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TABLE OF DECISION NUMBERS

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Uniform pagination. The page numbers in the pamphlet are identical to those in the permanent bound volume.

[A-3551]

Checks—Endorsements—Powers of Attorney—Special—Without Time Limitation

Special power of attorney in favor of responsible financial institution authorizing that institution to indorse and negotiate Government benefit checks on behalf of payee may be executed without time limitation as to validity, since recent court cases, applying Treasury regulations which provide that death of grantor revokes power and that presenting bank guarantees all prior indorsements as to both genuineness and capacity, afford adequate protection to Government against risk of loss. Modifies 48 Comp. Gen. 706, 17 *id.* 245 and other similar decisions.

Powers of Attorney—Special—Acknowledgment

Although General Accounting Office (GAO) is aware of no requirement under Federal law, other than Treasury regulations, that special power of attorney be acknowledged, and feels therefore that acknowledgment may be eliminated without prejudice to rights of United States, GAO nevertheless recommends retention of acknowledgment provision in power of attorney form as option due to potential consequences of lack of acknowledgment under local law to private parties in matters not directly involving rights of United States.

In the matter of negotiation of Government benefit checks under power of attorney, August 1, 1974:

This decision to the Secretary of the Treasury is in response to a request dated June 11, 1974, from the Fiscal Assistant Secretary, Department of the Treasury, that we reconsider prior decisions holding that a special power of attorney executed in favor of a responsible financial institution authorizing that institution to indorse and negotiate Government benefit checks on behalf of the payee must be renewed every 12 months. We are also asked if the requirement that such powers of attorney be acknowledged (notarized) may be eliminated.

Current Treasury requirements, based in part on our decisions, are contained in 31 C.F.R. § 360.12, pertinent parts of which are set forth below:

§ 360.12. Powers of attorney.

* * * * * * *

(b) *General powers of attorney.* Checks issued for the following classes or payments may be negotiated under a general power of attorney in favor of an individual, financial organization or other entity:

(1) Payments for the redemption of currencies or for principal or interest on U.S. securities.

(2) Payments for tax refunds.

(3) Payments for goods and services.

(c) *Special powers of attorney.* Under decisions of the Comptroller General of the United States, classes of checks other than those specified in paragraph (b) of this section may be negotiated under a special power of attorney which names a financial organization as attorney in fact, is limited to a period not exceeding 12 months, and recites that it is not given to carry into effect an assignment of the right to receive payment, either to the attorney in fact or to any other person.

* * * * * * *

(e) *Revocation of powers of attorney.* Powers of attorney are revoked by the death of the grantor * * *.

(f) *Acknowledgment of powers of attorney.* Powers of attorney shall be acknowledged before a notary public or other officer authorized by law to administer oaths generally. * * *

The Treasury Department would now like to issue a new special power of attorney form without time limitation as to validity. This is seen as an interim measure leading to the direct deposit of benefit checks with financial institutions as authorized by Public Law 92-366, 86 Stat. 506, 31 U.S.C. 492(d), and ultimately to an electronic funds transfer system. Under the direct deposit system, a payee may request that his checks be made payable to a financial institution of his choice, and mailed directly to that institution. This system is already in use for payments of wages and salary. *See* 31 U.S.C. § 492(b). The eventual adoption of the direct deposit system will obviate the need for a power of attorney. The Treasury Department points out that "financial organizations and banking industry trade associations increasingly request the Treasury to consider removing the [12-month] limitation, as discussions proceed concerning the steps towards direct deposit and electronic funds transfer."

Prior to 1937, authority to collect and indorse Government benefit checks could not be granted to a financial institution under a general or special power of attorney, but required the execution of a specific power of attorney with each check. *See* 22 Comp. Dec. 393 (1916). The matter was frequently subject to reexamination, however, and certain limited exceptions appeared. Thus, in A-3551, April 5, 1929, we recognized an exception in the case of payments under a matured term war risk insurance policy, stating as follows:

In the case of payments of installments of insurance, as under the law and the condition of the policy, these continuing payments are contingent upon the life of the beneficiary, and on the death of the beneficiary other rights may intervene or arise, it will be necessary to limit payments under a power of attorney to a relatively short period not exceeding a year * * *.

In 17 Comp. Gen. 245 (1937), a retired employee sought to have his retirement annuity checks mailed to his bank under a special power of attorney, since he was contemplating an extended overseas cruise and it would have been impossible for him to receive his checks by mail. Noting that existing restrictions were not necessary to protect the interests of the United States in such a case because "the authority of the agent terminates with the death of the principal and the agent's ignorance of the death of the principal is immaterial," we said that we would—

* * * interpose no further objection to the endorsement of annuity checks under a general [sic] power of attorney in favor of a reputable bank or trust company as in the instant case, provided that for the adequate protection of the interests of the Government the general power of attorney be required to be renewed every 12 months. * * * *Id.* at 248.

In A–3551, August 15, 1956, we extended the rule of 17 Comp. Gen. 245 to other classes of Government benefit checks "in the same general category, that is, where the right thereto is dependent upon the continued existence of the payee." Our most recent letter in this area, A–3551, February 3, 1970, to the Chairman of the Committee on Banking and Currency, House of Representatives, is to the effect that powers of attorney of the type in question could be executed in favor of credit unions as well as banks and trust companies. Protection of the Government was the reason behind the 12-month limitation in these cases.

The Treasury Department contends that its regulations and existing court decisions afford the Government adequate protection against risk of loss, and that the 12-month limitation is no longer necessary for this purpose.

The Supreme Court, in *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943), established the primacy of Federal law in the area under consideration.

> * * * The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law. When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power. * * * *Id.* at 366.

Thus, the regulations of the Treasury Department, as construed and implemented by the Federal courts, became recognized as the governing body of law.

The rights of the United States with respect to indorsement of its commercial paper are outlined in 31 C.F.R. part 360, as follows:

> § 360.4 Guaranty of indorsements.
>
> The presenting bank and the indorsers of a check presented to the Treasury for payment are deemed to guarantee to the Treasurer that all prior indorsements are genuine, whether or not an express guaranty is placed on the check. When the first indorsement has been made by one other than the payee personally, the presenting bank and the indorsers are deemed to guarantee to the Treasurer, in addition to other warranties, that the person who so indorsed had unqualified capacity and authority to indorse the check in behalf of the payee.
>
> § 360.5 Reclamation of amounts of paid checks.
>
> The Treasurer shall have the right to demand refund from the presenting bank of the amount of a paid check if after payment the check is found to bear a forged or unauthorized indorsement or an indorsement by another for a deceased payee where the right to the proceeds of such check terminated upon the death of the payee, or to contain any other material defect or alteration which was not discovered upon first examination. If refund is not made, the Treasurer shall take such action against the proper parties as may be necessary to protect the interests of the United States.

Other sections provide specific coverage for incompetent payees, deceased payees, and minors.

Recent court cases cited by the Treasury Department, based on the substantially identical predecessors to the above-cited regulations, support its contention. Thus, in *United States* v. *National Bank of Com-*

merce in New Orleans, 438 F. 2d 809 (5th Cir. 1971), cert. denied, 404 U.S. 828 (1971), the United States sought to recover the proceeds of 22 retirement annuity checks negotiated by defendant Bank after the death of the payee. Noting that the Bank had no authority to negotiate the checks after the payee's death, notwithstanding that neither the Bank nor the Government was notified of the payee's death for almost 2 years, the Court, relying heavily on *Clearfield Trust Co.* v. *United States*, *supra*, held that summary judgment should have been granted in favor of the United States. Although the 22 checks were indorsed by the Bank under a special power of attorney, the Court in its decision did not mention or discuss the power of attorney.

In *United States* v. *City National Bank & Trust Co.*, 491 F. 2d 851 (8th Cir. 1974), the United States was held entitled to recover from defendant Bank the proceeds of 72 disability pension checks cashed under forged indorsement by the payee's common-law wife after his death. Although this case does not involve a power of attorney, it is significant in that the Court affirmed the *Clearfield* doctrine and looked to the Treasury regulations as the source of governing law.

In further support of its request, Treasury cites a joint study of the implementation of Public Law 92–366 (31 U.S.C. 492) made by the Treasury Department and the Social Security Administration, concluded in November, 1973. Concerned primarily with social security benefit checks, the study found as follows:

> * * * An examination of suspended and terminated social security benefit cases disclosed that beneficiaries report events which affect their payment status even though they are being paid at financial organizations. In at least 94% of the cases examined, the event involved had been reported on a timely basis. Suspension and termination notifications of death and other occurrences are received from the beneficiary himself or a member of his family. Where overpayments have occurred due to untimely notification, refunds have been obtained from the overpaid beneficiary or withheld from other benefits due on the account. Although overpayments are made to power of attorney beneficiaries, there is no distinction between them and overpayments made to the general population of social security beneficiaries.

In consideration of the foregoing, especially the cases which indicate that the courts will apply Treasury regulations under the *Clearfield* doctrine in determining the rights of the United States on its commercial paper, we concur with the Treasury Department that the 12-month limitation no longer appears necessary to protect the interests of the Government. We thus have no objection to an amendment of the Treasury regulations which would permit a special power of attorney to be executed in favor of a responsible financial institution authorizing that institution to indorse and negotiate Government benefit checks on behalf of the payee, without time limitation as to the validity of the power. Prior decisions inconsistent with our holding herein are modified accordingly.

The Treasury Department further proposes to eliminate notarization of the special power of attorney. Apart from 31 C.F.R. § 360.12 (f), we know of no requirement in Federal law that such powers of attorney be acknowledged. Since, under the *Clearfield* doctrine, the rights and duties of the Government are to be determined under Federal law, there would appear to be no need to insist upon acknowledgment from the standpoint of protection of the Government. Also, we note that the Uniform Commercial Code (§ 3–403), adopted in 49 states, requires no particular form of appointment to establish the authority of an agent to indorse commercial paper. While the Uniform Commercial Code is not controlling in this area (*cf. United States* v. *City National Bank & Trust Co.*, *supra*, at 853), we have stated our belief that it should be followed "to the maximum extent practicable in the interest of uniformity where not inconsistent with Federal interest, law or court decisions." 51 Comp. Gen. 668, 670 (1972).

Even though there may be no requirement for acknowledgment under Federal law, considerations of local law render it undesirable in our opinion to delete the acknowledgment provision from the power of attorney form. State law regarding acknowledgment is subject to considerable variation, summarized as follows:

> An acknowledgment to an instrument may have any of three functions: it may give validity to the instrument, it may permit the instrument to be introduced in evidence without other proof of execution, or it may entitle the instrument to be recorded. Generally, its function is to entitle the instrument to be recorded and to authorize its introduction in evidence without further proof of its execution. The certificate of acknowledgment furnishes formal proof of the authenticity of the execution of the instrument when presented for recording, and in the absence of a specific statutory requirement, acknowledgment is not necessary to the validity of an instrument, and does not constitute a part of the instrument, or affect its force. * * * 1 Am. Jur. 2d Acknowledgments § 4.

The reference to recording deals mainly with powers to convey real property. The other two functions, however, are pertinent. We note, for example, that acknowledgment of a power of attorney may be required as a condition to its validity even in some States which have adopted the Uniform Commercial Code. *See*, e.g., New York General Obligations Law § 5–1501, McKinney's Consol. Laws, c. 24A (1964). Thus, the absence of acknowledgment, while perhaps not affecting the rights of the United States, may have significant consequences for the parties involved. *Cf. Bank of America* v. *Parnell*, 352 U.S. 29, 32–34 (1956), holding that the *Clearfield* doctrine is not applicable in litigation involving private parties where the rights of the United States are not directly in issue.

Because of the potential impact on the private parties involved, we recommend that the acknowledgment language be retained in the power of attorney form, along with a notation to the effect that acknowledgment is not required by the Treasury Department but is an

565-529 O - 75 - 2

optional procedure to be followed if required or desirable under local law. We recognize that, under this option, banks may tend to insist upon acknowledgment automatically as a precaution; in any event, the expense and inconvenience for the payees involved will be minimal since the power of attorney will no longer be a recurring requirement.

[B-178674]

Claims—Assignments — Validity — Lease Payments — Computer Equipment

Assignment of lease payments under Government leases for computer equipment to lease financing company which purchases title to equipment should be recognized since purchaser of equipment may be regarded as financing institution under Assignment of Claims Act.

In the matter of Alanthus Peripherals, Inc., August 1, 1974:

Alanthus Peripherals, Incorporated seeks our opinion as to whether it is a "financing institution" within the meaning of the Assignment of Claims Act, 31 U.S. Code 203, 41 U.S.C. 15, and whether a proposed assignment of payments under Government equipment leases to Alanthus Peripherals is permissible under the statute. As explained below, agencies of the Government have taken conflicting positions regarding the validity of such assignments.

The Assignment of Claims Act of 1940, 54 Stat. 1029, 31 U.S.C. 203, as amended, permits assignments of Government contract proceeds to financing institutions in derogation of the general prohibition against assignments. The purpose of the 1940 enactment was to make it easier for Government contractors, particularly small businesses, to secure financing for carrying out obligations to the Government to the end that Government contracts might be speedily and effectively performed. Additionally, the act implemented the Congressional preference that Federal contracts be financed by private rather than public capital. See *Produce Factors Corporation* v. *United States*, 467 F. 2d 1343, 199 Ct. Cl. 572 (1972) and *Continental Bank and Trust Company* v. *United States*, 416 F. 2d 1296, 189 Ct. Cl. 99 (1969).

In describing the background of the present case, Alanthus Peripherals states:

Historically data processing equipment has been obtained by end users through the vehicle of leasing rather than purchase. This is largely because of a pattern set by International Business Machines Corporation (IBM), the dominant factor in the data processing industry. IBM has always encouraged the leasing of its equipment rather than the purchase of that equipment by end users. In recent years, smaller manufacturers of data processing equipment, principally data entry equipment and memory, have developed products which compete with older methods of data entry and with IBM-manufactured memory. Many of these manufacturers are undercapitalized and must sell their equipment in order to recover

manufacturing costs and produce a positive cash flow. Tradition in the industry however dictates that they lease their equipment rather than sell it to end users. As a result, the manufacturer must wait several years to recover its costs and to show a profit, during which period a negative cash flow results.

Alanthus Peripherals is said to be a separate corporate entity from, and a wholly owned subsidiary of, Alanthus Corporation. Although Alanthus Corporation is engaged in the business of purchasing data processing equipment from the larger manufacturers and obtaining lease agreements with users, as lessor, it is responsible for the maintenance and service of the equipment.

On the other hand, Alanthus Peripherals enters into agreements with independent manufacturers which provide for the purchase of a large portion of the manufacturer's lease portfolio. The company acquires title to specific equipment from the manufacturer on the date a lease between the manufacturer and the end user goes into effect, at which time we understand the company makes payment to the manufacturer. The lease payments are assigned to Alanthus Peripherals but the manufacturer remains responsible for the maintenance and service of the equipment. Alanthus Peripherals assumes no obligation to the Government as a result of the transaction between it and the manufacturer. Furthermore, upon expiration of the lease the manufacturer is responsible for remarketing the equipment as the exclusive agent of the owner. Counsel for Alanthus Peripherals states that while a sale transaction is utilized rather than a normal factoring of accounts receivable, the sale is a necessary device to support the two "layers" of financing. When the manufacturer agrees to sell a portion of its lease portfolio to Alanthus Peripherals it receives an advance from its bank based on such sale and counsel contends that the bank's financing is, in effect, replaced by Alanthus Peripherals when it makes payment for the equipment purchased at the commencement of the lease.

On October 2, 1972, the United States Geological Survey, Department of the Interior, approved such an assignment to Alanthus Peripherals of monies due under a lease between the Department and Scan-Data Corporation (Scan), a small independent manufacturer of data processing equipment. In December 1972 a notice of assignment was submitted to the Veterans Administration (VA) relating to the assignment to Alanthus Peripherals of monies due under Contract No. GS-00S-4291 and Letter Order No. 2-204-13, dated March 15, 1972, as amended, entered into between Scan and the VA, covering Scan data processing equipment.

Both assignments to Alanthus Peripherals were identical in form, but the VA refused to acknowledge the assignment on the ground that Alanthus Peripherals is not a "financing institution" within the meaning of the Assignment of Claims Act.

An assignment is a manifestation of intention by the owner of a right to another person, presently to transfer such right to that other person or to a third person. (See Restatement of Contracts, Section 149(1).) In the present case, we have a payment of money from Alanthus Peripherals to Scan in return for title to the computer equipment, leased to the Government, and the assignment to Alanthus Peripherals of the right to lease payments from the Government. Even though the transfer of the right to receive money under the lease is incorporated within a sale of legal title of tangible property, it constitutes an assignment of a right.

A purpose of the Assignment of Claims Act, as amended, "* * * is to assist Government contractors in financing their operations." *Peterman Lumber Company* v. *Adams*, 128 F. Supp. 6, 13 (W.D. Ark. 1955). The court in *Peterman* continued:

> * * * that under the Act a contractor may assign his payments under a particular contract to the bank as security for the advances made in connection with said contract; or the contractor (when he is performing a number of Government contracts) may assign his payments under a particular contract as security for money advanced by the bank in connection with his whole operation of performing other Government contracts as well as that particular contract.

Thus, in order for an assignment to be included within the Assignment of Claims Act, the assignee must finance a Government contractor in his performance of a Government contract or contracts. Moreover, we have held, in the wake of the unreported opinion of the United States District Court for the Eastern District of Tennessee, Southern Division, in *Chattanooga Wheelbarrow Co.* v. *United States*, Civil Action No. 4755, January 26, 1967, that "* * * an assignment had no validity against the United States where there was no loan by the assignee to the assignor to be used in performance of the contract with the * * *" Government. B-175670, May 25, 1972. *Also see* 49 Comp. Gen. 44, 46 (1969).

In a submission to this Office, counsel for Alanthus Peripherals contends that *Peterman; Chattanooga Wheelbarrow; Beaconwear Clothing Co.* v. *United States*, 174 Ct. Cl. 40, 355 F. 2d 583 (1966) and 49 Comp. Gen. 44 (1969) do not stand "* * * for the proposition that a Government agency must or should refuse to honor an assignment of contract proceeds when there is no showing of an existing underlying 'loan'." Alanthus Peripherals further contends that:

> The only possible requisite to the validity of an assignment pursuant to the Assignment of Claims Act is that the assignment be made for the general purpose of financing Government contracts and the instant transaction meets that standard.

In each of the cited cases there was an advance of money for the purpose of financing the particular contract and the Government was not required to recognize the collateral assignment once the underly-

ing debt was satisfied. We agree with counsel that the above cases do not require the existence of a loan as a prerequisite to a valid assignment. Rather, they deal with the question of the extent to which the Government must recognize the validity of an assignment where the contract has been financed with a loan. To the extent that financing is effected through the purchase and assignment of accounts receivable, the situation discussed in these cases does not arise.

A factoring company has been considered to be a financing institution to whom assignments could be made under the Assignment of Claims Act of 1940. This is one who purchases merely the accounts receivable. 20 Comp. Gen. 415 (1941). Generally assignments are recognized where the assignee deals in money as distinguished from other commodities as a primary function of its business activity (22 Comp. Gen. 44, 46 (1942)) and an ordinary business corporation which incidentally provides financing to its suppliers is not a proper assignee under the act. 31 Comp. Gen. 90 (1950).

The question here stems from the fact that Alanthus Peripherals purchases not only the accounts receivable but also the particular equipment involved and therefore it may be viewed as functioning, at least in part, as a leasing company. However, we believe an analogy may be drawn here to the situation considered in *Freedman's Savings and Trust Co.* v. *Shepherd*, 127 U.S. 494 (1888) wherein the court held that a contract for the lease of real property was properly transferred upon the sale of the realty where the lessor performed no function other than to collect the rent. While in the instant case there is no attempt to transfer the lease contract itself, there is a sale of the underlying subject matter of the lease concerning which the purchaser, as in *Freedman's*, performs an entirely passive role insofar as concerns the Government's use of the leased equipment.

Furthermore, we believe that the arrangement here may be viewed, in a larger sense, as providing lease financing to the manufacturer and as contributing to the performance of Government contracts. Many factors which are unique to the peripheral equipment industry explain the existence of this type of arrangement. There exists intense competition among manufacturers of peripheral equipment which has produced a rapid rate of technical innovation and obsolescence. Under such conditions equipment users normally do not purchase equipment but rather prefer to enter into relatively short term leases. Newly developing manufacturers cannot afford to provide such short term leases to cover their entire output because of the expenses of manufacturing and they find that the accounting ramifications of such a leasing operation are undesirable. In this situation the leasing company, which may be viewed as "akin to a venture capitalist," is primarily a "financial intermediary" without its own marketing or

service capabilities. See Birnbaum, *Lease Financing for Fledgling Manufacturers of Computer Peripheral Equipment*, 29 Bus. Law'r 477 (1974). Considering the peculiar circumstances of the peripheral equipment industry, the role of Alanthus Peripherals as a financing intermediary appears to be significant and is an acceptable alternative to borrowing from conventional lenders against the security of the leased equipment and contractual rights to receive rent. Although it may be debatable whether such lease financing companies primarily deal in money as opposed to other commodities, we do not think that this should be the pivotal criterion for applying the financing institution exception of the Assignment of Claims Act. In view of the unique circumstances of the peripheral equipment industry, we have concluded that the instant arrangement should be recognized as providing lease financing which significantly contributes to the performance of Government contracts and that this type of lease financing operation is more than an incidental function of such lease financing companies. Further, we believe assignments incident to such lease financing arrangements further the objectives of the Assignment of Claims Act of 1940, and that such lease financing companies should be regarded as financing institutions under the act.

[B-180996]

Contracts—Negotiation—Offers—Unbalanced—Not Automatically Precluded

Upon confirmation of apparently unbalanced offer for preparation of technical publication data, acceptance is proper, as fact that offer may be unbalanced does not render it unacceptable nor of itself invalidate award of contract to low offeror in absence of evidence of irregularity or substantial doubt that award will in fact result in lowest cost to Government.

Contracts—Negotiation—Offers—Prices—Unprofitable

No provision of law prevents award of contract to low offeror even though quoted prices may be unrealistically low or result in unprofitable contract.

Contracts—Negotiation—Prices—Reduction

Low offeror's substantial reduction of original prices following negotiations provides no reasonable basis to conclude that offeror was supplied with additional information by agency, for it is not uncommon for offerors to offer substantial price reductions in final stages of negotiations, even without change in Government's requirements.

In the matter of Global Graphics, Inc., August 2, 1974:

Request for proposals (RFP) No. DAAJO1-74-R-0120 (PIG), issued by the Army Aviation Systems Command (AVSCOM), St. Louis, Missouri, solicited proposals for the preparation of technical publication data in reproducible form.

Each offeror was required to submit a price for each of four quantity ranges within thirteen line items listed in the RFP. In addition, the solicitation at paragraph D.2 advised prospective offerors that the contract was to be awarded to the lowest responsive, responsible offeror, and that for purposes of evaluation only, the lowest total cost to the Government was to be obtained by taking the subtotal of the four ranges within each item and then summing the thirteen line items. The actual quantities to be ordered were not listed or estimated in the RFP but were to be established by individual delivery orders issued during the remainder of fiscal year 1974.

Upon initial evaluation of the thirty-one proposals received, the five firms with the lowest initial aggregate prices were determined to be within the competitive range. Each of these firms was sent letters inviting "best and final" offers and in response thereto each firm either affirmed or revised its initial prices. After an affirmative preaward survey was concluded, the contract was awarded to NHA Technical Services, Incorporated (NHA) based on its submission of the lowest aggregate price.

Global Graphics, Incorporated (Global), a firm not found by the procuring activity to be within the competitive range, protested against the award of the contract to NHA on the grounds that its proposal did not offer the Government realistic prices for each of the four ranges of the thirteen line items to be priced. Global contends that NHA, having previous contracts with AVSCOM for essentially the same requirement, "knew from historical data what ranges of each item, if any, would be required and priced each range and item accordingly." Moreover, Global alleges that often the prices submitted by NHA did not reflect its actual costs should the services be required, in view of the fact that many of the prices offered would not equal the cost of the raw materials, let alone the cost of any of the services to be performed. Furthermore, Global argues that a substantial price reduction between the original prices quoted by NHA and those submitted in its "best and final" offer was the result of some additional information supplied NHA by the procuring activity.

It is the administrative position that although the prices quoted by NHA were concededly unbalanced at the time of award, they were fair and reasonable compared to the prices AVSCOM had previously paid for essentially the same requirement. Furthermore, it is AVSCOM's position that the subject procurement was conducted in an atmosphere in which adequate price competition existed among all prospective offerors. Finally, AVSCOM observes that NHA has confirmed the prices quoted in its proposal.

As to the matter of unbalanced bids generally, it is our view that it is in the best interest of the Government to discourage, through

appropriate invitation safeguards, the submission of unbalanced bids or offers based on speculation as to which items are purchased in greater quantities. 49 Comp. Gen. 335 (1969); B–173487(4), December 10, 1971. Moreover, in situations in which an evaluation formula permits bidders to bid low on items known from past experience or on the basis of speculation to be purchased infrequently and high on items frequently purchased, our Office has held that such evaluation formulas violate the requirements of free and open competition and that solicitations containing such formulas should be canceled. *See* 47 Comp. Gen. 768 (1968); 43 *id.* 159 (1963). However, since the subject contract has been either completely or substantially performed and the procuring activity has advised our Office that, to discourage unbalanced bidding in future similar procurements, estimated quantities will be set forth and there will be excluded ranges for items where there is little likelihood that substantial quantities will be ordered, it is the opinion of this Office that cancellation of the contract would not be in the best interests of the Government.

Furthermore, the fact that a bid may be unbalanced does not render it nonresponsive nor does that factor of itself invalidate an award of a contract. 49 Comp. Gen. 335, 343 (1969). As was stated by the Court in *Frank Stamato & Co.* v. *City of New Brunswick*, 90 A. 2d. 34, 36 (1952):

> There must be proof of collusion or of fraudulent conduct on the part of such bidder * * * or proof of other irregularity of such substantial nature as will operate to affect fair and competitive bidding.

In 49 Comp. Gen. 335, *supra*, after citing *Stamato*, we stated at page 343:

> * * * where a bidder has confirmed a bid which appears to be unbalanced and there is no indication that the bid is not as intended or evidence of any irregularity, we have held that the bid may be accepted if it is otherwise the lowest acceptable bid and the bidder is responsible. [Citations omitted.]

While the decisions referred to above pertain to advertised procurements, we see no basis for a different rule to be applied to negotiated procurements.

Although we have held that an unbalanced bid which is evaluated as low should not be considered for award where there is substantial doubt that award to that bidder will result in the lowest cost to the Government, B–172789, July 19, 1971, we do not believe that such doubt exists in this case because the procuring activity has determined that the prices quoted by NHA are fair and reasonable compared to what it is accustomed to paying for similar requirements. Therefore, we do not believe NHA's unbalanced proposal gave that company a competitive advantage over other offerors or will result in other than the lowest cost to the Government.

In regard to Global's contention that the unrealistic prices quoted by NHA for some quantity ranges do not reflect its actual costs should any of the services be required, we are not aware of any provision of law precluding a firm from submitting an offer which will result in a contract being performed at a price which others may consider unrealistically low, or even unprofitable. B–175928, August 2, 1972.

Finally, Global contends that the drastic reduction in NHA's prices following negotiations with AVSCOM was the result of some additional information being supplied NHA by the agency. However, we have noted that it is not uncommon for offerors to offer substantial price reductions in the final stages of negotiations, even without changes in the Government's requirements. *See* B–174141, January 20, 1972. Global has not advanced any evidence to support its allegation, but merely infers that some additional information was supplied from the fact that NHA substantially lowered its prices. We do not think that conclusion may reasonably be drawn in the above circumstances.

Accordingly, there is no legal basis to question the propriety of the award to NHA and the protest of Global is therefore denied.

[B–166943]

President's Executive Interchange Program—Interchange Executives—Transportation and Travel Expenses

Employees of the Federal Government selected to enter the business sector under the Executive Interchange Program established pursuant to Executive Order 11451, January 19, 1969, are entitled to travel and relocation expenses to the location where they are to enter private employment under the program on the same basis and in the same amount as any employee transferred from one official station to another in the interests of the Government.

In the matter of travel allowances under Executive Interchange Program, August 5, 1974:

A decision has been requested as to the travel allowances that may properly be paid to a Government employee entering the business sector from a position in the Federal Government under the Executive Interchange Program established pursuant to Executive Order 11451, dated January 19, 1969.

In the request for decision it is pointed out that although Executive Order 11451 makes no provision for the travel allowances available to Federal selectees under the program, the Operating Manual of the Executive Interchange Program provides that the travel and relocation expenses payable to an employee selected from the Federal sector "are payable on the same basis and in the same amount as in the case of any Government employee transferred in the interest of the Government from one official station to another." However, the request

also notes that in our decision of February 16, 1971, B–166943, we stated that a transfer under the program is a part of an employee's Government career and aids his career development, thus conveying the impression that the program should be subject to the provisions of chapter 41 of Title 5, U.S. Code, pertaining to training programs. Travel allowances payable to employees in training programs are limited to those specified in 5 U.S.C. 4109. Therefore, our decision has been requested as to which of the following travel and relocation allowances are appropriate for employees assigned under that program:

Those provided by 5 USC 4109 which are travel and per diem as if on temporary duty, or transportation of immediate family, household goods and personal effects, packing, temporarily storing, draying and unpacking when the estimated costs of transportation and related services are less than the estimated aggregate per diem payments for the period of training.

Those provided by the Federal Travel Regulations, FPMR 101–7, Chapter 2, Relocation Allowances as they apply to transferees, which are house hunting trips and/or actual subsistence for temporary quarters, per diem for self and immediate family during travel, mileage or transportation for self and immediate family, residence transactions, miscellaneous expenses and transportation and storage of household goods.

Under Executive Order 11451 the President's Commission on Personnel Interchange was created for the purpose of developing an Executive Interchange Program and given the responsibility for establishing the operating procedures for the program. The Operating Manual of the Executive Interchange Program issued by that Commission sets forth the methods and procedures by which interchanges are to be effected between the public and private sectors. Regarding conditions of employment for Government participants entering the business sector, the manual provides as to relocation expenses:

2. *Relocation Expenses*—Relocation expenses for actual participation in the program will be provided in such a manner that the Government-sector selectee will be transferred from the location where he is currently employed to the location where he will go on leave without pay from his Government position and enter the private employment under the program. As the purpose of the transfer is a valid governmental one (to further the President's Interchange Program and to develop the executive potential of Government-sector selectees), the Government agency concerned will be justified under the law in paying the travel and relocation expenses. *The travel and relocation expenses are payable on the same basis and in the same amount as in the cast of any Government employee transferred in the interest of the Government from one official station to another.* When the Government sector participant's period of private employment is ended, he resumes active duty status as a Government employee at the location where he held private employment and the Government agency will then transfer him from that location to the location where his future Government services are needed. The Government agency in which he is employed will pay the cost of that transfer.

Participants who have not previously changed duty station under Government orders should become thoroughly familiar with the regulations which apply in this situation. It should be noted that in general, Government travel and relocation expense allowances are quite liberal, but there are some expenses which may be incurred and which will not be paid by the Government (e.g., the broker's fee for leasing a home). Such expenses should be considered by the participant prior to acceptance of a temporary position in private industry. [Italic supplied.]

The cited section states that an employee relocated in connection with an Executive Interchange assignment is entitled to travel and relocation expenses "on the same basis and in the same amount" as any Government employee transferred in the interest of the Government. Also, the non-allowable expense cited (the broker's fee for leasing a home) is not payable because it is not authorized by the statutory regulations covering employees' relocation allowances upon transfer. *See* 46 Comp. Gen. 705 (1967); B–179079, November 13, 1973. The section does not purport to limit allowable expenses to those authorized by 5 U.S.C. 4109. Moreover, while transfers under the program aid employees' career development, the primary purpose of the interchanges is to provide outstanding career people in business and Government with management operating exposure to the philosophies, practices, disciplines, problems, and objectives of the other arenas. The appointments are expected not only to improve executive performance, but also to foster cooperative action between Government and industry, open both sectors to fresh thinking on problems and programs, etc. In view of these factors we believe the interchanges result primarily in work assignments rather than training assignments.

Therefore, it is our opinion that employees relocated under the Executive Interchange Program are entitled to those travel and relocation allowances authorized generally to employees transferred in the interest of the Government as set forth in chapter 2 of the Federal Travel Regulations.

[B–180730]

General Accounting Office—Settlements—Reopening, Review, etc.—Transportation Claims

Even though request for reversal of audit action is addressed to Transportation and Claims Division, settlement action, disallowing claims, is ripe for review by Comptroller General where record shows Division adequately responded to all of claimant's grounds for reversal.

Transportation—Motor Carrier Shipments—Claims Settlement—National Classification Board Ruling—Effect on GAO Consideration

In exercise of statutory duty to settle claims of motor common carriers General Accounting Office is not bound by rulings of National Classification Board, since Board in effect is mere agent of claimant motor carrier.

In the matter of Maislin Transport Ltd., August 5, 1974:

A protest of settlement action, addressed to our Transportation and Claims Division by Maislin Transport Ltd., is submitted for consideration by the Comptroller General. The Division disallowed the carrier's claims for additional freight charges in connection with the

transportation of nine shipments from Brooks and Perkins, Inc., Cadillac, Michigan, to McGuire Air Force Base, New Jersey, during 1969. On the Government bills of lading the property is described as aerial delivery platforms, item 146510.

The freight charges, which were paid during 1969, were based on the class 45 truckload rating named in item 146510 of the National Motor Freight Classification (NMFC). Item 146510 provides ratings on aerial delivery platforms.

The charges shown on the carrier's supplemental bills reflect the class 125 truckload rating named in item 150370 of the NMFC. The additional charges claimed of $13,489.74 result from a letter, dated December 1, 1970, of the Defense Contract Administration Services Region, Detroit, which in turn was the result of a determination of the National Classification Board that the articles shipped were pallets for lift trucks covered by item 150370.

A new item, item 157520, effective March 2, 1973, was published in Supplement 4 to NMFC A–13 providing a specific commodity description of the articles here involved. This item, which, of course, is for prospective application only, introduces to the NMFC a commodity description for "platforms, aircraft cargo shipping and handling, NOI, aluminum, with solid wood core, with tie down rings, see Note, item 157522, in crates or in bundles." The note provides that item 157520

> Applies only on platforms designed to be used in conjunction with aircraft and vehicles equipped with surface conveyor casters or rollers.

The Division's action disallowing the claims was based on the premise that the NMFC failed to provide a specific or general description for the aircraft cargo platforms that actually moved. Establishment of the new item by the National Classification Board, subsequent to the dates on which the transportation services were rendered, supports the validity of the Division's basic premise. Invoking the rule of analogy, item 421 of the NMFC, the Division concluded that the most analogous description of the aircraft cargo platforms was the description for aerial delivery platforms in item 146510, rather than the description of pallets for lift trucks in item 150370.

The Division reports that it has taken final action on the claims. The record shows that it has responded twice to requests for reversal of its action and we are satisfied that the prerequisites of 4 C.F.R. 55.2, 5 GAO Manual 6060.20, have been met in substance and that the matter is ripe for review by the Comptroller General despite the fact that the request was addressed to the Special Reports Branch of the Division.

Maislin bases its claims upon an opinion of the National Classification Board (of the motor carrier industry) supporting Maislin's posi-

tion. And Maislin raises the issue of whether the General Accounting Office must be governed by the determinations of the National Classification Board. We need not express an opinion as to the validity of Maislin's contention that, as a motor common carrier subject to regulation of the Interstate Commerce Commission, it must abide by the rules and regulations of the National Classification Board. It is sufficient that we point out a distinction between whatever the carrier may believe is its obligations on the one hand and, on the other hand, the statutory duties of the General Accounting Office to settle transportation claims under section 305 of the Budget and Accounting Act of 1921, act of June 10, 1921, ch. 18, 42 Stat. 20, 24, 31 U.S. Code 71, and section 322 of the Transportation Act of 1940, as amended, act of September 18, 1940, ch. 722, 54 Stat. 898, 955, 49 U.S.C. 66.

Precedent of this Office shows that our determinations of the applicable classification description and rating have agreed at times with those of the National Classification Board. In some other cases they have disagreed. What is clear is that this Office, while considering determinations of the Board, has proceeded to make its determinations independently. The extent of deference is somewhat analogous to the consideration allowed informal opinions given by officials or employees of the Interstate Commerce Commission. While such rulings are entitled to weight and consideration, they are not conclusive or binding.

This Office has the duty to settle and adjust claims involving the United States. 43 Comp. Gen. 772, 774 (1964). Claimants have the burden of proving their claims to establish the clear legal liability of the United States and the claimant's right to payment. *See* 44 Comp. Gen. 799, 801 (1965). Requests by claimants for amounts not included in original billing are claims within the meaning of 4 C.F.R. 54.2.

To prove Maislin's claims, the carrier would have this Office recognize a ruling of the National Classification Board as in the nature of a quasi-judicial determination, as though the Board existed through statutory creation. In view of the real nature of the Board, such recognition would result in the abrogation of our statutory duty to settle claims.

The Board was in fact created by the joint action of motor carriers, which existence is given legal sanction by the Interstate Commerce Commission under section 5a of the Interstate Commerce Act. Act of June 17, 1948, Ch. 491, 62 Stat. 472, 49 U.S.C. 5b. The Commission has observed that the National Traffic Committee (now National Classification Committee), composed of representatives of

motor carriers, can overrule action of the Board. *Cereal Food Preparations—Classification Ratings*, 47 M.C.C. 9, 12, footnote 2 (1947). The same basic arrangement, preserved in a section 5a agreement, was approved in 1956. *National Classification Committee—Agreement*, 299 I.C.C. 519 (1956). It is clear that each carrier, party to the agreement, may appeal dispositions of the Board to the Committee. Each also retains the right to take independent action. Under these circumstances it appears that the Board in essence is an agent of the carriers, thus a determination of commodity classification by the Board is, in effect, a determination by the carriers themselves. In this case we view the ruling of the Board as an opinion of the claimant.

We have given consideration to the Board's ruling here and for the reasons contained in B–177223, January 10, 1974, addressed to Ringsby United, involving the same factual situation, we did not arrive at the same conclusion as the Board. For these reasons, the disallowance of Maislin's claims is sustained.

[B–61937]

Military Personnel—Dependents—Certificates of Dependency—Filing Requirements

In view of proposed Joint Uniform Military Pay System—Army procedures for recertifying and verifying dependency for payment of basic allowance for quarters, the annual recertification of dependency certificates prescribed by 51 Comp. Gen. 231, as they relate to Army members' primary dependents, no longer will be required.

In the matter of recertification of dependency certificates, August 6, 1974:

This action is in response to letter dated January 9, 1974, from the Assistant Secretary of Defense, Comptroller, requesting the reconsideration of decision 51 Comp. Gen. 231 (1971), so as to authorize the discontinuance of the requirement for annual recertification of dependency certificates by Army members receiving basic allowance for quarters with dependents. The request was assigned Department of Defense Military Pay and Allowance Committee Action No. 499, a copy of which was enclosed with the Assistant Secretary's letter.

The discussion included in the committee action indicates that in the above-cited decision it was held that annual recertification should be continued because it provides some assurance that changes in dependency which have been overlooked, or are unreported for other reasons, will not go undetected indefinitely. The committee action discussion indicates that now under the Joint Uniform Military Pay System—Army, this assurance is available without the necessity of

annual recertification of dependency certificates. And, it is indicated that the discontinuance of the requirement for annual recertification of dependency certificates for Army members would result in substantial cost savings.

Under the proposed system recertification would be required during in-processing procedures each time an Army member arrives at a new permanent duty station, rather than annually. The committee action indicates that this procedure would provide a recertification approximately every 18 to 24 months, which is the average length of current tours of duty. In addition, the system includes a "shred-out" program whereby a computer-generated listing of all members receiving basic allowance for quarters is prepared by the Army Finance Support Agency and sent to each military installation for periodic verification of entitlement.

It appears that this proposal applies to primary dependents (i.e., spouse and unmarried minor children) and does not apply to secondary dependents (i.e., parents) as the "shred-out" program apparently does not include verification of secondary dependents.

In 51 Comp. Gen. 231, *supra*, it was stated that the importance of these certifications lies in the support they provide for the credit claimed by disbursing officers for dependency payments made during the periods involved and, it was indicated that this support covers the continued existence of the dependent and the dependency status. Consequently, it was held that recertifications are important to the proper audit of disbursing officers' accounts. *See also* 32 Comp. Gen. 232 (1952) and 38 *id.* 369 (1958).

It appears that the proposed Army system to require recertification each time the member makes a permanent change of station in conjunction with using the "shred-out" program to verify entitlements would provide reasonable assurance that changes in status do not go undetected.

Accordingly, we have no objection to a modification of the requirements stated in 51 Comp. Gen. 231, *supra*, as they relate to recertification of the Army members' primary dependents only, under the system outlined in Committee Action No. 499.

[B–171878]

Officers and Employees—Transfers—Relocation Expenses—Taxes

Civilian employee of Army Corps of Engineers seeks reimbursement of New Mexico Gross Receipts and Compensating Tax levied in connection with his purchase of a newly constructed residence incident to transfer. Reimbursement may not be made since tax is a business privilege tax, and the fact that employee may deduct tax on income tax return does not alter the nature of tax. The tax is not assessed on casual sale of previously occupied home and, therefore, is not

a transfer tax within meaning of section 2–6.2d of Federal Travel Regulations, FPMR 101–7. Additionally, regulation prohibits reimbursement of expenses that are associated only with construction of a residence. B–174335, December 8, 1971, overruled.

In the matter of relocation expenses and certain taxes, August 8, 1974:

This matter involves a request for an advance decision submitted by the Finance and Accounting Office, Albuquerque District, Corps of Engineers, Department of the Army, concerning the propriety of reimbursing a civilian employee, Mr. Arthur G. Cudworth, Jr., for the New Mexico State "sales tax" that he paid when he purchased a new home incident to his transfer to Albuquerque, New Mexico.

By Travel Order Number E80–74–0141, Mr. Cudworth was transferred from the South Pacific Division, Corps of Engineers, San Francisco, California, to Albuquerque. Incident to this transfer, he purchased a new home, with the settlement occurring on November 26, 1973. On December 13, Mr. Cudworth was advised, by a letter from Mr. C. R. Zimmerman of Charter Building and Development Corporation, that the purchase price of his home included a "sales tax" of $1,259.61 which Mr. Cudworth could use as a deduction in filing his personal income tax return. When Mr. Cudworth submitted his "Application for Reimbursement of Expenses incurred by DOD Civilian Employee upon Sale or Purchase (or Both) of Residence upon Change of Duty Station" (DD Form 1705), under 5I., "Sales or Transfer Taxes; Mortgage Tax, If Any," he listed the amount of the "sales tax" that he paid. We have been informally advised by Mr. Zimmerman that this tax is computed by subtracting the value of the land from the total price of the home, before multiplying by the applicable rate, 4 percent. In addition, we understand that the tax is levied on a newly constructed home sold by a contractor, but not on a home that has previously been occupied, which is transferred through a "casual" sale by a private individual.

At the time of Mr. Cudworth's transfer, payment of travel and relocation expenses of civilian Government employees was governed by the Federal Travel Regulations, FPMR 101–7, May 1973. Section 2–6.2d provides, in pertinent part:

Miscellaneous expenses. The following expenses are reimbursable with respect to the sale and purchase of residences if they are customarily paid by the seller of a residence at the old official station or if they are customarily paid by the purchaser of a residence at the new official station, to the extent they do not exceed amounts customarily paid in the locality of the residence: * * * mortgage and transfer taxes, * * * In cases involving construction of a residence, reimbursement of expenses would include those items of expense which are comparable to expenses that are reimbursable in connection with the purchase of existing residences and will not include expenses which result from construction.

If the tax paid by Mr. Cudworth can be classified as a transfer tax, it may be reimbursable under the regulation.

In order to determine whether or not a particular tax is a "transfer tax," it is possible to examine each tax from two different perspectives. A tax can be analyzed by examining its impact on the individual taxpayer, followed by the application of a single national standard, no matter how the tax may be characterized by the taxing authority. On the other hand, the essential nature of the tax, as construed by appropriate State or local authorities, can be examined to see if it is, in fact, a tax on the transfer itself. In the latter case, there may be variations in how taxes from different areas, that are ostensibly the same, are treated. Throughout the sections of FPMR 101–7 that deal with the reimbursement of real estate expenses, the references and standards are related to local constructions of the various expenses. In the section quoted above, the stated expenses are payable if:

> . . . they are customarily paid by the seller of a residence at the old official station or if they are customarily paid by the purchaser of a residence at the new official station . . .

Clearly this calls for an examination of local practices. By applying the same standards to the analysis of a possible transfer tax, it becomes readily apparent that the characterization given a particular tax by the appropriate State or local authorities must be controlling.

The New Mexico "sales tax" is levied under New Mexico Statutes Annotated, section 72–16A–1, *et seq.* Section 72–16A–2 provides:

> *Purpose*—The purpose of the Gross Receipts and Compensating Tax Act [72–16A–1 to 72–16A–19] is to provide revenue for public purposes by levying a tax on the privilege of engaging in certain activities within New Mexico and to protect New Mexico businessmen from the unfair competition that would otherwise result from the importation into the state of property without payment of a similar tax.

This tax was enacted in 1966, and there are no annotations to the statute that deals with the essential nature of the tax. However, it is clear on the face of the statute that it is a tax on the privilege of doing business in the State of New Mexico. This interpretation is confirmed by section 72–16A–4, which provides:

> A. For the privilege of engaging in business, an excise tax equal to four per cent [4%] of gross receipts is imposed on any person engaging in business in New Mexico.
>
> B. The tax imposed by this section shall be referred to as the "gross receipts tax."

This privilege tax is specifically imposed on a person "engaging in business," not on the ultimate consumer. The fact that the tax may be deducted on the purchaser's personal income tax return does not change the essential nature of the tax. It is imposed on the privilege of doing business, not on the transfer. This position is supported by the fact

that this same tax is not imposed on the casual sale of a home that has previously been occupied. Therefore, we cannot say that the New Mexico Gross Receipts and Compensating tax is a transfer tax within the meaning of section 2-6.2d of FPMR 101-7.

In B-174335, December 8, 1971, we considered the authority for the reimbursement of a similar tax provision in the State of Arizona. There, the employee purchased a mobile home that was to be used as a residence at his new duty station in Arizona. At the time of purchase, a tax was levied under title 42, section 1309, of the Arizona Revised Statutes. That section described the tax as a "privilege tax" to be assessed against "gross proceeds of sales, or gross income." This characterization was confirmed by the Supreme Court of Arizona in *State Tax Commission* v. *Consumers Market, Inc.*, 87 Ariz. 376, 351 P. 2d 654 (Sup. Ct. 1960) and *Industrial Uranium Co.* v. *State Tax Commission*, 95 Ariz. 130, 387 P. 2d 1013 (Sup. Ct. 1963). In those cases, the court specifically held that the taxable event was not the sale of goods, but was the doing of business in Arizona. In B-174335, *supra*, we analogized this tax to a "use tax" imposed upon the registration of a vehicle or mobile home when it is brought into a State other than the one in which it was purchased. In so doing, we departed from the strict application of the local interpretation of tax laws, and attempted to view the tax from the perspective of its impact on the employee. Therefore, B-174335, December 8, 1971, will no longer be followed.

In the instant case, there is no equivalent to the "use tax," so the essential nature of the business privilege tax becomes clear, and it becomes readily apparent that a business privilege tax, standing alone, is not a transfer tax, and cannot be reimbursed under the provisions of Office of Management and Budget Circular No. A-56, section 4.2d, and FPMR 101-7, section 2-6.2d.

As noted above, the tax involved here will normally only be assessed incident to the purchase of a newly constructed residence. In FPMR 101-7, section 2-6.2d, it is specifically stated that in a case involving construction of a new residence, only those costs that would also be included in the purchase of an existing residence may be reimbursed. Any expenses resulting from construction may not be reimbursed. In this connection, we have held that, in relation to the construction of a residence, there could be no reimbursement for the cost of: architect's plans, B-164926, September 30, 1968; water and sewer hook-ups, B-165879, February 7, 1969; construction loan fees charged in addition to normal mortgage fees, B-164452, July 2, 1968, and B-164938, August 26, 1968; and a sales tax, B-164491, August 20, 1968. In the instant case, the "privilege tax" was assessed against the contractor that built the house. It was a charge incident to the construction of a new residence, and is therefore not reimbursable.

Accordingly, Mr. Cudworth's Travel Voucher, which will be retained, may not be certified for payment.

[B-180913]

Bids—Two-Step Procurement—Discontinuance and Contract Negotiated—Propriety

Determination to limit 1974 utility aircraft two-step procurement to turboprop aircraft, based on agencies' determination of minimum needs, guidance from congressional committees, and contracting officer's belief that fuel shortages require procurement of more economical turboprops is not objectionable. The fact that protester's turbofan jets were found most cost effective under 1972 canceled request for proposals does not demonstrate unreasonableness of 1974 determination and fact that receipt of single acceptable offer results in sole-source procurement does not prove specifications were drafted to cause this result.

Contracts—Protests—Timeliness—Two-Step Procurement

Where offeror selected for award under 1972 negotiated utility aircraft procurement makes timely oral protest to agency after January 29, 1973, cancellation of request for proposals (RFP) but agency neither sustains nor responds to protest, after reasonable time has elapsed protester is charged with notice of adverse agency action. Subsequent protest to General Accounting Office (GAO), filed when resolicitation is issued 13 months later, is untimely in regard to portions asserting invalidity of cancellation, resulting invalidity of resolicitation, and protester's demand for award under 1972 canceled RFP. Moreover, GAO consideration of untimely issues is not justified under good cause and significant issue provisions of 4 CFR 20.2(b).

In the matter of Cessna Aircraft Company; Beech Aircraft Corporation, August 12, 1974:

Background

The protest of Cessna Aircraft Company deals with a series of three procurement actions conducted by the Department of the Army over the past 2 years in an attempt to obtain a quantity of utility aircraft for the Army and the Air Force. The aircraft in question are small, twin-engine airplanes, capable of carrying about 6–10 passengers and/or light cargo. The first procurement took place in late 1972 and was conducted on a competitive negotiated basis. The Cessna proposal, which offered an aircraft powered by turbofan engines, was selected by the Source Selection Authority (SSA) for award; however, the request for proposals (RFP) was canceled in January 1973. The second, a two-step advertised procurement, commenced with the issuance of an invitation for bids (IFB) on March 15, 1974, and was limited to turboprop aircraft. In the first step, only one acceptable technical proposal, submitted by Beech Aircraft Corporation (Beech), was received and this solicitation was also canceled. The third procurement, which is ongoing at the present time, is on a sole-

source negotiated basis with Beech. The Army is withholding award until Cessna's protest is resolved.

Cessna's protest to our Office was filed on March 25, 1974, immediately after the issuance of the two-step IFB. Cessna has maintained that this solicitation, and the subsequent sole-source negotiation with Beech, are invalid. The relief requested is basically that either award be made to Cessna under the 1972 canceled RFP, or that the present procurement be suspended and the Army required to rejustify its actions to the Congress. Cessna contends that the cancellation of the 1972 RFP was invalid for two reasons—first, because the Secretary of the Army's action in directing that the procurement be canceled was improper and outside his authority, and second, because the Army violated various provisions of the Armed Services Procurement Regulation (ASPR) in failing to notify Cessna of the reasons for the purported cancellation. Next, Cessna argues that the specifications in the March 1974 two-step IFB were unduly restrictive and calculated to eliminate all but one offeror. Lastly, Cessna believes that the current noncompetitive procurement from Beech runs contrary to the express basis for the congressional authorization to procure utility aircraft.

The complex background facts underlying the present protest, and varying interpretations of them, are set forth in a number of congressional documents, reports from the procuring agency, and written submissions to our Office from Cessna and Beech. At the outset, it is necessary to discuss a technical point. The controversy reflected in the record, reduced to its simplest terms, involves a question of whether competition for the utility aircraft requirement should have been limited to turboprop aircraft, or whether competition should have included turbojet and turbofan powered aircraft as well. The record does not provide any authoritative technical definition of these types. As we understand it, in a turboprop the jet engine is utilized to drive a propeller; in other words, turboprops are propeller-driven aircraft. Turbojets and turbofans fall into the generic category of "jets" as that term is commonly understood—that is, the propulsion is caused by the rearward-directed thrust of hot gases. Cessna draws the further distinction that its turbofan engines, utilizing a turbine to drive a fan which forces air around and through the compressor, are more efficient and advanced than turbojets.

The circumstances leading to the initiation of the 1974 procurement were discussed in a hearing before the Subcommittee on Defense, House Committee on Appropriations, on February 13, 1974. The report of this hearing contains the following pertinent statements by Congressman Sikes of the subcommittee and General Olenchuk, the Army witness:

MR. SIKES.

* * * * * * *

By way of background, in fiscal year 1973 the Army budgeted $12.7 million for 20 U–21F type utility aircraft and the Air Force budgeted $8.4 million for 14 CX–X executive-type aircraft. A total of $20.4 million was authorized and the Army and Air Force were directed to undertake a competitive procurement of a single aircraft that would elicit bids from a number of aircraft manufacturers. The funds were appropriated by Congress with this understanding.

In January 1973, the proposed competitive procurement was canceled after a recommendation was made to the Secretary of the Army that a jet aircraft be approved for award. During consideration of the fiscal year 1974 budget, the House and Senate Armed Services Committees directed that the fiscal year 1973 buy be limited to turboprop aircraft only. The Appropriations Committees of the House and Senate in conference directed that the fiscal year 1973 buy be held in abeyance until this program is rejustified to Congress. We have called for this hearing today to have this rejustification made.

Congress recognizes the need for the aircraft which are under consideration, and wants a determination made and agreement between the services on what is considered desirable and satisfactory.

* * * * * * *

General Olenchuk.

* * * * * * *

As you know, during the fiscal year 1973 budget hearings the Army and the Air Force requested funds for U–X and CX–X aircraft respectively. The Army asked for $12.7 million for 20 utility aircraft to be procured competitively. Army witnesses also made clear in testimony that a U–21F type turboprop (also referred to as propeller driven) aircraft would fully satisfy its operational needs * * *. During the hearings, the Air Force also requested $8.4 million for the procurement of 14 medium weight executive transport aircraft * * *. In testimony, the possibility of combined Army/Air Force procurement was discussed. As a result, the Army and the Air Force agreed on proceeding jointly * * *.

In the House Armed Services Committee (HASC) report No. 92–1149 of June 19, 1972, the committee approved both the Army request for U–X airplanes and the Air Force request for CX–X aircraft; and recommended that the Army negotiate a contract for both services with options for procurement in fiscal year 1974. The Senate Armed Services Committee year 1974. The Senate Armed Services Committee report (SASC) No. 92–962 of July 14, 1972, recommended denial of all executive-type aircraft pending a reevaluation of the requirements of all services. The SASC also recommended and strongly urged that the Army and Air Force reexamine the requirement for an aircraft in the $600,000 price range and, in any case, undertake a competitive procurement that would elicit bids from a number of aircraft manufacturers. In the conference report of H.R. 92–1388 of September 11, 1972, the Senate receded from its position and agreed to restoration of the service request with an amendment reducing the Army's request to $12 million. During the conference, assurance was received from the military departments that the Army and Air Force aircraft would be a common procurement of a single aircraft and that procurement procedures would address themselves to the recommendations made by the Senate. The House Appropriations Committee (HAC) report No. 92–1389 of September 11, 1972, and the Senate Appropriations Committee (SAC) report No. 92–1243 of September 29, 1972, recommended appropriation of funds to buy the U–X and CX–X aircraft. amending the Army request to $12 million to conform to the recommended authorizations, after which Congress appropriated the funds. The Army and Air Force then agreed to proceed with a competitive negotiated procurement using jointly developed specifications incorporating required and desired aircraft performance characteristics. Accordingly, the Army issued a request for proposals on October 6, 1972.

The Request for Proposals was issued without any constraints as to the type of propulsion system, that is, turboprop or turbofan (commonly referred to as jets). Four companies submitted eight proposals * * *. These proposals were evaluated and in late January 1973, a recommendation was made to the Secretary of the Army, that a jet aircraft be approved for award. On January 29, 1973, after evaluation of the recommendations, the Secretary of the Army, Robert F. Froehlke, canceled the procurement because, among other reasons, the Army had continuously represented to Congress that it required and intended to procure a

U-21F turboprop type aircraft and had not justified a requirement for a jet aircraft.

After cancellation of this negotiated procurement, the Army and the Air Force met to reach agreement on joint specifications before proceeding with reprocurement. The Army did not modify its required aircraft performance characteristics; however, the Air Force requirements, dictated by safety considerations, were higher in single engine service ceiling.* * * To accommodate the Air Force requirement and thereby maintain a joint competitive procurement Secretary Froehlke * * * decided in April 1973 that the joint specifications should be revised upward to provide for safe flight operations over the more extensive route structure, including remote and mountainous regions, which the Air Force must fly. Since these revisions would exclude the U-21F turboprop aircraft from the competition, Secretary Froehlke determined not to proceed upon this basis until your committee and the other concerned committees of Congress had been advised of the revision and had an opportunity to comment.

In response, your committee and the Senate Armed Services and Senate Appropriations Committees expressed their concern as to the proposed upward revision in performance requirements. In sum the Army was advised that if the procurement was not based upon performance characteristics which would include the U-21F turboprop aircraft, the procurement should be deferred pending further congressional review and consideration. Consequently, the procurement was stymied. On the one hand, we had clear and unequivocal congressional and defense directions to make a joint competitive procurement; and on the other hand, the Army and Air Force had different minimum performance requirements stemming from operational necessity.

To resolve this dilemma * * * discussions continued between our services. * * * [T]he U21-F type aircraft satisfied the Army's minimum operational requirements. However, the Air Force needed an additional capability in the CX-X to satisfy their minimum safety of flight performance requirements. Because of this dilemma, the Under Secretary of the Army, * * * by letter of June 18, 1973, proposed to your committee and the other concerned committees that a basis for joint procurement did not exist. He requested * * * to resolicit industry in a two-step formally advertised competitive procurement for an aircraft to satisfy the Army's minimum performance requirements * * *. The Air Force also planned a separate competitive procurement * * *.

* * *[Y]our committee desired that neither the Army nor the Air Force take any action to initiate separate procurement of fiscal year 1973 aircraft until they thoroughly reviewed the matter with Army and Air Force officials during consideration of the fiscal year 1974 budget.

In the review of the fiscal year 1974 budget, the HASC (H.R. No. 93-383) on July 18, 1973, authorized the Army request for 20 aircraft at $12.2 million; however, "the committee was not convinced that the Air Force justified a higher specification than the Army for the uses to which these aircraft are to be put. Therefore, the committee recommends that the Air Force request for 16 CX-X attaché aircraft, in the amount of $9.6 million, be disapproved." The SASC (S.R. No. 93-385) Report of September 6, 1973, denied both the Army and Air Force requests since the aircraft authorized for fiscal year 1973 had not yet been purchased. Further, the committee could find no valid justification for increasing performance specification requirements over those originally approved and recommended procurement of the fiscal year 1973 authorized aircraft "be limited to propeller driven aircraft only." The SASC and the HASC in the October Joint Conference Report on the fiscal year 1974 Budget (H.R. No. 93-588) denied both the Army and Air Force requests. Also, the Conference Committee directed

"That the Army and the Air Force enter into a joint procurement for the 34 aircraft approved by the Congress for fiscal year 1973; that the bid proposals be limited to turboprop aircraft only; and that the performance requirements of the selected aircraft be such as to satisfy the needs of both the Army and the Air Force."

The HAC Report (H.R. 93-662) of November 26, 1973, stated that the—

"Committee did not have the understanding last year that the joint competitive procurement would be restricted to turboprop aircraft only and that the performance requirements of the selected aircraft be such so as to satisfy the needs of both the Army and the Air Force."

The Committee directed that the fiscal year 1973 buy of utility aircraft specify that the aircraft may be "powered either by turboprop or turbofan engines" so that all qualified manufacturers could bid. On December 12, 1973, the SAC in their report on the fiscal year 1974 budget (S.R. No. 93-617) was not in agreement with the HAC position. Instead, the SAC approved the directions in the Conference Report on the fiscal year 1974 Procurement Authorization bill which directed that the joint procurement for the 34 aircraft in the fiscal year 1973 budget be limited to turboprop aircraft only. Subsequently, on December 19, 1973, the Joint Conference Report (H.R. 93-741) on the fiscal year 1974 Defense Procurement Appropriation bill stated that the funds already appropriated for fiscal year 1973 procurement for the Army U-X and Air Force CX-X utility aircraft "be held in abeyance until this program is rejustified to Congress."

Based on the foregoing, we have again jointly reexamined our performance requirements for the U-X/CX-X and have executed a joint specification which we propose to use for the procurement of both aircraft. * * * It is our plan. subject to the approval of your committee and the other concerned committees, to solicit industry for a commercial, FAA certificated turboprop using a two-step formally advertised competitive procurement. During our view of the performance requirements for this aircraft, it was determined that a turboprop would meet all mission requirements and effect a considerable savings in fuel consumption. thus supporting our national energy policies. Turboprop aircraft characteristically use significantly less fuel and have lower maintenance costs.

In this period of fuel shortages and rising prices, turboprop aircraft have proven to be most cost effective. We propose that specifications for the aircraft be limited to U.S. design and expect this to result in competitive bids from at least two United States manufacturers. We believe our proposed action will result in maximum competition and the lowest cost for an aircraft meeting our joint requirements. * * *

The substance of this procurement plan was detailed in a letter dated February 4, 1974, from the Secretary of the Army to the chairmen of the House Appropriations Committee and the House and Senate Armed Services Committees. In a letter to the Secretary dated February 27, 1974, the chairman of the House Appropriations Committee stated that the committee had no objection to the proposed procurement under the conditions set forth in the Secretary's February 4 letter. We understand that the other committee chairmen also approved the procurement plan.

By letter dated May 20, 1974, the Secretary advised the chairman that although seven companies had been solicited in the two-step IFB, only Beech had submitted technical proposals. This letter states:

Since there is only one respondent to the solicitation, we intend to cancel the formal solicitation and negotiate the price pursuant to the Armed Services Procurement Regulation. Our objective continues to be to obtain the lowest price for an aircraft meeting the minimum joint requirements of the Army and Air Force.

We understand that similar letters were sent to the chairmen of the Senate Appropriations Committee and the House and Senate Armed Services Committees.

The contracting officer reports that in accordance with ASPR 2-503.1(h) and 3-210.2(iii), the two-step invitation was canceled and RFP DAAJ01-74-R-0694 was issued on a sole-source basis to Beech.

1974 Procurement Actions

We will first address the portions of Cessna's protest dealing with these most recent Army procurement actions—the issuance of the two-step IFB on March 15, 1974, and the subsequent cancellation of this solicitation and initiation of a sole-source negotiated procurement with Beech.

Cessna contends that the 1974 procurement actions are invalid because the cancellation of the 1972 RFP was invalid. For reasons to be indicated *infra*, we will explain why this contention will not be considered. In addition, Cessna has presented other objections going to the merits of the current procurement actions. In its letter dated April 8, 1974, to the General Accounting Office (GAO), the protester originally voiced the objection that the two-step IFB specifications were unduly restrictive because they excluded jets and expressed fears that a sole-source procurement would result. Later, Cessna amplified its position by contending that the two-step specifications were written so that only one aircraft could qualify. Cessna maintains that the result is a sole-source buy, in contravention of the express basis for congressional authorization of the procurement—namely, the belief that the procurement would be competitive with at least two concerns submitting offers.

Cessna believes the Army is buying the Beech King Air 200, an aircraft closely competitive in price with Cessna's. Moreover, the protester points to the irony of the Army's purchasing the Beech King Air 200, a higher performance aircraft than the one offered by Beech in 1972, when one of the bases for the cancellation of the original procurement was that the Army, in purchasing a Cessna jet, would be buying aircraft in excess of its minimum needs.

In addition, Cessna disputes the allegation that turboprops are more economical than jets as a justification for limiting competition in the 1974 procurement. In its July 3, 1974, letter to GAO, Cessna presented cost data indicating that the Cessna jet's yearly operating costs are significantly less than the Beech King Air 200's.

From the pertinent legislative history discussed, *supra*, it seems clear that the decision to procure by means of a two-step IFB limited to turboprop aircraft represented the considered judgment of the Army and Air Force that this method would assure that aircraft meeting their minimum needs would be procured in a competitive environment. Moreover, the services, in making this determination, had the benefit of the guidance of congressional committees. Cessna's allegation that the two-step IFB specifications were drafted so that only one aircraft could qualify has not been substantiated. The fact that only one acceptable technical offer was received, when at least two offers were antici-

pated, does not establish a case of restrictive, noncompetitive specifications.

Moreover, we note that the subsequent sole-source negotiation with Beech was undertaken in accordance with the above-cited ASPR provisions. In addition, we understand that the chairmen of the various committees, though informed of the sole-source negotiation, have not raised any objections to the procurement plan. In this light, we see no basis for the protester's allegation that the current procurement runs contrary to the express intent of the Congress. The authorization act (Public Law 92–436, September 26, 1972, 86 Stat. 734, 10 U.S. Code 133 note) and the appropriation act (Public Law 92–570, October 26, 1972, 86 Stat. 1184, 1190, 1193) spoke only of funds to procure "aircraft," attaching no specific conditions. The pertinent legislative history is germane for the purpose of indicating whether the services have made a sound determination of minimum needs and procurement procedures to satisfy the needs. We believe that in the absence of congressional objections, no basis exists to question the soundness of the 1974 procurement plan.

The only remaining objection to the 1974 procurement actions is Cessna's allegation that its turbofan jets are more economical to operate than turboprops—in other words, that Cessna's aircraft can perform the required mission and can do so in a more cost–effective manner. In its July 3, 1974, letter to GAO, Cessna presented cost data indicating that, based on 600 hours of flight per year, both the direct costs and the fixed annual costs of its "Citation" turbofan are substantially lower than those of the Beech King Air 200. Specifically, Cessna alleged that its costs amount to $1.07 per nautical mile and $0.93 per statute mile, as compared to $1.26 and $1.10, respectively, for the Beech King Air 200.

We provided both parties with a further opportunity to address this issue. The Army and Beech furnished information seriously disputing Cessna's analysis. Among other things, the Army's response states that the Beech King Air 200 was not offered in response to the 1974 solicitation. According to the Army, the Beech model actually offered has a lower horsepower and more economical engine than the King Air 200. In addition, the Army's response points out that the proper selection of aircraft type depends on the mission to be performed and upon the aircraft speed. Turboprops are more efficient at relatively low speeds, while turbojets and turbofans are more efficient at relatively higher speeds. A well-designed turboprop, operating at relatively lower speeds, will consume less fuel than a similar turbojet or turbofan operating at higher speeds. The higher speed of a turbofan will to some extent offset its higher hourly operating costs; however, if speed is reduced to conserve fuel, the economic advantage of the turbofan is

reduced. In this connection, we note that the contracting officer has cited the energy crisis and fuel shortages, which have unfolded in the period since the cancellation of the 1972 RFP, as a justification for limiting the 1974 procurement to the more economical turboprop aircraft.

Cessna was also provided with the opportunity to further document its contention that its turbofans are more cost effective than turboprops. In its July 23, 1974, letter, the protester indicated that it would not provide further details, essentially for the reason that a proper evaluation of the issue would call for a whole new source selection effort, involving considerable time and the assistance of technical experts. Instead, Cessna relies on the findings made by the source selection authority under the 1972 canceled RFP, i.e., that the Cessna aircraft was the most cost effective of those aircraft below the Government target cost of $600,000.

We understand that the evaluation under the 1972 RFP was judgmental, involving tradeoffs of performance and cost factors. The fact that Cessna may have been most cost effective in that procurement does not prove that the services' needs under the 1974 procurement were unduly restrictive in limiting competition to turboprop aircraft. To show undue restrictiveness, we believe Cessna must present evidence clearly demonstrating that the contracting officer's decision to limit competition to turboprops in the 1974 procurement was without a reasonable factual basis. The contracting officer's determination that the procurement should be limited to the more economical turboprop aircraft is supported both by the technical comments discussed above and material presented by the Army at the February 13, 1974, above-quoted hearings. Under the circumstances, we see no basis on the record to conclude that the contracting officer's judgment was an abuse of procurement discretion.

Cancellation of 1972 Solicitation—The Issue of Timeliness of Protest

RPF DAAJ01–73–R–0198 was issued on October 6, 1972, and called for offers on 20 UX (Army) and 14 CX–X (Air Force) aircraft, with options for additional quantities.

Award selection was to be made on the basis of various criteria designed to determine which proposal offered the best prospect for accomplishing the Government's needs, as then defined, considering both required and desired features. The evaluation criteria were, in order of importance: (1) ability of the proposed aircraft to meet the technical and operational requirements; (2) ability of the offeror to provide and manage the required logistics support; (3) the total cost to the Government; and (4) the offeror's proposed delivery schedule.

Cessna, Beech and two other concerns timely submitted proposals, which were evaluated during the period from November 8, 1972, to January 6, 1973. On January 16, 1973, the Source Selection Authority (SSA) selected the Cessna proposal for award:

1. Pursuant to authority delegated the undersigned as designated Source Selection Authority, a final decision has been made.
2. An extensive negotiation and evaluation process was conducted with each of the four competing contractors—Beech Aircraft Corporation; Cessna Aircraft Company, Wallace Division; Swearingen Aviation Corporation; and Gates Learjet Corporation. All of the proposals were of a high caliber of responsiveness and provided the Source Selection Evaluation Board detailed data upon which to base an intensive evaluation. After reviewing the results of this evaluation, the Source Selection Advisory Council reviewed the signed contracts which each contractor had submitted as the final offer. The Council evaluation was that the contracts best met the Services' requirements in the order of Cessna Aircraft Company, Wallace Division, Swearingen Aviation Corporation, Gates Learjet Corporation, and Beech Aircraft Corporation. This evaluation was a carefully considered analysis and balance of all the key elements of operational capability, support and total costs.
3. After full consideration of both the Board and Council's evaluations I have selected the Cessna Aircraft Company, Wallace Division. Key reasons for this choice are: (1) This aircraft is the most cost effective of those aircraft which were below the Government target cost of $600,000 over the required range of up to 1,000 NM; (2) the aircraft represents modern technology particularly with its fanjet engine, and has the best flying qualities and crew station design of all offered; (3) significant safety advantages exist thru its certification to transport category FAA standards and its excellent performance and ease of handling with one engine inoperative; (4) the Cessna logistical plan was the best of all offered.

The contracting officer states that the procurement had been designated to be forwarded for Departmental Preaward Review and Secretarial notation in accordance with Army Procurement Procedure 1–403.54(ii), and that the procurement was so reviewed. On January 29, 1973, the Secretary of the Army announced the cancellation of the procurement. An announcement gave the following reasons for the cancellation:

1. The Army during the Fy 72 budget hearings continuously represented to the Congress that it required and intended to procure a turbo prop U–21F type aircraft. The reports of both the House and Senate Armed Services Committees make this abundantly clear. To alter this position at this time and to attempt to procure a jet aircraft seriously and adversely reflects upon the Army's credibility with the Congress. This cannot be permitted. We believe that the Congress has a right to rely upon the accuracy of the information they are furnished by the Army; and the Army in turn has an obligation to act in accordance with the advice furnished to the Congress.
2. Further, it was not clear that the Army had completely justified the requirements for a jet aircraft. Many of the Army's missions can be adequately accomplished with a turbo-prop aircraft of the U–21 type. Consequently, it was determined that the Army may have overspecified its requirements with the result that it was proposing to pay for added performance not necessary to accomplish its defined mission.
3. Additionally, despite the fact that a final decision on the award and contract had not been made, specific details as to the evaluation and ranking of the various offerors were known in several quarters. Although it is unclear how this information became known, its release clearly affects the integrity of the procurement process and permits questions as to the validity of the source selection authority itself. This may not be permitted. The source selection process cannot be compromised. It must be completely free from even the slightest question or

doubt as to its objectivity. Whenever information of this nature becomes compromised the Army must act positively and promptly to remedy the situation—including cancellation of the competition.

Each of the foregoing factors in and of itself would be sufficient to create major concern as to the propriety of the proposed U-X/CX-X procurement. However, when considered together there was no choice but to cancel the competition, reconsider the requirements and resolicit. It is essential that the Congress continue to respect the integrity and credibility of the Army.

It is equally essential that the procurement process not be compromised in any fashion; and particularly in this day of shrinking budgets, the Army must insure that it is not stating excessive requirements but only procuring that which is necessary to the fulfillment of its mission.

Accordingly, the Secretary of the Army has decided that the current competition for procurement should be cancelled, and that the Army's requirements be reconsidered, and industry resolicited.

Cessna believes this rationale cannot support the cancellation, and that the real reasons for the cancellation have never been disclosed. The protester in its submissions has reviewed in detail the legislative history of the acts which authorized and appropriated funds for the utility aircraft procurement, and believes that nothing is contained therein to indicate that the Army intended to limit the procurement to turboprops, or that the Congress, in directing the Army to undertake a joint procurement for itself and the Air Force, intended to establish such a limitation. In addition, Cessna cites an undated memorandum sent from the Commanding General, Army Materiel Command (AMC), to the Secretary after the RFP cancellation, which describes how the Army and Air Force worked together during 1972 to establish joint specifications permitting competition by turboprops and jets. This memorandum concludes by stating:

Looking back over this chronology and considering the number and the organizational levels of those who participated in shaping the course of events, it is interesting that the final recommendation of the source selection group could come as a surprise in any official quarter.

In view of these considerations, and the fact that the procurement had been underway for 4 months, with negotiations conducted with concerns offering both turboprops and jets, Cessna contends it is impossible to understand how the Secretary could order a cancellation based on the belief that only a procurement of turboprops was contemplated, or how any misrepresentation to the Congress could be charged if award of a contract for jets were made. Cessna points out that these alleged justifications for cancellation had existed for some time before source selection, yet it was only after a jet was selected for award that the cancellation was made. Cessna argues that the Secretary's eleventh-hour cancellation, overriding the conclusions of the technical experts who evaluated the proposals, must be regarded as arbitrary.

In addition, Cessna believes the Secretary's second ground for cancellation—that the aircraft selected may have exceeded the Army's

needs—is without substance since the RFP specifications were drawn so as to allow offers of higher performance aircraft. Also, Cessna believes the third ground for cancellation, the alleged leaks of information regarding the evaluation and ranking of the offers, was simply a "fantasy" designed to obfuscate the real reasons for cancellation.

In view of the foregoing, Cessna believes that the action of the Secretary in canceling the RFP is not only without prior precedent, but also invalid because it was beyond the Secretary's authority. Cessna points out that the authority to enter into or terminate contracts is vested in the contracting officer (ASPR 1–201.3, 1–402) not the Secretary. Moreover, even if the Secretary possessed the authority to cancel, it was wrongfuly exercised, since cancellation of a solicitation should not be permitted except for cognent reasons, citing *Massman Construction Co.* v. *United States*, 102 Ct. Cl. 699, 719 (1949), and several decisions of our Office.

Also, Cessna believes the purported cancellation was invalid because neither the Secretary nor the Army ever officially notified Cessna of the reasons for this action. In this regard, Cessna cites ASPR 2–404.1 (b) and 2–404.3, which state that when an invitation is canceled or all bids are rejected, the contracting officer shall, in his determination, state the reason for such actions. Cessna argues that actions in violation of these provisions must be deemed null and void.

It is the Army's position that Cessna's objection to the cancellation of the RFP is untimely. The Army's June 14, 1974, report states:

> * * * By telegram dated 1 February 1973, Cessna was notified that the Secretary of the Army had cancelled the RFP, and that a new procurement would be issued. To indicate the wide publicity given this action, and the reasons therefor, we have inclosed a copy of a press release dated 30 January 1973, as well as a fact sheet submitted to members of Congress dated 29 January 1973. We can assert categorically that, as of 1 February 1973, Cessna knew of the reasons for cancellation. If Cessna had any doubts concerning the validity of the cancellation, or the authority of the Secretary of the Army to take this action, it was incumbent upon them to protest the action to your Office within 5 working days after receipt of the notification of the cancellation. Now, more than one year later, Cessna seeks to question the validity of the cancellation. At this late date Cessna should not now be permitted to litigate this issue. In support of this position we refer to your decisions B–180464, February 15, 1974, and B–179925, February 22, 1974, where protests against cancellations were dismissed because of untimeliness.

In the cited cases, the protests were filed with our Office 12 days and about 6½ months, respectively, after the cancellations.

In response to this, Cessna has vigorously argued that not only is its protest against the cancellation timely, but that, in addition, it would be improper for our Office to refuse to consider the substantive issues involved. The protester's July 23, 1974, letter states:

> Cessna's protest, asserting the invalidity of the cancellation of the RFP, was timely filed for several reasons: The first rests on the fact that the Chairman of the Cessna Aircraft Company, Mr. Wallace, vehemently protested the merits and validity of the Secretary's January 29, 1973 cancellation in statements made

to both the Secretary himself and the Assistant Secretary for I&L on January 30, 1973. * * * Cessna's view of the entire matter could not have been made plainer any sooner, and was never formally answered by the Army.

In addition, the cancellation, when it was made, was based, in part, on the Army's stated intent to publish a new solicitation "on restated procurement objectives." From that point in time, until the new IFB was issued, the entire utility aircraft procurement was in a state of confusion. In light of this fact, there was no practical reason to challenge the cancellation of a procurement which was expressly intended to be redefined.

Moreover, and just as important, the lack of direction to the procurement was a product of the Army's and the Air Force's inability to agree on common specifications and obtain the necessary approval from the Congress. The procurement was going nowhere during this period. For example, it was unclear as to whether the Army and Air Force would procure the aircraft separately, or whether turbofans would be included or left out. Communications were made to Congress during this period in which both of these possibilities were raised, without formal resolution. * * * It would be incredible for the Army to contend that they were in any way prejudiced by Cessna's decision not to protest to the GAO in early 1973. Had turbofans been left in the procurement, or if the Army and Air Force had decided to move separately, the work done, costs incurred, and evaluations made under the first RFP would still have been valid and effective. Cessna would have had little, if any, practical basis for protesting to the GAO. Cessna complied with the encouragement contained in 4 C.F.R. § 20.2(a) that protests be first made to the procuring agency in an effort to work the matter out at that level.

By February of 1974, the procurement appeared to be moving toward a new solicitation; one in which everything under the initial RFP would be scrapped. In response, Mr. Wallace addressed a letter, dated February 25, 1974, to Secretary Callaway, in which he strongly reasserted Cessna's contention that the cancellation had been improper and illegal, and affirmed Cessna's intent to carry the protest further. This letter was written two days *before* Chairman Mahon gave his final approval for the procurement. The Army's answer to this letter, from Undersecretary for I&L, Berg, was not received until March 21, 1974, a day after the IFB was received by Cessna. Cessna's written protest was hand delivered to the GAO on March 25, 1974.

Cessna's actions in protesting the cancellation comply with the requirements stated in 4 C.F.R. § 20.2(a). The receipt of the March 20, 1974 IFB was Cessna's first clear, formal notice that the submissions and evaluations made under the October 6, 1972 RFP were no longer to be given any weight. The protest was filed within five days of that date. Moreover, Cessna's protest was filed within five days of the receipt of Undersecretary Berg's letter noting final agency action on the matter. Under either view, Cessna has filed a timely protest within the language of 4 C.F.R. § 20.2(a).

Section 20.2 of GAO's Interim Bid Protest Procedures and Standards provides in pertinent part:

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

(b) The Comptroller General, for good cause shown, or where he determines that a protest raises issues significant to procurement practices or procedures, may consider any protest which is not filed timely.

The bases for Cessna's protest against the cancellation are that it was invalid because the Secretary exceeded his authority and the Army never notified Cessna of the reasons for the cancellation. Ini-

tially, we observe that the protester complied with our timeliness rules to the extent that its chairman of the board presented oral objections to the Secretary of the Army immediately after the cancellation—that is, Cessna in the first instance attempted to resolve the matter with the contracting agency. This matter was first brought to our Office's attention at the July 16, 1974, conference on the protest. In view of its importance, we requested Cessna and the Army to document any and all oral or written protests made during the period between the cancellation and the 1974 resolicitation. The following discussion is based on information furnished in response to that request. Cessna's chairman has stated he told the Secretary of the Army the cancellation was a flagrant breach of faith, and that he demanded to know the real reasons for the cancellation. There is no indication that any specific action was requested of the Secretary. However, we believe that this oral objection must be regarded as in the nature of a protest to the contracting agency within the meaning of section 20.2(a) of our standards. 53 Comp. Gen. 780 (1974).

The record does not show that the oral protest was communicated to the contracting officer; that it was developed in accordance with the DOD protest procedures of ASPR 2–407.8; or that the Army made any reply to it. The next manifestation of Cessna's protest to the Army is a letter to the Secretary dated February 25, 1974, more than 1 year later. This letter reviewed the history of the procurement and the RFP cancellation and threatened suit to recover $1,838,607 in lost profits. The Under Secretary of the Army rejected Cessna's claim in a letter dated March 18, 1974, which was apparently received by Cessna on March 21. At about the same time, Cessna received notice of the issuance of the two-step IFB.

Under our rules, where a timely protest is made to the agency, any subsequent protest to our Office must be filed within 5 working days of notification of adverse agency action. Adverse agency action can refer to a specific action, such as the award of a contract during the pendency of a protest. 52 Comp. Gen. 20 (1972). It can also refer to a course of conduct prejudicial to the complaining party over a period of time. *See*, for example, 52 Comp. Gen. 792 (1973), a case where the protester's letters to the agency were ignored, and contract performance proceeded for 3 months before a protest was filed with our Office. Our decision held that because the protester had reason to know of the agency's acquiescence in and active support of continued and substantial contract performance, it was charged with notification of this adverse action.

We must take Cessna at its word that its protest against the cancellation was based on the fact that this action was invalid, and that award must be made to it under the 1972 canceled RFP. Cessna did not request reopening of the 1972 procurement to further competition, nor was its protest directed at assuring it a competitive posture in any resolicitation. Its protest was prospective only in the sense that it wanted award made under the past procurement. In these circumstances, we think that at some point in time after the cancellation, Cessna must be charged with notice of adverse agency action—the fact that the Army neither sustained the protest nor responded to it. While it is not possible in these circumstances to fix a precise point in time when the protester must be charged with notice of adverse agency action, we believe Cessna should have followed up its oral protest timely to determine whether a response would be forthcoming. If no response was received within a reasonable period of time, the protester should promptly have filed a protest with our Office.

We have carefully considered Cessna's allegation that because the interim period between the January 1973 RFP cancellation and the March 1974 resolicitation was confused and uncertain, it was pointless to protest until the resolicitation was issued. This argument, while superficially persuasive, conflicts with the protester's central contention that the cancellation was invalid and still is, and that any resolicitation is a nullity. If this is the objection, we cannot see the logic of waiting for the resolicitation before pressing a protest. It would seem that the nature of any resolicitation is irrelevant to the contention as presented. We believe the protester had but two alternatives—to accept the cancellation and subsequently object to the terms of a resolicitation, or to object to the cancellation itself. It cannot rely on the former course of action to subsequently establish the timeliness of the latter. Nor can the protester now cite the invalidity of the cancellation as one of the reasons why the current solicitations are defective, and thus obtain consideration on the merits of matters long since regarded as closed. To allow circumvention of our timeliness standards here would render them virtually meaningless. Considering all of the foregoing circumstances, we believe it is clear that the protest against the RFP cancellation is untimely.

4 CFR 20.2(b) provides that untimely protests may be considered if "good cause" is shown or if our Office determines that "issues significant to procurement practices or procedures" are involved. The former exception has reference to some compelling reason, beyond the protester's control, which prevented it from filing a timely protest. The latter refers to the presence of a procurement principle of widespread interest. *See* 52 Comp. Gen. 20, *supra.*

For the reasons already indicated, we do not find any compelling reason which prevented Cessna from filing a timely protest to the cancellation. Moreover, we do not believe a significant issue is involved. We note that an allegation that the factual circumstances are without precedent or unique does not necessarily mean that the issue is significant. *See* 53 Comp. Gen. 932 (1974). The size and dollar value of a canceled procurement is not a criterion for determining "significance," and we see no reason to apply the exception in this instance.

Cessna has also expressed the view that even if its protest against the cancellation is untimely and not for consideration, it would be improper for our Office to decline to consider this issue on a technicality.

We do not regard our timeliness standards as technicalities. To raise a legal objection to the award of a Government contract is a serious matter. At stake are not only the rights and interests of the protester, but those of the contracting agency and other interested parties. Effective and equitable procedural standards are necessary so that parties have a fair opportunity to present their cases and protests can be resolved in a reasonably speedy manner. *See* 53 Comp. Gen. 932, *supra*. In this context, our rules impose strict time standards and are strictly construed. *See*, for example, B–181005, B–181006, May 21, 1974, and B–181127, May 16, 1974, where protests filed 6 working days after knowledge of the basis of protest were rejected as untimely. In short, we see no merit in the protester's argument that the issue involved justifies disregarding our timeliness standards.

Objection to GAO Refusal to Extend Time to Comment

The parties' final written comments were due July 23, 1974. All parties were similarly advised of this due date and no objections were noted. Cessna's oral request of July 19 for an additional 10 working days to make further comments was denied, and the protester has taken exception to this denial. We understand that the principal reason for the extension was to unable Cessna to obtain certain Army documents for evaluation and comment. By letter dated July 19, 1974, Cessna filed a Freedom of Information Act request with the Army, seeking generally any and all correspondence produced by the Secretary or his staff related to the cancellation of the RFP, and also a report or memorandum prepared by an AMC audit team which evaluated the work done by the source selection group under the 1972 RFP. The Army is presently considering this request.

565-529 O - 75 - 6

It appears that the information requested relates to an issue which we have determined to be untimely and not for consideration—the cancellation of the 1972 RFP. Given the posture of the present protest—before award—and the nature of the information sought, we do not believe that our denial of the time extension was unreasonable or unwarranted.

Contingent Fee

Lastly, Cessna has raised a question concerning the compensation of an individual who represented Beech during the course of the protest. This person has been described to our Office as a Beech "consultant." Cessna believes it is possible that this individual is being paid on a commission basis, and that he is therefore deriving a fee contingent upon obtaining a Federal contract in violation of 10 U.S.C. 2306(b).

We note that the cited statutory provision provides that negotiated contracts shall contain a provision whereby the contractor warrants that it has employed or retained no person or selling agency to solicit or obtain the contract under an understanding or agreement for a commission, percentage, brokerage, or contingent fee, except a bona fide employee or established commercial or selling agency maintained by him to obtain business. We have no reason to believe that the contemplated contract with Beech does not include the required warranty, or that the Army is incapable of asserting the Government's rights under the warranty in the event a breach by the contractor is detected. *See* part 5, section 1, ASPR.

We have thoroughly reviewed both the genesis and bases of this protest and, on the entire record developed, we do not find a legal basis or the existence of other overriding considerations which would require our Office to object to the proposed award to Beech.

[B-161457]

Accountable Officers—Accounts—Irregularities, etc.—Administrative Authority to Resolve—Amount Increased

Limitation of $150 on administrative resolution of irregularities in accountable officers accounts, authorized by General Accounting Office letter of August 1, 1969, B-161457, to Heads of Federal Departments and Agencies, cannot be eliminated, but may be increased to $500 without appreciable risk to the interests of Government. Letter increasing limitation is being issued and amendment to 7 GAO 28.14 will be forthcoming.

Accountable Officers—Bonding Elimination—Liability—Insurer *v.* Bailee

General Accounting Office does not agree that elimination of bonding of accountable officers pursuant to act of June 6, 1972, Public Law 92-310, 86 Stat. 201,

reduced basic liability of officer from that of insurer liable with or without negligence, to that of bailee responsible only for performing duties with degree of care, caution, and attention which prudent person normally exercises in handling own affairs.

Accountable Officers—Relief—Negligence—What Constitutes

Regarding complaint that General Accounting Office (GAO) is too strict in interpretation of negligence in cases of relief of accountable officers and suggestion that standard of such care as reasonably prudent and careful man would take of his own property under like circumstances be used, GAO is no more strict than law requires and uses suggested standard, but because of difference of opinion in application of standard GAO may sometimes construe negligence in circumstances where agency involved does not.

In the matter of personal accountability of accountable officers, August 14, 1974:

This decision to the Secretary of the Treasury is in response to a request by the Commissioner of Accounts of that Department. He requests that we consider the possibility of eliminating the present $150 limitation and related restrictions on the administrative resolution of irregularities in the accounts of accountable officers, as prescribed in our letter of August 1, 1969, B–161457, to the Heads of Federal Departments and Agencies, 7 GAO 28.14. He also requests that we consider a modification of General Accountinng Office (GAO) standards to provide for a less stringent interpretation of the present laws in determining whether negligence exists in connection with requests for relief of accountable officers.

Prior to the issuance of our letter of August 1, 1969, all irregularities in the accounts of accountable officers were required to be settled by GAO. In the exercise of our authority to establish minimum amounts for exceptions taken by our Office in our audit of accounts of accountable officers, our letter of August 1, 1969, authorized administrative resolution of irregularities under $150. We do not believe that the monetary limitation on irregularities subject to administrative resolution should be eliminated. However, in the light of our experience in the operation of the $150 limitation we believe the limitation may be increased to $500 without appreciable risk to the interests of the Government. A letter increasing the $150 limitation to $500 is being issued today to the Heads of Federal Departments and Agencies, and an amendment to 7 GAO 28.14 will be forthcoming. The increase will be effective immediately.

The Commissioner of Accounts presented extensive arguments to the effect that since the requirement for fidelity bonding of accountable officers has been eliminated pursuant to the act of June 6, 1972, Public Law 92–310, 86 Stat. 201, 31 U.S.C. 1201, the liability of an accountable officer is no longer that of an insurer, who is liable regardless of

the presence or absence of negligence, but is merely that of a bailee, who is responsible only for performing his duties with the degree of care, caution, and attention which a prudent person could normally be expected to exercise in handling his own affairs.

We do not agree that elimination of the requirement for fidelity bonding of accountable officers has changed the basic liability of such officers. Even the cases relied upon by the Commissioner acknowledge that the basic liability of an accountable officer as an insurer of the funds in his charge arises from "principles which are founded upon public policy," in addition to the bond. *United States* v. *Prescott*, 3 How. 578, 587 (1845). Moreover, while section 101(a), 31 U.S.C. 1201 (a), of Public Law 92–310, *supra*, provides that:

> No agency of the Federal Government may require or obtain surety bonds for its civilian employees or military personnel in connection with the performance of their official duties.

Section 101(b), 31 U.S.C. 1201(b), also provides that:

> The personal financial liability to the Federal Government of such employees and personnel shall not be affected by reason of subsection (a) of this section.

Hence, it is the clear intent of the act that the elimination of fidelity or surety bonds would not have the effect on the basic liability of accountable officers for which the Commissioner contends, but that such liability would continue to exist as before the act when bonds were required.

However, the question of granting relief to accountable officers under the provisions of the relief statutes from their basic liability is a separate and distinct matter. While an accountable officer may be held liable under his basic liability as an accountable officer regardless of the presence or absence of negligence, he may be relieved from such basic liability under the relief statutes provided that the loss or deficiency occurred without fault or negligence on the part of the officer (31 U.S.C. 82a–1), or that the illegal, improper, or incorrect payment was not the result of bad faith or lack of due care on the part of the officer (31 U.S.C. 82a–2). *See also* 31 U.S.C. 95a; 28 U.S.C. 1496; and 28 U.S.C. 2512. It is at this point that GAO exercises its discretion.

An accountable officer is automatically liable at the moment either a physical loss occurs or an erroneous payment is made. If the cash or accountable item which was physically lost cannot be recovered, or the erroneous payment cannot be recovered from the recipient thereof, consideration is given to relief of the accountable officer upon proper administrative requests. Relief is granted by our Office unless it is determined that the accountable officer was negligent or guilty of bad faith or lack of due care, and that such negligence,

bad faith, or lack of due care was the proximate cause of the physical loss or erroneous payment. There is nothing in the cited statutes or their legislative histories to indicate that anything more than simple negligence or bad faith or lack of due care was required to deny relief to an accountable officer. All of the cited relief statutes have been interpreted by our Office and by the Court of Claims as requiring denial of relief from liability in any instance where it is shown that the officer was negligent (not grossly negligent) or guilty of bad faith or lack of due care (not gross bad faith or gross lack of due care), and that such negligence, bad faith, or lack of due care was the proximate cause of the loss or erroneous payment.

The courts and our Office have always held that the accountable officer was liable until he proved that he was faultless—the burden of proof was on him. In *Boggs* v. *United States*, 44 Ct. Cl. 367 (1909), the Court of Claims stated on pages 383 and 384:

> It is, we think, a sound proposition that the statutes under which the court, on the petition of the plaintiff, has acquired jurisdiction were intended to give disbursing officers a greater right to relief than they already possessed before these acts were passed.
>
> They were passed to relieve innocent disbursing officers from the rigors of the law and the consequent judgment of courts of law, by allowing them to go into a court of equity, and, by establishing the fact they were faultless, obtain a "decree" which would require the accounting officers to allow to such officer credit in the settlement of his accounts. The provisions in question are predicated upon the act of 1866, which did not lessen the *legal liability* of disbursing officers, nor give them generally greater legal rights than they possessed. The Court of Claims alone, acting as a court of equity, can administer the equitable provisions under which relief is here asked and award the specific redress authorized by the statute *in and only in exceptional cases.* That is, where the officer has established the fact that his conduct has really been faultless. Before relief can be granted it must appear with reasonable degree of certainty from all the proof and circumstances of the case that the officer entrusted with public money has exercised watchfulness over the funds and such degree of care as fairly and equitably entitle him to a decree exonerating him from the obligation of his bond.
>
> From the foregoing statement it is apparent that the responsibility of the court in this class of cases is very great. It is equally apparent that the court can not well undertake to formulate any general rule declaring what acts may carry exemption from liability. Each case must depend upon those conditions and circumstances which necessarily arise out of the proof when presented. As, however, redress can only be had in exceptional cases there is at the outset a presumption of liability, and the burden of proof must rest upon the officer who has sustained the loss.

See also, *O'Neal* v. *United States*, 60 Ct. Cl. 413 (1925). We perceive no compelling reason for departing from this principle now.

The Commissioner contends that an accountable officer should be held to the standard of such care of property or funds entrusted to him as a reasonably prudent and careful man may be expected to take of his own property of the like description under like circumstances, but that in view of GAO's position that a custodian of public funds is an insurer of such funds GAO has not evaluated negligence on the basis of that standard. This appears to constitute a confusion of two

separate and distinct factors. GAO does consider a custodian of public funds, or any accountable officer, as an insurer of the funds entrusted to him, but only insofar as his *basic liability* is concerned. When the question of relief from that basic liability under the cited relief statutes arises, we do apply the "reasonable care" standard where applicable, and even where negligence under that standard exists relief will be granted if such negligence is not the proximate cause of the loss or the erroneous payment. The fact that the activities of accountable officers are generally prescribed by regulations leaves no room for the exercise of the judgment of a "reasonably prudent and careful man." If an accountable officer fails to follow such regulations, and a loss of funds or an improper payment is caused thereby, such failure to follow the regulations must be considered negligence and relief denied. Where there are no regulations covering the actions in question, the cited standard is applied to determine the presence or absence of negligence. There obviously is room for an honest difference of opinion in the application of the standard. Circumstances which may be construed by one person as indicating the presence of negligence may be construed by another as indicating the lack of negligence. This fact appears to be the essence of the Commissioner's complaint, since GAO may occasionally construe negligence in circumstances where the Department of the Treasury deems there was no negligence.

[B–180050]

Pay—Retired—Survivor Benefit Plan—Record Correction—Entitlement to Retired Pay Prior to SBP—SBP Coverage—Not Automatic

A person whose military record is corrected on date subsequent to September 20, 1972, to show entitlement to retired pay on date prior to September 20, 1972, is not automatically covered under Survivor Benefit Plan (SBP), since purpose of record correction is to place member as nearly as possible in same position he would have occupied had he been retired at earlier date and in order to be automatically covered under SBP member must become entitled to retired or retainer pay subsequent to effective date of SBP.

Pay—Retired—Survivor Benefit Plan—Record Correction—Entitlement to Retirement Pay Prior to SBP—Election Status

Members who become retroactively entitled to retired or retainer pay prior to effective date of Survivor Benefit Plan by virtue of record correction occurring after that date, and statutory time limit for members entitled to retired or retainer pay on effective date of the act to elect to participate has expired, must be afforded the same opportunity as other prior retirees to elect into the Plan such period in their case being 18 months from the date of notification of records correction.

Pay—Retired—Survivor Benefit Plan—Record Correction—Entitlement to Retired Pay Subsequent to SBP—SBP Coverage—Automatic

Persons whose military records are corrected on date subsequent to September 20, 1972, to show entitlement to retired or retainer pay commencing subsequent to that date are automatically covered under Survivor Benefit Plan and may not be afforded a period of time to decline coverage or elect reduced coverage after award of retired pay, since their positions cannot be distinguished from a member becoming entitled to retired or retainer pay without correction of their record and do not receive opportunity to elect reduced coverage or decline coverage after they become entitled to that pay.

In the matter of Survivor Benefit Plan participation following a record correction, August 14, 1974:

This action is in response to a request for advance decision from the Principal Deputy Assistant Secretary of Defense (Comptroller) concerning Survivor Benefit Plan coverage in the case of members initially granted retired pay as a result of a correction of records, which correction occurred on or after September 21, 1973, but was retroactively effective on a date prior to September 21, 1972. The specific questions and a discussion thereof are contained in Department of Defense Military Pay and Allowance Committee Action No. 497, enclosed with the transmittal letter.

The questions are as follows:

1. In the case of a member who is initially granted retired pay on or after 21 September 1973 but retroactive to a date prior to 21 September 1972, as a result of correction of records, would such a member be—
   a. Required to make a Survivor Benefit Plan election within a specified period of time similar to the requirement placed on Retired Servicemen's Family Protection Plan (RSFPP) elections by the Comptroller General of the United States in B–122198, 11 May 1955 (34 Comp. Gen. 582); or
   b. Automatically covered because of the provisions stated in Title 10, U.S. Code Section 1448(a)?
2. If the answer to question 1 is a, above, what would be the maximum period during which the member may make an election?
3. If the answer to question 1 is b, above, may such a member be permitted the privilege of electing out or reducing coverage similar to that provided a member retired within 180 days of passage of PL 92–425?
4. Would the answers be the same if the member was granted retroactive retired pay effective on a date subsequent to 20 September 1972? (Members who retired after 20 September 1972, are automatically covered, unless they elect not to participate in the Plan.)

In the discussion of the questions set forth in the Committee Action, it is pointed out that in our decision 34 Comp. Gen. 582 (1965), involving the Uniformed Services Contingency Option Act of 1953, approved August 8, 1953, 67 Stat. 501, it was held that the members who had their records corrected to show an earlier retirement were required to make their election under that Plan "at the time" they were awarded retired pay. Under the holding in that decision, members

who filed elections more than 60 days following the award of retired pay were not entitled to participate in the Plan, based on the language of the statute which provided that a former member on the effective date of the act and who is thereafter awarded retired pay may make his election to participate in that Plan at the time he is awarded that pay. It was further pointed out that this provision was subsequently amended to provide a specific period of time for making such elections under the circumstances described, but that the Survivor Benefit Plan does not contain similar language.

It is also noted in the Committee Action that 10 U.S. Code 1448(a) provides that the Plan applies to a person who is married or has a dependent child when he becomes entitled to retired or retainer pay, unless he elects not to participate in the Plan before the first day for which he is entitled to that pay. The discussion also refers to the provisions of subsection 3(a) of Public Law 92–425, approved September 21, 1972, 86 Stat. 706, which states that members retired within 180 days after the effective date of the act may be allowed to elect not to participate or to participate at less than full annuity within 180 days after becoming entitled to retired pay. A citation to the legislative history of that section indicates the Congress intended to grant a member who retires within that time frame a reasonable amount of time to decide whether to participate in the Plan.

The discussion in the Committee Action concludes by stating that it would appear such a member is automatically covered under the provisions of 10 U.S.C. 1448(a). However, as a matter of equality, it appears that the member should be granted the same opportunity as a member retired within 180 days after the effective date of Public Law 92–425.

The purpose of correcting a member's military records pursuant to the provisions to 10 U.S.C. 1552 is to correct an error or remove an injustice from his records, thereby placing the member as nearly as possible in the same position he would have occupied had the error or injustice not arisen. Thus, if a member is initially granted retired pay after the effective date of the Survivor Benefit Plan (September 21, 1972), pursuant to a record correction, such rights as he may have to benefits under the Plan must be based on the effective date of his retirement.

In this regard, subsection 3(b) of the above-cited act provides that a person who is entitled to retired or retainer pay on the effective date of the Survivor Benefit Plan may elect to participate in the Plan before the first anniversary of that date. This 1-year period was subsequently extended to 18 months by Public Law 93–155, approved November 16,

1973, 87 Stat. 605. The statutory period, however, expired on March 21, 1974.

Thus, a situation is created where, by operation of various laws, a person becomes entitled to retired or retainer pay on or before the effective date of the Survivor Benefit Plan, but under the law as enacted would be precluded from participating in the Plan as a result of the expiration of the statutory time limitation imposed by the act for electing to participate, prior to the date action was taken to grant the member the right to retired or retainer pay. We do not believe such a result was intended by Congress.

The legislative history of the Survivor Benefit Plan does not specifically address itself to or seem to even recognize the existence of a situation involving a person who is retroactively retired effective on a date prior to the inception date of the Survivor Benefit Plan. However, it does provide ample indication that the Congress intended to afford the opportunity of participation in the Plan to all persons who were entitled to retired or retainer pay on the effective date of the act as well as to all persons who subsequently became entitled to retired or retainer pay. Furthermore, the overall purpose of the act and the clear expression of congressional intent as evidenced by section 3 of the act with regard to those on the retired rolls and those becoming entitled to retired pay within a short period following the effective date of the Plan, support the conclusion that members retiring under the circumstances described in the submission should be provided every opportunity to participate in the Plan.

Accordingly, it is our view that persons who retroactively become entitled to retired or retainer pay on a date prior to or on the effective date of the Survivor Benefit Plan by virtue of correction of their military records under 10 U.S.C. 1552 are not automatically covered under the provisions of 10 U.S.C. 1448(a). Rather, coverage under the Plan is by virtue of section 3(b) of the act and such persons must be afforded the opportunity to elect coverage under the Plan with positive action to be taken by administrative officers to insure that the details of the Plan, its benefits and costs are fully explained and understood by the member. *Cf.* 53 Comp. Gen. 192 (1973). Question 1 is answered accordingly.

With regard to question 2 and as noted above, subsection 3(b) of Public Law 92-425 provided a 1-year period for those members entitled to retired or retainer pay on the effective date of the act to elect participation in the Plan. This period was subsequently extended an additional 6 months. It would appear that the reason for granting such

a liberal grace period stemmed from the fact that with the new legislation adequate time should be afforded to insure that information concerning the Plan be disseminated to all members to whom the Plan applies in order to permit them to make intelligent elections. Therefore, since one of the purposes of a correction of records is to place a member who is affected thereby, into the same relative position as that enjoyed by other retirees who were retired before the effective date of the Survivor Benefit Plan, question 2 is answered by saying that such member should be permitted 18 months from the date of notification of the correction action and question 3 need not be answered.

In the case of a member who was granted retroactive retired pay by virtue of a correction of records effective on a date subsequent to September 20, 1972, he would be automatically covered under the provisions of section 1448(a) of the Plan. In such circumstances we are unable to distinguish between such a member and a member who retires without the correction of his records insofar as application of the Survivor Benefit Plan is concerned. A member prior to his retirement and entitlement to retired pay is presumed under the pertinent law to be informed of the provisions of the Survivor Benefit Plan and is given the opportunity to decline coverage or elect reduced coverage prior to the time he becomes entitled to retired or retainer pay. It is our view, therefore, that a member who has applied to a correction board for a correction of his records to show entitlement to retired pay effective on a date subsequent to September 20, 1972, has this same opportunity and it must be assumed that a member applying for such a correction has a reasonable expectation that his application will be favorably considered. In light of this, it would seem that he has adequate time to elect reduced coverage or decline participation prior to the correction board recommendation and Secretarial action correcting his record. In this connection, we might add that we assume that appropriate procedures will be taken administratively to assure that members so retired will be afforded the same options, including the election out privilege, as those granted members retiring without correction board action prior to the date of their entitlement to retired pay.

Question 4 is answered accordingly.

[B–179876]

Contracts—Labor Stipulations—Service Contract Act of 1965—Amendments—Minimum Wage, etc., Determinations—Rates Under Prior Contracts

Where October 1973 Service Contract Act minimum wage and fringe benefit determination issued for General Services Administration solicitation is based on May 1973 survey data covering manufacturing and nonmanufacturing employ-

ees in locality, contention that determination should have specified conformable rates developed under prior contracts between bidder and Air Force in same locality which contained wage determination based on May 1972 survey data is without merit, since act provides that determinations are to be in accordance with prevailing rates in locality.

Contracts — Specifications — Definiteness Requirement — Labor Stipulations

Listing in invitation for bids of specific equipment types to be repaired is preferable, since bid calculation is difficult where solicitation lists only general equipment types, requiring bids on flat labor hour rate for each type; also, applicable repair standard depends on equipment specified in purchase orders placed under contract. Since solicitation provided common basis for bidding, and submission of 20 bids is indication terms were reasonable, conclusion cannot be drawn that defects were so serious as to contravene requirement for full and free competition.

Bids—Competitive System—Government Property Furnished—Not Prejudicial to Other Bidders

No reasonable basis is found to support conclusion that alleged availability to some bidders of Government-furnished specialized testing equipment adversely affected competition under General Services Administration solicitation for repair services, since record indicates Government-furnished equipment in possession of bidders was recalled before bid opening and solicitation terms provided that contractor would be responsible to furnish all necessary equipment.

Departments and Establishments—Services Between—Procurement of Supplies and Services—Aircraft Services

No impropriety has been demonstrated in General Services Administration's (GSA) procurement of heavy equipment repair services for use of Air Force since solicitation was issued pursuant to GSA-Air Force agreement executed under Air Force authorizing regulations; moreover, provisions of Armed Services Procurement Regulation 5-205 whereunder GSA sources are required to be used for repair services does not prohibit GSA from procuring subject repair services on behalf of Air Force.

Bids—Opening—Public—Information Disclosure

Where direct labor hour capacity stated in bids is necessary to determine entitlement to award under solicitation's progressive awards provision, General Accounting Office believes this information should have been read aloud at bid opening along with bidders' names, discount terms, and prices; but even if failure to do so was improper, procedural deficiency does not compromise protester's rights, and in any event information could have been obtained by taking advantage of opportunity to examine bids.

Bids—Evaluation—Options—Status

Solicitation stating contractor must accept all orders, but that offeror can indicate by checking box whether it will or will not accept orders under $50, and which provides blank where offeror can indicate specific minimum amount below $50, means that bidders are offered three options: to accept all orders less than $50; to refuse all such orders; or to accept orders under $50 but above a specified minimum. However, since provision is somewhat confusing, agency should consider revision to provide clarity.

Bids—Qualified—Dollar Minimum

Bids indicating bidders would not accept orders less than $50, and containing insertions of "$500.00" and "$100.00" in blank calling for specific minimum amount under $50, were properly rejected by contracting officer, since defects pertain to material provision and are not waivable irregularities under Federal Procurement Regulations 1-2.405.

Contracts — Requirements — Progressive Awards — To Insure Supply

Low bidder found to be nonresponsible to perform full amount of labor hours capacity specified in its bid was properly excluded from award consideration under invitation for bids (IFB) provision which called for progressive awards to low responsible, responsive bidders until Government's estimated needs were satisfied; however, if some amount of Government's requirements were not contracted for after following award procedure in IFB, agency could reconsider responsibility of low bidder for award of some quantity of hours less than maximum specified in bid, provided bid was not otherwise qualified, since under IFB instructions and conditions, Government reserves right to make award for quantity less than quantity offered.

In the matter of Page Airways, Inc.; Space A.G.E. Inc.; B. B. Saxon Company, Inc.; Alco Tool & Manufacturing Company; Border Machinery Company; Midwest Maintenance & Construction Company, Inc., August 15, 1974:

Invitation for bids (IFB) No. GS-07-DP-(P)-45903 was issued by the General Services Administration (GSA) on September 28, 1973, and solicited bids on 1-year requirements-type contracts for services involving the maintenance, repair, and overhaul of heavy construction, material handling ground powered industrial and vehicular equipment, including engines and related items. The solicitation contemplated the award of contracts in 10 different service areas in the Southwestern United States; the contracts were to be mandatory for use by Government agencies in these areas for their normal service requirements.

Prior to bid opening on December 13, 1973, three concerns in the San Antonio, Texas, service area—Page Airways, Inc. (Page), Space A.G.E. Inc., and B. B. Saxon Company, Inc. (Saxon)—protested to our Office.

First, Page objected to the Service Contract Act minimum wage and fringe benefit determination for the San Antonio area furnished by the Department of Labor and included in the solicitation. Second, Page, Space A.G.E. and Saxon contended that various terms of the solicitation were excessively vague, deficient, or otherwise precluded fair competition among the bidders. Third, Page protested that the contemplated work in service area 10, San Antonio, included work on aerospace ground equipment which is the primary responsibility of the Department of the Air Force's San Antonio Air Materiel Area

(SAAMA). Page contended in this regard that an award by GSA would duplicate contract coverage already available under three contracts between the Air Force and Page.

After bid opening, Page protested against the manner in which the bid opening was conducted. Also, Page and Alco Tool & Mfg. Company (Alco) protested against the rejection of their bids as nonresponsive.

For the reasons which follow, the protests are denied.

Page's objection to the San Antonio wage determination initially issued for this solicitation was on the ground that it was inadequate and in violation of the Service Contract Act because wage rates were provided for only five classes of service employees. Page also expressed the view that the wage rates specified should have been those conformable rates developed under a previous wage determination applicable to several contracts between the Air Force and Page in the San Antonio area. Conformable rates are those agreed upon by the contractor, the contracting agency and the employees for classes of service employees which were not listed in a determination issued by the Department of Labor. *See* Federal Procurement Regulations (FPR) 1–12.905–5.

As for Page's contention that the determinations should have specified the conformable rates in effect under other service contracts between Page and the Air Force, we note that the Service Contract Act provides that determinations are to be in accordance with the *prevailing* wage rates and fringe benefits in the locality. *See* 41 U.S. Code 351(a)(1), (2). The Acting Administrator, Wage and Hour Division, Department of Labor, in a letter to our Office dated January 22, 1974, pointed out that the determination issued for the instant solicitation, No. 72–120 (Rev.–3), was based on May 1973 survey data collected in the San Antonio area. This letter also states:

> * * * This survey was based upon wages paid to a cross section of manufacturing and non-manufacturing industries in the San Antonio area, which of course includes Page Airways employees but is not limited thereto. On the other hand, the wage rates agreed to by the Air Force and Page Airways were conformed to those contained in Wage Determination 72–120 derived from the May 1972 wage survey data. Thus, the wage rates contained in Wage Determination 72–120 (Rev.–3) are those prevailing in the locality and not wage rates of a 1972 vintage.

In view of the foregoing, we se no merit in Page's contention. Also, since determination No. 72–120 (Rev.–3) contained wage rates for 43 classes of service employees, and was not objected to by Page, it appears that its adequacy in this regard is an academic issue.

Numerous objections have been raised by Page and Saxon against the alleged inadequacy of various terms of the solicitation. One of the central objections is that the equipment to be serviced was described

in vague and general terms, rather than by Federal stock number or by manufacturer's name and model number. The equipment types were classified in 14 groups ("A" through "N") in the schedule. Group "A" equipment was described as follows:

> On and off the road heavy construction and related equipment, such as; crawlers and wheel tractors, loaders, scrapers, earth movers, rollers, cranes, shovels, trenches, pavers, etc., and related items (gas and diesel engine driven).

The descriptions of equipment in groups "B" through "N" were similarly stated in general terms. For example, group "B" equipment was described as "Material Handling Equipment, towing tugs and tractors and related items;" group "G" equipment was stated to consist of "Aircraft ground servicing equipment and related items."

The objection raised is that it was impossible for bidders to bid intelligently since they could not know how to calculate the various cost factors in preparing their bids. In other words, not knowing the exact types of equipment involved, bidders could not know what tools would be needed to perform the work; what Military Technical Orders or equipment manufacturer's instructions and manuals would have to be followed; what type and quantity of spare parts would have to be obtained; and how projected labor costs should be priced.

In addition, Page believes the solicitation should have contained established time standards developed by the Air Force for work on various equipment types since his would enable GSA to maintain more control over the reasonableness of estimates for a particular repair job and would eliminate the negotiated or time and materials character of the procedure for determining the amount of individual purchase orders issued under the contract.

Also, Saxon has raised several other objections to the terms of the solicitation. The protester alleges that paragraph 21 of the solicitation, requiring a contractor to provide storage space for equipment for a holding period of from 1 to 6 months, precludes it from submitting an intelligent bid, since it could not estimate how much storage space it might need. Second, Saxon challenges the reasonableness of paragraph 22, requiring contractors to guarantee or warrant materials obtained from suppliers.

We believe that many of these objections have been satisfactorily answered by the reports furnished our Office by GSA. GSA's December 14, 1973, report points out that the Air Force advised against the use of estimated time standards because they have proved to be unrealistic, and also that standards for much of the equipment are nonexistent. Thus, while the solicitation did contain estimated total direct man-hour requirements for the various equipment groups, the

estimates were intended to reflect the Government's total projected needs, against which individual purchase orders would be placed.

The report also states:

> As far as the use of Federal Stock Numbers is concerned, the heavy equipment to be repaired under GSA contracts were purposely described in general terms because it is impossible for the Air Force to predict which equipment, if any, will require repair. Any listing by Federal Stock Number of equipment needing service must necessarily include equipment which might never need repair during the contract period. This approach, in our opinion, is totally unrealistic and burdensome. Our contracting official has also noted that several of our present contracts for these types of repair service which list equipment by general types and groups have created no significant problems. It is also to be noted that as a result of Page Airway's initial protest, the solicitation was amended to exclude from the scope of the contract, services already under contracts to be performed by the protestor * * *. Thus, there exists little possibility for duplicative services.

Also to be noted is the contracting officer's observation that the various equipment items were grouped on the schedule by homogenous types so that, in the contracting officer's view, a bidder found capable of handling one item in a group would be capable of handling all items in the group. In addition, the contracting officer believes that the required testing equipment would generally correspond to the homogenous equipment type groupings.

As for the alleged problem of determining what procedures are to be followed in performing repair work, and the consequent difficulties in preparing a bid, GSA has pointed out that the solicitation does provide guidance for bidders in this area. Paragraph 9a of amendment No. 2 provided that the required work was to be performed in accordance with an order of precedence—first, applicable technical orders; second, equipment manufacturer's manuals, instructions, etc.; third, repair procedures developed by the contractor and approved by the contracting officer; and fourth, standard commercial practice. Moreover, paragraph 9a requires that a technical order and data library shall be established by the contactor within 20 days after award, with respect to known items, and that additional technical orders will be requisitioned as required. In other words, the accumulation of necessary technical information is recognized to be a continuing process.

Consistent with this provision, the procedure to be followed on a particular repair job would be dependent on the purchase order issued for that job, which would indicate the specific equipment to be serviced. Bidders were required to quote a labor hour rate for the various equipment groups; this rate would be applicable generally to the purchase orders issued for specific items. A specific job might require that any of the four standards described in paragraph 9a be followed, depending on the type of equipment involved. Although this may have made pricing of bids difficult, it cannot be said that bidders were without a common basis upon which to calculate their bids,

or that biders were allowed to submit bids based upon their own individual specifications.

GSA responded to Saxon's objection to the Storage Facilities and Guarantee clauses as follows:

> The Storage Facilities clause and the Guarantee clause are both standard clauses for this type of contract. The Air Force has always used the Storage Facilities clause in its previous contracts, as the protestor should well know. Admittedly, in most instances, storage capacities are only needed for a few days or weeks. Occasionally, however, some equipment may require storage for longer periods due to unavailability of parts. Under the circumstances, we think the clause is a perfectly valid requirement, especially since it is difficult to predict what equipment would need repair and whether parts would be readily available. We might note that nineteen out of twenty bidders apparently had no difficulty with these requirements.
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> With regard to the Guarantee clause, we do not think it is unfair to require a contractor to guarantee or warrant his work or his parts even if the parts are acquired from his suppliers. A contrary rule would completely absolve a contractor from responsibility for defective parts and would certainly encourage negligence or carelessness in the selection of equipment parts. In any event, we understand this requirement is general commercial practice and, as such, should not be any burden on the contractor.

From a policy standpoint, we agree with Page and Saxon that it would have been preferable to identify the equipment by Federal stock numbers so that bidders could quote prices for work on specific items of equipment, and more definite work standards could be specified. Specifications should be as definite as practicable. In this regard, we view with approval GSA's indication that while to have listed specific equipment types in the present solicitation was unduly burdensome under the circumstances, the provisions of the solicitation will be reviewed and possibly revised prior to the next solicitation for these services. In this regard, we note that the present solicitation was apparently the first of its type issued by GSA for these services in the areas in question.

In addition, we have considered the protesters' contentions that alleged solicitation defects will lead to performance difficulties and disputes after contract award. In this regard, Saxon contends that the IFB's estimated quantities are not best estimates, with the resulting possibility of claims by contractors dissatisfied with the quantities ordered; Saxon expects possible disputes where the contracting officer determines that a contractor has not obtained parts and materials at the most economical price reasonably available, as required by Special Provision 7 of the IFB; Page believes that the instant procurements might duplicate existing contract coverage to the end that contract administration costs will increase and generate claims; and Page and Saxon believe that purchase orders placed under the present contracts are in the nature of time and materials contracts, requiring constant Government surveillance if excessive costs are to be avoided.

It may well be, as Page and Saxon have observed, that some of the successful bidders will find their bids to have been "improvident," and that contract administration might involve substantial difficulties. In this connection, we note that two of the bidders (Midwest Maintenance & Construction Co., Inc., and Border Machinery Company) and one of the protesters (Space A.G.E.) in written comments to our Office have taken issue with Page's and Saxons' allegations regarding the inadequacy of the specifications and the method of contracting employed. After careful consideration, we do not believe a reasonable basis exists on the record to conclude that the alleged defects in the specifications were so serious as to contravene the statutory requirement for full and free competition.

Space A.G.E.'s protest before bid opening raised an additional objection—that other bidders possessed certain items of Government-furnished equipment, i.e., specialized testing equipment—while Space A.G.E. did not. It was contended that competition on this basis was unfair.

GSA's December 14, 1973, report points out, however, that in November 1973 contractors which planned to bid on this solicitation were notified that Government-furnished equipment in their possession would be recalled; that GSA did not believe that the Air Force would make available any special test equipment; and that all bidders were informed that they should submit bids without taking into account the availability of specialized testing equipment. Under these circumstances, we see no basis in the record to conclude that competition among the bidders was adversely affected. We note that Page has taken issue with GSA's statement that bidders were informed that they should submit bids without taking into account the availability of special test equipment. However, amendment No. 2, paragraph 9a, states that the contractor shall furnish all equipment to perform the required work, including testing; moreover, standard form 33A, paragraph 11, states that no material, labor or facilities will be furnished by the Government unless otherwise provided for in the solicitation.

Page's objection to the propriety of GSA's procurement of services under the present solicitation for the use of the Air Force was first raised in its initial protest, and further supplemented in a letter to our Office dated January 2, 1974, commenting upon GSA's report of December 14, 1973. This report stated that GSA had entered into an agreement with the Air Force in September 1972, whereby GSA would undertake to solicit and administer, on behalf of the Air Force, a repair service contract for various types of heavy equipment in SAAMA, and that the instant solicitation was issued in furtherance of that agreement.

Page contends, first, that GSA has no jurisdiction in the field of letting contracts for repair of the types of aerospace ground equipment used by SAAMA, since work on such specialized military support equipment is reserved to the Department of Defense by virtue of Armed Services Procurement Regulation (ASPR) 5–205. ASPR 5–205 provided in pertinent part:

> * * * General Services Administration regional offices provide facilities for maintenance, repair, rehabilitation and reclamation of Government-owned personal property and, in addition, have Term Contracts with commercial concerns for similar services. These contracts are published as General Services Term Contracts. When requirements exceed the in-house capabilities of a Departmental activity or installation, or it is otherwise required that outside sources be used, it is mandatory that General Services Administration sources for such services be used except when:
>
> (i) the items involved are military weapons systems, specialized military support equipment, or specialized technical or scientific equipment;
>
> * * * * * * *
>
> (v) the required services are not within the scope of the existing GSA Term Contract * * *.

Next, Page challenges the propriety of the agreement between GSA and SAAMA on the basis that a question of this type should have been resolved by Headquarters, Department of the Air Force. Page views GSA's action in issuing the solicitation as an undesirable usurpation of SAAMA's functions, resulting in the award of a "Mother Hubbard" contract which purports to, but will not in fact, cover specialized military equipment, such as MJ–1 bomb lifts, since such equipment is not included in Industrial Group 769, Industrial Class 7699, specified on page 1 of the IFB. Also, Page contends that complete coverage is available under its existing contracts with the Air Force at lower prices.

The contracting officer has replied to these contentions as follows:

> A Depot Maintenance Interservice Support Agreement (DMISA) was entered into under authority of Air Force Regulation 400–27 and AFLCR 65–14. It was signed by representatives of San Antonio Air Materiel Area (SAAMA), Air Force Logistics Command, and General Services Administration. A similar DMISA was entered into with Warner Robins Air Materiel Area (WRAMA).
>
> Armed Services Procurement Regulation 5–205 provides that GSA sources are *mandatory* for specified services. The exceptions listed do not prohibit GSA from providing those services. It only points out that they are *not mandatory.* ASPR 5–206 refers to Federal Supply Catalog entitled "Guide to Sources of Supply and Services." Section 5 of that guide lists numerous categories of equipment under Industrial Class 7699. Among these is "Air Ground Support Equipment Service." If an MJ–1 bomb lift is Air Ground Support Equipment, then it will be covered.
>
> Mr. Gardner's allegation that Page's contracts provide complete coverage conflicts with his contention that items must be listed by specific stock number. Further, it has been our experience that no one firm can handle the volume of maintenance anticipated. This was confirmed by the capacities stated on bids received. While Page's current *rates* are lower there is no way to assure that the *cost of a specific job* would be lower. Also, present rates must be renegotiated if Page's contracts are to be extended past February 26, 1974.

Page was provided with the opportunity to comment on the contracting officer's statement but did not do so. We believe the statement adequately responds to Page's allegations.

Page's letter of December 18, 1973, to our Office, objected to the procedures at the bid opening because none of the bidders were advised of the total monthly direct labor capacity and the capacity per equipment group specified in the bids. Bidders were required to provide this information by virtue of amendment No. 2 to the IFB, which also provided that progressive awards could be made in service area 10:

> Progressive awards may be made for Groups G thru N for service area 10. If the low responsive, responsible bidder offers a monthly direct labor capacity less than the Government's estimated requirements, progressive awards may be made to the extent necessary to meet the estimated requirements. In such cases, awards will be made to the low bidder up to his stated direct labor hour capacity, and then, progressively to other bidders to the extent necessary to meet the Government's estimated requirements.
>
> Where a bidder is low on more than one group, awards will be made first to the group with the largest labor hour requirement, then in descending order to the group with the lowest labor hour requirement.

In these circumstances, prospective awardees in service area 10 could not be determined without first evaluating the bid prices according to the formula in the invitation, then considering the bidders' direct labor capacity, and finally applying the progressive awards procedure described above. Page's contention apparently is that without knowledge of the direct labor capacity, it was impossible for bidders to know either their entitlement to an award or the size of the award and, therefore, the bidders could not actively pursue their legal rights in this regard.

The contracting officer has responded to this contention as follows:

> In order to minimize the time required to conduct the formal bid opening only the name of the bidder, his discount terms, and his bid prices were read at the bid opening. Everyone attending the opening had the opportunity to ask for any other information they desired and the bids were available for examination.

FPR 1–2.402 provides that bids shall be publicly opened and, "when practicable," read aloud. While this regulation contemplates the exercise of some discretion by agency officials in conducting bid openings, our Office has also stated, as a general standard, that "The purpose of public opening of bids for public contracts is to protect both the public interest and the bidders against any form of fraud or favoritism or partiality or complicity, and such openings should as far as possible be conducted so as to leave no ground even for suspicion of any irregularity." 48 Comp. Gen. 413, 414–415 (1968).

Since the direct labor capacity to the service area 10 bids was crucial for determining the identity of successful contractors for that area, we believe it would have been preferable to read aloud this portion of

the bids. However, even if the failure to do so is regarded as improper, we cannot see how this procedural deficiency compromised Page's rights. *Cf.* B–178888, October 26, 1973. Moreover, Page's representatives could have obtained this information simply by examining the bids.

By letter dated January 8, 1974, the contracting officer advised Page that its bid was declared nonresponsive "* * * due to your minimum order of $100.00. The solicitation provides that you accept any orders in excess of $50.00." Alco was similarly advised that its bid was nonresponsive due to its minimum order of $500.

Paragraph 1 of the IFB's "SPECIAL PROVISIONS," entitled "SCOPE OF CONTRACT," contained the following provisions dealing with the respective obligations of ordering agencies and bidders to place and accept orders in certain minimum amounts:

1. *SCOPE OF CONTRACT:*
* * * each contractor whose offer is accepted will be obligated to furnish all services of the kind contracted for that may be ordered during the contract term, EXCEPT:

* * * * * * *

(2) *Small Requirements.* No ordering office will be obligated to place any order requiring delivery to any one destination amounting to $50.00 or less. This provision also applies to the contractor unless otherwise indicated below.

Offeror is asked to indicate (by checking the applicable box) whether he will ☐, or will not ☐ accept orders requiring delivery to any one destination amounting to $50.00 or less; or whether he will accept small orders of a specific minimum below $50.00. Specific Minimum $_____. If "will" is checked or a specific minimum below $50.00 is entered, it is mutually agreed that the contractor will accept small orders as indicated and this information will be shown in the resultant schedule and applicable contractor catalog/price list.

If the offeror fails to furnish the information asked for above, the Government may place orders for deliveries to any one destination amounting to $50.00 or less. Failure on the part of the contractor to return such orders by mailing or otherwise furnishing them to the ordering office within 3 days after receipt shall constitute acceptance, whereupon all other provisions of the contract shall apply to such order.

Both Alco and Page checked the "will not" box. Alco inserted "$500.00' in the Specific Minimum blank and Page inserted "$100.00.'

Alco's protest is on a number of alternative grounds. First, that the above-quoted minimum order clause was inadequate, ambiguous, and did not expressly state that bidders would be required to accept all orders in excess of $50. Alco states it construed the clause to mean that if a bidder did not wish to accept orders less than $50, it could so indicate, and, further, that bidders were provided with the option to indicate what specific minimum amount they would accept.

Alco also contends that if GSA's interpretation of the clause is correct, and the "Specific Minimum" amount refers to an amount of $50 or less, then the mistaken insertion of the figure $500 is obviously meaningless and should have been disregarded by the contracting officer.

Alternatively, Alco argues the solicitation was so defective that no awards should have been made under it.

Page similarly contends that the minimum order provision is obscure and does not clearly state that all orders in excess of $50 must be accepted. In any event, Page believes that the defect in its bid should have been waived as a minor informality pursuant to FPR 1–2.405.

GSA's February 15, 1974, report contains the following pertinent reply:

> It is clear that this clause, as written, could only have one reasonable, logical interpretation. What the clause says, essentially, is this: Contractors are obligated to accept all orders, except as specifically provided by the clause. One of the expressed exceptions is that he is not obligated to accept orders for less than $50.00. However, should he wish to accept any orders between $0 and $50.00, he is given an opportunity to accept such lesser orders by indication. It is unequivocal that the purpose of the clause is to allow a contractor to accept orders less than the minimum order limitation and not to allow a bidder to qualify his bid so that he could choose, to his own advantage, whatever amount of order he wishes to accept. Nowhere does the clause state "$50 or *more*." If the protestor's theory is correct, then the Government could not reject a bid of an offeror who would not accept an order less than $10,000—a totally unreasonable and illogical interpretation.

We believe that GSA's interpretation of the clause is legally correct. At the same time, we can appreciate the protesters' contentions that the provision is somewhat unclear and could be confusing to bidders. Accordingly, we are recommending that GSA revise subparagraph (2) of the SCOPE OF CONTRACT clause to achieve greater clarity. At a minimum, we think it would be appropriate to include in the clause a cautionary note warning bidders that the insertion of an amount greater than $50 in the "Specific Minimum" blank may result in rejection of the bid as nonresponsive. However, we do not believe the solicitation can be regarded as fundamentally defective. We note that in the present case only three of 20 bids were found nonresponsive for this reason. *Cf.* 52 Comp. Gen. 842 (1973).

GSA also believes that, for the following reasons, the contracting officer acted properly in rejecting the Page and Alco bids and in declining to waive the insertions of $100 and $500 as minor informalities or to allow the bidders to correct their bids:

> * * * [T]he Government clearly has requirements within the $50.00 to $100.00 range. The $50.00 minimum order limitation is included in the specification for the purpose of covering a specific need, and, as such, is a material and essential requirement of the solicitation. In this regard, your Office has clearly stated that the acceptance of a bid in which conditions are incorporated is manifestly unfair to those bidders who have not similarly qualified their bids. 40 Comp. Gen. 668 (1961).
>
> * * * * * * *
>
> Our regional contracting officer has advised that within the past year, nine Air Force orders were placed for less than $100.00 * * *. It must be noted that these figures do not include orders from other Federal agencies which are the main users of low value repair service. Had the contracting officer

waived the minimum order limitation qualification, he would not only have left a number of potential orders (under $500.00) without coverage, but he would also have prejudiced other bidders who had submitted offers based on the contingency that they might have to undertake less profitable job assignments. * * *

The responsiveness of a bid must be judged from the bid itself and without the benefit of subsequent explanations by the bidder as to what it intended. 51 Comp. Gen. 352, 355 (1971); 50 *id.* 302 (1970). From examination of the Alco and Page bids, it cannot be said that the insertions of $500 and $100 were meaningless defects. In our view it is reasonable to conclude that a bidder which inserted $500 or $100 would not be bound to accept orders in lesser amounts.

As GSA states, the defects clearly pertain to a material provision of the invitation. Moreover, we do not believe their significance as to price, quantity, quality, or delivery can be determined with certainty to be trivial or negligible. Therefore, the contracting officer acted properly in refusing to treat the defects as immaterial or inconsequential and in declining to allow correction or waiver under FPR 1-2.405.

In its letter dated March 27, 1974, Space A.G.E. raises a final point for our consideration. The protester states it was found to be nonresponsible by the contracting officer due to inadequate financial capability and lack of specialized test equipment. The matter was referred to the Small Business Administration (SBA), which declined to issue a certificate of competency. Essentially, Space A.G.E. does not object to these determinations. However, it points out that it might have been considered responsible to perform some amount of work less than the total of 6,920 hours direct labor capacity stated in its bid. In view of the progressive awards made in service area 10, Space A.G.E. questions why it cannot be determined responsible for something less than the full capacity stated in its bid, and why the contracting officer could not reconsider its responsibility on this basis or refer its case back to SBA. In this regard, Space A.G.E. states that according to its information, GSA has not awarded contracts to fully cover the estimated requirements in the San Antonio area. GSA has indicated to our Office that progressive awards were made in service area 10 for equipment groups "H" through "N;" the present record does not indicate the extent, if any, to which the Government's estimated requirements were not fully contracted for.

It is apparent that the progressive awards procedure set forth in amendment No. 2, discussed *supra*, contemplated that the low responsive, responsible bidder would be determined for each equipment group, and that if its direct labor capacity was insufficient to exhaust the Government's requirements, recourse would be had to the subsequent responsive, responsible bidders, in order of ascending price, to the extent necessary. Space A.G.E., as a nonresponsible prospective

contractor, was properly excluded from consideration for an award under this procedure. In addition, it appears that the progressive awards procedure might not be sufficient to satisfy the Government's estimated requirements in all instances, because the responsive, responsible bidders may not have offered enough labor capacity to meet the Government's needs. The question, then, is whether the solicitation would permit the agency, after making awards in accordance with the progressive procedure, to reconsider the responsibility of a bidder for the award of a contract involving a lesser amount of labor hours than specified in its bid and, if such bidder is found to be responsible on that basis, make an award for the lesser amount.

In this regard, Standard Form 33A, March 1969 edition, which was incorporated by reference in the IFB, provides in paragraph 10(c):

> The Government may accept any item or group of items of any offer, unless the offeror qualifies his offer by specific limitations. UNLESS OTHERWISE PROVIDED IN THE SCHEDULE, OFFERS MAY BE SUBMITTED FOR ANY QUANTITIES LESS THAN THOSE SPECIFIED; AND THE GOVERNMENT RESERVES THE RIGHT TO MAKE AN AWARD ON ANY ITEM FOR A QUANTITY LESS THAN THE QUANTITY OFFERED AT THE UNIT PRICES OFFERED UNLESS THE OFFEROR SPECIFIES OTHERWISE IN HIS OFFER.

In view of the foregoing, we believe that, after complying with the progressive awards procedure set forth in amendment No. 2, GSA could, at its option, have reconsidered Space A.G.E.'s responsibility for the award of a contract in a lesser amount of hours than was specified in the bid, provided that Space A.G.E.'s bid was not otherwise qualified. *Cf.* 49 Comp. Gen. 499 (1970).

[B–181854]

Debt Collections—Waiver—Military Personnel—Allotment—Class S

An erroneous repayment of a Uniformed Services Savings Deposit Program deposit plus interest which arose out of an erroneous allotment of pay resulting in the member's indebtedness may be considered a claim "arising out of an erroneous payment of any pay" within the meaning of 10 U.S.C. 2774(a) and may be considered for waiver.

Debt Collections—Waiver—Statutes of Limitation

A "Pay and Allowance Inquiry" form (on which the date was altered) prepared by the Army Finance Center and sent to the member's disbursing officer inquiring as to the erroneous payment but upon which no action was taken by the Army for over three years to notify the member or collect the debt may not be considered evidence that as of the original date of such form it was definitely determined by an appropriate official that an erroneous payment had been made so as to preclude the member's request for waiver from consideration as not being timely filed within the three-year period provided by 10 U.S.C. 2774(b)(2).

Debt Collections—Waiver—Military Personnel—Effect of Member's Fault

Although the Army administrative report recommended against waiver of the member's debt because he stated at the time of his separation from the service he believed he had received an overpayment, the Army does not refute the member's statement that he alerted the Army to a possible overpayment by so indicating on his "out-processing" financial papers, and since there is no evidence of fault on the part of the member, the claim is waived under 10 U.S.C. 2774.

In the matter of a waiver of indebtedness, August 20, 1974:

This action is in response to letter dated June 17, 1974, from First Lieutenant William L. Black, USA, 285–40–9635, appealing the determination of the General Accounting Office, Transportation and Claims Division, which by letter dated May 6, 1974, advised the United States Army Finance Support Agency that the claim of the United States against Lieutenant Black for $302.50 is precluded from waiver under 10 U.S. Code 2774.

From the record, the facts in the matter appear to be as follows. Lieutenant Black, while serving on active duty in the Army, made a cash deposit of $300 in the Uniformed Services Savings Deposit Program on October 9, 1969. On September 4, 1969, he authorized a class "S" allotment from his pay of $300 per month, effective October 1969, to be deposited in the Uniformed Services Savings Deposit Program. On June 22, 1970, Lieutenant Black signed an allotment form directing that the class "S" allotment be discontinued as of the end of June 1970.

Deductions for the class "S" allotment were made from Lieutenant Black's pay account for the 9-month period of October 1969 through June 1970, for a total of $2,700. Due to delayed processing of the form directing discontinuance of the allotment, the Army erroneously made an additional deposit of $300 for July 1970 to Lieutenant Black's Uniformed Services Savings Deposit Program account, which deposit was not deducted from his pay. Before that erroneous deposit could be withdrawn, repayment of Lieutenant Black's savings account deposits was made to him by check dated August 3, 1970, for $3,468.59, which repayment represented deposits of $3,300, plus accrued interest of $168.59, when he should have received $3,000 in deposits plus accrued interest of $166.09, for a total of $3,166.09. Therefore Lieutenant Black received an overpayment of $300 in deposits and $2.50 of accrued interest for a total of $302.50.

Effective August 27, 1970, Lieutenant Black was relieved from active duty, but the $302.50 was not collected from his pay account upon separation.

The Army administrative report indicates that the error was first discovered on or about August 13, 1970, when a United States Army

Finance Center Pay and Allowance Inquiry form, requesting a charge of $302.50 against Lieutenant Black's pay account, was forwarded to the Finance and Accounting Officer, Fort Buckner, APO San Francisco. Since Lieutenant Black left Fort Buckner on August 17, 1970, that document was not posted to his pay account. The Army took no further action to notify Lieutenant Black of his indebtedness until December 17, 1973 (about 3 years and 4 months after the Pay and Allowance Inquiry was issued), when a letter requesting repayment was mailed to him.

By a communication dated January 5, 1974, to the U.S. Army Finance Support Agency, Lieutenant Black responded to the request for repayment stating that upon separation from the service he had indicated on his "out-processing financial papers" that he believed he had been overpaid $300 plus interest in the savings plan. He also indicated that in anticipation of some contact from the Army regarding the matter, he maintained a balance in excess of $300 (apparently in a bank account) for a period exceeding 6 months after separation. He further stated that when no contact with the Army was forthcoming, he spent the money. In addition, Lieutenant Black requested relief from accountability for the debt on the grounds that it is the result of an error completely attributable to the Government, that he took all reasonable action to correct that error, and that an unreasonable period of time had passed to locate the error.

The Army forwarded the request for waiver to the Transportation and Claims Division of the General Accounting Office as a doubtful matter since Lieutenant Black stated that he was aware of the erroneous payment prior to the date of his release from active duty. Doubt was also expressed as to whether an erroneous repayment of a deposit and interest on such deposit from the Uniformed Services Savings Deposit Program may be included in the definition of pay and allowances as used in the Standards for Waiver (4 C.F.R. 91, *et seq.*) promulgated pursuant to 10 U.S.C. 2774. The Army recommended that in these circumstances, waiver be disallowed.

The Transportation and Claims Division determined that the debt was precluded from consideration for waiver because it apparently was discovered on or about August 13, 1970, and Lieutenant Black's request for waiver was not received by the Army until January 1974, over 3 years after such discovery date.

Under the provisions of 10 U.S.C. 2774(a) the Comptroller General or the Secretary concerned, as the case may be, may waive a claim of the United States against a person "arising out of an erroneous payment of any pay or allowances, other than travel and transportation allowances," under certain conditions. In this case while the erroneous

payment was made as a repayment of a savings deposit plus interest, it resulted from an erroneous allotment of the member's pay to the savings deposit program, an allotment which was then not deducted from his pay account. Thus, the erroneous payment here involved is one "arising out of" an erroneous payment of pay within the meaning of 10 U.S.C. 2774(a) and the Standards for Waiver.

Concerning the matter of whether Lieutenant Black's request for waiver was received by the Army within the statutory 3-year period, 10 U.S.C. 2774(b)(2) provides in part that the Comptroller General or the Secretary concerned, as the case may be, may not exercise his authority under section 2774 to waive any claim if application for waiver is received in his office after the expiration of 3 years immediately following the date on which the erroneous payment of pay or allowances "was discovered." Such period must be considered as beginning to run from the date the erroneous payment was discovered by the administrative office. That is, from the date it is first definitely determined by an appropriate official that an erroneous payment had been made. The date of notice to the member is not relevant in fixing such date. *See* B–172885, May 15, 1973.

In determining such date of discovery in this case the Army and the Transportation and Claims Division apparently relied upon the "Pay and Allowance Inquiry" form issued as a "charge inquiry" by the Army Finance Center to the Finance and Accounting Officer, Fort Buckner, authorizing a charge of $302.50 against Lieutenant Black's pay account for nondeduction of the July 1970 class "S" allotment. That form appears to have been originally dated August 13, 1970; however, that date has been stricken through and what appear to be several other illegible dates entered. Also, the "inquiry" initiated by that form apparently required some degree of verification and action by the local finance officer to whom it was addressed. Apparently no action was taken pursuant to the inquiry until December 1973 when the Army Finance Center letter advising Lieutenant Black of the indebtedness was sent.

Therefore, in these circumstances, the original date of the Pay and Allowance Inquiry form (August 13, 1970) does not appear to be the date it was "definitely determined by an appropriate official that an erroneous payment had been made." Instead, it appears that such definite determination was probably made sometime in December 1973, prior to the letter being sent to Lieutenant Black notifying him of the debt. Since Lieutenant Black's request for waiver was received by the Army in January 1974, it was received within the 3-year period provided by 10 U.S.C. 2774(b)(2), and it may be considered for waiver.

A claim may be waived under 10 U.S.C. 2774 and the Standards for Waiver if its collection would be against equity and good conscience

and not in the best interests of the United States, and there exists no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the member or any other person having an interest in obtaining the waiver.

In this case while the Army recommended against waiver apparently because the member indicated that at the time of his separation from the service he believed he had received an overpayment from the savings plan, the Army administrative report states that there is no indication of fraud, misrepresentation or lack of good faith on the member's part. The report does not refute the member's statement to the effect that he notified the Army by indicating on his "out-processing" financial papers that he believed he had been overpaid. Also the administrative report states that the erroneous payment was made as a result of the Army's error and Lieutenant Black was not advised by the Army of the indebtedness until over 3 years after he was released from active duty.

In these circumstances it now appears that collection of the claim would be against equity and good conscience and not in the best interest of the United States. Accordingly, under the authority of 10 U.S.C. 2774 the claim of the United States against Lieutenant William L. Black in the amount of $302.50 is hereby waived.

The Department of the Army should advise Lieutenant Black of this action and his right under 10 U.S.C. 2774(c) to file claim within 2 years of the date of waiver for refund of any amount of the waived claim collected from him or refunded by him.

[B–180271]

Claims—Assignments—Contracts—Assignee's Right to Payment—Without Government Set-Off

Where assignee bank, acting in its own capacity, makes loan to contractor and in return receives assignment of contractor's claim against Government on specific contract and pledge of future receivables, but is not fully repaid the amount of its loan out of funds of contract and/or receivables of contractor, if further funds become due under contract, assignee is entitled to amount of such fund which will cause loan to be fully repaid without setoff by Government.

Claims—Assignments—Contracts—Validity of Assignment—Assignee's Right to Payment

Fact that third party repaid assignee bank (a principal in loan to contractor) the sum outstanding on loan made by bank to Government contractor, who in turn assigned bank its Government contract and also pledged all future receivables, is not determinative of Government's obligation to pay assignee-principal or that bank's rights to receive additional monies, as Government is stranger to transactions between assignee-principal and third party.

Claims—Assignments—Contracts—Third Party Rights

Third party dealing with assignee bank under assignment of claim can obtain same but has no greater rights than assignee bank had.

Claims—Assignments—Contracts—Validity of Assignment—Assignee's Loan Not for Contract Performance

Bank, not assignee of claim under Assignment of Claims Act, which loaned money to contractor after subject contract was completed is not entitled to protection of the no-setoff provision of Assignment of Claims Act as beneficiary of trust arrangement with assignee bank which acted in agency and/or trustee capacity since bank did not provide any financial assistance which facilitated performance of this particular contract.

In the matter of Trilon Research Corporation—request for an advance decision, August 22, 1974:

STATEMENT OF FACTS

Trilon Research Corporation (Trilon) was awarded contract N00156-67-C-1620, effective December 28, 1966, by the Naval Air Engineering Center, Philadelphia. The contract was a firm fixed-price supply contract in the amount of $87,318.46 for furnishing and updating operation manuals. The first progress payment under the contract ($46,527.43) was made to Trilon on April 19, 1967.

In May 1967, Trilon submitted a notice of assignment of the remaining payments under the contract to the Franklin National Bank (Franklin), New York, New York. Franklin and the Small Business Administration (SBA) had made a so-called joint loan to Trilon of $250,000. The loan was secured by Trilon's pledge of all present and future receivables. The risk of loss under the loan was equally divided between Franklin and SBA but repayment of the first $125,000 was at Franklin's risk and the last half of the loan was at SBA's.

The balance of the original contract, $40,791.03, was thereafter paid to Franklin ($4,155.08 on August 10, 1967, and $36,635.95 on November 1, 1968).

In September or October 1969, the First National City Bank commenced making loans to Trilon. The initial loan was in excess of $250,000. First National City requested that both SBA and Franklin subordinate their respective security interests in all receivables of Trilon including Government contracts to the interest of First National City Bank. Indeed, by a letter dated October 15, 1969, SBA agreed to "* * * the release of all accounts receivable, inventory and contracts (including Government contracts) all whether now owned or hereafter acquired, assigned, pledged and/or set over to * * * [Franklin National Bank] by Trilon Research Corp."

In September of 1971, Franklin called in its loans and threatened to call the balance of the SBA loan. Trilon attempted to forestall these actions by making payment to Franklin with a check for $45,000 drawn on First National City. However, First National City indicates that in view of Trilon's already heavy indebtedness to it, the check would not have been honored but rather the bank would have exercised its right to set off debts owing it against the assets of Trilon in its possession.

On September 30, 1971, an arrangement was reached between Franklin and First National City whereby Franklin agreed to transfer all of its security interest in Trilon's receivables to First National City. In exchange First National City agreed to pay Franklin $52,812, the unpaid balance of Franklin's sole risk loans, and reduced the outstanding balance on the Franklin/SBA $250,000 loan to less than $125,000, thus relieving Franklin of any further risk thereon. These payments were made by (1) releasing Trilon's $45,000 check payable to Franklin, drawn on and also subject to the first lien of First National City, and (2) by direct payment to Franklin of $7,812 to pay off Franklin's risk portion of the Franklin/SBA loan arrangement. Franklin, in accordance with its contract, however, continued as agent for SBA, which advises that with respect to the instant contract it is in the position of a mere unsecured creditor.

Subsequent to the payment to Franklin, First National City forwarded a notice of assignment of contract -1620 to the agency. However, since no release of Trilon's prior assignment to Franklin had ever been received, the agency never acknowledged receipt of this document.

In fact, on the suggestion of SBA, Franklin declined to release the prior assignment. SBA apparently desired to maintain Franklin as disbursing agent for all parties having any continuing interest (First National City and SBA).

Subsequent to the First National City loan, Trilon asserted a claim under contract -1620 for $126,418.24 based upon an alleged constructive change and also defective Government-furnished property. The matter was settled prior to hearing by the Armed Services Board of Contract Appeals. The amount of the settlement between Trilon and the Navy was $62,181.37. This amount was incorporated into the contract via modification No. P00004 dated April 27, 1973.

However, as a result of another contract, DAAB05-69-C-1028, on which Trilon was defaulted as of December 29, 1972, that firm presently owes the United States Government $213,211.49 for unliquidated progress payments. The Internal Revenue Service by its Notice of Levy

dated August 11, 1972, further indicates that Trilon is also $157,312.73 in arrears in its taxes.

DISCUSSION OF LAW

First National City asserts that the Government may not assert any right of setoff against the $62,181.37 claims settlement for the following reason:

THE ASSIGNMENT OF CLAIMS ACT OF 1940, AS AMENDED, EXPRESSLY PROVIDES FOR SUCH AGENCY PAYMENTS. THE STATUTE IS EXPLICIT. THE DEFENSE SUPPLY AGENCY SEEMS TO BE ASSERTING AS ITS ONLY REASON FOR REFUSAL TO PAY, THE FACT THAT NO MONEY IS *NOW* DUE TO FRANKLIN NATIONAL BANK FROM TRILON. A SIMILAR CONTENTION HAS BEEN REPEATEDLY REJECTED BY THE COURTS.

(First National City's second contention relative to Government waiver of its setoff right was withdrawn on February 15, 1974.)

The embodiment of the Assignment of Claims Act, incorporated into the contract pursuant to paragraph 7–103.8 of the Armed Services Procurement Regulation (ASPR), provides:

ASSIGNMENT OF CLAIMS (FEB. 1962)

(a) Pursuant to the provisions of the Assignment of Claims Act of 1940, as amended (31 U.S.C. 203, 41 U.S.C. 15), if this contract provides for payments aggregating $1,000 or more, claims for monies due or to become due the Contractor from the Government under this contract may be assigned to a bank, trust company, or other financing institution, including any Federal lending agency, *and may thereafter be further assigned and reassigned to any such institution.* Any such assignment or reassignment shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any *such assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in such financing. Unless otherwise provided in this contract, payments to an assignee of any monies due or to become due under this contract shall not, to the extent provided in said Act, as amended, be subject to reduction or set-off.* [Italic supplied.]

ASPR 7–103.8 also provides that:

* * * Pursuant to the provisions of the Assignment of Claims Act of 1940, as amended by Public Law 30, 82d Congress, the effect of the last sentence of paragraph (a) of the foregoing clause is that payments to be made to an assignee after 15 May 1951 of any monies due or to become due under the contract shall not be subject to reduction or set-off for any liability of any nature of the contractor to the Government which arises independently of the contract, or for any liability of the contractor on account of (i) renegotiation under any reneogtiation statute or under any statutory renegotiation clause in the contract, (ii) fines, (iii) penalties (which term does not include amounts which may be collected or withheld from the contractor in accordance with or for failure to comply with the terms of the contract), or (iv) taxes, Social Security contributions, or the withholding or nonwithholding of taxes or Social Security contributions, whether arising from or independently of the contract. * * *

The primary issues raised in the instant case are, therefore, whether First National City Bank either enjoys the status of a beneficiary of an acceptable trust arrangement or has some other relationship with

the assignee which would under the regulation preclude the Government from setting off a debt due it from Trilon.

First National City argues that it is the beneficiary of a trust arrangement whereby Franklin is acting as agent or trustee both for SBA and First National City. Indeed, it should be noted that First National City admits that Franklin has not released the assignment. Therefore, in concert with ASPR 7-103.8 the second assignment by Trilon could not have been made absent a release of the initial assignment.

As noted above, under the loan arrangement with Trilon, Franklin was the principal or creditor on the first $125,000 but was merely an agent and/or trustee for SBA on the remaining $125,000. It was in these joint capacities that it received Trilon's assignment.

As was indicated in *Beaconwear Clothing Company* v. *United States*, 355 F. 2d 583; 174 Ct. Cl. 40 (1966), once the outstanding indebtedness has been repaid in full from the proceeds due on the contract (and where applicable, other receivables of the contractor which it had also pledged as security for the loan), the principal making the loan has no further rights or financial interest. The court stated at page 590 that:

> * * * Generally, an assignment made as collateral security for a debt gives the assignee only a qualified interest in the assigned chose, commensurate with the debt or liabilities secured, even though the assignment appears to be absolute on its face. * * *

See *Peterman Lumber Co.* v. *Adams*, 128 F. Supp. 6 (W.D. Ark. 1955), 49 Comp. Gen. 44, 45 (1969), 37 *id.* 9 (1957). Therefore, since Franklin, in its capacity as principal, had not been fully paid from the proceeds of the contract and/or the receivables of Trilon (as noted above Franklin was short of full payment by $7,812), we feel that funds arising out of the contract should continue to be paid it as original assignee, without setoff, until Franklin's original loan of $125,000 is fully paid.

In this regard, the fact that Franklin had already been paid out by a third party, First National City, is not determinative of Franklin's rights or the Government's obligation under the assignment for the Government is a stranger to any contractual agreements between the assignee-principal (Franklin) and any third party. We do note, however, that since Franklin was paid $7,812 by First National City, it might be contractually bound to turn over this same sum to First National City upon payment by the Government. First National City may, in essence, have obtained for its $7,812 the same but no greater rights than Franklin itself possessed under the Trilon assignment—essentially the right to payment of nearly $8,000, without any setoff. See *Berkeley* v. *United States*, 276 F. 2d 9; 149 Ct. Cl. 549 (1960),

and *United States* v. *Munsey Trust Co.*, 332 U.S. 234 (1949); *see*, *also*, B-171552, April 27, 1971.

Accordingly, the sum of $7,812 should be paid directly to Franklin National Bank as assignee-principal.

In support of the contention that First National City is entitled to the balance of the $62,181.37 in question (or $54,369.37), counsel for the bank cites the cases of *Continental Bank and Trust Company* v. *United States*, 416 F. 2d 1296; 189 Ct. Cl. 99 (1970) and *Chelsea Factors, Inc.* v. *United States*, 181 F. Supp. 685; 149 Ct. Cl. 202 (1960). In *Continental*, a Government contractor assigned Continental Bank and Trust Company (Continental) all proceeds on a contract with the Army. Continental, in turn, advanced certain monies to the contractor for the performance of the contract. This initial sum was repaid. However, additional loans were made by Continental to the contractor and Continental claimed that a balance of $43,848.41 was still owed it on these loans secured by the assignment.

The contract between the Army and the contractor was terminated on or about November 15, 1965, at which time the sum of $100,141.05 was due the contractor under the terms of the convenience termination. Continental asserted a claim for $43,848.41 (the amount still owed it) of this total sum. However, at the time the contractor was adjudicated bankrupt (October 6, 1966), the contractor was indebted to the Government in the sum of approximately $332,602.26 under other contracts between the contractor and the Government.

The Government conceded that funds were advanced by Continental "*for performance of said Government contract.*" However, the Government argued that since the original loan between the contractor and Continental secured by the assignment had been repaid, the Government may set off the $43,848.41 claimed by Continental, as the no setoff provision was applicable only to that portion of the original loan still outstanding. Since no such portion existed, Continental could not invoke the protection of the no setoff clause.

The Court of Claims, in holding that the no setoff provision was applicable to the amount claimed, stated at page 1302 that:

> In apparent recognition of the lack of support for its position in the decisional law, defendant resorts to the contention that the set-off is permissible in this instance, since under the common law of assigments, plaintiff's interest in the assigned collateral ceased when the loan made for the performance of the contract was repaid. 6 C.J.S. Assignments § 93. This argument ignores the modern trend away from tying particular loans to particular security. Furthermore, the adoption of such a rule for the statutory assignment involved here would impair the familiar revolving credit financing device to which Congress referred when deleting the previously discussed set-off and reduction limitation provision from the 1951 amendments to the Act. As this court noted in *Chelsea Factors, Inc., supra*, 181 F. Supp. 690, 149 Ct. Cl. at 210:
>
> "The 1940 Amendment to the Assignment of Claims Act was intended to facilitate the financing of Government contracts by private capital in the

way in which private capital normally operates in financing the country's economy. * * *" [Underscoring deleted.]

Chelsea Factors involved the claim of a party (Chelsea) which loaned money to the Government contractor which in turn assigned the proceeds of its contract to a bank with which Chelsea had established a financial relationship regarding this matter. The bank, the assignee of record, was to receive all monies due under the assignment and, after application of Chelsea's indebtedness to the bank, pay over the remaining funds to Chelsea.

The Government, while noting that the statute permits an assignment to one and only one financing institution but does permit the assignment to one financing institution as agent or trustee for two or more parties, argues that any notice given by the single assignee-agent to the Government must advise of any arrangement which the bank has with other parties to the transaction. The Court of Claims, however, rejected this reasoning, stating instead that irrespective of any failure to indicate any agency-principal relationship, the rights of Chelsea, a party clearly participating in the financing of this Government contract, were preserved.[1]

The facts of the instant case are, however, distinguishable in that here the beneficiary-principal did not participate in the financing of this Government contract.

The case of *Coleman, et al.* v. *United States*, 158 Ct. Cl. 490 (1962), cited in *Chattanooga*, indicates that where a lending institute advanced money to a Government contractor and in turn receives an assignment, without knowledge that the funds would not be used to finance the performance of the contract, the use to which funds are put should not defeat the assignment. However, we feel that a loan made after the contract has been performed can and does in and of itself constitute irrefutable constructive knowledge to the lender that the money lent will not be applied to performance of the contract. *See* 49 Comp. Gen., *supra*. Specifically, First National City did not make any loans to Trilon until September or October of 1969, while performance on Trilon's contract with DSA had been completed on October 7, 1968. It seems improbable, therefore, that unlike the situation in *Chelsea* and *Continental* any of the funds advanced by First National City were utilized for the performance of the instant contract.

In 49 Comp. Gen., *supra*, our Office held that the no setoff provision did not preclude setoff against an assignee who had loaned the con-

[1] In *Fine Fashions Inc.* v. *United States*, 328 F. 2d 419 (2nd Cir., 1964) the court in commenting on *Chelsea* stated at page 423:

In that case a bank, which had received an assignment of the proceeds of a Government contract, was found to be a trustee for a factoring corporation, which had also participated in financing the Government contract.

tractor monies which in view of the time relationship to contract performance did not appear to provide financing for the contract the proceeds of which had been assigned.

Similar precedent can be found in the unreported opinion of the United States District Court for the Eastern District of Tennessee, *Chattanooga Wheelbarrow Co.* v. *United States*, Civil Action No. 4755, January 26, 1967; and in B–175670, May 25, 1972.

The court in *Chattanooga* stated at page 4 that:

> * * * There is no showing of any financial assistance rendered by the Bank which facilitated the performance by Traders Distributing Company of this particular contract with the Government. * * *

The Court of Claims in *Continental* presented a fairly concise portrait of the legislative history of the Assignment of Claims Act where it cited the comments of Senator Barkley, as follows:

> "[T]he amendment merely provides that when a contractor, in order to obtain money so that he may perform *his contract* with the Government under the defense program, assigns *his contract* to a bank or trust company in order to get money with which to proceed with the work, it shall not be permissible to offset against the claim or contract later an indebtedness which the contractor may owe the Government on account of some other contract or some other situation.* * * 86 Cong. Rec. 12303 (1940) * * * [Underscoring deleted.]" [Italic supplied.]

We take these cases, therefore, to affirm a policy of encouraging the financing of Government contracts by not limiting to the initial amount loaned the no setoff protection of parties which lend a contractor several sums for the performance of a contract. However, neither *Continental*, *Chelsea* nor *Coleman* stand for the proposition that parties which lend money to a firm having both completed (from the contractor's point of view) and on-going contracts are protected against setoff under the completed contract.

First National City loaned Trilon $250,000 believing that the subject contract was fully performed. It therefore quite reasonably anticipated that no further funds would flow to Trilon from this contract. Yet, when funds did become available the bank asserted a claim against them.

While it is true that due to the priorities established by the Uniform Commercial Code of New York, First National City has first priority to these funds, the bank's entitlement is secondary to the setoff rights of the Federal Government. And, since we conclude that the Assignment of Claims Act does not extend no setoff protection to First National City Bank in this instance, the Government may properly exercise its right of setoff to the $54,369.37 in question.

As noted above, however, the sum of $7,812 is not subject to setoff and should therefore be paid in accordance with the provisions of the assignment.

[B-181414]

Bids—Discarding All Bids—Reinstatement—Cancellation of Invitation Unjustfied

Reinstatement of canceled invitation is proper course of action when to do so is not prejudicial to any bidder, and no cogent or compelling reason exists to have warranted initial cancellation. Moreover, reinstatement is favored when needs of Government can be served under original invitation for bids.

In the matter of Spickard Enterprises, Inc.; Cottrell Engineering Corporation, August 26, 1974:

On March 1, 1974, invitation for bids (IFB) DACW31-74-B-0053 was issued by the Corps of Engineers, United States Army. The IFB was a 100-percent small business set-aside for dredging work to be performed in the Tred Avon River, Talbot County, Maryland. Three separate schedules were set forth, providing for the dredging of varying amounts of yardage with Schedule "A," the least amount; Schedule "B," the next least amount; and Schedule "C," the greatest amount. The IFB provided that award would be made to the low bidder on that schedule offering the maximum amount of dredging within the limit of funds available to the Government.

Four bids were received in a timely fashion and opened on April 3, 1974. With the exception of the low bidder (East Coast Dredging, Inc.—$435,420 for Schedule "B"), all bids received were determined by the contracting officer to be beyond the amount of funds available for the work. The bid submitted by Spickard Enterprises, Inc. (Spickard) offered the lowest price for Schedule "A" at $472,320 and the second lowest price for Schedule "B" at $553,660. Cottrell Engineering Corporation (Cottrell) submitted the low bid of $690,400 for Schedule "C."

Both Spickard and Cottrell, by telegrams of April 5, 1974, protested the small business status of East Coast Dredging, Inc. (East Coast). By letter dated April 16, 1974, the Small Business Administration advised that East Coast was other than a small business concern for Government procurements having a size standard of $5,000,000.

Therefore, since the lowest bid received was from an ineligible bidder and since all other bids exceeded the amount of funds believed to have been available at the District level, the contracting officer made the determination to reject all bids and cancel the invitation. However, the letter dated April 30, 1974, conveying this determination erroneously stated that all bids were being rejected because they were at an unreasonable price. The actual reason for the rejections was that it was thought that none of the eligible bids received were within the funding limitations for this project.

The project in question was subsequently readvertised on May 16, 1974, with the small business set-aside removed.

The above-mentioned chain of events resulted in protests being filed with our Office by both Spickard and Cottrell. Spickard contends that the original IFB was improperly canceled, as sufficient funds were available to have allowed an award to its firm. Cottrell contends that (1) a resolicitation is prejudicial to all bidders as prices have been disclosed, (2) the contracting officer acted without proper authority in removing the small business set-asides in the resolicitation, and (3) award should be made to it under Schedule "C" of the initial IFB, such award being in the best interests of the Government.

The Department of the Army, after a thorough review of the entire procurement history, has taken the following position:

> The determination of the Contracting Officer that the bids of the subject protestors were in excess of funds available to accomplish the work, although made in good faith and technically correct at the time so made, did not take into account the authority of the Chief of Engineers to transfer funds amongst projects. In this case, the amount available at the start of the fiscal year was less than $500,000 and accordingly the Chief of Engineers is authorized to transfer up to 25 percent of the amount available for the project at the beginning of the fiscal year (Paragraph 4, ER 11-2-102). Of this 25 percent, the Chief of Engineers has delegated authority to District Engineers to transfer from one project to another within the District up to 10 percent of the amount available for the project at the beginning of the fiscal year (Paragraph 10, Chapter 3, ER 11-2-101). In point of fact, the transfer authority of District Engineer (10 percent) and the Chief of Engineers (15 percent) has been accomplished subsequent to the cancellation of subject IFB (in contemplation of having sufficient funds available for the readvertisement) such that the Contracting Officer currently has available the sum of $484,000.00 for this project. On this basis the bid of Spickard (Schedule A, $472,000.00) is now within the funds available for accomplishment of the work. The bid of Cottrell on Schedules A, B and C still remains in excess of available funds.
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> In view of the above circumstances, it is the opinion of this office that the protest of Spickard should be upheld on the basis that due to additional funds being made available to the project, its bid is now within the funding limitation set forth in subject IFB and is otherwise the lowest responsive bid. It is also the opinion of this office that the Contracting Officer is authorized to reinstate subject IFB in order to make award thereunder to Spickard. Such action is considered to be in the best interest of the Government.

Therefore, the primary issue for resolution by our Office is whether reinstatement of the canceled IFB would be appropriate.

Our Office has sanctioned the reinstatement of a canceled IFB in the past when to do so would work no prejudice on the rights of others and would, in fact, promote the integrity of the public bidding system. 39 Comp. Gen. 834 (1960). The circumstances of this procurement appear to lend themselves to such a reinstatement.

Initially, we must recognize that our Office has previously acquiesced in the cancellation of solicitations, but only when a "cogent or compelling reason" to do so existed. In actuality, the original IFB was canceled as a result of an erroneous, albeit honest, determination. From our point of view, no "cogent or compelling reason" presently exists

to allow the cancellation to stand. As was stated in the *Massman Construction Co.* v. *United States*, 102 Ct. Cl. 699, 719 (1945):

> To have a set of bids discarded after they are opened and each bidder has learned his competitor's price is a serious matter, and it should not be permitted except for cogent reasons.

The rejection of all bids after they have been opened tends to discourage competition because it results in making all bids public without award, which is contrary to the interests of the low bidder, and because rejection of all bids means that bidders have extended manpower and money in preparation of their bids without the possibility of acceptance. 52 Comp. Gen. 285 (1972). As a general proposition, it is our view that the cancellation after bids are opened is inappropriate when an otherwise proper award under a solicitation would serve the actual needs of the Government. 53 Comp. Gen. 586 (1974); 49 *id.* 211 (1969); 48 *id.* 731 (1969).

In the circumstances, reinstatement of IFB DACW31-74-B-0053 and award on the basis of the low bid would be proper.

In view of our conclusions, the requests of the Army are granted, and the protest of Spickard is sustained. Cottrell's first contention, that a resolicitation would be prejudicial, is upheld; and its second contention, that the small business set-aside was improperly eliminated from the resolicitation, is now moot.

The remaining contention of Cottrell, that award to it under Schedule "C" would be in the best interests of the Government, is without merit. While it may be correct that certain costs will be increased as a result of an award under Schedule "A" as opposed to Schedule "C," the specific language of the solicitation is controlling. On page 4 of the IFB, "NOTES TO BIDDERS," it is clearly indicated that award will be made to the lowest bidder on the greatest amount of work, but only if the bid is *within the funds available to the Government.* [Italic supplied.] As Cottrell's bid on Schedule "C" and Schedule "B" exceeds the amount of funds available, award to it on either schedule is precluded by the IFB. Cottrell's bid on Schedule "A," being greater than Spickard's, is not properly for consideration.

[B-180813]

Leaves of Absence—Court—Jury Duty—Saturdays and Sundays—Inclusion of Premium Pay in Compensation Payable

Because it would be a hardship on Federal Aviation Administration (FAA) employees called for weekday jury duty whose tours of duty include work on Saturdays or Sundays, or both, to require them to work their regularly scheduled weekend days in addition to serving on juries on 5 weekdays, the FAA may establish a policy to permit those employees to be absent on weekends without charge to annual leave and with payment of premium pay normally received by them for work on Saturdays and Sundays.

In the matter of jury duty for employees whose workweek includes weekends, August 27, 1974:

The Federal Aviation Administration (FAA) seeks an opinion regarding the propriety of establishing a policy which would permit payment of premium pay for certain prescheduled weekend days of duty when FAA employees are called for jury duty during weekdays. The question arises because of the unusual employment conditions within the FAA. In order to assure aviation safety the FAA must operate many of its facilities continually on a 7-day-a-week basis. These facilities include Air Route Traffic Control Centers, Airport Traffic Control Towers, Flight Service Station, and Airway Facilities Sectors. Because of the 7-day operation of these facilities, some employees are scheduled to work on Saturday or Sunday, or both, with their regular days off occurring on weekdays. The work schedules for these employees are posted well in advance, sometimes as much as a year in advance. Nevertheless, when employees are called for jury duty, they serve only when the court is sitting, which is usually Monday through Friday. To avoid the hardship of a 6 or 7-day workweek for employees with the stated work schedules or to avoid requiring employees to take annual leave on Saturdays and Sundays and thereby lose their Sunday premium pay or night differential, the FAA proposes to change its policy concerning employees called for jury service. Under its proposal the FAA would change the previously established tours of duty for such employees to tours that most nearly coincide with the sitting of the court but would authorize payment of premium pay corresponding with the previously scheduled tours of duty. Alternatively, the FAA proposes a policy that would retain such employees on their previously scheduled tours of duty but would excuse them from weekend work without charge to leave and with premium pay for the weekend work for which they were scheduled.

Section 6322(a) of Title 5, U.S. Code (1970), as amended, provides in pertinent part:

> (a) An employee as defined by section 2105 of this title (except an individual whose pay is disbursed by the Secretary of the Senate or the Clerk of the House of Representatives) or an individual employed by the government of the District of Columbia is entitled to leave, without loss of, or reduction in, pay, leave to which he otherwise is entitled, credit for time or service, or performance of efficiency rating, during a period of absence with respect to which he is summoned, in connection with a judicial proceeding, by a court or authority responsible for the conduct of that proceeding, to serve—
>
> (1) as a juror; or
>
> * * * * * * *
>
> in the District of Columbia, a State, territory, or possession of the United States including the Commonwealth of Puerto Rico, the Canal Zone, or the Trust Territory of the Pacific Islands. * * *

The above statute, derived from the act of June 29, 1940, Chapter 446, 54 Stat. 689, states the long-standing policy of the Congress that Government employees should be permitted to perform jury service without loss of compensation or leave. It has been held that an employee is entitled to compensation for regularly scheduled working hours although he is not scheduled for actual jury service when it would impose a hardship upon him to return to his regular work. 26 Comp. Gen. 413 (1946). Also, it has been held that employees may be excused from their regularly scheduled night duties when the employees serve on jury during the day without charge to annual leave and with compensation at the night differential rate. 29 Comp. Gen. 427 (1950).

In view of the decision cited above concerning payment of night differential to employees on court leave, it is our opinion that payment of premium pay otherwise payable to the employees with scheduled tours, including days on weekends, may be made when they are on jury duty from Monday through Friday. It is also our view that 5 U.S.C. 6322 does not contemplate that an employee must render jury service for 5 days over a period of weeks and perform duties with the FAA on the remaining 2 days in order to avoid loss of compensation or leave. Nevertheless, we do not believe that it would be proper for the FAA to reschedule employees on court leave to tours of duty coinciding with the time of actual jury service and then compensate those employees for working hours different from those of the rescheduled tour of duty, because it is the established schedules on the weekends that give rise to the entitlement for premium pay. Also, employees must be compensated for regularly scheduled work hours. *Cf.* 43 Comp. Gen. 434 (1963). Therefore, should the FAA change its policy regarding the involved employees, it should establish the alternative policy of retaining its employees on their regularly scheduled tour of duty and providing court leave without charge to annual leave or loss of premium pay. Also, such new policy should provide for the crediting of jury fees covering weekdays usually not worked during which the employees are on jury duty against their pay for the substituted days of leave on weekends. Moreover, should an employee be excused from jury service on a weekday, the new policy should provide that he should work a weekend day in place of such excused jury service if no hardship is involved. 26 Comp. Gen. 413, *supra.*

[B–180881]

Quarters Allowance—Civilian Overseas Employees—Locally Hired Employees—Eligibility—Determination Erroneous

Army employee who was erroneously found entitled to living quarters allowance under subparagraph 031.12c, Standardized Regulations, when not recruited in

U.S. for prior employment with U.S. Armed Forces Institute under conditions providing for return transportation may not have initial finding reinstated on basis of Army's policy in *Stringari* grievance determination. Determination in employee's case was clearly contrary to regulation whereas initial determination which was reinstated in *Stringari* grievance involved exercise of faulty judgment in area of discretion and *Stringari* policy is applicable prospectively from date of determination.

In the matter of a living quarters allowance, August 27, 1974:

By his letter of November 30, 1973, Mr. Ronald H. Davis has appealed the denial by our Transportation and Claims Division Settlement Certificate dated May 6, 1970, of his claim for a living quarters allowance. In support of his appeal Mr. Davis makes no assertion that the determination in that Settlement Certificate as to his nonentitlement to such an allowance under the language of the applicable regulation is incorrect but relies upon the Department of the Army's determination upon the grievance of Miss Lorita A. Stringari.

Mr. Davis' claim arises in connection with his appointment as a civilian employee of the Department of Defense's School System, Frankfurt, Germany, on October 16, 1964. The record shows that he traveled to Germany at his own expense in December of 1963 and there obtained employment until August 31, 1964, under contract with the United States Armed Forces Institute. On October 16, 1964, 10 months after his arrival in Germany, Mr. Davis was appointed to a position with the Department of Defense's School System and was authorized a living quarters allowance under the authority of subsection 031.12 of the Standardized Regulations (Government Civilians, Foreign Areas). As in effect from October 13, 1963, and at the time of Mr. Davis' appointment, that subsection provided in pertinent part as follows:

031.12 *Employees Recruited Outside the United States*

Quarters allowances prescribed in Chapter 100 may be granted to employees recruited outside the United States, provided that

a. the employee's actual place of residence in the place to which the quarters allowance applies at the time of receipt thereof shall be fairly attributable to his employment by the United States Government; and

b. the employee is not a member of the household of another employee or of a member of the U.S. Armed Forces; and

c. prior to appointment, the employee was recruited in the United States, the Commonwealth of Puerto Rico, the Canal Zone, or a possession of the United States, by

(1) the United States Government, including its Armed Forces;

(2) a United States firm, organization, or interest;

(3) an international organization in which the United States Government participates; or

(4) a foreign government;

and had been in susbtantially continuous employment by such employer under conditions which provided for his return transportation to the United States, the Commonwealth of Puerto Rico, the Canal Zone, or a possession of the United States; or

d. the employee was temporarily in the foreign area for travel or formal study and immediately prior to such travel or study had resided in the United States,

the Commonwealth of Puerto Rico, the Canal Zone, or a possession of the United States; or

e. as a condition of employment by a government agency, the employee was required by that agency to move to another area, in cases specifically authorized by the head of agency.

Under the above regulation the employee must meet either the condition prescribed at subsection c, d, or e in order to be eligible for a living quarters allowance. At the time of Mr. Davis' appointment it was initially determined that he did meet the condition of subsection c. In view of that finding and upon the determination that he also met the conjunctive conditions of subsections a and b, Mr. Davis was granted a living quarters allowance until June 28, 1968, when he was notified that he was in fact ineligible to receive that allowance. This determination as to his ineligibility under subparagraph c was affirmed in the Settlement Certificate referenced above inasmuch as Mr. Davis had not been recruited in the United States for his prior position with the Armed Forces Institute and because his contract with that Institute did not provide for his return transportation. Since he clearly met neither the condition of subsection d nor of subsection e, our Transportation and Claims Division upheld the denial of his claim for a living quarters allowance.

Notwithstanding that the original determination as to his entitlement was erroneous, Mr. Davis asserts that he is eligible for a living quarters allowance on the basis solely of the original determination. Although he does not explain the particular basis for that assertion, he has forwarded copies of a number of documents pertaining to the Department of the Army's resolution of a grievance presented by Miss Lorita A. Stringari in which the Army determined that the original determination of eligibility for a living quarters allowance by the then authorized official need not be reversed where that determination was later held by a different official to be an exercise of "faulty judgment." In the Stringari case, the initial determination had been made based on a finding that at the time of her appointment Miss Stringari, a locally hired employee, was temporarily in Italy for travel or formal study—the criterion stated at subsection d quoted above. In upholding the view of the second official that the original determination reflected a faulty exercise of judgment, the Department of the Army nevertheless did not reverse that initial determination. Instead they held as follows:

4. With the circumstances of * * * presence abroad as described in the basic letter, we agree with your finding that upon * * * local hire in August 1968 the Vincenza Civilian Personnel Office exercised faulty judgment in determining her eligible to the living quarters allowance. However, it is our view * * * in the absence of any concealment or misrepresentation on the part of the employee, a living quarters allowance eligibility determination made in good faith by the command official authorized to make such determinations should not be overturned because another official months later comes to a different conclusion

on the same set of facts. Rather than taking action against the employee in such a case, it is suggested that appropriate action be taken to improve the performance of the civilian personnel staff member who was responsible for the questionable eligibility determination.
5. It is emphasized that the view in paragraph 4 above applies only to determinations falling within the authorized area of discretion of the command official. It does not apply where the command official either exceeds or violates his delegated authority.* * *

As suggested in the *Stringari* case, the determination of whether an individual's presence in the foreign area is for travel or formal study is one which, to a large degree, involves the exercise of judgment and discretion. While this Office held in B–141723, February 2, 1961, and in B–168161, May 14, 1971, that an individual whose travel to the foreign area is for the purpose of seeking employment may not be regarded as in the foreign area for travel or formal study, there are few formal guidelines for officials to follow in making such determination. Thus, the particular finding in the *Stringari* case was one on which two individuals could properly differ.

The initial determination in Mr. Davis' case is not one which merely reflects faulty judgment. It is clearly erroneous in that there was no discretion on the part of the official making that determination to find that Mr. Davis met the condition of subsection 031.12c when in fact he was not recruited for his previous position by the United States Government or any of the listed entitles under conditions which provided for his return transportation. Thus, we do not find the principle in the *Stringari* case to be applicable here. Moreover, the record indicates that the Department of the Army considers the principle expressed in the *Stringari* case to constitute the issuance of a new policy effective May 1, 1972, the date of the grievance determination, and they do not regard that policy as a basis for disturbing actions taken prior to that date.

For the foregoing reasons, the denial of Mr. Davis' claim by our Transportation and Claims Division Settlement Certificate dated May 6, 1970, is affirmed.

[B–180916]

Gratuities—Six Months' Death—Conflicting Claims—Wife *v.* Parent—Effect of Wife's Separation Agreement

When a member and his wife were separated and an agreement was executed by them prior to the time the member entered the Air Force whereby the wife waived all rights and other benefits to which she may be entitled as a result of the member's possible future military service and the member designated his mother to receive the six months' death gratuity in the event there was no surviving spouse, the mother's claim was properly disallowed because 10 U.S.C. 1447(a) provides that the surviving spouse shall be paid the gratuity and a simple waiver of an unknown future right does not afford a legal basis for payment of the gratuity due from the United States to someone other than the lawfully designated recipient.

In the matter of reconsideration of claim for six months' death gratuity, August 27, 1974:

This action is in response to an undated letter received in this Office on March 25, 1974, and prior correspondence requesting reconsideration of a settlement dated January 24, 1974, by our Transportation and Claims Division which disallowed the claim of Mrs. Emma L. Mead, mother and designated beneficiary of her late son, Airman Ellery Mead, SSAN 303-56-8909, USAF, for payment of the six months' death gratuity in the amount of $2,053.80 due upon his death on June 23, 1973.

The record indicates that the member married June Kight Mead on or about May 20, 1971, that there were no children born of the marriage and that on July 12, 1972, they signed a separation agreement which provided in part as follows:

> * * * [T]he party of the second part [June Kight Mead] acknowledges that the party of the first part [Ellery Mead] is of sound health, and potentially subject to military service, but said party of the second part with this knowledge hereby waives all rights, allotments, or other benefits connected with any possible future military service of the party of the first part.

The separation agreement was properly notarized.

The record further shows that the member entered active duty in the United States Air Force on August 9, 1972. On January 10, 1973, the member executed AF Form 246, "Record of Emergency Data," and designated his mother, Emma L. Mead, as the person to receive the death gratuity if there was no surviving spouse or child.

The record also shows that two claims were filed for the death gratuity. One claim was filed by Mrs. June Mead, as surviving spouse, and the other was filed by Mrs. Emma Mead, as mother and designated beneficiary. Our Transportation and Claims Division disallowed the claim of Mrs. Emma Mead by settlement dated January 24, 1974, and authorized payment of the claim of Mrs. June Mead on the same date.

Mrs. Emma Mead requests reconsideration of this settlement on the basis of the above-quoted provisions in the separation agreement executed by Mrs. June Mead whereby she waived all rights and other benefits connected with the military service of the member and on the basis that the member designated her to receive the death gratuity if there is no surviving spouse or child.

The controlling provisions of law governing the six months' death gratuity are contained in 10 U.S. Code 1477, which provides in pertinent part as follows:

> (a) A death gratuity payable upon the death of a person covered by section 1475 or 1476 of this title shall be paid to or for the living survivor highest on the following list:
> (1) His surviving spouse.
> (2) His children, as prescribed by subsection (b), in equal shares.

(3) If designated by him, any one or more of the following persons:
(A) His parents * * *.

It will be seen from the foregoing that the law providing for the payment of a death gratuity places the surviving spouse and children of the deceased, first and second, respectively, in the order of precedence for payment of the gratuity, and a parent, even though a designated beneficiary, third in the order of precedence of eligible survivors. While the record shows that the member designated his mother, Mrs. Emma Mead, as the person who was to be paid the death gratuity, it appears that Mrs. June Mead was his lawful spouse at the time of his death. As such, she became entitled to the death gratuity due in the deceased member's case as the living survivor highest on the before-quoted list.

With regard to the fact that Mrs. June Mead agreed to waive all rights and other benefits connected with any possible future military service of her husband, generally this Office has not considered a simple waiver of an unknown future claim as constituting a legal basis for payment of an amount due from the United States to someone other than the lawfully designated recipient. We have, however, accepted as a basis for payment instruments which have been executed by such individuals after becoming lawfully entitled to payment, the legal effect of which would be to estop those persons executing such instruments from asserting any further claim to the amount due.

In the present case, Mrs. June Mead executed an agreement waiver whereby she waived certain of her rights before they had accrued and which were not at that point definite or known. It is our view, therefore, that since Mrs. June Mead's right to the death gratuity did not accrue until after the separation agreement was executed, she was not estopped from making the claim and receiving payment therefor.

Accordingly, we must sustain the action taken by our Transportation and Claims Division in settlement dated January 24, 1974.

[B-181138]

Officers and Employees—Severance Pay—"Reduction-in-Force Situation"

Although employee resigned after receipt of general *announcement* by agency of proposed reduction-in-force action and publication of general news items, he is not entitled to severance pay since notice failed to meet requirements for a general reduction-in-force *notice* under 5 CFR 351.804 and 550.706(a)(2), and his separation may not be regarded as involuntary within meaning of section 550.706 for purpose of entitlement to severance pay.

Leaves of Absence—Without Pay—Administrative Discretion

Where employee resigned prior to receipt of specific notice of involuntary separation or general notice of proposed transfer or abolition of all positions

in his competitive area, as required in applicable regulations for entitlement to severance pay, neither failure of agency to grant him leave without pay status prior to resignation nor its action in granting such leave to other employees provides basis for his entitlement to severance pay if not otherwise eligible since granting of leave without pay is not a matter of right but a matter for agency's discretion.

In the matter of severance pay, August 27, 1974:

This action concerns a request for reconsideration of our Transportation and Claims Division settlement dated February 27, 1974, disallowing a claim for severance pay submitted by Mr. W. Mitchell Oney, a former employee of the National Aeronautics and Space Administration (NASA), Lewis Research Center, Plum Brook Station, Sandusky, Ohio, incident to the termination of NASA nuclear programs.

The claim was disallowed on the ground that prior to his resignation on July 27, 1973, the employee had not received either a specific notice in writing that he was to be involuntarily separated or a general notice of reduction in force by his agency, announcing that all positions in his competitive area would be abolished or transferred to another commuting area and that one or the other was required by Civil Service Commission regulations contained in 5 CFR 550.706 for a separation by resignation to be regarded as involuntary for the purpose of entitlement to severance pay authorized in 5 U.S. Code 5595. Mr. Oney requests consideration on the ground that NASA announcements concerning the closing of Plum Brook Station constituted such notice entitling him to severance pay. He also alleges that three other employees were carried on leave-without-pay status until they were specifically notified they were to be separated in order to entitle them to severance pay whereas he was denied such leave.

The record indicates that a memorandum dated January 5, 1973, was issued to Lewis Employees by the Director of the NASA-Lewis Research Center in Cleveland, which was entitled "Termination of NASA Nuclear Programs and Plans for the Plum Brook Station" which reads in pertinent part as follows:

> More specifically for us here at Lewis, essentially all of our current nuclear propulsion and nuclear power programs will be terminated as soon as possible in an orderly fashion. Further, some of our major facilities that will not be utilized in NASA's restructured program will be placed in a standby condition. As regards the Plum Brook Station, this means that the Reactor Facility will be placed in a standby condition by the end of this fiscal year and the remainder of the station, which is principally devoted to the development of the Titan-Centaur shroud, will be placed in standby by the end of fiscal year 1974.
>
> It will, of course, also be necessary to separate many Lewis employees associated with these programs, both during the rest of this fiscal year and at the end of fiscal year 1974. Plans to develop the exact number to be separated, the professional and support groups involved and the specific phasing of these

reductions are now being prepared. Further information on these matters will be passed on to you as soon as it is available to me.

Speaking for both NASA senior management and the management of this Center, I can assure you that these very significant reductions in our program and staff is in no way a reflection on the high level of competence and dedication with which we have pursued these programs. It is, instead, simply a matter of relating current fiscal constraints to our Nation's anticipated needs in space for the rest of this decade or longer.

The memorandum indicates only that the Plum Brook Station would be placed in a standby condition by the end of fiscal 1974 and that, although it would be necessary to separate many employees, plans to develop the exact number were still in the preparation stage and would be announced when they had become finalized. This interpretation of the language is supported by the following statement in an administrative report dated December 14, 1973—5 months after Mr. Oney's resignation:

* * * In matter of fact, although it is now clear that a vast majority of employees at the Plum Brook Station will be separated, it remains uncertain what number of employees will be retained to operate the facilities of the Station for the purposes of other Government agencies and for maintenance of the facilities in a standby status.

In our view, the advice contained in the January 5 memorandum may not reasonably be considered as tantamount to an announcement that all positions in Mr. Oney's competitive area would be abolished or transferred to another area which is required by 5 CFR 550.706(a)(ii) if resignation based on a general notice is to be regarded as involuntary for the purpose of entitlement to severance pay.

Furthermore, additional criteria for the content of a valid general notice with respect to reduction-in-force actions are contained in 5 CFR 351.804 which reads as follows:

A general notice shall inform the employee that action under this part may be necessary but that the agency has determined no specific action in his case. The notice shall state that as soon as the agency determines what action, if any, will be taken under this part the employee will receive specific notice of the action to be taken. The general notice shall state that it will expire as stated therein unless, on or before the expiration date, it is renewed or supplemented by a specific notice. A general notice shall inform the employee that he should not appeal to the Commission before he receives a specific notice, and it may include any other information specified in § 351.802.

Since the January 5 memorandum does not contain the last two items required by the above regulation, it does not satisfy the content requirements for a general notice under 5 CFR 351.804. The papers submitted by Mr. Oney include copies of such agency publications as NASA ACTIVITIES and LEWIS NEWS, as well as press releases by NASA to the public press with respect to decreased NASA activity. The announcements therein are general information and also do not meet the notice requirements of the regulation.

Since the general notice provisions of the regulations were not met and Mr. Oney did not receive a specific notice, his resignation must be considered to be voluntary. 45 Comp. Gen. 784 (1966).

As noted above, Mr. Oney alleges that three other employees in his unit were granted leave without pay in May 1973 and were carried in such status until March 14, 1974, so that they could receive their severance pay—apparently on specific notice of reduction-in-force action—whereas his request for such status was administratively denied.

With regard to Mr. Oney's allegation of denial of his request for leave without pay, we point out that the authorization of such leave is a matter of administrative discretion and not a matter of right except in certain situations not here involved. Federal Personnel Manual Supplement 990–2, Subchapter S12–2. In any event the authorization of such leave status to other employees could provide no valid basis for the payment of severance pay to an employee who is not found entitled thereto under the law and regulations pertaining to severance pay entitlement.

In view of the above the settlement disallowing Mr. Oney's claim for severance pay is sustained.

[B–181940]

Contracts—Specifications—Samples—Place of Submission

A bid sample requirement that one mockup of item be submitted with bid may not be interpreted so technically as to exclude low bidder from consideration for award because it submitted samples prior to bid opening to contracting activity's technical personnel.

Contracts—Specifications—Samples—Time for Submission

In future, requirements for bid samples should include (Federal Procurement Regulation (FPR) 1–2.202–4) warning that bid may be rejected for failure to submit sample timely and should list reasons for sample requirement; however, failure to comply with FPR did not affect validity of instant procurement.

In the matter of Unique Packaging, Inc., August 28, 1974:

Invitation for bids No. BM 74–112 was issued by the Bureau of the Mint, Department of the Treasury, to forty prospective bidders on May 16, 1974, for the procurement of coin display cases for the Bicentennial coinage program. It was amended on June 14 to incorporate various technical changes to the specifications. Two bids were received by the July 2 bid opening date: Design Pak, Inc.'s bid of $1,537,600 (unit price .3844) and Unique Packaging, Inc.'s bid of $1,594,000 (unit price .3985).

Unique Packaging protests any award to Design Pak for two reasons. First, Article IX on the Continuation Sheet of the Solicitation Instructions and Conditions provided that "One mockup of the item described shall be submitted with each bid." Design Pak submitted no sample with its bid, although prior to bid opening it did submit three sample cases to the Bureau's Marketing Specialist on June 7 and additional samples on June 10 to the Marketing Specialist and the Bureau's Technical Representative. The contracting officer was apparently unaware of these submissions until he received the samples the day after bid opening. Secondly, Unique Packaging believes that the technical changes made to the specifications by the amendment of June 14 resulted from Design Pak's conversations with the Bureau. In this respect, the changes, it is contended, indicated Design Pak's inability to meet the original specifications and placed Design Pak in an unfair and superior position vis-a-vis other prospective bidders on the procurement.

For the reasons that follow, the protest is denied since we are of the opinion that award to Design Pak under the present solicitation would be proper.

Section 1-2.202-4 of the Federal Procurement Regulations (FPR) provides, relative to the requirement for bid samples, that the samples "must be furnished as a part of the bid and must be received before the time set for opening bids." This does not mean that a sample must be furnished with the invitation papers and that no other manner of timely submission will be permitted. To interpret that requirement so technically would be irrational. Rather, it means that the sample must be submitted to the activity in such a responsible manner as to identify it with the procurement in question, which must be done before bid opening. In the instant case, Design Pak delivered samples prior to bid opening to the person who would be responsible for examining the sample for the contracting officer. Consequently, we see no reason to consider Design Pak's bid to be nonresponsive for its failure to submit a sample directly with its bid.

As regards the final argument set forth by the protester, we note first that whether or not Design Pak could have produced a case in conformance with the original specifications is irrelevant. The only pertinent question is whether what Design Pak now proposes to furnish will meet the advertised specifications. Since Design Pak's bid took no exceptions to the specifications, as amended, and inasmuch as the Bureau of the Mint is satisfied with the samples submitted, we may not conclude that the bidder has not agreed to furnish a product in conformance with the advertised specifications. Concerning the

allegation that portions of the specifications were changed pursuant to recommendations made by Design Pak, we see no reason why a procurement activity may not revise its specifications in the light of suggestions made to it by a prospective bidder and incorporate any such revisions in a timely amendment to the solicitation. *See* FPR section 1-2.207(d).

While the agency failed to comply with the bid sample requirements of FPR 1-2.202-4—and we are advising the agency that this should be corrected in the future—we do not believe this failure constituted a material defect in the solicitation.

[B-181218]

Contracts—Subcontracts—Bid Shopping—Listing of Subcontractors—Alternates

Where formally advertised solicitation contained subcontractor listing requirement, low bid which listed alternate subcontractors for several of the categories of work listed on bid form was properly determined nonresponsive in that contractor would have been afforded opportunity to select, after opening of bids, the firm with which it would subcontract work in each category where an alternate was stated, contrary to design and purpose of requirement to preclude "bid shopping."

Contracts—Specifications—Failure to Furnish Something Required—Information—Subcontractor Listing

Where intent of bidder in listing alternate subcontractors is to protect itself in the event the Government exercises its option to select an alternate listed on the bid schedule, such intent must be noted on "List of Subcontractors" attached to bid form prior to bid opening so as to be considered in the agency's determination of bid responsiveness.

In the matter of James and Stritzke Construction Company, August 29, 1974:

This matter concerns the rejection of James and Stritzke Construction Company's low bid under invitation for bids (IFB) No. DSC-74-230, issued by the Bureau of Land Management, for the construction of the Roseburg district office complex, Roseburg, Oregon. The bid of James and Stritzke listed alternate subcontractors for a single category of work and was rejected as nonresponsive to the subcontractor listing requirement.

The IFB required bidders to quote prices on all of the nine separate items (A-I) of the bid schedule. Item A consisted of four sub-items which constituted the total complex while items B thru I were specific parts of the total job, less various alternates which the Government reserved the option to delete from the procurement depending on the

availability of funds and the prices quoted. In addition, the IFB required that bidders submit a list specifying the firms with whom it proposed to subcontract for each of the designated categories of work contained in the "List of Subcontractors" attachment to Bid Form, SF-21. Pertinent sections from the subcontractor listing requirement contained in the invitation's Additional General Provisions (Paragraph 30) are set out below:

> 30(a) For each of the categories of work contained in the list included as an attachment of the Bid Form, SF-21, the bidder shall submit the name and address of the firm to whom he proposes to subcontract the work to be performed on the site. Failure to submit the list by the time set for bid opening shall cause the bid to be considered nonresponsive * * *.
>
> * * * * * * *
>
> 30(c) * * * If more than one subcontractor will perform a single category of work, the portion to be performed by each shall be specified.

In evaluating the bids, the contracting activity determined that the low bid submitted by the protester was nonresponsive to the IFB's subcontractor listing requirement in that the bidder listed alternate subcontractors (i.e., C&H or Knot Roseburg) for several of the categories of work contrary to paragraph 30(a) which required that a single firm be named for each category, except as provided in paragraph 30(c). While paragraph 30(c) contemplates multiple listings when more than one firm is to perform in a category and the particular work to be performed by each subcontractor is designated, the protester did not identify which firm it actually proposed to subcontract the respective category of work or what portion thereof each firm would perform.

Counsel for protester contends that subcontractors were listed in the alternative because of the alternate bids required by the solicitation. It is stated that the bidder intended to use one subcontractor if alternate six (6) had been accepted by the Government and the other firm listed would be utilized if alternate six was not exercised. It is the agency's position that if the protester had put the agency on notice prior to bid opening of its intent to list alternate subcontractors in order to protect itself in the event the agency exercised one of the options on the bid schedule, this action would have been given consideration in the agency's determination of responsiveness.

The subcontractor listing requirement is intended to preclude post award "bid shopping," i.e., the seeking after award by a prime contractor of lower price subcontractors than those originally considered in the formulation of its bid price. It is therefore a material requirement pertaining to bid responsiveness. 50 Comp. Gen. 839, 842 (1971); 43 *id.* 206 (1963). Under the circumstances, if the contracting activity had accepted the protester's bid with the listing of alternate subcon-

tractors, the protester would have been afforded the opportunity to select, after the opening of bids, the firm with which it would subcontract work in each category where an alternate was stated. Such action could not be permitted pursuant to the above-quoted solicitation provisions.

In regard to the protester's contention that alternate subcontractors were listed in order to protect itself in the event the Government exercised one of the options listed on the bid schedule, it appears that the subcontractor listing clause did not spell out how bidders were to handle the listing requirement under alternate bidding schedules. We therefore are recommending to the Secretary of the Interior that clarifying language be adopted in future solicitations.

Nevertheless, we believe the overall purpose of the clause and its operation were sufficiently clear to have placed the protester on notice that its bid would be rejected if the Government could not ascertain from the bid itself precisely which firm would perform any portion of the work upon the Government's acceptance of any of the alternate bidding schedules. We therefore concur with the agency position that the protester should have informed the agency of its purpose in listing the subcontractors prior to bid opening by noting on the "List of Subcontractors" which firm it intended to subcontract with for the respective category of work in the event the Government exercised alternative 6. B–171771, April 23, 1971. The determining factor here is not whether the bidder intends to be bound, but whether this intention is apparent from the bid as submitted. 42 Comp. Gen. 502 (1963). Since the responsiveness of a bid must be determined from the face of the bid itself at time of bid opening, in the absence of any notation on the "List of Subcontractors" as to which of the listed alternate subcontractors would perform the required category of work, the procuring activity could not determine whether one or more than one firm would be performing the work in those categories.

Therefore, the determination to reject the bid as nonresponsive was proper and the protest is denied.

[B–181553]

Contracts—Default—Reprocurement—Government Procurement Statutes—Not for Consideration

When reprocurement is for account of defaulted contractor, statutes governing procurements by Government are not applicable; therefore, questions concerning procurement policy and regulations are not properly for consideration.

Contractors—Defaulted—Reprocurement—Standing

Defaulted contractor, who was furnished reprocurement solicitation because of Freedom of Information Act, has no standing to be considered for award, as award at increased price would be tantamount to modification of defaulted contract without any consideration therefor to Government.

Bids—Preparation—Costs—Recovery—Prerequisite Requirements

While Federal courts have granted recovery of proposal preparation costs when proposals have not been fairly and honestly considered for award, they have done so only when arbitrary or capricious actions have been established, and failure to so establish these prerequisites bars recovery.

In the matter of Aerospace America, Inc., August 29, 1974:

On June 28, 1973, Aerospace America, Inc. (AAI) was awarded contract No. DACW87-73-C-9049 to furnish chutes for the United States Postal Service bulk mail centers. However, a portion of the contract was terminated for default on March 12, 1974, after AAI stated that it would not perform the spiral chute line items in its contract. Subsequent to this action, the contracting officer by final decision dated May 1, 1974, terminated for default AAI's right to proceed with performance of the balance of the contract. This termination resulted from AAI's failure to make further progress and its unsatisfactory response to the Government's "show cause" letter. The Government did, however, offer to accept in mitigation "any completed and acceptable quantities that can be shipped, prior to the close of business 6 May 1974." AAI elected to refrain from making further shipments and by letter dated May 7, 1974, appealed from the final decision.

Solicitation DACW87-74-R-9024 was issued by the Army Corps of Engineers for reprocurement of the defaulted items for the account of the United States Postal Service. Proposals were solicited from all bidders (except AAI) who submitted bids in response to the invitation for bids which resulted in the earlier award to AAI. By telegram dated May 2, 1974, AAI requested a copy of the solicitation. The contracting officer, after consideration of the propriety of releasing a copy to AAI, determined that he could not withhold the solicitation under the Freedom of Information Act. However, no encouragement was extended for AAI to submit an offer.

Five proposals, including that of AAI, were timely submitted. Subsequently, Amendment 0001, which deleted the quantities shipped by AAI prior to termination, was issued on May 10, 1974. The contracting officer determined that the amendment should be forwarded to AAI because if AAI became aware of the amendment "(a) a subsequent

request for it would be honored under the Freedom of Information Act and (b) Aerospace might question its exclusion and file a protest, thus further delaying the procurement of items critically needed at the construction sites."

All offerors submitted their best and final offers timely. AAI was the low offeror under Schedules I and IV, and became the low offeror under Schedules II and III when the Docutel Corporation withdrew its offer. The contracting officer, however, determined that AAI's offers could not be accepted and proceeded to conduct preaward surveys with the next low offeror under each schedule. This action resulted in a splitting of the award, by schedules, to achieve the lowest aggregate cost to the Government. All awards were made on May 20, 1974.

By letter dated May 21, 1974, the contracting officer advised AAI as follows:

You are hereby advised that the offer submitted by you on RFP DACW87-74-R-9024 constituting the repurchase action of the "terminated for default" portion of your Contract DACW87-B-C-9049 is considered unacceptable because acceptance would be tantamount to a modification of the defaulted contract and providing for an increase in price without consideration to the Government.

AAI responded to the wire as follows:

WE ARE THE LOWEST BIDDER ON ALL FOUR SCHEDULES. YOU ARE SPENDING $902,937.57 MORE OF THE TAX PAYERS DOLLARS FOR HIGHER BIDS. YOU ARE DELAYING THE POST OFFICE CONTRACT BY AWARDING BIDS TO NEW CONTRACTORS WHEN AEROSPACE HAS STOCKPILES OF CHUTES ON HAND.

This protest was denied on June 13, resulting in the protest presently before our Office.

AAI contends that the Government, in not considering its proposal, acted contrary to sound procurement policy and contrary to applicable procurement regulations. Therefore, AAI requests that the contracts awarded under the subject solicitation be terminated, and that any remaining Government needs be satisfied through an award to AAI. In the alternative, AAI asks that it be awarded proposal preparation costs incurred in responding to the subject solicitation, and in addition, requests that our Office rule that the Government is barred as a matter of law from pursuing an assessment against AAI for alleged excess costs of reprocurement occasioned by the termination of Contract DACW87-73-C-9049.

In B-171659, November 15, 1971, our Office recognized that where, as here, a procurement is for the account of the defaulted contractor the statutes governing procurements by the Government are not applicable. As such, we cannot raise any questions with regard to AAI's

contention that the Government acted contrary to sound procurement policy or applicable procurement regulations. *See also* B–178885, November 23, 1973.

With regard to the contention that AAI was misled by the Government's acceptance of its proposal and subsequent dealings, it must be recognized that the Government did not initiate these actions. It was AAI that requested the solicitation. But the fact that AAI, the defaulted contractor, was furnished the solicitation does not necessarily entitle it to have its proposal considered for award. B–178885, *supra.* More specifically, our Office, in B–171659, *supra*, held,

> * * * that where a defaulted contractor submits a bid for a repurchase contract at a price higher than the price for which he was bound under the defaulted contract, his bid should not be accepted. Acceptance of such a bid would be tantamount to a modification of the defaulted contract to provide for an increase in the contract price without any consideration therefor to the Government. 27 Comp. Gen. 343 (1927) ; B–165884, May 28, 1969.

Accordingly, we find no basis to object to the contracting officer's rejection of AAI's proposal.

Concerning the request for proposal preparation costs, we recognize that the Federal courts have taken the position that offerors are entitled to have their proposals considered fairly and honestly for award and that the recovery of proposal preparation expenses is possible if it can be shown that proposals were not so considered. However, the courts have required that arbitrariness or capriciousness be established as a prerequisite to recovery. *Keco Industries, Inc.* v. *United States*, 492 F. 2d 1200; 192 Ct. Cl. 773 (1974). See also *Excavation Construction Inc.*, v. *United States*, No. 408–71, U.S. Court of Claims, April 17, 1974. The court in *Keco* also cautioned that "not every irregularity, no matter how small or immaterial, gives rise to the right to be compensated for the expense of undertaking the bidding process." B–179197, July 18, 1974.

After review of the record, we do not believe that AAI is entitled to recover its proposal preparation costs. As stated above, the contracting officer knew that it would have been improper to accept AAI's proposal, but believed that he could not legally refuse AAI's request for the solicitation. We do not believe that the subsequent actions taken by the contracting officer are subject to question or appear to have been arbitrary or capricious. Therefore, "no right to be compensated" for proposal preparation costs has arisen under the standards of the *Keco* case, *supra.*

In view of the foregoing, there is no legal foundation upon which our Office could rule that the Government is barred, as a matter of law, from pursuing an assessment against AAI for alleged excess costs of reprocurement occasioned by the termination of contract DACW87–73–C–9049.

Accordingly, the protest is denied in its entirety.

[B-180031]

Pay—Drill—Training Assemblies—Status for Benefits Entitlement

Military member who during attendance at multiple unit training assembly two (MUTA-2) was instructed by his first sergeant to take the most direct route home to obtain his clothing records and return to the Armory, and who was injured on return trip when he lost control of his motorcycle, is entitled to disability pay and allowances since his return home was not due to an omission on his part with respect to the training schedule. 52 Comp. Gen. 28, distinguished.

In the matter of disability pay and allowances, August 30, 1974:

This action is in response to a request for an advance decision from the Finance and Accounting Officer, Headquarters, Fort McPherson, Fort McPherson, Georgia, concerning the propriety of making payment of pay and allowances to PFC Thomas F. Miller, 259-92-4491, for the period August 28 to October 18, 1972, in the circumstances described. This submission was forwarded to this Office by Office of the Comptroller of the Army, Department of the Army (file reference DACA-CSJ-E), and has been assigned Control Number DO-A-1210, by the Department of Defense Military Pay and Allowance Committee.

The record shows that the member was attached to the 182nd Military Police Company, Georgia Army National Guard, which was scheduled to have a multiple unit training assembly two (MUTA-2) between 12 p.m. and 4 p.m. on August 27, 1972, under the authority of 32 U.S. Code 502. At approximately 1:40 p.m. on that afternoon, the member was instructed by his first sergeant to take the most direct route to his home, obtain his clothing records, and return to the Armory. While returning to the Armory with his clothing record, the member failed to negotiate a curve when the kick stand of his motorcycle slipped striking the pavement causing him to lose control. As a result, he was thrown approximately 20 feet and reportedly suffered a severe contusion to the right wrist. The file reflects the member was unable to perform his military duties until October 18, 1972, and that the injury was determined to have been sustained in line of duty.

Based on the above, doubt is expressed as to the member's entitlement. Our decision 52 Comp. Gen. 28 (1972) is cited as having possible application. However, it is pointed out in the submission that there may be a sufficiently distinguishable difference between the facts of that case and the present case so as to permit payment.

The multiple unit training assembly two (MUTA-2) is authorized by 32 U.S.C. 502(a) which provides in pertinent part as follows:

(a) Under regulations to be prescribed by the Secretary of the Army * * * each company * * * of the National Guard * * * shall—

(1) assemble for drill and instruction, including indoor target practice, at least 48 times each year * * *.

Section 318, Title 32, U.S. Code, provides in pertinent part as follows:

A member of the National Guard is entitled to the hospital benefits, pensions, and other compensation provided by law or regulation for a member of the Regular Army * * * of corresponding grade and length of service, whenever he is called or ordered to perform training under section 502 * * * of this title—

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(2) for any period of time, and is disabled in line of duty from injury *while so employed.* [Italic supplied.]

Section 204, Title 37, U.S. Code, provides in pertinent part as follows:

(h) A member of the National Guard is entitled to the pay and allowances provided by law and regulation for a member of the Regular Army * * * of corresponding grade and length of service, whenever he is called or ordered to perform training under section 502 * * * of title 32—

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(2) for any period of time, and is disabled in line of duty from injury *while so employed.* [Italic supplied.]

Our decision 52 Comp. Gen. 28 (1972) involved three members of the Nebraska Army National Guard who were instructed by their commanding officer to return to their homes and pick up equipment which they had been previously instructed to bring with them to assemblies. On returning to the Armory in one automobile, a collision occurred in which two of the members were killed and the third was seriously injured. In that case we held that upon leaving the training area where the scheduled training exercise was being conducted to return to their homes to pick up required equipment and clothing they had apparently forgotten to bring with them, they passed out of military control and had ceased to be engaged in inactive duty training prior to the time of the accident for the purposes of 32 U.S.C. 318(2) and 37 U.S.C. 204(h)(2).

In the present case, the file clearly reflects that the member did not return to his home because of an omission on his part with respect to the training schedule. There is nothing in the record to show that there was either a standing order or that he was specifically instructed to bring his clothing record as a normal part of his scheduled drill. In fact, the submission indicates that the member had no prior knowledge of such a requirement. It is our view, therefore, that 52 Comp. Gen. 28 is not controlling and the member was under military control and was engaged in inactive duty training at the time of the accident.

Accordingly, payment of disability pay and allowances may be made to the member for the period August 28 to October 18, 1972, less any drill pay received during that period, if otherwise correct.