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COMPTROLLER GENERAL OF THE UNITED STATES

Elmer B. Staats

DEPUTY COMPTROLLER GENERAL OF THE UNITED STATES

Robert F. Keller

GENERAL COUNSEL

Paul G. Dembling

DEPUTY GENERAL COUNSEL

Milton J. Socolar

ASSOCIATE GENERAL COUNSELS

F. Henry Barclay, Jr.

James M. Campbell

John W. Moore

Paul Shnitzer

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[B-179085]

Contracts—Awards—Small Business Concerns—Set-Asides—Subsequent to Unrestricted Solicitation

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

To Booz-Allen Applied Research, November 5, 1973:

By letter dated September 6, 1973, and prior correspondence, you protest award of a contract on a total set-aside basis for small business under request for quotations (RFQ) No. DAAA21-73-Q-0148, issued at Picatinny Arsenal, Dover, New Jersey, for the Modernization of Materials Handling in Loading Plants.

The subject RFQ was issued on June 11, 1973, and the deadline for receipt of quotations was the close of business on July 11, 1973. The original solicitation was unrestricted in terms of the size of business which could compete. Amendment No. 0001, issued on June 28, 1973, restricted the procurement to small business concerns.

You are a large business and you report that at the time the amendment was issued you had substantially completed the preparation of your quotation. Despite the small business set-aside, you completed your quotation and submitted it to the agency prior to the deadline for receipt of quotations. You were the only large business to submit a quotation. It is your position that it was improper to restrict the procurement solely to small business concerns and that, therefore, Booz-Allen Applied Research (Booz-Allen) is entitled to have its quotation opend and evaluated.

The record indicates that the contracting officer decided to issue the solicitation without any restriction as to size on the basis that the required technical capability, background, experience and personnel normally could be found only in large business firms. Thereafter, upon the request of the SBA representative, the contracting officer agreed to set aside this procurement for exclusive participation by small business firms. Apparently, the contracting officer became convinced that offers could be obtained from a sufficient number of responsible small business concerns so that award could be made at a reasonable price.

There was a previous procurement for a similar requirement in which three small business firms submitted proposals considered to be within the competitive range of acceptability. Accordingly, on June 28 the solicitation was amended as a total set-aside for small business.

You advance several arguments in support of your position that it was improper and illegal to issue the subject amendment. First, you contend that the contracting officer lacked any authority to amend the solicitation after its issuance for the purpose of restricting the procurement to small business. Although there is no specific provision in the Armed Services Procurement Regulation (ASPR) authorizing a contracting officer to amend a solicitation to provide for a small business set-aside, we do not think the contracting officer was precluded from doing so.

First of all, ASPR 1–706.5, which deals with the making of total small business set-asides, does not require that such determinations be made only prior to the issuance of the solicitation. Moreover, ASPR 1–706.3(d) contemplates that contracting officers review set-aside proposals suggested by SBA representatives and, in the event a contracting officer disagrees with a particular recommendation, it specifically permits the suspension of the procurement action. We think this provision reasonably may be interpreted as authorizing the delay of a procurement already in progress for the purpose of resolving whether the existing procurement should be changed to a set-aside for small business. Where, as here, the contracting officer is persuaded that his original decision to go forward with an unrestricted solicitation is unwarranted, and he agrees to set aside the procurement for small business participation, we believe he would be authorized to effect the necessary change in the solicitation pursuant to the provisions in ASPR 3–505 for amending solicitations prior to the closing date for receipt of quotations.

You contend, however, that the contracting officer was estopped from modifying the solicitation to exclude large business firms since your firm had been invited to respond to the original solicitation and had prepared a comprehensive and responsive proposal prior to notification of the set-aside action. We agree that good procurement procedure dictates that determinations concerning set-asides should be made prior to the issuance of the solicitation. But we do not agree that such decisions become irrevocable once the solicitation has been issued. The Small Business Act of 1958, 15 U.S. Code 631 *et seq.* states, as the policy of Congress, that a fair proportion of all Government contracts be let to small business. Part 7 of Section 1 of ASPR implements this policy. In view of this congressional policy, we do not believe that a contracting officer may be estopped from setting aside a procurement for small

business even after the solicitation has been issued unless such action is arbitrary or in bad faith, and we do not find that the contracting officer acted arbitrarily or in bad faith in this case.

In this connection, you contend that the SBA representative exerted undue influence on the contracting officer to alter his original decision to proceed with an unrestricted procurement. You state that if the SBA representative disagreed with the contracting officer's decision, the proper procedure was to appeal the contracting officer's determination to the head of the procuring activity.

However, there is no indication in the record of any undue influence on the part of the SBA representative. The record indicates only that on June 27, 1973, the SBA representative presented his reasons for recommending that the procurement be set aside for small business and that the contracting officer was persuaded to change his position in this regard.

You point out that prior to making a total small business set-aside the contracting officer must determine that there exists a "reasonable expectation that offers will be obtained from a sufficient number of responsible small business concerns so that awards will be made at reasonable prices." ASPR 1–706.5(a)(1). You claim that the contracting officer did not have a sufficient basis to make such a determination. As indicated above, the contracting officer reports that his determination was made on the basis of a prior unrestricted procurement for similar services in which three proposals were received from small businesses which fell within a zone of consideration. Although you contend that the work to be performed under this contract is much more demanding than the work to be performed under the prior procurement, we must defer to the administrative judgment in the matter, since the determination as to whether a particular procurement should be set aside is within the province of the agency involved and the SBA. 41 Comp. Gen. 351, 362 (1961).

You also argue that you are entitled to have your quotation opened for the purpose of determining the reasonableness of the prices submitted by the small business concerns. We do not agree. While we have held that a contracting officer may consider unsolicited bids received from large business concerns in determining whether small business bids are unreasonable, *see* 49 Comp. Gen. 740, 743 (1970), we do not believe that a contracting officer should be required to consider a proposal from a large business concern under a small business set-aside. In our opinion, a requirement that offers from large businesses be considered under a small business set-aside, even if only for the purpose of determining the reasonableness of the offers submitted by small businesses, is incompatible with the Small Business Act and the

set-aside program. Procurements may be negotiated with small businesses at a higher cost to the Government than is otherwise obtainable. 41 Comp. Gen. 306, 315 (1961). Moreover, where, as here, a Cost-Plus-Incentive-Fee type contract is contemplated, the proposed costs of performance may not be the determining factor for award.

Finally, you contend that if the Army refuses to consider your quotation for award you would be entitled to the costs incurred in preparing your quotation, citing *Heyer Products Co.* v. *United States*, 140 F. Supp. 409 (135 Ct. Cl. 63, 1956). Also see *id.*, 177 F. Supp. 251 (147 Ct. Cl. 256, 1959). While the courts have recognized that a contracting agency's failure to fairly and honestly consider bids would give rise to a cause of action to recover bid preparation expenses, standards and criteria to be applied in allowing such a claim have not been established to our knowledge. Accordingly, this Office must decline to attempt the settlement of claims for bid preparation costs until appropriate criteria and standards are judicially established. See *Longwill* v. *United States*, 17 Ct. Cl. 288 (1881); *Charles* v. *United States*, 19 Ct. Cl. 316 (1884); B-177489, December 14, 1972.

Accordingly, both your protest and your claim for the costs of preparing your quotation must be denied.

[B-179071]

Compensation—Assignment—Banking Facilities for Deposit, etc.—Commercial Insurance Premium Payments

An allotment of civilian compensation to a joint account in a financial institution which is used to effect payment of commercial insurance premiums is proper under the applicable law and regulations—31 U.S.C. 492, as amended by Public Law 90-365; Treasury Department Circular No. 1076 (First Revision), dated November 22, 1968; chapter 7000, Part III, Treasury Fiscal Requirements Manual for Guidance of Departments and Agencies, and the Department of Treasury Transmittal Letter No. 59 to the Manual.

To Captain W. A. Yohey, Department of the Air Force, November 6, 1973:

We refer further to your letter of May 11, 1973, reference ACF, forwarded here on June 29, 1973, by Mr. Earl W. Banman, Deputy Director, Directorate of Plans and Systems, Assistant Comptroller for Accounting and Finance (HQ USAF), wherein you requested an advance decision as to the propriety of an allotment of civilian pay of Mr. George A. Toliver, an employee of the Department of the Air Force, to effect payment of premiums on a commercial life insurance policy.

The question presented is whether the provisions of 31 U.S. Code 492 as amended by Public Law 90–365, approved June 29, 1968, 82 Stat. 274, permit an allotment of pay to a financial institution for payment of commercial insurance premiums under the circumstances stated below.

Your letter sets forth the facts as follows:

a. Mr. George A. Toliver, a federal employee, purchased a commercial insurance policy. Representatives of the insurance company concerned secured Mr. Toliver's authorization to establish a savings account, in Mr. Toliver's name, with the Central Park Bank, San Antonio, Texas. In addition, the representatives secured Mr. Toliver's signature on a Standard Form 1198 (Request by Employee for Allotment of Pay for Credit to Savings Account With a Financial Organization) to establish an allotment for credit to the savings account to be established. The amount of the allotment requested is identical to the amount of premiums due on the commercial insurance policy.

b. A recently received allotment request of this nature was claimed, by the employee concerned, to have been forged and, to protect both the employees and employer, subsequent allotment requests were confirmed with employees to ascertain validity.

c. Mr. Toliver confirmed the validity of the allotment request and readily offered the information contained in paragraph 2a, above. The allotment, while designated for credit to a savings account, is intended solely for the purpose of automatic payroll deductions for payment of premiums on a commercial insurance policy.

Mr. Bauman states that at some Air Force installations in the continental United States, a large number of savings allotments currently in effect and established under Public Law 90–365 are being used for deposit of insurance premiums. The accounts credited are joint accounts, the titles of which include the names of the allotters and the insurance company. He states that the Department has permitted these allotments on the basis of the Department of the Treasury Transmittal Letter No. 59 and supplemental guidance issued by that Department. Mr. Bauman notes that the Treasury instructions prohibit allotments for the payment of union dues.

You point out that the legislative history of Public Law 90–365 indicates that the law was designed to provide a vehicle to enable Federal employees to save through a payroll savings plan. Additionally, Mr. Bauman refers to 5 U.S.C. 5525 which, as implemented by the Civil Service Commission in 5 CFR 550.371, authorizes allotments by civilian employees for direct payment to carriers of commercial insurance premiums on the life of the allotter when he is: (1) Assigned to a post of duty outside the continental United States; (2) Working on an assignment away from his regular post of duty when the assignment is expected to continue for 3 months or more; or (3) Serving as an officer or member of a crew of a vessel under the control of the Federal Government.

It is stated that in view of the legislative history of Public Law 90–365 and the fact that there is no statutory authority for allotments for direct payment of commercial insurance premiums by employees per-

manently assigned to a post of duty within the continental United States, the validity of the proposed allotment is in doubt.

The applicable subsections of 31 U.S.C. 492 provide:

Agency authorization for drawing checks in favor of financial organizations and for credit of employee's checking account, deposit of savings, or purchase of shares; reimbursement; definitions

(b)(1) Notwithstanding subsection (a) of this section or any other provision of law, and under regulations to be prescribed by the Secretary of the Treasury, the head of an agency shall, upon the written request of an employee of the agency to whom a payment for wages or salary is to be made, authorize a disbursing officer to make the payment in the form of one, two, or three checks (the number of checks and the amount of each, if more than one, to be designated by such employee) by sending to each financial organization designated by such employee a check that is drawn in favor of the organization and is for credit to the checking account of such employee or is for the deposit of savings or purchase of shares for such employee: *Provided*, That the agency shall not be reimbursed for the cost of sending one check requested by such employee but shall be reimbursed for the additional cost of sending any additional check requested by such employee by the financial organization to which such check is sent. For the purposes of the foregoing proviso, the check for which the agency shall not be reimbursed shall be the check in the largest amount.

(2) If more than one employee to whom a payment is to be made designates the same financial organization, the head of an agency may, upon the written request of such employee and under regulations to be prescribed by the Secretary of the Treasury, authorize a disbursing officer to make the payment by sending to the organization a check that is drawn in favor of the organization for the total amount designated by those employees and by specifying the amount to be credited to the account of each of those employees.

(3) In this subsection, the term "agency" means any department, agency, independent establishment, board, office, commission, or other establishment in the executive, legislative (except the Senate and House of Representatives), or judicial branch of the Government, any wholly owned or controlled Government corporation, and the municipal government of the District of Columbia; and the term "financial organization" means any bank, savings bank, savings and loan association or similar institution, or Federal or State chartered credit union.

Payment of check drawn as required and properly endorsed as full acquittance for amount due employee

(c) Payment by the United States in the form of more than one check, drawn in accordance with subsection (b) of this section and properly endorsed, shall constitute a full acquittance for the amount due to the employee requesting payment.

As you know, allotments authorized under the provisions quoted above are governed by regulations set forth in Treasury Department Circular No. 1076 (First Revision) dated November 22, 1968, and the requirements stated in chapter 7000, Part III, Treasury Fiscal Requirements Manual for Guidance of Departments and Agencies. The Treasury Department's Transmittal Letter No. 59 to the Manual, dated June 7, 1971, was designed to:

* * * (1) apprise agencies of the policy of the Department of the Treasury with respect to allotments of pay of employees which are for credit to savings accounts in financial organizations, and (2) guide agencies in the application of that policy in situations where knowledge of the manner in which an employee will dispose of his savings generates a question as to the propriety of the savings allotment itself. * * *

The regulatory provisions of Department Circular No. 1076 (First Revision) as summarized in Transmittal Letter No. 59 states:

(a) The employee's allotment must be to a "financial organization" (as defined in the regulations);
(b) The employee's allotment must be for credit to a savings account; and
(c) The title of the savings account, which may be either a single or joint account, must include the name of the authorizing employee.

As you point out and as set forth in Transmittal Letter No. 59, the Department of the Treasury does not look behind the allotment in terms of how the employee intends to dispose of his savings in cases when the savings allotment meets the above-stated criteria unless the specific purpose of the allotment is to circumvent other fundamental requirements, such as contained in statutes, executive orders and executive branch regulations.

In this connection you submitted a copy of a letter dated August 5, 1971, to the Assistant Secretary of Defense (Comptroller) from the Commissioner of Accounts, Department of the Treasury, wherein the problem at issue was discussed and it was noted that certain Air Force employees' savings allotments were discontinued because they were recognized as deposits for the purpose of paying insurance premiums. The Commissioner of Accounts stated that the action stopping such allotments was in direct conflict with the requirements of the Department of the Treasury and asked that steps necessary to rectify the situation be taken.

Accordingly, we are of the opinion that the described use of savings allotments is proper under the applicable law and regulations despite the fact that the ultimate use of the savings is for the payment of premiums on a commercial life insurance policy.

[B–179213]

Subsistence—Per Diem—Temporary Duty—New Employee Prior to Reporting to First Duty Station

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

Travel Expenses—Temporary Duty—New Employee Prior to Reporting to First Duty Station

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

To Donald S. Schneider, November 6, 1973:

Further reference is made to your letter of June 4, 1973, in which you request reconsideration of a settlement by our Transportation and Claims Division dated May 31, 1973, that sustained the administrative disallowance of your claim for certain travel expenses in connection with your temporary duty assignment in Philadelphia, Pennsylvania, during the period September 6, 1972, to October 6, 1972.

The record indicates you were employed on September 5, 1972, by the Albany District Office of the Internal Revenue Service as an Estate Tax Attorney. Your official duty station was designated as Newburgh, New York, however, you were immediately ordered to travel to the Internal Revenue Service Mid-Atlantic Region Training Center, Philadelphia, Pennsylvania, on September 6, 1972, to begin a training course of approximately 30 days duration. Because of the time limitation, it was not possible for you to move your residence from Syracuse, New York, to the vicinity of your new duty station at Newburgh, New York, and therefore you traveled from your home in Syracuse to Philadelphia. While temporarily assigned in Philadelphia, you returned to your residence in Syracuse on 4 weekends (8 nonworkdays). At the conclusion of the temporary duty you submitted a travel voucher claiming travel expenses and per diem for the aforementioned travel.

Travel expenses from Syracuse to Philadelphia and return were administratviely recomputed on the basis of travel from your official duty station at Newburgh to Philadelphia and return. Also your claim for per diem for your temporary duty station at Philadelphia was administratively recomputed to reflect zero cost for lodging during the weekends you spent in Syracuse. The administrative action on your claim was sustained by our Transportation and Claims Division, which you now appeal.

You contend that since you were not given an opportunity to move to your official duty station prior to your temporary duty assignment in Philadelphia, Pennsylvania, you should be entitled to travel ex-

penses and per diem from your residence in Syracuse, New York, instead of from your official duty station in Newburgh, New York. For the same reason, you also contend you should be entitled to travel expenses, not to exceed per diem at Philadelphia, for nonworkdays on which you voluntarily returned to your place of abode in Syracuse, since in effect your employing agency prevented you from establishing a place of abode from which you could daily commute to your official duty station.

The general rule is that an employee must bear the expenses of travel to his first permanent duty station in the absence of a statute to the contrary. Therefore, when a new employee, incident to travel to his first duty station, is assigned temporary duty away from his permanent duty station, reimbursement of travel expenses is limited to the additional costs of travel related to the temporary duty assignment. *See* 30 Comp. Gen. 373 (1951). 5 U.S. Code 5723 provides authority for payment of travel expenses of a new appointee as follows:

§ *5723. Travel and transportation expenses of new appointees and student trainees; manpower shortage positions*

(a) Under such regulations as the President may prescribe and subject to subsections (b) and (c) of this section, an agency may pay from its appropriations—

(1) travel expenses of a new appointee, or a student trainee when assigned on completion of college work, to a position in the United States for which the Civil Service Commission determines there is a manpower shortage;

Inasmuch as there is nothing in the record indicating you were appointed to a manpower shortage position or that you were otherwise entitled to travel expenses to your first duty station, there is no authority to pay your travel expenses from your place of residence in Syracuse to Newburgh, New York. Information to the contrary contained in the settlement certificate, issued by our Transportation and Claims Division, stating you would be entitled to such travel expenses was in error and should be disregarded.

Per diem payments for employees traveling on official business is governed by 5 U.S.C. 5702 which provides in part as follows:

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

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

This statute limits payment of per diem to employees traveling away from their official duty stations. Under provisions of this statute the beginning and terminal point for your per diem and travel expenses incident to your temporary assignment in Philadelphia, Pennsylvania, was your official duty station in Newburgh, New York, notwithstanding the fact you did not travel to Newburgh en route to

Philadelphia and return. Therefore, the disallowance of your claim for round trip travel and per diem expenses between Syracuse and Philadelphia and return was proper.

With regard to your claim for travel expenses incurred when you voluntarily returned to your Syracuse residence during nonworkdays, we note that section 6.5c, Office of Management and Budget (OMB) Circular No. A–7 provides:

> * * * In cases of voluntary return of a traveler for nonworkdays to his official station, or his place of abode from which he commutes daily to his official station, the reimbursement allowable for the round trip transportation and per diem en route will not exceed the per diem and any travel expense which would have been allowable had the traveler remained at his temporary duty station.

The provisions of this regulation would normally preclude reimbursement of travel expenses to an employee who traveled away from his temporary station and who neither returned to his official station nor his place of abode from which he commutes daily to his official station. The regulation presupposes that an employee on assignment at a temporary duty station has reported to his permanent official duty station and has established himself a residence within commuting distance of his permanent duty station. However, in a situation where an employee is ordered to a temporary duty station at the time he is hired, before he has an opportunity to report in or establish a residence in the vicinity of his new permanent official duty station, we believe it would be unfair to deny travel expenses to his old residence. Thus, under such circumstances, the phrase "* * * place of abode from which he commutes daily to his official station" may be construed so as to include an employee's old residence that is not within normal commuting distance of the station. On the basis of the foregoing, you are entitled to reimbursement allowable for the round trip transportation and per diem en route when you voluntarily returned to Syracuse from Philadelphia on the 4 weekends in September 1972, not to exceed the per diem and any travel expenses which would have been allowable had you remained at your temporary duty station at Philadelphia. Inasmuch as you were not in subsistence status on the 4 weekends that you returned to Syracuse, the 8 nights should not be included in the average lodging cost computation. B–176706, October 13, 1972. Computed on this basis your per diem rate is $22. Also, since the round trip transportation and per diem en route between Newburgh and Philadelphia would exceed your per diem allowance at Philadelphia, you are entitled to an amount equivalent to the per diem you would have received if you had remained in Philadelphia on the 8 nonworkdays you spent at your residence in Syracuse.

Accordingly, your travel voucher will be recomputed and a new settlement will be issued in due course by our Transportation and Claims Division on the basis of the foregoing.

[B-159327]

Property—Private—Federal Funds for Improvements, Repairs, etc.—Limitation on Expenditures

The general rule prohibiting the use of appropriated funds for permanent improvements of private property (5 Comp. Dec. 478) unless specifically authorized by law, and the limited exception to that rule in section 322 of the Economy Act (40 U.S.C. 278a) which, in effect, permits expenditures for alterations, repairs, and improvements of rented premises not in excess of 25 percent of the first year's rent is for application to the proposed alteration, repairs, and improvement of a permanent nature to premises rented for housing flight service stations and other air navigation facilities operated by the Federal Aviation Administration (FAA) in connection with air control facilities since section 307(b) of the Federal Aviation Act concerning the establishment and operation of air traffic control facilities does not constitute statutory authority for FAA to effect permanent improvements to private property without regard to the limiation in 40 U.S.C. 278a.

To the Administrator, Federal Aviation Administration, November 8, 1973:

This refers to your letter, dated June 26, 1973, asking our advice "on the extent to which the Federal Aviation Administration [FAA] may expend appropriated funds for repairs, alterations, and improvements to rented premises housing flight service stations and other air navigation facilities operated at airports by FAA in connection with its air traffic control activities."

You explain in this regard that:

Under the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301 *et seq.*), the FAA is charged with broad responsibilities for safe and efficient air navigation and air traffic control. To those ends, the agency is authorized in Section 307(b) of the Act to acquire, establish, improve, operate, and maintain air navigation facilities wherever necessary (49 U.S.C. 1348 (b)). One such facility is the flight service station (FSS) through which pilots are provided pre-flight and in-flight services such as weather briefings, enroute radio communications, monitoring of radio aids to navigation, and various other air traffic control support activities. FAA has established and operates a nationwide system of over 300 FSSs, some of which are housed in FAA-owned facilities (e.g., certain air traffic control towers) but most of which occupy premises leased from airport proprietors or operators.

The efficiency and cost-effectiveness of the FSS system currently require upgrading and the agency is exploring major improvements through the use of automated systems which, if adopted, will ultimately necessitate extensive modification of FSSs selected for installation throughout the country.

The first step in improving the FSS system, and our immediate concern in requesting your advice, involves the installation and operational testing of an automated Aviation Weather and Notam System (AWANS) at our FSS located at the Fulton County Airport in Atlanta, Georgia. This FSS is housed in a building owned by Fulton County and leased to FAA (lease No. DOTFA 6950-5112) at an annual rental of $24,930, the current lease being for one year with FAA having one-year renewal options until June 30, 1989. Space limitations and room configuration render the present FSS operations area of the building unsuitable for installation of the AWANS, and it will be necessary to alter for that purpose office space presently occupied by FSS administrative personnel and facility technicians. It is planned to house such personnel in Government-owned office trailers during testing of the AWANS and to convert the present FSS operations area into the needed office space when the AWANS becomes fully operational.

We recognize the general rule prohibiting the use of appropriated funds for permanent improvements to private property (5 Comp. Dec. 478) unless specifically authorized by law, and the limited exception to that rule in Section 322 of the Economy Act (40 U.S.C. 278a) which, in effect, permits expenditures for alterations, repairs, and improvement of rented premises not in excess of 25 percent of the first year's rent. Proposed alterations, repairs, and improvements of a permanent nature to the existing office space and FSS operations area, a schedule of which is enclosed, are estimated to cost approximately $52,575. The limitation in Section 322, if applicable to the proposed FSS alterations, would limit expenditures therefor to $5,813.75.

In a previous decision issued by your Office, published at 46 Comp. Gen. 60 (1966), FAA was held authorized to expend appropriated funds without regard to Section 322 for reinforcement and other structural improvements to non-Federally owned airport buildings as part of the cost of constructing air navigation and related facilities thereon where, pursuant to Section 11(6) of the Federal Airport Act,[4] the airport owner or operator had granted the Government the right without cost to install such facilities. That decision appears to have been based upon language in Section 11(6) which, after amendment of the Federal Airport Act in 1961 (P.L. 87-255), required an airport operator receiving an airport development grant to provide "rights in buildings" as needed by FAA "for construction at Federal expense" of facilities for air traffic control weather reporting, and related communication activities. Prior to the 1961 amendment, Section 11(5) of the Federal Airport Act (formerly 49 U.S.C. 1110(5)) had required instead that operators provide at no cost "*space* in airport buildings as may be reasonably adequate" for use in connection with such activities, and in an earlier decision, B-122722 (August 16, 1965), it had been ruled that expenditures by FAA for changes in rent-free space furnished pursuant to that requirement were subject to the Economy Act limitation. The 1961 amendment was viewed in 46 Comp. Gen. 60 as indicating a congressional intent

that the Federal Aviation Agency not be hampered by restrictions or limitations in the construction of these vitally important air traffic control facilities. 46 Comp. Gen. at 62.

Accordingly, your Office had no objection to

payment from funds appropriated to the Federal Aviation Agency for reinforcements of building foundations and other structural improvements as part of the cost of constructing air-navigation and related facilities at selected airports.

Unlike the situations considered in B-152722 and 46 Comp. Gen. 60, the FSS at Atlanta does not involve either "space" or "rights" in buildings furnished by the airport in connection with a grant agreement under the Federal Airport Act (or under its successor, the Airport and Airway Development Act of 1970). The FSS occupies rented space which was originally acquired pursuant to a lease-construction arrangement in 1960. However, as in the case of the earlier decisions, we are here concerned with the installation of air navigation facilities pursuant to authority in Section 307(b) of the Federal Aviation Act. Whether improvements incidental to such installation may be made without reference to the general prohibition against improving private property or the Economy Act limitation would not seem logically to depend upon whether the agency has leased the property to be improved or has, in connection with an airport development grant, acquired "rights" therein. Based upon this and our belief that Congress did not intend that FAA be restricted in establishing and improving air navigation and related facilities at airports pursuant to Section 307(b) of the Act, neither the general prohibition nor the Economy Act limitation would seem to be applicable to such activities. [Footnotes omitted.]

You advise that FAA has an active contract in the amount of $1,287,285 for the design, development, installation and testing of the automated AWANS at the Fulton County Airport.

As a general rule, as you acknowledge, appropriated funds may not be expended for permanent improvements to leased private property unless specifically authorized by law. 19 Comp. Gen. 528 (1939); 29

id. 279 (1949); 35 *id.* 715 (1956). Section 322 of the Economy Act (40 U.S. Code 278a), providing in pertinent part that no appropriation shall be obligated or expended for alterations, improvements, or repairs of rented premises in excess of 25 percent of the first year's rent, constitutes a limited exemption from the rule, but the amount which could be expended by FAA under this exemption is, you advise, not sufficient to effect the desired improvements.

The question presented is, therefore, whether any other exemption from the rule against expenditure of appropriated funds for improvements to private property would apply in the circumstances here present so as to allow FAA, without regard to 40 U.S.C. 278a, to make the proposed expenditures. You argue that such an exemption exists, based on what you contend are the implications of our decision in 46 Comp. Gen. 60 (1966), and on your belief "that Congress did not intend that FAA be restricted in establishing and improving air navigation and related facilities at airports pursuant to section 307(b)" of the Federal Aviation Act.

In 46 Comp. Gen. 60, it was decided that in the circumstances there present, we would not object to payment by FAA for permanent improvements to buildings provided by an airport owner or operator for use by FAA pursuant to section 11(6) of the Federal Airport Act. (The Federal Airport Act was repealed by section 52(a) of the act of May 21, 1970, Public Law 91-258, 84 Stat. 235. Section 18(6) of the act of May 21, 1970 (49 U.S.C. 1718(6)) is however substantially the same as section 11(6) of the Federal Airport Act.) Section 11(6) provided that an airport owner or operator must agree, as a condition precedent to receiving Federal aid for an airport development project, that he would furnish without cost such "rights in buildings of the sponsor as the Administrator may consider necessary or desirable for construction at Federal expence of space or facilities" for use in connection with air traffic control facilities. An earlier version of section 11(6), before being amended by the act of September 20, 1961, Public Law 87-255, 75 Stat. 526, had required only that the airport owner or operator furnish without charge "such space in airport buildings as may be reasonably adequate" for air traffic control facilities. While we held in 46 Comp. Gen. 60 that "Congress expressed its intent in unequivocal language" that FAA not be hampered by restrictions or limitations in the construction of air traffic control facilities, that holding was based explicitly on our construction of the language of the 1961 amendment to section 11(6) of the Federal Airport Act. That decision cannot, therefore, support the proposition you advance that Congress did not intend that FAA be restricted in improving air navigation facilities pursuant to section 307(b) of the Federal Aviation

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Act, approved August 23, 1958, Public Law 85-726, 72 Stat. 749, 49 U.S.C. 1348(b).

Section 307(b) authorizes the Administrator

> within the limits of available appropriations made by the Congress, (1) to acquire, establish, and improve air-navigation facilities wherever necessary; (2) to operate and maintain such air-navigation facilities; * * * and (4) to provide necessary facilities and personnel for the regulation and protection of air traffic.

In an earlier decision, in which we specifically considered the effect of section 307(b) in this respect, we held that it, along with other provisions of law granting certain powers to the Administrator concerning establishment and operation of air traffic control facilities, does not constitute statutory authority for FAA to effect permanent improvements to private property without regard to the limitation in 40 U.S.C. 278a. B-152722, August 16, 1965. Nothing in 46 Comp. Gen. 60 affects the conclusion in B-152722 with respect to the authority contained in section 307(b) of the Federal Aviation Act. Our decision in 46 Comp. Gen. 60—construing the Congress' intent in providing for rights in buildings to be provided to FAA without charge for construction of air traffic facilities at Federal expense—has no application to the facts of the instant case, wherein the private property in question is being rented.

Consequently, the general rule against expenditure of appropriated funds for permanent improvements to private property is applicable to this case, subject to the limited exemption in 40 U.S.C. 278a. Accordingly, you are advised that the aggregate expenditure for the proposed improvements to rented premises at Fulton County Airport may not exceed 25 percent of the amount of the rent for the first year of the rental term.

[B-178625]

Contracts—Termination—Cancellation of Requirement

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

To the Director, Defense Supply Agency, November 8, 1973:

In our decision dated July 19, 1973 (53 Comp. Gen. 32), to you, we recommended that the contract awarded to J. I. Case Company, the low bidder, under invitation for bids (IFB) No. DSA700-73-B-2031, the second step of a two-step formally advertised procurement, be terminated for the convenience of the Government, and that the procurement be resolicited. We took this position because the award was made to other than the low responsive bidder under an IFB which we believed to be defective.

Case requested reconsideration on the basis that our decision erroneously concluded that its bid upon which the contract was awarded was nonresponsive to the delivery provisions, of the IFB. By letter dated September 14, 1973, and prior correspondence, your Assistant Counsel, Headquarters, subscribes to the Case position.

For the reasons set forth below, our decision of July 19, 1973, is modified insofar as it recommended that the contract awarded to Case should be terminated for the convenience of the Government.

RESPONSIVENESS OF THE CASE BID

As originally structured, the IFB called for submission of the first article test report by the contractor within 270 days after date of award (ADA), approval or disapproval of the report by the Government within 30 days thereafter, and delivery of first production units 665 days ADA. IFB Note 2 to bidders explained the 365-day difference, as follows:

> NOTE 2: Concurrent delivery with the end items is required for stock repair parts and publications. Acceleration in the delivery of end item will not be acceptable to the government unless all other scheduled deliveries relating to contract items such as provisioning, technical documentation, drawings, publications, overpack manuals, etc., and specifically first article testing, are accelerated by an equal period of time and prior approval of the procuring contracting officer is obtained.

Note 3 to bidders precluded offerors from extending the time for submission of the first article test report apparently to preserve the 365-day interval.

Amendment 0001 to the IFB advised bidders that (1) the delivery times and acceleration conditions were "firm," and (2) the 365-day interval was necessary to allow for concurrent delivery of repair parts. Amendment 0002 extended by 90 days the delivery of first production units from 665 days ADA to 755 days ADA. Also, the first article test report date was extended from 270 days ADA to 330 days ADA. Note 3, above, was deleted and the following new Note 3 substituted (as completed by Case):

1. Time between scheduled government approval of 1st article test report (the number of days scheduled for submission of report plus 30 days) and 1st delivery of production trucks is a minimum 365 days.
2. Final delivery of all items does not exceed 905 days.
3. Offeror, when accelerating or extending the time for submission of the 1st article test report is requested to indicate below his alternate delivery schedule encompassing all CLINs 0001 through 0014 consistent with the conditions cited above or named elsewhere in the solicitation.

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

[First Article requirement]

Our decision concluded that the alternate schedule proposed by Case was nonresponsive to a material delivery requirement in the IFB that first production units be delivered *no earlier than* 365 days after approval by the Government of the first article test report. This conclusion was based on the fact that the Case alternate schedule provided a period of only 275 days between test report approval and first production unit delivery. We further supported our conclusion by stating that the required concurrent delivery of spares and repair parts was not assured in the Case alternate schedule since "Under this procurement, the contractor has no control over the source or timing of delivery of spares and repair parts." The alternate schedule was also found to be nonresponsive to Note 2 and amendment 0001 requirements since delivery of first production units was accelerated without a corresponding acceleration in the date for submission of the first article test report.

Counsel for Case argues that the 365-day interval requirement may be disregarded or waived as an immaterial requirement of the delivery provisions of the IFB. The 365-day interval requirement was utilized in the second-step IFB by the procuring activity to respond to the following request by the using activity:

Section 8.d of the RFTP should be modified to reflect a revised delivery schedule. Consideration must be given to the requirement for concurrent delivery of data and repair parts. It is estimated that 365 days after First Article approval will be required to meet the concurrent delivery requirement for Provisioning.

Counsel interprets this request as attaching no importance to the 365-day requirement *per se* but as an estimated means of achieving a contract requirement for concurrent delivery by the contractor of re-

pair parts. In further support of the waivability of the 365-day requirement, counsel points to the following provisions of the IFB which, it is claimed, assure concurrent delivery of repair parts: (1) Note 2, quoted above; (2) the IFB provisions clause which gives the contracting officer an option to order, *inter alia*, repair parts and, if so ordered, may provide for concurrency; and (3) the IFB's statement of provisioning policy containing a requirement for concurrent delivery of repair parts. Counsel also relies on and subscribes to statements submitted to our Office by the using activity concerning the concurrency requirement, as follows:

c. Although repair parts required for initial support will be procured from sources other than the prime contractor, the provisioning performance schedule requiring concurrent delivery considers only the concurrent delivery of prime contractor repair parts (PIO repair parts).

a. The concurrent delivery of repair parts as specified in the Provisioning Performance Schedule is applicable to only those repair parts that are manufactured or controlled by the prime contractor (this could include repair parts manufactured by his sub-contractors under this particular contract) which may be included in the Provisioned Items Order (PIO).

b. Repair parts, other than those listed in the PIO, which are required for initial issue support are not procured/ordered from the contractor but are procured from the Integrated Materiel Manager responsible for the procurement of such parts.

The Integrated Materiel Managed repair parts normally represent the preponderance of repair parts required for initial support. These items support several types of equipment, can carry an FSN, and may already be in the supply system. On the other hand, they can be readily available commercial items which are procured for DOD use by the Integrated Item Manager responsible for the procurement of such parts. If additional Integrated Managed repair parts are required for initial support, they are procured on a schedule consistent with the planned in-service date.

We quote from counsel's arguments with respect to the source and timing of repair parts acquisition and its relation to the 365-day interval requirement, as follows:

While not explained in the Marine Corps letter [quoted above], the reason the schedule did not "consider" or relate to the repair parts from non-contractor sources lies in the different nature of those repair parts to be secured from the contractor and those from other sources. Basically, the distinction is one between unique design parts peculiar to this particular contract item and shelf items of a standard commercial nature stocked by the Marine Corps or the manufacturer or both.

Under the provisioning requirements of the contract (CLIN 0019) the contractor prepares a "provisioning list" which includes every part in the vehicle. Together with other information the provisioning list separates the parts into two broad categories. The first, "contractor parts," are those parts over which the prime contractor has design control. Typically a longer lead time is involved in securing "contractor parts" than the second category, "vendor parts." As explained in paragraph 9.21 of the "Provisioning Requirements for DSA Procured Equipment" (DSAM 4100.1 September, 1970) vendor parts are procurable on the open market or from established sources. Vendor parts normally have both commercial and military applications, are stocked by the Government and are available "off the shelf" from a wide variety of sources (manufacturers, distributors, retailers, etc.) in 30 to 90 days. With perhaps a handful of exceptions, every vendor part proposed by Case in this contract is already stocked by DSA. The purchase of vendor repair parts will simply result in temporarily increased stock levels.

In addition to indicating whether each part is of the "contractor" or "vendor" variety, the provisioning list indicates the available source or sources of supply for each part and the length of time necessary for purchase and delivery.

Following submission of the provisioning list it is reviewed by the Marine Corps, changes are made if necessary and it is approved. The next step is the Source Coding Conference. In this meeting, which lasts two weeks, every part is reviewed and the Government decides the procurement source and the quantity to be stocked. All parts which are not vendor parts are designated for procurement under the contract.

In this procurement the Source Coding Conference will be concluded 554 days ADA—which is 164 days after approval of the first article test report. First production delivery is required 755 days ADA which means that the Marine Corps will have in excess of 200 days (755 minus 554) to secure its vendor repair parts. Even if it is assumed that 90 days would be required for delivery of vendor parts, the Marine Corps would still have the parts more than one hundred days in advance of first production delivery of the end items. While we recognize that orders for vendor parts would not all be placed the day after conclusion of the Source Coding Conference, those orders can be placed quickly because the vendor parts and sources of their supply have been identified, most already possess Federal stock numbers, etc.

When the distinction in the *nature* of the parts to be secured from the contractor and those from vendor sources is understood, the reason why the schedules requiring concurrent delivery "considered" only prime contractor parts is apparent. The 365 day period did not consider or relate to the securing of repair parts from vendor sources because the Marine Corps knew that vendor parts would be available well in advance of either contractor repair parts or delivery of the first production units.

Since the 365 day interval had no bearing on vendor repair parts and the prime contractor was bound by Note 2 of the contract to make concurrent delivery of end items and repair parts in any event, the 365 day interval can be seen for what it really was, a superfluous and unnecessary reference in the IFB which could be waived without any material effect on the parties or the contract. The Government's needs could have been (and were) fully secured by the simple statement in the IFB that concurrent delivery of end items and repair parts was required.

After a careful review of counsel's arguments, we continue to be of the opinion that no evidence has been presented which would detract from the material nature of the 365-day interval requirement. We find it difficult to ignore the initial requirement and the subsequent reinforcements of the 365-day interval throughout the course of this procurement. It is well established that delivery requirements are presumed to be material and that variations in offered delivery dates can reasonably be expected to be responsible for variations in bid prices. *See* 51 Comp. Gen. 518 (1972) and paragraph 2-404.2 of the Armed Services Procurement Regulation (ASPR) which requires the rejection as nonresponsive of any bid which fails to conform to the delivery schedule or permissible alternates thereto.

Furthermore, we note that the minutes to the post-award preprovisioning guidance conference between the Government and Case contain the following entry:

First Article Test Report is contractually scheduled for 30 April 1974 with Government approval 30 days thereafter; i.e., 29 May 1974. *Production equipment is to be delivered no sooner than 365 days after Government approval of first article;* i.e., 29 May 1975 with final delivery to be completed 905 days from date of award, 26 October 1975. [Italic supplied.]

The above minutes and the conforming provisioning performance schedule with 365 days for concurrency appear to have assured contractor compliance with that time interval by taking delivery dates from the Case alternate schedule and the basis delivery schedule. Despite the provisioning contract performance schedule, the IFB does not limit the applicability of the 365-day requirement to repair parts to be supplied by the contractor only. And, repair parts will be acquired from other vendors or sources. Therefore, we view the 365-day requirement, at least as set forth in this IFB, as not permitting the assumption that concurrency did not relate to repair parts from non-contractor sources. The intention may have been otherwise, but the IFB does not evidence that intention.

The arguments propounded by Case fail to explain away the fact that the contractor has no control over the source and timing of delivery of repair parts. We find no requirement in the DSAM 4100.1 (Provisioning Requirements for DSA Procured Equipment) or the IFB which compels the Government to order the repair parts at any particular point in time after contract award. While, as Case points out, the acquisition of repair parts can possibly be expected to be reasonably prompt, we must view what might occur for all possible timeframes for parts acquisition. We readily admit that the IFB contains various requirements which permit or obligate Case to achieve concurrency. However, according to the alternate schedule, Case can and, for illustrative purposes, we assume, will deliver first production units 275 days after approval of the first article test report. Assuming the conceivable circumstance that the Government orders repair parts from Case on the 276th day after first article test report approval, concurrency would be impossible. If repair parts are acquired from other sources at some point in time not within its control, Case itself has no way of assuring concurrency.

Accordingly, we find that the Case bid fails to assure the Government of the required concurrency. As we stated in our decision of July 19, since the alternate schedule permits it to deliver 90 days earlier than required, it is nonresponsive.

Counsel for Case attempts to achieve acceptability of the alternate schedule by asserting compliance with a provision in the procuring activity's master solicitation that where, as here, delivery is phased, bids may be on any basis provided it is within the period required for the entire quantity. Even assuming compliance with this clause, the 365-day requirement contained in the delivery schedule takes precedence over the provisions of the master solicitation incorporated by reference into the IFB. See section 19 of the Solicitation Instructions and Conditions of the IFB (Standard Form 33A, March 1969).

Counsel for Case repeats arguments made during our consideration of the original protest that Case may fall back on a commitment in its bid to the required delivery schedule as revised in amendment 0002. Referring to Note 2, above, counsel contends that proffering an alternate schedule gave the Government an option which it could exercise at some point in time *after award*. Until award, counsel argues, no individual stood in a contracting officer relationship to bidders. Counsel claims our decision is incorrect in attaching a character of responsiveness to the prior approval of the procuring contracting officer of accelerated end item delivery.

After a careful consideration of the legal arguments propounded by respective counsel and a further review of the matter, we continue to be of the opinion that the Case bid was nonresponsive to the delivery provisions of the IFB. *Inter alia*, Note 2 permitted acceleration in the delivery of end items so long as there was a corresponding acceleration in the date for submission of the first article test report. Any proposed acceleration was subject to the prior approval of the procuring contracting officer and therein lies the basis for the Case argument that the Government had an option to choose delivery schedules.

We note that the language of Note 2 does not preclude action by the procuring contracting officer prior to contract award. It is incorrect to say that, prior to award, no individual is in a contracting officer relationship with a bidder. While the intentions of the procuring activity may have been different, the language of Note 2 is unambiguous.

In any event, upon further review, we believe that the subsequent issuance of amendment 0002 removed any option that the Government may have had by virtue of Note 2. Amendment 0002 can only be reasonably construed as setting forth parameters within which acceleration of end item delivery in relation to submission of the first article test report would be acceptable to the Government. This rendered inoperative any applicability of the provisions of Note 2 with respect to approval to be exercised by the contracting officer. This reasoning, we believe, further reinforces our original decision that nothing in the Case bid evidenced a firm obligation to comply with the required delivery schedule in view of the submission of the alternate schedule absent any delivery schedule option with the Government. Arguably, counsel's interpretation is not wholly without merit. But, on review, we do not believe that our interpretation of the IFB language is unreasonable. Thus, at best, the bid is ambiguous. Viewed in a light most favorable to Case, its bid is subject to two reasonable interpretations; under one it would be nonresponsive and under the

other, responsive. Such a bid is nonresponsive. *See* B–177258, February 7, 1973.

Counsel feels that the Case bid should be entitled to a presumption of responsiveness in the absence of a clear qualification, particularly in the case of two-step procurements. *See* 52 Comp. Gen. 821 (1973). Counsel complains that the July 19 decision suggested a contrary presumption of responsiveness. Our considerations were based on the situation presented without any presumptions.

In view of the foregoing, we sustain our decision that the Case bid was nonresponsive to the delivery provisions of the IFB.

RECOMMENDATION THAT THE CONTRACT BE TERMINATED FOR THE CONVENIENCE OF THE GOVERNMENT AND THE PROCUREMENT RESOLICITED

Your Assistant Counsel draws our attention to the adverse effect that termination of the Case contract will have on the Government from monetary and delivery delay standpoints. However, we do not believe that point alone should be determinative of the case.

Counsel for Drexel argues that offering delivery 90 days earlier than required allowed Case to reduce certain costs of performance. Thus, it is argued, Case obtained a competitive advantage over other bidders by being able to reduce its bid price. On the other hand, counsel for Case disagrees stating that all bidders were on an equal footing.

In our initial consideration, we concluded that Case's change in required delivery time was prejudicial to other bidders, largely on the basis of a rationale developed in earlier precedents dealing with the matter of changes in delivery schedules. Upon review, however, we conclude that such reliance was misplaced, in light of the fact that each of the earlier cases involved bidder attempts to delay delivery as opposed to the acceleration of delivery as in the instant case.

While it is reasonably clear that an extension of required delivery times might well allow a bidder either to participate in a procurement he would otherwise be unable to consider or to participate at a reduced price, we do not believe that the price of a bidder's offer would be significantly affected by the acceleration of required deliveries under the circumstances of this case.

We are unable to conclude from the record that the bids which complied with the 365-day interval requirement would have been materially different had those bidders understood that the interval did not have to be honored. Since the Government will obtain what it wanted, we do not believe any interference with the procurement

would be warranted absent a clear indication of prejudice to other bidders. The positions of the parties are conflicting. Therefore, we recommend that your contracting personnel investigate the situation further and that action be taken in accordance with the foregoing.

In view of the foregoing, it is no longer necessary for you to submit written statements to the congressional committees named in section 232 of the Legislative Reorganization Act of 1970 (31 U.S.C. 1172) as required by our prior decision. We would appreciate advice as to the action taken by your Agency with respect to this procurement.

As requested, the report of the contracting officer is returned.

[B-179162]

Agriculture Department—Forest Service—Roads and Trails—Appropriation Availability for Closing, etc.

Funds appropriated or made available to the Forest Service for construction and maintenance of forest roads and trails to carry out the provisions of 23 U.S.C. 205 and 16 U.S.C. 501 may not be used to close such roads and trails or return them to a natural state for pursuant to 31 U.S.C. 628 appropriations are required to be applied solely to the objects for which they are made unless otherwise provided by law, and according to the definitions of "construction" and "maintenance" in 23 U.S.C. 101(a), the legislative purpose of both 23 U.S.C. 205(a) and 16 U.S.C. 501 pertains to the development and preservation of forest roads and trails and not to their liquidation. However, road funds may be used to return abandoned road sites to their natural state in order to prevent future public usage or to ameliorate damage to the land, but the funds may not be used to convert the land to other uses.

To the Secretary of Agriculture, November 8, 1973:

By letter of July 11, 1973, the Assistant Secretary for Conservation, Research and Education requested our decision as to whether (1) funds appropriated to carry out the provisions of section 205 of the Act of August 27, 1958, 72 Stat. 907, as amended, 23 U.S. Code 205, or (2) funds made available for the construction and maintenance of roads and trails within the national forests by Chapter 145 of the act of March 4, 1913, 37 Stat. 843, 16 U.S.C. 501, may be utilized for closing and, in some instances, obliterating abandoned national forest system roads and (3) whether we would be required to object to the use of the funds described above for the purpose of returning abandoned road sites to a new natural state when necessary to prevent future public usage or to ameliorate damage to the land.

Under the provisions of 31 U.S.C. 628, and except as otherwise provided by law, "sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others."

The Department of the Interior and Related Agencies Appropriation Act, 1974, Public Law 93-120, 87 Stat. 429, reads, in part, at 87 Stat. 441, as follows:

> FOREST ROADS AND TRAILS (LIQUIDATION OF CONTRACT AUTHORITY)
>
> For expenses necessary for carrying out the provisions of title 23, United States Code, sections 203 and 205, relating to the *construction and maintenance of forest development roads and trails*, $90,700,000, to remain available until expended, for liquidation of obligations incurred pursuant to authority contained in title 23, United States Code, section 203: *Provided*, That funds available under the Act of March 4, 1913 (16 U.S.C. 501) shall be merged with and made a part of this appropriation. [Italic supplied.]

This appropriation act specifically provides funds for the purpose of carrying out the provisions of sections 203 and 205 of Title 23 of the U.S. Code relating to "the construction and maintenance of forest development roads and trails." Also it provides for the merger of the funds available under the act of March 4, 1913, with the appropriation for carrying out the provisions of sections 203 and 205 of Title 23. It does not appear that the provisions of 23 U.S.C. 203 are relevant to the issue presented. However, 23 U.S.C. 205(a) provides, in part, that:

> *Funds available* for forest development roads and trails *shall be used* by the Secretary of Agriculture *to pay for* the costs of *construction and maintenance* thereof, including roads and trails on experimental and other areas under Forest Service administration. [Italic supplied.]

Chapter 145 of the act of March 4, 1913, 37 Stat. 843, 16 U.S.C. 501, provides, in part, that:

> Ten per centum of all moneys received from the national forests during each fiscal year shall be available at the end thereof, to be expended by the Secretary of Agriculture for the *construction and maintenance of roads and trails* within the national forests in the States from which such proceeds are derived * * *. [Italic supplied.]

The two key terms are "construction" and "maintenance." Their definitions in 23 U.S.C. 101(a) are directly applicable to 23 U.S.C. 205. These terms are also applicable to funds made available under 16 U.S.C. 501 by virtue of the language of the appropriation act merging the funds available under 16 U.S.C. 501 with those appropriated pursuant to 23 U.S.C. 205. Their definitions in 23 U.S.C. 101(a) are as follows:

> The term "construction" means the supervising, inspecting, actual building, and all expenses incidental to the construction or reconstruction of a highway, including locating, surveying, and mapping * * * acquisition of rights-of-way, relocation assistance, elimination of hazards of railway grade crossings, acquisition of replacement housing sites, and acquisition, and rehabilitation, relocation, and construction of replacement housing.
>
> * * * * * * *
>
> The term "maintenance" means the *preservation* of the entire highway, including surface, shoulders, roadsides, structures, and such traffic-control devices as are necessary *for* its *safe and efficient utilization*. [Italic supplied.]

Considering these definitions, the legislative purpose of 23 U.S.C. 205(a) is the development and preservation of forest development roads and trails for their safe and efficient utilization, and the legislative purpose of 16 U.S.C. 501 is the development and preservation of roads and trails within the national forest for their safe and efficient utilization.

The Assistant Secretary recognizes that these definitions pertain to development and preservation of roads (and trails), as distinguished from their liquidation, but states that there are unavoidable expenses incident to road liquidation. The Assistant Secretary states that the Forest Service has found it necessary to discontinue some forest development roads because of changes in current and projected usage, refinements in transportation system planning, and reduction in funds for maintenance of roads.

It is further stated in his letter that actual destruction of a road may be necessary to prevent undesirable types of usage and damage to the land. In addition, in order to improve environmental and aesthetical aspects, it is necessary to plant grasses, trees, and shrubs. According to the Assistant Secretary, other stated measures that may be necessary to prevent deterioration of natural resources are removal of bridges and culverts, elimination of ditches, outsloping, and cross-draining the road bed, revegetation, and other erosion control measures.

Concerning the third question, the Assistant Secretary states that it is not intended to use road funds beyond the need required to effectively eliminate discontinued roads and that expenses necessary to convert the land to other uses would be financed from other funds.

There is not the slightest indication in anything that we have found, and nothing has been called to our attention, which would warrant a conclusion that the Congress intended the use of any of the funds in question for purposes other than "construction" and "maintenance" as defined in 23 U.S.C. 101(a), *supra*. The purposes as set out in the letter from the Assistant Secretary would not be in accordance with the plain meaning of the statutory definition of those words. Hence, in light of the provisions of law set out above, it is our view that the first two questions must be answered in the negative and the third question in the affirmative. In other words it is our opinion that funds appropriated or available to the Forest Service for the construction and maintenance of forest roads and trails under authority of 23 U.S.C. 205 or 16 U.S.C. 501 may not be used to close such roads or trails or to return them to a natural state.

[B-178287]

Bidders—Qualifications—Subcontractors—Insurance, Affirmative Action Plans, Percentage of Work

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

To Matzkin & Day, November 13, 1973:

Reference is made to a telegram of March 26 and a letter dated March 27, 1973, from The Southern Plate Glass Co. (Southern), and to your subsequent correspondence on its behalf, protesting the award of General Services Administration (GSA) contract No. GS-00B-01351 to H. H. Robertson Company, Cupples Products Division (Robertson).

The invitation for bids on contract No. GS-00B-01351 for the window walls, National Air & Space Museum, was issued on February 22, 1973. The bids were opened on March 8, 1973. Robertson submitted the low bid while Southern submitted the second low bid.

Paragraph 2 of section 0890 of the invitation contained the following pertinent requirements:

2. QUALIFICATIONS AND RESPONSIBILITIES

2.1 To be eligible for award, the contractor shall have a minimum of five years experience as a designer, fabricator, and erector of window walls, entrances, sliding and rolling doors, of a type similar to those specified herein. In addition, the contractor shall have installed at least three window wall installations of a size equal to that specified herein.

2.1.1 The purchase of components for use in fabrication of window walls, entrances, sliding and rolling doors, shall not be deemed to disqualify an otherwise qualified bidder who performs the actual fabrication himself as well as the design and erection.

2.1.2 The bidder shall furnish a list of the prior installations, he has made, with the names and addresses of the building and the names of the owners or managers thereof. The bid may be rejected if the bidder has established, on previous jobs, a record of unsatisfactory installations or otherwise fails to meet the requirements of this clause with respect to the bidders qualifications.

2.2 All references made to window wall shall mean all work herein specified (window walls, entrances, rolling doors and sliding doors).

2.3 Contractor for window wall work shall be responsible for the design of all component members to meet the performance requirements hereinafter specified. Window wall details indicated on drawings are intended to establish overall appearance and dimensions.

2.4 Make all modifications which are required to achieve satisfactory results in testing. Maintain the overall appearance, unless tests show that sizes of members or profiles need to be increased or modified. Any such modification shall be approved by the Architect.

In an earlier invitation for a prior contract for the same work which was canceled, paragraph 2.1 stated, in pertinent part, as follows:

Window walls, entrances, sliding and rolling doors shall be designed, manufactured and erected by a *single firm* to ensure an undivided responsibility. * * * [Italic supplied.]

However, it is reported that this provision was inadvertently omitted from the present procurement.

In addition, paragraph 31 of section 0110 of the present procurement contained the following requirement:

31. INSURANCE

Verification by the bidders insurance carrier; of the bidders experience modification factor for Workmen's Compensation must be submitted with each bid. Contracts will be awarded taking into consideration the cost to the Government for providing Insurance under the directed insurance plan, included in these specifications as "Insurance Guide for Contractors working on National Air & Space Museum." Failure to include the Insurance experience modification factor will be cause for rejection of the bid. * * *.

The following notation appeared on the face of Robertson's bid:

Subcontractor:
F. H. Sparks Co., Inc.
6320 Howard Lane
Baltimore, Maryland 21227

Robertson also submitted a letter from Sparks' insurance broker giving Sparks' insurance experience modification factor.

The Board of Award met on March 12, and again on March 16, 1973, to consider whether Robertson had submitted evidence of having all of the qualifications necessary to be eligible for award and whether the notation on the face of Robertson's bid constituted a qualification of its bid. The Board concluded that Robertson had the necessary experience and that the requirement that the bidder have 5 years' experience in designing, fabricating and erecting walls, did not require the successful bidder to perform all contract requirements with its own forces.

The Board also concluded that the intent of the insurance provisions was to require each bidder to furnish information which will enable the Government to ascertain the cost it would incur in providing insurance coverage for the bidder awarded the contract. The Board reasoned that if a bidder intended to subcontract for site work, the insurance cost to the Government would be based on the subcontractor's insurance rating and that this was the reason that Robertson had submitted an insurance rating for the Sparks firm rather than its own insurance ratings. Finally, the Board noted that Southern had failed

to enter its minority employment goals on its Washington Plan bid annex and, therefore, its bid was considered to be nonresponsive.

It is your contention that Southern was the low qualified bidder and that the bid submitted by Robertson was nonresponsive to the invitation in several respects. In support of this position you point out that GSA's report states that the work is to be performed "* * * *by a firm* with sufficient experience as to give the Government reasonable assurance against leakage, as might occur if the work were performed *by a firm* lacking sufficient prior experience." You state that this provision, coupled with the quoted language of the solicitation and oral instructions of the contracting officer, makes it clear that no subcontracting was to be permitted and Robertson's naming of a subcontractor to do the erection work conditioned its bid. [Italic supplied.]

Specifically, you maintain that paragraph 2.1, quoted above, required the contractor (no reference being made to a subcontractor) to have 5 years' experience as a: (1) designer; (2) fabricator; (3) erector of window walls, entrances, sliding and rolling doors similar to those specified in the contract. You also argue that the language of paragraph 2.1.1, quoted above, clearly states that the bidder must perform the erection work and it could not be done by a subcontractor. You point out that paragraph 2.1.2, also quoted above, states that a bid may be rejected where it fails to meet the requirements of that clause with respect to the bidder's qualifications and that the language of this clause clearly addresses itself to the bidder's qualifications to install and not to a subcontractor's qualifications. Also, you state that since the invitation did not require the listing of subcontractors, the act of listing a subcontractor also made Robertson's bid nonresponsive.

You also allege that Robertson, having no field erection forces of its own in the Washington, D.C., area, inserted the name of its subcontractor for the field erection of the window walls to avoid any misunderstanding as to who was to perform the erection. To further substantiate the fact that field erection in Washington was to be done by the subcontractor, you maintain that Robertson submitted the insurance experience modification factor for the subcontractor rather than for itself. This, you contend, is evidence that Robertson did not plan to do any work on site in Washington, D.C., thereby further conditioning its bid insofar as the requirement set forth in paragraph 32 of the General Conditions that at least 12 percent of the contract be performed by the contractor with its own forces. It is your view that an award to Robertson on the basis of its bid as submitted would be tantamount to a constructive approval of Robertson's performance of less than 12 percent of the contract by its own field organization. You

also allege that Robertson lacks the required experience in erection, designing, fabricating and erecting revolving entrance doors.

Additionally, you contend that Robertson's bid was nonresponsive for the reasons that its subcontractor, who will actually be performing a major portion, if not all, of the site work in Washington, D.C., failed to execute a "Washington Plan" to commit itself to the required minority hiring goals. You maintain that while Robertson is committed to specific minority hiring goals, since it executed and submitted the Washington Plan bidding annex with its bid, the subcontractor is not so committed. Moreover, you state that there is no way of enforcing Robertson's minority hiring goals against the subcontractor. You assert that this is contrary to the provision in paragraph 1 on page 4 of appendix "A," under the caption "Requirements, Terms and Conditions," wherein it states in effect that no contract or subcontract shall be awarded for Federal construction in the Washington, D.C., area unless the bidder completes and submits, prior to bid opening, the documents designated as appendix "A."

Regarding the determination that Southern's bid was nonresponsive for failure to include minority hiring goals, you state that *Northeast Construction Co.* v. *Romney*, C.A. No. 71-1891 (D.C.Cir. 1973), in which it was held that failure to enter the bidder's goals renders the bid ineligible for acceptance, was not decided until March 6, 1973. You point out that this was only 2 days before bid opening and at least 20 days before the legal community had knowledge of this decision, which reversed an earlier District Court decision. You also point out that prior to the Court of Appeals decision in the *Northeast* case, GSA was taking the position in another protest that failure to include these goals in a bid was a minor informality or irregularity which did not render a bid nonresponsive. You state that Southern relied on GSA's position in the latter protest when it prepared its bid for the present procurement. Thus, Southern did not believe that it was necessary to include the minority hiring goals.

In regard to your contention that the instant solicitation required that all work be performed by the contractor, there is no question that the solicitation for the previous contract, mentioned earlier, did require all of the work to be done by a single firm. However, the language in that invitation, which reportedly was inadvertently omitted from the present invitation, specifically stated that "Window walls, entrances, sliding and rolling doors shall be designed, manufactured and erected by a single firm." In the absence of such specific language in the present invitation, we do not believe that the language of paragraph 2, section 0890, can be interpreted to mean that subcontracting is prohibited. We view paragraphs 2.1 through 2.1.2 as re-

quiring the contractor to have certain experience qualifications in order to be eligible for award. In B-176951(1), April 4, 1973, it was stated:

> * * * the matter of experience presents a question of responsibility and does not relate to the responsiveness of the bid. B-170099, January 22, 1971. In that connection, our Office has held that the bids of responsible bidders may not be rejected for failure to meet the literal requirements of experience qualification clauses. 45 Comp. Gen. 4, 7 (1965).

The Board of Award concluded that Robertson met the specific experience requirements. Also, we have been advised that Sparks had bid on this job on a prior procurement and was determined at that time to meet the experience requirements applicable to the present procurement.

While you contend that the contracting officer orally advised Southern that all of the work was to be done by the contractor, there is no evidence of record, other than the uncorroborated statement of Southern, that the contracting officer gave such advice and the contracting officer denies having given such advice. In that regard, paragraph 1 of the Instructions to Bidders provided that "oral explanations or instructions given before award of the contract will not be binding."

Regarding Southern's allegation in its letter of March 27, 1973, that Robertson's submission of Sparks' insurance rating, rather than its own, conditioned its bid since section 0110, paragraph 31, specifically states that "Failure to include the Insurance experience modification factor will be cause for rejection of the bid," we do not believe Robertson's submission of Sparks' insurance rating made its bid nonresponsive. As can be seen from a review of the insurance provisions set forth at pages 0110-24 through 0110-34, of the "Specification and Bid Forms," the Government, through its construction manager, was to provide certain insurance coverage (including Workmen's Compensation) to contractors working on the site, while the contractors themselves were required to furnish other specified insurance. Paragraph 31, on page 0110-24, required each bidder to submit with the bid its experience modification factor for Workmen's Compensation, so that the contract could be awarded by taking into consideration the cost of Government-provided insurance. A percentage of the base bid representing the cost of labor (in this case, 30 percent of the bid, pursuant to paragraph 16 of the Supplemental Special Conditions), was to be multiplied by the standard insurance rate, then adjusted by the bidder's modification factor. Since the purpose of requiring the insurance rating information was to enable the Government to ascertain the identity of the bidder whose bid, if accepted, would entail the least cost to the Government, taking into account a cost factor outside

the bid itself, Robertson's submission of Sparks' insurance rating appears to be a submission of the requested information.

In order to strictly conform to the requirements of the solicitation, Robertson should have also submitted its own rating, since paragraph 32 of the "General Conditions" does require that the contractor perform on site, with its own organization, at least 12 percent of the total contract work, unless the contracting officer approves performance on a lesser percentage. In fact, we have been advised that Robertson is expected to perform 85 percent of the site work with its own forces.

After reviewing the method used in determining the insurance rating, we are of the view that it is not something which Robertson could have changed or influenced subsequent to bid opening to the prejudice of Southern. According to GSA's insurance broker, the rates are based on trade experience by State as modified by the individual contractor's experience. These are objectively determinable factors not influenced by anything which may or may not be included in any bid. Moreover, even had Robertson submitted its insurance rating, the bid amounts would have been changed only slightly and Robertson would still be low by a considerable margin. Robertson's insurance rating was subsequently determined to be 1.19, compared with Southern's rating of 1.06 and Sparks' rating of 1.07.

The procuring activity has taken the position that Robertson's failure to submit its insurance rating resulted in a defect or variation in the bid which is "trivial" or "negligible" when contrasted with the total cost or scope of the work to be performed under the contract and, as such, could be waived as a minor informality in accordance with section 1-2.405 of the Federal Procurement Regulations (FPR). FPR sec. 1-2.405 defines a minor informality as:

> * * * one which is merely a matter of form and not of substance or pertains to some immaterial or inconsequential defect or variation of a bid from the exact requirement of the invitation for bids, the correction or waiver of which would not be prejudicial to other bidders. The defect or variation in the bid is immaterial and inconsequential when its significance as to price, quantity, quality, or delivery is trivial or negligible when contrasted with the total cost or scope of the supplies or services being procured. * * *.

You have furnished nothing that refutes the contracting agency's determination in this regard. Therefore, there is no basis for our Office to object to the determination made.

Further, Robertson did not take any exception to the requirement that it perform at least 12 percent of the work with its own forces and we do not view the naming of a subcontractor as an indication that all the work is being subcontracted. Although it is true that it did not provide its own insurance rating factor, we do not consider that to be an indication that it did not intend to comply with the 12 percent requirement.

Regarding Sparks' failure to execute a "Washington Plan" to commit itself to the required minority hiring goals, we note that Robertson submitted a fully executed "Washington Plan" wherein it states, in paragraph 8, that:

> * * * whenever a prime Contractor * * * subcontracts a portion of the work in any trade designated herein, *he shall include in such subcontract his commitment made under this Appendix * * * which will be adopted by his subcontractor, who shall be bound thereby and by this Appendix to the full extent as if he were the prime contractor* * * *. [Italic supplied.]

Thus, it does not appear that there is anything in the appendix that required the bidder on the prime contract to submit anything more than his own goals as part of his bid. Apparently, Robertson met its "Washington Plan" bidding requirements applicable to it in its bidding on the prime contract and, upon being awarded the contract, was required to impose the above-quoted obligation upon Sparks which is bound by Robertson's commitment.

While you contend that Robertson is ineligible for award because of lack of erection experience and lack of experience in designing fabricating and erecting revolving entrance doors, no evidence was introduced in support of this contention, whereas the procuring activity determined that Robertson did, in fact, meet the specified experience requirements.

For the above reasons, the protest is denied.

[B-114860]

Corporations—Government—Claims Settlement Authority

The claim of the Federal National Mortgage Association (FNMA) against the Federal Housing Administration (FHA) of the Department of Housing and Urban Development for handling, as successor mortgagee, the adjustments necessitated by the conversion from insurance for housing for moderate income and displaced families under section 221(d)(3) of the National Housing Act, as amended, to insurance for rental and cooperative housing for lower income families under section 223 of the act may not be considered by the United States General Accounting Office (GAO) for the FHA while not specifically chartered as a corporation is defined in the Government Corporation Control Act (31 U.S.C. 846) as a "wholly owned Government corporation," and as Government corporations are authorized to settle their own claims or to have their financial transactions treated as final, GAO is without authority to determine FNMA's entitlement to the handling charges claimed.

To John P. Cookson, November 15, 1973:

Your letter of June 6, 1973, requests our decision as to a difference in position between the Federal Housing Administration (FHA) of the Department of Housing and Urban Development and your office, the Federal National Mortgage Association (FNMA) as to the entitlement to $49 in handling charges which the FHA has determined to be

due the New England Merchants National Bank in accordance with the provisions of section 236.520(c) of the FHA regulations (24 CFR 236.520(c)).

It appears from your letter and attached correspondence that the mortgage insurance on FHA Project No. 016–44041–LDP, Bullocks Point, East Providence, Rhode Island, FNMA No. 38–790920 was converted from insurance for housing for moderate income and displaced families under section 221(d)(3) of the National Housing Act, as amended, 12 U.S.C. 1715*l* to insurance for rental and cooperative housing for lower income families under section 223 of that act, 12 U.S.C. 1715z–1. By letter dated February 5, 1973, FHA notified you that the effective date for the conversion of the mortgage insurance had been changed from March 23, 1972, to April 29, 1971, which established April 29, 1971, as the beginning date for the computation of interest reduction payments and mortgage insurance premiums. That letter set out the basis for proposed adjustments and requested that you prepare an adjusted billing which included the $49 in handling charges which you question.

FNMA purchased the loan from the New England Merchants National Bank on June 26, 1972. The $49 which you question as due that bank as originating mortgagee represented handling charges at $3.50 a month for the 14 months prior to that purchase. You feel that this handling charge is due FNMA as succeeding mortgagee. Thus, in effect, your request constitutes a claim on behalf of FNMA for the $49.

Congress created the FHA as a Government agency to perform certain commercial operations and as an incident to performing those operations it was given authority to sue and to be sued. See section 1 of Title I of the National Housing Act, 48 Stat. 1246, as amended by the act of August 23, 1935, 49 Stat. 684, 722; 12 U.S.C. 1702. The authority granted under this provision of law is similar in effect to the extraordinary authority to determine and prescribe obligations found in many Government corporation charters, and although the Federal Housing Administration is not specifically chartered as a corporation, for the purpose of the Government Corporation Control Act, it is defined in 31 U.S.C. 846 as a "wholly owned Government corporation." In 27 Comp. Gen. 429 (1948) our Office advised the FHA (formerly the Public Housing Administration) that claims against the agency should not be forwarded for settlement purposes to this Office for the following reasons:

> It was not intended under the Regulation [promulgated pursuant to the Government Corporation Control Act 31 U.S.C. 841] to require the submission to this Office of claims against Government corporations. In fact, such a requirement would appear to be inconsistent with the statutory authority given to the various corporations generally (1) to sue and to be sued in their own names and (2)

to settle their own claims or to have their financial transactions treated as final and conclusive, and, also, to be inappropriate in any case where such submission was not directed by specific provision of law. * * *.

Based on this rationale we have declined to consider claims against the FHA. B–156202, March 9, 1965.

On November 9, 1965, by operation of the Department of Housing and Urban Development Act, Public Law 89–174, approved September 9, 1965 (79 Stat. 667), the FHA was transferred to the Department of Housing and Urban Development. Section 5(a) of the act (42 U.S.C. 1451) transferred to and vested in the Secretary of the Department of Housing and Urban Development all of the functions, powers and duties of the Federal Housing Commissioner and the FHA which existed prior to November 9, 1965. Pursuant to the authority conferred on the Secretary by section 7d of the act he authorized each officer, employee and organizational unit of the FHA to exercise the functions, powers and duties vested in, or delegated or assigned to, the office or position or officer or employee or organizational unit having the same title immediately prior to the effective date of the act. See Interim Order II, effective January 18, 1966 (31 F.R. 815).

Since the authority granted the FHA has not been modified but merely relocated within the Department of Housing and Urban Development through operation of the referenced statute, we believe that the holding set forth in B–156202, cited above, is applicable to the subject case and accordingly our Office is without authority to determine FNMA's entitlement to the $49.

We might point out here that the Secretary of Housing and Urban Development has general regulatory power over FNMA (12 U.S.C. 1723a(h)) and has authority over FHA. Hence you may wish to present your question to the Secretary.

[B–168661]

Station Allowances—Military Personnel—Dependents—Maintained Overseas at Place Other Than at Member's Station

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

To the Secretary of the Air Force, November 15, 1973:

Further reference is made to a letter dated June 1, 1973, from the Assistant Secretary of the Air Force, Manpower and Reserve Affairs, requesting a decision as to whether the principle enunciated in 49 Comp. Gen. 548 (1970), concerning the payment of station allowances, is for application in the case of remote and isolated Alaskan sites where the movement of dependents, automobiles, and household goods has been authorized concurrently with the movement of the member.

The request has been forwarded by the Per Diem, Travel and Transportation Allowance Committee and assigned PDTATAC Control No. 73–29.

In his letter the Assistant Secretary says that the members involved are assigned to remote and isolated duty posts to which dependents are not permitted to accompany the member and at which dependent support facilities are virtually nonexistent. The dependents have been authorized to travel in a military dependent status to another location in Alaska at which housing, schools, medical support, etc., are available. Members are said to travel from isolated duty stations for periodic visits to the location to which dependents have been authorized to travel.

Since the member's duty station and the residence of his dependents both are in Alaska, the view is expressed that the basic requirements of paragraph M4300–1 of the Joint Travel Regulations (Member with Dependents) were satisfied. Under paragraph M4300–3 of the regulations, dependents are considered as residing in the vicinity of a member's duty station for any period during which they actually reside in the country within which the member's permanent duty station is located.

The Assistant Secretary says further that since our above-cited decision relates to dependents who were authorized to travel to a place outside the United States not in the vicinity of the member's duty station and who were not residing outside the United States in a military dependent status, it was believed that the decision was not applicable to circumstances in which a member is assigned to remote and isolated Alaskan sites. Additionally, he states as follows:

> It has since come to the attention of the DoD Per Diem, Travel and Transportation Allowance Committee that the members here under discussion were serving 12-month tours. This introduced the possibility that the provisions of JTR, par. M 7000, item 16, would preclude transportation of dependents under that paragraph and that the provisions of JTR, par. M 7005, would instead be considered to be applicable. If JTR, par. M 7005, were considered to be applicable, then station allowances as prescribed in JTR, par. M 4305, would in turn be applicable rather than the general provisions of JTR, par. M 4301, with the possible requirement to consider these cases as governed by the principle of 49 Comp. Gen. 548. To resolve the issue, the case is referred to you for decision. Less than 100 cases currently are being paid allowances in this area.

It is our understanding that for several years prior to August 1972, members assigned to remote Alaskan sites were authorized travel and station allowances for their dependents on the basis that they were serving accompanied tours. Apparently in August 1972, the Secretary of the Air Force delegated authority to the Commander, Alaskan Air Command, to permit travel by dependents to designated locations in Alaska. It would therefore appear that after that date the travel of members' dependents described in the Assistant Secretary's letter was on the basis of travel to a designated location.

We have also been informed that the members referred to in the Assistant Secretary's letter are assigned to remote isolated locations in Alaska such as Clear, Fire Island and Murphy Dome.

Under the provisions of 37 U.S.C. 405, the Secretaries concerned may authorize the payment of a per diem, considering all elements of the cost of living to members of the uniformed services and their dependents including the cost of quarters, subsistence, and other necessary incidental expenses, to such member "who is on duty" outside the United States or in Hawaii or Alaska, whether or not he is in a travel status.

Pursuant to the above authority, payment of station allowances is provided in Part G, Chapter 4 of Volume I, Joint Travel Regulations, including allowances for members with dependents. Paragraph M4300 of the regulations defines a "member with dependents" to mean a member:

1. * * * who is authorized to have his dependents reside at or in the vicinity of his duty station outside the United States and whose dependents do so reside;
2. * * * who is joined by or who acquires dependents while serving outside the United States provided he has at least 12 months remaining on his overseas tour after arrival or acquisition of dependents, or serves the accompanied tour of duty at that station, whichever is considered to be in the best interests of the Government as determined by the Service concerned * * *.

Item 17 (formerly item 16) of paragraph M7000 of the Joint Travel Regulations precludes the transportation of dependents at Government expense for travel to a duty station outside the United States unless the member will have a minimum of 12 months remaining in his overseas tour after scheduled arrival of dependents.

Department of Defense (DOD) Directive 1315.7, October 20, 1970, "Overseas Duty Tours of Military Personnel," provides policies for the length of overseas duty tours and related policies affecting dependents of those members assigned to duty overseas. Enclosure I to the Directive lists the length of tours for members (other than the Defense Attache System) "accompanied by dependents" and "all others," i.e., without dependents. For Clear, Fire Island and Murphy Dome, Alaska, there is no tour for members accompanied by dependents, the only tour authorized being an "all others" tour for 12 months.

Paragraph V.C. of the Directive provides:

2. The approval of the Assistant Secretary of Defense (M&RA) will be obtained by any Military Department desiring to move dependents to any area where dependents of that Department are not currently authorized. Similarly, commanders will not authorize military personnel to have their dependents present in the vicinity of their overseas duty station unless the station is within an area where an "accompanied by dependents" tour is authorized (enclosure 1).

• • • • • • •

10. Military personnel who are joined by or who acquire dependents while serving in an overseas area where there is an "accompanied by dependents" tour, although otherwise entitled, will not be authorized station allowances as members with dependents or to transoceanic or overseas land transportation of dependents at government expense incident to their next permanent change of station unless they have at least 12 months remaining on their overseas tour after arrival or acquisition of dependents, or serve the accompanied tour of duty at that station, whichever is considered to be in the best interests of the government as determined by the Service concerned.

As the members in the described circumstances were serving in a location at or near which dependents were not authorized in accord with the above-cited directive, since no "accompanied by dependents" tour was permitted, there was no entitlement to station allowances as members with dependents.

It appears that after August 7, 1972, the travel of dependents was considered as travel to a designated location when the member was assigned to a restricted location.

Paragraph M7005–1 of the Joint Travel Regulations provides that a member transferred by permanent change-of-station orders to a restricted area will be entitled to transportation of dependents. Subparagraph 2 of this regulation provides that when the old duty station is located in the United States, transportation of dependents is authorized to any of the following places:

1. any place in the United States the member may designate;
2. the point of actual departure of dependents from the United States in conjunction with travel to a place outside the United States designated by the member;
3. Puerto Rico, Alaska, Hawaii, or any territory or possession of the United States, if authorized or approved by the Secretary of the service concerned or his designated representative (in the absence of such authorization or approval, the provisions of item 2 will apply).

In accordance with paragraph M7001 of the Joint Travel Regulations, if a member certifies that the place designated is in fact the place where his dependents will establish a bona fide residence during the interim period until further transportation is authorized, transportation of dependents is authorized at Government expense to a designated place in Alaska, if authorized or approved by the Secretary of the service concerned, or his designee. Accordingly, after August 7, 1972, transportation of dependents of members serving at remote Alaskan sites would appear to be proper in view of the reported delegation of such authority to the Commander of the Alaskan Air Command and the apparent utilization of such authority.

However, to be entitled to station allowances as a "member with dependents," not only must authority exist for dependent travel to an overseas area—such as in the case of a move to a designated place—but there must also be authority for dependents to reside there in a military dependent status, i.e., on a "with dependents" tour, or in accord with paragraph M4305 of the regulations for a member who was previously authorized a "with dependents" tour.

In 49 Comp. Gen. 548, *supra*, we stated:

> * * * In cases where dependents, who are not authorized to accompany a member to an overseas duty station, move from the United States to an overseas residence as a designated place, their overseas residence is purely a matter of personal choice and, as such, is separate and apart from the member's overseas duty.
>
> * * * * * * *
>
> Since * * * the dependents would not be residing outside the United States in a military dependent status but because they elected to establish a residence there for personal reasons, it is our opinion that any increased living costs incurred by them do not come within the contemplation of 37 U.S.C. 405.

In the case before us, members serve a 12-month "all others" tour at either Clear, Fire Island, or Murphy Dome, Alaska. There is no provision for an accompanied tour at these locations. In accord with paragraph V.C. 2 of DOD Directive 1315.7, dependents are not authorized to be present in the vicinity of such stations where no "accompanied by dependents" tour is authorized. Where, incident to a member's tour of duty at a restricted station, dependents are permitted to choose a designated location in Alaska, Hawaii, Puerto Rico, or a territory or possession of the United States, in lieu of a location in the continental United States, clearly, the choice of a residence in Alaska during the "all others" tour at a remote site in Alaska, cannot serve to change the nature of the member's tour of duty to an "accompanied by dependents" tour. Nor can it afford the member station allowances as a member with dependents which are otherwise available only for a member serving an accompanied tour.

In accord with 49 Comp. Gen. 548, *supra*, the provisions of paragraph M4305 of the regulations would preclude payment of station allowances as a "member with dependents" where the member's prior permanent duty station was located in the continental United States. Accordingly, your question is answered in the affirmative.

Therefore, the payment of station allowances as members with dependents to members serving "all others" tours at remote and isolated locations in Alaska, is not proper. However, in view of the longstanding administrative practice of allowing station allowances in the described circumstances, and since it appears that payment of such allowances was based on a misunderstanding of the applicable law and regulations, we will not question those payments. However, such practice should be discontinued.

538-820 O - 74 - 5

[B-178841]

Bidders—Qualifications—Financial Responsibility—Improvement After Contract Award

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

To the Xidex Corporation, November 15, 1973:

Your letter of July 30, 1973, and prior correspondence from your attorney, protested the determination that your firm was not a responsible bidder under invitation for bids (IFB) No. FPNHP-D 29149-A-1-16-73, issued by the Federal Supply Service, General Services Administration (GSA), on December 18, 1972.

The IFB covered an indefinite amount of sensitized diazotype film for the period of July 1, 1973, or date of award, whichever is later, through June 30, 1974. A subsequent amendment to the solicitation, dated December 26, 1972, extended the date of bid opening from January 16 to January 19, 1973. In addition, the December 26 amendment expanded the requirements of the solicitation by adding thermal developing film. The method of award provided that award would be made under each development type and special item number for the sensitized diazotype film and on an item-by-item basis for the thermal developing film.

Seven bids were received by the closing date. Xidex was the low bidder on 95 items of sensitized diazotype film and 18 items of thermal developing film.

On February 27, 1973, the contracting officer submitted GSA Form 894, "Financial Responsibility—Inquiry and Reply," to the Credit and Finance Branch, Office of Finance, GSA, to determine whether Xidex had the financial credit and capability to perform the contract. The Finance and Credit Branch reported on March 14, 1973, that Xidex's financial status was unsatisfactory and that until such time as it could be established that the $3,000,000 which Xidex hoped to raise by the sale of stock in May or June had, in fact, been raised, financial ability was not approved.

Since Xidex is a small business concern, the contracting officer submitted the matter to the Small Business Administration (SBA)

San Francisco Regional Office for consideration for a certificate of competency (COC) on March 28, 1973. The SBA San Francisco Regional Office informed Xidex of the referral and of the action required to apply for a COC. Thereafter, Xidex filed an application for a COC together with supporting documentation.

On April 17, 1973, the SBA informally advised the contracting officer that it would decline to issue a COC if a decision had to be made at that time. However, SBA advised that if GSA would grant an extension until May 15, Xidex might be able to improve its financial situation so as to be eligible for a COC. GSA granted an extension and on May 11, 1973, the SBA San Francisco Regional Office COC Review Committee recommended issuance of a COC to Xidex. The Regional Director concurred in the recommendation for issuance of a COC and forwarded the file to the SBA Central Office (Washington).

The file was reviewed by the Central Office which determined that, based upon the record before the SBA, Xidex's application for a COC should be declined on financial grounds. Accordingly, by letter dated May 23, 1973, SBA notified GSA of this determination.

On May 25, an Xidex official notified the contracting officer by telephone that he was forwarding additional information regarding Xidex's financial competency to perform. This additional information, which included a proxy statement and an investment memorandum, was received by the contracting officer on May 30. After a review of this information, the contracting officer concluded that it gave no factual indication of any change in Xidex's financial status which would either warrant a second referral to SBA or provide a basis for a finding of responsibility. Consequently, he determined that Xidex failed to meet the minimum standards of a prospective contractor required by the Federal Procurement Regulation (FPR) section 1–1.1203 and therefore concluded that Xidex was not a responsible bidder. Contracts were awarded to the next low responsive and responsible bidders, Scott Graphics and Kalvar Corporation, on May 31, 1973.

In your attorney's protest letter of June 12, 1973, it was stated that as of that date, the reorganization and recapitalization of Xidex were proceeding as SBA and GSA had been advised. Furthermore, it was stated that firm binding subscriptions for new shares aggregating $636,551 had been received. By telegram dated June 26, GSA was informed by the Bank of America that as of that date, there was a balance of $703,963.19 in Xidex's equity account.

Xidex contends that the denial of the COC by the SBA Central Office improperly overruled the favorable finding of financial competency made by the SBA San Francisco Regional Office. In that

regard, the record shows that the question of Xidex's financial responsibility was submitted to SBA pursuant to FPR section 1–1.708–2. The SBA regulations, 13 CFR 124.8–16, provide that for procurements in excess of $250,000, if the Regional Director recommends the issuance of a COC, the recommendation is reviewed by the Central Office which either issues or denies a COC. The latter office, in consideration of all the information in the record, declined to issue a COC. SBA has authority under 15 U.S.C. 637(b) (7) to issue or deny COCs, and our Office has no authority to either review SBA determinations or to require it to issue a COC. *See* B–177088, April 3, 1973; B–175970, July 18, 1972; B–176804, September 6, 1972; and B–178743, September 4, 1973.

In addition, Xidex maintains that by relying upon SBA's denial of a COC, GSA improperly disregarded the information concerning Xidex's program of refinancing made available subsequent to May 23, 1973, the date on which the COC was denied. In this regard, Xidex contends that the determination of whether a bidder is qualified for award "must be made on the basis of its financial condition in June 1973, just prior to the beginning of the contract term, not on the basis of its financial condition three months prior thereto."

It appears that Xidex is contending that (1) the contracting officer's determination of nonresponsibility on May 30 placed undue reliance on the denial by SBA of the COC by failing to take account relevant information furnished subsequent to date of the denial; and furthermore that (2) the determination of the question of Xidex's nonresponsibility should not have been made on May 30, but at a later point in time.

With respect to administrative findings of nonresponsibility, our Office has consistently held that the question of a prospective contractor's responsibility is a matter for determination by the contracting officer and that since such determination involves a considerable range of discretion, we will not substitute our judgment for that of the contracting officer unless it is shown by clear and convincing evidence that the finding of nonresponsibility was arbitrary, capricious, or not based upon substantial evidence. 45 Comp. Gen. 41 (1965); B–174897, June 1, 1972.

With regard to the first contention mentioned above, it should be noted that the contracting officer delayed determining the question of responsibility after the denial of the COC until he had received and reviewed the additional information, which included a proxy statement and an investment memorandum, submitted by Xidex. The contracting officer subsequently determined that this additional information gave no factual indication of any change in Xidex's financial

situation which would warrant either a second referral to SBA or provide an affirmative basis for a finding of responsibility in accordance with FPR 1–1.1204–1.

We have reviewed the information which was considered by the contracting officer in arriving at the determination of nonresponsibility of Xidex. We are unable to conclude that the determination was either arbitrary or not based upon substantial evidence. 51 Comp. Gen. 448, 451 (1972). While the Bank of America provided GSA information in the latter part of June which indicated that as of June 26 Xidex had a balance of $703,963.19 in its equity account and was, therefore, financially responsible as of that date, we do not view such development as affecting the propriety of the decisions made prior thereto, since such decisions were necessarily made in the light of the information then of record. *See* B–165830, July 24, 1969; B–161339, September 25, 1967; and 51 Comp. Gen., *supra.*

With regard to Xidex's contention concerning the date on which the determination of responsibility was made, it should be noted that the award of the contracts in question were under a constraint of time. It is reported that GSA had been informed by high volume users such as the Social Security Agency, the Internal Revenue Service, and various elements of the Department of Defense that their normal programs would be severely hampered if awards were not made prior to July 1, 1973. In addition, the Federal Supply Schedules Production Plan indicated that the Federal Supply Schedules for the films should be forwarded for typing and printing on or before April 20, 1973, for timely distribution to various using agencies.

While FPR 1–1.1205–2 contemplates that action to obtain information regarding the responsibility of a prospective contractor shall be taken promptly after bid opening, a bidder's responsibility should be measured, as a general rule, with respect to the information of record at time of award rather than an earlier time. *See* 41 Comp. Gen. 302 (1961) and B–171095, May 4 , 1971. With respect to a bidder's financial resources, FPR 1–1.1205–2 further requires that information pertaining thereto be obtained on as current a basis as feasible with relation to the date of contract award. Infrequently, we have indicated to an agency our view that, time permitting, further consideration of a determination of nonresponsibility would be desirable because of a material change in a principal factor on which the determination was based. 49 Comp. Gen. 619 (1970). However, in our actions and decisions involving an issue of responsibility, we have consistently recognized that the projection of a bidder's ability to perform if awarded a contract must properly be left by our Office largely to the sound administrative discretion of the contracting offices involved, since they

are in the best position to assess responsibility and must bear the brunt of any difficulties experienced by reason of the contractor's lack of ability to perform in the time and manner required. 39 Comp. Gen. 705, 711 (1960). *See* 51 Comp. Gen. 448, 452 (1972). In the present instance, the contracting officer's determination of nonresponsibility which took into account all pertinent information received as of that date was made on May 30, 1973, one day prior to the award of the contracts. This determination was in keeping with the principle enumerated above, that responsibility should be measured at the time of award.

With regard to the date of award, we recognize that procurements should be processed in an orderly and efficient manner, and that there comes a time when an award must be made on the basis of the facts at hand. It is not the intention of our Office to unduly interfere with the timely processing of procurements by the agencies. Accordingly, it is the position of our Office that the awarding of the contracts on May 31, to take effect on July 1, was neither arbitrary nor capricious, but was an exercise of procurement judgment based on the circumstances then before the contracting officer.

For the reasons set forth above, the protest is denied.

[B-178917]

Contracts—Negotiation—National Emergency Authority—Restrictions on Negotiations

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

To the Triumph Corporation, November 20, 1973:

We are in receipt of your letter of September 26, 1973, and prior correspondence, protesting the rejection of your proposal submitted under request for proposals (RFP) DAAA09-73-R-0081, issued on May 21, 1973, by the Army Munitions Command. The RFP was issued pursuant to 10 U.S. Code 2304(a)(16), as implemented by paragraph 3-216 of the Armed Services Procurement Regulation (ASPR), for 8,396,250 module type boosters, M125A1 MPTS assy, w/M17 detonator. The design of this item is different than the M125A1 booster which had been procured previously.

Under 10 U.S.C. 2304(a)(16) a contract may be negotiated if the head of the agency determines that (A) it is in the interest of national defense to have a plant, mine or other facility, or a producer, manufacturer, or other supplier, available for furnishing property or services in case of a national emergency; or (B) the interest of industrial mobilization in case of such an emergency, or the interest of national defense in maintaining active engineering, research, and development, would otherwise be subserved. This authority is implemented in ASPR 3-216.2:

> * * * The authority of this paragraph 3-216 may be used to effectuate such plans and programs as may be evolved under the direction of the Secretary to provide incentives to manufacturers to maintain, and keep active, engineering and design staffs and manufacturing facilities available for mass production. The following are illustrative of circumstances with respect to which this authority may be used.
>
> (i) when procurement by negotiation is necessary to keep vital facilities or suppliers in business; or to make them available in the event of a national emergency;
>
> (ii) when procurement by negotiation with selected suppliers is necessary in order to train them in the furnishing of critical supplies to prevent the loss of their ability and employee skills, or to maintain active engineering, research, and development work; or
>
> (iii) when procurement by negotiation is necessary to maintain properly balanced sources of supply for meeting the requirements of procurement programs in the interest of industrial mobilization. (When the quantity required is substantially larger than the quantity which must be awarded in order to meet the objectives of this authority, that portion not required to meet such objectives will ordinarily be procured by formal advertising or by negotiation under another appropriate negotiation exception.)

The determination as to whether it would be in the best interest of the Government to negotiate a contract and thus assure the availability of a particular industrial mobilization base is vested in the head of the military department by the statute and the ASPR. 49 Comp. Gen. 463 (1970). In this regard, we have held that the determination of the needs of the Government with respect to industrial mobilization and the method of accommodating such needs is primarily the responsibility of the procuring agency. Except in situations where convincing evidence has been produced indicating that the administrative discretion was abused, our Office will not challenge those determinations. 49 Comp. Gen., *supra*.

The RFP was issued initially to the six firms having current mobilization agreements with the Government for the old style M125A1 booster. Prior to the issuance of the RFP, several firms, including the Triumph Corporation, which were not included in the mobilization base for the old style M125A1 had requested that they receive copies of any future procurement for the booster. When the present RFP was released, these firms were each sent a telegram which explained that the procurement of the new module style M125A1 was being restricted to those six firms holding valid mobilization agreements

for the old style M125A1 and that no other firms would receive a solicitation package.

Triumph and another firm subsequently insisted on receiving the RFP. It was furnished to them pursuant to ASPR 1-1002.1. The cover letter to Triumph which accompanied the RFP stated that the RFP was restricted to those companies included in the present mobilization base. Specifically, is was stated that "* * * any offers which may be received from firms, including yours, which are outside that base will not be considered for award under RFP DAAA09-73-C-0081."

On June 8, 1973, proposals received under the RFP were opened. At that time a package was received from Triumph. The markings on the outside of the envelope identified it as Triumph's offer on -R-0081. This unsolicited package from Triumph was rejected and was returned unopened on June 12, 1973. The reason for this action, the fact that the RFP was restricted, was again explained to Triumph in the cover letter accompanying the returned submission.

The Triumph protest to our Office followed the rejection of the offer. The agency determined, thereafter, pursuant to ASPR 2-407.8 (b), that because of the urgent need for the items, award of the contract should be made prior to our decision. Awards were made on June 29, 1973, to three base producers: Etowah Mfg. Co.; DVA Division of Alcotronics; and Westclox Division of General Time Corporation.

Triumph contends that the Army acted improperly in limiting the procurement of the module style booster to mobilization base producers of the old style booster. In support of this argument, Triumph raises questions of the technical differences between the two types of boosters and also notes that the initial procurement of 2.5 million module style boosters was solicited on an essentially free competition basis, yet this procurement of 8.5 million units was restrictively solicited to maintain a mobilization base for an outdated item.

Triumph states, and the agency agrees, that there is almost no commonality of parts between the old M125A1 booster and the M125A1 booster being presently procured. The agency, however, states that all the skills required for manufacture of the old booster are readily adaptable to the manufacture of the module style booster and that only minor changes in capital equipment are required for the changeover of production.

Triumph contends, however, that the old design is based in large part on the use of either special forgings or elaborate machine tooling to provide a cavity in the booster body itself to provide a means of building the escapement into the booster. The new design, it states, provides a modular type of construction, in which the entire escape-

ment is a module consisting of matched plates incorporating a gear train escapement mechanism. It is argued that this design requires precision assembly skills not required in the previous booster.

It is not questioned that there should be a visible industrial mobilization base for the M125A1 booster. Therefore, the issue is whether this desired end of assuring a viable industrial mobilization basis should have been achieved by utilizing the old mobilization base or by creating a new mobilization base for the new style booster which may have included Triumph. While Triumph and the agency do not agree on the principle question regarding the transferability of skills and equipment from the manufacture of the old style booster to the new style booster, we believe that sufficient evidence has not been produced which would allow us to refute what is essentially a technical determination made by the Army in this regard. As such, we see no impropriety in attempting to maintain the requisite skill level in the industry and maintain a capability for production through a solution restricted to the old style M125A1 booster base.

Accordingly, the protest is denied.

[B-179837]

Veterans—Rehabilitation—Noninstitutional Setting—Air-conditioning of Private Home

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

To the Administrator, Veterans Administration, November 21, 1973:

Your letter of October 4, 1973, requests our views as to whether appropriations to the Veterans Administration (VA) to provide medical care to eligible veterans may be expended as a necessary component of the VA's treatment and rehabilitation program to add central air-conditioning to an eligible disabled veteran's home under the special circumstances set forth in your letter.

Your letter discloses that certain disabled veterans suffer from a severe impairment of the heat regulatory mechanisms of their bodies to such an extent that their body temperatures can only be safely

maintained in an artificially controlled physical environment. In the past, the Veterans Administration has attempted to meet this need by installing a room air-conditioning unit in the veteran's home. However, your letter indicates that this was not sufficient to resolve the problem in that it proved to be unduly restricting for some veterans to be confined to only one room of the house and such limited mobility affected their rehabilitation adversely or the noise of the unit prevented the disabled veteran from getting essential rest. Thus it appears that even if multiple room units were to be installed, this would not be an acceptable solution because of the noise of individual units.

You advise that a special committee has considered these problems and recommended that a policy be adopted under which central air-conditioning would be provided when medically prescribed in a particular case, if legally permissible.

The legal problem arises because the installation of central air-conditioning in the veteran's home would constitute a permanent improvement to privately owned property. As you point out, it is a well-established rule that appropriations may not be used for permanent improvements of private property in the absence of specific legislative authority for such use. *See* 5 Comp. Dec. 478 (1899); 6 *id.* 295 (1899); 2 Comp. Gen. 606 (1923); 19 *id.* 528 (1939). This rule is based upon the fact that no Government official, in the absence of specific legislation, is authorized to give away Government property. *See* 38 Comp. Gen. 143 (1958).

A number of limited exceptions to the rule have been made over the years when it appeared that the granting of such an exception would prove particularly advantageous to the Government. However, generally all such exceptions have involved permanent improvements to premises or unimproved real property leased by the Government or improvements (to a contractor's property) incidental to but necessary to give full force and effect to research contracts made by the Government with private parties. *See* 16 Comp. Gen. 644 (1937); 18 *id.* 144 (1938); 20 *id.* 927 (1941); 31 *id.* 364 (1952); 38 *id.* 143 (1958); 42 *id.* 480 (1963); 46 *id.* 25 (1966). In each instance, before granting the exception, we determined that (1) the improvements were incidental to and essential for the accomplishment of the purpose of the appropriation; (2) the cost of the improvement was in reasonable proportion to the overall cost of the lease or contract price; (3) the improvements were used for the principal benefit of the Government; and (4) the interest of the Government in the improvements was fully protected.

The general rule mentioned above is one of policy and not of positive law. As we have stated on several occasions, the facts and circum-

stances of each particular case must be considered in determining the propriety of granting exceptions to the prohibition against expending appropriations to make permanent improvements to private property. 42 Comp. Gen. 480, 484 (1963). The instant case is distinguishable from those cited above in that the improvement involved is primarily for the benefit of the disabled veteran rather than the United States. Thus, all the principles set forth above would not be met in the instant case.

However, the appropriation for medical care for the current fiscal year (the Department of Housing and Urban Development, Space, Science, Veterans, and Certain Other Independent Agencies Appropriation Act, 1973, approved August 14, 1972, Public Law 92-383, 86 Stat. 547) under the heading "Veterans Administration" and the subheading "Medical Care," provides:

> For expenses necessary * * * for furnishing, as authorized by law, inpatient and outpatient care and treatment to beneficiaries of the Veterans Administration * * *.

The definition of "medical services," contained in your authorizing legislation (38 U.S. Code 601(6), as amended by section 101(c) of the Veterans Health Care Expansion Act of 1973, Public Law 93-82, approved August 2, 1973, 87 Stat. 179) now includes, in addition to authority for medical examination and treatment,

> * * * such home health services as the Administrator determines to be necessary or appropriate for the effective and economical treatment of a disability * * *.

The purpose of that and other amendments made by Public Law 93-82, according to Senator Vance Hartke, Chairman of the Subcommittee on Readjustment, Education, and Employment of the Veterans Affairs Committee, was to—

> * * * Permit(s) the furnishing of medical services on an outpatient or ambulatory basis for any veteran eligible for hospital care under veteran laws, *where such care is reasonably necessary to obviate the need for hospital admission* * * *. (Cong. Rec. of July 26, 1973, at page S14770; see also House Rept. 93-368.) [Italic supplied.]

Moreover, the Senate Committee, in rebuttal of Presidential objections to the added costs of "liberalizing" features of the amendments, contained in the President's veto message of October 27, 1972, of an earlier version of the legislation (Veterans Health Care Expansion Act of 1972, H.R. 10880), stated:

> The Committee believes several principles should guide the VA medical program in producing first quality care for the nation's veterans. Among these are treating the veteran as a whole patient, treating the veteran as part of a family unit, and treating the veteran as a member of his community.
>
> * * * * * * *

Along these same lines, the bill expands authorities for outpatient care when needed to obviate hospital care. Such ambulatory care will permit the veteran to receive necessary treatment while still remaining with his family and many times without causing an interruption of his employment responsibilities. (S. Rept. 93-54, March 2, 1973, pp. 19-20). [Italic supplied.]

In view of the above, it appears that the Congress clearly intended that funds appropriated for medical care to be used to facilitate and emphasize nonhospital based care offered in the veteran's own home and community wherever possible and appropriate, where such care is reasonably necessary to obviate the need for hospital admission. It is a settled rule of statutory construction that where an appropriation is made for a particular object, purpose, or program, it is available for expenses which are reasonably necessary and proper or incidental to the execution of the object, purpose or program for which the appropriation was made, except as to expenditures in contravention of law or for some purpose for which other appropriations are more specifically available. 6 Comp. Gen. 621 (1927); 17 *id.* 636 (1938); 29 *id.* 421 (1950); 44 *id.* 312 (1964); 50 *id.* 534 (1971).

According to your letter, it has been administratively determined that home medical care for certain veterans can only be provided if central air-conditioning is made available, less permanent alternatives having been tried and found unsatisfactory. We assume that if central air-conditioning is not provided these veterans at home it would be necessary to admit them to a hospital .We are not aware of any provisions of law specifically prohibiting the installation of central air-conditioning under these special circumstances nor are we aware of any other appropriation making more specific provision for such expenditures than the medical care appropriation cited previously. The proposed use of appropriated funds appears to be reasonably related to and, under the circumstances, essential to carry out one of the purposes of the appropriation; namely, the medical rehabilitation of a veteran in a nonhospital setting who otherwise would have to be admitted to a hospital. In fact it appears from your letter that there is no alternative to the provision of central air-conditioning if the veteran is to receive care and treatment in his own home.

In light of the foregoing the funds appropriated to VA for medical care of veterans may be used to provide central air-conditioning in the homes of certain disabled veterans under the limited circumstances described above upon an administrative determination that central air-conditioning is necessary for the effective and economical treatment of such disabled veterans.

[B-157936]

States—Employees—Detail to Federal Government—"Pay" Reimbursement

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

To the Chairman, United States Civil Service Commission, November 23, 1973:

This refers further to your letter of August 13, 1973, reference GC:LEG 1, wherein you request our opinion concerning the reimbursements to a State or local government authorized by title IV of the Intergovernmental Personnel Act (IPA), 5 U.S. Code 3374(c).

You state that IPA permits an employee of a State or local government to be assigned to an executive agency either pursuant to an appointment or by means of a detail. This law provides that the executive agency may reimburse the State or local Government for the pay, or a part thereof, of the employee during the period he was detailed to the agency. You further state that the provisions authorizing an executive agency to reimburse "for the pay" of the employee appear in 5 U.S.C. 3374 for the first time, to your knowledge, and were not a part of prior laws providing for the interchange of personnel with States.

You are of the opinion that the statutory scheme authorizes the payment of all salary expenses normally associated with an employee and that the fringe benefits an employer pays on behalf of his employee may be included in the reimbursement a Federal agency makes for a detailee assigned to it. The following question is submitted for our consideration:

May the sums of money paid by an Executive agency to a State or local government under the authority of 5 U.S.C.A. § 3374(c) include reimbursement for the employee's fringe benefits such as retirement, life, health insurance and costs for negotiating the assignment agreement (required under 5 CFR 334.105) and preparing the payroll records and the assignment report (required under 5 CFR 334.106)?

Subsection 3374(c) of Title 5, U.S. Code, providing for assignments from State or local governments to an executive agency provides in part as follows:

(c) During the period of assignment, a State or local government employee on detail to an executive agency—

(1) is not entitled to pay from the agency;

* * * * * * * *

* * * A detail of a State or local government employee to an executive agency may be made with or without reimbursement by the executive agency for the *pay*, or part thereof, of the employee during the period of assignment. [Italic supplied.]

Our examination of the legislative history indicates that pay is referred to as the salary of a State or local detailee. H. Rept. No. 91–1733, 91st Cong., 2d sess., page 19; S. Rept. No. 91–489, 91st Cong., 1st sess., page 19. In this connection we have previously held that the words "pay," "salary," and "compensation" generally are considered synonymous in the construction of personnel statutes. 10 Comp. Gen. 302 (1931).

The word "pay" used in such legislation as the comparability provision of the Classification Act of 1949, now codified in 5 U.S.C. 5101 *et seq.*, and in applicable regulations does not necessarily cover the whole ambit of employment costs. In general the term is used in personnel statutes to refer to wages, salary, overtime and holiday pay, periodic within-grade advancements and other pay granted directly to the Federal employees. With respect to fringe benefits, such as retirement, insurance and health benefits, the Federal employees receive such benefits under various acts of Congress rather than the Federal Pay Comparability System. *See*, for example, Chapter 83 of Title 5, U.S. Code.

We found no indication in the legislative history that the Congress intended that the word "pay" as used in 5 U.S.C. 3374(c) was to include benefits, such as retirement, life, health insurance, etc., which, as stated above, are not generally encompassed in pay statutes. Moreover, we note that 3374(e) expressly provides that, under the conditions enumerated therein, executive agencies may make contributions to State and local retirement, life insurance and health benefit plans applicable to employees appointed to executive agency positions pursuant to 3374(a). It is significant that no similar authority is included in the law which would permit contributions in the case of State or local employees detailed to executive agency positions under 3374(c).

In view of such fact and in the absence of any clear indication of a legislative intent to the contrary we would not be warranted in ascribing to the term "pay" as used in 3374(c) any meaning different from that intended by the Congress in enacting the various pay legislation contained in Title 5 of the U.S. Code. Accordingly, it is our view that executive agencies may not make reimbursement to State and local governments covering the various fringe benefits enumerated in your letter which the State or local government provides for employees detailed to Federal positions under 3374(c). Regarding costs for negoti-

ating the assignment agreement and preparing the payroll records and the assignment report, we agree with your analysis that such expenses are overhead items rather than salary items.

In view of the above your question is answered in the negative.

[B–179446]

Bids—Two-Step Procurement—Bid Protest Procedures Applicability

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

Bids—Two-Step Procurement—Technical Proposals—Preparation Costs, Anticipated Profits, etc.

A damage claim for anticipated profits by an unsuccessful offeror is not for allowance since no contract came into existence and, therefore, there is no legal basis to support the claim. Also, the claim for proposal preparation costs based upon the contention that the technical proposal submitted under step one of a two-step procurement was not fairly and honestly considered is not for allowance by the United States General Accounting Office since standards and criteria for allowance of preparation costs have not been established by the courts.

To Don Lee Electronics Company, Inc., November 26, 1973:

Reference is made to your letters of August 10, 1973, and September 21, 1973, protesting against the rejection of the technical proposal submitted jointly by you and another concern under step one of a two-step procurement under invitation for bids (IFB) No. N66314–73–B–1404, request for technical proposals, issued on February 14, 1973, by the Navy Regional Procurement Office (NRPO), Oakland, California. The procurement is for a Centrally Controlled Interconnection System (CCIS) which is to be installed and interfaced with the Combat Systems Maintenance Training Facility now under construction at the Mare Island Naval Shipyard, Vallejo, California. In addition you have submitted a claim for $20,000 on the basis that your proposal was not fairly considered by the procuring activity. For the reasons stated below we conclude that your protest is untimely and with respect to your claim, we must decline to consider it.

As background, the request for technical proposals (RTP) for step one issued on February 14, 1973, encouraged offerors to submit multiple technical proposals presenting different approaches. Prospective offerors were advised that upon final determination by the Government as to the acceptability of the technical proposals received, the IFB would be issued to those firms submitting acceptable technical proposals and that the bids to the second step must be based on the bidder's own technical proposal. The RTP stated that a pre-technical proposal conference would be held on March 7, 1973, to explain the CCIS specifications and requirements. Offerors were asked to submit in writing any questions regarding the specifications and requirements at least 7 days prior to the pre-technical proposal conference. Offerors were further advised that the questions would be discussed at the conference and that individual replies would not be made. Four attachments were appended to the RTP including: (1) a Description of the Supplies/Services and Instructions and Information For Offerors; (2) a Development Specification for the CCIS; (3) the Requirements for Technical Proposals; and (4) Criteria For Evaluation of Technical and Management Proposals. Attachment (4) included 15 criteria for evaluation of technical proposals and 7 criteria for evaluation of management proposals. Offerors were informed that technical proposals would be given 75 percent weight and that management proposals would be given 25 percent weight.

The pre-technical proposal conference was held as scheduled on March 7, 1973, and a number of questions relating to the specifications were discussed at the conference. Amendment 0002 dated March 15, 1973, addressed these questions and other matters.

Four concerns, including yours, submitted proposals by the closing date for receipt of technical proposals on April 9, 1973. One of your technical/management proposals was referred to as Proposal A and the other as Proposal B. On May 7, 1973, the Naval Electronics Systems Command, Western Division (WESTNAVELEX) which is the cognizant technical activity, forwarded comments to NRPO, concerning the evaluation of proposals. Your Proposal B was rated as unacceptable. Your Proposal A was rated as "not satisfactory" in both the management and technical aspects. The comments concerning Proposal B were that your management proposal did not address certain paragraphs of the Requirements section (attachment 3 to the RTP) and that your technical proposal was incomplete and misleading in a number of instances, and you were so informed in a letter of May 18, 1973. By letter of May 17, 1973, the contracting officer advised you that your Proposal A had been categorized as "reasonably susceptible of being made acceptable by additional information clarifying or supplement-

ing, but not basically changing the proposal submitted." The letter then listed the supplemental information and explanations that were required in the management and technical areas of your proposal before the review of your proposal could be completed. The deadline for the receipt of the supplemental information was June 6, 1973. Meanwhile, on June 1, 1973, a meeting was held at NRPO with your representatives to discuss the various problem areas of your Proposal A. The Navy reports that discussions were also held with the other offerors submitting proposals which were categorized as reasonably susceptible of being made acceptable.

The following is a summary computed by WESTNAVELEX of the final evaluation scores of all offerors based on the evaluation factors in attachment 4 to the RTP:

	Management	Technical	Total
Bidder A:			
(1)	24. 2	73	97. 2
(2)	24. 7	73. 5	98. 2
Bidder B	24. 6	71. 5	96. 1
Bidder C	24. 1	68. 5	92. 6
Bidder D: (Don Lee)	20. 5	58. 25	78. 75

After the evaluation of all the revised technical proposals the contracting officer and the Contract Review Board determined on July 9, 1973, that your revised proposal was unacceptable and that in view of your low technical merit score, further discussions with you would not be feasible. It was further determined that there were sufficient acceptable proposals to assure adequate price competition under step two and that the time and effort to make additional proposals acceptable was not in the best interests of the Government because of the urgency of procuring and installing the CCIS in the Combat Systems Maintenance Training Facility. The procuring activity relied on Armed Services Procurement Regulation (ASPR) 2–503.1(e) as the legal authority for this determination. We have been advised that bids under step two were opened as scheduled on September 14, 1973.

By letter of July 9, 1973, you were advised that your proposal as revised on June 6, 1973, had been categorized as unacceptable and that further revisions would not be considered. The Navy reports that while the letter to you was in general terms with respect to the deficiencies in your proposal, the contracting officer would have been willing to meet with you to point out the deficiencies which made your proposal unacceptable. Apparently you did not notify the contracting officer that you were dissatisfied with the rejection letter.

The record indicates that subsequent to the rejection notice you met with a WESTNAVELEX representative on July 26, 1973, to discuss the rejection of your proposal. You apparently indicated that you

intended to protest the rejection of your proposal and you were advised that any such protest should be filed with NRPO, the contracting activity. About the same time you had a telephone conversation with another individual at WESTNAVELEX to set up a meeting with a Captain Feit. You were advised on July 30, 1973, that while Captain Feit would meet with you, he could not discuss the subject procurement with your representatives and that any such discussions would have to be with NRPO. Apparently you had no further contact with either WESTNAVELEX or NRPO, nor did you file any protest until your letter of August 10, 1973, to our Office, which was received on August 31, 1973.

First you have protested the adequacy of the specifications in the solicitation contending that they were misleading and confusing. Since any alleged improprieties in the specifications should have been apparent prior to the closing date for receipt of technical proposals under step one, we consider your protest against such improprieties at this time untimely. *See* 4 CFR 20.2, our Interim Bid Protest Procedures and Standards, and 52 Comp. Gen. 184, 188 (1972). Furthermore, the proper time for resolving this type of objection would have been at the pre-technical proposal conference referred to above, which was designed for such purpose.

The second aspect of your protest concerns the rejection of your proposal as unacceptable. In this regard, you have offered rebuttal arguments to the technical deficiencies found in your proposal by Navy. In addition, you have anticipated that your protest on this issue may not be considered timely. In this regard, you argue that since notice of the rejection on July 9, 1973, you have been seeking clarification of the reasons for the rejection but that you did not pursue this with the contracting officer "because of the conclusive nature of the letter dated 9 July 73, and * * * past experience with the Procurement Office, which collectively established that further dialogue with administrative personnel would be futile." You assert that the timeliness standards regarding protests should be relaxed in two-step procurements in view of the complexities therein to give protesters the opportunity to "*thoroughly* exhaust all matters of protest with the procuring agency *before* protesting to GAO." You further assert that this is a case of "good cause shown" since you continued to pursue the matter with the procuring activity and consideration of your protest at this time would not be prejudicial to the Government or the other offerors. In this regard, you have cited 43 Comp. Gen. 255 (1963). Finally, you have asserted that inducing an offeror to revise its proposal when the agency knew or had reason to know that the revised proposal would not be seriously considered raises an issue significant to the procurement process.

Section 20.2 of our Interim Bid Protest Procedures and Standards, *supra*, provides:

> * * * In other cases, bid protests shall be filed not later than 5 days after the basis for protest is known or should have been known, whichever is earlier. If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 5 days of notification of adverse agency action will be considered provided the initial protest to the agency was made timely * * *.
>
> (b) The Comptroller General, for good cause shown, or where he determines that a protest raises issues significant to procurement practices or procedures, may consider any protest which is not filed timely.

It is our view that the basis for protest became known as of the date you received the letter of July 9, 1973, advising that your proposal was rejected as unacceptable. We believe that the "conclusive nature" of the rejection of your proposal was reasonable notice that any attempt to administratively resolve the matter, particularly by contacting personnel unrelated to the cognizant procuring activity, would be futile. Since you did not protest to either the cognizant procuring activity or to our Office until over a month after you were advised of the basis for protest, your protest is untimely. *See* B–177592, May 16, 1973. Furthermore, even if we consider your contacts with personnel at WESTNAVELEX for the purpose of obtaining explanations and information as to the basis for rejecting your proposals as a timely protest to the contracting agency, your protest to our Office was not filed within 5 days after being advised that Captain Feit would not discuss the subject procurement and was therefore untimely. Section 20.2, Interim Bid Protest Procedures and Standards, *supra*. Finally, we find no basis for making a special exception to the timeliness requirement in this type of case since the technical problems related to the rejection of a proposal under step one of a two-step procurement are no greater than in negotiated procurement where no such exception applies. B–177592, *supra*.

"Good cause shown" generally refers to some compelling reason beyond the protester's control which has prevented him from filing a timely protest. *See* 52 Comp. Gen. 20, 23 (1972). You have not offered any reason as to why you did not protest within 5 days after the basis for your protest became known, except that you wished to pursue the matter with WESTNAVELEX personnel. We do not consider this to be sufficient to meet the criteria where, as in this case, there is no reasonable basis to assume that this would serve any useful purpose.

In 43 Comp. Gen. 255, *supra*, cited by you, an agency rejected a proposal as unacceptable but failed to give prompt notice of this determination to the offeror. Upon being advised of the unacceptability of its proposal after the closing date for receipt of revisions, the offeror nevertheless submitted an amendment making its proposal acceptable

prior to opening of the step two bids. Since the agency's failure to give prompt notice of the rejection was found to be the prime factor which prevented the company from submitting its revisions in a timely manner, we found no objection to considering the revisions even after the date set for submitting such revisions. In our view, the instant case is not one where some agency action prevented you from protesting in a timely manner; therefore, we do not consider the cited case to be applicable here. At any rate, as noted above, your protest after the adverse action by WESTNAVELEX was not timely. Furthermore, considering that bids have now been opened and that any further delay would jeopardize the scheduled installation of the equipment upon completion of the facility at Vallejo, California, it cannot be said that consideration of your protest at this time would not be prejudicial to the other bidders or to the Government.

Finally, you have contended that the charge that you were in bad faith induced to submit a revised proposal comes within the exception to the timeliness rule as it is an "issue significant to procurement practices or procedures," citing 4 CFR 20.2(b) of our Interim Bid Protest Procedures and Standards, which we have interpreted as referring "to the presence of a principle of widespread interest." 52 Comp. Gen. 20, *supra*. For support of your charge of bad faith you refer to the letter of May 17, 1973, which you have categorized as a "conditional acceptance," and the meeting of June 1, 1973. You state that it was agreed at the meeting that your "serial" approach was "perfectly sound" and that your proposed project manager for the CCIS was "enthusiastically accepted."

The Navy's response is that while your project manager was listened to attentively, he was not "enthusiastically accepted;" that the "serial mode" proposed by you was considered an acceptable alternative if specification requirements such as the speed of transmission would be met; that it was stressed by Navy that the "ifs" had to be removed from your proposal; and that you were advised that "it was imperative that the specifications be met and that the quality indicated be achieved since it was expected that the system would be in use for at least 25 years." The Navy denies that it made any statements calculated to mislead you into believing that you would be assured of qualifying for step two.

ASPR 2-503.1 sets forth the procedures for evaluating technical proposals in a two-step procurement. Under the procedure set forth in ASPR 2-503.1(e) proposals under step one may be placed in one of three categories: (1) acceptable, (2) reasonably susceptible of being made acceptable, and (3) unacceptable. The record indicates that your proposal was initially placed in category (2) in good faith based on

advice from WESTNAVELEX technical personnel that your proposal was "not satisfactory" in certain areas. Placing a proposal in category (2) is not a conditional acceptance as you contend, but merely indicates that in its present form the proposal cannot be definitely placed in either of the other two categories. The cited regulation provides for requesting additional information from the offeror for purpose of further evaluation. In this case, after acting in accordance with the procedure set forth in the regulation, it was determined based on an evaluation of the additional information furnished by you that your proposal should be categorized as unacceptable. Legally there is nothing to preclude the agency from determining your revised proposal unacceptable if after evaluation of your revisions it is determined that it does not conform to the essential requirements or specifications even though initially it was considered reasonably susceptible of being made acceptable. This constitutes an exercise of discretion which will not be questioned by our Office unless shown to be arbitrary, capricious or in bad faith. Based on our review, we do not find that the record supports the assertion that you were induced into submitting a proposal when the Navy knew or should have known that it would not be fairly considered. Consequently, insofar as you dispute the validity of the technical determination your protest is untimely and not therefore for consideration as an exception under the cited provision of our regulation as a "significant issue."

With respect to your claim for damages you have cited *Heyer Products Co., Inc.* v. *United States*, 140 F. Supp. 409, 135 Ct. Cl. 63 (1956) and 177 F. Supp. 251, 147 Ct. Cl. 256 (1959). While the courts have recognized that bidders or offerors are entitled to have their bids or proposals considered fairly and honestly for award, they have also held that any failure of the contracting agency in this regard would give rise to a cause of action by the aggrieved bidder or offeror to recover *only* preparation expenses. See *Heyer Products Co., Inc.* v. *United States*, *supra; Keco Industries, Inc.* v. *United States*, 428 F. 2d 1233, 192 Ct. Cl. 773 (1970); and *Continental Business Enterprises, Inc.* v. *United States*, 452 F. 2d 1016, 196 Ct. Cl. 627 (1971). Therefore, this Office could not allow a claim in the nature of anticipated profits. B–177489, December 14, 1972.

With regard to a claim for bid or proposal preparation expenses, standards and criteria to be applied in allowing such a claim have not been established to our knowledge. Accordingly, this Office must decline to attempt settlement of claims for preparation costs until appropriate standards or criteria are judicially established. See *Longwill* v. *United States*, 17 Ct. Cl. 288 (1881); *Charles* v. *United States*, 19 Ct. Cl. 316 (1884); 53 Comp. Gen. 307 (1973).

[B-114824]

Regulations—Retroactive—Administrative Policy Revision

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

To the Secretary of Agriculture, November 27, 1973:

By letter dated July 6, 1973, the Assistant Secretary of Agriculture for International Affairs and Commodity Programs requested our opinion whether a proposed amendment as hereinafter described may be made to the regulations governing the Commodity Credit Corporation's program for price support payments on marketings of shorn wool and unshorn lambs pursuant to the authority contained in the National Wool Act of 1954, as amended, 7 U.S. Code 1781–1787. The current regulations for this program are published in Part 1472 of Title 7, Code of Federal Regulations.

The Assistant Secretary's letter reads, in part, as follows:

> The [National Wool] Act provides in pertinent part that "The Secretary of Agriculture shall, through the Commodity Credit Corporation, support the prices of wool and mohair, respectively, to producers thereof by means of loans, purchases, payments, or other operations" (7 U.S.C. 1782(a)), and that "If payments are utilized as a means of price support, the payments shall be such as the Secretary of Agriculture determines to be sufficient, when added to the national average price received by producers, to give producers a national average return for the commodity equal to the support price level therefor * * *" (7 U.S.C. 1783). The Act further provides that "the amounts, terms, and conditions of the price support operations * * * shall be determined or approved by the Secretary of Agriculture" (7 U.S.C. 1785).
>
> Prior to 1954, CCC supported wool prices through loans and purchases, as a result of which CCC took into inventory a considerable part of our domestic wool production. The National Wool Act was enacted as the best way to provide income protection to wool growers while at the same time leaving the marketing process in the hands of wool growers and the trade without Government involvement. As was pointed out during committee hearings on the legislation, it was proposed, in order to provide an incentive to each producer to obtain the maximum price for his wool and thereby reduce the government cost of the program, to base each grower's payment on the amount realized from the marketing of his wool. Accordingly, the program regulations for the marketing years from 1955 through 1973 have provided that the wool payments will be based on the net proceeds realized by each grower from the sale of his wool (7 CFR 1472.1308), at a rate of payment which is the percentage of the national average price per pound received by producers in the same marketing year which is required to bring such national average price up to the support price for the wool (7 CFR 1472.1305(b)). In order to determine the net sales proceeds, the regulations require the producer's application to be supported by a final accounting for the wool, evidenced by sales documents which may not include contracts to sell or tentative or pro forma settlements (7 CFR 1472.1310), and the support-

ing sales document to show, among other things, the net amount received by the producer for the wool (7 CFR 1472.1310(b)).

A promise to pay, even though supported by a promissory note or a post-dated check, has not been accepted as the equivalent of a payment within the meaning of the regulations governing the computation of incentive payments. In certain situations beyond a producer's control, this policy can, and in fact recently did, lead to inequities in the program which would result in a frustration of the purpose of the program. For example, during 1969 and early 1970, a number of wool producers in Colorado, Idaho and Wyoming delivered wool to a marketing agency under one of several types of agreements whereby the producer delivered his crop of wool to the agency, relinquished title to the wool, and received an advance against either a specified price, or a price to be agreed to at a later date, or the market value at the time of receipt of the wool. The balance was to be paid on delivery, under one type of contract, or when the agency sold the wool, under the others. In addition, in some instances the wool was turned over to the agency under a marketing agreement pursuant to which an initial advance was made and the proceeds from the sale of the wool were to be accounted for after the wool was sold. Under such an agreement, title to the wool did not pass at time of delivery. For all 1970 transactions, the balance was paid by note in December of 1970, transmitted with a final accounting on the wool and an explanation that although the agency was unable to sell a considerable proportion of the wool, it was completing the purchase in order that the producers might apply for their incentive payments. Each of the statements of account indicated final payment by check, however, rather than by note and as a result incentive payments were made on the net proceeds set forth in the statements of account. In all cases, the notes were unpaid and uncollectible at and subsequent to maturity. Because of the administrative policy in interpreting the computation provisions of the regulations described hereinabove, it was determined that incentive payments properly should have been made only on that part of the purchase price which was received in the form of a cash advance and the uncollectible notes should not have been considered a part of the net sales proceeds. Consequently, on learning the facts in these cases, claim was made against each of these producers for repayment of the amounts improperly paid. This has resulted in many instances in considerable hardship for the producers.

In view of the foregoing, it is proposed to amend the regulations to permit the computation of incentive payments, under 7 CFR 1472.1208 (applicable to the marketing years 1966–1970) and 7 CFR 1472.1308 (applicable to the marketing years 1971–1973), to be based on either the net sales proceeds received by the producer or, in the event the producer does not realize the amount provided for in the sales document, as for example where the purchaser has become insolvent between the time all the conditions of a marketing as prescribed by 7 CFR 1472.1307 have been met and the time payment is due (under a note, check or some other contractual arrangement), the lower of (1) the net sales proceeds based on the price the producer should have received had there been no default or (2) the fair market value at the time of sale of the wool. It is further proposed to amend the regulations to permit reconsideration, under the amended sections governing computation of payments, of any application previously filed with respect to a marketing which took place within the current marketing year or the three marketing years prior thereto.

The Commodity Credit Corporation (CCC) regulations governing the wool price support programs, as published in the Code of Federal Regulations, recite as authority for their issuance sections 4 and 5 of the Commodity Credit Corporation Charter Act, as amended, 15 U.S.C. 714b, 714c, and the National Wool Act. Section 4(d) of the Charter Act, 15 U.S.C. 714b(d), authorizes the Corporation to "adopt, amend, and repeal bylaws, rules, and regulations governing the manner in which its business may be conducted and the powers vested in it may be exercised." Section 706 of the National Wool Act, 7 U.S.C. 1785, provides in part, quoting from the U.S. Code:

Except as otherwise provided in this chapter, the amounts, terms, and conditions of the price support operations and the extent to which such operations are carried out shall be determined or approved by the Secretary of Agriculture. * * * The facts constituting the basis for any operation, payment, or amount thereof *when officially determined in conformity with applicable regulations prescribed by the Secretary* shall be final and conclusive and shall not be reviewable by any other officer or agency of the Government. [Italic supplied.]

Under well-established principles applied in numerous decisions of our Office, regulations promulgated pursuant to express statutory authority, such as the CCC regulations here involved, have the force and effect of law and cannot be retroactively waived. *See*, e.g., 51 Comp. Gen. 162, 166 (1971); 43 *id.* 31, 33 (1963); 37 *id.* 820 (1958), and decisions cited therein.

Of particular interest here is our 1958 decision to the Secretary of Agriculture, 37 Comp. Gen. 820, wherein we concluded that there was no authority to waive substantive regulations governing the soil bank acreage reserve program, notwithstanding that section 485.240 of the soil bank regulations purported to authorize waiver of any provision of such regulations. Our decision stated:

While section 124 [of the Soil Bank Act] grants broad discretionary authority for prescribing regulations, it is not dissimilar to numerous provisions in other legislative acts authorizing the issuance of regulations. It is well established in administrative law that valid statutory regulations have the force and effect of law, are general in their application, and may no more be waived than provisions of the statutes themselves. Regulations must contain a guide or standard alike to all individuals similarly situated, so that anyone interested may determine his own rights or exemptions thereunder. The administrative agency may not exercise discretion to enforce them against some and to refuse to enforce them against others. See *United States* v. *Ripley*, 7 Pet. 18; *United States* v. *Davis*, 132 U.S. 334; *Federal Crop Insurance Corporation* v. *Merrill*, 332 U.S. 380; *Sheridan-Wyoming Coal Co.* v. *Krug*, 172 F. 2d 282, 31 Comp. Gen. 193, and decisions cited therein.

* * * * * * *

Section 485.240 of the regulations under consideration attempts to create in the Administrator, Commodity Stabilization Service, the right to waive the requirements of any provision of the regulations or the agreements in hardship cases even though such action might give up vested rights of the Government; might permit payments contrary to the regulations or agreement; would be taken on a case-by-case basis; and would be retroactive rather than prospective in that the Administrator, after noncompliance, would determine whether to waive the pertinent regulation. Such authority is so contrary to the principles referred to above and normally associated with statutory regulations that we are convinced that such discretionary authority was not contemplated by the Congress in enacting section 124 of the Soil Bank Act and numerous similar provisions in other laws. While section 103 of the Soil Bank Act, 7 U.S.C. 1821, authorizes you to include in the acreage reserve program such "terms and conditions" as you deem desirable to effectuate the purposes of the Soil Bank Act and to facilitate the practical administration of the acreage reserve program, we do not believe it authorizes you to include in the regulations a further provision authorizing the waiver on an individual case basis of any "terms and conditions" prescribed in the regulations. In our view, the authority to regulate and to include in the program such terms and conditions as the Administrator deems desirable for the specified purposes does not necessarily imply authority to disregard those terms and conditions thereby creating an unregulated area subject only to his discretion. If any agency requires authority to waive its statutory regulations, we believe that specific statutory authority therefor * * * should be requested from the Congress.

See also 15 Comp. Gen. 869 (1936), wherein we declined to give effect to a provision in regulations implementing the National Housing Act (12 U.S.C. 1701 *et seq.*) which purported to reserve authority to waive any other provision of such regulations. As noted in our 1958 decision, *supra*, the National Housing Act was subsequently amended to authorize waiver of regulations thereunder.

Turning to the instant matter, it is proposed to amend the wool price support regulations governing past marketing years and the present marketing year so as to permit under certain circumstances payments on a basis other than actual net sales proceeds. Provision would then be made for reconsideration under the amended regulations of applications previously filed and presumably rejected for the present marketing year and 3 years prior.

Whatever may be the reasons for the particular approach thus suggested, its purpose and effect is clearly to provide for waiver of regulatory requirements applicable at the time transactions were consummated. Accordingly, we must conclude that this proposal is subject to the principles discussed herein precluding retroactive waiver. The instant proposal is, if anything, more tenuous than those disapproved in our 1958 and 1937 decisions, *supra*, since there is nothing in the present wool regulations which even purports to reserve waiver authority. Obviously the requirement that payments be based on actual net sales proceeds is a substantive element in the present regulations. *Cf.* 37 Comp. Gen. 820, 823. Thus, in addition to the detailed requirements set forth in the regulations concerning documentation of net sales proceeds, it is specifically stated that "Contracts to sell as well as tentative or pro forma settlements will not be acceptable as sales documents." 7 CFR § 1472.1310.

For the foregoing reasons, it is our opinion that the proposed regulations may not legally be adopted to the extent that they would permit retroactive waiver of the requirement that payments be based on actual net sales proceeds. We might point out, however, that in view of the broad administrative discretion afforded by section 706 of the National Wool Act in formulating program terms and conditions, we would not object to prospective adoption (i.e., for marketing years subsequent to 1973) and application of a provision for varying the actual net sales proceeds requirement under limited and clearly defined circumstances and subject to a determination that such provision is consistent with the purposes of the Act. *See* 37 Comp. Gen. 820, 822–23; 17 *id.* 566, 568 (1938).

[B-178378]

Contracts—Mistakes—Contracting Officer's Error Detection Duty—Notice of Error—Substantial

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

To the Secretary of Agriculture, November 27, 1973:

By letter dated April 3, 1973, the Director, Office of Plant and Operations, United States Department of Agriculture, forwarded to us a claim relative to a bid mistake by the Frischhertz Electric Company.

Invitation for bids ARS-118-B-72 was issued by the Agricultural Research Service (ARS), United States Department of Agriculture, for furnishing and installing an electrical distribution system in New Orleans, Louisiana. The solicitation invited bids for Basic Bid Item 1 and Alternate Item 1A. Alternate Item 1A required bidders to state the amount to be added to the Basic Bid for furnishing circuit-breaker type main switchgear in lieu of the switch-and-fuse type required under Basic Bid Item 1.

Bids were opened on June 26, 1972; six bids were received as follows:

	Basic Bid Item 1	Alternate Item 1A
1. Frischhertz Electric Co., Inc	$172,022	$4,000
2. Webb Electric Company	173,286	34,349
3. Walter J. Barnes Electric Co	190,000	38,000
4. Lambert Electric	207,555	35,167
5. R. E. Neuman, Inc	224,485	35,580
6. Pratt Farnsworth, Inc	228,755	46,930

Due to the great difference between Frischhertz's bid on Alternate Item 1A and the next low bid on that item, Frischhertz was contacted concerning possible error in its price for Alternate Item 1A. Frischhertz informed ARS, however, that it had sent a telegram revising prices for both items. Frischhertz was advised that ARS had not received this telegram. Just prior to this discussion, the requisitioning

office had directed the contracting officer to disregard Alternate Item 1A and make award for Basic Bid Item 1 only.

ARS received Frischertz's telegram the next day on June 27, 1972, at 3:46 p.m. The telegram would have increased Frischhertz's bids for Basic Bid Item 1 and Alternate Item 1A by $37,370 and $24,780, respectively. Western Union acknowledged in a letter dated July 5, 1972, that it failed to deliver the telegram properly.

The contracting officer determined that the late telegraphic modifications could not be considered, and he awarded Contract No. 12-14-100-11468(72) to Frischhertz for Basic Bid Item 1 in the original bid amount of $172,022. Notice of award, requesting that the contract and surety documents be executed and returned within 10 days, was sent to Frischhertz on June 29, 1972.

Frischhertz failed to return the necessary documents. On July 18, 1972, the contracting officer again requested that the executed contract documents be returned immediately and he advised Frischhertz that "* * * if he wanted to file a claim, he should submit to me a statement of fact along with other supporting evidence for legal determination." Frischhertz did not reply; however, the contracting officer on July 12, 1972, did receive a telephone call in Frischhertz's behalf from Mr. Ray E. Putfark, Executive Director of the Construction Industry Association of New Orleans, Incorporated. Subsequently, on July 17 the contracting officer received a letter from Mr. Putfark requesting that Frischhertz be relieved of any obligation to perform the contract. On August 8, 1972, the contracting officer sent a cure letter to Frischhertz giving it 10 days to return the executed documents; a copy of this letter was sent to Frischhertz's surety. On August 10, Mr. Putfark called to advise that the executed contract would be mailed. Thereafter, the executed documents were received and a notice to proceed was sent to the contractor on August 14, 1972.

By letter of February 21, 1973, Frischhertz requested a "final decision relative to granting relief due to failure of timely delivery of telegraphic revisions to original bid prices and for negotiating a reasonable price adjustment." Frischhertz contends that its original bid prices were computed incorrectly "* * * due to a mathematical error in figures supplied by a potential subcontractor and which were incorporated in the contractor's original bid prices." It contends that the contracting officer acted improperly in sending a Notice of Award to Frischhertz since the contracting officer "* * * had full and complete knowledge that there were obvious errors in the contractor's original bid submission." The contracting officer, on the other hand, states that no claim of error was made prior to the letter of February 21 and that the contractor, by accepting the contract and proceeding with the work, waived any claim it might have against the Government.

Under ordinary circumstances we would not expect the contracting officer to anticipate the possibility that the bidder would subsequently claim a mistake in bid after the award was made. However, in this case the contracting officer was on notice of the possibility of a bid error in regard to Item 1A and the attempted bid modification included Items 1 and 1A. While we recognize that the contracting officer was not on constructive notice of the possibility of an error on Item 1 on the basis of the bid price itself, he should have been alerted to the possibility of an error on Item 1 as well as Item 1A once he became aware of the bidder's attempted price increases on both items. We believe that the prudent course of action for the contracting officer prior to any award would have been to ask the bidder whether the attempted price increases reflected mistakes in bid on both items. Moreover, the record indicates that Frischhertz did not acquiesce in the award. After the award was made, the contracting officer advised the contractor that it could file a claim.

We think this case fits within the rule set forth in 38 Comp. Gen. 504 (1959). In that case a bidder alleged a mistake in bid but was incorrectly told that the bid could not be withdrawn instead of being advised that it could submit evidence substantiating its alleged error. We held that the bidder should not be foreclosed from relief simply because it went ahead and executed a contract in reliance upon the incorrect advice. Similarly, we think that Frischhertz should have been given the opportunity to establish error prior to the award.

Accordingly, we think that if Frischhertz presents evidence to establish the existence of a mistake, it would be evident that no contract was ever effected at the award price. *Chris Berg Inc.* v. *United States*, 426 F. 2d 314 (1970), 176 Ct. Cl. 192, and 37 Comp. Gen. 706, 707 (1958). The contracting officer has reported that a substantial portion of the contract work has been completed. Since rescission is no longer feasible we would interpose no objection to payment on a *quantum valebant* or *quantum meruit* basis, that is, the reasonable value of the services and materials actually furnished. B-157280, October 11, 1965 and *C. N. Monroe Manufacturing Company* v. *United States*, 143 F. Supp. 449 (1956).

[B-178400]

Contracts—Labor Stipulations—Service Contract Act of 1965—Applicability of Act—Keypunch Operators, etc.

Although the practice of the Labor Department in classifying as "service employees' keypunch operators and other clerical-type employees under the Service Contract Act of 1965, 41 U.S.C. 351, *et seq.*, is questionable since the statutory language of the act and its legislative history, as well as the Department of Labor's regulations, indicate "service employee" was intended to mean "blue

collar" employee, the practice is not specifically prohibited and, therefore, the protest is denied. However, because of the significant adverse impact on procurement procedures, the department should present the matter to Congress and obtain clarifying legislation, and should submit statements of the action taken to the appropriate congressional committees as required by the Legislative Reorganization Act of 1970.

Contracts—Labor Stipulations—Service Contract Act of 1965—Minimum Wage, etc., Determinations—Locality Basis for Determination

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

To the Secretary of Labor, November 28, 1973:

We refer to letter of May 24, 1973, with enclosure, from the Assistant Administrator, Employment Standards Administration, concerning the protest of Descomp, Inc., against certain terms in request for proposals (RFP) No. 3FP-A5-N-3473-4-12-73, issued by the Federal Supply Service, General Services Administration (GSA).

The RFP was issued March 14, 1973, calling for an indefinite quantity of ADP keypunching and verification services. Prior to the issuance of the solicitation, the contracting officer sent to the Department of Labor a Notice of Intention to Make a Service Contract (Standard Form 98) which listed as the "place of performance" the locations of the Government installations for which the services were to be performed. In response, Labor provided Service Contract Act Wage Determinations for 23 classes of employees, including keypunch operators, file clerks, secretaries, stenographers, switchboard operators, typists, computer operators, and draftsmen, in three localities—the District of Columbia; an area of suburban Maryland (Montgomery and Prince Georges Counties); and a suburban Virginia area (Arlington, Fairfax, Loudon, and Prince William Counties, and the independent Cities of Alexandria, Fairfax, and Falls Church). The wage determinations for these localities were included in the RFP along with the following provision:

NOTE: The Wage Determinations shown herein covers employees employed on contracts for services for installations located in the specified localities, cities, counties and/or states. The wage rate paid must correspond to the Wage Determination for the location of the agency and not for the location of the contractor. For Example: If you are awarded Service Area A, which is located in the District of Columbia, you must pay the rate listed on the Wage Determination for the District of Columbia regardless of your plant location.

The solicitation further provided that the contractor would be paid on a card-output basis in accordance with 1,000-card allotments.

Among the objections made by Descomp against the terms of the RFP, two contentions, in particular, raise fundamental issues in regard to the interpretation and application of the Service Contract Act of 1965, 41 U.S. Code 351, *et seq.* Since we believe, for the reasons discussed, that certain procedures which your Department has adopted in implementing the act may be questionable, we are calling these matters directly to your attention.

The specific contentions raised by Descomp are as follows. First, the protestant's counsel in a letter to our Office has questioned whether the Service Contract Act was intended to apply to services of the type being procured under the RFP, Counsel has expressed the view that the act's coverage is limited to contracts for services such as janitorial work, guard services, window washing, trash removal and the like. Also, the protestant objects to the RFP "NOTE" requiring payment of wage rates based on the location of the agencies and not the location of the contractor. In this regard, Descomp has advised that its actual performance under contracts of this type takes place at its facility in Delaware. Descomp picks up cards at various Government agencies in the Washington area, processes them in Delaware, and returns them to Washington. Apparently, a similar procedure would be utilized by any contractor, since there is no indication in the RFP that the services being contracted for are to be performed on the premises of the Government installations involved. Descomp believes that it is unfair to force contractors who are not located in the Washington, D.C., area to pay minimum wage rates as determined from the wages prevailing in that area. The protestant therefore requests that your Department be required to make wage determinations for its locality and the localities of the other offerors, and that the RFP be amended accordingly.

The Service Contract Act of 1965, requires that every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of $2,500, with certain exceptions, the principal purpose of which is to furnish services in the United States through the use of service employees, shall contain a provision specifying the minimum monetary wages and fringe benefits to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder as determined by the Secretary of Labor, or his authorized representative, in accordance with the prevailing rates and fringe benefits for such employees in the locality.

Initially, we have serious doubts whether the RFP contemplates the award of a contract the principal purpose of which is to furnish

services through the use of service employees. A contract awarded under the RFP will apparently be performed by clerical, "white-collar" employees who do not come within the Act's definition of "service employee" (41 U.S.C. 357(b)):

> The term "service employee" means guards, watchmen, and any person engaged in a recognized trade or craft, or other skilled mechanical craft, or in unskilled semiskilled, or skilled manual labor occupations; and any other employee including a foreman or supervisor in a position having trade, craft, or laboring experience as the paramount requirement; and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

The legislative history of the act indicates that the scope of the "service employee" concept was intended to be limited to employees generally referred to as "blue collar" employees. In this regard, Senate Report No. 798, September 30, 1965, 89th Congress, 1st Session on H.R. 10238, the bill enacted as the Service Contract Act, states at pages 1 and 2 as follows:

> The bill is applicable to advertised or negotiated contracts in excess of $2,500, the principal purpose of which is to furnish services through the use of service employees. Service employees are defined in the bill as guards, watchmen, and any person in a recognized trade or craft, or other skilled mechanical craft, or in unskilled, semiskilled, or skilled manual labor occupations. Typical services furnished would also include laundry and drycleaning, custodial, janitorial, cafeteria, food, and miscellaneous housekeeping.

Further, the statement of Mr. Charles Donahue, then Solicitor of Labor, at page 4 of the Hearing on H.R. 10238 before the Special Subcommittee on Labor of the Committee on Education and Labor, House of Representatives, August 5, 1965, makes clear that the act was intended to apply to those employees performing service contracts involving the type of work performed by Federal Wage Board employees:

> The standards set forth in H.R. 10238 would apply to guards, watchmen, and employees in jobs of the type for which wage rates are set by individual agency wage boards when the workers are employed directly by the Government. These employees are, as you know, employees in trades, crafts, or manual labor occupations, including supervisors, often referred to as "blue collar" workers. Included in coverage under the bill would be janitorial, custodial, maintenance, laundry, drycleaning, hauling, pest extermination, clothing and equipment repair, and cleaning service employees.

To the same effect is a statement in a memorandum furnished by Mr. Donahue which appears at pages 15 and 16, Hearing on H.R. 10238 before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, September 23, 1965:

> The Service Contract Act proposal covers contracts, the principal purpose of which is to furnish services through the use of service employees, as defined in the proposal (i.e., manual, skilled, blue-collar type employees), under contracts with the United States and the District of Columbia in excess of $2,500. Examples of contracts covered are those for janitorial, custodial, laundry and drycleaning services. * * *.

It is our understanding that your Department's policy concerning coverage of clerical employees has been inconsistent, and that during 1970 and 1971 you regarded such employees as being outside the act's coverage. In any event, your rules relating to the administration of the act, published in Title 29, Code of Federal Regulations, Part 4, seem to indicate that the "service employee" concept covers blue-collar workers and that clerical employees are not covered. 29 CFR 4.113(b) states that "service employee" does not include employees employed in a bona fide executive, administrative, or professional capacity, and further notes that the definition of "service employee" is for the most part identical with that in the Classification Act Amendments of 1954 (5 U.S.C. 1082(7)) which defines "blue collar workers" or "wage board employees" in the Federal service. Also, 29 CFR 4.153 includes as an example of an employee not covered by the act a laundry service contractor's billing clerk performing billing work with respect to the items laundered.

Descomp's objection to the RFP "NOTE" requiring the contractor to pay wage rates based upon the localities of the Government installation being served, in accordance with the wage determinations included in the RFP, rather than upon the localities of the various offerors, raises an even more serious issue—the proper interpretation of the "locality" basis of wage determinations. In a typical service contract procurement—for example, a solicitation calling for janitorial or trash removal services—the locality of the Government installation and the locality where the services are performed are one and the same. Where, as here, there is a procurement of services which can be rendered at the location of the successful bidder, wherever that may be, your Department's position, as we understand it, has been that the act requires the issuance of wage determinations based upon the locality of the Government facility for which the services are to be performed.

In a letter to Descomp dated May 1, 1973, the Assistant Administrator, Employment Standards Administration, stated that in a procurement of services where there is uncertainty as to where the work is to be performed because the services can be rendered at the location of the successful bidder, wherever that may be, the Department issues wage determinations based on the location of the Government facility for which the services are to be performed. The letter further states:

> It was, and is, our opinion that such an approach to wage determinations for procurements where the place (or places) of performance is unknown at the time of the filing of the SF-98 not only furthers the remedial purposes of the Act but also provides the fairest opportunity to any interested bidder to compete for a Government contract.
>
> * * * * * * *
>
> Given the present procurement procedures for such contracts, we feel the position outlined above is the only practical and equitable course to follow. The

only alternatives are (1) not to issue any wage determination for inclusion in the invitation for bids and subsequent contract, which would be contrary to the clear intent of the Act or (2) to issue a wage determination for a contractor's facility after contract award when the contractor's location is known. Such a policy is, of course, inconsistent with the competitive bidding process itself.

With regard to the question of the "locality" basis for wage determinations, the relevant language of the act indicates quite clearly that "locality" has reference to the place where services are performed:

> Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of $2,500 * * * the principal purpose of which is to furnish services in the United States through the use of service employees * * * shall contain * * *:
>
> (1) A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract * * * as determined by the Secretary * * * in accordance with the prevailing rates for such employees in the locality * * *.

This view is confirmed by examination of the legislative history of the act. See, in this regard, the statement of Mr. Charles Donahue, the then Solicitor of Labor, reported at page 11 of Hearing before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 89th Congress, 1st session, on H.R. 10238. Mr. Donahue stated in part:

> At the threshold I have been told that there is some curiosity as to why we did not simply take the Davis-Bacon Act and extend it so that it would cover service contracts as well as construction contracts.
>
> * * * * * * *
>
> Another answer to that question is, that in principle, without mentioning it, we have followed the Davis-Bacon Act. I address myself to the provisions on page 2 of the bill as it was reported in the House of Representatives, paragraph No. 2, which provides for the determination of prevailing wage rates by the Secretary of Labor on the basis of those prevailing for service employees in the locality.
>
> Now the word "locality" is comparable to the words in the Davis-Bacon Act; city, town, village, or any other political division of the State in which the contract work is to be performed.

Mr. Donahue's further statements in the Senate hearings indicate that "locality" was substituted for the Davis-Bacon formulation because of the need for a more flexible geographic standard. However, there is no indication here or elsewhere in the legislative history that "locality" was meant to have reference only to the location of Government installations for which the services are being provided to the exclusion of the locations of performance.

In short, the "locality" contemplated by the Congress appears to have been an area encompassing the location where service employees are actually performing a service contract. This is in accord with the purpose of the act—"* * * to provide much needed labor standards protection for employees of contractors and subcontractors furnishing services to or performing maintenance service for Federal agencies."

H. Rept. No. 948 on H.R. 10238, 89th Congress, 1st Session, September 1, 1965.

The locality interpretation which you have adopted in the present case and in similar cases is subject to question. It results in employees being paid minimum wages as determined from the prevailing wages in a locality other than the one wherein they are actually engaged in performing the contract. Also, it establishes, in effect, a nationwide rate, since all bidders whatever their location are bound to pay the wage rates in the locality of the Government installation. This nationwide rate is not determined with reference to the prevailing wages throughout the country, but is based on the prevailing rates in the locality of the Government facility.

We believe that these practices have an adverse impact upon the Government's procurement of services. It is apparent that the departmental interpretation of "locality" and the practice of classifying clerical workers as service employees increase the cost of procuring services as contemplated by the RFP.

While as indicated we think your current practices are subject to serious question we cannot conclude that they are prohibited by the language of the Service Contract Act. Accordingly, we are advising the Administrator of General Services and the protestor by letters of today that the protest is denied. However, in view of the significant impact of the protested procedures on the Government's procurement of services generally, we strongly recommend that your Department, as the agency charged with the implementation of the Service Contract Act, present these matters to the Congress with a view towards obtaining clarifying legislation.

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

We would appreciate being advised of whatever action is taken on our recommendation.

[B–179164]

Military Personnel—Reserve Officers' Training Corps—Programs at Educational Institutions—Marine Corps Junior Officers' Training Corps

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

To J. J. Burkholder, United States Marine Corps, November 29, 1973:

Reference is made to your letter dated June 27, 1973 (file reference RP–JJB–dm), requesting an advance decision relating to the establishment of a Marine Corps Junior Reserve Officers' Training Corps unit at the Phoenix Indian High School, Phoenix, Arizona, under the provisions of 10 U.S. Code 2031, in the circumstances described. Your letter was forwarded to this Office by letter dated July 6, 1973, from the Commandant of the Marine Corps and has been assigned Control Number DO–MC–1198 by the Department of Defense Military Pay and Allowance Committee.

You say that the Phoenix Indian High School, which is operated by the Bureau of Indian Affairs of the Department of Interior and funded by funds appropriated to that Agency, entered into an agreement with the United States Marine Corps to establish a Marine Corps Junior Reserve Officers' Training Corps at the school under the authority of 10 U.S.C. 2031. That agreement, approved by the Marine Corps on February 3, 1969, provided that the *school* will employ retired Marine Corps officers and retired enlisted members to conduct military science courses and military activities. It also provided that retired personnel so employed are entitled to receive their annual retired pay and an additional amount equal to the difference between their annual retired pay and the active duty pay and allowances they would receive if ordered to active duty. It further provided that the school (1) would be the employing agency, (2) would pay the full "additional amount" due the retired members on a pay schedule identical to that in effect

for other faculty members, and (3) would be reimbursed for one-half of the "additional amount" so paid to the retired members.

You say that prior to September 1972, the high school contracted with a nonfederal organization (in this case we understand it to be the White Mountain Indian Tribe) to hire and pay the MCJROTC instructors. You indicate that the reason for this arrangement was that the Bureau of Indian Affairs expressed the view that if the school employed the two individuals in question as direct-hire employees as instructors for their Junior ROTC program, such employment would subject them to the implications of the dual compensation laws.

Subsequent to their employment at the school under the terms of the contract with the White Mountain Apache Tribe, that contract, as well as several other similar contracts, were examined by our Office and were determined to be in violation of Federal regulations applicable to the operation of the school. The basis for that determination, apparently, was that such an arrangement was deemed to be a personal service contract wherein it appeared that the Indian tribe was merely a conduit through which an employer-employee relationship was created between individuals and the Phoenix Indian School, with the Indian tribe levying an additional charge against the school for contract administration.

On September 18, 1972, Colonel Clay A. Boyd, 525 92 30 21, United States Marine Corps, Retired, and Master Sergeant William M. Weckerly, 483 48 25 99, Fleet Marine Corps Reserve, the MCJROTC instructors at the school under the earlier contract arrangement, were given temporary appointments as General Schedule employees at the GS-9 and GS-6 level, respectively. You say that Headquarters Marine Corps, upon being furnished with a copy of these appointments, expressed the view that the appointments were without lawful effect, being inconsistent with both 10 U.S.C. 2031(d)(1) and the terms of the MCJROTC agreement referred to above. Headquarters Marine Corps suggested to the Bureau of Indian Affairs that these temporary appointments be revoked as of their effective date and that Colonel Boyd's and Master Sergeant Weckerly's employment as MCJROTC instructors be reeffected in such a manner as to insure that their employment as MCJROTC instructors at the school and their rate of compensation conform to that authorized by 10 U.S.C. 2031 and the referred-to agreement between the Marine Corps and the school.

It is your understanding that in the light of 48 Comp. Gen. 796 (1969), Headquarters Marine Corps view the provisions of 10 U.S.C. 2031 as being applicable to the instant situation even though the Phoenix Indian High School is operated and funded by the United States Government.

You say that in response to the above suggestion, the Department of Interior requested of the United States Civil Service Commission that Schedule A exceptions be granted to position of administrators and instructors in junior ROTC units in schools operated by the Bureau of Indian Affairs. In reply to the exception request, the Chief, Career Service Division, Bureau of Recruiting and Examining, United States Civil Service Commission, apparently advised that no basis could be found for submitting such a recommendation for the approval of the Commission. You indicate that it was also stated in that reply that their Office of the General Counsel determined that the reduction-in-military-retirement pay provision (5 U.S.C. 5532) does apply to Colonel Boyd's appointment and that the provisions of 10 U.S.C. 2031(d)(1) applies only to nongovernmental institutions.

Because of the doubt expressed as to the applicability of 10 U.S.C. 2031 to the establishment of the MCJROTC unit at the Phoenix Indian High School under the present arrangement and the effect of 5 U.S.C. 5532 on Colonel Boyd's entitlement to retired pay as the result of his appointment under the General Schedule as the MCJROTC administrator at the school, you ask the following questions:

1. The school has not been reimbursed for any part of the "additional amount" it paid to Colonel Boyd and Master Sergeant Weckerly for periods after 17 September 1972. Is reimbursement to the school authorized for one-half the difference between their retired or retainer pay and the salary received by them since 18 September 1972, not to exceed one-half the difference between such retired or retainer pay and the active duty pay and allowances they would receive if ordered to active duty?

2. Am I required to reduce Colonel Boyd's retired pay under 5 U.S.C. 5532 as a result of his temporary appointment of 18 September 1972 to the General Schedule position of Training Administrator, MCJROTC, Phoenix Indian High School?

3. If it is held that the school may be reimbursed, and Colonel Boyd's retired pay must be reduced under 5 U.S.C. 5532, should the difference between his "retired pay" and the active duty pay and allowances he would receive if ordered to active duty be computed by using his retired pay before application of the dual compensation reduction, or his retired pay remaining after that reduction has been made?

In view of the indicated statements by the Office of the General Counsel, United States Civil Service Commission, we will consider at the outset the question whether the provisions of 10 U.S.C. 2031 are applicable to Governmental institutions such as the Phoenix Indian School.

Section 2031 of Title 10, U.S. Code, provides in pertinent part:

(a) The Secretary of each military department shall establish and maintain a Junior Reserve Officers' Training Corps, organized into units, at public and private secondary educational institutions which apply for a unit and meet the standards and criteria prescribed pursuant to this section.

The legislative history of this law indicates that its purpose was to expand the number of JROTC programs at qualified secondary schools. We find nothing in the legislative history which would in-

dicate that Congress intended to restrict the meaning of the phrase "public and private secondary educational institutions" to only non-governmental institutions. Since the indicated purpose was to expand the then existing program, it is our view that the provisions of 10 U.S.C. 2031 should be liberally construed and not be interpreted so as to preclude or discourage the establishment of a Junior ROTC program at any particular type of secondary institution, if otherwise qualified, and that a Junior ROTC program under 10 U.S.C. 2031 may be established in Governmental institutions, such as the Phoenix Indian High School. *Cf.* 48 Comp. Gen. 796 (1969).

Authority for the employment of retired members of the uniformed services by schools participating in the Junior Reserve Officers' Training Corps program is contained in subsection 2031(d) of Title 10, U.S. Code, which provides in pertinent part:

> (d) Instead of, or in addition to, detailing officers and noncommissioned officers on active duty under subsection (c)(1), the Secretary of the military department concerned may authorize qualified institutions to employ, as administrators and instructors in the program, retired officers and noncommissioned officers, and members of the Fleet Reserve and Fleet Marine Corps Reserve, whose qualifications are approved by the Secretary and institution concerned and who request such employment, subject to the following:
> (1) Retired members so employed are entitled to receive their retired or retainer pay and an additional amount of not more than the difference between their retired pay and the active duty pay and allowances which they would receive if ordered to active duty, and one-half of that additional amount shall be paid to the institution concerned by the Secretary of the military department concerned from funds appropriated for that purpose.

Under the provisions of clause (1) of that subsection such members employed by the institutions as administrators and instructors in the programs are entitled to receive their retired or retainer pay and an "additional amount" of "not more than" the difference between their retired or retainer pay and the "active duty pay and allowances which they would receive if ordered to active duty."

Paragraph V.B.2.a., Department of Defense Directive No. 1205.13, dated October 17, 1968, which directive was promulgated pursuant to the authority of 10 U.S.C. 2031, provides in part:

> Retired personnel so employed shall receive their retired or retainer pay and an additional amount equal to the difference between their retired pay and the active duty pay and allowances, excluding hazardous duty pay, which they would receive if ordered to active duty. The institution is the employing agency and shall pay the full additional amount due to the individual employed.

It would thus seem reasonably clear that under the proscription of both the law and the regulations, the maximum as well as the minimum "additional amount" which may be paid by an employing institution to retired members under the provisions of 10 U.S.C. 2031 for the performance of these duties is established and that the total payment by the institution for such employment may not exceed the dif-

ference between their retired pay entitlement and the active duty pay and allowances to which they would be entitled to receive if serving on active duty. *Cf.* 46 Comp. Gen. 647 (1967).

During the period involved, both Colonel Boyd and Master Sergeant Weckerly were employed as administrators and instructors at the Phoenix Indian High School under the General Schedule as a GS–9 and GS–6, respectively. As a result, compensation for their employment was set, not in the amount prescribed by 10 U.S.C. 2031 (d) (1), but rather by the rates prescribed for General Schedule employees under the provisions of Subchapter III, Chapter 53 of Title 5, U.S. Code, which amount may be more or less than that authorized under subsection 2031(d).

Headquarters Marine Corps has suggested, however, that these appointments are without lawful effect, that they should be revoked as of their effective date and that the members' employment be reeffected in such a manner as to ensure that their employment and rate of compensation conform to 10 U.S.C. 2031(d) and the agreement. While in our opinion the better view is that 10 U.S.C. 2031(d) constitutes the sole authority for the employment of retired members as administrators and instructors in JROTC programs, subsection 10 U.S.C. 2031(d) does not specifically state that it is the sole authority for the employment of retired members in JROTC programs, and under 5 U.S.C. 5103 the CSC is vested with broad authority to determine which specific positions are subject to the classification provisions. In view thereof and since the appointments to the GS positions were made with the express approval of the CSC, we are not required to conclude that such appointments must be revoked retroactively, especially since the duties embraced under such appointments may have covered a broader range of responsibilities than those contemplated by 10 U.S.C. 2031(d).

Henceforth, however, any retired member employed primarily as an administrator or instructor in a JROTC program at a Government operated school should be paid only in accordance with 10 U.S.C. 2031(d) which prescribes a basis for payment that is wholly inconsistent with that provided by the classification provisions contained in Title 5, U.S. Code.

When a retired member is employed in accordance with 10 U.S.C. 2031 it has been held that he is not subject to the dual compensation provisions contained in 5 U.S.C. 5531 and 5532. *See* 48 Comp. Gen. 796 (1969). In that decision we stated:

> We understand that the purpose of the provisions quoted above [10 U.S.C. 2031 (d)] was to avoid the application of the dual compensation statutes and other restrictive statutes in existence at the time the legislation was being consid-

ered which might have affected the employment of retired members of the armed services by qualified secondary schools in the Junior Reserve Officers' Training Corps program. See our decision of October 28, 1963, to the then Secretary of the Army, 43 Comp. Gen. 421.

On the other hand, we do not believe that such exception is applicable where the employment of a retired member is not effected under the specific terms of 10 U.S.C. 2031(d) even though he may be performing a function similar to that contemplated under such section. Consequently, your second question as to whether Colonel Boyd's retired pay is required to be reduced as a result of his employment as Training Administrator, MCJROTC, Phoenix Indian High School, under a temporary appointment to the General Schedule, is answered in the affirmative.

Based on the information contained in the file, and since Colonel Boyd is subject to the restriction in 5 U.S.C. 5532(b), it would appear that he may have received an overpayment of retired pay as a result of his employment at the Phoenix Indian High School, beginning September 18, 1972. If that is the case, appropriate steps should be taken to establish the amount of that overpayment and to notify Colonel Boyd of his indebtedness. In this connection the provisions of 10 U.S.C. 2774, as added by the act of October 2, 1972, Public Law 92-453, 86 Stat. 758, authorize the waiver of certain claims of the United States. An indebtedness arising out of an overpayment of retired pay may be considered for waiver under these provisions. Therefore, should an indebtedness actually be established in Colonel Boyd's case, the erroneous payment appropriately may be considered for waiver.

As to the question whether the Phoenix Indian High School may be reimbursed under the provisions of 10 U.S.C. 2031(d) for one-half the difference between the members' retired or retainer pay and the salary received by them since September 18, 1972, reimbursement by the Secretary of the military department concerned under clause (1) depends on whether the members in question were entitled to receive payment under those provisions. Since we view the status of the two retired members as not coming within the scope of 10 U.S.C. 2031(d) after their appointments to GS positions, your first question is answered in the negative. In view of our response as to the inapplicability of 10 U.S.C. 2031(d)(1) in this case, your third question requires no answer.

[B-179184]

Contracts—Negotiation—Requests for Proposals—Proposal Deviations—Disqualification of Offeror

The disqualification of the low offeror who took exception to the "Technical Data—Withholding of Payment" clause (ASPR 7-104.9(h)), concerned with

the untimely delivery or deficiency of technical data, and the "Reserve Pending Execution of Release" clause contained in the request for proposals (RFP) is upheld since the offeror was adequately advised during negotiations of the consequences of failing to accept the terms of the RFP, and the fact that the amount withheld under the technical data clause may exceed the price of the data does not make the contracting officer's determination to include the clause arbitrary and capricious, and the use of the "Reserve Pending Execution of Release" clause is a matter within the discretion of the contracting agency. Furthermore, since the protest was untimely delivered it properly was regarded as filed after award.

To the General Dynamics Corporation, November 29, 1973:

We refer to your telefax message dated September 6, 1973, and subsequent correspondence, protesting against the award of a contract to AEL-EMTECH Corporation under request for proposals (RFP) No. N00019-73-R-0187 (RFP-0187), issued by the Naval Air Systems Command (NAVAIR), Washington, D.C.

Your basic contention is that the contracting officer arbitrarily and capriciously excluded your firm from consideration for award. Additionally, you allege that the procuring agency improperly made award to AEL-EMTECH after receipt of your protest.

The above-referenced solicitation was issued on June 27, 1973, for the supply of AN/ARR-75 radio receivers and related supplies and services, including technical data. Part III, Section L of the RFP provided that any resulting contract would contain the clause "Technical Data—Withholding of Payment (1972 APR)" which as set forth in Armed Services Procurement Regulation (ASPR) 7-104.9 (h) states:

(a) If "Technical Data" (as defined in the clause of this contract entitled "Rights in Technical Data"), or any part thereof, specified to be delivered under this contract, is not delivered within the time specified by this contract or is deficient upon delivery (including having restrictive markings not specifically authorized by this contract), the Contracting Officer may until such data is accepted by the Government, withhold payment to the Contractor of ten percent (10%) of the total contract price or amount unless a lesser withholding is specified in the Schedule. Payments shall not be withheld nor any action taken pursuant to this paragraph, when the Contractor's failure to make timely delivery or to deliver such data without deficiencies arises out of causes beyond the control and without the fault or negligence of the Contractor within the meaning of the clause hereof entitled "Default."

(b) After payments total ninety percent (90%) of the total contract price or amount and if all technical data specified to be delivered under this contract has not been accepted, the Contracting Officer may, withhold from further payment such sum as he considers appropriate, not exceeding ten percent (10%) of the total contract price or amount unless a lesser withholding limit is specified in the Schedule.

(c) The withholding of any amount or subsequent payment to the Contractor shall not be construed as a waiver of any rights accruing to the Government under this contract.

The solicitation also included the clause "Reserve Pending Execution of Release (1963 OCT)," which provided:

(a) After payment of eighty percent (80%) of the total contract price, further payments shall be withheld until a reserve of one percent (1%) of the total

contract price, but in no event more than twenty-five thousand dollars ($25,000), shall have been set aside such reserve to be paid to the Contractor at the time of final payment. The Contractor and each assignee under an assignment in effect at the time of final payment shall execute and deliver at the time and as a condition precedent to final payment, a release in form and substance satisfactory to and containing such exceptions as may be found appropriate by the Contracting Officer, discharging the Government, its officers, agents and employees of and from liabilities, obligations and claims arising under this contract. (1963 OCT) (NPD 7-150)

(b) The Contracting Officer may permit total or partial payment, prior to execution and delivery of the release, of the amount withheld pursuant to paragraph (a) above, upon finding that the final settlement of the contract is being delayed for a reason beyond the control of the Contractor. (1961 FEB) (NAVAIR 7-150)

Five firms responded to the solicitation, and on August 6 and 7, 1973, negotiations were conducted with the four offerors determined to be within the competitive range. General Dynamics' initial offer was premised upon a reduction from 10 to 5 percent of the amount withheld under the "Technical Data—Withholding of Payment" clause and upon the deletion of the "Reserve Pending Execution of Release" clause.

The contracting officer has provided our Office with the following account of his discussions with your firm, the accuracy of which you have not disputed:

During the discussions with GD [General Dynamics], I raised the issue that they had taken exception to two General Provisions in their covering letter to their response to the RFP, and advised them that these exceptions would not be agreed to or modified in any way as requested by GD. The two exceptions were the Technical Data Withholding of Payment Clause and the Reserve Pending Execution of Release Clause. GD asked for the rationale of including these two clauses. I explained that NAVAIR had found through experience that the best way to ensure that all the requirements in the contract had been fulfilled was to hold back money or to maintain the right to hold back money. GD felt that the Reserve Pending Execution of Release Clause was not appropriate for a Fixed Price Contract. I read the clause and advised them that it was only suitable for a fixed price contract. I further advised GD that through the discussions with other offerors, a number of ambiguities that required clarification were raised, some issues regarding technical data requirements were raised and other points raised to the extent that these clarifications, changes in the data requirements and other modifications were to be included in an amendment to the RFP which would accompany the BFO letter. It was further explained to GD that this was being done in order to be equally fair and consistent to all offerors and that what was being clarified or modified for one would be modified for all. GD was advised that no other offeror had requested changes in these two clauses and that we had no intent of changing them in any event. I further advised GD that if they persisted in taking exception to these clauses, that it would be definite consideration in the evaluation for award since the RFP states that the award would be based on price and other factors and not price alone. I also advised GD that both of the clauses related to a risk factor having monetary value and that if we would grant a modification to one offeror we would grant that same modification to all offerors and it was our intent not to change or modify either of these two clauses.

By letter dated August 14, 1973, the contracting officer furnished General Dynamics with changes to the solicitation, a list of deficiencies and desired clarifications peculiar to General Dynamics' proposal, and a request for submission of best and final offer by August 21, 1973.

Although the exceptions which General Dynamics had taken to the solicitation were not enumerated in the list of "deficiencies and clarifications," the contracting officer's letter stated: "Your submission shall clearly indicate exceptions, if any, to the solicitation. Exceptions may disqualify you from further consideration."

General Dynamics timely submitted its best and final offer, which included the following statement:

> The terms and conditions of the subject solicitation are acceptable with the following exceptions:
>
> Part III— General Provisions
>
> Section L—General Provisions
>
> ASPR7-104.9(h)—Technical Data—Withholding of Payment:
> In view of the discussions pertaining to this clause which were held during our meeting of 7 August 1973, it is requested that this clause be modified to provide for withholding of payment in an amount not to exceed 5% of the contract value.
> NPD/NAVAIR 7-150—Reserve Pending Execution of Release:
> It is again requested that this clause be deleted since it appears to be inappropriate for use under a fixed price contract.

An attempted withdrawal of these exceptions after the common cutoff date for best and final offers was rejected by the procuring activity.

Evaluation of the proposals disclosed that your price of $574,312.64 was the lowest received, and AEL-EMTECH's price of $583,323 was second low. The contracting officer determined that the above-discussed exceptions to the solicitation disqualified your firm from consideration for award. On September 7, 1973, the contract was awarded to AEL-EMTECH as the lowest qualified offeror.

You contend that you were not adequately forewarned that the exceptions which you took to the terms of the RFP would lead to disqualification; that the contracting officer acted arbitrarily and capriciously in requiring an excessive amount to be withheld under the "Technical Data—Withholding of Payment" clause; and that the "Reserve Pending Execution of Release" clause was inappropriate for a firm fixed-price solicitation.

You suggest that the contracting officer exhibited bad faith in disqualifying your firm from award without first explicitly advising you in writing, that the exceptions which you had taken would result in disqualification. In this connection, you emphasize that the contracting officer's letter of August 14, 1973, calling for best and final offers, did not specifically mention the exceptions which you had taken and contained only a general statement that "Exceptions may disqualify you from further consideration."

However, we believe the contracting officer's letter must be read in light of the negotiations which preceded it. We have been furnished

no reason to reject the contracting officer's statement, quoted above, that he advised your firm during negotiations that "these exceptions would not be agreed to or modified in any way" as you had requested; that your persistence in requiring the exceptions "would be a definite consideration in the evaluation for award;" and that if a modification were permitted, it would be extended to all offerors. Under these circumstances, we believe General Dynamics was adequately advised of the consequences which might flow from its continued insistence upon the two exceptions to the terms of the solicitation.

You further maintain that the contracting officer acted arbitrarily in requiring that the maximum permissible amount of 10 percent of the total contract price be withheld under the "Technical Data Withholding of Payment" clause. You state that the amount thus withheld is so much greater than the value of the data itself that it is unreasonably excessive.

In this connection, ASPR 9-504(a) provides:

> Timely delivery of data is particularly important to the operation and maintenance of equipment as well as competitive procurement of follow-on quantities of contract items and of items broken out from an assembly or equipment. The clause set forth in 7-104.9(h) is designed to assure timely delivery of data. The clause permits a withholding not exceeding ten percent (10%) of the total contract price or amount, but the Contracting Officer may specify a lesser amount in the Schedule if circumstances warrant. A case-by-case determination as to the amount to be withheld shall be made by the Contracting Officer after considering the estimated value of the data to the Government. * * *.

It is clear that the contracting officer regarded a withholding of 10 percent of the contract price to be necessary to assure the timely delivery of the technical data, and this action was within the discretion committed to him by ASPR 9-504(a). We do not believe that the possibility that the amount withheld pursuant to the "Technical Data Withholding of Payment" clause may exceed the price of the data renders the contracting officer's determination arbitrary and capricious, considering the importance of such data to the operation and maintenance of the equipment.

You next contend that the contracting officer erred in his insistence that the fixed-price contract resulting from RFP-0187 contain a "Reserve Pending Execution of Release" clause, quoted above. In this regard, Navy Procurement Directions (NPD) 32-402 states in pertinent part:

> (a) All fixed-price types of contracts which provide, in addition to payment of a fixed price for the articles and services covered thereby (whether stated as a single amount or as separate amounts), for (i) adjustment of the fixed price for labor or material escalation, (ii) separate reimbursement of premiums for and related cost of overtime or shift work, or (iii) indemnity by the Government against third-party liabilities of the contractor, and all cost-reimbursement contracts, shall provide that the contractor and any assignee shall, as a condition precedent to the final payment under the contract, execute a release of all claims

against the Government, its officers, agents and employees under or arising from the contract (see NPD7–150). Each of such contracts shall further provide for the withholding until final payment of such amount or amounts as in the opinion of the contracting officer will be adequate to obtain execution of the release to which the Government is entitled * * *.

* * * * * * *

(d) Nothing in this NPD precludes the inclusion in contracts other than those within (a) above, of an appropriate provision requiring a release as a condition precedent to final payment by the Government.

The inclusion of a "Reserve Pending Execution of Release" clause in RFP–0187 was therefore expressly permitted by NPD 32–402(d). Although you question the necessity for such a clause, we regard the propriety of including such a clause in a contract to be a matter within the discretion of the contracting agency. *See* 51 Comp. Gen. 609, 610 (1972).

Finally, you allege that the procuring activity improperly proceeded with an award to AEL–EMTECH on September 7, 1973, despite prior notice of your protest. The record shows that your initial telegram of protest was dispatched to GAO, with a copy to NAVAIR, on September 6, 1973. The telegram was received at the Naval Communications Station, Cheltenham, Maryland, at 7:04 PM EDT the same day. The message was then read by personnel in the commercial refile section at Cheltenham, who receive and readdress incoming messages to a wide variety of Washington-area Navy installations.

Your telegram did not specifically request handling on a "Priority" basis, and its contents did not alert the Cheltenham operators to the need for handling on other than "Action Routine" basis. Cheltenham therefore relayed the telegram, marked "Action Routine," to the Naval Telecommunications Center, Arlington, Virginia, where it was received on September 7 at 10:07 AM EDT.

At 1:37 PM EDT on Friday, September 7, the Naval Telecommunications Center placed the message in a basket for pickup by NAVAIR. However, the last message pickup by NAVAIR of "Action Routine" communications for that day had already been made at 1 PM EST. No further pickup of those messages was made until 6AM EDT on Monday, September 10, at which time your telegram was received by NAVAIR and was delivered to the contracting officer at approximately 3:15 EDT that afternoon.

Our Office received its copy of your telegram at 9:07 AM EDT on September 7, whereupon it was processed with other incoming communications. Although we telephonically advised NAVAIR early that

afternoon of the receipt of your protest, an award had already been made to AEL-EMTECH.

It therefore appears that NAVAIR made award to AEL-EMTECH prior to being notified of your protest, and that the protest has properly been regarded as one filed after award.

For the foregoing reasons, your protest is denied.

[B-179171]

Contracts—Negotiation—Evaluation Factors—Manning Requirements—Noncompliance

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

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

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

To Chemical Technology, Inc., November 30, 1973:

We refer to your letter of September 28, 1973, and prior correspondence, relative to the protest of the Checkers Division of Chemical Technology, Inc. (Checkers), against the award of a contract under request for proposals (RFP) N00189-73-R-0166, as amended, to Military Base Management of New Jersey, Inc. (MBM). The RFP, issued by the Naval Supply Center, Norfolk, Virginia, on April 2, 1973, sought offers to provide mess attendant services at the Naval Weapons Station, Yorktown, Virginia.

Section D1(a) of the RFP set forth the Government's estimate of the total number of man-hours required—127 hours for weekdays and 88 hours for weekends—for satisfactory performance, and provided as a part of the evaluation factors for award that:

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

Eleven offers were received under the RFP. After evaluating the respective manning charts, it was determined that meaningful negotiations could be conducted with all offerors. This conclusion was reached even though some offerors proposed manning levels outside the 5 percent acceptable deviation and had not, at that time, substantiated their lower figures.

In its best and final offer, Checkers offered 36,544 man-hours at a price of $103,019.28. Other prices were:

MBM	$106,204.16
Federal Food Service	106,650.00
Jet Services	107,352.00

In view of these prices, the procuring activity determined that the initial cost estimate of $80,000 submitted by the Food Service Officer at the Naval Weapons Station, Yorktown, was unrealistic. It sought and received additional funds, and the cost figure listed on the initial requisition was modified to read $115,548, rather than $80,000.

Checkers contends that it should have received the award since its manning level was very close to the acceptable range and that it was obvious that Checkers had budgeted enough money to adequately perform the services and was still the low offeror. Moreover, Checkers contends that MBM's price did not cover the man-hours which it had submitted.

Notwithstanding Checkers' low price, the contracting officer rejected its offer because its man-hour figure was outside the 5 percent acceptable man-hour deviation and because Checkers did not submit any substantiation which would have demonstrated that satisfactory performance could be accomplished at that level. Award was made to MBM on June 29, 1973.

Checkers also contends that this rejection of its competitive range offer constituted a determination of nonresponsibility without the benefit of a Small Business Administration Certificate of Competency (COC) review. While it is true that the determination to reject Checkers' offer was based in part on considerations usually going to questions of responsibility (51 Comp. Gen. 204 (1972); *id.* 308), we do not agree that in this negotiated procurement such rejection was, in essence, a determination of nonresponsibility. Rather, the failure of Checkers'

final offer to be considered for negotiation was due to its deficiencies in the area of compliance with the Government's expressed requirements. *Cf.* 46 Comp. Gen. 893 (1967).

In 52 Comp. Gen. 198, 208 (1972), our Office concurred in an agency's exclusion from the competitive range of an initially acceptable offer, where:

> * * * after the revised proposals were examined * * * serious misgivings arose concerning * * * [that offeror's] ability to perform the contract successfully. * * *

Under such circumstances, we stated:

> * * * Whether a proposal is initially determined to be within the competitive range or whether the proposal is initially rejected, the contracting agency should not be required to hold discussions with an offeror once it is determined that his proposal is outside the acceptable range. *See* B-174436, April 19, 1972, and B-173967, February 10, 1972, where we upheld administrative determinations to exclude firms initially determined to be within the competitive range from further award consideration after their revised proposals were found to be technically unacceptable and no longer within the competitive range.

Section D1(c) of the RFP states that:

> *Award* will be made to the responsible offeror whose proposal, meeting the criteria set forth in (a) [manning] and (b) [dollars/hours] above, offers the lowest evaluated price.

Checkers contends that its offer meets the requirement that the manning chart reflect a sufficient manning level to insure adequate performance of the contract (Checkers offered 87 per cent of the Government's estimate.) However, we believe that the language of section D1(a), quoted above, gives the contracting officer discretion to eliminate unsubstantiated sub-95 per cent offers from consideration at any time before award. *See* 52 Comp. Gen., *supra*, and 53 Comp. Gen. 198 (1973). Since we have not been presented, nor do we find, any evidence which would indicate that the present action constitutes an abuse of that discretion, we do not question the rejection of Checker's offer. Moreover, since the Government has set out seemingly elaborate procedures to assure that award will be made to an offeror who will guarantee an adequate level of performance at its offered price, it would seem inconsistent to require that an agency circumvent these procedures and accept an unsubstantiated low-hour offeror's proposal because of the offeror's mere assertions that it can perform adequately.

Checkers additionally contends that MBM's offer, with regard to the number of man-hours, is not supported by its price since the MBM dollar/hour ratio is alleged to be insufficient to cover the basic labor expenses as required by section D1(b)(2) of the RFP. The basic labor

expense, excluding applicable holiday and vacation benefits, we calculate vis-a-vis MBM's offer to be $2.67 per hour (basic wage—$2.33; Health and Welfare—$0.12; FICA—$0.14; unemployment—$0.06; Workmen's Compensation—$0.02). Vacation and holiday benefits which are usually calculated at about 5 per cent of the basic wage would add an additional $0.12 to the total basic labor expense which would then be $2.79 per hour. However, MBM's offer of 39,549.5 hours at a price of $106,204.16, which it indicated included holiday and vacation benefits, indicates a dollar/hour ratio of only $2.69 per hour.

In 51 Comp. Gen. 308, 311 (1971), in which we affirmed our decision at 51 Comp. Gen. 204, we stated that:

> * * * the requirement that offeror's manhours be consistent with offered prices connotes a test of reasonableness, rather than an exact requirement to quote a certain minimum price per manhour. Even if ABC's calculations are accepted, we cannot say that a 5 percent or a 10 percent discrepancy should automatically oust an offeror from consideration because its offer did not approximate the Government's estimated range. On the other hand, we have held that a 30 percent discrepancy was sufficient to justify the contracting officer's refusal to negotiate with the offeror there involved. B-173628, September 9, 1971. Since we do not think that manning charts can properly be used as an exact formula in the exercise of the discretionary authority given the contracting agencies in this area, unless there is a clear abuse of such authority we would not be justified in interposing any objection to the determinations of which offerors are properly considered to be within the competitive range.

However, this statement by our Office was made with reference to language in a prior solicitation which stated the following:

> * * * For the purpose of establishing a competitive range, evaluation of the offerors manning charts will be based on the following factors:
> 1. The cost of the number of manhours per year shown on the manning chart including wage rates; if applicable, fringe benefits (health and welfare, vacation, and holidays); and other employee-related expenses (for example, FICA), will be compared with the offeror's price to verify that offeror's manhours are consistent with offered price. * * *

Since the date of our 51 Comp. Gen. decisions, the language employed by the Navy in regard to procurements of this type has been substantially modified so as to read at section D1(b)(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 5.85%
> (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 Unem-

ployment Insurance Rate and Workman's Compensation Insurance Rate Applicable to His Company;" and

(C) Workman'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.

MBM's dollar/hour ratio ($2.69) covers its calculated basic labor expense less vacation and holiday benefits ($2.67). However, unless vacation and holiday benefits were figured at or less than .86 per cent of the minimum wage rate, MBM's dollar/hour ratio would not cover its total basic labor expense as required by the RFP. As noted above, it is customary to compute vacation and holiday benefits at approximately 5 per cent of the minimum wage. While the application of this 5 per cent figure is in no way mandatory in computing these expenses, we think some realistic figure should have been stated in the RFP to advise offerors of the factor that would be used to compute each offeror's basic labor expense. We have been advised that in this instance no labor expense computation has been made utilizing any figure for vacation and holiday benefits.

We believe that this procurement was defective for the reasons indicated above. However, we are unable to determine whether or not MBM's dollar/hour ratio really covered its total basic labor expense. Therefore, we cannot conclude that its basic labor expense would have exceeded its dollar/hour ratio if a percentage factor had been stated in the RFP and had been applied to the MBM offer. Parenthetically, we observe that all offerors were treated alike with respect to the failure to apply any figure. Further, we note that the purpose of the evaluation criteria is to prevent unrealistically inflated manning charts and an award at a price so low that satisfactory performance would be jeopardized. In this connection, although the criteria were not strictly applied, it would appear that the purpose of the criteria has been met in that MBM apparently is performing the contract satisfactorily at its offered price.

For the reasons noted above, Checkers' protest is denied.

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