testing in specification L–F–320b (the method used by Kalvar in testing the sample of Xidex HS–66 film):

As various companies joined the vesicular film manufacturing field, and the technology advanced, it was progressively found that that method (diffusion) was lacking in accuracy and reproducibility. By varying the exposure time, developing time, temperatures, using different instrumentation in the field of sensitometers and densitometers designed for use with silver film and not specifically for the vesicular type, wide variations in speed could be obtained. Hence, the condition of lack of accuracy and reproducibility in that system.

The above situation led to the development of the "projection approach" methodology currently in the revised specification, Interim L–F–00320C, endorsed by the entire industry, including Kalvar (Kalvar participated in the development of that method as part of the inter-company effort for a standard). Work in this new measurement procedure is continuing, aimed at improving, perfecting, as technology continually advances.

With specific parameters provided by the manufacturers, increased knowledge in accurate calibration and modification of photographic measuring instruments, the projection approach promises to be far more reliable and reproducible, the requisite for conduciveness to obtaining uniformity in the resulting test values, by industry as well as Government.

Kalvar's comment with respect to the above information is that it is "opportunistic" and "after the fact" and should not be considered at this time.

(2) Kalvar urges that the margin between the upper limit of the speed rating (1.45) of Type I, Subtype A, class 2 film in the Federal Specification is so close to the speed rating of the Xidex HS–66 film (1.50) that the difference is not sufficient to establish that the Xidex HS–66 film was outside the scope of Kalvar's contract. Tied in with the above is Kalvar's argument that because of the "looseness" of Federal Specification L–F–320b, film capable of running on duplicating equipment at 200 feet per minute was included within the excessively broad limits of the required sensitometric characteristics. For this reason Kalvar urges that as a matter of fair administration of Kalvar's primary source contract by GSA, Kalvar should have been given the opportunity to meet the requirements of the IRS under its contract. Kalvar has also referred to apparent inconsistent treatment in fiscal year 1972 when the upper limit for the speed rating in the specifications was 1.25 (compared to a speed rating of 1.45 in fiscal year 1973) and GSA did not permit Kalvar to list its Mikrolith 200 film on the FSS schedule when Xidex had the primary source contract. *See* B–174427, July 14, 1972 and March 9, 1973.

GSA concedes that there were problems with the specifications for fiscal year 1973 and we have been advised that GSA as well as industry has been working on improving the specification. GSA has further advised that it had to rely to a large degree on information furnished by the user agencies as well as the suppliers in making the type of determination required in this case since GSA did not have the necessary facilities to make independent tests. In this regard, once IRS advised that it needed faster film than that being furnished under Kalvar's contract, and the available information supported that the film requested by IRS had a higher speed rating than that specified in Kalvar's primary source FSS contract, GSA concluded that a

multiple-award FSS listing was appropriate since Kalvar would not be obligated to furnish the faster film required by IRS. With respect to the alleged prior inconsistent treatment of Kalvar, GSA has advised that Kalvar's Mikrolith 200 film was not listed in fiscal year 1972 since the film being furnished under the FSS contract was found to comply with and actually exceed the requirements of the Federal Specification for that year. This conclusion was based on the fact that no complaints had been received from user agencies that the film which was being furnished by Xidex, the FSS contractor for that year, did not meet their requirements. GSA has concluded that a different situation existed in fiscal year 1973, in view of IRS' request of October 19, 1972.

(3) Kalvar has referred to a letter from IRS dated June 5, 1973, to GSA and contends that the various additions to the specification proposed in the letter were not necessary since those characteristics were already included in the applicable specification. Kalvar urges that IRS' letter of June 5, 1973, should be considered as an example of the type of detail that can be furnished by an agency which is not satisfied with a specification for vesicular film. It asks us to compare the June 5, 1973 letter from IRS, with that of October 19, 1972, which merely referred to the speed rating but did not refer to the other characteristics that IRS needed. Kalvar argues that the October 19 letter did not adequately define IRS' requirements.

GSA states that the June 5 IRS letter was solicited by GSA to obtain its views on the revision of the specification for the fiscal year 1975 requirements and that the letter has little, if anything, to do with the issues in this case.

(4) Kalvar argues that the provision in its primary source FSS contract requiring agencies to obtain a *waiver* from GSA in order to procure special requirements was the only procedure that could be used in the event that an agency's requirements could not be satisfied under Kalvar's FSS contract. In this regard Kalvar has referred to various sections of the Federal Property Management Regulations (FPMR) and has urged that by listing Xidex on the multiple-award FSS with prices below Kalvar's FSS contract, GSA "undercut" Kalvar's FSS contract, thereby giving Xidex "two bites at the apple." In support of this assertion, Kalvar has submitted selected pages from Xidex' Form S–1 which was filed with the Securities and Exchange Commission indicating that Xidex and Kalvar have been engaged in a price war with respect to "photographic heat film."

GSA states that it has the authority to list articles on a multiple-award schedule and that it was proper to exercise this authority pursuant to IRS' request in the circumstances of this case. GSA has confirmed that the price of Xidex HS–66 film was lower than the price of the closest comparable film listed on Kalvar's primary source

FSS contract. GSA has not denied that there was some overlap between the film listed on Kalvar's FSS contract and the Xidex HS-66 film in that the Xidex HS-66 film was capable of being used at lower speeds in lieu of the film listed on Kalvar's primary source FSS contract. It is GSA's view that it would not be proper for an agency to purchase the Xidex HS-66 film listed on the multiple-award FSS schedule merely to take advantage of the lower price of that film where the film listed on Kalvar's primary source contract was adequate to meet the requirements and the Xidex film exceeded its requirements. GSA has advised that it did not monitor whether agencies engaged in such practices.

Our Office has contacted representatives of the IRS and the Social Security Administration (SSA), the primary users of the high speed type of film under consideration. The IRS representative advised that the speed of the film that an agency might require depends on such factors as the speed capability of the machine which would process the film, the light level of the equipment, and the developing drum temperature. We were further advised that the Kalmar Mikrolith 200 film and the Xidex HS-66 film were the only two types of film known to the IRS that had the capability of meeting its needs and that this determination was based primarily on the speed rating of these two films. The SSA advised that its needs were met by film purchased from Kalvar's primary source contract and that such film could be satisfactorily operated on SSA's equipment at a speed of 200 feet per minute.

Kalvar's counsel was informally advised of the substance of our conversations with the IRS and the SSA representatives, and he urged that the advice from SSA supports its position. With respect to IRS, counsel for Kalvar reiterated the prior arguments that Kalvar was never given the opportunity to meet IRS' needs and that the film in the upper speed limits of its FSS contract would have been adequate to meet IRS' needs if Kalvar had been advised of the specific nature of the requirements.

Based on a review of the terms of Kalvar's contract we believe it is clear that the Government was obligated to purchase all its normal requirements of the film listed on that contract from Kalvar. It was on the basis of this obligation that the various firms competed for the primary FSS contract and this obligation was firm for the fiscal year covered by the contract. Therefore, Kalvar would be entitled to damages if it can be shown that an agency purchased the Xidex HS-66 film during the term of Kalvar's primary source FSS contract and that the film listed on Kalvar's FSS contract was adequate to meet the agency's requirements. The only instance presently before our Office where an agency apparently purchased the Xidex

HS–66 film involves the above-cited purchases by IRS. However, the record presented does not support the conclusion that IRS' purchase of Xidex HS–66 film constituted a breach of Kalvar's primary source FSS contract since it has been reported that IRS' equipment required film that exceeded the speed rating of the film listed on Kalvar's FSS contract.

Moreover, since IRS had need for film with a higher speed rating than Kalvar was furnishing, IRS could have obtained a waiver and independently procured for this need on a competitive basis. We do not think Kalvar's contract gave it the right to upgrade its contract film to meet additional Government requirements. In such circumstances the waiver provisions cannot reasonably be construed as having precluded GSA from meeting additional requirements through a multiple-award FSS.

However, since it has not been disputed that there was some overlap between the film listed on Kalvar's FSS contract and the Xidex HS–66 film, it is questionable whether GSA should have relinquished the control it might otherwise have had under the waiver procedure without establishing a safeguard for preventing possible misuse of the multiple-award FSS. Accordingly, we think the FPMR should be modified to expressly preclude the purchase of items listed on a multiple-award FSS in any case where another item which is listed under primary source FSS contract will satisfy the requirement. While this problem may not recur in the purchase of film since GSA is working to improve the specifications and is acquiring independent test facilities, the suggested modification would provide protection should a similar problem arise in connection with other requirements where more than one listed item serves the required functional purpose.

[B–177865, B–179812]

Buy American Act—Applicability—Contractors Purchases From Foreign Sources—End Product *v.* Components

For the purposes of the Buy American Act (41 U.S.C. 10a-d), the General Services Administration properly evaluated the general mechanics' tool kits being produced as domestic source end products, since each kit as an entirety- not the individual tools contained therein—is an "end product" and the cost of the foreign component tools constituted less than 50 percent of the cost of all components.

In the matter of Imperial Eastman Corporation; Thorsen Tool Company, March 29, 1974:

Thorsen Tool Company (Thorsen) and Imperial Eastman Corporation (Imperial) have alleged that the procedures used by the General Services Administration (GSA) in procuring mechanics' tool kits are in violation of the Buy American Act, 41 U.S. Code 10a-d (1970 ed.), and implementing orders and regulations. Specifically,

Thorsen alleges that the procurement of mechanics' tools under contract No. GS-00S-18578, awarded under solicitation No. FPNTP-B-52083-N-3-10-73, issued by the Federal Supply Service, GSA, violates the Act in that the end products being procured are not "domestic source" as certified by the contractor, Century Tool Company, Incorporated, in its bid.

The Buy American Act provides in pertinent part:

> Notwithstanding any other provision of law, and unless the head of the department or independent establishment concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, shall be acquired for public use. * * *. 41 U.S.C. 10a.

In implementation of this statute, section 1-6.102 of the Federal Procurement Regulations (FPR) provides that "only domestic source end products shall be acquired for public use." In addition, FPR 1-6.010(a) provides:

> "End products" means articles, materials, and supplies which are to be acquired for public use. As to a given contract, the end products are the items to be delivered to the Government, as specified in the contract, including articles, materials, and supplies to be acquired by the Government for public use in connection with service contracts.

Article 14 of Standard Form 32: General Provisions (Supply Contract) is of similar effect. Furthermore, under Article 14, and paragraph 7 of Standard Form 33: Solicitation, Offer, and Award, each bidder is required to certify that each end product he offers to deliver is a domestic source end product.

The contract in question was awarded to Century Tool Company, Incorporated (Century) for a definite quantity of general mechanics' tool kits. Each kit contained numerous tools such as a pry bar, paint brush, various files and gages, a flashlight, a pocket knife, a putty knife, pliers, and a socket wrench handle and sockets. Some types of tools which were supplied in graduated sizes were place in pocketed canvas rolls. All the tools were then arranged in a steel case secured with a hasp and padlock.

Procurement of hand tools by GSA has also been subject to the following restriction which has appeared in GSA's appropriation acts since 1970:

> No part of any appropriation contained in this Act shall be available for the procurement of or for the payment of the salary of any person engaged in the procurement of any hand or measuring tool(s) not produced in the United States or its possessions except to the extent that the Administrator of General Services or his designee shall determine that a satisfactory quality and sufficient quantity hand or measuring tools produced in the United States or its possessions cannot be procured as and when needed from sources in the United States and its possessions or except in accordance with procedures prescribed by section 6-104.4(b) of Armed Services Procurement Regulation dated January 1, 1969, as such regulation existed on June 15, 1970. This section shall be applicable to all solicitations for bids opened after its enactment.

Public Law 93-143, Title V, Sec. 505, October 30, 1973, 87 Stat. 524. Armed Services Procurement Regulation (ASPR) 6-104.4(b) currently provides, as it did on June 15, 1970:

(b) Except as provided in (d) below, bids and proposals shall be evaluated so as to give preference to domestic bids. Each foreign bid (other than a low bid offering a Canadian end product) shall be adjusted for purposes of evaluation either by excluding any duty from the foreign bid and adding 50 percent of the bid (exclusive of duty) to the remainder, or by adding to the foreign bid (inclusive of duty) a factor of 6 percent of that bid, whichever results in the greater evaluated price, except that a 12 percent factor shall be used instead of the 6 percent factor if (i) the firm submitting the low acceptable domestic bid is a small business concern, or a labor surplus area concern, or both, (ii) small purchase procedures (see Section III, Part 6) are not used, and (iii) any contract award to a domestic concern which would result from applying the 12 percent factor, but which would not result from applying the 6 percent or 50 percent factor, would not exceed $100,000. (If an award for more than $100,000 would be made to a domestic concern if the 12 percent factor is applied, but would not be made if the 6 percent or 50 percent factor is applied, the matter shall be submitted to the Secretary of the Department concerned for a decision as to whether the award to the small business or labor surplus area concern would involve unreasonable cost or inconsistency with the public interest (see 6-103.3).) If the foregoing procedure results in a tie between a foreign bid as evaluated and a domestic bid, award shall be made on the latter. When more than one line item is offered in response to an invitation for bids or request for proposals, the appropriate factor shall be applied on an item-by-item basis, except that the factor may be applied to any group of items as to which the invitation for bids or request for proposals specifically provides that award may be made on a particular group of items.

GSA has classified the tool kits as "end products" and the individual tools within the kits as "components" for purposes of the Buy American Act. GSA's position is, therefore, that since the cost of the foreign components of the tool kits amounted to less than 25 percent of the aggregate cost of all components, its procurement of the tool kits did not violate the Buy American Act and the contract to Century was properly awarded. *See* FPR 1-6.101(d).

Thorsen and Imperial contend that the individual tools, not kits of tools, are the "end products" acquired for the public use, and consequently, that the tools must be evaluated individually to determine whether they are of "domestic source." They argue that GSA's failure to evaluate the tools on an individual basis, and its resulting purchase of kits containing tools of foreign origin, violates the Buy American Act.

We conclude that GSA correctly regards the general mechanics' tool kits, not the individual tools, as the "end product" to which the Buy American Act evaluation criteria should be applied.

In its reports to our Office, GSA states that it considers the complete tool kit to be the end product required; that the various components, including the tool box and rolls, comprise an integral unit and are intended to be used as such; that the kits contain components designed primarily by the military agencies, which are the using agencies, to perform specific functions; and that each component in the kit is a required part of the kit and each is dependent on the others to perform the functions for which the kits are designed. As an example, it is

pointed out that a mechanic would not attempt the repair of a machine unless he had a tool kit with the necessary assortment of tools to permit access to all parts of the machine, and for which parts there must be tools of particular types and sizes.

GSA has further indicated that dire consequences would result from a ruling that each component of a kit or set must be considered an end product for purposes of evaluation under the Buy American Act. In the event that the individual tools are considered as end products, GSA states that such conclusion would require the preparation of solicitations for various types of kits; would require separate bid prices for evaluation purposes for each component of the set including assembling, preservation, packaging, packing, marking, and shipment of the assembled set; and that an award under such a solicitation would have to be made on an aggregate basis to the overall low responsive bidder. It is stated further that to be responsive a bidder would have to submit a bid on each of the components, and that such a procedure would be detrimental to bidders offering domestic source end products if a bidder offering foreign source end components understated a foreign source end product price and overstated both the domestic source end product price and domestic costs of assembly, preservation, packaging, packing, and marking. It is the opinion of GSA that under the above-stated circumstances the application of the Buy American differential would not protect a domestic bidder in the manner intended.

We believe it is clear that discrete items being procured under a single solicitation may bear such an interrelationship that it is appropriate to evaluate them, for purposes of the Buy American Act, as a group. This is recognized by the last sentence of ASPR 6–104.4(b), which is quoted above and incorporated by reference into GSA's current appropriations act.

The question as to what constitutes "manufactured" end products within the meaning of FPR 1–6.101(d) is the root of the problem presented by Thorsen and Imperial. We do not believe that "manufactured" has reference only to a mechanical operation performed on a foreign product. It relates not only to making the product suitable for its intended use but also to the identity the resulting product would take. We feel that the administrative competence in this area of procurement must be recognized in determinations whether foreign products have been transformed into domestic end products through a manufacturing process. The complexity of the process or whether the character of the foreign product has been significantly altered is not, in our view, the conclusive test of manufacture. We do not regard the tool case and rolls as items of mere packaging, as in the nature of a bottle, but as integral units of the kit without which the tool kit would not fulfill its intended and practical purpose. To accomplish this purpose, the individual tools—each having an interrelationship to

particular mechanical repair operations—must be incorporated into a kit and maintained as a tool kit. This is assured by the assembly of the particularly related tools into a case and rolls whereby the identity and character of the kit is established and fixed as to its current and future use. We, therefore, believe that the "end products" of this procurement are the tool kits and not individual tools, cases and rolls. To hold otherwise would create almost insurmountable difficulties in administering "kit" procurements by the procurement departments.

In our view the instant case is analogous to our decision B-156768, August 17, 1965, in which we regarded the "end product" to be a musical background library, which was created through the use of phonograph records (some of which were of foreign origin), master recording tapes, and blank recording tapes. Each record or tape was a discrete object, severable from the others. Yet no one of them, nor any combination of them less than the whole, met the Government's needs for a musical background library. Only the entire collection of records and tapes, as a whole, functioned together to satisfy the Government's needs. Similarly, in the instant case, only complete kits of tools wholly satisfy the Government's needs.

It follows that we reject the analogy which Thorsen's counsel has attempted to draw between this case and that which is reported at 46 Comp. Gen. 784 (1967). In 46 Comp. Gen. 784, we pointed out that the essential need of the Government was for sulfadiazine tablets, not bottles, and that the tablets, being foreign articles, could not be transformed into American items by being packaged in American bottles. In the present case, the essential need of the Government was for a complete mechanics' tool kit containing certain related tools. The fact that each tool may be available and may be procured as an individual item does not, in our opinion, change the need of the Government for a set of tools in a tool kit for the performance of specific mechanical jobs.

[B-178224, B-179173]

Contracts—Protests—Abeyance Pending Court Action

Where the material issues in a protest before the United States General Accounting Office (GAO) are also involved in a court action and are likely to be disposed of by the court, GAO, pursuant to 4 CFR 20.11, will not render a decision on the protest.

Contracts—Protests—Court Action—Precedence Over Protest

While a party protesting a contract award is not involved in a pending court action, a decision will not be rendered on its protest under the same solicitations involved before the court since the court's action would take precedence and the United States General Accounting Office could not recommend remedial action.

In the matter of Nartron Corp.; DC Electronics, Inc., March 29, 1974:

Invitation for bids (IFB) Nos. DAAE07-73-B-1168 and DAAE07-73-B-1725 and request for proposals (RFP) Nos. DAAE07-74-R-

0630 and DAAE07-74-R-1029 were issued by the United States Army Tank Automotive Command (ATAC), Warren, Michigan, for solid state Turn Signal Kits. These kits consisted of a control unit, a flasher unit, and a harness assembly. IFB-1168, issued on January 24, 1973, required the control and flasher units to be qualified end products. While DC Electronics, Incorporated, (DCEL) was not a qualified manufacturer of these units, it proposed to furnish qualified products of another manufacture. An award was made under IFB-1168 to DCEL as the low responsive, responsible bidder. It subsequently developed that DCEL was unable to furnish the required qualified products and the contract was terminated for default. RFP-0630 was issued by ATAC for reprocuring this requirement on a qualified product basis. Also, to satisfy an independent requirement for additional Turn Signal Kits, ATAC issued IFB-1725 on June 1, 1973, and indicated that items offered would have to satisfy first article testing. Thereafter, ATAC canceled IFB-1725 and resolicited for the kits under RFP-1029 on the basis of specifications calling for qualified end products. On November 2, 1973, ATAC awarded a contract to the Nartron Corporation (Nartron) under this solicitation.

Nartron has filed a protest against award made to DCEL under the initial procurement, IFB-1168. Nartron contends that DCEL's bid was nonresponsive because DCEL improperly listed a supplier other than the supplier from whom DCEL intended to procure the qualified end item and because DCEL improperly changed its source of supply. Nartron also protests any award to DCEL under RFP-0630 on the grounds that DCEL is not a Qualified Products manufacturer and because DCEL was defaulted on IFB-1168. It should be noted that Nartron's protests under IFB-1725 and RFP-1029 are now moot by virtue of the cancellation of the former solicitation and contract award to Nartron under the latter.

Concurrently, DCEL filed several protests with this Office on these procurements. DCEL initially protested an award to Nartron under IFB-1168 on the grounds that Nartron's bid thereunder was nonresponsive and that Nartron was a nonresponsible bidder because of its alleged anticompetitive activities. DCEL also protested an award to Nartron under RFP-0630 on the basis that the procurement should be advertised rather than negotiated and should not be restricted to QPL suppliers. DCEL also contends that Nartron is a nonresponsible bidder for this procurement. In reference to IFB-1725, DCEL protests its cancellation and contends that Nartron is nonresponsible and therefore could not qualify for award under this solicitation. Finally, DCEL has protested the award made to Nartron under RFP-1029.

In November 1973, DC Electronics filed a civil action in the United States District Court for the Northern District of Illinois, Eastern

Division (*DC Electronics, Incorporated* v. *James Schlesinger, Secretary of Defense, et al.* (Civil Action No. 73C2966)). Among its prayers for relief DCEL has requested the court to reinstate its terminated contract or direct that DCEL be awarded the contract on reprocurement. It has also requested termination of the contract awarded to Nartron under RFP–1029 and the reinstatement of IFB–1725.

Subsequent to these protests, this Office requested additional information from the Army concerning several allegations made by the parties. By letter dated December 13, 1973, the Army forwarded the requested information to this Office. However, the Army noted that DCEL had filed the aforementioned suit, and that the issues involved in the suit were basically the same as those in the protests before this Office. Therefore, the Army requested that we not release these supplemental reports outside the Government. By letter of February 7, 1974, counsel for Nartron requested that this information be made available to him, as the information affected the interests of his client who was not a party to the DCEL suit.

In our opinion, the complaint in the court action puts in issue the substance of DCEL's bid protests on this matter. Since we will not render a decision on a protest where the material issues involved are likely to be disposed of in litigation by a court of competent jurisdiction, this Office will take no action on DCEL's protests. B–174052, August 29, 1972; 4 CFR 20.11. *See also* B–177197(1), August 9, 1973. Although we consider protests notwithstanding pending litigation where the court indicates a desire for a determination by this Office, such as the granting of injunctive relief pending resolution by this Office, in this case the court was not requested to grant injunctive relief for this purpose. B–172648, July 29, 1971.

In relation to the protests of Nartron, counsel for Nartron takes the position that, since his client has chosen not to become a party to DCEL's court action, we should proceed with independent consideration of its protests. However, even if we were to conclude that the initial award action to DCEL was improper, we would not be in a position to recommend an award to Nartron since whatever action the court may decide to take regarding RFP–0630 and RFP–1029 would take precedence. Therefore, our policy of refusing to rule on a protest where the matter involved is the subject of litigation would also apply with respect to Nartron's protest. B–172648, *supra.*

With regard to Nartron's request that we furnish it with the Army's supplemental reports, we are not in a position to accommodate the request at this time since the Army has requested the reports not be released outside the Government during the pendency of the litigation.

Accordingly, we will take no further action concerning this matter.

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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

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BIDDERS

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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

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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

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Preliminary and postliminary duties

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. —— (B–158549, July 5, 1974)..... 489

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Erroneous 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

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

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

CONTRACTS—Continued Page
Awards—Continued
Propriety
Incumbent contractor
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
Small business concerns
Certifications
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
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, terms "manufactured or produced" as used in small business definition is not regarded as "manufacturing" processes within contemplation of Buy American Act---- 463
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
Bids, generally. (*See* **BIDS**)
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

CONTRACTS—Continued Page

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

Equal employment opportunity requirements. (*See* **CONTRACTS, Labor stipulations, Nondiscrimination**)

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

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

CONTRACTS—Continued Page
Labor stipulations—Continued
Nondiscrimination—Continued
"Affirmative action programs"—Continued
Grants-in-aid—Continued
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 neverthless 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
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
Service Contract Act of 1965
Applicability of act
Keypunch operators, etc.
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
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
"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

CONTRACTS—Continued Page
Labor stipulations—Continued
Service Contract Act of 1965—Continued
"Successor employer doctrine"—Continued

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, (*See* BIDS, Mistakes)
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 pre-existing contract that domestic title vest jointly. To accomplish this, corrected assignment executed by parties should be refiled ---------- 653
Negotiation
Auction technique prohibition
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
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
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
Competition
Discussion with all offerors requirement
Proposal revisions

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

CONTRACTS—Continued
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Negotiation—Continued
Competition—Continued
Discussion with all offerors requirement—Continued
Proposal revisions—Continued

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. — (B–178001, May 14, 1974) ---- 593

Impracticable to obtain
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

Sole-source generally. (*See* **CONTRACTS, Negotiation, Sole-source basis**)

Competitive range formula
Technical acceptability

Upon reconsideration of holding in 53 Comp. Gen. 440 (B–179101, Dec. 28, 1973) 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

Discussion 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
Factors other than price
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

CONTRACTS—Continued Page
Negotiation—Continued
Evaluation factors—Continued
Factors other than price—Continued
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
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
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
Government estimated basis
Upon reconsideration of holding in 53 Comp. Gen. 440 (B–179101, Dec. 28, 1973) 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
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

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

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

Price/hour less than basic labor expense

Since the RFP for mess attendant services mandates rejection of an offer whose dollar/hour ratio (price/hours) 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

CONTRACTS—Continued Page
Negotiation—Continued
Evaluation factors—Continued
Manning requirements—Continued
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
Propriety of evaluation
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
Manning requirements
Evaluation. (*See* **CONTRACTS, Negotiation, Evaluation factors, Manning requirements**)
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 does not affect award 593
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
Disclosure
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
Public exigency
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 re-

CONTRACTS—Continued Page
Negotiation—Continued
Public exigency—Continued
Justification for negotiation—Continued
quired for formal advertising procedure may constitute justification for non-competitive procurement under negotiating authority of 10 U.S.C. 2304(a)(10) ---- 670
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 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
Requests for proposals
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
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
Proposal deviations
Disqualification of offeror
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.———(B-178001, May 14, 1974) ---- 593

CONTRACTS—Continued Page
Negotiation—Continued
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 throughly reexamined to determine if multipurpose simulator is sole type that will satisfy Govt.'s needs---- 478
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
Payments
Absence or unenforceability of contracts. (*See* **PAYMENTS, Absence or unenforceability of contracts**)
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

CONTRACTS—Continued Page
Protests—Continued
Authority to consider
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 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
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
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
Procedures
Interim Bid Protest Procedures and Standards
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
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

CONTRACTS—Continued Page
Protests—Continued
Procedures—Continued
Interim Bid Protest Procedures and Standards—Continued
Constructive notice—Continued
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
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
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
Solicitation improprieties
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 invitation 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

CONTRACTS—Continued Page

Requirements

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

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

Specifications

Addenda acknowledgment

Failure to return. (*See* **CONTRACTS, Specifications, Failure to furnish something required, Addenda acknowledgment**)

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

Ambiguous

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

Defective

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

CONTRACTS—Continued Page

Specifications—Continued

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

"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

Deviations

Informal *v.* substantive

Affirmative action programs

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

Informal *v.* substantive

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

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

CONTRACTS—Continued Page
Specifications—Continued
Evaluation factors—Continued
"Life cycle *v.* "cost of ownership"—Continued
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
Failure to furnish something required
Addenda acknowledgment
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
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 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
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
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 thoroughly reexamined to determine if multipurpose simulator is sole type that will satisfy Govt.'s needs---------- 478

CONTRACTS—Continued Page
Specifications—Continued
Restrictive
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
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
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
"Successor employer" doctrine. (*See* **CONTRACTS, Labor stipulations, "Successor employer" doctrine)**
Termination
Convenience of Government
Erroneous awards
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

CONTRACTS—Continued Page
Termination—Continued
Convenience of Government—Continued
Erroneous awards—Continued

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 contract should be terminated for convenience of Govt. and award made to low bidder at its bid price---- 569

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

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

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

COURTS—Continued Page

Criminal Justice Act of 1964—Continued

Attorneys fees—Continued

Extraordinary overhead—Continued

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

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

DEPARTMENTS AND ESTABLISHMENTS

Heads

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

Sex. (*See* **NONDISCRIMINATION, Sex**)

DISTRICT OF COLUMBIA 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
ENVIRONMENTAL PROTECTION AND IMPROVEMENT
Grants-in-aid
Water pollution control
Regulations inconsistent with law
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
EQUAL EMPLOYMENT OPPORTUNITY
Contract provision. (*See* CONTRACTS, Labor stipulations, Nondiscrimination)
ESTOPPEL
Against Government
Erroneous contract award
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
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
EXPERTS AND CONSULTANTS
Employment
Authority
Although FCC lacks specific authority to employ experts and consultants pursuant to 5 U.S.C. 3109, in view of funds provided in its current appropriation for "special counsel fees," 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 retire-

EXPERTS AND CONSULTANTS—Continued Page

Employment—Continued

Authority—Continued

ment 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

Reemployed civil service annuitants

Annuity deductions

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 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

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 SUPPLY SCHEDULE (*See* **CONTRACTS, Federal Supply Schedule**)

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

FEDERAL WATER POLLUTION CONTROL ACT—Continued Page
Grants-in-aid—Continued
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
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 fee scharged, 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

FOREIGN SERVICE Page

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

FUNDS

Appropriated. (*See* **APPROPRIATIONS**)

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

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 Page

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 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

Recommendations

Implementation

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 Committees 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

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 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

GRANTS Page

To States. (*See* **STATES, Federal aid, grants, etc.**)

INFORMERS

Awards. (*See* **AWARDS, Informers**)

INSURANCE

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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

INTERNATIONAL ORGANIZATIONS

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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

LEAVES OF ABSENCE

Administrative leave

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

LEAVES OF ABSENCE—Continued Page

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

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

MEDICAL TREATMENT

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 unjury. 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

MILITARY PERSONNEL

Annuity elections for dependents. (*See* **PAY, Retired, Annuity elections for dependents**)

Contracting with Government

Retired members. (*See* **MILITARY PERSONNEL, Retired, Contracting with Government**)

Dependents

Transportation. (*See* **TRANSPORTATION, Dependents, Military personnel**)

MILITARY PERSONNEL—Continued Page

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

Orders. (*See* **ORDERS**)

Overpayments

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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

Pay. (*See* **PAY**)

Retired. (*See* **PAY, Retired**)

Per diem. (*See* **SUBSISTENCE, Per diem, Military personnel**)

Quarters allowance. (*See* **QUARTERS ALLOWANCE**)

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

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 purposes of rendering technical assistance, updating catalogue materials, providing information on companies he represented

MILITARY PERSONNEL—Continued Page
Retired—Continued
Contracting with Government—Continued
Sales activities—Continued
Retired pay withholding—Continued
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
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
Station allowances. (*See* **STATION ALLOWANCES. Military personnel**)
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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

NATIONAL ADVISORY COUNCIL ON VOCATIONAL EDUCATION—Con.
Executive Director—Continued Page
Compensation—Continued

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
Contracts. (*See* **CONTRACTS, Labor stipulations, Nondiscrimination**)
Discrimination alleged
Basis of sex
Removal of differential treatment

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

OFFICERS AND EMPLOYEES
Administrative leave. (*See* **LEAVES OF ABSENCE, Administrative leave**)
Compensation. (*See* **COMPENSATION**)
Contracting with the Government
Former employees

Although FCC lacks specific authority to employ experts and consultants pursuant to 5 U.S.C. 3109, in view of funds, provided in its current appropriation for "special counsel fees," 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

OFFICERS AND EMPLOYEES—Continued Page

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 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**)

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

OFFICERS AND EMPLOYEES—Continued Page
Health insurance—Continued
Carrier liability—Continued
Failure of employee to file claim—Continued

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**)
Leaves of absence. (*See* **LEAVES OF ABSENCE**)
Moving expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)
Overseas
Home leave
Travel expenses. (*See* **TRAVEL EXPENSES, Overseas employees, Home leave**)
Overtime. (*See* **COMPENSATION, Overtime**)
Per diem. (*See* **SUBSISTENCE, Per diem**)
Relocation expenses
Transferred employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)
Retirement. (*See* **RETIREMENT, Civilian**)
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
Transfers
Relocation expenses
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

OFFICERS AND EMPLOYEES—Continued
Transfers—Continued
Relocation expenses—Continued
Temporary quarters
Permanent dwelling occupation
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
Travel expenses. (*See* **TRAVEL EXPENSES**)
Wage board
Compensation. (*See* **COMPENSATION, Wage board employees**)
Witnesses. (*See* **WITNESSES, Government employees**)
ORDERS
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, he is entitled to per diem provided for temporary duty 454
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
Annuity elections deductions. (*See* **PAY, Retired, Annuity elections for dependents**)
Civilian employees. (*See* **COMPENSATION**)

PAY—Continued Page

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

Retired

Annuity elections for dependents

Children

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

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 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---------- 519

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------ 470

Survivor Benefit Plan

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

PAY—Continued Page

Retired—Continued

Annuity elections for dependents—Continued

Survivor Benefit Plan—Continued

Election status—Continued

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

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 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

Cost-of-living increases. (*See* **PAY, Retired, Increases, Cost-of-living increases**)

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---- 698

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---- 698

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

PAY—Continued Page

Retired—Continued

Increases—Continued

Cost-of-living increases—Continued

Adjustment of retired pay—Continued

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 (0–10) is equally applicable in computing the retired pay of officer who served as Chief of Staff_____ 698

Voluntary *v.* involuntary retirement

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

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

PAYMENTS Page

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

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 542

Private contract *v.* Government personnel

Former employees

Although FCC lacks specific authority to employ experts and consultants pursuant to 5 U.S.C. 3109, in view of funds provided in its current appropriation for "special counsel fees," 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-emplo yee relationship 702

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

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

PRESIDENT—Continued Page
Authority—Continued
Basis—Continued

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

PROPERTY
Real. *(See* **REAL PROPERTY)**

QUARTERS ALLOWANCE
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

Temporary duty
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

REAL PROPERTY Page

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

"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

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

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

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

REGULATIONS—Continued Page
Applicability to laws—Continued
Requirement—Continued

Reorginization 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

Modification
General Accounting Office instigation

Practice of National Labor Relations Board (NLRB) of making promotions effcctive 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

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 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.—(B-158549, July 5, 1974) 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 Page

Civilian

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, 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

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 ---------- 654

Limitation on pay of public members of Technology Assessment Advisory Council contained in sec. 7(e)(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

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 ---------- 542

Although FCC lacks specific authority to employ experts and consultants pursuant to 5 U.S.C. 3109, in view of funds provided in its current appropriation for "special counsel fees," 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

RETIREMENT—Continued Page

Civilian—Continued

Reemployed annuitant—Continued

Annuity deduction—Continued

Services under contract—Continued

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

REWARDS (*See* **AWARDS**)

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 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

SMALL BUSINESS ADMINISTRATION

Contracts

Awards to small business concerns. (*See* **CONTRACTS, Awards, Small business concerns**)

STATES

Federal aid, grants, etc.

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

STATES—Continued Page

Federal aid, grants, etc.—Continued

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

STATION ALLOWANCES

Military personnel

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 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

STATUTES OF LIMITATION

Claims

Military matters and personnel

Sex discrimination removed

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

STATUTORY CONSTRUCTION

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 695

STATUTORY CONSTRUCTION—Continued Page

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 560

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

Military personnel

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, he is entitled to per diem provided for temporary duty 454

SUBSISTENCE—Continued Page

Per diem—Continued

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

TRANSPORTATION

Dependents

Military personnel

Dependents delayed travel

Member transferred twice

Since dependents of member of uniformed services did not exercise right to Govt. transportation 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

Rates

Section 22 quotations

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. ———— (B–178563, May 15, 1974) 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

TRANSPORTATION—Continued Page
Rates—Continued
Section 22 quotations—Continued
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
TRAVEL EXPENSES
Military personnel
Dependents
Transportation. (*See* **TRANSPORTATION, Dependents, Military personnel**)
Overseas employees
Home leave
Time at or near residence
Substantial amount requirements
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
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
UNITED NATIONS CHILDREN'S FUND
Appropriations. (*See* **APPROPRIATIONS, United Nations Children's Fund**)
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

WITNESSES Page

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

"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

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