Decisions of The Comptroller General of the United States

VOLUME 53 Pages 195 to 306

OCTOBER 1973

UNITED STATES
GENERAL ACCOUNTING OFFICE

PCN 45300105100

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1973

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Price 95 cents (single copy) ; subscription price $10.80 a year ; $2.70 additional for foreign mailing.

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Cite Decisions as 53 Comp. Gen.—.

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[B-175732]

Telephones—Army Barracks—Public and Private Use

The prohibition in 31 U.S.C. 679 that appropriated monies shall not be expended for telephone services in a private residence or apartment, except for long-distance calls on public business, reflects a general policy against furnishing telephone service at Government expense for the personal benefit of employees and is not intended to apply to a Government-owned facility that is not set aside for exclusive personal use and where sufficient official use for telephone exists, such as in Army barracks. Therefore, local-service telephones may be installed and operated at Government expense in Army barracks, notwithstanding the availability of the telephones for personal use without the means of apportioning costs between official and personal calls since telephone availability will improve soldier morale, and the operation and maintenance appropriation, Army, is available for the welfare and recreation of military personnel.

To the Secretary of the Army, October 1, 1973:

By letter dated January 26, 1973, the then Acting Secretary of the Army requested our decision on a legal question arising with respect to a proposal to install and operate local-service telephones in Army barracks at Government expense. The Acting Secretary's letter reads in part:

> During the past year, the Army has conducted a test at Fort Carson on the value to the all volunteer Army objectives of providing free telephone service in the barracks for both official and personal use. The test results indicate that implementation of such a service would significantly enhance the objectives of an all volunteer force.
>
> Accordingly, the Army is considering the provision of non-pay, on-post and local civilian community telephone service in barracks for both official purposes and the convenience of troops. The service proposed would restrict the placing of long distance toll calls from the barracks and restrict the receipt of incoming collect toll calls, but would permit completion of prepaid incoming toll calls.
>
> Telephones in the barracks are primarily intended for communications incident to service. They would provide communications between the company orderly room or battalion headquarters and the soldier for the conduct of business; direct and immediate access from the barracks to emergency base facilities, such as medical, fire and military police; direct and immediate means for a family to notify a soldier of family tragedies, such as death, serious illness or accident; and a direct and immediate pipeline between the barracks and HELP Centers (operated on a 24-hour per day basis) for consultation and assistance in matters relating to major personal problems, such as drug or alcohol abuse. While all of the above uses are considered "official" in the normal sense of the word, these telephones would not be restricted to "official only" calls. Such a restriction does not appear realistic in light of the automation of local telephone service by the telephone companies and general communication practices in government and industry for controlling local telephone calls.
>
> Installation of such phones would provide the second, incidental, advantage for our soldiers. Provision of such service would materially enhance the Modern Volunteer Army concept by improving the morale, and efficiency of the modern-day soldier, and it would therefore enhance the ability of the Army to attract the type of personnel it needs.

The legal question posed by the Acting Secretary is whether 31 U.S. Code 679 applies to prohibit the proposal described above. This section, derived from section 7 of the Legislative, Executive and Judi-

cial Appropriation Act, 1912, approved August 23, 1912, Ch. 350, 37 Stat. 360, 414, as amended, provides in pertinent part:

> Except as otherwise provided by law, no money appropriated by any Act shall be expended for telephone service installed in any private residence or private apartment or for tolls or other charges for telephone service from private residences or private apartments, except for long-distance telephone tolls required strictly for the public business, and so shown by vouchers duly sworn to and approved by the head of the department, division, bureau, or office in which the official using such telephone or incurring the expense of such tolls shall be employed * * *.

The foregoing provision of law has been applied strictly, as required by its terms, in numerous decisions of our Office. *See*, e.g., 35 Comp. Gen. 28, 30 (1955), wherein we stated:

> The language of this section is plain and comprehensive and constitutes a mandatory prohibition against the payment from appropriated funds of any part of the expense of furnishing telephone service to a Government officer or employee in a private residence or apartment irrespective of the desirability or necessity of such service from an official standpoint, and has so been held in a long line of decisions. * * *. [Citations omitted.]

If such provision applies by its terms in the instant matter, the prohibition must be given effect irrespective of any considerations of official desirability or necessity. Accordingly, the initial question is whether an Army barracks constitutes a "private residence or private apartment" within the meaning of the statutory provision.

Resolution of the foregoing question requires reference to several decisions of the Comptroller of the Treasury shortly after original enactment of this provision. The most relevant decision is 19 Comp. Dec. 198 (1912), which addressed the question whether Government-owned buildings used as residences could be considered private residences for purposes of this provision of law. The decision held that they could, reasoning as follows:

> * * * the fact that said buildings are public property does not make them any less private residences when they are turned over for the private personal use of Government officials, and the prohibition of the act quoted is against expenditures for telephone service installed in a private residence or apartment. In my view, a residence or apartment is "private" within the meaning of the act in question when it is set apart for the exclusive personal use of any one person, or of such person and his family. *Id.* at 199.

Most significant for present purposes is that the language "private residence or private apartment" is defined as meaning a facility, whether publicly or privately owned, set apart for the exclusive personal use of one person or family. This definition comports with common understanding, and also the general legal context. Thus the Acting Secretary's letter points out that the similar term "private dwelling" has been defined as a place or home in which a person of family lives in an individual or private state. 33A Words and Phrases 412. Clearly an Army barracks does not qualify as a private residence or apartment under this test. As the Acting Secretary points out:

* * * A person living in a private residence or apartment lives in an individual or private state since he may choose his own quarters, determine who else may live with him, and most importantly, control who will or will not be permitted to enter the premises. Obviously, an enlisted man living in an Army barracks has none of these prerogatives and certainly cannot be considered as living in an individual or private state. * * *.

Accordingly, we do not believe that an Army barracks need be considered within the literal application of 31 U.S. Code 679 and thus subject to the mandatory prohibition set forth therein. However, consideration must also be given to the general purposes and objectives underlying this statutory provision. Relevant in this regard is an unpublished decision of the Comptroller of the Treasury dated November 12, 1912, 63 Manuscript Decisions 575. The decision held that 31 U.S.C. 679 did not prohibit installation of telephones in Government buildings provided to forest rangers as residences but which also served for official purposes. In support of this conclusion, it was stated:

Section 7 of the Legislative, Executive and Judicial Appropriation Act, set out in your letter, was not passed as I understand for the purpose of requiring government employees to bear the expense of telephone messages on public business, but on the contrary, its plain intent was that the Government should not be chargeable with the cost of private and personal messages of such employees. The provision in question was passed to secure the latter purpose and grew out of the fact that a large number of public officers here in the District of Columbia had installed in their private residences telephones at Government expense under the guise of their use for public purposes, when in truth the Government had provided them with sufficient telephones in their public offices to transact all the public business.

Under such circumstances as exist here at the seat of Government the clause in question needs no interpretation, but where a forest ranger must necessarily use a telephone on official business and use it from his station in the forest, which happens also to be the place where he lives, I think it would be a perversion of the intent of the law to hold that those in charge of this service are without authority to install a telephone for such public use in such a building because of the said provision of law. If, however, the official desires to use said instrument for his own personal convenience at any time, the service should be charged for at so much per message, which would insure that the Government would not be paying for the private telephoning of such individual.

It is not intended to hold herein that telephones may be installed and operated at Government expense in all residences which an official happens also to use as an office or official headquarters. The intent of Congress, as above set out, must be kept in mind in all cases, and no opportunity made for an official, under the guise of public business, to have a telephone for his private use paid out of public funds, but on the contrary this rule should not be so rigid as to compel an officer or employee to pay for public telephoning from his private purse.

Several additional decisions have also permitted the installation of telephones in Government-owned facilities used both as residences and for official purposes. *See* 4 Comp. Gen. 891 (1925); 19 Comp. Dec. 350 (1912); 19 *id.* 212 (1912).

Under the approach adopted by the foregoing decisions, 31 U.S.C. 679 reflects a general policy against the provision at Government expense of telephone service for the personal benefit of employees. As applied to privately owned residences or Government-owned facilities set apart for the exclusive personal use of employees, the degree of per-

sonal use of telephones as opposed to likely official need is considered so great that a mandatory prohibition was imposed. On the other hand, where a Government-owned residence facility cannot be considered as set aside for exclusive personal use, some flexibility is afforded so that the policy underlying the statute need not be applied where sufficient official use for telephones exists.

The context presented by the instant submission falls within the latter category. As the Acting Secretary observes, "the soldier residing in the barracks has no separate office; his office, in effect, is the barracks." It is stated that such telephones are intended primarily for communications incident to service, and a number of potential official uses are set forth. It is further stated that restricting such telephones to official use would be unrealistic. Finally, the submission indicates that provision of barracks telephones would serve an incidental official benefit by materially enhancing the Modern Volunteer Army concept by improving the morale and efficiency of the modern-day soldier and thus enhance the Army's efforts to attract personnel.

We accede to the Acting Secretary's determination that barracks telephones would serve an official purpose in terms of direct official use. The fact that such telephones would also be available for personal use does not diminish that determination, even though there would apparently be no basis for apportioning costs between official and personal calls. Moreover, the operation and maintenance appropriation, Army, is available for the welfare and recreation of military personnel.

In view of the foregoing, it is our opinion that 31 U.S.C. 679 does not prohibit the use of appropriations otherwise available to install and operate telephones in Army barracks, as distinguished from private residences or private apartments, under the circumstances set forth in the Acting Secretary's letter.

[B-178707]

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

Under a request for proposals for the performance of mess attendant services that contained a Government estimate of required man-hours and that stated a 5 percent deviation below the estimate may result in rejection of an offer unless satisfactory performance could be substantiated, the acceptance of a proposal that was 15 percent below the Government's estimate would not constitute a change in specifications without notice to offerors since the solicitation indicated the use of lesser man-hours than required which could reduce total cost would be desirable; five of eight offerors were without the 5-percent range, thus evidencing an equal opportunity to deviate; and the feasibility of accepting the 15-percent deviation is supported by the fact the deviation was based on a study of the degree to which the mess facilities would be used and the fact the man-hours proposed exceeded the man-hours utilized by the incumbent contractor.

To Bryan, Jones, Johnson, Hunter & Greene, October 2, 1973:

We are in receipt of your letter dated May 21, 1973, and subsequent correspondence, protesting on behalf of Dyneteria, Inc., the award of a contract under request for proposals (RFP) N00604–73–R–0230 to Integrity Management International, Inc. (Integrity).

The RFP requested offers to provide labor and material to perform mess attendant services at various Navy and Marine Corps stations on the Island of Oahu, Hawaii. The RFP contained a Government estimate of the number of man-hours required and other data to aid offerors in preparing their proposals. The Government estimate for the operation was 265,172 man-hours.

Section D of the RFP stated 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.

The eight offers received were:

	Man-Hours Offered	Difference from Government's estimated Man-Hours (265,172)	Price
Quality Maintenance Company, Inc.	213, 704	−19%	$ 740, 943. 00
Integrity Management. International, Inc.	224, 927	−15%	660, 216. 97
Jet Services	251, 337	−5+%	748, 980. 00
Dyneteria, Inc.	251, 772	−5+%	722, 803. 51
Space Services of Georgia	251, 898	−5+%	818, 589. 72
Contract Management, Inc.	253, 445	−4+%	869, 174. 00
M C & E Services and Support Company, Inc.	264, 751	0+%	777, 792. 65
Broken Lance Enterprises, Inc.	265, 468	0+%	1, 136, 365. 98

Integrity, the low offeror, justified its offered man-hours (a 15-percent deviation from the Government estimate) on the basis that (1) it had spent considerable time studying the mess operation and that

it had submitted a time and motion study; (2) it was offering more hours than the current contractor used in adequately performing the past year's contract; and (3) no substantive information was presented to refute that performance of these services could be accomplished with manning below the Government's estimate.

Integrity's approach in justifying its manning chart was to break down the Government estimate into days of the week and offer less manning than estimated on those particular days when fewer troops would utilize the mess facilities, i.e., Fridays and paydays.

It is contended that all offerors were not treated equally in that not all offerors were allowed to negotiate on the same terms and conditions as Integrity and that the acceptance of Integrity's offer which was 15 percent below the Government's estimate constituted a change in the specification without notice to the other offerors. It is further contended that Integrity could not justify the manning deviation from the Government range with specific documentation since only an incumbent contractor would be in such a knowledgeable position.

It is clear from the language of the solicitation that any proposal which could lessen the number of man-hours required and thus reduce the total cost was desirable. However, should any such proposal have exhibited low manning levels (that is, below 5 percent of the Government's estimate), the Government then required that the offeror substantiate its claim that the job could be accomplished at the number of hours it had offered. This unambiguous provision of the solicitation allowed all participants the same opportunity to submit offers deviating from the Government estimate of man-hours, notwithstanding any contention that the procuring activity would not consider such a proposal. Indeed, five of the eight offerors were without the 5-percent range.

While it may be true that an incumbent contractor having first-hand knowledge of the facilities may be able to justify a substantially lesser number of man-hours than that estimated, Integrity was not the incumbent. Furthermore if, as it is contended, only an incumbent could sufficiently justify a lesser number of man-hours, question could be raised as to the restrictive character of the solicitation. In any event, we feel that the procurement agency was in a unique position to examine the feasibility of Integrity's manning chart.

Integrity's justification for deviating from the 5-percent range was based on the degree to which the mess facilities would not be patronized by the troops on certain days and thus would require fewer man-hours to staff. Integrity, in its justification letter of April 12, 1973, states that:

> * * * [W]e are presenting only "the estimated number of personnel proposed in each space each half hour of a *representative* weekday and of a *representative*

weekend day/Holiday" on the manning charts which really doesn't allow us to present the complete picture. * * * Certainly, as indicated, we do intend to provide more hours on some days, closely approximating the Food Service Officer's estimates, but on other days we expect to use the number of hours reflected on our manning charts and lower.

We note that Integrity's offer was 40,245 hours less than the Government's estimate, but still exceeded the manning of the incumbent contractor. This fact, while seemingly questioning the Government's estimate, is supportive of an offer of substantially lesser man-hours, and therefore could properly have been taken as justification for Integrity's offered manning levels.

It is contended that your client, in computing its proposal, took into account an announced personnel increase in Hawaii to be accomplished by June 1974, while Integrity's offer most probably did not. As we noted, in its offer, Integrity exceeded the incumbent's manning level and furthermore justified its offered man-hours to the contracting officer's satisfaction. Sufficient evidence has not been presented which would indicate that the contracting officer's determination was unreasonable.

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

[B–177986]

Contracts—Negotiation—Competition—Discussion With All Offerors Requirement—Cost-Reimbursement Contracts

The administrative view that there is no requirement for competitive discussion under FPR 1–3.805–1(a) (5) when a cost-reimbursement contract is contemplated means that competitive discussions would not be required even when proposed costs of the most technically acceptable offeror were unreasonable and unrealistic, and the belief that discussions need not be held in any circumstances when a cost-type award is involved conflicts with the requirement in the section that discussions be held prior to award where there is any uncertainty as to the pricing or technical aspects of a proposal. The fact that a cost-type award need not necessarily be made at the lowest estimated cost does not nullify the general requirement for discussion prior to award of a negotiated contract as the requirement for discussions with competitive offerors for cost-type awards is mandatory unless one of the enumerated exceptions to the requirement is involved.

To the Secretary of Labor, October 3, 1973:

Enclosed is a copy of our decision of today denying the protest of Systems Technology Corporation under request for proposals MA/OPER 7301. This protest was the subject of reports dated February 28 and March 30, 1973, from the Director, Office of Policy and Evaluation, and a report dated July 30, 1973, from the Assistant Secretary for Administration and Management, Manpower Administration.

Although we have denied the protest, since the award on an initial proposal basis was justified under Federal Procurement Regulations

(FPR) 1–3.805–1(a)(5), we must take issue with the view informally advanced to our Office by representatives of the procuring office that there is no requirement for competitive discussions under FPR 1–3.805–1(a) when a cost-reimbursement contract is contemplated.

Pertinent excerpts from the FPR are set out below.

> The procedures set forth in this § 1–3.805–1 are generally applicable to negotiated procurement. However, they are not applicable where their use would be inappropriate, as may be the case, for example, when procuring research and development or special services (such as architect-engineer services) or when cost-reimbursement type contracting is anticipated (*see* § 1–3.805–2). While the lowest price or lowest cost to the Government is properly the deciding factor in source selection in many instances, award of a contract properly may be influenced by the proposal which promises the greatest value to the Government in terms of possible performance, ultimate producibility, growth potential, and other factors.
>
> (a) After receipt of initial proposals, written or oral discussions shall be conducted with all responsible offerors who submitted proposals within a competitive range, price and other factors considered, except that this requirement need not necessarily be applied to:
>
> * * * * * * *
>
> (5) Procurements in which it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product or service that acceptance of the most favorable initial proposal without discussion would result in a fair and reasonable price: *Provided,* That the request for proposals contains a notice to all offerors of the possibility that award may be made without discussion of proposals received and, hence, that proposals should be submitted initially on the most favorable terms, from a price and technical standpoint, which the offeror can submit to the Government. In any case where there is uncertainty as to the pricing or technical aspect of any proposals, the contracting officer shall not make award without further exploration and discussion prior to award. * * *
>
> * * * * * * *
>
> (c) Except where cost-reimbursement type contracts are to be used (see § 1–3.805–2), a request for proposals may provide that after receipt of initial technical proposals, * * * award shall be made to that offeror of an acceptable proposal who is the low responsible offeror.

We think the above administrative view conflicts with the requirement in FPR 1–3.805–1(a)(5) that discussions be held prior to award where there is any uncertainty as to pricing or technical aspects of any proposal. Further, acceptance of the administrative view would mean that competitive discussions would not be required even when proposed costs of the most technically acecptable offeror were unreasonable or unrealistic.

In our view, FPR 1–3.805–1 should not be read to produce these absurd results. We do not read that paragraph to mean that discussions need not be held in any circumstance when a cost-type award is involved, as has been suggested. Rather, we believe that the paragraph, read as a whole, merely cautions that a cost-type award need not necessarily be made at the lowest estimated cost, but does not nullify the general requirement for discussions prior to award of a negotiated procurement. By contrast, FPR 1–3.805–1(c) provides that requests for proposals involving fixed-price awards may directly provide for award to the "low, responsible offeror."

In short, we believe the requirement for discussions with competitive offerors for cost-type awards is mandatory except when any one of the five exceptions to the requirement for discussions may properly be invoked. *See* FPR 1-3.805-1(a)(1)(5).

We therefore recommend that action be taken to ensure that the requirement for competitive discussions, except in the enumerated circumstances, is observed in procurements for cost-type awards. Please advise us of the action taken in response to our recommendation.

[B-172930]

Foreign Differentials and Overseas Allowances—Tropical Differentials—Basis for Payment

The exceptions in 35 CFR 253.135 to the payment of a tropical differential to more than one spouse if both are employed by the Federal Government; to the payment of the differential where the job of the spouse employed outside of the Federal Government reasonably is determinative of the family's location; and to the payment of the differential to the employee whose spouse is a member of the U.S. military forces, are equally applicable to male and female employees and, therefore, the prohibitions are not susceptible to the allegation of sex discrimination that violates legislation and the governing regulations made effective January 10, 1971, to eliminate sex discrimination in employment because of marital status. In the case of claims submitted by Panama Canal Zone Government female employees, the differential is payable only if the positions occupied are determinative of the family location, and future claims in view of varying factual circumstances should be judged individually.

To the Governor of the Canal Zone, October 4, 1973:

Reference is made to your letter of July 12, 1973, requesting a decision from our Office concerning the payment of tropical differential to certain female employees of the Panama Canal Zone Government.

You state that the United States citizen employees of the Canal Zone Government generally have permanent status, as distinguished from a limited tour of duty, and may remain in the Canal Zone during all or most of their working lives. As a result, their families and those of United States military personnel in the Canal Zone form a pool of United States citizens from which appointments to the positions in the Canal Zone may be made without the need of recruitment from the United States. Obviously the dependent who reaches majority, is employed, and establishes his or her own household in the Canal Zone may occupy a job that is the reason for the family in the area, because persons who are the immigration responsibility of the United States can remain there only so long as they are employed by the Government.

You submit the following list of married female employees of the Canal Zone Government, all of whom are United States citizens,

with a resume of their employment history which you state is representative of the types of claims received in your office for payment of tropical differential:

Name	Married to
(1) Arboleda, Renata M_____	Panamanian sculptor and official in Panama's ministry of education.
(2) Dymond, Ray R_____	U.S. citizen employee of Ford Motor Co. based in Panama.
(3) Jurado, Sue M_____	Panamanian who is self-employed manufacturers' representative.
(4) Kwai Ben, Beatrice_____	Panamanian employed by private company in Panama.
(5) Makibbin, Shirley S_____	U.S. citizen who is self-employed in Panama.
(6) Zeimetz, Margaret_____	U.S. citizen who is owner and general manager of a steamship agency operating in the Canal Zone and Panama.

The Arboleda Claim

Dr. Arboleda is employed by the Canal Zone Government as director of its Mental Health Center. Her pay is fixed administratively at a grade equivalent to GS–15. Pursuant to our decision B–175954, dated September 26, 1972, Dr. Arboleda was paid the tropical differential for a period prior to January 10, 1971, which she had been considered ineligible to receive under the terms of section 253.135 of title 35 of the Code of Federal Regulations (CFR) as the regulation then read. Dr. Arboleda was recruited by the Canal Zone Government for work in the Canal Zone when she was residing in the United States at which time she was separated from her husband. She came to the Canal Zone from the United States in 1965 and was divorced in November of that year. In January 1966 she married a Panamanian citizen residing in the Republic of Panama adjacent to the Canal Zone. Her husband is employed by the ministry of education of the Government of Panama as director of an arts and culture center. He is also a well-known sculptor and is understood to have been commissioned from time to time to execute important public monuments. Dr. Arboleda brought to the Canal Zone with her a child by her prior marriage and she now resides with her family in Canal Zone quarters assigned to her by the agency on the basis of her position as director of the Mental Health Center.

The Dymond Claim

Mrs. Ray R. Dymond is employed by the agency's police division as a youth officer at a grade equivalent to GS–7. She came to Panama in September 1971 with her husband, Mr. W. J. Anthony Dymond, who is a United States citizen employed by the Ford Motor Company.

Mrs. Dymond was hired locally by the Canal Zone Government in November 1971. She contends that her husband has only temporary immigration status and has been unable to obtain permanent residence in the Republic of Panama. She states that his job requires him to spend a substantial portion of his time traveling throughout Latin America and that he continues to work from a base in Panama primarily because of her employment in the Canal Zone.

The Jurado Claim

Mrs. Sue M. Jurado is employed as an elementary teacher in the division of schools. She is paid at a grade equivalent to class 15–C on the teachers' pay schedule for the District of Columbia. She was recruited from the continental United States and commenced work in the Canal Zone in September 1960. On March 25, 1961, she married Rosendo Jurado, a Panamanian citizen. Mrs. Jurado resides with her husband in Panama City, Republic of Panama, where he is self-employed as a manufacturer's representative.

The Kwai Ben Claim

Mrs. Beatrice Kwai Ben is employed in the health bureau as a personnel assistant at a grade equivalent to GS–9. She resides in the Republic of Panama with her husband, Oliver Kwai Ben, a Panamanian citizen employed by Framorco, Inc., a private company. Mrs. Kwai Ben was born in the Republic of Panama and at the time of her marriage in 1958 she was employed by the American Embassy in Panama City. Her employment by the Embassy terminated in November 1960 and in January 1961 she was employed in the Canal Zone by the Panama Canal Company. Her transfer to the Canal Zone Government in January 1967 was accomplished with no break in service.

The Makibbin Claim

Mrs. Shirley S. Makibbin is employed as a supervisor of elementary schools in the division of schools. She is compensated at a grade equivalent to class 8–C on the teachers' pay schedule for the District of Columbia. Mrs. Makibbin resides in Panama where her husband, George D. Makibbin, a United States citizen, is self-employed. Both Mrs. Makibbin and her husband were born in the Canal Zone and she has no legal residence in the United States. At the time of her marriage in June 1950 she was employed by the Canal Zone Government. In December 1956 she resigned in order to accompany her husband to Honduras where he had been transferred by his em-

ployer. She returned to Panama in August 1960 and was reemployed by the schools division of the Canal Zone on September 7, 1960. It is understood that her husband was then unemployed due to poor health. She has been continuously employed since 1960 and was promoted to her present position on August 4, 1969.

The Zeimetz Claim

Mrs. Margaret Zeimetz is employed as a secretary in the civil affairs bureau at a grade equivalent to GS–6. She was born in the Republic of Panama and has been continuously employed in the Canal Zone by the United States Government since 1945. In 1948 she married Frank X. Zeimetz, a United States citizen. He is presently owner and general manager of a private steamship agency that functions in both the Canal Zone and the Republic of Panama.

It is stated that the claim of Renata Arboleda was forwarded to our Office by the claimant and bears Claim No. Z–2475150. You state you have not submitted an administrative report to our Office and request that it be adjudicated on the basis of your submission, together with the five other representative cases. Of the five additional cases, settlements were issued by our Office on December 1, 1971, and September 25, 1972, in the cases of Sue M. Jurado and Shirley S. Makibbin. These settlements were for tropical differential for the period prior to January 10, 1971, and prior to the amendment to paragraph (b) of section 253.135, title 35 of the Code of Federal Regulations, pertaining to the payment of tropical differential in the Canal Zone.

Your doubt in the matter arises from the contention being made by some claimants that the provisions of section 253.135 of 35 CFR are in violation of section 3 of Public Law 92–187, 85 Stat. 644, 5 U.S.C. 7152, or of section 717 of the Equal Employment Opportunity Act of 1972, Public Law 92–261, 86 Stat. 111, 42 U.S.C. 2000e–16.

Section 3 of Public Law 92–187 provides as follows:

> SEC. 3. Section 7152 of title 5, United States Code, relating to the prohibition on discrimination in employment because of marital status, is amended—
> (1) by inserting "(a)" immediately before "The President"; and
> (2) by adding at the end thereof the following new subsections:
> (b) Regulations prescribed under any provision of this title, or under any other provision of law, granting benefits to employees, shall provide the same benefits for a married female employee and her spouse and children as are provided for a married male employee and his spouse and children.
> (c) Notwithstanding any other provision of law, any provision of law providing a benefit to a male Federal employee or to his spouse or family shall be deemed to provide the same benefit to a female Federal employee or to her spouse or family.

Regarding the intent and effect of the above section, House Report No. 92–415, 92d Cong., 1st sess., states the following:

> Section 3 of the bill amends section 7152 of title 5, United States Code, by adding a new subsection (b) thereto. The new subsection (b) requires that

regulations issued under any provision of law granting benefits to employees (as defined in section 2105 of title 5) shall provide the same benefits for married female employees as are provided for married male employees. The intent of this provision is to prohibit discrimination because of sex in regulations which govern the granting of various benefits to employees. All persons who are employed under identical circumstances should be entitled to the same employee benefits.

The Committee understands that certain regulations (particularly ones issued by the Department of State and the Department of Defense) governing payment of various allowances and differentials which are viewed primarily as recruitment incentives do not authorize the payment of such allowances and differentials to a married male or female employee whose presence in a foreign area is primarily attributable to a desire to be with his or her spouse rather than to his or her Federal employment. The Committee does not intend to alter such practice and this provision should not be construed as requiring a change in the existing practice.

* * * * * * *

* * * The Committee believes that no additional cost to the Government will result from the enactment of section 3 of the bill, since the committee is advised that current regulations granting employee benefits do not distinguish between female and male employees.

Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S. Code 2000e *et seq.*, was amended by Public Law 92–261, approved March 24, 1972, by adding section 717. Subsection 717(a) provides as follows:

SEC. 717. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

This subsection provides that all personnel actions affecting employees or applicants for employment in the competitive service of the United States or in positions of the District of Columbia Government covered by the Civil Service Retirement Act shall be made free from discrimination based on race, color, religion, sex, or national origin.

Regarding the denial of the tropical differential to certain married women, 35 CFR 253.135 provides in pertinent part as follows:

(b) The tropical differential shall be paid to employees who are U.S. citizens except as provided in the following subparagraphs:

(1) When a U.S. citizen employee is married to another U.S. citizen employee, the differential may be paid to one spouse only.

(2) When a U.S. citizen employee is married to a person not employed by a department such employee is eligible to receive the differential only if such employee is the member of the family whose job may reasonably be deemed to be the job which determines the location of the family in the area. The spouse of a person serving in the U.S. military forces in the area shall not be deemed to be a person whose job determines such location.

The first subsection cited above does not appear to violate the intent of the statutes in question since it merely limits the allowance to one spouse only and does not distinguish between female and male employees. The second provision denies the allowance to a married woman only when her job is not the one determining the presence of the family in the Canal Zone. This is in accord with the legislative intent as expressed in the report cited above. The regulations, as amended on January 10, 1971, are equally applicable to males as well as females and from that date would not appear to be susceptible to any allegation of discrimination because of sex.

Dr. Arboleda came to the Canal Zone with her daughter in 1965, for the sole reason of employment and was assigned housing in the Canal Zone because of her employment. Her husband who had spent the majority of his adult life in Europe had returned to Panama in 1962 because of the illness of his father. At the time she met her husband-to-be he was on the point of leaving for Mexico as Panama proved financially unrewarding for an artist. Dr. Arboleda states that her husband stays in Panama because of her employment since her annual salary amounts to four times the annual income received by her husband. Under these circumstances we find that Dr. Arboleda's job in the Canal Zone is the one which determines the location of her family in that area and she is entitled to tropical differential from January 10, 1971. As noted above you have not submitted a report to our Transportation and Claims Division. Accordingly, we have no financial data upon which to issue a settlement. In order to expedite settlement we hereby authorize your agency to compute the tropical differential due under this decision and pay Dr. Arboleda the sum found due.

In Mrs. Dymond's case the record indicates that she accompanied her husband to Panama solely because of his employment with the Ford Motor Company and she subsequently was hired locally. Therefore, it cannot be said that it is her job which determines the location of the family in the Canal Zone area. In this regard there is a rebuttable presumption that the job of a locally hired employee is not the determinative factor in the location of a family. Accordingly, on the facts presented, her claim for tropical differential is for disallowance.

Mrs. Jurado was recruited in the U.S. and after arrival in Panama and while still employed she married a Panamanian citizen who is self-employed in Panama City. On the basis of these facts alone it is not clear whose job is determinative of the location of the family. However, if it be true as you indicate that the claimant's job produces a significantly smaller percentage of total family income we see no basis for questioning your determination on the present record.

In none of the remaining cases was the claimant recruited for duty in the United States and no facts are set forth sufficient to support a conclusion that their jobs were the primary reason for their presence in the Canal Zone. Thus for reasons similar to those expressed above in the Dymond case, we are of the opinion that on the facts submitted the jobs of Mrs. Kwai Ben, Mrs. Makibbin, and Mrs. Zeimetz are not the ones presently determining their presence in the Canal Zone and they are not eligible to receive tropical differential.

As to providing guidelines that may be utilized generally in determining the right to tropical differential, we must point out that each case will have to be determined on its own merits in view of varying factual circumstances therein.

[B-178624]

Contracts—Specifications—Qualified Offerors List

Although the protest against the award of a contract under a request for proposals issued by the National Highway Traffic Safety Administration will not be considered as it was untimely filed pursuant to section 20.2 of the GAO Interim Bid Protest Procedures and Standards, exception is taken to the establishment and operation of a Qualified Offerors List (QOL) by the Administration to curtail the excessive production of solicitation packages, but which in fact is a presolicitation procedure for determining a prospective bidder's or offeror's responsibility, and as the procedure unduly restricts competition it should be eliminated. Furthermore the Federal Procurement Regulations, relied upon as authority to establish the QOL, merely permit the establishment of a mailing list to assure an adequate source of supply and to spell out the necessary procedures for a reasonable restriction on the number of solicitations available.

To the Secretary of Transportation, October 5, 1973:

Enclosed is a copy of our decision of today to the counsel for AMF, Inc., advising that the protest against the award of a contract under request for proposals NHTSA-3-A862, issued by the National Highway Traffic Safety Administration (NHTSA), is untimely under section 20.2 (4 CFR) of our Interim Bid Protest Procedures and Standards and will not be considered.

However, during the course of our development of information on the matter, it came to our attention that the solicitation procedures employed by NHTSA do not comport with applicable statutes and regulations.

At our request, by letter dated August 2, 1973, NHTSA forwarded all relevant documents concerning the establishment and operation of its Qualified Offerors List (QOL). This information was contained in Policy Memo No. 20, dated March 27, 1972, from the Director, Office of Contracts and Procurement:

A Qualified Offerors List, identified with the CONCORD Coding Structure, has been developed. It presently consists of Contractors which received awards during

FY '71 and '72, together with FY '71 RFP offerors whose proposals were evaluated as being technically acceptable.
In order to preserve the integrity of the List, all new firms seeking inclusion must be reviewed to determine if qualified.
All SF 129 "Bidder's Mailing List Applications" together with capability descriptions received from firms interested in being included in the NHTSA Qualified Bidders List will be directed to Group C for appropriate review program activities. Only firms deemed qualified after evaluation will be included in the list. Suitable responses will be prepared and forwarded to these firms by Group C, after a determination of qualification has been completed.

At a conference held at our Office on August 1, 1973, representatives of NHTSA stated that the QOL had been established as a means to curtail excessive production of solicitation packages. Support for this position is found, in NHTSA's opinion, in Federal Procurement Regulations (FPR) 1–1.302–(b), 1–1.1002, 1–2.203–1, 1–2.205–1 and 1–2.205.4. FRP 1–1.302–1(b) imposes the responsibility on the contracting officer to solicit competitive proposals or bids from "* * * all such qualified sources as are deemed necessary * * * to assure such full and free competition as is consistent with the procurement of types of supplies and services necessary to meet the requirements of the agency concerned." FPR 1–1.1002 provides that only a "reasonable number of copies" of each invitation for bids and request for proposals need be maintained. To the extent of availability, the solicitations should be disseminated to interested parties, except that the solicitations may otherwise be restricted to perusal at the issuing office. FPR 1–2.203–1 requires that a sufficient number of invitations for bids be distributed so as to elicit adequate competition. FPR 1–2.205–1 provides for the establishment of mailing lists to assure access to adequate sources of supply and services. Procedures are also established for addition to the mailing list. Finally, FPR 1–2.205–4(a) provides that:

> To prevent excessive administrative costs of a procurement, mailing lists should be used in a way which will promote competition commensurate with the dollar value of the purchase to be made. As much of the mailing list will be used as is compatible with efficiency and economy in securing adequate competition as required by law. * * * The fact that less than an entire mailing list is used shall not in itself preclude furnishing of bidding sets to others upon request therefor, or consideration of bids received from bidders who were not invited to bid.

We do not agree that the foregoing regulations provide NHTSA the authority to establish the QOL. In our opinion, the foregoing merely permits the establishment of a mailing list to assure an adequate source of supply and to spell out the necessary procedures for a reasonable restriction on the number of solicitations available. However, the QOL goes further. As we understand the procedure, interested parties submit Standard Form 129, Bidder's Mailing List Applications, plus "capability descriptions" which are then evaluated in advance of any procurement to establish the bidder's responsibility.

It is the cornerstone of the competitive system that bids and/or proposals be solicited in such a manner as to permit the maximum amount of competition consistent with the nature and extent of the services or items being procured. Any establishment of presolicitation procedures for determining a prospective bidder's/offeror's responsibility, whether relating to the manner of manufacture or capability to manufacture, is a restriction of full and free competition. The question to be answered concerning the validity of the procedures is not whether it restricts competition *per se*, but whether it unduly restricts competition.

This procedure is akin, with some notable exceptions, to that employed in conjunction with the qualified manufacturer's list (QML). The QML was established by the Department of the Army to determine the responsibility of firms in the cut-make-and-trim industry in advance of procurement as a condition precedent to competition. The procedures were deemed necessary in view of the industry's history of persistent unsatisfactory performance by marginal producers. The usual preaward methods of determining responsibility were found inadequate because the urgency of supply requirements for military clothing often restricted the extent of investigation. Further, when time permitted a complete investigation, inordinate amounts of time were required because of the physical ease with which facility locations could be transferred and the complex corporate structures established by the firms. The foregoing dissuaded most reputable firms from competing. Therefore, while noting that the procedures restricted competition, our Office sanctioned the procedures as not unduly restrictive and within the agency's discretion to determine its needs and place legitimate restrictions on competition when required by the nature of the items or services being procured. B–135504, May 2, 1958. *See* Defense Personnel Support Center Manual 5105.3 (1973) for procedural safeguards.

NHTSA advances no further reason to justify the need for predetermination of bidder/offeror responsibility beyond the need to restrict the available number of solicitations. However, means of promoting administrative economies and efficiencies in this regard are covered in the aforementioned FPRs. As we stated in 50 Comp. Gen. 542, 544 (1971) concerning our approval of the National Aeronautics and Space Administration's Microelectronics Reliability Program to assure a continuous supply of microcircuits meeting its stringent requirements:

While determinations concerning a contractor's responsibility must be made before contract award, we have not ordinarily sanctioned such determinations prior to bid opening since to do so might foreclose the receipt of proposals from

responsible contractors of whom the procurement agency is not aware. Thus, in the usual case, such prebid opening determinations have been considered as unduly restricting competition within the meaning of the statutes governing competition. * * *

Therefore, it is our opinion that the QOL constitutes an undue restriction on competition and should be eliminated. Further, even if there were valid reasons for the use of the QOL, the almost total lack of regulation and procedures for its use would render it invalid in its present form.

We would appreciate advice on what action is taken on our recommendation.

[B-179319]

Contracts—Protests—Timeliness—Filing in Other Than General Accounting Office

An oral protest 1 day before bid opening to the specifications for trash and refuse removal and disposal services on the basis they misstated the scope and nature of the services required was not timely filed in view of the IFB provision requiring a protest to be filed with the procurement office in writing at least 5 days before bid opening—a reasonable requirement. Since the initial protest was not timely filed, a subsequent protest to the GAO may not be considered under section 20.2 of the Interim Bid Protest Procedures and Standards which provides that protests based upon alleged improprieties in a solicitation that are apparent prior to bid opening must be filed with GAO prior to bid opening, and that a protest initially filed with a contracting agency will only be considered if timely filed with the agency and subsequently filed with GAO within 5 days of notification of adverse agency action.

To Alexander Boskoff, October 5, 1973:

This is in reply to your letters of September 13 and July 31, 1973, protesting on behalf of J. S. & G., Incorporated, against award of any contract under invitation for bids (IFB) No. 2320-0-4-047-GW, issued June 14, 1973, by the Department of General Services, Bureau of Materiel Management, Government of the District of Columbia.

The subject invitation requested bids for trash and refuse removal and disposal services. Bids were opened June 28, 1973, and J. S. & G. was the second low bidder. J. S. & G., the incumbent contractor for these services, has had its contract extended and is continuing to perform pending the protest.

The record discloses that the president of J. S. & G. orally advised the contracting officer by telephone on June 27, 1973 (1 day before the bid opening), that he was protesting the solicitation specifications, and that the contracting officer replied that the protest could not be considered in view of an IFB provision requiring such protests to be filed with the procurement office *in writing* at least *5 days before the bid opening*.

The record further discloses that on June 28, 1973, immediately after the bid opening, J. S. & G. filed a written protest with the contracting officer. In filing your protest with this Office, you state:

> On 28 June 1973, Protestant filed its written protest with the District (copy attached), and thereafter had several meetings with District personnel, during which Protestant urged that a site survey be carried out for the purpose of determining whether the advertised specifications were in fact substantially at variance with the services which would in fact be required, and paid for, by the sub-agencies.
>
> Pending these discussions, Protestant withheld filing the protest with the General Accounting Office. It now appearing that the District does not intend to reject all bids for the purpose of redrawing its invitation, so that it will accurately describe the services which will be required, the protest is now being referred to your office. No award has yet been issued under the invitation.

Essentially, you have protested the award of a contract under a solicitation which you allege contains specifications which substantially misstated the scope and nature of the services actually required. In this connection, you have forwarded to us a copy of a letter dated April 10, 1973, addresed to the Bureau of Materiel Management from your client, as evidence that a protest was filed in a timely manner with the agency. Specifically, you refer to the following language in the letter:

> If we may be of any assistance to you in the placement of the new equipment you are receiving this week, please do not hesitate to contact our Office immediately.

You have advised us that the reference to the "new equipment" meant four compaction units in possession of the D.C. General Hospital. Your client states that prior to and after receipt of the solicitation he spoke with the appropriate agency representatives regarding changing the specifications to reflect the actual requirements of the new equipment. However, we must conclude that nothing contained in the letter of April 10, 1973, could be construed as a written protest of the specifications used in connection with the instant solicitation, which was issued June 14, 1973.

Furthermore, the Deputy Director of the Bureau of Materiel Management, District of Columbia, reports that several telephone calls were initiated by J. S. & G. to agency personnel after bid opening concerning J. S. & G.'s protest, and one meeting took place between J. S. & G. representatives and agency personnel in the Deputy Director's office on July 18, 1973. He has advised us, however, that throughout these discussions the agency's position with respect to the untimeliness of the protest remained consistent.

Section 20.2(a) of our Interim Bid Protest Procedures (4 CFR) provides that protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening must be filed with the General Accounting Office prior to bid opening. It is further pro-

vided that if the 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 action will be considered *provided the initial protest to the agency was made timely.*

It is clear that your protest was considered to be untimely filed with the contracting agency because it was not filed in writing until after the bid opening. Although your protest was made orally to the contracting officer 1 day before bid opening, we do not believe we may consider it as timely filed with the agency for that reason. It is reasonable for the agency to insist that protests be filed in writing and we will not object to such a requirement. In this connection, section 20.1(a) of our Bid Protest Procedures provides that protests may be filed with the General Accounting Office by telegram or letter.

Accordingly, we must consider your protest to be untimely and must decline to consider it on the merits.

[B–179037]

Torts—Claims Under Federal Tort Claims Act—Private Property Damage, etc.—Scope of Employment

A part-time, Schedule A, employee of the U.S. Department of Commerce employed as a Field Supervisor on a when-actually-employed basis who, involved in an automobile accident while operating a privately owned vehicle on official business, was charged with failure to obey a stop sign and given a summons to appear in court is entitled to payment for her time and mileage expenses from her home in Camden, N.J., to New Castle, Del., and return, incident to her court appearances since the Federal Government under the "Federal Tort Claims Act" is the party potentially liable for the damages sustained by the defendent due to the negligent operation of the motor vehicle by the employee within the scope of her employment and, consequently, the appearance of the employee at the judicial proceeding to which she was summoned may be regarded as the performance of official duty within the meaning of 5 U.S.C. 6322(b) (2).

To John J. Rodden, Department of Commerce, October 9, 1973:

Further reference is made to your letter of June 25, 1973, requesting a decision on the propriety of paying a claim submitted by Miss Cecelia Opczynski, a part-time, Schedule A, employee of the U.S. Department of Commerce, Bureau of the Census, Data Collection Center, Philadelphia, Pennsylvania. No voucher covering the claim was enclosed with your letter, as is ordinarily required with a request for a decision. However, since it appears a claim has been presented, the requirement of a voucher will be waived in this case.

Miss Opczynski is employed as a Field Supervisor on a when-actually-employed (WAE) basis. On April 19, 1973, while operating a privately owned vehicle in Glasgow, Delaware, on official U.S. Government business, she was involved in an automobile accident, in

which she collided with another vehicle. The official police accident investigation report indicates extensive damage to both vehicles and serious injuries to the driver of the other automobile which included contusions of the nose and chest and a hematoma of the forehead.

Miss Opczynski was charged with violating title 21, section 41646, of the Delaware Code, requiring motor vehicle operators to obey a duly installed stop sign and was given a summons commanding her appearance in court in New Castle, Delaware, on May 16 and June 7, 1973. Miss Opczynski has submitted a claim for her time and mileage expenses from her residence in Camden, New Jersey, to New Castle, Delaware, and return, incident to her court appearances.

Miss Opczynski's entitlement to compensation for her time and travel expenses depends upon whether her appearances in court in defense of the traffic code violation were sufficiently in the interest of the United States to be regarded as official Government business within the meaning of 5 U.S. Code 6322(b) (2). That provision of law describes the status of an employee performing official duty when appearing in court as follows:

(b) An employee * * * is performing official duty during the period with respect to which he is summoned, or assigned by his agency, to—

* * * * * * *

(2) testify in his official capacity or produce official records on behalf of a party other than the United States or the District of Columbia.

Chapter 171 of Title 28, U.S. Code, based on title IV of the act of August 2, 1946, 60 Stat. 842, 28 U.S.C. 2671, the "Federal Tort Claims Act" establishes the liability of the United States for tort claims of persons injured by negligent or wrongful acts of Government employees while acting within the scope of office or employment. Section 2679 of Title 28 provides, in pertinent part, as follows:

§ 2679. Exclusiveness of remedy

* * * * * * *

(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the

incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

Pursuant to the above-quoted law tort suits against employees in their individual capacities are precluded and the injured party's exclusive remedy is against the United States. Thus, the employee is immune from suit and the Federal Government is the only party subject to liability for the employee's negligent operation of a motor vehicle within the scope of his employment, *Skrocki* v. *Butler*, 324 F. Supp. 1042 (1971), *Kizer* v. *Sherwood*, 311 F. Supp. 809 (1970).

Inasmuch as the United States is subject to suit and potentially liable for all the damages sustained by the plaintiff, as a result of the employee's negligent operation of his vehicle while in the scope of his employment, it therefore follows that the United States would have a direct interest in the disposition of the traffic charge from which liability might result. Consequently, we believe the appearance of the employee at the judicial proceeding to which she was summoned may be regarded as the performance of official duty within the meaning of 5 U.S.C. 6322(b)(2), *cf.* 44 Comp. Gen. 188 (1964).

In view of the foregoing, we are of the opinion that Miss Opczynski may be compensated for her time and reimbursed her travel expenses.

Accordingly, the employee's claim may be certified for payment in accordance with the foregoing, if otherwise correct.

[B–179216]

Officers and Employees—Promotions—Reclassified Positions—Incumbent's Status

The claim of a civilian employee for retroactive promotion and salary differential between grades GS–12 and GS–13 on the basis the position he was serving in overseas was reclassified on July 3, 1970, to GS–13, and that although he was legally qualified for the promotion the administrative office failed to act timely, is a justifiable claim and the employee should be retroactively promoted to GS–13 to a date not earlier than July 3, 1970, nor later than the beginning of the fourth pay period after July 3, 1970, in accordance with 5 CFR 511.701 and 511.702, and paid the salary differential to August 28, 1972, the date he returned from overseas. The rule is that when a position is reclassified to a higher grade, an agency must within a reasonable time after the date of final position reclassification, unless the employee is on detail to the position, either promote the incumbent, if qualified, or remove him. and the time frame for a "reasonable time" is prescribed in 5 CFR 511.701 and 5 CFR 511.702.

To the Secretary of the Army, October 9, 1973:

Transmitted herewith for appropriate administrative action is the claim of Mr. William J. Urbanek, a civilian employee of the Department of the Army, for retroactive promotion and salary differential between grades GS–12 and GS–13 for the period July 3, 1970, to August 28, 1972.

The record shows that as of July 3, 1970, Mr. Urbanek, a GS–12, was serving as the Deputy Director for Distribution and Transportation at Germersheim Army Depot, Germersheim, Germany. The position was coded GS–2001–12. On that date the position was administratively upgraded (reclassified) to GS–13. Mr. Urbanek had been in grade since March 1968 and the administrative report states that he was legally qualified for promotion to GS–13.

On August 26, 1970, a Request for Personnel Action, SF 52, was submitted by Mr. Urbanek's supervisor recommending him for promotion to GS–13. The request was approved by Mr. Urbanek's Commanding Officer but shortly thereafter the supervisor and Commanding Officer were reassigned and, for reasons uncertain from the record, the request was not processed. Mr. Urbanek's new supervisor submitted another SF 52, requesting temporary promotion. The new Commanding Officer disapproved the request, however, indicating that he preferred to seek permanent promotion at a later date. Shortly thereafter, the second supervisor was transferred. Mr. Urbanek's third supervisor submitted still another SF 52 on or about September 3, 1971, again requesting promotion to GS–13. Again, for reasons not disclosed by the record, no response was received.

From July 3, 1970, to his return to the continental United States on August 28, 1972, the record shows that Mr. Urbanek continued to fill the position of Deputy Director for Distribution and Transportation. Following his departure, the position was filled by a GS–13.

On August 3, 1972, Mr. Urbanek presented his claim to the U.S. Army Finance Center, Fort Benjamin Harrison, Indiana. The claim was forwarded to the National Personnel Records Center, St. Louis, Missouri, and from there transmitted to the Payroll Certifying Officer at Germersheim for processing in accordance with Army Regulation 37–105. The claim was subsequently returned to the Army Finance Center and, by letter dated November 13, 1972, the Heidelberg Area Civilian Personnel Officer, Headquarters, U.S. Forces Support District Baden-Wuerttemberg, confirmed Mr. Urbanek's contentions and indicated that the claim was considered valid. The Finance Center forwarded the claim to the General Accounting Office Claims Division on February 22, 1973.

It is well established that, when an agency reclassifies a position to a higher grade, it must, within a reasonable time after the date of final position classification, either promote the incumbent if he is otherwise qualified or remove him. *See* B–165307, November 4, 1968; 48 Comp. Gen. 258 (1968); 37 Comp. Gen. 492 (1958). This is to be distinguished from the situation where an employee is detailed to a higher-grade position. In the latter situation, the employee is entitled to the compensation only of the grade to which he has been officially appointed. Where, on the other hand, as in the instant case, an agency upgrades a position, the retention of the incumbent in that position amounts to a determination by the agency that the incumbent is in fact qualified to perform the duty of the higher grade. Thus, as nothing in the record suggests that Mr. Urbanek was not qualified for promotion to GS–13, he should have been either promoted or removed within a reasonable time after his position was upgraded.

The only remaining question is what constitutes the "reasonable time" within which the agency must act with respect to the incumbent of the reclassified position. While our decisions have not defined the limits of what may be considered a reasonable time in this situation, we note that, under 5 CFR 511.701, a classification action by the Civil Service Commission must be placed into effect by the agency concerned not earlier than the date the agency receives the certificate and not later than the beginning of the fourth pay period following such receipt unless a subsequent date is stated therein. A similar time frame is prescribed in 5 CFR 511.702 for the effective date of classification actions resulting from classification appeals either to the agency concerned or to the Civil Service Commission, i.e., not later than the beginning of the fourth pay period following the date of the classification decision unless a subsequent date is stated therein. It is our view that a similar time frame should be applied in the instant case. Accordingly, we hold that the reasonable time within which Mr. Urbanek should have been either promoted or removed from the GS–13 position expired at the beginning of the fourth pay period after July 3, 1970, the date of the reclassification action. *Cf.* B–167234, July 8, 1969; B-167819(1), October 9, 1969. His promotion, therefore, should be made retroactive to a date not earlier than July 3, 1970, nor later than the beginning of the fourth pay period after July 3, 1970.

[B–178290]

Subsistence—Per Diem—Military Personnel—Training Duty Periods—Excess of 20 Weeks

A chief warrant officer, a member of the Rhode Island National Guard, who under permanent change of station orders attended full-time training duty in a Warrant

Officer Auto Repair Course at an Army Ordnance Center and School for a period in excess of 20 weeks, although the usual period of instruction is less than 20 weeks, because no instruction was provided during the Christmas holiday period, and other military personnel who were students—some members of the Army, the National Guard and United States Army Reserve—similarly situated are entitled to a per diem allowance, notwithstanding the receipt of permanent change of station orders, as both the officer and students were in fact in a temporary duty status since the actual course of instruction was less than 20 weeks duration and the active duty status during the holiday period was merely incidental to the course of instruction and did not serve to extend the period of the instruction.

To Major F. P. Spera, Department of the Army, October 10, 1973:

Further reference is made to your letter, with enclosures, dated December 20, 1972, file reference STEAP-CO-F, requesting a decision as to the payment of per diem allowances to members who underwent training at the United States Army Ordnance Center and School, Aberdeen Proving Ground, Maryland, in a Warrant Officer Auto Repair Course, for a period in excess of 20 weeks when the usual period of instruction was less than 20 weeks. The longer period was due to the Christmas holidays during which time no instruction was conducted. The request was assigned PDTATAC Control No. 73-12.

It is indicated that the students attending the auto repair course were members of the Army, the National Guard and United States Army Reserve, who, with one exception, received permanent change of station orders for the period September 15, 1972, through February 13, 1973.

By orders dated September 5, 1972, Chief Warrant Officer George F. Viens, a member of the Rhode Island National Guard, was ordered to full-time training duty for the period September 15, 1972, through February 13, 1973, inclusive. The orders indicated that this was a permanent change of station and authorized travel of dependents and shipment of permanent change of station weight allowance of household goods. Upon completion of the period of full-time training duty Mr. Viens was to return to the place where he entered such duty.

However, by orders dated September 12, 1972, Mr. Viens' prior orders were amended to provide that travel of dependents and shipment of other than temporary change of station weight allowance of household goods were not authorized. Also the type of duty was changed to temporary duty (duty under instruction for less than 20 weeks) citing our decision of November 17, 1969, 49 Comp. Gen. 320.

A certificate of nonavailability of Government quarters was issued to Mr. Viens for the period September 15, 1972, through February 13, 1973.

The record indicates that the actual period of instruction for the Warrant Officer Auto Repair Course normally was less than 20 weeks. However, because of the Christmas holiday period, the course of instruction was suspended from December 21, 1972, through January 4,

1973. This had the effect of extending the period during which the course of instruction took place.

You refer to paragraph M1150–10b of the Joint Travel Regulations, for active duty personnel, and to paragraph M6001–1c of the regulations, for Reserve and National Guard personnel, as indicating that if the cumulative period of duty at one location is 20 weeks or more, then no per diem is allowable as the course falls within the purview of duty at a permanent duty station. However, you say that in view of the above-cited decision, payment of per diem to Mr. Viens would appear to be valid. In such event, you express the belief that all members attending the course of instruction should be entitled to similar allowances.

Section 404(a)(4) of Title 37, U.S. Code, provides for payment, under regulations prescribed by the Secretaries concerned, of travel and transportation allowances to a member of a uniformed service when away from home to perform duty, including duty by a member of the Army or Air National Guard of the United States.

Paragraph M6001–1c(3) of the Joint Travel Regulations, in effect during the period here involved, providing for travel of members of the Reserve components states:

> When the period of active duty contemplated by the orders is for 20 weeks or more, no per diem allowances are payable at the permanent duty station * * *.

In 49 Comp. Gen. 320, *supra*, we had for consideration a claim for per diem of a member of the National Guard who attended two successive courses of instruction at different locations; each course of instruction normally was for less than 20 weeks. This Office held (at page 324):

> Accordingly, since * * * neither the duty under instruction at Fort Wolters nor the duty under instruction at Fort Rucker exceeds 20 weeks *excluding the Christmas holidays*, per diem allowances * * * are authorized * * *. [Italic supplied.]

We believe that it was contemplated in the circumstances now before us that the actual course of instruction was less than 20 weeks duration, and that active duty status during the holiday period is merely incidental to the course of instruction, and does not serve to extend the period of the instruction. Therefore, in accord with the above-cited decision, since the actual period during which the students received the instruction provided in the course was less than 20 weeks, we do not believe that students who had the period extended beyond 20 weeks because of a holiday should be denied per diem allowances because their assigned class happened to fall within a certain calendar period during which no instruction would be presented.

Consequently, the voucher in favor of Mr. Viens is returned for payment, if otherwise proper. Similarly, the other National Guard or

United States Army Reserve students attending the course would be entitled to per diem allowances, notwithstanding the receipt of permanent change of station orders, as they in fact were in a temporary duty status.

The other personnel who were students in the course received orders providing for a permanent change of station in accordance with paragraph M1150–10b. This subparagraph states:

Assignment to Schools. When a member is transferred or assigned under permanent change-of-station orders to a school or installation as a student to pursue a course (or courses) of instruction, the cumulative duration of which is 20 weeks or more at one location, such school or installation is defined to be a permanent duty station.

As we have indicated above, we are of the opinion that the Christmas holiday period, during which time no instruction was presented, should be excluded in determining the length of instruction. Accordingly, the period of instruction of the auto repair course should also be considered as less than 20 weeks for these members, as well as for members of Reserve components. Thus, all members would be considered to be on temporary duty and, therefore, entitled to per diem allowances during their attendance at the course, if otherwise proper.

[B–178722]

Contracts—Awards—Small Business Concerns—Set-Asides—Withdrawal—Procedural Steps Before Withdrawal

Although the deletion of a total set-aside for small business concerns from an IFB for hamsters without verification of potential bidders' intentions will not be questioned in view of the concurrence of the SBA representative to the deletion, it is recommended that in future procurements the decisions to make or delete a total set-aside be carefully considered, potential sources of small business interest be thoroughly investigated, and the basis of the determination be fully explained and documented. Furthermore, the discarding of all bids under the amended invitation that deleted the set-aside and the negotiation of the procurement under 41 U.S.C. 252(c)(10) were improper actions since the deviations in the three bids received affected bidder responsibility and not bid responsiveness. However, negotiations currently being conducted may be continued as the needs of the contracting agency have changed since the opening of bids and the use of negotiations will not negate the maximum possible competition which advertised procurements attempt to further.

To the Secretary of Health, Education, and Welfare, October 10, 1973:

We refer to the letters of June 18 and July 2, 1973, from the Office of the Secretary submitting reports on a congressional inquiry into the propriety of the procurement methods utilized by the National Institutes of Health (NIH), Bethesda, Maryland, under invitation for bids No. NIH–73B–(V)–261CC.

The invitation, which solicited bids for the supply of Golden Syrian Hamsters, was issued on March 12, 1973, as a 100-percent set-aside for small business concerns. Bid opening was set for March 29. On March 28 the procurement activity received a request from ARS/Sprague-Dawley (SD) for a copy of the invitation and for an extension of the bid opening date. At that time, we are advised, the procurement activity was unaware that SD was a large business concern. Because of this request, however, a review was made of the procurement file. This review indicated that as of March 28 only one potential bid had been received. Also, one prospective bidder had informed the procurement activity that it would be unable to submit a bid. Because of the consequent belief that competition might not be obtained for the procurement, the invitation was amended to extend the bid opening date to April 9, 1973. The amendment was forwarded to the 12 firms on the bidders' list, as well as to SD to which an invitation was also sent.

After issuance of the amendment, it was decided to contact those firms which had not replied to the invitation to determine whether they would be submitting bids by the new opening date. Of these firms, nine were known to be small businesses, while the status of the others was unclear. Five of the small business concerns indicated they would not bid on the procurement; two were, it appears, not contacted, one because no telephone listing for the firm was found. The other two, Lakeview Hamster Colony (Lakeview) and Engle Laboratory Animals, Inc. (Engle), had submitted bids previously, the latter firm having unfortunately not received notice of the amendment before hand-delivering its bid to the procurement activity on the bid opening date. Of the four remaining firms, two indicated they would not bid, and another indicated that its subsidiary would instead bid (an invitation was subsequently mailed to the subsidiary on March 29). The General Manager of the fourth of these prospective bidders, SD, telephoned the procurement office on April 2, and at that time it was learned that SD was large business. During the conversation he requested that the small business set-aside requirement be deleted from the invitation so that his firm might submit a bid on the procurement. He also asked whether the requirement had previously been restricted to small business, and when advised that it had been and that the present contractor was Lakeview, he questioned the size of Lakeview due to its alleged affiliation with Charles River Breeding Laboratories, Inc.

In view of these facts, amendment No. 2 to the solicitation was issued on April 2, deleting the small business set-aside requirement and extending the bid opening date to April 17. We are advised that the Small Business Administration (SBA) representative was informed of this decision on April 3, He, reportedly, concurred therein.

Three bids were received under the invitation. Evaluation of each showed the following:

(1) SD had submitted the low bid of $40,515; however, the bid was determined to be nonresponsive because the outline of the means of transportation to be utilized, as required by the invitation, did not include the method of transportation to be used in making deliveries to the laboratories at NIH.

(2) Lakeview submitted the second low bid of $43,875; however, the bid was determined to be nonresponsive because evidence of a viral serology test based on a representative sample of the colony and a written description or photographs of the interior and exterior of the facilities were not submitted with the bid as was required by the invitation.

(3) Engle submitted the third low bid of $44,175; however, the bid was determined to be nonresponsive because the bidder did not, as required by the invitation, provide information with its bid as to the type of vehicles to be used in transporting the hamsters to and from the airport, the qualifications of the driver(s) of the vehicle(s), and the name of the Washington, D.C., area firm which would pick the hamsters up at the airport.

Because all three bids were found to be nonresponsive, it was determined that the procurement would be negotiated under the authority of 41 U.S. Code 252(c)(10) which allows negotiations to be conducted in situations where it is impossible to secure competition for procurements of property or services. Negotiations are now being conducted with Lakeview and SD under request for proposals 73P-(V)-510CC. Engle withdrew from the negotiated procurement when requirements for item No. 2, pregnant hamsters, were reduced from a quantity of 5,000 to 2,000.

As regards the decisions, first, to make the procurement a total set-aside for small business and, secondly, to delete this requirement, it has been the position of our Office that the determination of whether there is a reasonable expectation of receiving a sufficient number of bids under a total set-aside to assure reasonable prices is within the ambit of sound administrative discretion and will not be questioned by our Office without a clear showing of an abuse of such discretion. 45 Comp. Gen. 228, 231 (1965). We note that the total set-aside requirement was deleted on the grounds that at the time such action was taken, only one possible bid was at the procurement activity, that bid being from a firm which was alleged by a hopeful large business to be possibly large business. This, of course, ignores the fact that the size status of Lakeview was represented by that firm to be small business and no

proof existed to disprove such representation. It also ignores the fact that Engle had submitted a bid on March 29, and although it had then withdrawn its bid after the time for bid opening was extended, it could have reasonably been presumed that it would submit another bid. At minimum, the firm could have been asked its intentions when the others were. From the record it does not appear that such was done. However, in view of the concurrence of the SBA representative with the deletion of the set-aside requirement, and the fact that Engle has now declined to bid on the procurement activity's changed needs, we will not object to the procedures currently being utilized in this instance. We do, however, recommend that any necessary action be taken to assure that in future procurements, the decisions to make a total set-aside, or the deletion thereof, be carefully considered, potential sources of small business interest be thoroughly investigated, and the basis of the determination be fully explained and documented.

Concerning the determination that all three bids were nonresponsive to the invitation and, consequently, that the procurement should be a negotiated one, we believe the procurement activity to have been in error. Firstly, we do not believe that information as to how the hamsters would be transported to the procurement activity goes to any question other than the bidder's ability to perform. The same is true for the description or photographs of the bidder's facilities. These are questions of a bidder's responsibility. Further, although in this case evidence of viral serology was required with the bid rather than as preaward testing, we believe that the requirement for that evidence also was properly a question of the bidder's responsibility rather than of the responsiveness of the bid. *See* B–169330, May 14, 1970. The bidder bound himself under the specifications to deliver hamsters "in physically sound and healthy condition * * * free of wounds, scars, external parasites, and clinical signs of disease or of sub-clinical diseases such as ectromelia and lymphocytic choriomeningitis."

In this regard we are advised by the agency that a bidder would be rejected only if the animals tested had ectromelia or lymphocytic choriomeningitis. Results of testing for other subclinical diseases were to be used only by the agency official accepting delivery to determine for which tests the hamster could be used. If such is the case, we believe the agency has not clearly expressed its needs. The specifications state that the animals shall be free of all subclinical diseases, not just the two enumerated. In this respect also, the specifications call for "evidence of viral serology." The agency interprets this, apparently, to require submission of a test report from an independent testing laboratory. Lakeview enumerated the appropriate diseases in its bid and following these stated:

Tests have been negative for all but PVM and Sendai. Samples are submitted to Seton Hall and to Charles River Breeding Laboratories.

This would appear to meet the specifications requirement. If the agency wanted more, then such should be spelled out in the specifications.

Although we conclude that award should have been made to the low bidder under the invitation for bids and that conducting subsequent negotiations instead was improper, we will not object to the negotiations now being conducted under the recently issued request for proposals inasmuch as the needs of the agency have changed since the opening of bids and inasmuch as we do not believe that use of negotiations will, in this case, negate the maximum possible competition which advertised procurements attempt to further. It seems apparent from the facts that those two firms engaged in the negotiations are the only ones which would compete on this procurement in any case.

We trust that actions will be taken to ensure that deficiencies such as those enumerated above will not occur in future procurements.

[B–179502]

Bids—Buy American Act—Foreign Product Determination—New Items and Trade-In Allowances

Under an IFB consisting of two items, the furnishing of a new printing press and a trade-in allowance for the removal of old presses, only the new item is considered the foreign end product to which the 6-percent differential factor prescribed by the Buy American Act (41 U.S.C. 10a–d) applies in the evaluation of bids to determine the price reasonableness of domestic articles, even though the bid value of the trade-in items was an evaluation factor, since no articles, materials, or supplies are to be acquired for public use under the trade-in provision of the IFB, and the fact that the second low bidder offering a foreign printing press would have been the low bidder if the trade-in allowance had been deducted from the cost of the new item furnishes no basis for sustaining the protest to the manner in which bids were evaluated.

To the Miller Printing Machinery Company, October 10, 1973:

This is in response to your letters of September 25 and August 21, 1973, which protested against award of a contract to any other bidder under invitation for bids (IFB) No. 5324, issued by the United States Geological Survey, Department of the Interior. Your protest questions the correctness of the Government's evaluation of your bid under the Buy American Act, 41 U.S. Code 10a–d, and implementing regulations, Federal Procurement Regulations (FPR) subpart 1–6.1. You contend that the 6-percent differential factor prescribed by the regulations should be added to your foreign bid only after your offered price for trade-in items has been deducted. Award under the solicitation is being withheld pending our Office's decision on your protest.

For the reasons which follow, your protest is denied.

The IFB, issued June 4, 1973, contained two items. Item IA called for bids on furnishing, delivering, installing, and demonstrating the satisfactory operation of a five-color offset printing press. Item IB provided as follows:

B. *TRADE-IN:* The contractor shall remove from the Government's GSA Building all of the items listed below (*see* Part II):

1. One Miehle Single Color Offset Press, 42" x 58", 15 years old, Serial No. 21822 ..... $\_\_\_\_$
2. One Harris Single Color Offset Press, 50" x 72", Model LTQ, 22 years old, Serial No. 102 ..... $\_\_\_\_$
3. One Harris Two Color Offset Press, 22" x 34", Model LTP, 22 years old, Serial No. 375 ..... $\_\_\_\_$
4. One Harris Two Color Offset Press, 23" x 36", Model LTP, 14 years old, Serial No. 529 ..... $\_\_\_\_$

TOTAL PRICE IN ITEM I.A. LESS THE TRADE-IN PRICES .. $\_\_\_\_$

NOTE: Consideration of the trade-in items is required and shall be an evaluation factor in determining the successful bidder. *See* Part II. for further information on the trade-in items.

Five bids were submitted on July 24, 1973, but for the purposes of your protest we need consider only your bid and the bid of the Harris-Seybold Company, the only concern which offered a domestic-made press. The prices offered for the two items were as follows:

	Harris-Seybold	*Miller*
Item IA	$735, 208. 16	$735, 815. 00
Total for Item IB	61, 500. 00	101, 000. 00

In evaluating Harris-Seybold's bid, the contracting officer deducted item IB from item IA, resulting in an evaluated net price of $673,708.16. Since your concern offered a foreign end product under item IA, the contracting officer added the 6-percent factor provided for in FPR section 1-6.104-4 to your price for item IA before deducting your trade-in price for item IB. The resulting evaluation is as follows:

Item IA	$735, 815. 00
Buy American factor	+44, 148. 90
Total	779, 963. 90
Total for Item IB	—101, 000. 00
Evaluated Net Price	$678, 963. 90

Your earlier protest against this evaluation was denied by the contracting officer in his letter of August 14, 1973. The contracting officer pointed out that item IA represents the only end product which is being procured by the Government, and that item IB calls only for the removal and acceptance of four old presses as trade-ins. Since your bid for item IA offered a foreign end product, the contracting officer believed that it would be inappropriate to consider item IB in the Buy American evaluation, although bids on both items are to be evaluated.

We agree with the contracting officer's determination. The Buy American Act requires that only such manufactured "articles, materials, and supplies" as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States shall be acquired for public use unless it is determined to be inconsistent with the public interest, or that the cost is unreasonable. 41 U.S.C. 10a. Executive Order 10582, December 17, 1954, as amended by Executive Order 11051, September 27, 1962, provides that the price of domestic articles is unreasonable if it exceeds the cost of foreign articles plus a differential—generally 6 percent, or 12 percent for small business concerns and labor surplus areas. In addition, the applicable regulations provide that "end products" are articles, materials, and supplies which are to be acquired for public use (FPR section 1–6.101(a)); that a "foreign bid" is the bid or offered price for a foreign end product (FPR section 1–6.101 (g)); and that "Each foreign bid shall be adjusted for purposes of evaluation by adding to the foreign bid (inclusive of duty) a factor of 6 percent of that bid * * *." (FPR section 1–6.104–4(b).)

Here, it is apparent that the end product consists only of item IA. No articles, materials, or supplies are to be acquired for public use under item IB. Since your "foreign bid" related only to item IA within the meaning of the Buy American Act as implemented, we conclude that the contracting officer acted properly in applying the 6-percent differential only to that item. And this is so even though the bid value of the trade-in items was an evaluation factor. Bids on both items were to be considered together in arriving at evaluated net prices after the Buy American differential was applied to foreign bids.

Your letter of September 25, 1973, also objects to the method of evaluation used because it is "fallacious." You point out that you could have bid $634,814 for item IA and $1 for item IB. The evaluated net price of this hypothetical bid would be $672,901.84. Your argument is that by incorporating the trade-in deduction in your price for item IA, you could have been the low bidder; instead of so bidding, you state that you bid both items in good faith and at fair market value.

The terms of the solicitation permit the submission of a bid in the manner suggested. This is not, however, a situation where the possibility of unbalanced bids, that is, bids based on speculation as to which items will be purchased by the Government in greater quantities, is involved. *See* 49 Comp. Gen. 330, 335 (1969). Generally, bidders may calculate their bids as they see fit in accordance with the terms of the solicitation. The fact that you could have bid differently, but did not do so, furnishes no basis for sustaining the protest.

[B-165627]

Pay—Retired—Annuity Elections for Dependents—Children—Payments After Age 18

The collection of the overpayments that resulted when annuity payments under the Retired Serviceman's Family Protection Plan were continued to be made to the legal guardian of the adopted, unmarried minor child of a deceased officer after the child attained age 18, may be waived pursuant to 10 U.S.C. 1442 since the "undue hardship test"—or other good reasons—stated in 35 Comp. Gen. 401 as the basis for waiver of overpayments under the Plan is satisfied where the legal guardian used the monies erroneously paid, plus her own and estate funds to continue the beneficiary's education, as well as providing a good home for her, and where it would be against equity and good conscience to attempt to recover the erroneous payments from the legal guardian who financially depends on social security payments for support.

To Brigadier General R. G. Fazakerley, Department of the Army, October 11, 1973:

Reference is made to your letter dated December 21, 1972 (file reference FINCS-EC Watts, Holway D., SSAN 341-30-2869 (Retired) (Deceased)), with enclosures, which was forwarded here by letter dated January 5, 1973, from the Office of the Comptroller of the Army, recommending waiver of recovery of the amount of $540.45, representing annuity payments under the Retired Serviceman's Family Protection Plan erroneously paid to Mrs. Jeanne M. Stoney, as guardian, on behalf of Marilyn M. Watts, adopted daughter of the late Colonel Holway D. Watts.

The file shows that Colonel Holway D. Watts, USA, SSAN 341-30-2869, retired, deceased, elected Option II at one-half reduced retired pay combined with Option IV under the provisions of the Uniformed Services Contingency Option Act of 1953, 10 U.S. Code 1431, later redesignated the Retired Serviceman's Family Protection Plan. The election of Option II with IV provided an annuity of $180.15 a month for the member's adopted daughter, an only eligible beneficiary, Marilyn M. Watts, who, at the time of the member's death on December 7, 1968, was an unmarried minor child, 17 years of age. You say that annuity payments were made to her legal guardian, Mrs. Jeanne M. Stoney, effective December 1, 1968, and that such payments continued to be made to her through March 31, 1970.

You say further, that pursuant to section 1435 of Title 10, U.S. Code, the above annuity payments should have terminated on November 30, 1969, the last day of the month preceding the month in which Marilyn Watts attained age 18. You say in this regard that an administrative suspense control is normally established to show the date an annuitant who is a minor child reaches age 18 in order to terminate the

annuity payments at the proper time. You say, however, that the prescribed suspense control was not made. As a result, annuity payments continued to be made through March 31, 1970, creating an overpayment of $720.60. This amount consisted of four checks in the amount of $180.15 each, for the months of December 1969, and January through March 1970. The overpayment was reduced to $540.45 when an uncashed annuity check of $180.15 was returned and canceled.

You say that Mrs. Stoney, as legal guardian, was requested to refund the $540.45 and in response to that request, she asked that repayment of this indebtedness be waived toward the education of Marilyn Watts, contending that she paid for Marilyn Watts' college expenses for over a year after the annuity payments were terminated, and that she had to borrow money to do so. She also stated that her husband is 100 percent disabled with emphysema and that his social security checks are their only means of support. In support of this contention, the Judge of the Superior Court, Prescott, Arizona, has informed you that Marilyn Watts was given good care and treatment while living in the Stoney foster home, that all of her estate funds expended in her behalf (by Mrs. Stoney) were properly managed, that her college expenses came out of her estate and that all funds were used up for that purpose. In view of these circumstances you recommend that recovery of the amount erroneously paid ($540.45) be waived.

Under the provisions of 10 U.S.C. 1442, recovery of amounts erroneously paid under the Retired Serviceman's Family Protection Plan is not required if, in the judgment of the Secretary concerned and the Comptroller General, "there has been no fault by the person to whom the amount was erroneously paid and recovery would be contrary to the purposes of this chapter or against equity and good conscience."

In 35 Comp. Gen. 401 (1956) we held that something more than freedom from fault must be shown before a basis exists for exercising the judgment as to whether collection of a particular overpayment, or erroneous payments under the Plan, should be waived; that unless it can be established that collection of the overpayment would work an undue hardship, or some other reason can be shown as to why collection should not be made, it is believed that no proper basis exists for the exercise of the waiver authority.

It is our view that the record contains sufficient information from which it may be concluded that collection would work an undue hardship on Mrs. Stoney, as guardian for Marilyn Watts, contrary to the purpose of the law. Accordingly, in light of the other facts and circumstances, we concur in your judgment that recovery of the erroneous payments would be against equity and good conscience and should be waived in this case.

[B-162639]

Medical Treatment—Officers and Employees—Overseas Employees—Medical Service Under Foreign Service Act

The medical services the Department of State is authorized under the Foreign Service Act of 1946, as amended, to furnish to other agency overseas employees and their dependents may not be extended to the overseas employees of the Internal Revenue Service (IRS) in the absence of specific legislation authorizing the service for IRS employees and in view of the unavailability of the IRS "necessary expenses" appropriation for expenses of this nature. The only exceptions to the general rule that medical care and treatment are personal to an employee unless provided by the contract of employment, statute, or valid regulation are where the illness is the direct result of Government employment or where limited medical services are for the principal benefit of the Government, that is, diagnostic and precautionary services such as examinations and innoculations made necessary by particular conditions or requirements of employment.

To the Secretary of the Treasury, October 12, 1973:

By letter dated February 9, 1973, the Assistant Secretary for Administration requested our decision whether appropriations made to the Internal Revenue Service (IRS) are available to reimburse the Department of State for provision of medical services to IRS overseas employees and their dependents.

The Assistant Secretary's letter to us states in part:

> Under authority of the Foreign Service Act of 1946, the State Department provides a program of health services to American employees who are serving abroad and to their dependents. The State Department has entered into formal agreements with a large number of agencies performing overseas functions to extend these services to their employees on a reimbursable basis. IRS is very anxious to extend these services to its overseas employees and their dependents so that the benefits of health protection and good medical care can be provided to its employees throughout the world regardless of the remote location or poor health conditions of the area to which assigned.

We have been furnished a copy of sections 681.1–682.2–1 of the Uniform State/AID/USIA Regulations, which govern the medical and health program referred to above. This program, based upon several sections of the Foreign Service Act of 1946, as amended, 22 U.S. Code 911, 912, 1156–58, provides for medical services to Foreign Service employees and their dependents, and—

> * * * when authorized by appropriate legislation and in keeping with specific administrative agreements, to those American citizen Federal employees assigned or to be assigned abroad by other U.S. Government agencies and to their eligible dependents.

Section 681.1(a) of the regulations lists those Federal departments and agencies which participate in the program.

The Assistant Secretary's letter indicates that no legislation exists which would expressly authorize IRS to make expenditures in connection with participation in the State Department program. However, it is suggested that such expenditures may be considered "neces-

sary expenses" of IRS, and thus within the application of appropriations made to the Service for that object. In this connection, the Assistant Secretary states:

> * * * These services will directly benefit the Service by treating and alleviating medical problems in the early stages of development, obviating the necessity of relieving or replacing overseas employees when medical problems have become so serious as to incapacitate them and require their hospitalization or return to the United States. It will also assist the Service to recruit and retain the competent key personnel necessary to conduct its activities and administer its programs abroad. Additionally, the fact that so many agencies pay for these benefits would indicate common acceptance that such expenditure is a "necessary expense."

Numerous decisions of our Office concerning the furnishing of medical treatment to civilian employees of the Government—except for illness directly resulting from the nature of their employment—have expressed the general rule that medical care and treatment are personal to the employee, and that payment therefor may not be made from appropriated funds unless provided for in a contract of employment or by statute or valid regulation. *See, e.g.*, 47 Comp. Gen. 54, 55 (1967); 41 *id.* 531, 532–33 (1962); *id.* 387, 388 (1961), and decisions cited therein. We must conclude that this general rule precludes the use of IRS appropriations to make reimbursement for the services contemplated.

As noted previously, there exists no specific statutory authority applicable to IRS which could be treated as establishing an exception to the general rule. Certainly an appropriation for "necessary expenses" is not sufficient in this respect. In addition we might note that our decisions have themselves recognized an exception to the general rule where the provision of limited medical services may be regarded as being for the principal benefit of the Government rather than the employee. However, these decisions relate primarily to the provision of diagnostic and precautionary services such as examinations and innoculations made necessary by particular conditions or requirements of employment, and are not here applicable. The State Department regulations described previously do not constitute an independent source of authority for participation in the medical and health program but, on the contrary, provide for such participation only "when authorized by appropriate legislation * * *." As stated above, there appears to be no such legislation in the case of IRS.

Finally, the Assistant Secretary suggests that the fact that so many agencies participate in the program indicates a common acceptance of such expenditures as "necessary expenses." A cursory examination of the authorities applicable to departments and agencies which now participate in the State Department program indicates in some

instances statutory provisions which specifically authorize such use of appropriated funds. *See*, for example, 15 U.S.C. 1514(a) (Department of Commerce), 49 U.S.C. 1657(1) (Department of Transportation), and Public Law 92-342, July 10, 1972, 86 Stat. 432, 446 (Library of Congress). The authority for provision of such services to Foreign Service employees is, of course, specifically set forth in 22 U.S.C. 1156-1158.

We have not sought to identify specific sources of authority applicable to each agency which participates in the State Department program. However, in view of the provision cited above, we fail to perceive a common acceptance of the position that payment of medical expenses for employees may be made as a "necessary expense" without further authority. On the other hand, the foregoing provisions—as well as a number of other statutory provisions authorizing in particular circumstances the furnishing of medical services to Government employees—indicate that where such authority is deemed appropriate by the Congress it is provided in specific terms and is subject to specific limitations. *See* 5 U.S.C. 7901; 16 U.S.C. 13; 33 U.S.C. 763c; 42 U.S.C. 253-253a.

For the reasons stated herein, it is our opinion that appropriations made for necessary expenses of IRS are not available for furnishing health and medical services to IRS employees stationed overseas under the State Department program.

[B-179084]

Bids—Mistakes—Evidence of Error—"Clear and Convincing Evidence" of Error

While GAO has a right of review, the authority to correct mistakes alleged after bid opening but prior to award vests in the procuring agency, and as the weight to be given evidence submitted in support of an error is a question of fact, the determination by the designated evaluator of evidence, to whom the matter was referred pursuant to ASPR 2-406.3(b)(1) and (e)(3), to correct the error since the work sheets of the low bidder established by clear and convincing evidence that the alleged error occurred, showed how it occurred, and that the price bid was only approximately 35 percent of the price intended, will not be disturbed by GAO, for work sheets alone can constitute clear and convincing evidence of error, and the fact that the procuring activity determined the evidence was not clear and convincing in no way bound the evaluator or reflected on the independent consideration of the evidence. Furthemore, the ASPR 2-406 procedure for evaluating bid mistakes applies whether the procurement is routine or complicated.

To Fraser-Volpe Corporation, October 17, 1973:

Reference is made to your letter dated July 3, 1973, and subsequent correspondence, protesting against the award of a contract to TSN Company, Inc. (TSN) under invitation for bids (IFB) No. DAAA

21–73–B–0131, issued by the Department of the Army, Picatinny Arsenal, Dover, New Jersey.

The IFB, as amended, which called for an Electro-Optical Scanning System to verify that the proper legend has been clearly imprinted on the 105mm M67 propellant charge bags, established January 8, 1973, as the bid opening date. On that date, nine bids were received and recorded as follows:

TSN	$8,758.00
Fraser Volpe Corporation	33,654.00
ZIA Associates, Inc	34,989.00
Food Technology Corporation	47,740.00
York Information System	48,375.50
Wellesley Instruments Corporation	48,600.00
Laser Sciences	68,900.00
Visicon, Inc	69,300.00
Wood-Ivey System Corporation	73,600.00

Since TSN's price was substantially below the other bid prices, the procuring activity, pursuant to Armed Services Procurement Regulation (ASPR) 2–406.1, requested that TSN verify its bid price. By a telegram dated January 11, 1973, TSN alleged that it had made an error in its bid price and requested that its bid be corrected to $30,856.00. By a letter dated January 17, 1973, TSN stated that the mistake occurred when its secretary erroneously transferred to the bid form only the total price shown on one of the four work sheets used in computing its bid price. TSN's work sheets were submitted to support its allegation together with one subcontractor quote and several potential suppliers' catalogs and price lists.

Our Office consistently has held that to permit correction of an error in bid prior to award, a bidder must submit clear and convincing evidence that an error has been made, the manner in which the error occurred, and the intended bid price. 49 Comp. Gen. 480, 482 (1970); 51 *id.* 503, 505 (1972). These same basic requirements for the correction of a bid are found in ASPR 2-406.3(a)(2) which provides:

> * * * if the evidence is clear and convincing both as to existence of the mistake and as to the bid actually intended, and if the bid, both as uncorrected and as corrected, is the lowest received, a determination may be made to correct the bid and not permit its withdrawal.

In the present case, after consideration of the evidence submitted in support of the alleged error, the procuring activity found:

> 4. The evidence has been reviewed by this Arsenal and it is not considered clear and convincing as to the bid actually intended. * * *

The procuring activity by letter dated August 1, 1973, received in our Office on August 8, 1973, advised that it made this determination because the catalog items and price lists submitted by TSN could not be correlated with the detailed costs shown on its work sheets, since TSN had not received firm quotations for these items. Only the subcontractor quote in the amount of $650.00 could be correlated with the work sheets.

This matter was forwarded by the procuring activity to the General Counsel of the United States Army Materiel Command (AMC) as required by ASPR 2-406.3(b)(1) and (c)(3). After a consideration of the submitted evidence in support of bid correction, AMC under date of May 3, 1973, made the following determination:

3. By letter of 17 Jan 73 TSN alleged that it had made a mistake in its bid price, that its intended price was $30,856.00, explained how the mistake occurred, submitted its worksheets in proof of its intended price and requested correction of its bid price.

4. The worksheets consist of 4 separate pages. The first 3 show the cost of material and labor for 3 separate components which comprise the Scanner System. The fourth page shows a total of the cost of the three components, as shown from the first 3 pages, to which is added miscellaneous expense, freight, travel, G & A and profit for a total of $30,856.00.

5. In its narrative statement, TSN explains that in filling out the bid set, the price was mistakingly submitted as shown on the first page of the worksheets as it was overlooked that the estimate consisted of 4 pages, the last of which contained the intended price. In review of this file, I find that addition of the various figures comprising the cost of the components to be correct and the addition of the costs of such components plus the cost of miscellaneous expenses, travel, freight, G & A and profit to be $30,856.00 as shown on the fourth page. This information then discloses clear and convincing evidence of an error in bid and the intended bid price.

6. Therefore, I hereby determine that in the best interest of the Government the contracting officer should be and hereby is authorized to permit TSN Company, Inc. to correct its unit bid price and the total amount of its bid to $30,856.00 for item 0001 under IFB DAAA21-73-B-0131.

You contend that the revision of TSN's bid by 253 percent and 10 percent below the next lowest bid is in strong opposition to ASPR's intent. You further contend that the work sheets submitted by TSN to support correction cannot constitute clear and convincing evidence as to the bid price actually intended, since ASPR 2-406.3(c)(1) requires that *all* pertinent evidence be submitted so that work sheets alone cannot constitute a sufficient basis for a decision to correct the bid. You state that the very fact that the procuring activity and AMC could differ as to their interpretation of the data submitted by TSN demonstrates that the evidence is not clear and convincing.

You also contend that TSN was subject to the same business pressures as the other bidders and in addition, TSN's president signed its bid on December 11, 1972, so TSN had 28 days to review its bid to insure correctness. You state that the other bidders, who properly reviewed their bids, should not be penalized by TSN's negligence. You further allege that ASPR 2-406, as written, better covers "routine

procurements" where a mistake can be easily traced, and not procurements such as the IFB questioned here for the procurement of a customized scanner system, where it is almost impossible to present clear and convincing evidence. You conclude that to accept TSN's original bid on such evidence is an invitation to fraud in future procurements of this nature, since it is easy to fabricate work sheets for any value desired after learning at bid opening the amount of the other bids submitted.

With regard to your contention as to TSN's failure to submit data other than its work sheets, TSN in its letter of August 16, 1973, received in our Office on September 4, 1973, stated:

> The Electro-Optical Scanning System in Contract DAAA21-73-B-0131 required custom design and development to meet the specifications. Consequently, in bidding, it was necessary to guess-estimate not only man-hours but also the cost of the various components to be included in the system. We gathered the technical materials and prices of photometers, marking devices and the like to help us arrive at probable costs. We were unable to get specific prices for the various components unless we defined our requirements. The requirements can only be defined after the designing and the development are completed. Obviously, it is impractical to do the actual design and development work on quotations.

Under such circumstances, our Office has found work sheets in themselves to be clear and convincing evidence, if they are in good order and indicate the intended bid price as long as there is no contravening evidence. *See* B-173031, September 17, 1971; B-176900, November 29, 1972.

Moreover, since ASPR 2-406.3(e)(3) required that this matter be submitted to AMC for its determination, the finding by the procuring activity that the evidence submitted to support bid correction was not clear and convincing in no way binds AMC nor should it be reflective on AMC's independent consideration of the evidence.

Even though the General Accounting Office (GAO) has retained the right of review, the authority to correct mistakes alleged after bid opening but prior to award is vested in the procuring agency and the weight to be given the evidence in support of an alleged mistake is a question of fact to be considered by the administratively designated evaluator of evidence, whose decision will not be disturbed by our Office unless there is no reasonable basis for the decision. 41 Comp. Gen. 160, 163 (1961); 51 *id.* 1, 3 (1971). Under the present IFB, this authority was delegated to AMC without authority to redelegate. ASPR 2-406.3(b)(1). Moreover, ASPR makes no distinction, as you allege it should, between "routine procurements" and more complicated procurements with regard to the applicability of ASPR 2-406.

This procedure for the correction of a bid after bid opening is consonant with the statutes requiring advertising for bids and the award of contracts to the lowest responsible, responsive bidders, since these statutes are for the benefit of the United States in securing both

free competition and the lowest competitive prices in its procurement activities. *See* B-148117, March 22, 1962. Therefore, where these procedures are strictly followed so that the integrity of the competitive bidding system is not prejudiced, the United States should have the cost benefit of the bid as corrected, provided that it is still lower than any other bid submitted. This procedure does not prejudice the other bidders, since correction will only be made upon a convicing showing of what the bid would have been at bid opening but for the mistake. In any case, this procedure is not for the benefit of the other bidders, but rather it is for the benefit of the United States so it can receive the procured goods or services at the lowest possible price.

The principles supporting this procedure have been followed by GAO since its creation by the Budget and Accounting Act of 1921, 42 Stat. 20, 23, 31 U.S.C. 1. *See*, for example, 2 Comp. Gen. 503 (1923). Prior to 1921, the Comptroller of the Treasury established this same general rule. *See* 20 Comp. Dec. 728 (1914). This procedure has also been sanctioned by the Court of Claims. *Edmund J. Rappoli, Inc.* v. *United States*, 98 Ct. Cl. 499 (1943); *Chris Berg, Inc.* v. *United States*, 192 Ct. Cl. 176 (1970).

The potential future fraud which you foresee flowing from a decision allowing correction in this case is protected against by the high standard of proof necessary before correction is authorized and the independent review of the submitted evidence by an appropriate higher authority such as AMC. Moreover, nothing prevents the submission of such cases, as has been done here, to GAO for our decision. *See* ASPR 2-406.3(f).

From the data furnished in support of the alleged error, we cannot conclude that there was no reasonable basis for the determination reached. Accordingly, your protest is denied.

[B-179331]

Travel Expenses—Military Personnel—Candidates for Military Academies—Rejected for Admission

A candidate for admission to the United States Air Force Academy who had in January, 1973, medically qualified for pilot training but when he reported to the academy in July was not admitted because he was found medically disqualified for a condition that had existed from birth but which had been overlooked during his initial physical examination may be reimbursed the cost of traveling from his home to the academy and return, even though paragraph M5000-1 of the Joint Travel Regulations (JTR) prescribes the reimbursement of travel expenses only to those persons accepted by the military academies, since the candidate's rejection was due to no fault on his part and, therefore, he should be granted reimbursement under paragraph M5050-2, JTR, on the basis the Government owes him the same consideration that is extended to rejected applicants for enlistment in the Regular services or Reserve components.

To Lieutenant Colonel R. F. Roscoe, Department of the Air Force, October 19, 1973:

This refers to your letter dated July 10, 1973, received in this Office on August 1, 1973, in which you request an advance decision concerning the propriety of payment of a travel claim submitted by Mr. Rodney Vessels, a candidate for admission to the United States Air Force Academy, under the circumstances hereinafter set forth. Your request has been assigned PDTATAC Control No. 73-37 by the Per Diem, Travel and Transportation Allowance Committee.

You say that Mr. Vessels was notified that he was medically qualified for pilot training on January 24, 1973. Subsequently he was issued an "Invitation to Travel" from his home in Aylett, Virginia, to the United States Air Force Academy, Colorado. The invitation to travel stated that it was issued for the purpose of Mr. Vessels' acceptance of an appointment as a cadet of the United State Air Force Academy, class of 1977, and that he was to arrive on July 2, 1973.

Mr. Vessels, it is reported, arrived at the academy on July 2, 1973, by private automobile and at that time was found medically disqualified for acceptance as a cadet into the academy class of 1977, due to the existence of the sickle cell anemia trait which had been overlooked during his initial physical examination. It is indicated that apparently this trait had been present from his birth. As a result, you say Mr. Vessels was not administered the oath prescribed by the Secretary of the Air Force as required by 10 U.S. Code 9346(d). You say Mr. Vessels departed from the Academy by private automobile on July 3, 1973, and returned to his home in Aylett, Virginia.

In view of the foregoing, it is requested that a decision be rendered on the following questions:

a. Does entitlement to transportation at government expense accrue to a cadet candidate for travel from his home to a service academy, who is found to be medically disqualified for acceptance of an appointment through no fault of the candidate after arrival at the Academy and who was not allowed to take the prescribed oath?

b. Does entitlement to transportation at government expense accrue to a cadet candidate for travel from the service academy back to his home, who is found to be medically disqualified for acceptance of appointment through no fault of the candidate after arrival at the Academy and who was not allowed to take the prescribed oath?

The invitation to travel to Mr. Vessels provides in paragraph 4:

Personnel who travel to the USAF Academy under this order who refuse to accept an appointment as a cadet or are unable to accept because of medical or other reasons will not be entitled to any travel allowances.

Paragraph 5 of the invitation to travel provides that travel allowances will be credited to the individual after he is admitted as a cadet. Paragraph 6 provides that travel is authorized in accordance with

chapter 5 of the Joint Travel Regulations and is necessary in the public service.

Section 410(a)(3) of Title 37, U.S.C., provides in part that cadets of the United States Air Force Academy are entitled to such travel and transportation allowances provided by section 404 of that Title as prescribed by the Secretaries concerned.

Chapter 5, Part A of Volume I of the Joint Travel Regulations contains regulations governing the travel of cadets and midshipmen of the service academies. Paragraph M5000–1 provides that a person entering one of the service academies will be entitled to the permanent change-of-station allowances prescribed for officer members in Chapter 4, Part D of the regulations for travel actually performed not to exceed the official distance between the place which he certifies was his actual permanent place of abode, home, school, or duty station at the time such travel commenced and the service academy involved. Paragraph M5002–2 provides in part that no travel and transportation allowances are payable under these regulations to civilians for travel performed in connection with any examinations preparatory to admission to any of the service academies.

It appears that on examination of the above-cited law and regulations that in order to be entitled to the prescribed allowances an individual traveling to accept an appointment must in fact accept the appointment and attain the status of a cadet. Therefore, as Mr. Vessels was not administered the prescribed oath he never attained the status of a cadet and, consequently, is not entitled to the allowances prescribed for cadets in paragraph M5000–1 of the Joint Travel Regulations.

However, section 410(a) of Title 37, U.S.C., also provides that the following persons are entitled to such travel and transportation allowances provided by section 404 of this Title, as prescribed by the Secretaries concerned:

(5) applicants for enlistment;
(6) rejected applicants for enlistment;

In accord with this statutory authority, paragraph M5050 of the Joint Travel Regulations (Travel and Transportation Allowances for Travel Incident to Enlistment Processing) provides as follows:

1. GENERAL. Applicants for enlistment in the regular services or in reserve components shall be furnished transportation and meal tickets, if available, for travel from the place where they make application for enlistment or from their homes to the place(s) of physical examination, or place of acceptance for enlistment, or both, including return travel in the event that the applicant is rejected or is accepted and ordered to return home to await further orders or a reporting date.

2. REIMBURSEMENT. In the event that transportation requests and/or meal tickets are not available for issuance to applicants for the travel contemplated in subpar. 1, reimbursement for transportation purchased from personal funds, supported by receipts if Pullman or parlor car accommodations are utilized, will be made on an actual cost basis (including tax), plus a per diem allowance for each day as authorized in par. M4205–4.

Provisions regarding the transportation of rejected applicants were originally included in Navy and Army appropriations acts and were based primarily upon public policy, and the obligation of the Government to return the applicant to a place where he had been provisionally accepted and where he had been given preliminary examinations which indicated that he in all probability would be accepted into the armed services. In cases where an applicant is rejected as a result of later physical examinations given at some distance from his home, the Government assumes the obligation of paying his travel and transportation expenses for return to his home.

We are unable to consider a candidate for admission to one of the service academies who has successfully passed all the preliminary examinations and travels to the academy with the expectation based on prior Government action of being admitted to the academy, as any less entitled to travel and transportation allowances if rejected, than any other rejected applicant for entry into one of the uniformed services. Under such circumstances it is our view that the Government has an equally clear duty to provide travel and transportation allowances to and from authorized places to the academies for those candidates rejected under circumstances where through no fault of their own, the candidates are not admitted.

In the absence of some legislative expression to the contrary, there is no basis to impute to the Congress an intention to exclude persons, such as a cadet candidate for admission to one of the service academies, who performs travel to the academy at the invitation of the Government and who without fault on his part is rejected for admission because of a physical condition. We view the terms "applicants for enlistment" and "rejected applicants for enlistment" as used in 37 U.S.C. 410(a)(5) and (6) not in a restricted or technical sense, but broadly, as applying to those persons who seek to enroll in one of the uniformed services, including applicants for the service academies.

We have been advised, informally, that rejected candidates for the United States Military Academy and for the United States Coast Guard Academy are afforded round trip travel at Government expense, apparently being treated as rejected applicants for enlistment.

In view of the foregoing, we are of the opinion that Mr. Vessels properly may be reimbursed for travel from Aylett, Virginia, to the United States Air Force Academy, and for return travel to his home, in accordance with paragraph M5050–2 of the Joint Travel Regulations.

Accordingly, your questions are answered in the affirmative and Mr. Vessels' voucher is returned herewith, payment being authorized if otherwise correct.

[B–176329]

Contracts—Research and Development—Cost-Plus Contract—Evaluation

The determination subsequent to discussion with all offerors not to award a cost-plus-a-fixed-fee contract for a development model of artillery locating radar to the low offeror under a request for proposals (RFP) which contained criteria to evaluate the Technical Proposal, Past Performance/Management, and the Cost Proposal/Cost Realism factor is upheld where use of a predetermined score, generally unacceptable, was not prejudicial in view of the protestor's low score; where acceptance of the design implementation would involve a high degree of risks, and the discussion of the design's deficiencies would subvert the intent of the procurement; where the Government's engineering man-hour estimates were not erroneous and their use to evaluate effort and cost realism did not mislead the protester: where the RFP contained a sufficient statement of evaluation and award factors and the record evidences meaningful discussions were held with all offerors; and where the commonality features between contracts were not made an evaluation factor.

Contracts—Cost-Plus—Evaluation Factors—"Realism" of Costs and Technical Approach

Since the award of cost-reimbursement contracts requires procurement personnel to exercise informed judgments as to whether submitted proposals are realistic with regard to proposed costs and technical approaches—judgments that are properly left to the administrative discretion of the contracting agency which is in the best position to assess "realism" of costs and technical approaches, and must bear the major criticism for any difficulties or expenses experienced by reason of a defective analysis—the acceptance of two proposals for award of cost-plus-a-fixed-fee contracts to develop an artillery locating radar on the basis these proposals were the only acceptable ones submitted from both a technical and cost standpoint was a proper determination that is substantiated by a record that evidences the selection of the successful offerors was not arbitrary.

To the General Electric Company, October 23, 1973:

By telefax dated June 23, 1972, and subsequent correspondence, you protested the award of contracts to Hughes Aircraft Company (Hughes) and to Sperry Rand Corporation (Sperry) under request for proposals (RFP) No. DAAB07–72–R–0281, issued by the United States Army Electronics Command (ECOM), Fort Monmouth, New Jersey.

The RFP, issued on March 6, 1972, contemplated two cost-plus-fixed-fee (CPFF) contracts, each for one advanced development model of artillery locating radar (AN/TPQ–37), engineering services during military potential testing, a value engineering program, and ancillary technical data items. On the April 17, 1972 closing date five proposals were received. The initial technical evaluation of the proposals resulted in only that of Hughes being rated technically acceptable. However, the contracting officer decided that the flaws in the remaining proposals could be corrected and, therefore, all proposals were determined to be within the competitive range and eligible for negotiations. Discussions were held with all offerors during the

period of May 17–24, 1972, and all offerors were notified by TWX dated May 19, 1972, that best and final offers were due on June 2, 1972. Five final offers were received and evaluated and on June 19, 1972, CPFF contracts were awarded to Hughes at $6,349,287 and to Sperry at $5,447,628.

Briefly stated, your protest is based upon the contentions that GE's technical proposal was erroneously and arbitrarily determined unacceptable; that GE's design implementation was erroneously and arbitrarily determined deficient on the basis of undisclosed and unnecessary design preferences; that ECOM's determination that GE's engineering man-hour estimates were unrealistically low was arbitrary; that the RFP did not contain a sufficient statement of evaluation and award factors; that ECOM's test for cost realism was deficient; that the commonality feature between the TPQ–37 and the TPQ–36 contracts may have unfairly impacted upon the selection of the contractors for the respective contractors; and that ECOM failed to conduct meaningful negotiations with GE.

As explained below, we do not agree with these contentions.

Offerors were advised by the RFP that their proposals would be evaluated in accordance with the following criteria:

D.1 * * * Any awards to be made will be based on the best over-all proposals with appropriate consideration given to Technical Proposal, Past Performance/Management, and Cost Proposal/Cost Realism in that order of importance.
Of the three factors set forth above, Technical Proposal is the most important factor and bears greater weight than the other two areas combined. Of the last two areas, Past Performance/Management bears the greater weight.
To receive consideration for award, a rating of no less than "acceptable" must be achieved in each of the three areas.

D.2 *FACTORS AND SUB-FACTORS TO BE EVALUATED AND RELATIVE ORDER OF SUBFACTORS IN DESCENDING ORDER OF IMPORTANCE.*

a. *Technical Proposal*
   (1) Engineering Approach
   (2) Engineering Man-hours
   (3) Estimated Mission Equipment Unit Cost (See AR 37–18)
   (Note: The following factors (4), (5), (6), and (7) are of equal value.)
   (4) Personnel
   (5) Adequacy and Availability of Required Facilities
   (6) Material List
   (7) Schedule
b. *Past Performance/Management*
c. *Cost Proposal/Cost Realism*

Following the above statement of evaluation criteria were 11 pages of detailed descriptions of each of the factors.

ECOM engineers developed a technical evaluation plan for this procurement. Under this plan the above-cited technical factors and subfactors were divided into three categories. Category A, consisting of engineering approach and engineering man-hours, was to be rated both numerically and narratively; a weighted score of 70 was estab-

lished as the minimum acceptable score for those factors rated numerically. Category B, the mission equipment unit cost estimate, was to be given a narrative appraisal, and Category C included factors for which a rating of satisfactory or unsatisfactory was to be assigned.

The evaluation of the initial proposals resulted in the following technical rating scores under Category A: GE 55.8; Sperry 65; and Hughes 82.7. The evaluation of revised proposals resulted in these final Category A scores: GE 54.2; Sperry 74.2; and Hughes 83.9. The evaluator's comments concerning the final proposals are as follows:

a. *Hughes Aircraft Corporation:*
This bidder received the highest Category A rating. Their proposed level of effort is about 25% below the government estimate, but is still considered to be reasonable. The high score in Category A reflects a sound technical approach, adequate proposed effort and a thorough proposal. This bidder received a marginal rating for only one factor, Maintainability. The shortcoming is not inherent in the basic design approach and it is expected that with the guidance of USAECOM personnel, the equipment developed by this bidder will meet the required maintainability standards.

b. *Sperry Gyroscope Company:*
This bidder received the second highest Category A rating. Their proposed level of effort is about 40% below the government estimate and is considered to be somewhat low. The Category A score reflects a good technical approach, adequate proposed effort and a good proposal. This bidder received a marginal rating for only one factor, Reliability. The shortcoming is not inherent in the basic design approach and it is expected that with the guidance of USAECOM personnel the equipment developed by this bidder will meet the required reliability standards.

* * * * * * *

e. *General Electric:*
This bidder received the lowest Category A rating. As a result of the additional data provided their rating increased in only one factor. A re-examination of the proposed level of effort disclosed that the rating in the Data Processing System factor should have been dropped one level. As a result, the overall Category A rating is lower than in the original evaluation. The overall level of effort proposed is 65% below the Government estimate and is considered to be very low. The poor Category A rating is a result of the combination of design deficiencies, inadequate proposed effort and a poor technical proposal. This bidder received marginal ratings for several factors. The marginal rating for the Trailer Configuration represents a design deficiency in a critical area. A complete redesign of the trailer configuration is required to correct this deficiency.

The record indicates that GE's technical proposal was determined to be unacceptable because ECOM considered the GE proposal deficient in seven of the 14 numerically scored technical factors. For five of these factors (trailer configuration, electronic counter countermeasures (ECCM), transmitter, receiver, and maintainability) GE was judged to be deficient in design implementation. GE was considered weak in the antenna and data processing system factors because in the agency's view GE's level of effort for these areas was insufficient.

Initially, you contend that ECOM considered the GE proposal unacceptable merely because it did not rate a score of 70, ECOM's predetermined cut-off point. You assert that such a determination based

on a predetermined score is arbitrary, citing B–174589(2), March 28, 1972, wherein this Office criticized the use of a predetermined cut-off point.

While we have objected to the use of a predetermined score to delineate the competitive range, we do not believe the inclusion of a predetermined cut-off point in the evaluation plan was prejudicial in view of GE's low score in comparison to the array of scores achieved by the other offerors and in any event, GE was included in the competitive range for the purpose of discussions.

You also contend the determination that GE's technical proposal was unacceptable was erroneous because it was based primarily on ECOM's arbitrary conclusion that GE's design implementation was deficient. It is your position that these alleged deficiencies were actually failures of the GE design to meet undisclosed ECOM design preferences rather than failures to meet requirements set forth in the RFP. Although you admit that some of these areas (ECCM, transmitter tube protection, receiver components and receiver protection, the inflatable radome, special tools and test equipment under maintainability, and the azimuth drive motor under trailer configuration) were mentioned during negotiation, you insist that any discussion held in these areas did not inform you that a specific detailed design was required. In view of the fact that the RFP contains only performance specifications, you urge that no specific design can be required. You argue that since the GE design met all the performance requirements of the specification it could not be considered unacceptable. In support of this argument, you cite 48 Comp. Gen. 314 (1968), wherein we held that a requirement important enough to require proposal rejection was also significant enough to have been explicitly provided for in the RFP.

We do not believe that the holding in the cited case is applicable to the instant situation. There, we criticized the agency for denying offerors the opportunity for negotiations because their designs failed to include a safety requirement which was not specified in the solicitation. In the case at hand, the GE proposal was considered to be within the competitive range and negotiations were held with your firm. The discussions included the areas which contributed to ECOM's ultimate determination that the GE proposal was unacceptable. The GE proposal was not selected for award because GE's overall plan for the implementation of its design was considered weak in comparison to the designs of the other offerors and not on the basis of any predetermined design preferences in the areas where GE received low scores. It was not one specific detail or design factor which led ECOM to this conclusion, but a combination of factors involving unsatisfactory de-

sign concepts, insufficient levels of effort under two factors, and the lack of adequate information in the proposal. Therefore, ECOM concluded that GE's approach to accomplishing the desired performance involved a higher degree of risk than the approaches of the selected offerors.

We do not agree with the contention that since a performance specification was used in the solicitation, any design which conceptually meets the performance criteria must necessarily be considered equal to that proposed by the other offerors, particularly where it is determined that the proposed method of implementing the otherwise acceptable design concept is doubtful. As indicated in the ECOM report, one of the objectives of such a specification is to obtain the most feasible technical approach at the lowest cost. This entails placing a high premium on an offeror's innovative and creative techniques in meeting the performance specifications. The record indicates that based on the information submitted in the GE proposal, ECOM did not consider GE's approach to design implementation as feasible as those offered by other offerors. While you have put forth arguments which you assert justify GE's design concept and approach, we are unable to conclude that ECOM's evaluation of your proposal was arbitrary.

Concerning your argument that ECOM's objections to the GE design involves features which are not essential to the system's performance, we note that the agency clearly does not share your categorization of the deficiencies in the GE design. We do not feel that the record shows that ECOM's view of the impact of the deficiencies in GE's technical proposal is unreasonable.

You contend that ECOM's man-hour and cost estimates against which the GE proposal was evaluated were unreasonably high. In this connection, you point out that the ECOM estimates were considerably higher than those proposed by the offerors who are all experienced firms.

The record indicates that the basis for ECOM's man-hour and cost estimates was a study performed by the General Research Corporation (GRC), entitled "Cost Estimating Methods for Electronically Scanned Weapon Locator Radar," dated June 1969. We are informed that this report indicates that development costs can be related to production costs, and that the report also provides a method for estimating production costs from the basic design parameters of the radar.

In this connection, the agency informs us that a baseline set of radar parameters for artillery locating radars was evolved during a study for ECOM by the Technology Services Corporation (TSC). Using this set of design parameters the agency reports that it developed a generalized production cost figure and using this figure and the GRC

method it backed into the costs for development. It is reported that the man-hours needed for development were obtained by applying an expected distribution of labor rates, overhead, G & A, fee and materials cost and by using each offeror's design parameters and the GRC methodology, a Government estimate of production costs for each offeror was developed; and that the total man-hours for each offeror was derived by multiplying the generalized man-hour estimate by the ratio of costs for each offeror's design over the Government's generalized estimated production cost.

Although you contend that ECOM's estimates are inaccurate, we find no basis for concluding that the method used by ECOM is erroneous. In matters such as this, the administrative judgment as to the method to be used is entitled to great weight. In our view, that judgment should not be questioned by this Office unless it is shown to be unreasonable. Based on our review of the record, we cannot say that ECOM's method of developing its estimates was improper or that its estimates were unreasonably high.

You also contend that ECOM's evaluation of the costs and man-hours proposed by GE is erroneous in that ECOM merely compared its estimates to those proposed by GE without exploring the factors peculiar to the GE proposal. In support of this position you cite 47 Comp. Gen. 336 (1967), where we held that it is inconsistent for an agency to use cost-reimbursement contracting on the one hand, while on the other hand maintaining that estimated costs are capable of being determined to such a degree of certainty that any offered estimated costs other than those stated by the Government are unrealistic. It is your view that this principle is equally applicable to the man-hour estimates.

The record indicates that all the information contained in the GE proposal was considered by the ECOM evaluators. It appears, however, that they were not convinced that the data contained in the GE proposal justified GE's proposed cost and man-hour figures. We do not find that ECOM's evaluation of these factors was arbitrary. Moreover, we believe it is significant to note in this regard that GE's technical proposal was not considered unacceptable solely because of the deficiency in the proposed level of effort. In fact, the ECOM report indicates that the GE technical proposal would have been considered unacceptable even if the proposed level of effort had not been included in the evaluation.

Further, we do not agree that 47 Comp. Gen. 336, *supra*, is applicable to the case at hand. In that case we criticized the agency for its failure to reopen negotiations after agency personnel determined that all offerors had proposed cost estimates for a cost-type contract which

were considered to be unreasonably low. As a result of these determinations the agency based its award selection solely on the proposed fee floor and health benefit costs. It was our opinion that the method of selection constituted a change in the stated evaluation approach. We emphasized in that case that the award was improper because none of the offerors was given the opportunity to justify the reasonableness of its cost estimates. In the case at hand, GE was informed of ECOM's doubts regarding its overall cost estimate and was given an opportunity to establish the reasonableness of its cost estimate.

You further contend that the solicitation did not contain sufficient information to enable offerors to prepare their proposals properly. In this regard, you urge that ECOM did not follow its own regulations in developing the evaluation scheme used in the subject RFP.

It is clear that the evaluation plan which is cited in the ECOM internal operating instruction ("Evaluation and Award Factors R&D Procurements," dated October 20, 1971) is only a sample and not intended to be mandatory. As long as the evaluation criteria set forth in the RFP comply with the standards set forth in the Armed Services Procurement Regulation (ASPR) 3-501(b) Section D, the fact that the factors and relative weightings applied may not comport with an internal agency instruction cannot affect the validity of the award selection.

You also object to ECOM's evaluation plan because in your view the RFP did not include reasonably definite information as to the weight to be assigned the various factors in the evaluation. You further argue that the evaluation criteria were deficient because insufficient information was supplied concerning the methods to be used in evaluating the level of effort and cost proposals.

Section D.1 of the RFP provides, in part, that of the three factors, technical proposal is the most important factor and to be accorded greater weight than the other two areas combined; of the last two factors, past performance/management bears the greater weight. The subfactors are set forth in descending order of importance. Offerors were also warned that a rating of acceptable under each of the three factors was necessary for award consideration.

This Office does not require an agency to set forth its exact scheme of scoring in a solicitation. All that is required is that offerors be provided with a reasonable indication of the relative importance of the evaluation criteria. In our view the instant RFP met this standard. In this regard, we note that GE did not complain that it felt the RFP statement of evaluation criteria was unsatisfactory until after the awards were made. The proper time to question the evaluation criteria is before proposals are submitted. Concerning the evaluation of the

level of effort and cost realism factors, we do not believe it is reasonable to argue that GE was misled by the failure of the RFP to mention that those factors would be evaluated by the use of Government estimates.

You also assert that meaningful negotiations were not conducted with GE either before or after the submission of GE's best and final offer. It is your position that at no time did ECOM personnel explore, in any detail, the GE cost and man-hour estimates. You also point out that ECOM personnel did not mention the fact that they considered the GE trailer design unsatisfactory and, although questions were asked concerning the other four areas considered deficient in design, particular deficiencies were not discussed.

In regard to the technical deficiencies, you have cited cases (50 Comp. Gen. 117 (1970) and 47 Comp. Gen. 336, *supra*), wherein we held that deficiencies had to be pointed out in order to have meaningful discussions. We have also concluded that whether the statutory requirement for discussions must include the pointing out of deficiencies, and the extent thereof, is a matter of judgment primarily for determination by the procuring agency in light of all the circumstances of the particular procurement and the requirement for competitive negotiations, and that such determination is not subject to question by our Office unless clearly arbitrary or without a reasonable basis. *See* 51 Comp. Gen. 621 (1972).

In the instant case the agency determined that it would not be appropriate in this research and development procurement to discuss design deficiencies in detail. It is the agency view that since it was primarily interested in innovative and cost effective approaches to its performance specifications any discussion of design details which would allow an offeror to bring up its original inadequate proposal would subvert the intent of the procurement. It should be noted in this connection that ECOM personnel did inform GE that the agency had reservations about the GE design in all but one of the areas which ultimately contributed to GE's low final score. In the one area not mentioned (trailer configuration), it is ECOM's view that a complete redesign would be needed in order for GE's trailer design to be acceptable. In these circumstances, we do not feel that ECOM abused its discretion in not informing GE more explicitly why the technical proposal was considered inadequate.

Next, you assert that ECOM conducted meaningful negotiations only with Sperry, enabling that firm to raise its unacceptable proposal to an acceptable level. You contend that GE should have been afforded the same opportunity.

The record reveals that the discussions held with Sperry were no more comprehensive than those held with GE. We do not think that the fact that Sperry is able to improve its initial proposal (which was ranked considerably higher than the initial GE proposal), while GE was not able to do so, can be said to establish that more extensive discussions were held with Sperry.

You also contend that ECOM may have given Hughes an unfair cost advantage because of the commonality feature between this contract, which has already been awarded to Hughes, and the similar AN/TPQ–36 contract which ECOM proposes to award to Hughes. The AN/TPQ–36 procurement has also been protested by GE and other firms. You assert that since Hughes already has received the award in the subject procurement, ECOM, in order to take advantage of the savings under the commonality adjustment clause in this contract, would have to award the AN/TPQ–36 contract to Hughes. Accordingly, you conclude that the award of this contract must impact on and have had a significant affect on the evaluation for determination of the AN/TPQ–36 award.

It is ECOM's position, as stated in its administrative report in response to the same allegation raised in the AN/TPQ–36 protest, that potential savings on commonality features between the AN/TPQ–36 and equipment on other contracts was not made an evaluation factor and, thus, was not considered in making the award selection. The record provides us with no basis upon which we may dispute ECOM's position in this matter.

Throughout your argument you have emphasized the point that ECOM was arbitrary in ignoring the cost savings inherent in GE's lower estimated costs. Of course, this argument is premised on your conclusion that the GE proposal is technically acceptable and substantially equal to the Hughes and Sperry proposals. As mentioned above, we find no basis to disagree with ECOM's contrary conclusions.

In the instant case the Hughes and Sperry proposals were selected for award because in ECOM's opinion they were the only proposals which were acceptable from both a technical and cost standpoint. We have held in similar situations that the award of cost-reimbursement contracts requires procurement personnel to exercise informed judgments as to whether submitted proposals are realistic with regard to proposed costs and technical approaches. We believe that such judgments must properly be left to the administrative discretion of the contracting agencies involved, since they are in the best position to assess "realism" of costs and technical approaches, and must bear the

major criticism for any difficulties or expenses experienced by reason of a defective analysis. *See* 50 Comp. Gen. 390 (1970).

Based on the record, we are not able to conclude that ECOM's selection of Hughes and Sperry was arbitrary.

Accordingly, your protest is denied.

[B–178015]

Contracts—Specifications—Qualified Products—Reevaluation—Changes Requiring Reevaluation

A bidder who failed to have a product on the Qualified Products List reevaluated pursuant to the Qualified End Products clause (ASPR 1–1107.2(a)) included in the invitation for bids to furnish road graders, a clause which requires reevaluation of a product if any change occurred in the location or ownership of a plant at which a previously approved product is, or was, manufactured, may, nevertheless, have its bid considered for award since the change in the circumstances of the bidding concern was one of form, not substance—a transfer of title to the plant facility and a change in corporate name with no accompanying change in employees, products, and manufacturing processes—and, therefore, reevaluation of the product would be a useless exercise and an overly technical application of the reevaluation requirement.

Bids—Evaluation—Manuals

An IFB schedule provision to the effect a bidder will be considered nonresponsive if the commercial technical manuals solicited did not meet military specification standards should be deleted for use in future solicitations as it is prejudicial to fault bidders for this failure in view of the fact the military specification on "Manuals, Technical: Commercial Equipment" does not contemplate bid rejection on the basis of manual insufficiency but rather provides that the details of manual content shall be covered by the contract; in view of a conflicting provision in the solicitation schedule that commercial manual content that unintentionally deviates from the equipment specification affords no basis for bid rejection; and in view of the fact a bidder is bound by its bid to comply with both equipment specifications and the commercial manual requirements of the military specifications.

To the Director, Defense Supply Agency, October 23, 1973:

We refer to the protest of Jeffrey Galion Inc. against certain provisions in Defense Construction Supply Center invitation for bids (IFB) DSA700–73–B–2129 and the rejection of its bid as nonresponsive.

Bids were solicited for 10 road graders under the IFB. The only bidders were Huber Corporation (Huber) and Galion Manufacturing Company (Galion), Division of Jeffrey Galion Inc. The latter firm bid only to supply six graders. The prices offered indicated that a split award should be made with Jeffrey Galion Inc. receiving award for six graders and Huber receiving award for four. Huber refused to extend its bid acceptance period and its bid expired before the resolution of

the protest. Therefore, if an award is made to Galion for the six graders it offered to furnish, the remaining four will have to be relet to competition.

DSA advises that Galion did not enter in clause B11 (qualified end products) of its bid either the applicable offered item name or qualified product test number. The IFB provided that failure to enter such information on the bid would require its rejection. We have held previously that a bidder's failure to do so does not, however, necessarily render its bid nonresponsive. 45 Comp. Gen. 397, 400 (1966); B-158197, April 5, 1966. The present IFB calls for a type I, size 5, road grader to be built in accordance with Federal specification 00-G-630D and listed on qualified products list (QPL) 00-G-630-9. And DSA does not contend that the item offered by Galion fails to comply with the specification or that Galion does not have such an item listed on QPL 00-G-630-9. Accordingly, since the specification, the QPL number and the type and size grader required are all known to DSA and it is also known that Galion is the manufacturer rather than a mere supplier of the item, the DSA examination of QPL 00-G-630-9 can ascertain the applicable item name (Galion model number) and the QPL test number for bid evaluation purposes. Therefore, the failure of Galion to provide its item number and its QPL test number is a minor irregularity which may be waived.

However, the Galion Manufacturing Company, Division of Jeffrey Galion Inc., was not listed on the QPL for the graders which were being procured on a QPL basis. Rather the applicable QPL lists Galion Iron Works & Mfg. Co., Galion, Ohio, as the qualified manufacturer. The latter company was a division of Jeffrey Galion Inc., an Ohio corporation.

Effective April 1, 1973, Jeffrey Galion Inc. changed its name to Jeflion Inc., formed a new Delaware corporation under the old name of Jeffrey Galion Inc., and transferred all its assets to the newly formed Delaware corporation. Jeffrey Galion Inc. is now a wholly owned subsidiary of Jeflion.

Moreover, the Galion Iron Works & Mfg. Co., which became a division of the Delaware-based Jeffrey Galion Inc., changed its tradename, prior to bidding, to Galion Manufacturing Company. Thus, Galion Manufacturing Co., a division of Jeffrey Galion Inc., was stated as the name of the bidder.

The Notice—Qualified End Products clause (Armed Services Procurement Regulation 1-1107.2(a)), included in the IFB, states:

> Any change in location or ownership of the plant at which a previously approved product is, or was, manufactured requires re-evaluation of the qualification. Such re-evaluation must be accomplished prior to the bid opening date in the case of advertised procurements and prior to the date of award in the case

of negotiated procurements. Failure of offerors to arrange for such re-evaluation shall preclude consideration of their offers.

We have stated generally that the determination as to whether requalification by a particular firm is required because of changed circumstances is a question for the agency responsible for qualification rather than our Office. *See* B-176159, January 24, 1973. However, in situations not revolving around the technical aspects of manufacture, our Office will review an agency decision to determine whether the decision was founded on a reasonable basis.

In B-161414, September 5, 1967, we concurred with an agency determination that under the prior version of ASPR 1-1107.2(a), changes in both ownership and management at a plant producing a qualified product need not result in the loss of product qualification. Since that decision, however, the relevant ASPR provision has been amended to require reevaluation of the qualification where "ownership" changes. Reevaluation would seem to be necessary because, where there is a change in ownership, there is a possibility that with new management there may be a change in quality controls and procedures of that nature. Thus, reevaluation is appropriate in situations where a change in the circumstances of manufacture, such as the sale of a plant, is not merely a change in form, but rather is one in substance. Where there is merely a transfer of title to the plant facility and a change in a corporate name with no accompanying change in employees, products, manufacturing processes, location, or more, as in the present case, the reevaluation would be a useless exercise.

On this point, therefore, the protest is sustained. Although the bidder was nonresponsive to ASPR 1-1107.2(a), it would be an overly technical application to apply the provision to a formal rather than a substantive change. Accordingly, it is recommended that the bid of Galion Manufacturing Company be considered for award.

With regard to the protestor's contention regarding the solicitation's provision for commercial manuals, we note that the manuals which were supplied with the bid were determined to be acceptable. Therefore, the protest against the provision is academic.

However, since there have been other protests regarding the provision, our Office offers the observations that follow.

AFAD-71-531-(13), included in the IFB schedule, provided:

Commercial Technical Manuals. * * * The bidder shall submit, with his bid or proposal, two copies of the commercial manual he is offering for evaluation by the Government in order to determine whether the manual meets the criteria for existing commercial manuals cited in Specification MIL-M-7298. The Contracting Officer in conjunction with the concerned organizations reserves the right to determine the adequacy of existing commercial manuals submitted using the MIL-M-7298 criteria. * * * In the event Bidder commercial manual requires Supplemental data in accordance with paragraph 3.2.2, MIL-M-7298, the supplemental data will be submitted to the Procuring Activity for approval or rejection. * * *

* * * If in the evaluation of the contractor's commercial manuals by the Government it is determined the manuals do not meet the requirements for commercial data in MIL–M–7298, the bidder will be considered nonresponsive * * *.

It is apparent from the foregoing quotation that, if the commercial manuals offered for evaluation do not meet the requirements for commercial data in MIL–M–7298, the bidder is to be considered nonresponsive. However, it does not appear from the quoted language that the purpose for the submission of manuals was to fix the bidder's obligation under the contract, but rather to determine whether proposed manuals met the MIL–M–7298 criteria for manuals. We note in that regard that the AFAD did not require the precise supplemental information be indicated, but only an "outline" of the data. In that regard, MIL–M–7298C, included in the IFB, states in paragraph 6.2 that:

* * * The successful bidder's contract for the equipment will state whether his manual is satisfactory, satisfactory if supplemented, a manual must be prepared, or his original quote for a manual was acceptable. If supplementary data is required, details will be provided as to what information such a publication shall contain.

Notwithstanding the statement in the AFAD as to nonresponsiveness, the MIL specification on "Manuals, Technical: Commercial Equipment" does not contemplate bid rejection based on insufficiency of manual samples. Rather, the MIL specification provides that the details of manual contents shall be covered by the contract. In this light, the IFB manual submission provision is informational in nature serving to clarify for contract definition purposes the content and makeup of technical commercial-type manuals.

The portion of the schedule pertaining to technical data reads in part:

Content of Commercial Manuals: If commercial manuals are submitted which depict items or features which depart from specification requirements or contain provisions at variance with those of this solicitation, such manuals will not be acceptable; however, they will not be treated by the contracting officer as qualifying the bid or deviating from the solicitation requirements (unless the offeror clearly indicated in his bid that deviations are intended). * * *.

It is quite clear from the foregoing that commercial manual content which might unintentionally deviate from the equipment specifications affords no basis for bid rejection. It seems inconsistent as well as prejudicial to fault a bidder which is already bound by its bid to produce manuals meeting MIL–M–7298 requirements and equipment specifications, for commercial manual deficiencies in format and at the same time excuse equipment specification deviations appearing in those manuals. This is even more significant since a bidder is bound by its bid to comply both with the equipment specifications and the commercial manual requirements of MIL–M–7298.

In view of the foregoing, we recommend that consideration be given to amending the AFAD to delete the provision that commercial manuals submitted with the bids which do not comply with the military specification will render the bids nonresponsive.

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

[B-178333]

Contracts—Negotiation—Evaluation Factors—Point Rating—Reevaluation

An award for aircraft to the offeror who scored highest both as to price and technical factors upon reevaluation of the price factor of proposals subsequent to the erroneous public opening of proposals and disclosure of prices will not be disturbed because the reevaluation of points accorded price was necessitated by the use of an erroneous technique in the initial evaluation that proportionally reduced points that exceeded the lowest price used as a datum level and accorded 40 points; because the initial technical evaluation by a composite board assured independent judgment and fairness; and because notwithstanding the disclosure of prices and the subsequent negotiating procedures amounted to the use of an auction technique in violation of FPR 1-3.805-1(b), sufficient justification has been shown for not canceling the procurement. However, a repetition of the deficiencies reviewed should be avoided in future procurements.

Contracts—Negotiation—Requests for Proposals—Preparation Costs

Although bid or proposal preparation costs may be reimbursable where the Government has breached an implied obligation to fairly consider a bid or proposal, a claim for the cost of preparing a proposal to furnish weather observation and cloud seeding aircraft may not be considered on the basis the reevaluation of the price score factor displaced the claimant—a reevaluation necessitated by the fact the initial evaluation used an erroneous technique—or on the basis it was deemed inadvisable to cancel the procurement because of the erroneous public opening of proposals—a determination sufficiently justified—since these facts do not support the finding of a breach of obligation that warrants the recovery of proposal preparation costs.

To Weather Science, Inc., October 23, 1973:

We refer to your letters of August 17 and April 5, 1973, protesting the award of a contract to Sierra Research Corporation (referred to in the record as SRI) by the Bureau of Land Management (BLM), Department of the Interior, under request for proposals (RFP) No. P-3-197.

The protest is premised on four grounds. First, you allege that the public opening of the proposals and disclosure of prices in this negotiated procurement was erroneous and led to an auction whereby SRI was able to "buy" the contract by reducing its price from $475,620 to $416,564. Second, you contend that the initial evaluation of the proposals, which resulted in your firm (WSI) receiving the highest point score for price and technical factors, was correct and in accordance

with your understanding of the evaluation criteria, and that a change in the evaluation method which resulted in SRI becoming the highest scorer was improper and prejudicial to WSI. You state that you would have geared your proposal to give proper weight to technical considerations had you known the actual basis of the evaluation. Third, you believe that the procurement was biased to some extent against your concern by reason of a letter dated March 6, 1973, which SRI sent to the contracting officer questioning your ability to supply the required aircraft and which may have influenced the technical evaluation and the Government's decision to seek submission of revised proposals. Fourth, you contend that BLM failed to provide you with specific information as to the technical deficiencies in your initial proposal to enable you to prepare your revised proposal. For these reasons, you believe the award may have been illegal and that, as a minimum remedy, BLM should not exercise the options under the contract for 1974 and 1975. You also believe you should recover the expenses of preparing your proposal.

The RFP was issued January 15, 1973, calling for services involving the use of four aircraft in weather observations and cloud seeding in Alaska during the 1973 summer fire season, with options to renew the contract for the 1974 and 1975 seasons. The RFP provided that the proposals would be evaluated in accordance with the following weighted criteria:

	Maximum Points Attainable
A. Price	40
B. Personnel	20
C. Aircraft, instrumentation, and support equipment to be provided	10
D. Weather data analysis and use, performance of cloud seeding, and overall project management	15
E. Performance evaluation techniques	10
F. Optional equipment and/or support	5
Total	100

Also, clause XXXII of the RFP provided:

The lowest price responsive proposal received from a responsible offeror will be used as a datum level, and will receive the entire 40 points for price. All higher responsive proposals received from responsible offerors will receive proportionally fewer points for price.

Proposals were received from WSI, SRI and North American Weather Consultants (NAWC). On February 15, 1973, the contract-

ing officer erroneously held a public opening of the proposals and disclosed the offerors' prices:

WSI	$396,388
NAWC	459,398
SRI	475,620

Upon realizing his error, the contracting officer determined that nothing would be gained by canceling the RFP and resoliciting since all solicitation requirements would remain the same and, in any event, the technical factors, representing 60 percent of the basis for award, "were to be evaluated by individuals who would not be given the offered prices." The results of the technical evaluation, conducted by a composite board made up of BLM, Bureau of Reclamation and U.S. Forest Service personnel, were as follows:

	NAWC	SRI	WSI
B. Personnel	17	20	13.3
C. Aircraft, etc	7.3	10	8.6
D. Weather data, etc	13.3	15	13.3
E. Performance, etc	8	9.3	9.3
F. Optional equipment, etc	1	5	3.6
Total points	46.6	59.3	48.1

In calculating the points each offeror was to receive for price, the contracting officer assigned 40 points to WSI, the low offeror. He then divided the difference between the low and high offers, $79,232, by 40 to arrive at a value of $1,980.80 per deduction point. Applying this calculation to the offerors' prices led to these results:

Offeror	Amount Over Low WSI Price		Points To Be Deducted		Net Points Assigned For Price	
1. NAWC	$63,010.00	÷$1,980.80	=31.8	8.2	(40–31.8)	
2. SRI	$79,232.00	÷$1,980.80	=40	0	(40–40)	
3. WSI	0	÷$1,980.80	0	40	(40–	

The total scores of technical and price points in the initial evaluation showed that the WSI proposal attained the highest score with the following results on all offers:

1. NAWC 46.6+8.2=54.8 points.
2. SRI 59.3+0=59.3 points.
3. WSI 48.1+40=88.1 points.

In this regard, the administrative report states that "* * * the Contracting Officer revealed to the three offerors the point values listed above, for both price and technical considerations."

By letter of March 6, 1973, to the contracting officer, SRI questioned WSI's ability to provide the required aircraft. Also, on March 12, 1973, SRI challenged the method used to compute points for price, contending that it differed from the method used in previous solicitations. The contracting officer determined that this complaint was justified. In this regard, the administrative report states:

After discussing the matter with personnel who had evaluated proposals received for the 1972 RFP, the Contracting Officer found that SRI was correct. It was not desired that the high price offeror (who could be very close to the low price offeror) lose the entire 40 points for price. The technique intended was that once the datum level was established by the low price, all higher proposals would receive *proportionally* fewer points. Thus, if a price was 25% higher than the datum price, a 25% deduction would be made from the possible 40 points. This would allow 40—.25(40)=30 points for such a proposal.

Reevaluation of the point totals showed that SRI's score was now highest:

Offeror	Points For Technical Factors		Points For Price		Points Total
1. NAWC	46.6	+	35.9	=	82.5
2. SRI	59.3	+	32	=	91.3
3. WSI	48.1	+	40	=	88.1

At this point in the procurement, the U.S. Forest Service advised BLM that due to funding problems it might be unable to contribute funds to cover the cost of the fourth aircraft. By letter of March 16, 1973, the contracting officer requested best and final offers from the offerors on a four aircraft basis, and alternatively on a three aircraft basis. All offerors responded with timely offers on both bases. The best and final offers for the four aircraft operations were as follows:

SRI	$416,564
WSI	420,899
NAWC	459,398

Resolution of the funding problem led to a decision to contract for a four aircraft operation, as had been originally planned. A technical reevaluation was conducted, which effected no change in SRI or NAWC's point score, but which raised WSI's score from 48.1 to 52.0. Since SRI was now the low offeror, points for price were recalculated. In the final ratings, the SRI proposal scored highest:

	Points For Technical Factors	Points For Price	Total Points
1. NAWC	46.6	35.92	82.52
2. SRI	59.3	40.00	99.30
3. WSI	52.0	39.58	91.58

Contract 5355-CT3-283(N) was awarded to SRI on March 30, 1973, in the amount of $416,564.

The disputed issue in regard to the points allocated for price in the evaluation of the initial proposals does not, as you have contended, involve a change in the evaluation factors themselves during the evaluation. Rather, the question is one of the correct interpretation of the provision which specified that the low offeror would receive 40 points for price and that higher proposals would receive proportionally fewer points for price. We think that the reasonable interpretation of this provision is the one adopted by the contracting officer in his revised calculation, namely, that a higher price proposal would receive a point score lower than 40 in proportion to the amount such proposal was higher than the lowest price proposal. The initial method of calculation adopted by the contracting officer would have the effect of allocating to the highest offer, regardless of its dollar amount, zero points for price in every instance, a result which is clearly in conflict with evaluation criteria stating that technical considerations were to constitute 60 percent of the basis for an award decision. We think it was proper for SRI to object to the initial calculation of points for price and for the contracting officer to act upon this objection. *Cf.* 49 Comp. Gen. 98 (1969). Further, any uncertainty which you may have had concerning the meaning of this provision and the proper weight to accord to price vis-a-vis technical considerations in preparing your proposal should have been raised with the contracting officer prior to the closing date for receipt of proposals.

As for the technical evaluation of the initial proposals, the record shows that it was completed by late February or early March 1973, prior to SRI's letter of March 6, 1973, which questioned your ability to provide the necessary aircraft. On its face, the initial technical evaluation report does not show bias or prejudice against your concern. No question is raised in the report as to your concern's ability to provide aircraft. Further, we consider it significant that the technical evaluation was conducted by a composite board—more precisely, separate technical evaluation reports were submitted by BLM, Bureau of Reclamation, and Forest Service teams, a procedure which by its nature would help to insure independent judgment and fairness. We cannot say that the technical evaluators had no knowledge of the prices which had been publicly disclosed, or, if they had such knowledge, that they were uninfluenced by it. However, we do not find a sufficient basis on the record to state that the initial technical evaluation was conducted in bad faith or that favoritism was shown to any one offeror.

Your contention that the contracting officer erroneously disclosed the prices in this procurement has been admitted by BLM. Such action was

in violation of Federal Procurement Regulations (FPR) 1-3.805-1(b), which proscribes the disclosure to an offeror of his relative standing or of the prices offered by other offerors, and which prohibits the use of auction techniques. We have stated that there is nothing inherently illegal about an auction in the context of a competitively negotiated procurement. 48 Comp. Gen. 536, 541 (1969). However, our Office has never approved of any procedure whereby information which would give an unfair competitive advantage to any offeror would be disclosed during the negotiation process. 50 Comp Gen. 619 (1971). Each situation of this type must be judged in light of the particular circumstances to determine if an unfair competitive advantage to an offeror has resulted.

We believe sufficient justification was shown for not canceling the solicitation after disclosure of the initial prices. In this regard it is stated that, in view of the lead time necessary for the successful offeror to prepare for performance during the summer of 1973, and the fact that a resolicitation of the services would necessarily be of the same requirements, it was considered best to continue with the procurement. However, we are of the view that it would have been desirable in these circumstances to have made an award on the basis of the initial proposals immediately after evaluation had been completed, although this point is moot in view of the contracting officer's error in his initial calculation of the evaluation points for price and his action in revealing these point scores to the offerors. For our present purposes, it is sufficient to note that, as discussed above, the record does not demonstrate that the disclosure of prices prejudiced your concern in connection with the evaluation of the initial proposals.

In considering whether disclosure conferred an unfair competitive advantage on SRI in connection with the submission of best and final offers, it is significant that SRI would have been entitled to award, had award been made on the basis of the initial proposals. Arguably, SRI stood to lose most by a second round of negotiations. Furthermore, in submitting best and final offers both your concern and SRI had an opportunity to make technical revisions to your proposals and to requote prices. In these circumstances, we believe this would tend to negate any unfair advantage which may have accrued to either your concern or SRI through disclosure of price or technical information. B-160675, March 10, 1967; B-167054(1), January 14, 1970. In this regard, we believe that the contracting officer's statement of the technical deficiencies in the proposals, which consisted merely of a listing of the evaluation criteria under which the offerors had lost points, could have been more detailed. However, it appears that all offerors were advised of their deficiencies in the same manner.

In its best and final offer, SRI reduced its price for the four aircraft operation substantially, which increased its overall point score from 91.3 to 99.3. Your concern increased the offered price, but by receiving additional technical points, likewise raised its score from 88.1 to 91.6. In short, SRI was able to increase its point margin by a price reduction in its best and final offer; this is not a situation where an offeror's price reduction resulted in a displacement of another concern as high point scorer.

The circumstances described above amounted to the use of an auction technique. Although this procedure was in violation of FPR 1-3.805-1(b), under the circumstances we do not believe that the resulting contract award can be considered illegal. Accordingly, the protest is denied. However, in view of the procedural deficiencies in this procurement, we are recommending to the Secretary of the Interior by letter of today, copy enclosed, that steps be taken to avoid a repetition of such deficiencies in future procurements.

Lastly, it has been held that bid or proposal preparation costs may be reimbursable where the Government has breached its implied obligation to fairly consider a bid or proposal. *Continental Business Enterprises, Inc.* v. *United States*, 452 F. 2d 1016, 196 Ct. Cl. 627. In this case, while deficiencies in the procurement procedures are evident, we do not believe that the facts warrant a finding of such a breach as to support your claim for proposal preparation costs.

[B-179029]

Bids—Buy American Act—Evaluation—Post-Delivery Requirements

The exclusion of the cost of travel for the post-delivery "no charge" services to be performed by the installation engineer in the evaluation by the Bonneville Power Administration of the low foreign bid to furnish power circuit breakers for the purpose of determining the Buy America Act (41 U.S.C. 10a-10c) differential to be added to the bid was a correct application of the holding in 41 Comp. Gen. 70 to the effect the cost of post-delivery services was for exclusion from the differential computation, and this method of evaluation is in accord with section 14-6.104-4(f) of the Department of Interior Procurement Regulations and is consistent with E.O. 10582, December 17, 1954, as amended, and FPR 1-6.1. Furthermore, the services of the engineer and his travel costs properly were not considered components of the delivered circuit breakers within the meaning of FPR 1-6.101(b) that components are those articles, materials, and supplies which are directly incorporated in the end product.

To Westinghouse Electric Corporation, October 23, 1973:

Your letters of June 26 and July 10, 1973, protest award of a contract to any other bidder under solicitation No. 3375, issued by Bonneville Power Administration (BPA), Department of the Interior, on

April 30, 1973, for a requirement of 500 kV power circuit breakers, with associated spare parts and installation engineering services.

You maintain that BPA improperly excluded the cost of travel for the installation engineer when it computed the Buy American Act (41 U.S. Code 10a–10c) evaluating differential for the foreign bid of Brown Boveri Corporation, thereby making Brown Boveri the lowest bidder. We must agree with BPA's evaluation for the reasons set forth below.

The requirement, deliverable on an F.O.B. destination basis to four electric power substation sites and one warehouse, was set forth in five groups in the solicitation, as pertinent:

ITEM NO. & (Code No.)	SUPPLIES/SERVICES * * *	UNIT PRICE	AMOUNT
	GROUP I		
1. (20–7960)	Power Circuit Breaker, 500 kV, * * *		
1a.	INSTALLATION ENGINEER for Item 1 in accordance with the Section entitled Supervision of Installation of Supplementary Provisions (if required).		
1b.	TRAVEL FOR INSTALLATION ENGINEER * * *		
* * * * * * *			
	GROUP V		
5.	SPARE PARTS SET; * * *		
	TOTAL of Above Amounts, GROUPS I thru V, * * * including Sub-Items a and b of each Group		

As an alternate to bidding on a group basis, the solicitation permitted bidders to offer lump-sum bids for two or more complete groups, excluding group IV for which bidders were to offer a separate lump-sum bid, and with respect to award on a lump-sum basis, provided:

LUMP-SUM OFFERS. * * * the amount to be paid for any item shall bear the same ratio to the lump-sum offer that the price offered for such item bears to the sum of the prices offered for the items comprising the lump-sum offer.

Brown Boveri and four other companies submitted bids by bid opening on June 5, 1973. Brown Boveri's bid on groups I thru IV stated that no charge would be made for the installation engineer's services, but that $600 would be charged for travel of the engineer: the corporation also submitted lump-sum bids (groups I, II, III, and V—$1,236,400; group IV—$196,400). Westinghouse's bid on groups I thru IV stated that the price of the installation engineer's services and travel was included, except for the engineer's travel under group II for which no charge would be made. Westinghouse did not submit a lump-sum bid.

BPA subsequently determined that Brown Boveri's lump-sum foreign bid was low after multiplying the Buy American differential factor (12 percent) by the lump-sum total bid, less prorated travel costs of the installation engineer, adding the resultant differential to the total, and adding bond premium and foreign inspection costs for an evaluated total of $1,622,240.65; your evaluated total on a group basis was second low at $1,622,245.25. On the other hand, if the Buy American factor had been applied to all of Brown Boveri's lump-sum bid without excluding prorated travel costs, Westinghouse would be low.

BPA's Chief of Materials and Procurement explains the decision to exclude prorated travel costs from Brown Boveri's lump-sum bid and the mathematical steps used in determining the Buy American differential, as follows:

* * * The cost of travel for the installation engineer was removed from the lump sum bid of Brown Boveri prior to application of the Buy American Act differential in accordance with Section 14–6.104–4(f) of the Interior Procurement Regulations (IPR) * * *. Those travel costs were removed on a prorated basis as provided in the paragraph titled Lump-Sum Offers * * *.

* * * * * * *

Step 1—Prorate travel

* * * * * * *

$\frac{1,432,800}{1,439,800}$ [Brown Boveri's total lump-sum bid]=0.9951382 [prorate factor]
[Brown Boveri's total bid for groups I–V]

TRAVEL X PRORATE [factor]= * * * 2400 [sum of all travel costs for Brown Boveri's installation engineer for groups I–IV]

X 0.9951382=$2,388.33 [prorated travel costs]
Step 2—Foreign Component Computation

* * * * * * *

* * * [1,432,800] [Brown Boveri's total lump-sum bid]—(2388.33) × 0.12
* * * [Buy-American factor]=$171,649.40 [Buy American differential]

Section 14–6.104–4(f) of the Interior Procurement Regulations, cited by BPA as authority for excluding travel costs from the Buy American differential computation, provides:

(f) Executive Order No. 10582, as amended, provides that computation of differentials should be based upon the cost of foreign supplies or materials delivered at destination, and that additional costs involved in installation or other services to be performed after delivery should be excluded from the differential computation.

BPA further advises that the regulation follows our decision, 41 Comp. Gen. 70 (1961), to the Secretary of the Interior when we said:

* * * We are inclined to the view that under the provisions of the Buy American Act, as implemented by Executive Order No. 10582 and FPR 1–6.2, computation of the differential should be based upon the cost of the foreign supplies or materials delivered at destination, and that additional costs involved in installation or other services to be performed after delivery should be excluded from the computation.

When, as in this instance, the contract for which bids are invited includes both supply and construction elements, it would appear to be desirable to separate those elements, so far as practicable, not only for application of the Buy American requirements but also to furnish a more precise basis for determination of the

applicability of pertinent labor laws and other requirements which are not equally applicable to the procurement of supplies and of construction work. * * *.

BPA states that the cost of the engineer's travel was properly excluded from the Buy American computation under the Interior procurement regulation since the engineer's work relates entirely to post-delivery services, as exemplified by paragraph 2-21.1 of the Supplementary Provisions of the IFB, which provides:

The Government may require the contractor to furnish one or more installation engineers * * * to supervise and be directly responsible for the installation and operation of the apparatus until tests are completed, the equipment is energized, and final acceptance is made.

On the contrary, you argue that some of the engineer's services which Westinghouse provides are performed before delivery, such as achieving delivery and arranging transportation from railhead to destination site; that other post-delivery services such as the engineer's duty to find, detect, and correct defective parts, after delivery of the circuit breakers, relate to continuing quality assurance procedures for the items; and that the Buy American factor should therefore apply to these costs.

We agree with BPA's view that the engineer's services as described in the Supplementary Provisions of the IFB are to be performed after delivery of the items at the F.O.B. destination sites. Although Westinghouse requires its installation engineer to perform predelivery services apart from the requirements of the IFB, bidders were only requested to price post-delivery services of the installation engineer. Further, we agree with BPA's statement that the primary job of the engineer under the IFB work description is to supervise the installation of the circuit breakers rather than to perform quality assurance procedures which, under the terms of the IFB, are to be performed in the factory.

Next, you urge that exclusion of the engineer's travel costs is contrary to the provisions of Executive Order 10582, December 17, 1954, as amended by Executive Order 11051, September 27, 1962, and Federal Procurement Regulations (FPR) 1-6.1 concerning the Buy American differential; alternatively, you argue that there is no indication in the Executive orders or the regulations that these costs should be excluded. We disagree. Pertinent provisions from the Executive orders and the FPR are quoted, as follows:

Executive Order No. 10582, as amended.
Section 1.

* * * (c) the term "bid or offered price of materials of foreign origin" means the bid or offered price of such materials *delivered at the place specified in the invitation to bid* * * *. [Italic supplied.]

Section 2(b) * * * the bid or offered price of materials of domestic origin shall be deemed to be unreasonable, * * * if the bid or offered price thereof exceeds the sum of the bid or offered price of like materials of foreign origin and a differential * * *.

(c) The executive agency * * * shall * * * determine the amount of the differential * * * on the basis of one of the following described formulas * * *:
(1) The sum determined by computing six per centum of the bid or offered price of materials of foreign origin.

FPR 1-6.101

(g) "Foreign bid" means a bid or *offered price for a foreign end product including transportation to destination* * * *. [Italic supplied.]

FPR 1-6.104-4(b)

* * * Each foreign bid shall be adjusted for purposes of evaluation by adding to the foreign bid (inclusive of duty) a factor of 6 percent of that bid * * * 12 percent factor shall be used * * * if the firm submitting the low acceptable domestic bid is a * * * labor surplus area concern.

We read the above provisions as requiring application of the Buy American factor to the price of foreign materials *delivered* to destination. Thus, the price of services rendered after delivery is properly excluded, in our view, from the "foreign bid" to which the factor is applied.

You also argue that the services of the engineer and his travel costs must necessarily be considered components of the delivered circuit breakers and subject to the Buy American factor. Components, as defined in FPR 1-6.101(b), mean those articles, materials, and supplies which are directly incorporated in an end product. Since the installation engineering services and related travel costs here are not articles, materials, or supplies, and because the services are performed after delivery of the manufactured (incorporated) circuit breakers, we do not agree that the engineer's travel cost is a component of the delivered end item subject to the Buy American factor.

This view does not preclude a bidder from including some or all of the required engineering services in the price of delivered circuit breakers. Notwithstanding instructions in a prior BPA solicitation for circuit breakers, which were similar to instructions in the present solicitation, directing bidders to quote unit prices for engineering services, we have considered a bidder's insertion of an "included" price for these subitems as complying with the instructions. 52 Comp. Gen. 265 (1972). Consequently, Brown Boveri's decision to bid "no charge" for engineering service costs in the subject procurement cannot operate, in itself, to make post-delivery engineering travel costs for which the corporation quoted lump-sum prices subject to the Buy American factor as you suggest. Rather, consistent with the relevant Executive orders and procurement regulations, post-delivery services and travel costs must be excluded from the Buy American computation.

You also claim that BPA had no basis for extracting travel costs from Brown Boveri's lump-sum bid. The IFB provisions on lump-sum awards provided a formula for prorating engineering services and travel costs which would otherwise be indeterminable since they were included in the lump-sum bid. The formula scheme was a rational

basis, in our view, for extracting engineering travel costs from Brown Boveri's lump-sum bid based on the prices the corporation quoted for engineering travel under its group bids. Since the travel costs were precisely determined and because the services were post-delivery, we believe BPA properly excluded them from the Buy American computation.

Finally, you urge that BPA has misapplied our 1961 decision, cited above. You state that the decision involved a situation where the cost of construction work to be done after delivery of the end items amounted to several hundred thousand dollars, unlike the case here, and special clauses, applicable only to construction contracts, were included in the solicitation for the work. You also point out that the solicitation in that decision required one lump-sum offer for the supply and the construction work, whereas here the engineering services are listed in separate subitems. Consequently, you suggest that BPA should not have relied on the decision as authority for excluding engineering travel costs here.

Although the present procurement does not require construction work amounting to several hundred thousand dollars, we believe our prior decision, reasonably read, was meant to exclude all post-delivery services from the Buy American computation whether or not they were related to a major construction effort. Further, the separate listing of post-delivery services in the subject solicitation directly conforms to our 1961 suggestion that these services be separately listed "so far as practicable" for application of the Buy American requirements and does not indicate that these services are different, for Buy American purposes, from the post-delivery construction services involved in our prior decision. Consequently, we believe BPA has correctly applied our decision in this procurement.

Your protest must therefore be denied.

[B–178715]

Statutes of Limitation—Claims—Compensation—Status of Claim

The claim of a reservoir superintendent of the Bureau of Reclamation for 2 hours overtime for the Sundays and holidays he was required to work during the period August 1, 1955, through January 10, 1970, to take weather and reservoir operation records—overtime claimed on the basis of not taking advantage of a compensatory time arrangement before its discontinuance—is not within the purview of 5 U.S.C. 5596 regarding timely appeal to an unwarranted personnel action and is for consideration pursuant to 31 U.S.C. 71a, and the claim having been received in the United States General Accounting Office on May 23, 1973, only that portion of the claim for the period prior to May 23, 1963, is barred.

Compensation—Overtime—Regular—Not Within Purview of Compensatory Time Provisions

Sunday and holiday work performed on a regular and recurring basis is not work within the purview of the compensatory provisions of 5 U.S.C. 5543 and 5 CFR 550.114, and an employee who from August 1, 1955, through January 10, 1970, maintained reservoir records, as well as other employees similarly situated, is entitled as provided by 5 CFR 550.114(c) to the overtime compensation prescribed by 5 U.S.C. 5542 for the period not barred by 31 U.S.C. 71a. The overtime is compensable on the basis of the actual time worked Sundays and a minimum of 2 hours for the holidays, payable without interest in the absence of a statute so providing, and at the grade limitation prescribed by 5 U.S.C. 5542(a)(1). Employees who took compensatory time may be paid the difference between the value of that time and overtime; claims affected by 31 U.S.C. 71a should be forwarded to GAO for recording and return; and overtime is payable when compensatory time is not requested.

To the Secretary of the Interior, October 24, 1973:

We refer to the letter of May 21, 1973, reference WBR 520/953.2, from Mr. Richard R. Hite, Deputy Assistant Secretary, concerning the claim of Mr. Thomas R. Holland, an employee of the Bureau of Reclamation stationed at Ellis, Kansas. Mr. Holland, a reservoir superintendent, is claiming 2 hours overtime for Sundays and holidays that he was required to work during the period August 1, 1955, through January 10, 1970.

It is stated that throughout northern Kansas, eastern Colorado, and southern Nebraska the Bureau of Reclamation operates 10 dams and reservoirs for the purpose of delivering water to various irrigation districts and municipalities. A reservoir superintendent is appointed to each of these reservoirs in order to control water deliveries. The reservoir superintendent is required to live in Government-furnished housing at each reservoir and is the only full-time onsite Bureau employee at the location.

Until January 25, 1970, each reservoir superintendent was required to take weather and reservoir operation records on a daily basis, including Sundays and holidays. Each employee had a regular 40-hour tour of duty spread over 6 days—7 hours per day Monday through Friday and 5 hours on Saturday. The additional work that was required on the nonworkdays, Sundays and holidays, took approximately 30 minutes per day and in order to compensate the superintendents for this work, each was instructed to take compensatory time off by adjusting his quitting time on one of the normal workdays in accordance with the amount of time he had worked on the Sunday or holiday. This compensatory time arrangement was made official in a letter dated October 29, 1957, from the Chief of Irrigation Operations. That letter provided in part as follows:

I realize that the obtaining of these daily records on weekends and holidays entails some work on the part of the Superintendents which is considered part of the overall work time for the week. However, I expect that Superintendents are

making adjustments for this extra time by adjusting their quitting time for normal work days at some hour before five o'clock which will offset the actual time worked on holidays and weekends.

This arrangement continued in effect until January 25, 1970, at which time work schedules for superintendents at most of the dams were revised to provide for 40-hour, Monday through Friday, workweeks during the winter months. At the same time it was determined that regular readings of gauges on Saturdays and Sundays would only have to be made when the last day of the month fell on one of those days. Superintendents were to be given compensatory time for all such readings made on Saturdays and a minimum of 2 hours overtime for readings taken on Sundays.

Mr. Hite states that it was felt reasonably certain that prior to the change in 1970 reservoir superintendents were adjusting their work hours in accordance with the compensatory time requirement. However, Mr. Holland and at least one other superintendent claim they did not do so. Mr. Holland is now claiming 2 hours overtime for each of the Sundays and holidays from August 1, 1955, through January 10, 1970, that he was required to take weather and reservoir operation records.

It is the position of the Bureau of Reclamation that Mr. Holland's claim was untimely filed since he apparently accepted the compensatory time arrangement for a period of nearly 15 years without ever bringing his discontent with the arrangement to the attention of management. It is further noted that Mr. Holland did not file a claim for overtime until May 1, 1972, a period of over 2 years after the arrangement was discontinued. Mr. Holland, however, states that he requested overtime pay on a number of occasions but that his requests were turned down. It is further contended that if Mr. Holland did fail to take the compensatory time off as provided for under the arrangement, the time must be considered forfeited under the provisions of section 550.114(c) of title 5, Code of Federal Regulations (CFR).

In light of the foregoing, the following specific questions are presented by Mr. Hite:

1. Is management's viewpoint that the claim was filed untimely valid? Is the position that compensatory time was forfeited under the provisions of Civil Service Regulation 550.114(c) valid?
2. Is Mr. Holland, in fact, entitled to callout compensation in view of the fact that the compensatory time off arrangement was unilaterally imposed by management, rather than being requested by the employee?

In the event our answer to question No. 2 is in the affirmative, certain additional questions are raised concerning the amount to which Mr. Holland is entitled.

In advising Mr. Holland that his claim is regarded as having been untimely filed, the Bureau of Reclamation, in its letter of September 29,

1972, relies on section 550.803(b) of title 5, Code of Federal Regulations. That section contains procedures under 5 U.S. Code 5596 governing the payment of backpay in instances where, on the basis of an administrative determination or timely appeal, an employee is found to have undergone an unjustified or unwarranted personnel action. A claim for overtime compensation such as Mr. Holland's is not within the purview of 5 U.S.C. 5596 and thus the requirement thereunder of timely appeal is not applicable. Pertinent to the timeliness of claims against the Government, 31 U.S.C. 71a, 237, provides only that claims shall be received in the General Accounting Office within 10 years of the date such claim first accrued. Since Mr. Holland's claim was received in this Office on May 23, 1973, only that portion prior to May 23, 1963, is barred.

The basic statutory provisions regarding the payment of overtime are codified in section 5542 of Title 5, U.S. Code. That section provides, in part, as follows:

§ *5542. Overtime rates; computation.*

(a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or * * * in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter, at the following rates:

(1) For an employee whose basic pay is at a rate which does not exceed the minimum rate of basic pay for GS–10, the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay.

(2) For an employee whose basic pay is at a rate which exceeds the minimum rate of basic pay for GS–10, the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of the minimum rate of basic pay for GS–10, and all that amount is premium pay.

* * * * * * *

(b) For the purpose of this subchapter—

(1) unscheduled overtime work performed by an employee on a day when work was not scheduled for him, or for which he is required to return to his place of employment, is deemed at least 2 hours in duration * * *.

Section 5543 of Title 5 provides for granting an employee compensatory time off from his scheduled tour of duty in lieu of payment of overtime under certain circumstances. The implementing regulations to that statute are found in 5 CFR 550.114. That section provides as follows:

§ *550.114 Compensatory time off for irregular or occasional overtime work.*

(a) At the request of an employee, the head of a department may grant him compensatory time off from his tour of duty instead of payment under § 550.113 for an equal amount of irregular or occasional overtime work.

(b) The head of a department may provide that an employee whose rate of basic pay exceeds the maximum rate for GS–10 shall be paid for irregular or occasional overtime work with an equivalent amount of compensatory time off from his tour of duty instead of payment under § 550.113.

(c) The head of a department may fix a time limit for an employee to request or take compensatory time off and may provide that an employee who fails to take compensatory time off to which he is entitled under paragraph (a) or (b) of this

section before the time limit fixed, shall lose his right both to compensatory time off and to overtime pay unless his failure is due to an exigency of the service beyond his control.

Under those regulations, a department head may require that an employee, whose rate of basic pay exceeds the maximum rate for GS–10, take compensatory time off for *irregular* or *occasional* overtime work instead of being paid overtime compensation for that work under 5 U.S.C. 5542. Employees whose rate of basic pay, like Mr. Holland's, is less than the maximum rate for GS–10 may, at their request, be granted compensatory time off in lieu of overtime compensation for *irregular* or *occasional* overtime work.

It does not appear that the overtime work required of Mr. Holland was either irregular or occasional. Prior to January 1970 Mr. Holland was required to take certain readings of gauges on a daily basis, including Sundays and holidays. The work he performed on Sundays was in addition to his regular 40-hour tour of duty. The concept of regular as opposed to irregular overtime appears in various statutes governing the compensation of Federal employees. Under 5 U.S.C. 5545(c)(2) which authorizes payment of premium compensation for "irregular, unscheduled overtime duty," we have held that the term "regular overtime" is work which occurs on successive days or after specified intervals, as opposed to irregular overtime which does not recur in that manner. 48 Comp. Gen. 334 (1965), 52 *id.* 319 (1972). We find nothing to warrant a different construction of the word "irregular" in the context of 5 U.S.C. 5543, nor does the legislative history of that section indicate that Congress intended the word "occasional" as used therein to have a meaning other than the common dictionary definition, namely "occurring now and then; occurring at irregular intervals; infrequent." Webster's New International Dictionary, 2d Edition, 1959. We do not believe that work required to be performed every Sunday on a regular and recurring basis can be considered either "irregular" or "occasional." Accordingly it does not appear that the overtime work performed by Mr. Holland on Sundays up to January 1970 would come within the purview of the provisions of 5 U.S.C. 5543 and 5 CFR 550.114 and thus he cannot be viewed as having forfeited his right to compensation for the time he worked under the provisions of 5 CFR 550.114(c). With the exception of that portion of his claim prior to May 23, 1963, it appears that Mr. Holland is entitled to overtime compensation for his work on Sundays under the provisions of 5 U.S.C. 5542(a) as work officially ordered or approved in excess of 40 hours in an administrative workweek.

As to the amount of his entitlement, Mr. Holland should be paid at the rate provided under 5 U.S.C. 5542(a)(1) only for the actual time he worked on Sundays. In that regard we point out that 5 U.S.C.

5542(b)(1) provides for the payment of a minimum of 2 hours overtime only for "unscheduled overtime work performed by an employee on a day when work was not scheduled for him." As previously discussed, the work performed by Mr. Holland was regularly scheduled to recur on successive Sundays. Therefore overtime payments would only be appropriate for time spent by Mr. Holland in actual work on a Sunday. Any work performed on a holiday, however, would be for compensation at the appropriate rate for a minimum of 2 hours in accordance with the provisions of 5 U.S.C. 5546(c). Since it is indicated that the days worked by Mr. Holland since May 23, 1963, can be verified by time and attendance records, he should be paid in accordance with the foregoing based on those records.

We note that Mr. Holland is also claiming interest on the amount due him. Concerning that portion of his claim, it is well settled that the payment of interest by the Government on its unpaid accounts or claims may not be made except where interest is stipulated for in legal and proper contracts, or when allowance of interest is specifically directed by statute. There is no statute authorizing interest on claims similar to that here involved.

As to the work schedule currently in effect as shown by the letter of January 13, 1970, from the Project Manager, Kansas River Projects, it is indicated that reservoir superintendents are being required to take compensatory time off for the work they are required to perform in excess of 40 hours per week when the last day of the month falls on a Saturday during the winter months. Under the provisions of 5 U.S.C. 5543 it would appear that, for those employees whose rate of pay does not exceed the maximum rate for GS–10, overtime pay would be proper unless compensatory time off is specifically requested by the employee.

We are aware that our decision herein with respect to the claim of Mr. Holland will serve as a basis for adjudicating similar claims for some, or all, of the other reservoir superintendents concerned. In that regard, those employees who, like Mr. Holland, did not adjust their work hours in accordance with the compensatory time arrangement would be entitled to overtime compensation on the same basis as Mr. Holland. As to those employees who took compensatory time, they would be entitled to the difference between the amount of overtime compensation they should have received and the value of the compensatory time used. In computing such amounts due we point out that prior to enactment of section 1(24) of Public Law 90–83, September 11, 1967, 81 Stat. 200, the controlling rate of pay with respect to payment of overtime compensation under 5 U.S.C. 5542

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was the minimum rate for grade GS–9 rather than the minimum rate for grade GS–10 currently in effect.

Upon receipt of claims from the other superintendents, those which may be affected by the 10-year limitation should be forwarded to our Transportation and Claims Division (General Claims) for recording under 4 GAO Manual 7.1. After recording, such claims will be returned for your consideration.

[B–177835, B–179237]

Contracts—Specifications—Minimum Needs Requirement—Different Approaches to Achieve

The fact that one agency seeks to meet its minimum needs for an efficient garbage removal system by purchasing an entire system—that is grouping bodies, refuse containers, and trucks—while another agency plans to modify on-hand items and buy only certain components of the system is not determinative of the propriety of either solicitation as both methods are reasonable in order to achieve desired ends. Therefore, an all or nothing bidding requirement on refuse containers, trucks, and related equipment is not considered unduly restrictive of competition, even though the manufacture of a single component would be excluded, since the question of the compatibility of components is a reasonable basis for the procuring agency to require bids on the entire system.

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

Where the procurement records for the purchase of refuse collection trucks and related equipment under invitations for bids reveal past problems in securing competition both because of the existence of patents and the inclusion of a patent indemnification clause, the needs of a procurement agency may be obtained under the negotiating authority in 10 U.S.C. 2304(a)(10) if it appears likely that persons or firms other than the patent holder who are capable of performing in accordance with the Government's specifications would not presently be interested in submitting bids.

Bids—Competitive System—Specifications—Changes to Effect Competition

Under an advertised procurement where the former supplier of single pick-up point refuse trucks would have been the sole source of supply, there appears to be no reason to exclude from competition manufacturers willing to bid dual point equipment conditioned on furnishing a kit to modify the agency's existing single point pick-up refuse containers to accept both single and double pick-ups, even though the former supplier may have some competitive advantage. Furthermore, a warranty as to the correctness of the successful bidder's recommendation relative to the operation of a refuse system which may in part use equipment of another manufacturer may not be implied where the solicitation provides for no warranty.

To the Secretary of the Army, October 29, 1973:

We refer to the protest of Capital Industries Inc. (Capital) with respect to request for proposals (RFP) DAAE07–73–R–0020, as amended and the protests of Dempster Brothers Inc. (Dempster) with respect to invitations for bids (IFB) Nos. DAAE07–73–B–0087, as

amended and −0097. The protests were the subject of letters dated May 9, June 21 and July 30, 1973, from the Deputy General Counsel, Headquarters United States Army Materiel Command.

The above-referenced solicitations for various refuse collection trucks and equipment were issued by the United States Army Tank-Automotive Command, Warren, Michigan. Although the procurements are the responsibility of the Army, the equipment, with few exceptions, is being secured for the Navy and the Air Force.

In view of the complexity of the facts and issues presented, we are addressing our decision to you, rather than to the protestants, and will consider each procurement individually.

Solicitation RFP −0020

This solicitation seeks to procure for the Navy front container hoisting refuse trucks with compaction bodies (per MIL-T-46748C) and tilting frame trucks which will be used with detachable cargo bodies of various types and sizes (per MIL-T-46701B). Additionally, the RFP seeks offers on refuse containers of various types and sizes (per MIL-R-23954A) and other refuse related equipment. It is reported that for optimum efficiency, it is mandatory that each truck and body combination of a given type be mechanically compatible. It is also a requisite of proper operation that the refuse containers be compatible with the hoisting device and related equipment of the refuse truck system.

Capital makes four contentions to support its protest under this solicitation. First, it protests the "grouping" in the RFP of certain items—bodies, refuse containers and trucks. The effect of this grouping requires offerors to submit proposals on trucks, refuse containers, and bodies as a "system." Manufacturers are precluded from submitting proposals on one part of such system. This requirement was incorporated in the RFP pursuant to instructions by the Navy, the requisitioning agency, that "all items must be furnished as a complete system by the same manufacturer."

Capital Industries does not produce refuse trucks, but does manufacture refuse containers. It is Capital's contention that the "all or nothing" grouping requirement unnecessarily restricts competition by effectively eliminating from consideration for award manufacturers unable to produce a complete system. Capital argues that the "all or nothing" requirement is unnecessary because Capital can guarantee that its refuse containers can be manufactured so as to be compatible with refuse trucks manufactured by another company. This would be accomplished, according to Capital, by contacting the successful manufacturer of the refuse trucks immediately after award of the

contract and inquiring as to the technical specifications which are to be used by the manufacturer in producing the trucks. Capital would then manufacture its containers according to these specifications to insure compatibility of components.

In 47 Comp. Gen. 701 (1968), we were faced with a similar situation. There, a manufacturer of refuse containers was protesting against an "all or nothing" requirement in the solicitation which required prospective bidders to bid on both refuse trucks and containers as a system. In denying the protest we stated at page 704:

> Clearly, in the orderly conduct of the Government's business, the Government as a buyer may not be placed in the position of having to purchase a portion of an advertised system from a potential supplier who is unable or unwilling to supply the entire system but only certain components of the system. Moreover, the technical and/or engineering question as to whether the desired compatibility of components may be attained other than through the purchase of a complete rubbish collection system is not for resolution by our Office. Rather, in accordance with our established rule in areas such as here involved, we must rely upon the technical judgment of the procurement activity.

In the present situation, it should be noted that the "all or nothing" requirement in the RFP applies to only part of the total number of refuse containers which are to go to Navy installations having no existing refuse disposal system; therefore, trucks as well as containers are needed. On the other hand, Capital, or any other manufacturer of containers, may submit proposals on those refuse containers which are to go to installations with existing refuse disposal systems.

The Navy justifies the "all or nothing" requirement in the initial purchase of refuse disposal equipment by first pointing out that the container specification (MIL–R–23954A) is a performance specification as opposed to a design specification. Therefore, it is possible for different manufacturers to produce containers of various designs in accordance with the specification. Since there are no refuse trucks at these "initial purchase" installations, a container manufacturer could not assure compatibility of his product with a particular truck until the truck had been delivered and the two components were tested together. Such an arangement, the Navy states, would not be feasible because if the containers were not compatible with the trucks, the containers would have to be modified, thus incurring not only additional expenses but also delays in placing the system in operation. The Navy cites past experiences where trucks and containers furnished by different manufacturers proved to be incompatible. As a result, the Navy suffered losses measured by excess administrative expense and resulted in component modifications and operational delays.

Because of the reasons stated by the Navy, our Office finds no basis for holding that the use of the "all or nothing" requirement in the RFP is not based upon a bona fide determination that such a provision is necessary to insure compatibility of components. Under the facts

of record, our Office will not substitute its judgment concerning the technical judgment of the requisitioning or procuring activity.

Capital raises the argument that other agencies in processing similar equipment have both (1) removed containers from the grouping requirement and (2) requested that successful bidders for trucks furnish technical and dimensional data within 30 days of bid acceptance so that the Government could modify existing containers to conform with the new trucks before delivery. Indeed, both of the above actions were taken with respect to IFB –0087. In IFB –0087, bidding on the containers was initially subject to a similar grouping restriction, however, that restriction was removed by amending the IFB. Furthermore, the Air Force subsequently determined that its existing containers should be modified and used. Therefore the container section of IFB –0087 was deleted and no new containers will be purchased thereunder.

In B–174140, B–174205, November 17, 1972, we considered a situation analogous to the present one. There two agencies took positions practically diametrically opposed concerning the means required to meet their actual needs. We held that where substantial merit exists as to both positions, we would not say that the specification requirement stated by one agency would not meet its particular actual needs. We think that there is merit in both the Navy's position regarding the systems approach and the Air Force's independent buy or container modification approach. We therefore will not question the Navy's intention to procure this equipment as a system rather than as a collection of individual pieces of equipment.

Capital's third contention concerns lack of independence of the contracting officer. However, we find no evidence in the record of any person or office interfering with the contracting officer in the performance of his duties. Moreover, the Navy, as the requisitioning agency, has the right and the responsibility to assure that the RFP accurately reflects its needs.

Capital's fourth contention concerns the length and complexity of the RFP. We are unable on the record before us to offer any substantive comment on this allegation. Capital also questions the propriety of using negotiated procedures (10 U.S. Code 2304(a)(10)) as opposed to formal advertising procedures. In this regard, one of the exceptions to the requirement for formal advertising is where it is determined that the purchase is for property for which it is impracticable to obtain competition.

The instant procurement was negotiated under 10 U.S.C. 2304 (a)(10) because Dempster allegedly holds patents on a number of the special features called for in the solicitation. Nevertheless, the RFP was mailed to 17 potential sources. However, Armed Services Procure-

ment Regulation (ASPR) 3-210.2 indicates, and our prior decisions have held, that the mere existence of such a patent right does not, in and of itself, justify the use of this authority to negotiate. 38 Comp. Gen. 276 (1958), B-166072(1), March 28, 1969. The reasons stated for not advertising this procurement are that in past IFBs, Dempster has been the only responsive, responsible bidder "because of their patents on the special features." While another manufacturer performing such a Government contract may not be able to produce equipment conforming to the specifications without infringing Dempster's patent(s), 28 U.S.C. 1498 effectively provides for Government indemnification of such a manufacturer in the event of a suit for infringement. However, it should be noted that ASPR 9-103 requires patent indemnity in the case of a contractor who might infringe a patent during the performance of a Government contract which was awarded under formal advertising.

As noted by our recent decision, B-176678, January 17, 1973, it is apparent that the procuring activity has had difficulty in obtaining competition when procurements of this nature have been formally advertised. Indeed, in the cited case, our Office concurred in the agency's determination of nonresponsiveness where a bidder took exception to the mandatory patent indemnification clause in the IFB.

In 38 Comp. Gen. 276, 278, we stated that:

> Nor do we believe that negotiation under 10 U.S.C. 2304(a)(10) would be authorized in other cases merely on the basis that the procurement involved patented articles, but rather that the determining factor should be whether or not it seems likely that persons or firms other than a patent holder, capable of performing in accordance with the Government's specifications, would be interested in submitting bids.

The record indicates that only one responsive bid was received on each of three prior procurements, and it is reasonably apparent from the record that the patent problem, together with the inclusion of a patent indemnity clause, severely restricted participation in the procurements. In view of this history, we feel that recourse to the negotiation authority in 10 U.S.C. 2304(a)(10) was proper.

Solicitation IFB -0087

This IFB covers an Air Force requirement for refuse trucks and detachable cargo bodies of various sizes (MIL-T-46701B) and containers (MIL-R-23954A) which were removed by amendment. This requirement for containers as noted previously was initially subject to a bid grouping restriction similar to that in RFP -0020. This restriction was, however, removed by amendment 0002 to the IFB. Thereafter, the Air Force determined to delete the container requirement and to utilize existing containers which would be modified, at Government

expense, to conform to the dimensions and characteristics of the low bidder's equipment. Primarily, these single pick-up point containers would be modified to accept either single or dual point pick-up.

Amendment 0004 to the IFB dated May 23, 1973, provides as follows:

> The successful bidder is, therefore, required to furnish certain (non-proprietary) hoisting operation technical criteria and drawings pertaining to the hoisting equipment so that the Air Force may successfully carry out the required container modifications. This hoisting operation technical criteria and drawings, are required by 30 days after receipt of contract and include the following:
> (1) Length, width, depth, and end (point) configuration of the forks.
> (2) Inside, clear distance between the forks.
> (3) Recommended clear inside length, width, and depth of the container hoisting sleeve.
> (4) Recommended maximums of length, width, height, gross container plus payload weight, and cubic volume capacity of containers operable with the hoisting equipment and chassis.
> (5) Any limiting container dimension(s) and/or hoisting sleeve positioning dimension(s) which would prohibit or restrict the hoisting or emptying operation into the demountable body (IFB item 3), or which if exceeded could damage the truck chassis (item 1) or demountable body * * *.
> (6) Any limiting factors of container design (such as length, width or direction of top-lid swing, etc.) which would prohibit or restrict hoisting or emptying operations or would damage the chassis, hoisting mechanism, or compaction body * * *.
> The requested data specified above is considered to be normal operational performance data and does not involve proprietary information * * *.

Dempster contends that:

(1) The use of the existing containers as modified would create a substantial delay since testing and improvising would be required upon delivery of the trucks to insure container compatability and the workability of the entire system;

(2) The requirement to furnish certain dimensional data could lead to misinterpretations of that information with disastrous results while the further requirement for information on limiting factors regarding container design and dimension could make the contractor liable for damages;

(3) Solicitation RFP -0020 was on a "systems basis" because a systems purchase is best.

In essence, Dempster contends that initial purchases of refuse collection equipment for a designated base should be done on a system basis. The Air Force does not question this contention but justifies its initial action in removing the grouping requirement on the containers on the basis that a protest by Capital might be avoided. The Air Force admits that testing of the system using modified containers would be required upon delivery of the trucks to assure safe and workable operation. However, it denies that many additional months would be required for such testing. Rather, the Department anticipates that because of the substantial time given for delivery of the trucks and the required prompt furnishing by the successful bidder of dimensional

and operational data, such testing should be completed within a reasonable time after the delivery of the trucks.

Much of the data requested of the successful bidder clearly could be obtained upon delivery of the trucks by measurement and observation. Therefore, a request to furnish data before delivery does not seem unreasonable. Dempster does not argue that this information is in any way proprietary and it is willing to supply its purely dimensional data. However, Dempster states that it is unwilling, should it be the low bidder, to make recommendations regarding the operational limits of containers other than its own. Dempster apparently feels that this requirement of the IFB, set out in amendment 0004, puts the successful bidder effectively in the role of a consultant. They claim that this role could create a legal liability should its recommendations prove erroneous with resultant damage.

The solicitation provides no warranty with respect to the furnishing of data. Moreover, we do not believe that a basis exists for implying a warranty as to the correctness of the successful bidder's recommendations.

There is justification for the planned procurement of trucks only and the modification and utilization of existing containers. The complete system plan is also unobjectionable from our point of view. The fact that the procurement agency here chose to use one approach while another procurement agency chose a different one is not determinative of the propriety of either solicitation. *See* B–174140, B–174205, *supra*. As we have noted in regard to RFP –0020, the fact that the Navy chose a system approach while the Air Force seeks to purchase only the trucks does not suggest that either method is an unreasonable way of obtaining a workable trash removal system. Each agency must determine its particular minimum needs. We have often stated that the determination of needs and the equipment required to meet those needs are matters of administrative judgment which we regard as conclusive absent, as here, bad faith or arbitrary action in that regard. 52 Comp. Gen. 941 (1973).

Solicitation IFB –0097

The subject IFB was issued in response to an Air Force requirement for 21 front container hoists compaction type body, refuse collection trucks, per MIL–T–46748C. These trucks were to be replacements for similar trucks which use a single point hoisting and container system.

The single pick-up point system is presently covered by a patent held by LoDal Inc. A prior attempt to procure such single pick-up point equipment was canceled due to a protest by Dempster which alleged that the solicitation was restrictive in that only LoDal could supply the trucks as described in the specifications, Thereupon, the Air Force

decided that since LoDal would have a definite competitive advantage over any dual point truck manufacturer, the solicitation was drafted to allow dual point truck manufacturers to bid, provided that such bidders agree to make the existing single point containers compatible with their hoist mechanisms by agreeing to furnish a modification kit. Such a kit would allow for dual as well as single point pick-up.

Dempster complains against the inclusion of the kit provisions of the IFB since LoDal, the sole single point manufacturer, if bidding its single point system, need not furnish the kit, whereas, all dual point manufacturers would be required to do so, thereby giving LoDal a distinct advantage. Dempster also questions the requirement for a 6,000 lbs. arm on the hoist equipment when it asserts that a lighter arm would be adequate.

With regard to the latter contention, the Air Force has reexamined its needs and iterates its requirement for the 6,000 lbs. arm. While it is true that in IFB–0087, which seeks to procure a quantity of self-loading detachable body trucks, the Air Force is requesting only 4,500 lbs. arms, the items there being procured are of a prototype nature. The Air Force also states that it anticipates the use of 6,000 lbs. arms in future procurements of detachable body trucks. While Dempster raises technical problems with this position, we fail to see the relevance of its position to the procurement of the equipment called for in the present solicitation. Indeed, sufficient evidence has not been produced which would cause our Office to question the reasonableness of the stated need for the use of a 6,000 lbs. arm in this procurement.

There is no question that there exists a number of potential sources for dual point equipment, including LoDal, and that the Air Force desires that these existing containers have both single and dual point capabilities. Indeed, the Air Force has recommended a change to the container specification (MIL–R–23954A) to insure that all containers would have "universal" capability.

On this record, we feel that the requirement in the IFB for the container modification kits would provide some incentive for manufacturers other than LoDal to participate in the procurement. While this procurement does contain some restrictive features, to the extent that LoDal may have some advantage over other prospective manufacturers, there is no reason apparent from the record why reputable manufacturers could not furnish appropriate equipment by also furnishing modification kits.

Accordingly, the protests are denied.

We recognize that the procurement of refuse equipment has in the past been and continues to be a troublesome area. Accordingly, we

suggest that the using and procuring agencies review their needs and procedures, keeping in mind the issues dealt with in this decision.

[B-177959]

Contracts—Negotiation—Awards—Advantageous to Government—Propriety of Award

The contentions against the propriety of an award "to develop fully the automated analysis of chromosomes" do not require cancellation of the award where the successful offeror was selected only after an on-site approval of facilities and a favorable *ad hoc* technical evaluation of its proposal by a panel of scientists on the basis of presenting the most advantageous offer, price and other factors considered, notwithstanding doubt as to the validity of the cost and best buy analysis and the failure to clarify the statistical program offered. Furthermore, the contracting officer is satisfied that the performance of the contract meets the RFP requirements; that the subcontracting of laboratory work is proper; and that no diversion of grant funds is occurring. The fact that the mechanism for the award was an interagency agreement between HEW and NASA (42 U.S.C. 2473(b) (5) and (6)), and the incorporation of the project as a task order under an existing contract between NASA and the contractor does not reflect on the legality of the contract.

To the National Biomedical Research Foundation, October 29, 1973:

By letter dated October 2, 1973, and prior correspondence, you protested the award of a contract to the Jet Propulsion Laboratory (JPL) of the California Institute of Technology (CIT) by the National Institute of Child Health and Human Development, National Institutes of Health, Department of Health, Education and Welfare. Request for proposals (RFP) NICHD-CMS-72-3 was issued on March 15, 1972, by the Mental Retardation Branch of NICHD. The solicitation sought proposals for a cost type contract "* * * to develop fully the automated analysis of chromosomes, including the new cytogenetic banding techniques, to the point where it will be available for routine automated use in antenatal and postnatal diagnosis of chromosome disorders" and "* * * the development of a prototype system which can be used in a research setting and has the capability for clinical application in hospitals and laboratories."

Although you raise many specific arguments, it is generally your position that JPL either did not propose to do what the solicitation required, or does not possess the capability to perform in accordance with the terms of the solicitation and, in addition, that the evaluation of the proposals was conducted improperly. Consequently, you request that the contract with JPL be canceled and that a contract be awarded to the National Biomedical Research Foundation (NBRF).

We agree that certain irregularities did occur in this procurement; however, we do not feel that they were such as to require cancellation.

We are, however, bringing these irregularities to the attention of the Secretary of Health, Education and Welfare, with the expectation that such irregularities will not occur in future procurements.

Your protest raises numerous specific issues which we will consider in detail after we set forth the history of this procurement. Initially, by letter of November 1, 1971, you queried Dr. Felix de la Cruz, Special Assistant for Pediatrics, National Institutes of Health, Department of Health, Education and Welfare, about the possible interest of NICHD in an unsolicited proposal for a contract for an automatic chromosome analysis system. Dr. de la Cruz prepared a Contract Request dated December 10, 1971, recommending sole-source award to NBRF. The contracting officer, however, denied the request because he felt that the proposal was not unique or of a sufficiently novel character to justify a sole-source award.

Five proposals were received in response to the RFP and three were determined to be within the competitive range. The three competitive offerors, their proposed costs, and their respective technical rankings were as follows:

JPL	$353,510	93
NBRF	267,297	83
New England Tufts	636,177	72

The proposals were evaluated by an *ad hoc* technical evaluation panel composed primarily of non-Government scientists. Following evaluation of the proposals the panel felt that certain clarifying information was needed from NBRF and JPL. NBRF supplied this information by letter of August 15, 1972. With respect to JPL's proposal, the panel had doubts whether JPL actually had on hand certain operational equipment as asserted in its proposal. Therefore, the panel conducted an on-site investigation of JPL's facilities. No on-site investigation was made of NBRF's facilities or of New England Tufts' facilities. After this clarifying information was obtained, all three offerors were invited to submit any further technical or cost revisions in their proposals. Only New England Tufts elected to submit a revision in its proposal, but the review panel considered the revision to be technically insignificant.

Subsequently, the Contract Specialist performed a best-buy analysis taking into consideration the technical evaluation, price analysis and past performance history. JPL's proposal was deemed to offer the greatest advantage to the Government, price and other factors considered. Therefore, award was made on February 1, 1973, to JPL in the form of a cost reimbursement interagency agreement with the National Aeronautics and Space Administration as a task order under an existing NASA contract with JPL.

It is your contention that in several instances JPL did not propose to do what the RFP required. For example, the RFP requires that the prototype system be capable of "chromosome spread image scanning of glass slides *directly* from the microscope *or* from photomicrographs." You argue that JPL does not input the image of good chromosome spreads *directly* into the computer; "rather the chromosome image from the microscope is first put onto magnetic tape which is then manually carried to the computer for input for analysis." It is also your position that JPL does not propose scanning chromosomes from photomicrographs. [Italic supplied.]

In regard to the first issue, the contracting officer insists that JPL does have the capability to input the chromosome image directly into the computer, but "because of the limited need to use such equipment to date, JPL has resorted to manually carrying data to the computer for input for analysis."

JPL, in its letter of May 18, 1973, responded to this contention in the following manner:

> Using the JPL scanner, images may be scanned, digitized, and fed directly into a computer system made up of two computers connected by a data link.

You argue that "directly" does not permit the use of a data link connecting two computers. However, we think that the interpretation given this provision by JPL and NICHD is not unreasonable. Therefore, we have no grounds for objection. In this regard, we should note that questions concerning the interpretation of specifications and whether an offeror's proposal in fact meets those specifications are generally left to the contracting agency and will not be overturned by this Office unless clearly arbitrary or unreasonable. B–169633(2), January 4, 1972.

Your next contention is that JPL does not propose scanning chromosomes from photomicrographs as required by the above provision. In this connection, you argue that since certain provisions of the RFP require scanning from a microscope, and offeror proposing only film-scanning would not comply with these other requirements. Therefore, you argue that both capabilities are required. NICHD agrees that JPL did not propose film scanning, but insists that the RFP does not require scanning from photomicrographs. NICHD argues that the intended meaning of the language, "chromosome spread image scanning of glass slides directly from the microscope *or* from photomicrographs," provides an option to scan neither from a microscope or from photomicrographs. [Italic supplied.]

Since the provisions you cite appear to specifically call for microscope scanning, we tend to agree that to read the provision in question as providing an option is questionable. However, the fact re-

mains that JPL's proposal of only microscope scanning was determined to meet the Government's actual needs. Furthermore, you have not alleged any basis for concluding that you were thereby prejudiced. Therefore, we are unable to conclude that NICHD's determination in this regard was arbitrary or unreasonable. B–169633 (2), *supra.*

You next contend that JPL does not have the capability to automatically direct the motion of the microscope stage to detect good chromosome spreads and to record coordinates to the nearest 1.25 micra of the center of each chromosome spread as required by the RFP. You state that the best JPL can do is to record coordinates to the nearest 7.50 micra of the center of a chromosome spread.

JPL contends that it possesses both of these capabilities. In regard to the former capability JPL states that:

> The NICHD site visit committee viewed a demonstration of the automatic spread location capability of ALMS. This capability is a software simulation of an automatic spread location hardware now under development and described in JPL's proposal. When the spread location process is initiated, a software routine (SRCH) commands the microscope stage to make a rapid 10 mm traverse. Simultaneously, the scanner continuously performs a cursory scan of the image to detect chromosome spreads. The computer analyzes the incoming scan data and records the coordinates of stage positions containing chromosome spreads. After completion of the traverse, the stage automatically returns to the coordinates of each spread in sequence for display to the microscope operator.

In regard to the ability to record to the nearest 1.25 micra the coordinates of a chromosome spread, JPL states that:

> A software routine (VSET) commands the microscope to perform a cursory scan of the image and computers vertical and horizontal boundaries of the spread thereby defining a minimum enclosing rectangle. The program then calculates and records the center of this rectangle. SRCH and VSET can be executed automatically in sequence to first locate stage coordinates and then locate and record the center of each spread. The net result of this process is a fully automatic location of (1) the stage coordinates of fields containing chromosome spreads and (2) the coordinates of the center of each chromosome spread within its field. This procedure, while not being our preferred method of operation, serves clearly to satisfy the RFP requirements, notwithstanding our use of a 15 micron stage translation step size.

The scientific review panel and the contracting officer agreed that JPL's proposal satisfied these RFP requirements. We do not find that their judgment was unreasonable in this respect.

You also contend in this connection that JPL does not claim the capability of locating chromosomes within a low power field. However, as JPL points out, "no such low power search capability is required by the RFP. Even if the RFP had included such a requirement the above procedure would be adequate since it operates at both low and high power." Accordingly, we think that this aspect of your protest is without merit.

You next contend that JPL's pattern-recognition programs do not, as required by the RFP, include syntax-directed pattern recognition. There seems to be some disagreement between you, JPL and the agency concerning the definition of syntax-directed pattern recognition. Although we concede that you are qualified in the area of pattern recognition, we must defer to the agency's technical determination that JPL offered a generic equivalent to syntax-directed pattern recognition.

You also allege that JPL does not comply with the RFP requirement for access to "a programming system that enables on-line computer console interaction with the disk memories of the computer for the evaluation and display of large masses of data in a file * * * [and] the capability to perform analysis of variance, t-tests, and other statistical tests, or to display histograms and scattergrams." In particular, you state the JPL lacks statistical interaction.

JPL's letter of May 18, 1973, notes, however, that one of its programs, BOLD, "allows the computer operator to execute interactively any program in the VICAR library, including many statistical programs. Thus, our programming system permits interactive statistical analysis." You argue that JPL is attempting to redefine "interaction" to cover a program which is not, in fact, interactive. However, the contracting officer reports that a preaward survey was conducted of JPL's facilities and it was determined that JPL has a programming system which fulfills this requirement of the RFP. Therefore, once again, we must defer to the agency's technical determination on this issue.

You next argue that JPL fails to meet the RFP requirement for "a high speed digital computer which can be dedicated to the development of the prototype system." Essentially, it is your position that JPL does not have a dedicated computer because it still employs batch processing, and batch processing is the opposite of dedication.

JPL disputes this contention. JPL claims that batch processing is the opposite of time sharing rather than of dedication. Furthermore, JPL states that:

> Using batch processing with our complex of computers allows us to achieve adequate dedication. Our IBM 360/44 computer is dedicated to image processing at all times and to biomedical image processing six hours each day. Our IBM 1130 computer is dedicated to the ALMS at all times. The PDP 11/40 minicomputer to be purchased for use under this contract will be totally dedicated to the prototype system. * * * The RFP does not, in our view, require total dedication of all these machines but only sufficient access to properly perform the work.

It appears the evaluators felt that JPL satisfied the RFP requirement for a "dedicated" computer as that term is used in connection with this procurement. Since such determination is the prerogative of

the procuring agency and appears reasonable, we cannot agree with your contention.

The RFP also provides that offerors have a "* * * staffed and currently operating cytogenetic laboratory capable of experimenting and developing new staining techniques as well as perfecting known staining methods and improving quality of chromosome spreads." You contend that JPL does not possess this capability.

The contracting officer states that although JPL does not have its own cytogenetic laboratory for the purposes of this contract, JPL will subcontract the cytogenetic work to the City of Hope Hospital. In this connection, the evaluators considered and approved this arrangement. The contracting officer also notes that you proposed to subcontract with the University of Colorado Medical-School to fulfill the RFP requirement for a cytogenetic laboratory.

We think that a reasonable interpretation of the RFP and applicable regulation, Federal Procurement Regulations (FPR) 1–1.1203–2 permits the type of subcontracting for cytogenetic support which you and JPL propose. While a cytogenetic laboratory and qualified personnel are essential to performance of this contract, an offeror's compliance with this requirement is a matter of responsibility, that is, capacity to perform, rather than responsiveness. Therefore, under the cited regulation, the question is whether JPL had the facilities and personnel or "the ability to obtain them" by the time performance was due. Since the subcontract arrangement for the required services was approved, we see no basis for our Office to object.

You next contend that there are certain capabilities or facilities which JPL claims they must have in order to perform the tasks required by the RFP and that the development of these capabilities is dependent upon successful completion of future research to be performed under NIH Research Resources Grant RR–00443. Therefore, you claim that since no one can guarantee the results of future research JPL cannot fulfill the responsibility requirement of FPR 1–1.1203–4 which provides as follows:

> Except to the extent that a prospective contractor proposes to perform the contract by subcontracting * * * acceptable evidence of his "ability to obtain" equipment, facilities, and personnel * * * shall be required. If these are not represented in the contractor's current operations, they should normally be supported by a commitment or explicit arrangement, which is in existence at the time the contract is to be awarded, for the rental, purchase, or other acquisition of such resources, equipment, facilities, or personnel.

In this connection, the contracting officer points out that one of the major reasons for the technical panel's site visit to JPL was to ascertain JPL's ability to obtain equipment, facilities and personnel as stated in its proposal. The technical panel was satisfied with JPL's ability to do so. Since such determination relates to responsibility

and the record reasonably supports the panel's affirmative determination, there is no basis for our Office to disagree. 49 Comp. Gen. 553 (1970). Furthermore, the contracting officer noted that the "* * * site visit also investigated grant progress and determined that there was no diversion of grant funds from the project and that there would be no overlap with grant support." In these circumstances, we see no basis for your contention in this regard.

Your next argument concerns JPL's failure to propose any telephone communication capabilities in its prototype system. The applicable RFP provision states that:

> If economically feasible the system should have the capability for telephone communication of findings directly from the computer to remote user consoles and for remote interrogation of the computer data files from laboratories via telephone lines.

The contracting officer states that telephone communication capability is "available to JPL for performance of this contract." Although JPL expresses uncertainty about the economic feasibility of telephone communication, it states that "the JPL proposal describes a computerized data management system accessible by telephone which can be used to evaluate the economic feasibility of telephone communication. * * * Thus, as required by the RFP, JPL will investigate the economic feasibility of this approach and implement the capability if feasible." Therefore, it appears that JPL intends to comply with the requirement "if economically feasible." In any event, the RFP did not provide that telephone communication capability was a prerequisite for award.

The RFP also requires the contractor to: "Develop statistical programs for use with the system." You claim that JPL does not propose to do so.

The contracting officer states that it was determined that statistical support is available to JPL. JPL, in its letter of May 18, 1973, states that its proposal "clearly sets forth plans for proposed statistical analysis development. * * * Further that proposal includes plans for a patient data file implemented on a large scale computer system."

You concede that a statistical patient data file is proposed, but not for the prototype system.

JPL argues that the prototype system actually consists of two components:

> (1) A mini-computer based automated microscope system for automatic karyotyping, and (2) a patient data file and a set of biostatistical analysis programs suitable for use on large scale computer systems.

You contend that JPL's statistical programs cannot be used with the first component of its system because the statistical programs require

a large scale computer system rather than the mini-computer proposed by JPL. Furthermore, you state that JPL's statistical programs cannot be used with the second component of its proposed system because it too does not contain the required large scale computer system.

JPL, in its final submission of June 15, 1973, states that the "biostatistical programs we propose to develop can clearly be used *with* the prototype system, even though these programs cannot be executed *on* that system."

Based upon our review of the record on this point, we believe there is some doubt whether JPL's proposal was in full compliance with these requirements. As you note, apparently two of the evaluators were concerned about this matter and recommended review of JPL's performance to insure compliance. In view thereof, we believe this matter should have been clarified prior to award. Nevertheless, we do not believe that the failure to do so is a sufficient basis for canceling an otherwise valid award.

You have also raised several questions concerning the propriety of the evaluation process, contending primarily that the stated evaluation criteria and scoring procedure were not followed.

The RFP states that:

* * * proposals will be evaluated in accordance with the following factors, * * *

1. The offeror's analysis of the proposed project; evidence of his understanding of the problem; and soundness and feasibility of the procedures proposed in consideration of Part I, Sections A and B of this Request for Proposals. (30)
2. Adequacy of the facilities and resources available or set forth in Part I, Section C *Facility Requirements.* (30)
3. Experience, qualifications, competence and availability of the offeror's investigative team. (20)
4. Recognition and discussion of anticipated major problems together with suggested solutions; originality of ideas presented and flexibility for redirection. (20)

The RFP further states that "Each proposal will be evaluated separately and independently on the basis of the above factors by an initial review panel composed mostly of nongovernmental scientists."

It appears, however, that the scientists comprising the technical panel reviewed the proposals on the basis of their overall merit and then recommended either approval or disapproval. There is no specific discussion in the reviewers' comments of any of the four evaluation criteria set forth in the RFP. Nor is there any indication that the reviewers assigned numerical scores based on those criteria. The numerical scoring apparently was done for the benefit of the Contract Review Committee by the contracting officer or project officer who attempted to structure a consensus of the reviewers' comments and, on the basis thereof, assign numerical scores for each of the four evaluation criteria.

We read the RFP as indicating that the scoring would be done by the individual panel members. We note, however, that all of the reviewers recommended approval of the JPL proposal and disapproved of your proposal. Therefore, it is clear that the relative technical ranking of the proposals would not have changed if the proposals had been individually scored by the members of the panel. Therefore, we fail to see how you were prejudiced.

You next allege that the contracting officer did not award the contract to the lowest responsive, responsible offeror and that the economic analysis conducted by the contract specialist was arbitrary and capricious. You also contend that the information used to evaluate your prior performance history was "slanderous" and inaccurate.

In regard to this phase of the evaluation, the RFP provided that:

> A separate cost analysis and evaluation will be performed by the Contract Specialist.

Furthermore, it provided that:

> A best-buy analysis will be performed, taking into consideration the results of the technical evaluations, price analysis, past performance history, and the ability to complete the work within the required time frame.

Although the contracting officer concedes that your estimated cost was $75,413 lower than the award amount, he notes that in selecting an offeror for an R&D contract an offeror's cost estimate "* * * reflects the basic assumptions underlying his technical or developmental approach, which may not demonstrate the degree of technical competence or capability deemed necessary for successful prosecution of the work. In the last analysis * * * the primary consideration in source selection is determining which offeror is likely to perform the contract in a manner most advantageous to the Government, price and other factors considered."

The following is the contracting officer's cost and best-buy analysis:

	NBRF	JPL
(1) Proposed Cost	$265, 297	$353, 510
(2) Additions/deletions	+27, 528	−10, 800
(3) Testing	—	−36, 088
(4) Additional Computer Items	40, 000	—
(5) Equipment adoption	×	—
Comparable Costs	$334, 825+×	$306, 622

(1) Proposed cost is the basic price each offeror gave as his response to the RFP requirements. The JPL price is for their stand-alone option which was the only one of two offered meeting the requirements.
(2) Additions to the NBRF proposal is for the laser scanner offered as an option, but required to provide the item set forth in the RFP. The deletion from the JPL proposal is for equipment negotiated out of their estimated cost which was not considered essential for contract performance.
(3) The NBRF proposal contains no cost data for testing. Their technical proposal on page 73 only states "when completed, a pilot application will be made

of the prototype system." If they were to be considered for award, NBRF would be required to perform testing similar to that proposed by JPL. Since this cost cannot be accurately estimated for NBRF, the costs proposed by JPL for testing have been deleted from the JPL proposal to enable an equal comparison of both proposals without the cost element to meeting testing requirements.
(4) The final result of the RFP requirement is for the development of a prototype system which can be used in a research setting and has the capability for clinical application in hospitals and laboratories (page 2 of RFP). The JPL stand-alone option will meet this requirement. One reviewer notes of the NBRF proposal, "one major weakness of this proposed system is that it is built around a dedicated IBM 360/44. It would be vastly better if a stand-alone device for at least partial analysis was available, with communication to a major computer in a batch mode as required." Another writes, "the total budget (of NBRF) is one of the lowest with any proposal which was submitted. This was due, at least in part, to a lack of purchases of expensive scanner and computer." A third adds, "* * * it is difficult to compare his budget with others. Presumably if one of the others who proposed to construct completely new equipment were funded, the title to that equipment would vest in the Government. With NBRF it would not—it seems likely that this cost, when added to the NBRF proposed budget, would make it much more comparable with some of the others proposed." JPL proposed an option "hybrid" system comparable to NBRF. The difference in equipment costs only between the JPL "hybrid" and "stand-alone" systems is $40,000. As a minimum, this cost is added to the NBRF proposal as a reasonable estimate of cost required to convert the NBRF system to a "stand alone" system, if possible.
(5) All ad hoc reviewers note that extensive modifications have been required of similar equipment delivered by NBRF previously. No cost figures were cited. For this reason an "X" factor has been used in the evaluation. This is an important "past performance history" evaluation criteria for the best buy analysis as stated in the Request for Proposals.

You have challenged the validity of the above analysis, except for the proposed costs and the deletion of $10,800 from JPL's costs. You contend that the addition of $27,528 to your costs was erroneous because the laser scanner was offered as an option and not necessary for compliance with the RFP requirement; that the deletion for testing was erroneous because your proposal contained figures for various personnel who were obviously connected with testing and, in any event, JPL's proposal shows testing costs of $5,760, rather than $36,088; that the addition of $40,000 to your costs for computer equipment because JPL's proposal included such figure was erroneous since you owned the necessary equipment; and that the addition of an unknown quantity represented by "X" for equipment modification was based upon erroneous information as to equipment previously furnished to commercial sources.

Initially, it should be noted that the agency concedes that the cost of your proposal should not have been increased for the laser scanner. The contracting officer maintains that if any costs for testing were included in your proposal they were obscure. With regard to the JPL figure of $36,088, he states that this figure was based upon privileged cost and pricing data furnished by JPL. The $40,000 figure was reportedly added to your costs to equalize the fact that title to equipment to be purchased by JPL would vest in the Government, whereas the

same would not be true in your case because you did not propose to purchase any new equipment.

It is our view that the contracting officer's cost and best-buy analysis is of doubtful validity. First, we believe that the RFP should have been more explicit as to the information to be considered in the evaluation of these factors and as to the relative weight of such factors. Second, it has been conceded that the figure for the laser scanner was erroneously added. Third, if testing cost information was obtained from JPL, such information should have also been requested from you. Fourth, we see no basis for adding the $40,000 to your costs as there was no provision in the RFP concerning such factor. Finally, you have furnished information which indicates that the basis for considering any need to modify your equipment was tenuous. However, we do not believe the latter factor was significant in the analysis as no money figure was ascribed to it.

Notwithstanding our view as to the validity of the cost and best-buy analysis, we do not believe that cancellation is justified in view of the nature of the procurement and applicable regulation, FPR 1–3.805–2, which provides:

> In selecting the contractor for a cost-reimbursement type contract, estimated costs of contract performance and proposed fees should not be considered as controlling, since in this type of contract advance estimates of cost may not provide valid indicators of final actual costs. There is no requirement that cost-reimbursement type contracts be awarded on the basis of either (a) the lowest proposed cost, (b) the lowest proposed fee, or (c) the lowest total estimated cost plus proposed fee. The award of cost-reimbursement type contracts primarily on the basis of estimated costs may encourage the submission of unrealistically low estimates and increase the likelihood of cost overruns. The cost estimate is important to determine the prospective contractor's understanding of the project and ability to organize and perform the contract. The agreed fee must be within the limits prescribed by law and agency procedures and appropriate to the work to be performed (see § 1–3.808). Beyond this, however, the primary consideration in determining to whom the award shall be made is: which contractor can perform the contract in a manner most advantageous to the Government.

We note that the technical review panel was unanimous in its recommendation that JPL be selected based upon technical considerations. Therefore, we do not believe any substantial prejudice resulted from any errors in the cost analysis.

Moreover, it is our opinion based upon a review of the record that the panel's recommendation of JPL was based primarily upon its affirmative findings with respect to JPL's proposal and ability to successfully complete the project, rather than upon any negative opinions expressed by some of the panel members as to the performance of your equipment under earlier commercial contracts. Hence, we do not ascribe any particular significance to the validity of these opinions insofar as the recommendation of JPL is concerned.

With regard to your contention that it was improper to conduct a site visit to JPL's facilities and not of yours, we think that this is a

matter of judgment to be decided by the contracting agency and absent a showing that such decision is unreasonable, we will not question the decision. The decision to make a site visit to JPL's facilities was based upon the panel's question as to the existence of certain equipment referenced in JPL's proposal. Although consideration was given to visting your facilities, the idea was rejected because at least two of the panel members were familiar with your facilities as a result of a recent visit in connection with a grant. In these circumstances, we do not believe the decision was arbitrary.

Finally, you question the legality and propriety of the type of contract awarded to JPL. The mechanism for award was an Interagency Agreement with the National Aeronautics and Space Administration (NASA), whereby this project was incorporated as a task order under an existing contract between NASA and JPL. Your contention is based upon the premise that since chromosome analysis is neither related to nor based on space technology, the work called for is not within the scope of the NASA contract.

JPL argues, however, that the term space technology "encompasses considerably more than rocketry and propulsion, fields which were long ago phased out at JPL. Rather, both that term and an important part of JPL's work for NASA include and are directed toward the scientific experiments and instrumentation which are placed on-board spacecrafts." Furthermore, the contracting officer advised that this task order was concurred in by both NASA and the General Counsel of the Department of Health, Education and Welfare, and that the specific authority for negotiation of this interagency agreement is 42 U.S.C. 2473(b) (5) and (6).

In view of the circumstances reported and the statutory authority cited, we have no basis to question the propriety of the interagency agreement.

Although, as we have pointed out, there were deficiencies in the conduct of this procurement, we find no compelling reason to disturb the existing contract with JPL. Therefore, we must deny your protest.

[B-178291]

Travel Allowance—Military Personnel—Husband and Wife Both Members of the Uniformed Services

The fact that the spouse of an Army major who was transferred effective June 12, 1972, from Palo Alto to Fort Sill is an Army nurse does not deprive the major to entitlement for a dependent travel allowance since paragraph M7000 of the Joint Travel Regulations which prohibits reimbursement for the travel of a dependent who is a member of the uniformed services on active duty on the effective date of the spouse's station change, and for the travel of dependents receiving any

other type of travel allowance from the Government in their own right, is not for application as the major's wife traveled from Palo Alto to Fort Sill during the period that she was in an excess leave status between graduating from Stanford University on June 11, 1972, and reporting to Fort Sam Houston on July 12, 1972, to attend an Army Nurse Officer Basic Course, a period during which she was not entitled in her own right to the basic pay and allowances prescribed by 37 U.S.C. 204 for active duty.

To Lieutenant Colonel Ray L. Vaught, Jr., Department of the Army, October 29, 1973:

This refers to your letter of December 27, 1972, with enclosures (file reference ALBGP-FA-ET), forwarded here by endorsement dated March 21, 1973, of the Per Diem, Travel and Transportation Allowance Committee, requesting an advance decision as to the legality of payment of dependent travel allowance to Major Clinton L. Anderson, United States Army, 249 78 6274, under the described circumstances. Your request has been assigned PDTATAC Control No. 73-13.

The record indicates that Major Anderson, under authority of Special Orders No. 87, Headquarters, Sixth United States Army, May 1, 1972, proceeded on or about June 12, 1972, on a change of permanent station from Palo Alto, California, to Fort Sill, Oklahoma. Subsequently, he filed a dependent travel claim based upon the travel of his wife, First Lieutenant Kathleen S. Anderson, from Palo Alto, California, to Lawton, Oklahoma, from June 12 to July 8, 1972, inclusive.

The record indicates that Lieutenant Anderson did not receive allowance for her travel from Palo Alto, California, to Lawton, Oklahoma. She was paid a mileage allowance in her own right for travel from Lawton, the place where her orders of July 12, 1972, were received, to Fort Sam Houston, and from there to Fort Sill, Oklahoma.

You express doubt as to the legality of payment to Major Anderson for the travel of his spouse from Palo Alto to Lawton, while she was on active duty in an excess leave status. You say that she was entitled to travel allowances from the Government in her own right, and in this regard you refer to item 10 (now item 11) of paragraph M7000 of the Joint Travel Regulations as possibly barring the claim for her travel.

In an endorsement to your request for decision, the Executive, Per Diem, Travel and Transportation Allowance Committee, expressed the view that the claim would be prohibited under item 6 (now item 7), paragraph M7000 of the regulations, as Lieutenant Anderson was a member on active duty in an excess leave status.

It appears that upon receiving a commission in the United States Army Reserve, Lieutenant Anderson was ordered to active duty on

December 11, 1971, assigned to the Army Nurse Corps and Medical Specialist Corps Student Detachment, Headquarters Sixth United States Army, and was stationed at Stanford University, Stanford, California. The record further shows that following her graduation on June 11, 1972, she was placed in an excess leave status and was not entitled to pay or allowances during the period prior to her travel in accord with orders of July 12, 1972, to Medical Field Service School, Brooke Army Medical Center, Fort Sam Houston, Texas. Following attendance at the Army Nurse Officer Basic Course she was to report to her permanent duty station at Fort Sill, Oklahoma.

Section 420 of Title 37, U.S. Code, provides that a member of a uniformed service may not be paid an increased allowance under Chapter 7 (allowances), on account of a dependent, for any period during which that dependent is entitled to basic pay under section 204 of this title.

Section 204(a)(1) of Title 37, U.S.C., provides that among those entitled to basic pay of the pay grade to which assigned or distributed in accordance with their years of service is a member of a uniformed service who is on active duty. "Active duty" is defined in 37 U.S.C. 101(18) to mean full-time duty in the active service of a uniformed service, including duty on the active list, full-time training duty, annual training duty, and attendance while in the active duty service at a school designated as a service school by law or by the Secretary concerned.

Paragraph M7000 of the Joint Travel Regulations provides that members of the uniformed services are entitled to transportation of dependents at Government expense upon a permanent change of station for travel performed from the old station to the new permanent station or between points otherwise authorized in this volume except: when dependent is a member of the uniformed services on active duty on the effective date of the orders (item 7), and for dependents receiving any other type of travel allowance from the Government in their own right (item 11).

Army Regulation 601–135 pertaining to the registered nurse student program provides in paragraph 10b(3) that participants in this program may be granted excess leave without pay and allowances subsequent to completion of the educational program and date of commencement of authorized travel to the first military medical installation for duty.

Item 7 of paragraph M7000 of the Joint Travel Regulations refers to nonentitlement to transportation for a dependent who is "on active duty." This provision apparently is intended to implement 37 U.S.C.

420 which bars increased allowances, including transportation allowances, for dependents for any period during which the dependent is entitled to basic pay under section 204 of Chapter 37, as a member who is on active duty. Consequently, we view the above-cited provision of the regulations as barring entitlement for the transportation of a dependent who is in receipt of basic pay while in an active duty status.

Lieutenant Anderson during the period of her travel from Palo Alto, California, to Lawton, Oklahoma, was placed in an excess leave active duty status and was not entitled to pay or allowances, in accordance with Army Regulation 601–135 cited above. Since the service member's wife was not entitled to basic pay or allowances in her own right during the period in question, it is our view that item 7 of paragraph M7000 of the Joint Travel Regulations would provide no bar to the payment to Major Anderson of his claim for dependent travel allowance incident to his wife's trip from Palo Alto, California, to Lawton, Oklahoma, during this period. *See* 47 Comp. Gen. 467 (1968).

Additionally, we are of the opinion that item 11, paragraph M7000 of the regulations does not provide a proper basis for the denial of the claim for dependent travel as Lieutenant Anderson has not received travel allowances for her travel from Palo Alto to Lawton. She was paid travel allowances as a member only for her travel from Lawton to her temporary duty station, Fort Sam Houston, Texas, and from there to Fort Sill, Oklahoma, her permanent station.

We have been advised informally that Lieutenant Anderson is the former Kathleen Scherff and that she received pay and allowances as a member in her maiden name as follows: May 1972, $581; June 1972, $580.11; and July 1972, $581. However, there is nothing in the record to indicate whether these payments were returned, or if any necessary recoupment has been accomplished in view of her nonpay status commencing June 12, 1972. We believe that this matter should be clarified.

Subject to the foregoing, payment on the voucher herewith returned is authorized if otherwise correct.

[B–159779]

Time—Standard Advanced to Daylight Saving—Compensation Effect

An employee on an 8 hour regular shift of duty, which included 2 a.m. on the last Sunday in April when standard time was advanced 1 hour to daylight saving time (15 U.S.C. 260a(a)), who was placed on annual leave for 1 hour so 1 hour of pay would not be lost may not be paid Sunday premium pay for the 1 hour of annual leave since 5 U.S.C. 5546 does not authorize premium pay for a leave status during any part of a regularly scheduled tour of duty on Sunday. However, the night differential prescribed by 5 U.S.C. 5545(a) is payable for a paid leave period that is less than 8 hours, including both night and day hours, and it is sufficient to only note on the time and attendance report the fact the leave was attributable to the time change. Thus an employee who works the 12 midnight to 8 a.m. shift on the Sunday when time is advanced will be placed on an-

nual leave for 1 hour and receive night differential for 6 hours including the hour of annual leave.

To the Chairman, Atomic Energy Commission, October 30, 1973:

This refers to letter of August 8, 1973, from the Acting Assistant General Manager, Controller, of your agency, requesting a decision from our Office concerning the propriety of paying an employee Sunday and night differential pay for the hour of annual leave with which he has been charged for the specific purpose of paying him for 8 hours when working on the shift during which standard time is advanced 1 hour in the spring.

The letter of August 8, 1973, states in part as follows:

As the advance of one hour in standard time, generally referred to as "changing to daylight saving time", occurs at 2:00 a.m. on the last Sunday in April, in accordance with 15 U.S.C. 260 a.(a), employees regularly scheduled to work an 8 hour shift which includes 2:00 a.m. would lose an hour of work and pay on that shift except where the administrative arrangement for charging the employee with annual leave approved in 26 Comp. Gen. 921 (1947) is applied. The question of night differential for the hour of leave charged to the employee was not germane in 1947 as the Federal Employees Pay Act of 1945, as amended, did not then permit payment of night differential to an employee in paid leave status. Presently, however, 5 U.S.C. 5545(a)(2) specifies that nightwork is regularly scheduled work between the hours of 6:00 p.m. and 6:00 a.m. and, for premium pay purposes, includes "periods of leave with pay during these hours if the periods of leave with pay during a pay period total less than 8 hours." Subject to the less than 8 hours during a pay period limitation above, it appears that employees whose regular work schedule includes 2:00 a.m. and is wholly within the 12 hour period specified in 5 U.S.C. 5545(a)(2) would be paid night differential for the hour of annual leave charged them in accordance with 26 Comp. Gen. 921. However, it is not clear whether we would be required to pay night differential in the case of employees whose regular work schedule included 2:00 a.m. but ended at some hour outside that 12 hour nightwork period, in view of the statement in 26 Comp. Gen. 921 that "the exact hour of absence on leave need not be shown on the Standard Form No. 1130, 'Time and Attendance Report'." This statement appears to provide the option of considering the hour of annual leave as being within the employee's regular work schedule but outside the statutory nightwork period so as to avoid payment of night differential for that hour.
As Sunday premium pay was not provided Federal employees until enactment of Public Law 89-504 of July 18, 1966, there was no need in the above decision relating to daylight saving and standard time matters to discuss application of Sunday premium pay to the hour of annual leave in question here. As stated in 46 Comp. Gen. 158 (1966), the general rule is that employees may not be paid Sunday premium compensation for a period of absence during their regularly scheduled 8 hour Sunday work period, as entitlement to this additional pay depends upon the actual performance of work on that day. This decision, however, does not make reference to the special situation discussed herein in which the annual leave is not requested by the employee in the usual manner for his own purposes (as implied in the questions answered by 46 Comp. Gen. 158) but is administratively charged to him as an adjustment for the regularly scheduled hour he is prevented from working because of agency compliance with 15 U.S.C. 260a(a).

The following questions are submitted:

1. Is it appropriate to pay Sunday premium pay for the hour of annual leave which must be charged to the employee under the special circumstances described above, in distinction to the general rule stated in 46 Comp. Gen. 158?
2. a. Because of present premium pay implications, is it necessary to designate the exact hour covered by the annual leave charged to the employee in

this special circumstance, contrary to the advice contained in 26 Comp. Gen. 921?

b. If so, is it the hour beginning at 2:00 a.m. so as to reflect the official time of advancing standard time which is specified in 15 U.S.C. 260a.(a).?

3. If the answer to question 2.a. is negative, is it required to pay night differential for the undesignated hour of leave to an employee whose regularly scheduled work ends at an hour outside the 12 hour nightwork period specified in 5 U.S.C. 5545(a)(2), and whose periods of pay with leave during the pay period concerned total less than 8 hours?

4. If the answer to question 1. is positive, would it be required to make payments of Sunday premium pay to employees concerned retroactive to the pay period commencing July 31, 1966, when the Sunday premium pay provision became effective?

5. If the answer to question 3. is negative, for what periods are we required to undertake collection of any past overpayment of night differential premium pay?

Section 5546(a) of Title 5, U.S. Code, reads as follows:

(a) An employee who performs work during a regularly scheduled 8-hour period of service which is not overtime work as defined by section 5542(a) of this title a part of which is performed on Sunday is entitled to pay for the entire period of service at the rate of his basic pay, plus premium pay at a rate equal to 25 percent of his rate of basic pay.

In 5 CFR 550.103 of the Civil Service Commission's regulations "Sunday work" is defined as follows:

(o) "Sunday work" means all work during a regularly scheduled tour of duty within a basic workweek when any part of that work is performed on Sunday.

Section 550.171 of the regulations authorizes pay for Sunday work as follows:

An employee is entitled to pay at his rate of basic pay plus premium pay at a rate equal to 25 percent of his rate of basic pay *for each hour of Sunday work which is not overtime work* and which which is not in excess of 8 hours for each regularly scheduled tour of duty which begins or ends on Sunday. [Italic supplied.]

While generally leave with pay is synonymous with duty insofar as entitlement to basic pay, where, as here, additional pay is authorized for services rendered on a certain day, entitlement to such additional pay would be dependent upon actual performance of work on such day, unless otherwise expressly provided by statute. Thus, since there is nothing in 5 U.S.C. 5546 providing for payment of Sunday premium pay to an employee who is in a leave status during any part of his regularly scheduled tour of duty on Sunday, question number 1 is answered in the negative. *Cf.* 5 U.S.C. 5545(a)(2).

In 26 Comp. Gen. 921 (1947) when we were considering payment of night differential pay we stated that whenever there is a change from standard time to daylight savings time leave is charged on that day on account of the reduction of the number of hours the employee is required to remain on duty, the exact hour of absence on leave need not be shown on the Standard Form No. 1130 "Time and Attendance Report" but an appropriate brief notation attributing the leave charge to the change from standard time to daylight savings time may be entered in the space provided for "Remarks." That would appear to be equally applicable to the case presented here. Question number 2a is

answered in the negative. In view of our reply to question number 2a, no answer is required to question number 2b.

Section 5545(a) of Title 5, U.S. Code, provides in pertinent part as follows:

(a) * * * nightwork is regularly scheduled work between the hours of 6:00 p.m. and 6:00 a.m., and includes–

* * * * * * *

(2) periods of leave with pay during these hours if the periods of leave with pay during a pay period total less than 8 hours.

5 CFR 550.122(b) of the Civil Service Commission's regulations concerning computation of night pay differential provides as follows:

(b) *Absence on leave.* An employee is entitled to a night pay differential for a period of paid leave only when the total amount of that leave in a pay period, including both night and day hours, is less than 8 hours.

If an employee's leave taken from scheduled night duty aggregates less than 8 hours during a pay period, under the above-quoted statute and regulation the employee is entitled to continuance of his night differential pay during those "less than 8 hours" leave. *See* 36 Comp. Gen. 734 (1957). In other words if an employee works the 12 midnight to 8 a.m. shift on the last Sunday of April when the standard time is advanced 1 hour he will be placed on annual leave for 1 hour and receive night differential for a total of 6 hours including the hour of annual leave. Question number 3 is answered in the affirmative.

In view of the answers to questions number 1 and 3, no reply to questions number 4 and 5 is required.

[B–177731]

Contracts—Specifications—Qualified Products—Listing—Misrepresentation

In the procurement of lighting panels to replace the panel designed to support the integrated electronics control equipment developed for the F–4 aircraft where a drawing stated the panel must be in accordance with a military specification that required a qualified products listing (QPL), but the request for quotations (RFQ) did not evidence such a requirement, although the award to a firm not on the QPL will not be disturbed as the award was not precluded by the RFQ and the contract is nearly completed, to require the displaced initial low offeror to unnecessarily comply with the QPL requirement was prejudicial, unfair and costly. Furthermore, although the contracting officials erroneously failed to take action when it was recognized before award the procurement should have been advertised utilizing the applicable military specification, this approach will be used to procure the panels in the future.

To the Secretary of the Navy, October 30, 1973:

We have considered the protest of California Plasteck Inc. against the award of a contract to Airmark Plastics Corp. under request for quotations (RFQ) No. N00383–72–Q–0580. Even though we have concluded that its protest should be denied for the reasons set out below, we believe that certain aspects of this procurement require corrective action.

The RFQ dated April 17, 1972, was issued by the Aviation Supply Office (ASO), Philadelphia, to satisfy an Air Force military interdepartmental purchase request for the procurement of lighting panels. The lighting panels were to be replacement parts for Collins Radio Company (Collins) part number 767–8136–001 and were designed for use in support of AN/ASQ–19/88 integrated electronics control equipment developed by Collins for use on F–4 aircraft.

The Collins drawing for the panels indicated the suggested source of supply was Airmark. The genesis of the protest was note number 1 on the Collins drawing, which states:

This panel to be in accordance with MIL–P–7788C. Classification shall be 1–R, Type V. Lamp circuit 28 volts.

Military Specification MIL–P–007788C covered general requirements for integrally illuminated information panels. Paragraph 3.1 thereof provided:

Qualification—The panels furnished under this specification shall be a product which has been tested and passed the qualification inspection specified herein, and has been listed on or approved for listing on the qualified products list.

Additionally, paragraph 6.3 of the specification stated in part:

Qualification—With respect to products requiring qualification, awards will be made only for such products as have, prior to the time set for opening of bids, been tested and approved for inclusion in the applicable Qualified Products List * * *.

The activity responsible for the applicable Qualified Products List (QPL) is the Naval Air Systems Command (NAVAIR) which funds qualification testing conducted by the National Bureau of Standards (NBS).

Despite the requirement in MIL–P–007788C for qualification testing, there was no indication on the face of the solicitation that it was restricted to QPL producers, nor does it appear that it was so regarded by ASO. In this connection, we note that the block adjacent to the standard clause, "* * * *NOTICE—QUALIFIED END PRODUCTS (1969 DEC)*," was not checked.

The contracting officer solicited quotations from Collins (supplier of the entire system), Airmark (previous supplier of the panels), and three other concerns all of which were previous suppliers of other components of the system. Both Collins and Airmark responded to the solicitation as did California Plasteck, which had not been solicited.

California Plasteck's quotation was the lowest received and, as a result, the contracting officer requested it to furnish information demonstrating that the offeror possessed sufficient design data to produce the lighting panels. After discussion of the QPL requirement with ASO, California Plasteck advised ASO that it intended to prepare and submit qualification test samples to the NBS for qualification testing in accordance with Military Specification MIL–P–007788C.

By letter dated September 6, 1972, a copy of which was sent to ASO, NAVAIR advised California Plasteck that the samples it had sub-

mitted for qualification testing met the requirements of MIL–P–7788D (successor to MIL–P–007788C), Type V, Class 2–W. Therefore, the California Plasteck panel was approved for inclusion on the QPL for that class. NAVAIR engineers thereafter informed the contracting officer that, although California Plasteck was not approved for the Type V, Class 1–R panel required by the Collins drawing, the approval for inclusion on the QPL for the Class 2–W panel also qualified it for QPL inclusion with regard to the Class 1–R panel. This was based on the fact that the requirements for qualification in Class 2–W were more extensive than those for Class 1–R. Consequently, California Plasteck was considered an acceptable source of supply under the RFQ.

Thereafter, on September 7, 1972, the contracting officer called for "best and final" offers. In response to this request, Airmark submitted prices which were lower than those of California Plasteck. Thus, California Plasteck became the second low offeror. On September 18, 1972, California Plasteck protested to the agency against any award under the RFQ to a manufacturer (such as Airmark) whose name did not appear on the relevant QPL. This protest was denied by the contracting officer on December 19, 1972, and on that date the contract was awarded to Airmark.

Subsequently, California Plasteck protested to our Office, on the basis that since the note in the Collins drawing incorporated by reference a military specification which required all items manufactured thereunder to be tested and approved for listing on the QPL, an award to any offeror whose product had not been so tested and approved was improper.

In denying California Plasteck's protest, the contracting officer, after consulting with ASO technical personnel, concluded that Airmark did not have to qualify its product under the QPL since: (1) Collins had repeatedly tested the Airmark panels (in its initial testing and approval of the panel and its periodic tests conducted thereafter) pursuant to test requirements believed to be more extensive than those required for listing on the QPL; (2) Collins had previously accepted thousands of panels from Airmark; (3) Collins listed and retained Airmark on its drawings as its vendor; and (4) it was known that Airmark had previously been granted first article approval of its panel under Air Force contract FO9603–71–C–3040.

Subsequent to the administrative denial of the protest and award of the contract to Airmark, it came to the Navy's attention that: (1) Airmark's panel had not been subjected to a full range of tests under the above-noted Air Force contract; (2) the tests conduted by Collins were not equal to the qualification tests of MIL–P–007788C; and (3) that Airmark's panel had recently failed a specified QPL test. Indeed, the Airmark panel has only recently passed appropriate tests required

by the contracting officer on February 8, 1973, almost 2 months after award.

ASO justified its award of the contract to Airmark on the basis that the specific QPL tests were really process tests and, as such, the approval of a test sample which is not in the exact configuration of the panel being procured does not indicate that the end product has been qualified. The Navy also states that even if the solicitation and the contract were interpreted as absolutely requiring qualification approval of Airmark's product, there is no time limitation for qualification approval. It is maintained, therefore, that Airmark may qualify its product after award.

The California Plasteck protest is premised on the incorrect assumption that the RFQ required compliance with the Collins drawing and the military specification referenced therein which, in turn, required all items manufactured thereunder to be tested and approved for listing on the QPL. The RFQ makes no reference whatsoever to the Collins drawing. More specifically, the schedule of supplies merely references the item to be manufactured as a part number (767–8136–001) and a stock number (5895–934–1349–2W). Nowhere in the RFQ is there a requirement that the manufactured item be listed or be qualified for listing on a QPL. In this regard, we note that block the applicable to the "specifications" portion of the RFQ, where the Government could reference required specifications for the articles requested, was not checked and the adjacent space for that portion was left blank. Based on the above, we find that the award of the contract to Airmark whose panel had not been tested and approved for listing on the appropriate QPL was not precluded by the terms of the RFQ.

While this may be the case, in a report to our Office dated August 31, 1973, ASO admitted that the procurement should have been advertised utilizing the citation of the applicable military specification, as follows:

> The military specification was not cited in the solicitation and the procurement was not advertised because, as stated in paragraph 2 of the Contracting Officer's statement, the buyer, believing that the item to be bought was one on which ASO had no data, did not send the requisition to cognizant technical representatives for technical review as required by existing procedures.

See section 1–1202 of the Armed Services Procurement Regulation which mandates the utilization of a military specification for an item where available, as here.

Furthermore, even after the erroneous failure to advertise the procurement utilizing the military specification, and over 6 months before award, ASO contracting officials were apprised of the applicable military specification but took no appropriate action. ASO, in its report, relates the circumstances surrounding this aspect of the procurement.

> Aviation Supply Office representatives first learned of the reference on the Collins drawing to the military specification at the meeting on 13 June 1972, when

California Plastek [sic] representatives (1) called it to their attention, (2) advised that they considered that the Collins drawing required the use of panels qualified pursuant to the military specification, and (3) advised that they were submitting a panel to the specified testing lab for qualification tests pursuant to the specification. A decision on the question of whether qualification was or was not required was not requested by California Plastek [sic] and was not required at that time since California Plastek [sic] representative made it clear that they considered qualification was required and were submitting a sample for qualification test.

There is further evidence of undesirable consequences flowing from the conduct of this procurement. The expenditure by California Plasteck of time and money in qualifying its product to compete under this procurement was unnecessary since the RFQ did not require such a qualification as the award to Airmark amply demonstrates. The record contains a factual dispute between ASO and California Plasteck as to exactly what part ASO contracting officials played in initiating and endorsing the unnecessary qualification procedure undertaken by California Plasteck. The second quotation, above, from the ASO report, clearly establishes that, at the very least, contracting officials were aware of the firm's intentions to proceed with the qualification procedure.

Though we do not recommend termination of the contract awarded to Airmark because performance of that contract is or is nearly completed, we feel that the procurement procedures followed were prejudicial and unfair to California Plasteck.

ASO informs us that future procurements of this item will be advertised utilizing the Collins drawing and the military specification. And, of course, California Plasteck as a QPL source will be in a position to compete for these procurements. We recommend that the circumstances of this procurement and its deficiencies be closely analyzed and corrective measures taken.

We would appreciate advice as to our recommendation.

[B–177924]

Education—Student Assistance Programs—Military Record Correction Effect on Allowance

The amount equal to the educational assistance allowances paid to a staff sergeant at the rate prescribed for veterans while attending school from July 6, 1970, to December 8, 1970, which was withheld from the payment due him as a result of the correction of his military records to show he was not discharged on September 8, 1969, but that he continued on active duty until December 8, 1970, at which time he was honorably discharged, may not be reimbursed to the member as the amount withheld represents educational assistance allowances paid at the rate prescribed in 38 U.S.C. 1682(a)(1) only for veterans discharged from the military service, and the sergeant's records having been corrected to show him on active duty for the period of school attendance, his entitlement is limited to the lesser educational assistance allowance rate provided by 37 U.S.C. 1682 for servicemen on active duty.

To N. R. Breningstall, Department of the Air Force, October 31, 1973:

Reference is made to your letter dated January 12, 1973 (file reference ACF), with attachments, requesting an advance decision as to the propriety of making payment of an amount equal to educational assistance allowances received from the Veterans Administration by Staff Sergeant Robert L. Smith, 422 56 7202, which was withheld from payment due him as a result of the correction of his military records. Your request was forwarded here by letter of January 29, 1973, from the Office of the Deputy Assistant Comptroller for Accounting and Finance, Headquarters United States Air Force (Department of Defense Military Pay and Allowance Committee Number DO-AF-1180).

You say that the Assistant Secretary of the Air Force, Manpower and Reserve Affairs, by memorandum dated June 30, 1971, directed that Sergeant Smith's military records be corrected to show that he was not discharged on September 8, 1969, but that he continued on active duty until December 8, 1970, at which time he was honorably discharged under the provisions of Chapter 3, Section A, Air Force Manual 39-10 (Expiration of Term of Service).

For the period of additional active duty resulting from the correction of Sergeant Smith's military records, it is indicated that there is a gross entitlement due him for pay and allowances in the sum of $8,534.02, deductions amounting to $3,143.49 and a net payable sum of $5,390.53. Of the total amount deducted, $1,173 represents educational assistance allowance payments at the rate of $230 per month paid for the period from July 6, 1970, through December 8, 1970, by the Veterans Administration, presumably while he was attending school as a discharged veteran.

You are in doubt as to whether Veterans Administration educational assistance allowance payments based upon a discharged veteran status are required to be deducted from the active duty pay and allowances settlement, as you say would be required in the case of Veterans Administration compensation or pension payments made under similar circumstances.

As set forth in letter dated August 31, 1973, received from the Director, Education and Rehabilitation Service, Department of Veterans Benefits, Veterans Administration (copy enclosed), section 1682(a)(1) of Title 38, U.S. Code, provides the statutory basis for the computation and payment by the Administrator of Veterans Affairs of educational assistance allowances for *veterans* pursuing programs of education under Chapter 34 of that title. The rate payable under this section is that which shall be paid to veterans discharged from military service. Subsection (b) of section 1682, on the other hand, sets forth the statutory rate which shall be paid to *servicemen* on active duty who receive educational assistance allowances.

Sergeant Smith apparently was paid educational assistance allowances for the period from July 6, 1970, through December 8, 1970, in the sum of $1,173, at the veterans rate prescribed by 38 U.S.C. 1682 (a) (1) based upon his original discharge instead of $79.80 which the Veterans Administration has now determined to be due him as a serviceman, pursuant to 38 U.S.C. 1682(b). Therefore, it appears that Sergeant Smith received $1,093.20 ($1,173–$79.80) in educational assistance allowances as a discharged veteran to which he was not entitled in view of the correction of his records changing his status to that of serviceman during this period.

It is the view of the Veterans Administration that it is without authority to waive recovery of the $1,093.20 overpayment. Consequently, this sum is deemed to be properly withheld from pay and allowances otherwise due Sergeant Smith as a result of his corrected record. We would not object to the payment of the additional sum of $79.80 from withheld funds, if otherwise proper.

Your question is answered accordingly, and the enclosed voucher for $1,173 is retained here.

[B–178360]

Courts—Costs—Government Liability—Suits Against Judicial Officers and Entities

When a Federal judge or other judicial officer, as well as a judicial entity, is sued within the scope of judicial duties and the Department of Justice declines to provide legal representation, the use of judiciary appropriations to pay litigation costs, including minimal fees to private attorneys where gratuitous representation is not available, is not precluded by 28 U.S.C. 516–519 and 5 U.S.C. 3106. However, the Administrative Office of the United States Courts should advise the appropriate legislative and appropriations committees of the Congress of its plans and the estimated cost for implementation of the plans, and the determination as to whether the defense of a judicial officer's ruling or a judicial body's rule is in the best interest of the United States and necessary to carry out the functions of the judiciary should be made by the Administrative Office of the United States Courts and not by a defendant. Also, the defense of Federal public defenders appointed under 18 U.S.C. 3006A(h) may be paid from appropriations provided for the public defender service where other public defender attorneys are not available.

To the Director, Administrative Office of the United States Courts, October 31, 1973:

Your letter of April 2, 1973, with attachments, requests our decision as to whether appropriations contained in the annual "Judiciary Appropriation Act" for "travel and miscellaneous expenses not otherwise provided for, incurred by the judiciary," are available to pay certain litigation costs, and attorneys fees, incurred in representing or defending Federal judges and other Federal judicial officers or entities in the circumstances considered below. We have had several discussions concerning this matter with members of your staff.

A large, and still growing, number of cases have been brought against individual judges, district courts, and judicial councils and against a variety of judicial officers, including referees in bankruptcy, clerks, United States magistrates, public defenders, court executives, officers of the Administrative Office of the United States Courts and foremen of juries. We understand that the cases causing the most concern involve judges sued, in their official capacity, by a petitioner or by the United States seeking a writ of mandamus pursuant to Rule 21 of the Federal Rules of Appellate Procedure (FRAP) and 28 U.S. Code 1651, collaterally attacking the judges' rulings in original actions. See, for example, *Colgrove* v. *Battin*, 41 LW 5025 (June 21, 1973), and *United States* v. *Ferguson*, 448 F.2d. 169 (1971). Your General Counsel, in a memorandum dated February 9, 1973, to the Deputy Director of your Office stated:

> Surely it would be unconscionable to expect judges and courts sued in their official capacities to support the defense by private contributions of the judges. It would be equally unconscionable for a judge to have to rely on the attorney of a private litigant to represent him and to pay the considerable cost of transcription, printing and the attorney's travel involved in an appeal on behalf of the court being sued.

The general question you raise, as stated in your letter, is as follows:

> When a Federal judge or other judicial officer is sued in his official capacity and representation is furnished by private counsel on request, rather than by the Department of Justice (pursuant to 28 U.S.C. 516–519, 547(2)), can the expenses of litigation be paid by the Administrative Office of the United States Courts from the Travel and Miscellaneous Expenses appropriation of the Judiciary Appropriation Act?

In additon, you ask the following specific questions with respect to the representation of judicial officers:

> (1) If we can apply the Judiciary Appropriations to payment of litigation costs in some cases involving judicial officers, what specific categories of cases are involved?
>
> (2) In addition to general litigation costs, would it be permissible to pay a minimal fee to an attorney representing a judge, court, judicial officer, judicial council, etc., where gratuitous representation is not otherwise available?
>
> (3) If the Judiciary Appropriation is not available for payment of costs described in questions 1 and 2 above, is there any other source of payment where services of counsel furnished by the Department of Justice are not available either because of a conflict of interest or for any other valid reason?
>
> (4) Would the same answers to the above questions apply to suits against Federal public defenders appointed pursuant to 18 U.S.C. 3006(h) whom the Department has previously declined to represent because of the inherent conflict of interest involved?

The general rule is that, in the absence of specific statutory authority for departments and establishments of the Government to resort to litigation in the courts in the performance of the duties and responsibilities with which they are charged, it is the duty of the Attorney General, as chief law officer of the Government, to institute, prosecute and defend actions in behalf of the United States in matters involving

court proceedings and to defray the necessary expenses incident thereto from appropriations of the Department of Justice rather than from appropriations of the administrative office which may be involved in the proceedings. *See* 44 Comp. Gen. 463 (1965) and 46 *id.* 98 (1966).

In a letter to you of January 31, 1973, the former Attorney General, Richard G. Kleindienst, set forth the circumstances under which the Department of Justice (Department) will assume the burden of representing judicial officers. First, he stated, the Department will provide representation where the acts which are the basis of the suit are within the scope of the defendant officer's authority and where the only relief sought is money damages against the defendant personally. It is his position, however, that when representation is requested in collateral proceedings which are in the nature of appeals to overturn a decision of the judicial officer rendered in favor of one party or another, and the Government is not a party to the litigation, the result of the Department's furnishing representation in such a situation amounts to the Department's defending the position of one or the other private litigants. The former Attorney General further stated that:

> In our view, when no personal relief is sought against the judicial officer, such officer is no more in need of a personal defense than he would be if an appeal were taken from any of his appealable rulings. Nor is there any impropriety in counsel for one of the private litigants representing the judicial officer, as if he were defending an appeal from the officer's ruling.

Accordingly, the Department will not provide representation in such cases. Where a collateral suit against a judicial officer in the nature of an appeal also seeks personal damages against the officer, the Department intends to evaluate the nature of the claim to determine if the money claim is frivolous and make its representation decisions on that basis.

The former Attorney General stated that the Department cannot furnish representation to a judicial officer in a situation where the Department's interests collide with those of the judicial officer, such as in a mandamus action instituted against a judge by the Department. He further stated that the Department could not furnish a special attorney in those cases where it could not on its own represent the judicial officer.

In addition, he stated, however, that the Department will file *amicus* statements in any type case where it will be helpful to the court to know the Government's position or for a relatively impartial statement of what the law is or should be. The former Attorney General stated that whenever the Department furnishes an attorney to represent a judicial officer, it will bear the costs attendant to the representation; however, he concluded that the Department cannot bear the costs of litigation or the fees of private counsel retained by a judicial officer.

We have been informally advised by members of your staff that in those situations, where judicial officers have felt that representation was required, local bar associations were frequently asked to provide attorneys without compensation and that the expenses of such representation, including in some cases attorneys fees, had to be borne by the judicial officers or their attorneys or by the bar associations.

In his memorandum your General Counsel points out that while many of the cases involving the procedure of suing a judicial officer to test collaterally a legal issue arising out of the original litigation are frivolous, some - such as *Colgrove* v. *Battin*, *supra*, testing the constitutionality and legality of a local rule of court (similar to that adopted by a majority of the Federal district courts) providing for a six-member jury in civil cases—involve basic and novel issues. Moreover, it is your Office's position that even where the suit is frivolous, some proforma submission should be made to the court. As we understand it, such a submission is not necessarily required to protect the judicial officer in the Courts of Appeals, since Rule 21 of FRAP provides that the failure of an officer to appear will not result in his losing by default; however, in the absence of an appearance in the Courts of Appeals, the judicial officer is precluded by the applicable rules from appealing an adverse decision to the Supreme Court of the United States. In this connection we suggest your Office may wish to consider proposing a change in the applicable rules which will allow an appeal to the Supreme Court by a judicial officer-defendant without the necessity of an appearance in the Court of Appeals.

In summary, there are numerous cases in which judicial officers are being sued in their official capacities as to which the Department of Justice, for a variety of reasons, has determined that it will not, or cannot provide representation. While your Office agrees that many of these suits are frivolous, it has determined that some sort of defense - frequently involving merely a pro forma submission to the Court of Appeals—is necessary in almost every case. Thus, you ask our views as to the availability of appropriations made to the judiciary to pay the costs of making a pro forma appearance in these cases, and of attorneys fees in those cases—which we have been informally advised will be few in number—which will actually require the personal appearance of counsel for the judicial officers where gratuitous representation is not available.

As noted above, under the provisions of 28 U.S.C. 516–519 and except as otherwise authorized by law, the conduct and supervision of litigation in which the United States, an agency or officer thereof is a party is reserved to the Department of Justice under the direction of the Attorney General. Accordingly, whenever a judicial officer, acting in the scope of his official duties, is named as defendant, the Attorney General should be requested to provide representation for such official.

(Of course, a request need not be made in those categories of cases—such as those in which the Department of Justice has instituted a mandamus action against a judicial officer—as to which the Attorney General has stated he will not provide such representation.) Also, 5 U.S.C. 3106 contains a restriction on the employment of attorneys or counsel for the conduct of litigation in which the United States, an agency or employee thereof, is a party, but this restriction is directed to the heads of executive and military departments and does not restrict the right of the judiciary to employ attorneys for the conduct of litigation.

It is clear, however, that if we were to hold that the judiciary's appropriations are not available to pay the costs of providing a defense, with respect to a case in which the Atorney General declines for any valid reason to provide representation, such defense, even though it involves defending actions taken by Federal employees in the normal course of their business, might have to be borne by the defendants. It is well established that where an officer of the United States is sued because of some official act done in the discharge of an official duty the expense of defending the suit should be borne by the United States. See *Konigsberg* v. *Hunter*, 308 F. Supp. 1361, 1363 (W.D. Mo., 1970) and 6 Comp. Gen. 214 (1926). Also, we note that under Rule 21 of FRAP judges are entitled, but not required, to appear in court in mandamus and prohibition proceedings (as well as other extraordinary writ proceedings) and it would be burdensome to require that the expenses of such appearances, when made in the best interest of the United States, be borne by the judicial officers involved. Moreover, the present situation involves having the Attorney General, an official of the executive branch of the Government, determine whether and to what extent members of institutions of a coordinate branch of the Government, the judiciary, are to be represented in litigation in which they are named as defendants or respondents.

With these factors in mind, and subject to the qualifications listed below, it is our view that the above cited provisions of law would not preclude the use of judiciary appropriations to pay the costs of litigation including minimal fees to private attorneys—if you determine the use of private attorneys is necessary—in those cases where it is determined that it is in the best interest of the United States and necessary to carry out the purposes of the Federal judiciary's appropriations for the judicial officer or body to be defended or represented in that litigation, and the Department of Justice has declined to provide representation. In connection with the matter generally compare 42 Comp. Gen. 595 (1963), in which litigation costs incurred incident to a trial between private parties were authorized to be reimbursed to private attorneys defending a private party where the United States, though not a party in the case, had a beneficial interest in its outcome.

Our approval of the payment of litigation costs including minimal attorney's fees where gratuitous representation is not available is subject to two further qualifications. First, your office should, at the first appropriate opportunity, advise fully the appropriate legislative and appropriations committees of the Congress of your plans and the estimated cost thereof.

Second, we strongly feel that the decision in each case as to the necessity for and the amount of representation required, if any, should be made by someone other than the defendant or respondent (i.e., the judicial officer or entity involved) in that case. In other words, we do not feel that the determination, as to whether a defense of a judicial officer's ruling or a judicial body's rule is in the best interest of the United States and necessary to carry out the functions of the judiciary, should be made by the judicial officer or body concerned. Such an independent determination made by your office would be designed to assure, to the extent possible, that appropriated funds are used only to the extent necessary to protect the judiciary's interest in the outcome of the subject litigation, rather than the judicial officer's personal interest in having his decision upheld, and that such funds are not used, in effect, merely to defend a private litigant's position where, as is the case in most appeals of judicial rulings, the judiciary and the United States have no real interest in the outcome of the appeal.

Much of the same reasoning used above may be applied with respect to Federal public defenders who are appointed pursuant to the Criminal Justice Act, as amended, 18 U.S.C. 3006A(h), who are sued for activities undertaken within the scope of their duties. The Department of Justice has declined to represent these defenders because of the inherent conflict of interest involved. Hence, in the absence of the availability of appropriated funds for their defense, such defense would have to be undertaken, out of the public defender-defendant's own private resources. We understand that it is your intention that the defense of the public defenders will be handled for the most part by other public defenders.

Appropriations for the public defender service, under 18 U.S.C. 3006A(h) are available to pay the necessary costs of litigation undertaken by the Public Defender Service. We believe that such appropriations are also available to pay litigation costs (including minimal attorney's fees where other public defenders are not available for such purpose) incurred in defending actions undertaken within the scope of the official duties of public defenders where such defense is considered as necessary for carrying out the purposes of the appropriations and in the best interest of the United States. Nonetheless, as in the case above, we feel that the Congress should be advised of the proposed use of appropriated funds.

U. S. GOVERNMENT PRINTING OFFICE : 1974 O - 536-020