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[B-180010]

Arbitration—Award—Retroactive Promotion With Backpay—Violation of Collective Bargaining Agreement

Following arbitrator's determination that agency had not given employee priority consideration for promotion in accordance with Federal Personnel Manual and collective bargaining agreement and that had such consideration been given, employee would have been promoted, agency accepted arbitrator's findings and appealed only that portion of award granting employee retroactive promotion and backpay. Since agency did not question arbitrator's finding that employee would have been promoted but for agency's unwarranted personnel action, GAO would have no objection to processing retroactive promotion and paying backpay under 5 U.S.C. 5596 in accordance with 54 Comp. Gen. 312.

Arbitration—Award—Consistent With Law, Regulations and GAO Decisions

While GAO would have no objection to processing retroactive promotion in accordance with arbitrator's award to employee of Defense Supply Agency, there is no legal basis under which promotion may be effective retroactive to July 1, 1969, as ordered by arbitrator. Since arbitrator's award was based on finding that agency had not afforded employee priority consideration due him for promotion, effective date of retroactive promotion must conform with one of dates on which a position was filled for which employee was entitled to priority consideration but did not receive it and date is determined to be July 22, 1969.

Compensation—Promotions—"Two Step Increases"

Concerning proper step in grade in which employee should be placed upon processing retroactive promotion, there is no legal basis for placing him in step 10 of GS–13 as ordered by arbitrator. Under 5 U.S.C. 5334(b) an employee who is promoted to higher grade is entitled to basic pay at lowest rate of higher grade which exceeds his existing rate of basic pay by two step increases. Since employee was in grade GS–12, step 7, on effective date of retroactive promotion, he is only entitled to promotion to grade GS–13, step 4.

In the matter of a retroactive promotion with backpay pursuant to arbitration award, December 2, 1974:

This matter involves a request submitted by the American Federation of Government Employees (AFGE) on behalf of Mr. Russell D. Mikel for a decision as to whether an arbitrator's award granting Mr. Mikel a retroactive promotion and commensurate backpay may properly be implemented.

The arbitrator's award was rendered as the result of a grievance filed by Mr. Mikel (now retired) and pursuant to a collective bargaining agreement between Mr. Mikel's agency, the Defense Supply Agency (DSA), and Local 2449 of AFGE. The arbitrator found that DSA had wrongfully denied a promotion opportunity to Mr. Mikel, a GS–12 employee, and that had he not been wrongfully denied such opportunity he would, in fact, have been promoted. Therefore, the arbitrator concluded that Mr. Mikel should "be upgraded to the GS–13

level, step 10, retroactive to July 1, 1969, and be made whole accordingly."

Upon receipt of the arbitrator's award, DSA promoted Mr. Mikel from GS–12 to GS–13, step 5, effective on June 17, 1973. The agency did not contest the finding that Mr. Mikel was wrongfully denied a promotion opportunity or that he should now receive a promotion. However, because the agency had doubt about its legal authority to execute the "make whole" provisions of the award, it filed a petition with the Federal Labor Relations Council for a review of those portions of the award which directed DSA (1) to promote Mr. Mikel retroactively to July 1, 1969; and (2) to promote him to GS–13, step 10. In appealing the award, DSA stated in its petition:

> Since the arbitrator's basic determination that Mr. Mikel was wrongfully denied a promotion opportunity is not being challenged, there is no need to summarize the facts of the case except as they have a bearing upon the "make whole" provisions of the award which are subject to challenge.

The agency contended that compliance with the retroactivity portion of the award and the order to promote to step 10 would violate both the Back Pay Act and the law fixing the in-grade step when a promotion to a higher grade is made.

The Council's decision on the appeal, FLRC No. 73A–51, was issued September 24, 1974. The facts in the case and the arbitrator's findings as to whether the matters were arbitrable are stated in the Council's decision as follows:

> In May 1969, Russell D. Mikel, Management Technician, GS–12, applied for each of two GS–13 positions, but was found not to meet the eligibility requirements. As to one of these positions, and agency conceded that Mikel had not been referred to the selecting official and, hence, had been denied an opportunity for consideration in competition with other qualified candidates. Mikel filed a grievance and, as corrective action, the agency directed that Mikel be given "priority consideration" [1] for the next position for which he was qualified. Subsequently, Mikel was considered for another GS–13 vacancy; however, he was not considered by the selecting official because he had not been ranked among the best qualified. Mikel grieved, and the agency agreed with Mikel that since the promotion panel did not rank Mikel among the best qualified, indeed "priority consideration" was not afforded for this particular vacancy. On January 30, 1970, the agency directed that Mikel receive "priority consideration" for the first two vacancies for which he was basically qualified.

---

[1] "Priority consideration" and the treatment of employees entitled thereto, are covered by Part II, Article Q, Section 10, of the collective bargaining agreement, which provides:

> PART II—ARTICLE Q. PROMOTIONS AND FILLING POSITION VACANCIES
>
> *Section 10.* Employees entitled to priority consideration as defined in the FPM will receive such consideration including a personal interview prior to official announcement . . . of the vacancy. Nonselection of an employee having the right to priority consideration must be justified in writing. An employee with such rights who is nonselected shall automatically be included on all promotion registers for which he is qualified, developed as a result of official announcement, and will be rated and ranked by the panel in the same manner as all other applicants.

FPM ch. 335, sec. 6–4c, provides:

> c. *Action involving nonselected employees.*
>
> * * * * * * *

(2) If the corrective action did not include vacating the position, an employee who was not promoted or given proper consideration because of the violation is to be given priority consideration for the next appropriate vacancy before candidates under a new promotion or other placement action are considered. An employee may be selected on the basis of this consideration as an exception to competitive promotion procedures (see section 4–3f).

On February 5, 1973, Mikel filed a grievance grounded, as the arbitrator concluded, on two basic claims: (1) that his position had been incorrectly classified, and (2) that he had not been accorded "priority consideration" for a promotion. The grievance was submitted to arbitration.

The arbitrator determined in his opinion that the second claim in the Mikel grievance, relating to "priority consideration," was arbitrable, but the first claim was not.[2] * * *

[2] The arbitrator determined that Mikel's first claim concerning the 'classification of his position was "beyond arbitral jurisdiction in view of the procedures availed of by Mikel via his appeals to the Civil Service Commission and its disposition of the appeals."

Because the Back Pay Act is implemented through regulations issued by the Civil Service Commission, the Council sought the Commission's advice on the matter. The Commission, in replying to the Council, stated in part as follows:

Technically, the question is not whether the award violates 5 U.S.C. 5596, since there was no "unjustified or unwarranted personnel action taken." Section 550.803(e) of the Commission's regulations defines personnel action for this purpose as being any action by an authorized official of an agency which results in the withdrawal or deduction of all or any part of the pay, allowances, or differentials of an employee. The Comptroller General, in his decision at 48 Comp. Gen. 502, stated "that a positive administrative action adverse to the employee must be the basis for back pay rather than an omission or failure to take action for an improper reason."

Rather, the question is whether there is a basis for the agency to approve a promotion to be effective retroactively. The Comptroller General has ruled on numerous occasions that promotions may not be made to take effect retroactively, except in cases where through administrative error, such as clerical error resulting in the delayed typing of the personnel action, a personnel action was not effected as originally intended.

* * * * * * *

The Comptroller General has also ruled that a personnel action may not be made retroactively effective so as to increase the right of an employee to compensation. (See 39 Comp. Gen. 583 and 40 *id.* 207.)

In its second exception to the award, the agency alleged that it may not fix pay on promotion at a rate which is not in accordance with law and regulation. In the instant case, the proper step would have been step 4, if the promotion could have been legally effected retroactively to July 1, 1969; however, neither citation would have permitted the agency to fix the pay at the step 10.

For the reasons set forth above, the arbitrator's award in this case may not be implemented.

In accordance with the Commission's reply, the Council modified the arbitrator's award by striking that portion of the award which ordered that Mr. Mikel be promoted to the GS–13 level, step 10, retroactive to July 1, 1969, and that he be made whole accordingly.

In our decision of October 31, 1974, 54 Comp. Gen. 312, we pointed out that under section 13(b) of Executive Order 11491, as amended by Executive Order 11616 of August 26, 1971, 3 Code of Federal Regulations (C.F.R.) 254, either an agency or an exclusive representative may file an exception to an arbitrator's award with the Federal

Labor Relations Council. The exception may relate to a dispute over the facts, over the interpretation of the collective bargaining agreement, or with respect to the legality of the remedy fashioned by the arbitrator. We further stated that when a matter is submitted to our Office for a ruling as to the legality of the implementation of a particular arbitration award, we will not rule on the facts or the interpretation of the agreement and our consideration will be limited to the propriety of implementing the award in question.

Although we are not, strictly speaking, an avenue of appeal from decisions of the Federal Labor Relations Council, we are obligated by law to make final determinations regarding the legality of expenditures of appropriated funds. Therefore, whenever there is a question as to whether an arbitrator's award may properly be implemented and involves, either directly or indirectly, the payment of money, a decision in the matter should be requested from our Office. In that regard, we also pointed out in 54 Comp. Gen. 312, *supra*, that whenever a matter is submitted directly to this Office for a ruling as to the legality of implementation of an arbitrator's award and an exception is not first filed with the Federal Labor Relations Council under section 13(b) of Executive Order 11491, we will assume that there is no dispute as to the facts or the interpretation of the agreement as determined by the arbitrator and will, therefore, limit our consideration to the propriety of implementing the particular arbitration award in question. When an agency does choose to first file an exception with the Council, if the Council is unsure as to whether the arbitration award may properly be implemented in accordance with the decisions of this Office, it should either submit the matter directly to this Office for decision or, after ruling on any other issues involved in the exception which pertain to matters not within the jurisdiction of this Office, it should instruct the agency to request a ruling from this Office as to the legality of implementation of the award.

Because the holding in 54 Comp. Gen. 312, *supra*, which authorized an agency to process a retroactive promotion and pay the appropriate backpay to an employee who had not been promoted as the result of a violation of a provision in a collective bargaining agreement, was rendered subsequent to the Council's decision in Mr. Mikel's case and appears to be applicable to his case, we have agreed to review Mr. Mikel's claim as it pertains to the question of whether the arbitrator's award granting him a retroactive promotion and backpay may be implemented.

In the above-cited case, we referred to the Back Pay Act of 1966, codified in 5 U.S. Code 5596, which provides, in part, as follows:

(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law

or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—

(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and

(2) for all purposes, is deemed to have performed service for the agency during that period, except that the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of the leave authorized for the employee by law or regulation.

In that case, we also referred to our decision of June 25, 1974, 53 Comp. Gen. 1054, wherein we recognized that where an arbitrator has made a finding that an agency has violated a collective bargaining agreement to the detriment of an employee, the agency head may accept that finding and award the employee backpay for the period of the erroneous personnel action so long as the circumstances surrounding the erroneous personnel action fall within the criteria set forth in the Back Pay Act and the implementing regulations. The criteria for an unjustified or unwarranted personnel action are set forth in 5 C.F.R. 550.803 (d) and (e) which provide:

(d) To be unjustified or unwarranted, a personnel action must be determined to be improper or erroneous on the basis of either substantive or procedural defects after consideration of the equitable, legal, and procedural elements involved in the personnel action.

(e) A personnel action referred to in section 5596 of title 5, United States Code, and this subpart is any action by an authorized official of an agency which results in the withdrawal or reduction of all or any part of the pay allowances, or differentials of an employee and includes, but is not limited to, separations for any reason (including retirement), suspensions, furloughs without pay, demotions, reductions in pay, and periods of enforced paid leave whether or not connected with an adverse action covered by Part 752 of this chapter.

In 54 Comp. Gen. 312, *supra*, we held that a violation of a provision in a collective bargaining agreement, so long as that provision is properly includable in the agreement, which causes an employee to lose pay, allowances or differentials, is as much an unjustified or unwarranted personnel action as is an improper suspension, furlough without pay, demotion or reduction in pay and that, therefore, the Back Pay Act is the appropriate statutory authority for compensating the employee for the pay, allowances or differentials he would have received but for the violation of the agreement. In the present case the arbitrator found that the agency had agreed to give Mr. Mikel priority consideration for subsequent suitable GS-13 vacancies in accordance with the Federal Personnel Manual and the collective bargaining agreement following their acknowledgement that, through an error, Mr. Mikel had earlier been denied an opportunity for consideration for a given vacant GS-13 position, and that the agency had not subsequently accorded Mr. Mikel the priority consideration

required in the circumstances. He also found that had Mr. Mikel been afforded such priority consideration, *he would have been promoted.* Under section 12(b)(2) of Executive Order 11491, management officials of an agency retain the right to "hire, promote, transfer, assign, and retain employees within the agency, and to suspend, demote, discharge, or to take other disciplinary action against employees." We have some question as to whether the finding by the arbitrator that Mr. Mikel would have been promoted is properly within his authority under the Executive order. However, of prime importance in that regard is the fact that the agency did not take an exception to the arbitrator's finding that Mr. Mikel "would have been promoted," questioning only their authority to grant the ordered retroactive promotion and backpay. We believe that the fact that the agency chose not to take an exception to the finding that Mr. Mikel would have been promoted but for its denial of priority consideration was tantamount to an agency determination that but for their violation of the agreement in not giving Mr. Mikel priority consideration after they had ordered he be given it, he would have been promoted. Therefore, in accordance with our decision 54 Comp. Gen. 312, *supra*, we would have no objection to processing a retroactive promotion for Mr. Mikel and paying the appropriate backpay.

As to the date on which Mr. Mikel's retroactive promotion should be effective, there is no clear indication in the arbitrator's award as to the reason for his choosing July 1, 1969, as the effective date of the award. In that regard, while we wish to give the maximum effect possible to arbitration awards, such awards must be in conformance with applicable laws and regulations. We are aware of no legal basis under which Mr. Mikel could be retroactively promoted back to the specific date selected by the arbitrator. Since the award was based upon the arbitrator's determination that the agency had not accorded Mr. Mikel the consideration that was required in the circumstances for various GS–13 positions following the agency mandate that he be given "priority consideration" for all suitable GS–13 positions, we believe that the effective date of Mr. Mikel's promotion must conform with one of the dates on which a position was filled for which Mr. Mikel was entitled to priority consideration but did not receive it. The Defense Supply Agency, in its petition for review of the arbitrator's award to the Federal Labor Relations Council, states that the first position for which Mr. Mikel was entitled to priority consideration but not selected was filled on June 2, 1970. They appear to base this contention on the fact that the position filled June 2, 1970, was the first such position for which Mr. Mikel was entitled to priority consideration following the January 30, 1970, mandate by the Deputy

Director of DSA that Mr. Mikel be given priority consideration for the first two vacancies for which he was basically qualified. The AFGE, on the other hand, states that the dates and facts presented by DSA in their request for review are contrary to the dates and facts presented and tested in the arbitration proceedings and that, in fact, Mr. Mikel was entitled to priority consideration for a GS–13 position that was open in June 1969. This position was apparently an Administrative Officer vacancy that was filled July 22, 1969. The record in the matter and the statement of facts by the Federal Labor Relations Council in its decision would appear to support the contention of AFGE. Those facts indicate that in May 1969 Mr. Mikel was not found to meet the eligibility requirements for two GS–13 positions. As to one of those positions, the agency conceded that Mr. Mikel had not been referred to the selecting official and, hence, directed that he be given priority consideration for the next position for which he was qualified. When subsequently Mr. Mikel was not selected for a vacant GS–13 position (apparently the Administrative Officer position, *supra*) the agency agreed that he had not been given priority consideration and then ordered (in the January 30, 1970, mandate) that he be given such consideration for the next *two* vacancies for which he was qualified. The fact that Mr. Mikel was entitled to priority consideration for a position prior to the June 2, 1970, position is further supported by the case resume which accompanied the January 30, 1970, directive of the Deputy Director of DSA. In that resume, in an item by item statement of the issues, it is stated:

2. Mikel contends DSASC–*Z* failed to properly consider his application for Program Analyst, GS–345–13 [one of the May 1969 vacancies].
DSASC–*Z* acknowledges an error in regard to this matter and had adopted the concept of priority consideration as corrective action.
3. Mikel contends that having promised priority consideration DSASC–Z failed to provide such consideration in connection with a subsequent vacancy for Administrative Officer, GS–341–13 [apparently the position filled July 22, 1969].
DSASC–*Z* agrees with Mikel since the promotion panel did not rank Mikel among the five best qualified, *indeed priority consideration was not afforded for this particular vacancy but is still promised for a future appropriated vacancy.* [Italic supplied.]

Based on the foregoing and in accordance with the arbitrator's finding that Mr. Mikel was not afforded priority consideration for any of the positions to which he was entitled, we believe that the appropriate date back to which Mr. Mikel's retroactive promotion should be made effective is July 22, 1969.

Concerning the proper step in grade GS–13 in which Mr. Mikel should be placed, there is no legal basis for placing him in step 10 of that grade as ordered by the arbitrator. There are ten steps in the General Schedule grade, GS–13, each successive step calling for a higher salary rate. The general purpose of these within-grade steps is

to permit an employee who performs satisfactory service in any given grade for fixed periods of time, such as 52, 104, or 156 weeks, without being promoted to a higher grade, to receive an increase in salary by advancing to the next highest within-grade step. The rules which govern determinations concerning the appropriate within-grade step at which any given employee may be classified and paid are set forth in sections 5335 and 5336 of Title 5, U.S. Code. In addition, section 5334(b) of Title 5 provides that "An employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases of the grade from which he is promoted or transferred." The agency indicates that on July 22, 1969, Mr. Mikel's grade and step were GS–12, step 7, and that if he had been promoted on that date he would have been promoted to GS–13, step 4. Since there is no legal basis for placing Mr. Mikel in a higher step of grade GS–13 than he would have been placed in, if promoted originally, Mr. Mikel should be retroactively promoted in accordance with the foregoing to GS–13, step 4.

It is noted that Mr. Mikel has retired and his annuity was based on lower pay rates than those provided in the arbitrator's award. Any request for adjustment of his annuity resulting from implementation of the award and this decision is for referral to the United States Civil Service Commission which has jurisdiction in the matter.

[B–181282]

Pay—Additional—Sea Duty—What Constitutes Vessel for Sea Duty Pay

Members who were ordered to perform temporary additional duty aboard the YRST–2, a nonself-propelled service craft with berthing and messing available onboard, are not entitled to special pay for sea duty as the YRST–2 is not a "vessel" within the meaning of paragraph 10703 of the Department of Defense Pay and Allowances Entitlements Manual.

Subsistence—Per Diem—Military Personnel—Temporary Duty—Additional Duty—Aboard Nonself-propelled Service Craft

Members who were ordered to perform temporary additional duty aboard the YRST–2, a nonself-propelled service craft with berthing and messing available onboard, are not prohibited from receiving per diem by paragraph M4201–10, Volume 1, Joint Travel Regulations (1 JTR), as the YRST–2 is not a "vessel" for purposes of travel entitlements.

Subsistence—Per Diem—Military Personnel—Assignment to Harbor Clearance Unit—Temporary Additional Duty—Aboard Nonself-propelled Service Craft

Members who were ordered to Harbor Clearance Unit Two (HCU–2) but who performed temporary additional duty aboard the YRST–2, which is not a "vessel"

for sea duty pay or for travel entitlement purposes may not receive sea duty pay but are not prohibited from receiving per diem by 1 Joint Travel Regulations paragraph M4201–10 since while service in HCU–2 is considered sea duty, *i.e.*, onboard a vessel, the temporary additional duty was, in fact, not performed onboard a vessel.

In the matter of entitlement to sea duty pay or per diem, December 2, 1974:

This action is in response to letter dated April 10, 1974, file reference AD27/021:jwh 7220, with enclosures, from D. M. Simmons, Disbursing Officer, U.S.S. *Yellowstone* (AD–27), FPO New York 09501, requesting an advance decision concerning payment of per diem allowance or special pay for sea duty in the cases of Seaman Steven R. Goins, USN, SSAN 408–92–8415, Seaman Charles D. Richards, USN, SSAN 455–96–4279, and Seaman Louis J. Fabiani, USN, SSAN 160–48–1764. The request was forwarded to this Office by endorsement dated June 13, 1974, from the Per Diem, Travel and Transportation Allowance Committee and was assigned PDTATAC Control No. 74–23.

The record shows that Temporary Additional Duty (TAD) Travel Order No. 45C449, U.S.S. *Yellowstone*, dated January 2, 1974, directed Seaman Goins to proceed on or about January 3, 1974, and report to the commanding officer, Harbor Clearance Unit Two (HCU–2), YRST–2, Pier 59 East, Naval Amphibious Base, Little Creek, Virginia, in order to attend diver second class training. Upon completion, Seaman Goins was to return to the U.S.S. *Yellowstone* at Charleston, South Carolina. Similar orders were issued to Seaman Richards and to Seaman Fabiani. All three orders directed the members to utilize Government berthing and messing where available. The record shows that Government berthing and messing were available and utilized onboard YRST–2, on which the members performed the TAD.

It is indicated that the members were denied special pay for sea duty during the period of the TAD in question because the YRST–2 is not an afloat unit and that the members were advised that they were not eligible for per diem allowance because HCU–2 is an afloat unit. Reference is made to paragraphs 6 and 10 of Chief of Naval Operations (OPNAV) Instruction 3111.14R, dated September 1, 1972, as providing that payment of travel entitlements is based on whether a member is attached to a command which has a permanent duty station or is assigned to a home port. In this regard, reference is made to paragraph M4201–10, 1 Joint Travel Regulations (1 JTR) as prohibiting payment of per diem for any period of temporary duty (TDY) onboard a Government vessel when both quarters and mess are available. The question presented is whether the members who per-

formed the TAD are eligible for special pay for sea duty or for per diem allowances while onboard the YRST–2.

Chapter 7 of the Department of Defense Pay Allowances Entitlements Manual (DODPM) governs the entitlements of enlisted members to special pay for sea duty. Paragraph 10701 provides that enlisted members entitled to basic pay are entitled to special pay for sea duty as defined in paragraph 10703. Paragraph 10703 provides, in pertinent part, as follows:

> Sea duty, for additional pay purposes, is a service performed under orders issued by competent authority:
>
> * * * * * * *
>
> b. While performing TAD or TDY abroad a *vessel* * * * but only when such duty is 8 continuous days or more. [Italic supplied.]

For the purposes of the above-quoted paragraph, paragraph 10703e provides that except as stated in paragraph 10703c, while on a vessel in an inactive status or special status, or on a nonself-propelled vessel but only when such vessel is operating at sea for a period of 8 continuous days, or more, the word "vessel" means a self-propelled vessel in an active status, in commission or in service, and equipped with berthing and messing facilities.

The Department of the Navy has issued instructions to indicate which of its commands are to be considered as afloat units and which are to be considered as based ashore for purpose of payment of travel entitlements. In this connection see 44 Comp. Gen. 670 (1965).

Paragraph 6 of OPNAV Instruction 3111.14R, dated September 1, 1972 (paragraph 5, OPNAV Instruction 3111.14S, June 1, 1974), provides that the assignment of a home port to a command indicates that such command is an afloat unit (on sea duty) for travel entitlements purposes, while the assignment of a permanent duty station to a command indicates that such a command is based ashore (on shore duty) for travel entitlements purposes. Paragraph 10 of that Instruction (paragraph 9, OPNAV Instruction 3111.14S) provides that home ports are not assigned to service craft and that a service craft is considered for purposes of travel entitlements to have a permanent duty station at the geographical location of the activity to which the service craft is permanently assigned. The YRST–2 is listed as a service craft in OPNAV Instruction 4780.5B, December 16, 1969. It appears that the YRST-2 is a nonself-propelled salvage craft tender with a crew of 2 officers and 40 enlisted men with a mission of providing logistic support for diving/salvage craft including limited repairs and working in conjunction with harbor clearance units. Therefore, clearly, the YRST–2 located at Naval Amphibious Base, Little Creek, Virginia, may not be considered a "vessel" within the meaning of paragraph 10703 of the DODPM.

With regard to entitlement to per diem allowance, under the provisions of 37 U.S. Code § 404(a) (1970), and implementing regulations contained in part E, chapter 4, 1 JTR (Temporary Duty Allowances in the United States), members are entitled to such allowance while performing TAD or TDY, with certain exceptions (paragraph M4200). Paragraph M4201–10, 1 JTR, change 250, December 1, 1973, provides, in pertinent part, as follows:

TEMPORARY OR TRAINING DUTY ABOARD GOVERNMENT VESSEL. No per diem allowance is payable for any period of temporary or training duty aboard a Government *vessel* when both Government mess and quarters are available. * * * [Italic supplied.]

While 1 JTR does not define "vessel," it appears clear that the YRST-2, a nonself-propelled service craft with a permanent duty station rather than a home port, in accord with the above-cited OPNAV Instructions, may not be considered as a "vessel" for travel entitlements purposes.

Although HCU-2 is considered a seagoing staff with its home port at Naval Amphibious Base, Little Creek, Virginia (enclosure 4, OPNAV Instruction 3111.14R, change 2, April 1, 1973), the TAD was performed onboard the YRST-2 which is not a "vessel" for special pay for sea duty or for travel entitlement purposes. Therefore, the fact that service in HCU-2 is considered to be sea duty, *i.e.*, onboard a vessel, is not controlling in determining entitlement to special pay for sea duty or to per diem allowance as the TAD actually was not performed onboard a vessel. *See* 50 Comp. Gen. 723 (1971).

Consequently, Seamen Goins, Richards and Fabiani are not entitled to special pay for sea duty but may be paid per diem allowances, if otherwise proper.

[B–181359]

Contracts—Negotiation—Sole Source Basis—Two-Step Procurement

Though stated laundry system requirements, including need for independent batch processing, are questioned, agency determination of minimum needs is not shown to be without reasonable basis. Protester's blanket offer to supply acceptable system, including proposed use of washer and extractor not shown to meet requirements, provides insufficient basis to question determination to procure sole-source (10 U.S.C. 2304(a)(10), ASPR 3–210.2(i) (1973 (ed.)), from only concern offering acceptable system. However, in future laundry system procurements, use of two-step advertising procedure might be desirable.

In the matter of Allen and Vickers, Inc.; American Laundry Machinery, December 2, 1974:

Allen and Vickers, Inc., has protested to our Office against the sole-source procurement of an automated laundry system from American Laundry Machinery (referred to in the record as American Laundry

Machinery Industries (ALMI)) by Walter Reed Army Medical Center (WRAMC).

The procurement is being made both to replace the existing laundry at WRAMC and for testing purposes to determine if the new system would be used in the future at other Army facilities. Allen and Vickers, which is a designer of laundry installations and a distributor and installer of various types of laundry equipment, objects to the award on the grounds that the Army has overstated its minimum needs; that Allen and Vickers can, in any event, furnish a system meeting the requirements; and, alternatively, that certain components of the system should be procured competitively. The Army's position is that since ALMI is the sole source of supply (Armed Services Procurement Regulation (ASPR) § 3–210.2(i) (1973 ed.)) of a system meeting the minimum needs, the procurement is proper.

For the reasons which follow, the protest is denied.

The ALMI system consists of various quantities of 18 items, including 11 ALMI slant line modular washers; two wet belt conveyers; two ALMI model 393 strike extractors; three model 2243 automatic thermatic steam heat tumblers; one formatic wet system steam finishing cabinet; one model CPC combination folder; one model 4EF Trumatic II primary folder; one Grantham small piece folder; two 6-roll hypro ironers; two class 2301 ironer ventilating canopies; one model TSF II tru-feed feeder/spreader device; two model XL14–42–5 ECI lint collectors; two flatbelt conveyers; one automatic liquid central supply system; and one automatic supply blending system. The total price of the system, less a $6,000 trade-in allowance, is $519,857.

Notwithstanding the pendency of the present protest, award was made to ALMI on June 18, 1974, on the basis of a determination by the contracting officer that a prompt award would be advantageous to the Government. Two considerations figured in this determination. The first was the fact that appropriated funds were available for the procurement in fiscal year 1974 but not in fiscal year 1975. The second was the need to coordinate with the construction schedule of the new laundry building. Under a separate contract, demolition of the existing laundry building was scheduled to begin on or about July 1, 1974. It is also reported that the new structure, which is scheduled for completion in late April 1975, was designed in terms of floor space, weight load requirements and utility connections so as to accommodate the ALMI system.

The first issue for consideration is the protester's challenge to the agency's determination of its minimum needs. In this regard, WRAMC's laundry requirements are reported to be unique. A

summary of the minimum needs and the justifications therefor is as follows:

1. Total Systems Manufacture

The system includes all equipment to perform washing functions, extraction, conditioning and finishing of major linen categories of flatwork, rough dry, press work, and garments and uniforms. All components should be of the same manufacturer, and fully compatible to provide for a smooth, flow-thru production line. Absence of these features will ultimately result in reduced efficiency and increased maintenance and service costs due to number of different manufacturers and suppliers involved. Further, an increase in required spare parts inventory will result.

2. U.S. Origin

Service and repair parts availability; items of foreign manufacture may experience delay in repair due to distance from home factory.

3. Batch Processing

To provide for maximum fabric classification, soil classification, color classification, and customer identity. All linen is processed under one or more of these classifications. Absence of these features will result in decreased service to the customer.

4. Independent Wash Pocket Control

To plan for minimum loss of productive capacity. No more than 25% production capacity should be subject to be out of operation at any given time. If this condition is exceeded the continuous supply of clean patient linen is seriously jeopardized.

5. Extractor Walls of Nonpuncturable Material

To prevent unscheduled downtime due to presence of sharp, pointed objects in linen commonly found in a surgical environment. Unscheduled downtime of equipment will result in reduction or cessation of clean linen to patient areas.

6. Automatic Liquid Supply Injection

To obtain maximum conservation of supplies thru mechanical injection; to obtain a guaranteed wash formula.

7. Water Recycle/Heat Reclamation Feature

Ecological and fiscal conservation.

8. Steam Heat Dryer/Conditioner

Reduction of atmospheric effluent; non-availability of natural gas.

9. Maximum Wash Pocket Flexibility in Formula Selection

To provide for full employment and maximum efficiency of up to eight basic formulas applied to segregated batch lots beginning at 35 lbs/batch, each requiring different formulas. If this capability is not provided, hygenic standards and customer service are reduced.

10. Total automation of Laundering Process from Soiled Phase Through Conditioning Without Manual Handling of Linen

Total employment of machine resulting labor savings. * * *

11. Simplicity in Design; Easy Serviceability

These features are desirable to reduce maintenance costs and conserve manpower in servicing.

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The most pertinent of these requirements can be summarized in two general categories: first, the need for a washer capable of various independent batch processing techniques (items 3, 4, 9, *supra;* and, second, the need for a fully automated system with all components produced by the same manufacturer (items 1, 10 and 11).

WRAMC places considerable emphasis on the need for independent batch processing (35- to 200-pound batches) with different wash formulas. There are essentially two reasons for this. First, because of different soil classifications (grease, human blood, animal blood, radioactive materials, wax, etc.) laundry batches must be segregated and washed separately to prevent cross-contamination and color bleeding. Thus, items such as color work, operating room linen, animal linens, baby linen and experimental surgical linen must be processed separately with different formulas. WRAMC uses eight different laundry wash formulas.

In addition, WRAMC believes it is mandatory to maintain the integrity of laundry batches submitted by different customers. That is, the laundry will process not only hospital work, but also work from the dental clinic, motor pool, chest clinic, chaplain's office and a number of other activities. To accumulate soiled laundry from each activity and process one large batch at a time would be impractical, because storage space is lacking and the various activities do not have large inventories of linen supplies. In addition, delivery schedules call for 72-hour service to nonhospital customers (5 percent of the total workload) and 1-day service for the hospital (95 percent of the total workload).

The need for a fully automated system with all components produced by the same manufacturer is based on experience with the previous WRAMC laundry operation, which involved manual loading and unloading of washers, extractors and tumblers. Detergents had to be manually inserted and finished laundry manually pressed and manually folded. The previous laundry was made up of incompatible components from many different manufacturers, necessitating the obtaining of maintenance, repairs and parts from many suppliers. In sum, WRAMC believes that these considerations require a system with minimum labor function and easy serviceability.

Allen and Vickers makes a number of points in response to WRAMC's justification of its minimum needs. In general, the protester suggests that batch processing of 35- to 200-pound loads with different laundry formulas is an inefficient procedure and questions whether WRAMC's needs in this regard are any more unique than those of any teaching hospital. The protester cites in this connection a statement by WRAMC that the tunnel-type washers which were

evaluated (washers which process large, homogeneous batches) might be ideal for commercial laundries, but are unsatisfactory for WRAMC. Allen and Vickers alleges that commercial laundries are faced with a greater number of laundry classifications from a greater number of customers than WRAMC. It is contended that, in this light, it is difficult to understand why WRAMC needs more sophisticated equipment than equipment found to be ideal for commercial work.

As pointed out in B–176570, January 17, 1973, and other decisions of our Office cited by the Army, it is the primary responsibility of the contracting agency to determine its minimum needs and to draft proper specifications reflecting those needs. In the absence of demonstrated fraud or bad faith, our Office will question such determinations only upon a clear showing that the determinations were without a reasonable factual basis. *Matter of Cessna Aircraft Company*, 54 Comp. Gen. 97 (1974).

In the present case, we believe that the points made by Allen and Vickers raise significant questions which bear more upon the proper procedures to be utilized in determining minimum laundry system needs generally than to a clear showing that the WRAMC's determination was without a reasonable foundation. Specifically, we think the agency's justification for independent batch processing with separate wash formulas has not been convincingly refuted by the protester. But the question raised—whether large batch processing with less sophisticated equipment might be a more desirable alternative in other circumstances—is a valid and important one. A factor which we believe may be significant here is one which is not specifically addressed in the record—namely, the correlation between the need for different wash formulas and the estimated amount of laundry expected to be processed with each formula. In a situation where the bulk of the laundry work was to be processed under one or two formulas with a small remaining quantity of special work requiring a variety of different formulas, a need for independent batch processing with individual wash formulas might not be justified.

In addition, we have no basis to question the contention that a modern automated laundry system utilizing a minimum amount of manual labor is a desirable goal. But it is less clear from the record why a partially automated, more labor-intensive system would be a wholly impracticable alternative for WRAMC. Again, in a different set of circumstances a totally automated system might not be a valid minimum need.

Having considered the above points and other questions raised by the protester, we cannot conclude that WRAMC's minimum needs have been shown to be without a reasonable basis. Allen and Vickers

next objects to the determination to procure the laundry system on a sole-source basis from ALMI. In this regard, the agency's sole-source justification is essentially grounded upon the unique capability of ALMI to supply a system meeting the requirements, as evidenced by the contracting officer's determination and findings:

Upon the basis of the following findings and determination, the proposed contract described below may be negotiated without formal advertising pursuant to the authority of 10 USC 2304(a)(10), as implemented by paragraph 3-210.2(i) of the Armed Services Procurement Regulation.

Findings

1. The Purchasing and Contracting Branch, Walter Reed Army Medical Center, Washington, D.C., proposes to procure by negotiation a new laundry system for the new laundry facility at the Forest Glen Section of Walter Reed Army Medical Center, from American Laundry Machinery Industries, at an estimated cost of $450,000.00.

2. Procurement from a single source is necessary, as American Laundry Machinery Industries is the only manufacturer of a completely automated system, with the capabilities for batch loading required to allow complete linen classification according to the needs of each activity at Walter Reed Army Medical Center.

3. Use of formal advertising for this procurement is impractical due to the absence of prospective bidders capable of manufacturing a laundry system with all of the essential requirements.

Determination

The proposed contract is for property or services for which it is impracticable to obtain competition by formal advertising.

Prior to deciding upon a sole-source procurement of the ALMI system, WRAMC officials made site visits to four commercial installations having various types of laundry systems. The first of these had primarily ALMI equipment; the second, primarily Poensgen equipment; the third, primarily Hydraxtor equipment; and the fourth, an AMETEC Corporation system utilizing a variety of equipment types.

The Poensgen, Hydraxtor and AMETEC systems were found to meet some of WRAMC's requirements, but each was deficient in at least four of the 11 criteria outlined above. None could offer all of the independent batch processing techniques with different wash formulas, and none was found to utilize extractors with nonpuncturable walls. In comparison, WRAMC found that the ALMI system met all the requirements, including offering an extractor with nonpuncturable (stainless steel) walls.

Allen and Vickers alleges, however, that it could furnish a system meeting the requirements. At a meeting with WRAMC officials on May 31, 1974, the protester made, in effect, a blanket offer to meet WRAMC's stated performance standards. According to the agency, the protester at that time identified only one specific component which its system would utilize—the Voss Archimedia washer. In a letter to our Office commenting upon the administrative report, Allen and Vick-

ers subsequently identified another proposed component—the Ellis extractor. In addition, the protester points out that it learned of the present procurement only shortly before the contract award and, therefore, that it is difficult to suggest specific components which would make up an acceptable system.

We can appreciate the problems involved in attempting to develop on short notice a detailed proposal offering to supply a system, especially in view of the fact that WRAMC spent a number of months developing its requirements and selecting a system. Nevertheless, it is incumbent on the protester to substantiate its allegation that it could have been an alternative source of supply and, thus, that the procurement should have been competitive. We think that the protester's blanket offer to meet the requirements is insufficient substantiation. In addition, there is serious doubt that the two specific systems components which Allen and Vickers has mentioned would in themselves be acceptable to perform the functions performed by the corresponding ALMI components.

In this regard, Allen and Vickers has supplied technical literature concerning the Voss Archimedia washer. Examination of this information reveals that the Voss machine is a tunnel-type washer which can process batches of 800 to 3,300 pounds. According to WRAMC, Allen and Vickers conceded at the May 31, 1974, meeting that this machine could not meet the need for simultaneous batch processing without intermixture of washing solutions between different batches. The technical literature claims the machine offers "absolute bath separation," but a drawing of the washer indicates only a single separation wall midway through the tunnel. The walls between individual batch compartments on either side of the separation are perforated and would permit intermixture of solutions. It would appear, then, that the suitability of the Voss washer for WRAMC's requirement of simultaneous processing of small batches without cross-contamination of solutions is extremely doubtful. In addition, we have no basis to question WRAMC's observation that unscheduled downtime on a tunnel-type washer brings the entire washing operation to a halt, and that tunnel washers are undesirable for that reason.

In its comments on the administrative report, the protester has also furnished technical literature on an Ellis Corporation extractor, which is described as being totally automatic and having a stainless steel enclosure. This information was furnished in contradiction of a WRAMC statement that Ellis manufactured only washers as opposed to systems. The literature refers to Ellis as "systems designers." While this may be the case, we do not believe such information in

itself convincingly demonstrates that the Ellis extractor meets WRAMC's requirements.

Lastly, the protester contends that because certain components of the ALMI system are not fabricated by ALMI, but rather are fabricated by other concerns and furnished by them to ALMI, these items should have been procured competitively. The items in question are as follows:

Item:	
0001AK	Small piece folder with take-away conveyer.
0001AP	Model XL14-42-5 lint collectors.
0001AQ and 0001AR	Flatbelt conveyers.
0001AS	Automatic liquid central supply system.
0001AT	Automatic supply blending system.

In addition, a portion of item 0001AG, the wet system steam finishing cabinet, is manufactured by a concern other than ALMI. This portion is the take-away screw conveyer which is used with the steam finishing cabinet. The supplier-furnished items amount to more than $92,000 out of a total system price of $519,857.

In general, it is for the contracting agency to determine whether to procure by means of a systems approach as opposed to separate procurements of individual pieces of equipment, and in the absence of clear evidence showing such determinations lacked a reasonable basis, they will not be disturbed by our Office. *See* 53 Comp. Gen. 270 (1973). We believe that WRAMC's minimum needs, discussed *supra*, establish a reasonable basis for a systems procurement approach. The fact that seven individual components, having a dollar value of less than one-fifth of the total system price, could have been procured competitively does not override the basis established here for a systems procurement. Therefore, we find no merit in this portion of the protest.

While, as indicated, we do not object here to the purchase of a laundry system in a single procurement, in such circumstances the use of other procedures which would promote competition should be explored in future procurements. We think that several technically acceptable offers might have been received if various manufacturers and distributors had had the opportunity to independently prepare technical proposals to meet WRAMC's needs.

In this connection, it is of interest to note that earlier this year the Veterans Administration (VA) sought to procure complete laundry systems for its hospitals at North Little Rock, Arkansas, and Brecksville, Ohio. One aspect of these procurements was considered in *Matter of Charles J. Dispenza & Associates et al.*, B-181102, B-180720, August 15, 1974. We understand that the requirement was for a systems approach designed for a maximum of automation and a

minimum of employee handling. VA did not procure on a sole-source basis from one manufacturer. Instead, two-step advertising was utilized, allowing bidders to develop their own technical proposals including brand name components obtained from various manufacturers. While each agency must determine its needs and the procurement procedures to satisfy those needs, a similar approach in the present case might have been desirable. Certainly, such an approach should be carefully considered in future procurements of this nature.

[B-115398]

Appropriations—Impounding—General Accounting Office Interpretation of Impoundment Control Act of 1974:

General Accounting Office interpretation of Impoundment Control Act of 1974 is that amendment to Antideficiency Act eliminates that statute as a basis for fiscal policy impoundments; President must report to Congress and Comptroller General (C.G.) whenever budget authority is to be withheld; duration of, and not reason for, impoundment is criterion to be used in deciding whether to treat impoundment as rescission or deferral; the C.G. is to report to Congress as to facts surrounding proposed rescissions and, in the case of deferrals, also whether action is in accordance with law; the C.G. is authorized to initiate court action to enforce provisions of the act requiring release of impounded budget authority; the C.G. is to report to Congress when President has failed to transmit a required message; and the C.G. can reclassify deferral messages to rescission messages upon determination that withholding of budget authority precludes prudent obligation of funds within remaining period of availability.

[Printed as House Document 93-404, 93d Congress, 2d Session]

To the Speaker of the House and the President pro tempore of the Senate, December 4, 1974:

The purpose of this letter is to provide you with our views concerning the interpretation and application of the Impoundment Control Act of 1974, Title X of Public Law 93-344, 88 Stat. 297, 332 (July 12, 1974), 31 U.S. Code 1401 note.

Recent years have witnessed disagreement between the Executive Branch and the Legislative Branch over which has ultimate control over Government program and fiscal spending policy. The Executive Branch, largely on grounds of fiscal responsibility, has sought to curtail or eliminate numerous programs funded by the Congress. The courts have held, for the most part, that such Executive attempts to avoid implementation of Government programs through the withholding of budget authority constituted illegal impoundments. Nevertheless, and despite a reasonably clear understanding of the limits of Executive authority, the power to impound budget authority was easy to exercise and challenges to that power difficult and time consuming to resolve.

The Impoundment Control Act of 1974 was designed to tighten congressional control over impoundments and establish a detailed procedure under which the Legislative Branch could consider the merits of impoundments proposed by the Executive Branch. The act fundamentally calls for the Executive Branch to report and explain to the Congress all proposed impoundments with ultimate authority to effectuate such proposals dependent upon congressional action. The basic scheme of the act's operative provisions is contained in four key elements:

1. All budget authority to be withheld by the Executive Branch from obligation or expenditure—either permanently or temporarily—must be reported to the Congress.

2. Budget authority intended for permanent withdrawal must be released for obligation and expenditure if the Congress fails within 45 days to pass legislation authorizing the withdrawal.

3. Budget authority intended for temporary withdrawal within a fiscal year may be withheld as proposed if the Congress fails to act; either House may require release of such deferred budget authority by passing a simple resolution to that effect.

4. The Comptroller General of the United States is empowered to seek court enforcement of any required release of budget authority.

The net result of the procedure established is that the propriety of any proposed impoundment will depend upon action (or inaction) by the Congress in connection with a contemporaneous consideration of such proposal. Earlier actions by the Congress either authorizing or denying authority for particular impoundments are of no ultimate consequence except as they might affect the outcome of considerations under the act of 1974.

A controversy has developed over whether application of the act as outlined above serves to strengthen or weaken congressional control over impoundments. With respect to permanent withdrawals of budget authority, it is clear that the intent is to require an act of Congress to clothe the Executive Branch with requisite authority. If the Congress fails to act, the President may not impound.

As to temporary withdrawals, however, it is contended that the President by virtue of congressional inaction acquires authority to defer where otherwise none exists—that the President, by proposing a deferral of budget authority, becomes vested through congressional inaction with authority which the Congress otherwise may have previously denied him. Under this interpretation, the act, in legitimizing otherwise impermissible deferrals of budget authority, might be regarded as weakening rather than strengthening congressional control over impoundments, albeit either House has it within its power to deny deferral authority through passage of a simple resolution.

The Impoundment Control Act of 1974 and its legislative history are considerably less than clear concerning the act's intended design. The act cannot be analyzed without producing a series of anomalous results which its history fails to explain away. Nevertheless there is an unmistakable philosophy underlying the act that does provide a rational and realistic basis for viewing the act as a means by which the Congress strengthened its control over Executive impoundments.

The fact is that prior to enactment of the Impoundment Control Act, the Executive Branch engaged in numerous impoundments, whether authorized or not, often without the Congress having a clear picture of precisely what was involved. Under the act, however, each withdrawal of budget authority becomes highly visible, allowing the Congress to consider its merit as of the time it is proposed. Rescissions or permanent withdrawals of budget authority are made difficult for the Executive Branch in that both Houses of Congress must support them through positive action to establish the requisite authority. Deferrals or temporary withdrawals are made easier in that inaction by the Congress establishes the requisite authority. However, to counterbalance this ease, the act allows either House on its own to void such proposed action. There is no question but that a rescission is the more significant type of impoundment over which congressional control is unmistakably absolute. The essential difference is that simple inaction on a rescission proposal automatically results in release of the budget authority after 45 days. Congressional control over the less significant deferral is no less absolute, though affirmative action is required in the exercise of that control.

To point up the full ramifications of the provisions of the act, and their operative effect, there follows a detailed analysis of the issues involved.

THE BASIC PROVISIONS

The Impoundment Control Act of 1974 was the result of a conference that combined features of two differing approaches to impoundment control. As the Conference Report, H.R. Report No. 93–1101, 93d Cong., 2d Sess. 76–77 (1974), states, the House bill that went to conference provided for a procedure that would require impoundment actions to be reported to the Congress by the President within 10 days after they were taken. In the event that either House passed a resolution of disapproval within 60 calendar days of continuous session after the date on which the Presidential message was received by Congress the impoundment would have to cease. The Senate bill considered by the conferees circumscribed the authority in the Antideficiency Act, 31 U.S.C. § 665, to place funds in reserve, and prohibited the use of budgetary reserves (except as provided specifically

in appropriation acts or other laws) for fiscal policy purposes, or to achieve less than the full objectives and scope of programs enacted and funded by the Congress. The Senate bill authorized the Comptroller General to bring a civil action in the U.S. District Court for the District of Columbia to enforce those provisions.

Section 1001 (31 U.S.C. 1401 note) of the act is a disclaimer section, stating among other things, that nothing in the title shall be construed as asserting or conceding the constitutional powers or limitations of either the Congress or the President.

Section 1002 (31 U.S.C. 665(c)(2)) amends the Antideficiency Act to authorize reserves solely (except as provided specifically in appropriation acts or other laws) to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements or greater efficiency of operations. The section continues the requirement that whenever an officer responsible for making apportionments and reapportionments determines that any amount so reserved will not be required to carry out the full objectives and scope of the appropriation concerned, he shall recommend the rescission of that amount.

Section 1011 is a definition section (31 U.S.C. 1401).

Section 1012 (31 U.S.C. 1402) provides that if the President determines that all or part of any budget authority will not be required to carry out the full objectives or scope of the programs, or that such budget authority should be rescinded for fiscal policy or other reasons, including the termination of authorized projects or whenever all or part of budget authority provided for only one fiscal year (one-year money) is to be reserved from obligation for such fiscal year, he shall transmit a special message to Congress requesting a *rescission* of the budget authority. The message is to include the amount of budget authority involved; the appropriation account or agency affected; the reasons for the requested rescission or placing the budget authority in reserve; the fiscal, economic, and budgetary effect; and all facts, circumstances, considerations, and effects of the proposed rescission or reservation. Unless both Houses of Congress complete action on a rescission bill within 45 days (of continuous session) of receipt of the message, the budget authority for which rescission was requested must be made available for obligation.

Section 1013 (31 U.S.C. 1403) provides for a second type of special message concerning proposed *deferrals*. This category includes any withholding or delaying of the availability for obligation of budget authority within the current fiscal year (whether by establishing reserves or otherwise), or any other type of Executive action or inaction that effectively precludes the obligation or expenditure of budget authority, including authority to obligate by contract in

advance of appropriations as specifically authorized by law. Such action or inaction may occur at the level of the Office of Management and Budget, as through the apportionment process, or at the departmental and agency level. The deferral special message from the President shall contain basically the same types of information included in a rescission special message. However, the procedure for congressional action is different in that the President will be required to make the budget authority available for obligation only if either House of Congress passes an "impoundment resolution" disapproving such proposed deferral at any time after receipt of the special message. The authority to propose deferrals is limited to the fiscal year in which the special message making the proposal is submitted to the House and Senate.

Section 1014 (31 U.S.C. 1404) provides that each Presidential special message—whether for rescission or for deferral—shall be referred to the appropriate committee of the House of Representatives and the Senate and printed as a document of each house and in the Federal Register. It further provides that a copy of each special message shall also be transmitted to the Comptroller General, who shall review each message and inform both houses of the facts surrounding the proposed action and its probable effects. In the case of deferrals, the Comptroller General must state whether or not (or to what extent) he determines the proposed deferral to be in accordance with existing statutory authority. Any revisions of proposed rescission or deferrals must be transmitted by the President in a supplementary message.

Section 1015 (31 U.S.C. 1405) provides that if the Comptroller General finds that an action or inaction that constitutes a reserve or deferral has not been reported to Congress in a special message as required, he shall report to Congress on such reserve or deferral. His report will have the same effect as if it had been transmitted by the President in a special message. Moreover, if the Comptroller General believes that the President has classified an action incorrectly, by covering it in a deferral special message when in fact a rescission is involved, or vice versa, he shall report to both houses setting forth his reasons.

Section 1016 (31 U.S.C. 1406) provides that if budget authority is not made available for obligation as required by the act the Comptroller General is empowered, through attorneys of his own choosing, to bring a civil action in the United States District Court for the District of Columbia in order to obtain any decree, judgment, or order that may be necessary or appropriate to make such budget authority available for obligation. However, no such action may be brought until the expiration of 25 calendar days of continuous session

after the Comptroller General files with the Speaker of the House of Representatives and the President of the Senate an explanatory statement setting forth the circumstances giving rise to the action contemplated. The section provides that the courts must give precedence to this type of civil action.

Finally, section 1017 (31 U.S.C. 1407) provides that congressional action with respect to a proposed rescission or deferral shall take the form of a "rescission bill" or an "impoundment resolution." Any rescission bill or impoundment resolution shall be referred to the appropriate committee of the House of Representatives or the Senate. If the committee fails to report a rescission bill or impoundment resolution at the end of 25 calendar days of continuous session after its introduction, it is in order to move to discharge the committee from further consideration. A motion to discharge may be made only by an individual favoring the bill or resolution; may be made only if supported by one-fifth of the Members of the House involved (a quorum being present); and is highly privileged in the House and privileged in the Senate.

BACKGROUND

In the past the Executive Branch generally has asserted three bases for its authority to impound funds: (1) the statutory provisions of a particular program; (2) statutory limitations upon overall budget outlays; and (3) the Antideficiency Act, 31 U.S.C. § 665. In an opinion to the Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, B–135564, July 26, 1973, Committee Print 183, 93d Cong., 2d Sess. (1974), (hereafter "Committee Print"), we offered a detailed review of these assertions. Committee Print, pages 14–23.

The Antideficiency Act as general authority for the impoundment of funds probably has been the most contested of the bases claimed, with the President claiming broad impoundment powers thereunder. Our analysis of this statute concluded that the Antideficiency Act could not be viewed as authorizing the President to withhold funds for general economic, fiscal, or policy reasons. Committee Print, pages 17–20.

The Impoundment Control Act of 1974 is, in part, the Congressional response to claims by the Executive Branch that the Antideficiency Act granted general authority to impound funds. The act accomplishes two objectives: first, it amends the Antideficiency Act to clarify and limit its terms and, second, it establishes a procedure that provides a means for the Congress to pass upon Executive Branch desires to impound budget authority.

Prior to passage of the Impoundment Control Act, the relevant provisions of the Antideficiency Act, 31 U.S.C. § 665(c)(2), stated:

In apportioning any appropriation, reserves may be established to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, *or other developments, subsequent to the date on which such appropriation was made available.* Whenever it is determined by an officer designated in subsection (d) of this section to make apportionments and reapportionments that any amount so reserved will not be required to carry out the purposes of the appropriation concerned, he shall recommend the rescission of such amount in the manner provided in the Budget and Accounting Act, 1921, for estimates of appropriations. [Italic supplied.]

This subsection was amended by § 1002 of the act to read as follows:

In apportioning any appropriation, reserves may be established solely to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements or greater efficiency of operations. Whenever it is determined by an officer designated in subsection (d) of this section to make apportionments and reapportionments that any amount so reserved will not be required to carry out the full objectives and scope of the appropriation concerned, he shall recommend the rescission of such amount in the manner provided in the Budget and Accounting Act, 1921, for estimates of appropriations. *Except as specifically provided by particular appropriations Acts or other laws, no reserves shall be established other than as authorized by this subsection. Reserves established pursuant to this subsection shall be reported to the Congress in accordance with the Impoundment Control Act of 1974.* [Italic supplied.]

The reason for this amendment was that the "other developments" language in 31 U.S.C. § 665(c)(2) was being construed as encompassing—

* * * any circumstances which arise after an appropriation becomes available for use, which would reasonably justify establishment of a reserve. Committee Print, p. 19.

In this light, impoundments motivated by fiscal policy considerations were being justified on the basis that they were within the "other developments" language of the Antideficiency Act.

The legislative history of the amendment to 31 U.S.C. § 665 underlines Congress' clear intent that the Antideficiency Act not be used as authority to withhold funds for fiscal policy reasons. Rather, it was to be used only to establish reserves to provide for contingencies or to effect savings. For example, a statement by Representative Matsunaga, during the House debate on the Conference Report on H.R. 7130, the bill that became, in part, the Impoundment Control Act of 1974:

One of the most important features of the bill, Mr. Speaker, is the impoundment title, which tightens the language of the Anti-Deficiency Act, thereby *prohibiting "reserves" for fiscal purposes.* This provision is key to maintaining the balance of power among the three branches of Government. 120 Cong. Rec. H5205 (daily ed. June 18, 1974). [Italic supplied.]

Senator Muskie, during debate of S. 1541, the bill that was the Senate-approved version of H.R. 7130, stated:

The purpose of title X [the impoundment control provisions of the Senate bill] is to define and clarify the authority of the President and other officers and employees of the executive branch to place appropriated funds in reserve. * * *

the "other developments" clause would be deleted by this bill because it has been treated by some officials of the executive branch as a justification for establishing reserves because of economic or other developments. Clearly that use was never intended by the Congress. It is that use which has provoked this controversy over impoundments.

Section 1001 further defines the boundaries of the Antideficiency Act for fiscal policy purposes or to achieve less than the full objectives and scope of programs enacted and funded by Congress. The apportionment process is to be used only for routine administrative purposes such as to avoid deficiencies in executive branch accounts, not for the making of policy or the setting of priorities. * * * Moreover, nothing in the language or legislative history of the Antideficiency Act suggests in any way the Congress intended the executive branch to place funds in reserve as part of economic policy. 120 Cong. Rec. S4091 (daily ed. March 21, 1974).

See also Senator Muskie's comments at 120 Cong. Rec. S3997 (daily ed. March 20, 1974); Senator Irvin's summary of the Antideficiency Act amendment at 120 Cong. Rec. S3835 (daily ed. March 19, 1974); Senator Metcalf's statement at 120 Cong. Rec. S3846 (daily ed. March 19, 1974); the report of the Committee on Rules and Administration on S. 1541, S. Report No. 93–688, 93d Cong., 2d Sess., 30, 72–75 (1974); and the Conference Report on H.R. 7130, H.R. Report No. 93–1101, 93rd Cong., 2d Sess., 76 (1974).

Thus, in light of the section 1002 amendment to the Antideficiency Act and the clear and extensive legislative history of this provision, we conclude that budget authority may not be withheld except to provide for contingencies or to effect savings, or as specifically provided for in appropriations acts or other laws.

However, apart from this, there currently exists disagreement as to whether the act did or did not have the effect, in some circumstances, of providing authority, at the initiative of the President and with Congressional concurrence, to defer budget authority temporarily from obligation. Generally speaking, one interpretation is that the act provides no such authority while the other interpretation is that it does. These contrasting views are discussed below.

THE TWO INTERPRETATIONS

The First Interpretation

Section 1002 requires the Executive Branch to report the establishment of all reserves to the Congress, and permits creation of reserves *solely* to provide for "contingencies" or to effect "savings" or as may otherwise be authorized by other law. Remaining portions of the Impoundment Control Act of 1974 are not viewed as "other law."

It is further contended that section 1012, relating to "rescissions," prescribes the sole procedure available to the President when he wishes to avoid expenditure of all or part of budget authority (1), which he does not believe will be required to carry out the full objectives or scope of programs for which it is provided, (2), the expenditure of which should be avoided for fiscal policy or other reasons, or (3), in

the case of one-year funds, which he wishes to reserve from obligation for the entire year. Both Houses of Congress must pass a rescission bill within 45 days in response to his proposed rescission or the budget authority must be made available for obligation.

Section 1013 relating to deferrals is viewed as merely providing a mechanism for reports required by section 1002. Congress may, by resolution of either House, direct the obligation of reserves established pursuant to the Antideficiency Act or any other specific statutory authority, and reported under section 1013. Otherwise, the budget authority may be deferred as proposed under previously existing authority.

Therefore, under the first interpretation, whenever the President proposes to withhold budget authority for a purpose not authorized by the Antideficiency Act or other specific law, he must propose a rescission under section 1012. This conclusion is deemed supported by section 1013(c), 31 U.S.C. 1403(c), which specifies that section 1012 is the exclusive recourse for the President whenever any of the three types of impoundments specified in section 1012 are involved.

Finally, when the President, either by act or omission, fails to submit a required message or, if he submits a message under section 1013 which should have been sent under section 1012, or vice versa, the Comptroller General, through his report pursuant to § 1015(b), 31 U.S.C. 1405(b), effectively rectifies the incorrectly classified message and converts it to the proper category.

In summary, this view of the act, stated simply, is that deferrals of budget authority may be proposed under section 1013 only if they are authorized by the Antideficiency Act, as amended by section 1002, or by appropriation acts or other laws; no deferral may be proposed under section 1013 on other grounds. It is urged, therefore, that if grounds other than those already authorized are the motivation for a proposed withholding of budget authority, the President must seek a rescission of the budget authority and transmit a special message under section 1012. Put another way, any budget withholding action for which the President lacks statutory authority to undertake must be proposed under section 1012.

The Second Interpretation

Section 1002, which amends the Antideficiency Act, requires the Executive Branch to report the establishment of all reserves to the Congress. It authorizes the establishment of reserves pursuant to the Antideficiency Act itself, as amended, or as specifically provided in particular appropriations acts or other laws. Under this interpretation, the term "other laws" includes the remainder of the Impoundment Control Act of 1974.

Section 1012 provides the procedure when the President wishes permanently to withhold the obligation of all or part of budget authority. Both Houses of Congress must pass a rescission bill within 45 days or the budget authority must be made available for obligation.

Section 1013 applies when the President wishes to delay, for any period up to the end of the fiscal year in which the delay is proposed, the obligation of budget authority. Unless either House passes a resolution disapproving the proposed delay, the delay may continue for the period proposed.

Thus, under the second interpretation, the difference between sections 1012 and 1013 is not based on the existence or lack of prior legal authority supporting the proposed withholding of budget authority, but rather on the proposed duration of the withholding—permanent under section 1012, temporary under section 1013.

An important aspect of the control provided by the act under the second interpretation lies in the provisions for full disclosure to the Congress of Executive Branch plans with an opportunity for Congressional oversight and the exercise of a veto power. Finally, subsection 1015(a) (31 U.S.C. 1405(a)) requires the Comptroller General to monitor the budgetary actions of the executive branch. When the Comptroller finds that an action tantamount to deferral or rescission of budget authority has taken or will take place and that a required Presidential special message has not been sent, he is to report this to Congress, together with essentially the same facts required for the Presidential special message that should have been sent. Such a Comptroller General's report triggers the procedures under sections 1012 and 1013 in the same manner as if a Presidential special message had been sent.

Subsection 1015(b) requires the Comptroller General to report when, in his view, a Presidential special message has been "mislabeled," i.e., sent in accordance with the wrong section. Generally, this report is informational. However, if the Comptroller General finds, in the case of a proposed deferral, that funds could be expected with reasonable certainty to lapse before they could be obligated, or would have to be obligated imprudently to avoid that consequence, the action by the President is to be construed as a *de facto* rescission. The Comptroller General would then, in addition to the subsection 1015(b) message, send a section 1012 message, which section 1012 message would become the Congressional action document. The President's deferral message would become a nullity by virtue of the fact that subsection 1013(c) (31 U.S.C. 1403(c)) provides that section 1013 will not apply to actions required to be sent under section 1012.

DISCUSSION OF THE INTERPRETATIONS

Both interpretations outlined above have considerable merit. The act contains complex and difficult provisions, on whose interpretation reasonable men may differ. The legislative history, while helpful in some areas, is in large part ambiguous. However, on balance, we must conclude that the second interpretation is the correct one, based primarily on the plain reading of the title.

First, the clear language of section 1013 does not limit the authority for proposed deferrals. The language of the section is very broad, providing that a message should be sent pursuant to the section *whenever* it is proposed that budget authority be deferred. The language is so broad, in fact, that it would include rescissions except that subsection 1013(c) specifically excludes "budget authority proposed to be rescinded or that is to be reserved as set forth in a special message required to be transmitted under section 1012." Clearly, the plain language permits the proposal of deferrals for any reason. It has been suggested that since section 1012 specifically lists "fiscal policy" withholdings as being reportable under that section, and section 1013 does not, all fiscal policy withholdings must be reported under section 1012. However, in that event, no deferrals could be proposed under section 1013, since the list of purposes under section 1012 is comprehensive, and section 1013 lists no purposes whatever.

Second, we conclude further that the Impoundment Control Act of 1974, apart from section 1002, is "other law" within the meaning of section 1002. This is the necessary conclusion to be drawn from the fact that section 1002 is in fact an amendment to a statute (the Antideficiency Act) separate and apart from the remainder of the sections making up the Impoundment Control Act of 1974.

Third, the language of sections 1012 and 1013 conveys a clear impression that the use of the two sections depends not on the purpose or legal authority of a proposed withholding action, but upon its duration. If it is to be a permanent withholding of funds; i.e., the funds will never be spent, section 1012 is to be used. If the withholding action is to be only temporary, section 1013 is to be used.

Our interpretation of the provisions of the Act may lead, at first glance, to some apparently anomalous results. In particular, it means that an action by the President that is authorized by statute (e.g., a deferral clearly authorized by the Antideficiency Act) may be made unathorized and terminated by a simple resolution by only one House. Similarly, a rescission that is authorized by a particular statute may, when submitted under section 1012, be rendered unauthorized and

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illegal if the Congress fails to pass a rescission bill within 45 days. We believe these results are understandable and reasonable in the context of the Act as a design to give the President the opportunity to initiate reconsideration of, and Congress the opportunity to reconsider, the expenditure of program funds under circumstances that may be different from those in existence when the original program was enacted. In addition, it should be noted that no program may be terminated without action by both Houses, and deferral actions cannot delay program funds for longer than one year.

A central premise of the argument against the second interpretation appears to be that the act cannot be interpreted so as to provide new authority for impoundments because, it is argued, the legislative history shows that the Senate, by its amendments to the Antideficiency Act, intended to reduce substantially the basis for Presidential impoundment, and all features of the Senate bill necessary to that purpose were incorporated in the Conference Report. In addition, it is said that the House version of the act merely provided a reporting and veto mechanism in the event unauthorized impoundments occurred. Therefore, it is argued, since the Senate bill would have reduced the President's power to impound and since the House bill would not have enlarged it, any argument that the act confers new power to the President to impound would mean that the sum of the legislative process in this case is greater than its parts. Finally, it is argued that the act cannot be interpreted to delegate new power of deferral by inadvertence or implication.

We cannot agree with this view of the act. As shown above, the plain language of the act supports the second interpretation. The legislative history of the act, particularly in the latter stages of floor debate after the House-Senate conference, is ambiguous, in part. However, some important light is shed by that history. The key point is the history of section 1013, which is virtually identical to the language of earlier bills developed in the House.

On March 6, 1973, Rep. Mahon introduced H.R. 5193. This bill is the basis for much of the act and clearly was the blueprint for section 1013. The bill was reviewed and revised by the House Committee on Rules. Rather than report out the bill with amendments, a new bill, H.R. 8480, was introduced. The substituted bill, however, retained the basic philosophy underlying H.R. 5193; i.e., the establishment of an impoundment control procedure through which Congress would review all impoundments and disapprove them through affirmative action. In the absence of affirmative action, the impoundment involved would stand. H.R. 8480 was, in turn, referred to the House Committee on Rules. Simultaneously, the House was studying another measure—H.R. 7130—which, in part, was also designed to deal with

Executive Branch impoundment of funds. H.R. 7130, which was introduced on April 18, 1973, contained two titles. Title II, an impoundment control section, was adopted from H.R. 8480. *See* H.R. Report No. 93–658, 93d Cong., 1st Sess. 16 (1973). H.R. 7130 passed the House on December 5, 1973, and subsequently was the House bill that went to conference and led to the enactment of section 1013.

During the debate on H.R. 8480, it became clear that the Members of the House did consider that the bill would, to the extent that it allowed an impoundment to continue unless Congress acted affirmatively to stop the impoundment, grant the President an additional means to impound budget authority. *See*, generally, 120 Cong. Rec. H6597-6630 (daily ed. July 25, 1973). For example, Rep. Harrington said:

> That measure [H.R. 8480] tinkers with the rules of the appropriations process, to make an Executive impoundment more accountable to the Congress. But it fails to address the underlying affront of impoundment to congressionally established priorities. *In short, the bill makes a clear case for the legality of such actions by the Executive.*
>
> *Some have tried to argue that procedural legislation like H.R. 8480 does not legitimize the impoundment practice. But the facts show the opposite: if Congress does not act on the impoundment, it is legal—by necessary implication. If I were a judge, I could reach no other conclusion.* It will not do to act on the supposition that congressional action implies no judgment on the impoundment of funds from substantive programs. 120 Cong. Rec. E5121 (daily ed. July 26, 1973). [Italic supplied.]

Similarly, Rep. Leggett, while supporting H.R. 8480, expressed these reservations during the debate (comparing the House and Senate bills):

> While H.R. 8480 attempts to limit the President's ability to impound, *both measures extend to the President de facto authority to impound for a least 60 days. The Madden [H.R. 8480] bill allows the President to impound pending congressional disapproval,* while the Ervin bill would have impoundments lapse after 60 days if not approved by Congress. A dangerous precedent is set in both instances. 120 Cong. Rec. H6619 (daily ed. July 25, 1973). [Italic supplied.]

And Rep. Danielson, speaking for an amendment to H.R. 8480, said:

> The last point I wish to make is simply this: We must always be cautious in this Congress to cease delegating our powers to the Executive, be he Republican or Democrat. His party makes no difference. We must rid ourselves of this tendency to delegate.
>
> Witness what can happen. *In this instance, by a simple majority vote, 50 percent plus 1, we could delegate to the President the power to impound subject only to Congressional veto.*
>
> Suppose we want to get this power back in the future? A President, Republican or Democrat might enjoy having this power of impoundment. So if we try to take back this power, what do we have to do?
>
> We have to pass another law repealing this law, and the President can very well veto it, whether he be Republican or Democrat. 120 Cong. Rec. H6600 (daily ed. July 25, 1973). [Italic supplied.]

In fact, this concern over the granting of "*de facto* authority" by H.R. 8480 was so great that several amendments were introduced that would have changed H.R. 8480 to the Senate approach of

requiring the impoundment action to cease in the absence of positive congressional action within a certain period of time. The most important of these was an amendment by Rep. Pickle, which was defeated 318–96. 120 Cong. Rec. H6603 (daily ed. July 25, 1974).

While recognizing that the provisions of H.R. 8480 would indeed give the President said "*de facto* authority," the apparent philosophy behind the House bill was expressed by one of the floor leaders of the bill, Rep. Bolling:

> Mr. Chairman, I do not really know how to go about opposing this [Pickle] amendment. I know it is well-intended.
>
> No. 1. It imputes to the bill before us the ratifying of the President's power to impound. It does no such thing.
>
> The bill before us, H.R. 8480, is completely neutral. It deals with a fact, not a theory.
>
> There are impoundments. There are not hundreds of impoundments but there are thousands of impoundments. Some are the kinds of impoundments apparently some of my friends feel are the only impoundments; but there are a great many impoundments.
>
> * * * * * * *
>
> What H.R. 8480 seeks to do is to provide for a regular procedure for dealing with the exceptional case when the Congress decides that a President has changed the policy—by impoundment unilaterally—that the Congress has already made, and the Congress does not approve the change.
>
> It is a very limited, very self-disciplined, very carefully contrived process. The committee very carefully considered the alternatives, because, after all, the other body has passed the other version a number of times, and we heard from the Senator from North Carolina; he was a witness before the committee. This was a matter which was very carefully considered. 120 Cong. Rec. H6602 (daily ed. July 25, 1973).

In other words, while the House bill was not considered a ratification of any impoundment power, it was a recognition that impoundment was taking place; that some impoundments, perhaps, should take place; and that Congress ought to have a means for control over impoundments and disapproving those it considered unwise or unjustified.

In summary, the House, while not ratifying or approving any particular impoundments, clearly did provide that, if the Congress did not disapprove a proposed impoundment, the impoundment would stand. In this sense, the House bill expanded Executive authority to impound.

The purpose of the Senate bill that went to conference clearly was different. S. 373, introduced on January 16, 1973, by Senator Ervin and others, set forth a procedure to deal with impoundment of funds. Significantly, and unlike H.R. 8480, this bill required affirmative congressional action within a certain period of time to authorize impoundments. The Senate passed S. 373 on May 10, 1973. The House amended the Senate-passed version of the bill and both chambers appointed conferees. That bill died in conference. S. 1541 was introduced on April 11, 1973, by Senator Ervin and five other members of

the Senate. The original version of this bill as well as that version of S. 1541 that was reported out of the Senate Committee on Government Operations on November 28, 1973, did not contain any impoundment control provisions. However, the bill was then referred to the Committee on Rules and Administration on November 30, 1973. The latter Committee reported S. 1541 (S. Report No. 93–688, 93d Cong., 2d Sess.) in a modified form—a form which did incorporate an impoundment control title. As was the case in the House of Representatives, the Senate was concerned that there be made available to the Congress a means through which impoundments could be scrutinized. The Senate bill that went to conference tightened the authority in the Antideficiency Act to place funds in reserve by deleting the "other developments" clause. It also prohibited, except where provided for by appropriations act or other laws, the use of budgetary reserves for fiscal policy purposes or to achieve less than the full objectives and scope of programs enacted and funded by the Congress, and authorized the Comptroller General to bring a civil suit action in the U.S. District Court for the District of Columbia to enforce those provisions.

The Senate, on March 22, 1974, substituted the agreed upon text of S. 1541 for the language of H.R. 7130. It was in this light that the two chambers went to conference.

The legislative history following the conference deliberations is ambiguous in that support can be found for either interpretation. See generally 120 Cong. Rec. H5177–5202 (daily ed. June 18, 1974); and 120 Cong. Rec. S11221–11257 (daily ed. June 21, 1974). In addition, we understand that some who participated in the debate adhere to an interpretation opposite to that which one would conclude from a reading of the record. Under the circumstances, this portion of the history is not helpful as an aid to interpretation of the language of the act.

Finally, other arguments that have been raised against the second interpretation include the arguments (1), that the disclaimer section (section 1001) and the Antideficiency Act amendment (section 1002) preclude any assertion or concession of Presidential power to impound, except pursuant to explicit statutory authorization, and (2), that nowhere else in the act is there found such as assertion or concession.

These arguments ignore the fact, however, that the history of section 1013 in the House clearly shows that that provision was intended as a mechanism whereby impoundments could be reviewed and approved or disapproved by Congress, regardless of the presence or lack of independent statutory authorization. Thus, the disclaimer disclaims any assertion or concession of Presidential constitutional power, or approval of any impoundment except pursuant to statutory authoriza-

tion. Section 1013 in a sense does provide such authorization, provided the Congress does not disapprove a proposed deferral. Similarly, the section 1002 amendment to the Antideficiency Act provides that no reserves shall be established other than as authorized by the Antideficiency Act, or "except as specifically provided by particular appropriation acts *or other laws.*" Section 1013, we believe, as discussed above, must be included in the category "other laws."

CONCLUSION

We view the Impoundment Control Act of 1974 as providing a means for Congress to review Executive Branch actions or inactions amounting to withholding budget authority from obligation; a mechanism for Congress to affirm or disapprove withholdings that are based on statutory authority outside of the act and to reconsider (contemporaneous with the circumstances at the time proposed) and approve or disapprove withholdings that are submitted under the section 1013 procedure, but which otherwise have no statutory authority. As such, it does not, as section 1001 makes clear, assert or concede the constitutional powers or limitations of either Congress or the President.

As we have stated, the act contains complicated provisions, the legislative history of which are, in large part, far from clear. Because of this, the title has presented difficult problems of interpretation. In addition, because of the act's importance, its interpretation and implementation have been the subject of keen interest by members of Congress and others. Consequently, because it is a close question involving difficult issues of interpretation of statutory language and legislative history, we suggest that Congress may want to re-examine the act and clarify its intent through further legislative action.

[B-181411]

Contracts—Protests—Timeliness—Negotiated Contract

In situation where protester after award received copy of awardee's proposal on May 21 and noted alleged deficiency therein, protest filed more than 5 working days thereafter is not untimely because (1) agency had scheduled debriefing conference for May 28 and (2) protest was filed within 5 working days of debriefing. 4 C.F.R. 20.2(a) (1974) urges protesters to seek resolution of complaints with contracting agency and does not require filing of protest at General Accounting Office where it was reasonable to withhold protest until contracting agency explained its position at debriefing.

Contracts — Negotiation — Subcontracts — Qualifications of Subcontractors

Where successful offeror submitted qualifications of two alternative subcontractors for evaluation with its proposal and contracting officer verified officer's ability

to commit highest evaluated of two subcontractors, even though offeror had made no firm commitment to either, merely having obtained firm quotes from both, unlike listing of subcontractor requirements in formally advertised invitations by certain Federal agencies, award was not improper since neither applicable procurement regulations nor request for proposals required firm subcontractor commitment or precluded proposal of alternate subcontractors and Government had right to approve subcontractors.

In the matter of Lambda Corporation, December 5, 1974:

Request for proposal (RFP) RFP—91—74—HEW—OS was issued by the Department of Health, Education, and Welfare (HEW), seeking offers for the installation, testing and operation of manipulation tasks as part of HEW's review of the New York City School System.

Only two offerors submitted proposals in response to the RFP—Lambda Corporation and Delta Research Corporation. After conducting negotiations with both offerors, award was made to Delta on April 30, 1974, on a cost-plus-fixed-fee basis.

On May 6, 1974, Lambda orally protested the award to HEW. This protest was, however, withdrawn on May 7, 1974, in view of the sketchy information then available to Lambda. Lambda therefore requested a copy of Delta's proposal as well as an immediate debriefing. A copy of Delta's proposal was forwarded to the protester on May 20, 1974, and was received by counsel for Lambda on May 21, 1974. On May 28, 1974, the debriefing conference was held. Lambda's protest was filed 3 days later.

The agency contends Lambda's protest is untimely under our Interim Bid Protest Procedures and Standards, 4 C.F.R. § 20.2(a) (1974), which reads in pertinent part:

* * * bid protests shall be filed not later than 5 [working] days after the basis for protest is known or should have been known, whichever is earlier. * * *

The agency cites in support of its position a statement made by Lambda in its June 6 letter to our Office:

This protest is based upon our review of certain portions of the Delta proposal as well as certain limited information received at a Debriefing Conference held at the office of the Contracting Officer on May 28, 1974.

Lambda went on in its June 6 submission to indicate that the May 28, 1974, debriefing informed it of the very general procedures used by the contracting officer in awarding the contract (i.e., that award was based on price and other factors).

Lambda's protest is, however, based on the absence of necessary pertinent information in Delta's proposal regarding Delta's proposed subcontracting arrangements. Thus, the agency contends that since Lambda should have been aware of this deficiency on May 21, its protest to our Office more than 5 working days thereafter is untimely.

4. C.F.R., *supra*, in addition to the standard governing the filing of bid protests quoted above, expresses a policy urging protesters to seek resolution of their complaints initially with the contracting agency. Lambda's actions comported with this policy by its participation in the debriefing prior to filing the instant protest here. In view of the above policy, we believe it would be incongruous to find this protest to be untimely where the protester withheld filing to attend a debriefing conference scheduled only 8 days later at which it may have found that there was no basis for protest. Therefore, we feel that the mere fact that Lambda received Delta's proposal on May 20 does not commence the running of the 5-working-day period prescribed in the bid protest procedures since it appears to have been reasonable for Lambda to have withheld a protest until after the agency explained its position at the debriefing. Because Lambda protested here within 5 working days from the date of the debriefing, we must consider the protest to have been timely filed.

Section IX(B)(V) of the RFP states with regard to the contents of the offeror's technical proposal that:

> If the offeror intends to subcontract any part of the work or to employ consultants for any phase of the proposed activities, he will provide in his proposal statement qualifications of those nominated and specific delineation of the tasks to be performed by such subcontractors and/or consultants.

The RFP also required that:

> * * * The cost proposal must include budgets developed for *each task activity* and/or deliverable product, at the lowest level of contract program planning, consistent with the technical approach and, at the same time, allowing for identification of cost elements for labor, materials, printing, travel, subcontractors, consultants, and overhead. * * * [Italic in original.]

In its proposal, Delta offered to subcontract a portion of the required computer programming. It further stated that the subcontractor would be either American Management Systems (AMS) or Planning Research Corporation (PRC) and that it had " * * * firm quotations from both of these suppliers, but has not yet committed to either one." Delta's proposal went on to indicate its inclination toward subcontracting with AMS. However, the proposed costs and capability descriptions of both proposed subcontractors were included in the Delta proposal.

Delta states in a letter to our Office that:

> At the time of Delta's proposal submission, we had firm quotations from two potential subcontractors; either of these subcontractors was bound to supply the described services at prices quoted, if Delta chose to purchase them.

The essence of Lambda's protest goes to the alleged failure of Delta to comply with what Lambda considers to be the "firm commitment" of subcontractors requirement of the above-quoted provisions of the RFP. According to Lambda, this failure gives Delta the improper

option after award of selecting either of the two subcontractors Delta mentioned in its proposal.

The contracting officer evaluated Delta's proposal on the basis of Delta's use of AMS, and alternatively PRC, and found that either subcontractor was acceptable to the Government. Prior to contract award, he verified Delta's intent and ability to commit AMS to the project. Clause 10 of HEW Form 316 (Rev. 3/72) incorporated into the RFP states that:

> * * * the Contractor shall not enter into any subcontract or purchase order not otherwise expressly authorized elsewhere in this contract without the prior written approval of the Contracting Officer and subject to such conditions as the Contracting Officer may require. * * *

We have reviewed the Delta proposal and find no basis to disagree with the contracting officer's reliance on the adequacy of the information contained therein in evaluating the proposals. We recognize that our Office has in certain formally advertised procurements, found that a bidder's failure to firmly commit itself to a particular subcontractor by listing of alternate potential subcontractors could render the bid nonresponsive. See *Matter of James and Stritzke Construction Company*, 54 Comp. Gen. 159 (1974); 50 *id.* 839 (1971); 43 *id.* 206 (1963). However, those decisions involved invitations which specifically required bidders to list the subcontractors to be utilized on pain of having their bids rejected as nonresponsive. Certain Federal agencies employ that requirement in formally advertised procurements. Neither the applicable procurement regulations nor the provisions of the RFP here required a firm subcontractor commitment or prevented the submission of alternate proposed subcontractors for technical evaluation, with firm quotes from both, subject to the condition that no subcontract could be entered into without Government approval. Moreover, inherent in the very nature of competitive negotiations is the concept that the Government can investigate and evaluate within the RFP's evaluation factors alternate means of accomplishing the contract objectives offered by proposers.

In this regard, we see no basis upon which the contracting officer should have limited his comparison of the Lambda and Delta proposals on the basis of Delta using PRC, which allegedly is technically inferior to AMS, as contended by Lambda.

In view of the above, we believe that award to Delta was proper and, accordingly, the protest is denied.

We note, as does the agency, that a predetermined cutoff score was used in the evaluation of proposals contrary to the procurement procedures of HEW. We concur in the agency's position that this fact does not affect the propriety of the award since all offerors were found to be technically acceptable. We have been advised that the

cognizant procurement office will be admonished in this regard and advised that further use of this technique must be avoided.

[B-181335]

Courts—Jurors—Fees—Grand Jurors—Increases—Effective Date

Fees of grand jurors sitting in the June 18, 1973 grand jury in the Eastern District of Louisiana and fees of the June 5, 1972 grand jury sitting in Washington, D.C., may be increased retroactively to the amount provided for in 28 U.S.C. 1871 at the discretion of and beginning with the dates determined by the presiding judge, in accordance with the limitations imposed by the statute.

Appropriations—Fiscal Year—Jury Fees—Retroactive Increases

Retroactive increased fees payable for jury service after the 30th day are chargeable to the appropriation for the fiscal year in which jury service was rendered.

In the matter of grand jury fees, U.S. District Court for District of Columbia, Watergate Grand Jury No. 1, and U.S. District Court, Eastern District of Louisiana, December 6, 1974:

This decision is rendered at the request of the Administrative Office of the United States Courts which is in doubt as to the legality of retroactive application of a provision of 28 U.S. Code 1871 that authorizes an increase in fees paid to jurors in United States District Courts when the attendance of such jurors is required for a period in excess of 30 days. The section provides, in pertinent part, as follows:

§ *1871. Fees.*

Grand and petit jurors in district courts or before United States commissioners shall receive the following fees, except as otherwise expressly provided by law:

For actual attendance at the place of trial or hearing and for the time necessarily occupied in going to and from such place at the beginning and end of such service or at any time during the same, $20 per day, except that any juror required to attend more than thirty days in hearing one case may be paid in the discretion and upon the certification of the trial judge a per diem fee not exceeding $25 for each day in excess of thirty days he is required to hear such case.

* * * * * * *

Jury fees * * * provided by this section shall be paid by the United States marshal on the certificate of the clerk of the court, and in the case of jury fees in excess of $20 per diem, when allowed as hereinabove provided, on the certificate of the trial judge.

The circumstances under which the question of payment of jury fees in the case of the June 5, 1972 grand jury sitting in the District of Columbia (commonly referred to as the Watergate Grand Jury No. 1) arose are described as follows in a letter dated January 4, 1974, from Mr. Vladimir N. Pregelj, foreman of the jury to Judge John J. Sirica:

* * * As you know, this grand jury was sworn in as a regular grand jury on June 5, 1972, and was to serve its normal tour of duty through August 4, 1972. It began hearing the Watergate case on June 23, 1972, and had held, by the end

of its regular term of service, twenty sessions connected with that case. The investigation being far from completed, the grand jury was held over and, moreover, as is well known, its life was recently extended by a special statute beyond the statutory 18 months.

The grand jury completed its thirty days of hearing the Watergate case on September 6, 1972, that is a month after it had already been held over from its regular term of service. Since that date, it had met 71 more times on the same case.

In summary, the question involves payment of the additional fee allowed by 28 U.S.C. 1871 to 13 grand jurors for a total of 1,333 days during the period August 7, 1972, through October 29, 1973. We understand that, beginning November 5, 1973, the fees were increased prospectively by a decision taken that day by an Executive Session of the District Judges.

The United States District Court, Eastern District of Louisiana has also presented to the Administrative Office vouchers dated April 8, 1974, for payment of additional grand jury fees, in an amount of $5 daily per juror for attendance in excess of 30 days on dates during the period January 29, 1974, to April 8, 1974. Subsequent to April 8, 1974, these grand jurors have been paid the additional fee in accordance with an order of that date of the presiding judge of the court which also provides for payment of the additional fees retroactively to January 29, 1974, the 31st day of service.

In the Watergate grand jury case, no order purporting to pay the retroactive fees has been issued by the court and no vouchers have been submitted. However, the claim of the grand jurors for a retroactive increase in their fees has been documented by the grand jury foreman and forwarded by the presiding judge to this Office through the Administrative Office. We are informed that vouchers will be presented if our decision is that the increased fees may be paid.

The Administrative Office of the United States Courts has advised the United States District Court for the District of Columbia that the fees may not be allowed retroactively on the basis of a line of decisions of this Office cited in the submission including 49 Comp. Gen. 505 (1970); 44 *id.* 89 (1964); 35 *id.* 148 (1955); 31 *id.* 191 (1951); 31 *id.* 163 (1951); 28 *id.* 732 (1949); 28 *id.* 300 (1948); 25 *id.* 601 (1946); 10 *id.* 514 (1931). As stated by the Administrative Office, these decisions have held consistently that salaries, wages and rates of per diem may not be increased retroactively by administrative determination. The question of the application of this rule to fees of grand jurors has been submitted for our review and decision.

Specifically, we are asked to rule on the following questions:

1. May the increased fees allowable under 28 U.S.C. 1871 for grand jury services after 30 days be paid on the basis of a retroactive certification of the presiding judge?

2. If retroactive payment is permissible, to what day may certification apply?

3. If retroactivity is permissible, and payment involves fees payable in a prior fiscal year, are appropriated funds available for payment?

As noted above, the view of the Administrative Office that the increased fees are not retroactively payable is based on decisions of this office disallowing retroactive increases in salaries, wages and payments of per diem or other allowances in lieu of subsistence. The provision of the aforementioned statute with which we are concerned relates to the jury fees *per se*, which may be increased after the 30th day of service. Thus, it appears the view of the Administrative Office is premised on a concept that jury fees are the equivalent of salaries and wages which we have held, generally, may not be increased retroactively by administrative action, in the absence of a specific statutory provision therefor.

On October 2, 1974, the Senate of the United States passed S. 3265, 93d Congress, a bill amending 28 U.S.C. 1871 in its entirety and increasing the jury fees in question here. In considering the legislation introduced, the Senate Judiciary Committee also had for consideration legislation proposed by the Judicial Conference of the United States, which was introduced as H.R. 14027, 93d Cong., 2d Sess. (1974), in the House of Representatives. (No action has, to date, been taken on H.R. 14027.)

In discussing its approach to the amount which should be authorized for jury fees, the Senate Committee stated in its report on S. 3265, S. Report No. 1188, 93d Cong., 2d Sess. 4, 5 (1974), that the first principle by which it had been guided is that—

> * * * juror fees, of whatever specific nature, are only intended to obviate undue financial hardship; they are not intended to make a juror as financially whole as he might be if he had invested the time given to jury service in some other endeavor. This principle has consistently been recognized by the judiciary's characterization of a juror's fee as a "gratuity" rather than as a "wage":
>
> > There is a fee paid for service of a juror, but this is not to be considered as a wage. It is merely a gratuity covering the expense that a juror may be put to in answering the call. * * *
>
> (Citing *Jochen* v. *County of Saginaw*, 110 N.W. 2d 780, 784 (Mich. 1961.))

See, also, *Silagy* v. *State*, 253 A. 2d 478 (Super. Ct. N.J. 1969); *Hicks* v. *Guilford County*, 148 S.E.V. 240 (N.C. 1966); *Board of Commissioners of Eagle County et al.* v. *Evans*, 60 P2d 225 (Colo. 1936); and *Seward* v. *County of Bernalillo (District Court)*, 294 P2d 625 (N.M. 1956).

The reasoning of the Senate Committee on the nature of jury fees is persuasive. We agree that jury fees are not salaries or wages within the meaning of our above-cited decisions in which we have disallowed retroactive increases in compensation and allowances as a general rule.

Even if jury fees were to be regarded as the equivalent of pay or allowances, in our decision 12 Comp. Gen. 554 (1933) this Office held that jurors are not to be regarded as officers or employees of the Government for purposes of reducing their fees pursuant to the Economy Act of June 30, 1932. For this reason, our previously-mentioned decisions regarding retroactive compensation are not applicable.

Even if jurors were to be regarded as Federal employees, those decisions would not apply because the exception for instances in which clear statutory authority exists for retroactive payments is present in this situation. Section 1871 provides for the increase in juror's fees after 30 days to be allowed *in the discretion* of the presiding judge. Taking into consideration the authority generally accorded a presiding judge over the administration of the court, we believe this authority extends to a determination as to whether the increased fee is payable and the date upon which it is allowable. A judge is within his jurisdiction in making orders relative to payment of jurors, 50 C.J.S. Juries 207d (1947). See, also, *Meredith* v. *Sampson*, 126 S.W. 2d 124, 125 (Ky. 1939). In this connection, we note that judges often are unable to accurately predict the duration a jury will be required to hear a case. These judges may not feel increased jury fees are warranted when jurors are required to attend only a few days in excess of the statutory 30-day period. However, as the case continues, they may feel that jurors should be compensated retroactively for hardship suffered as a result of the extended duration. On the other hand, we think it is unrealistic to insist that judges exercise their discretion to award increased jury fees on the 31st day of hearings merely to preserve their ability to compensate jurors for hardship encountered as a result of drawn out proceedings. Thus, we think the statute, in granting judges discretion to increase jury fees for each day in excess of 30 that jurors are required to attend, also contemplated that such discretion would have to be exercised on a retroactive basis.

Finally, the original purpose of the law from which section 1871 is derived was to improve the quality of Federal juries by increasing fees and travel expenses and providing for payment of subsistence expenses. An important feature of the law was the provision for increasing the jury fees in the discretion and upon the certification of the presiding judge after 30 days of attendance. See testimony of Judge John C. Knox, Chairman of the Committee on Selection of Jurors of the Judicial Conference of Senior Circuit Judges of the United States, hearings before the Senate Judiciary Committee on S. 19, 80th Congress, April 23, 1947, prior to enactment of the act of June 25, 1948, Ch. 652, 62 Stat. 1016. See, with respect to the increase proposed

for payment after 30 days attendance, the discussion on page 32 of the hearings. Although the testimony of witnesses at the Senate hearing, *supra*, was directed mainly to the circumstances of petit juries, section 1871 of Title 28, codified by the act of June 25, 1948, Ch. 646, 62 Stat. 869, 953, which was amended by the later act, provided for payment of fees to grand and petit jurors. Nothing in the legislative history of the provision suggests that grand jurors were to be compensated differently from petit jurors.

Our review of the purposes of the original legislation—to promote the public interest by improving the jury system—and of the facts and circumstances of the grand jury fees in the cases presented lead us to the conclusion that we would not object to retroactive payment of the increased fees. Hence, question 1, *supra*, is answered in the affirmative.

With regard to question 2, *supra*, concerning the date upon which the increase may be made retroactively effective, we are of the opinion that certification by the presiding judge may be made at any time after the 31st day jurors attended the proceedings for as many days of service over 30 as he feels are appropriate under the particular circumstances.

In response to question 3, *supra*, regarding the availability of prior year funds for retroactive certification and payment, the principles stated in 50 Comp. Gen. 589 (1971), cited in the submission are for application. As stated in the decision at page 591, "a claim against an annual appropriation when otherwise proper is chargeable to the appropriation for the fiscal year in which the obligation was incurred." The obligation is incurred at the time jury service is performed, but the amount of the obligation, whether $20 or $25 per day, is not certain until such time as the presiding judge in the exercise of his discretion retroactively certifies the payment of increased jury fees. Accordingly, prior year funds may be utilized if available.

[B–182066]

Bids—Options—Price Higher Than Basic Bid

Bid submitted which contained price for base quantity and greater price for option quantity in derogation of invitation for bids provision imposing ceiling limitation on option quantity (option price was not to exceed price bid on base quantity) may not be considered for award since deviation would be prejudicial to all bidders who submitted bids in conformance with option ceiling provision.

In the matter of ABL General Systems Corporation, December 9, 1974:

On June 10, 1974, invitation for bids (IFB) No. DAAB07–74–B–0915 was issued by the United States Army Electronics Command (ECOM), Fort Monmouth, New Jersey. The IFB called for the fabri-

cation and delivery of 400 each Multiplexer Subassembly FSN 5805–944–8146, First Article Test Report, and technical data covering standardization components selection and control. Pursuant to "SECTION J—SPECIAL PROVISIONS," the Government retained the option to increase the quantity of supplies called for by up to but not exceeding 100 percent of the quantity of item 0001, the Multiplexer Subassembly. Section J.1C stated "Evaluation of bids or offers received will be made on the basis of prices quoted for the supplies or services exclusive of the option."

Fifty sources were solicited, from which ten bids were received. Bids were opened on July 19, 1974, with the apparent low bid of $181.03 for item 0001 being submitted by ABL General Systems, Corporation (ABL). However, ABL submitted an option price, as called for in section "J" of the IFB, in the amount of $292.66. The apparent second low bid was submitted by Allied Research Associates Inc. (ARA), its bid on both item 0001 and the option quantity being $284.27.

Section J.1 of the IFB, which section pertains to the option for an increased quantity, states as follows with regard to the pricing of the option:

> a. The Government may increase the quantity of supplies called for herein by up to but not exceeding 100% of quantity of Item 0001 *at the unit price specified in the schedule or the lesser price* if specified below by the offeror. * * * [Italic supplied.]
>
> * * * * * * *
>
> c. Evaluation of bids or offers received will be made on the basis of prices quoted for the supplies or services exclusive of the option.

In light of this provision, and after evaluation and consideration of the other bids submitted, ECOM, on August 16, 1974, indicated to ABL that its bid was nonresponsive because it had taken exception to section J.1 in that the option price quoted was in excess of the price quoted for the base quantity. (A second exception, ABL's limitation on the time that ECOM could exercise the option, was initially indicated, but has since been dropped by ECOM.)

Once ABL became aware of ECOM's position, it protested to our Office, on August 19, 1974, contending that its bid was the lowest responsive bid submitted. ARA, on the other hand, contends that ABL's bid clearly deviated from the express provision cited above, and therefore, must be found to be nonresponsive.

In a report on this matter, ECOM refers to our decisions in 44 Comp. Gen. 581 (1965) and B–176356, November 8, 1972, which involved situations somewhat similar to the instant case. In 44 Comp. Gen. 581, *supra*, the Admiral Corporation (Admiral) was the low bidder on the base quantity. Admiral was also the low bidder on the

option quantity, although its price for the option did exceed the base price quoted. Our decision held that:

> * * * Admiral does not seem to have gained any material advantage in price, since considering its basic price alone or totaled together with the option prices it is still the low bidder and it is not conceivable in these circumstances that any bidder was prejudiced by Admiral's manner of bidding. Therefore, the failure of Admiral to conform to the option price ceiling in its bid does not appear to have been a material deviation, since by the limitation the Government was seeking to obtain the best possible option prices and while Admiral exceeded the limitation it did not prejudice any other bidder. In these circumstances, we believe that the Government could properly waive the limitation.

Subsequently, in B–176356, *supra*, our Office considered the protest of GULL AIRBORNE INSTRUMENTS, INCORPORATED (GULL). GULL had bid in the same manner as Admiral had done in that it was the low bidder on both the base and option quantities and, similarly, its option price exceeded its basic quantity price. In this case, however, the contracting officer determined:

> * * * that GULL's specific exception to the option clause would defeat the purpose of that clause by forcing the Government to buy option units after award at prices above the lower basic quantity unit price. Furthermore, * * * the bid qualification * * * was such a significant deviation that it could not be disregarded as a minor informality * * *.

Our Office, following Admiral, criticized the procuring activity for not allowing GULL to cure the deviation or for not having waived it, since it would have been to the advantage of the Government and not prejudicial to the other bidders as it would not have affected their relative standing.

ECOM next points out that in 51 Comp. Gen. 439 (1972) and in *Matter of Bristol Electronics, Inc.*, 54 Comp. Gen. 16 (1974) (Bristol), our Office considered two situations that were similar to Admiral and GULL except for a slight variation. In 51 Comp. Gen. 439 the contracting officer made the determination that the bid submitted by Fourdee, Incorporated (Fourdee), although low on the base quantity, was higher than the next low bidder on the option quantity. This resulted in the aggregate of Fourdee's bid exceeding the sum quoted by the next low bidder for these items and the bid was rejected as nonresponsive. Our Office sustained the rejection.

In Bristol, the low offeror on the base item, E–Systems, quoted an amount on the option quantity that exceeded both its base offer and the offer by Bristol on the base and option items. As in Fourdee, E–Systems' offer was, in the aggregate, greater in amount that the sum quoted by Bristol. Therefore, since the procuring activity had already accepted E–Systems' offer, our Office recommended that corrective action be taken to remedy the improper award.

In both of the latter cases, our position was based upon the fact that should the Government exercise the full option, it would incur

greater costs if it accepted the low offer which was in an aggregate amount greater than the next low offer submitted.

ECOM asserts that ABL's situation is unique and presents a case of first impression in that ABL's bid falls squarely between the two sets of cases discussed above. ABL's bid was low on the base quantity (as in all four cases), high on the option quantity (as in Fourdee and Bristol), but remained low for the aggregate of all items (as in Admiral and GULL). Therefore, ECOM states that if we continue to follow the Admiral decision by looking only at the low aggregate bid, ABL would be entitled to the award. However, ECOM has "serious reservations" concerning the Admiral decision, in that it seems to reward a bidder who deliberately deviates from a requirement in the IFB to the prejudice of those bidders who balanced their bid prices. Award is being upheld pending resolution of the protest.

For the reasons that follow, our position in this area is that where a bidder is low on the base quantity, but higher than the next low bidder on the option quantity, notwithstanding the fact that the bid remains low in the aggregate, such a bid is not properly for acceptance under the terms and conditions of the IFB. This being the case, it is our opinion that ABL's bid must be rejected and award made to the next low responsive, responsible bidder.

We reach this position by beginning with the determination that ABL's manner of bidding clearly deviated from section "J" of the IFB. The determinative issue is whether or not this deviation worked to the prejudice of other bidders for the award. In our opinion, this manner of deviation is prejudicial to the parties submitting bids in response to the IFB.

While it is true that ABL is the low bidder on the base quantity, and only the amount bid for the base item is to be used for evaluation purposes, our Office cannot unquestionably conclude that if any other bidder had bid in the same manner as ABL, it would not have displaced ABL as the low bidder. For example, ABL bid $181.03 per unit on the base quantity and $292.66 per unit for the option quantity. As contemplated by the IFB, ARA bid $284.27 per unit for both the base and option quantities. However, if ARA had ignored the price ceiling limitation contained in the option provision and bid in the same manner as ABL, it is quite possible that ARA's base bid could have been reduced below ABL's base bid with the dollar reduction being added to the option price. Since the IFB provides that evaluation is only to be made on the base item price, ARA would then be the apparent low bidder.

Additionally, our Office is concerned with the use of an option provision like the one contained in section "J" of the IFB. A clause

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of this nature appears to cause a "frontloading" of costs on the base quantity which are transferred from the option quantity to equalize the prices bid, when in actuality there is no assurance that the option will ever be exercised. What this does, in effect, is cause the Government to pay for a portion of an optional item each time a base item is paid for. If the option is not exercised, the Government will pay a price in excess of the reasonable competitive value of the item delivered. Moreover, nowhere in section "J" is there a cautionary note warning bidders that an insertion of an option price in excess of the base price may result in rejection of the bid. Therefore, we recommend that the language of section "J" be critically examined with the view of devising an option provision which will eliminate the above-mentioned deficiencies in future procurements of this nature.

Accordingly, the protest of ABL is denied, and award should be made to the next low responsive, responsible bidder.

[B-182004]

Bids—Competitive System—Profit *v.* Nonprofit Organizations

Fact that Lowell Technological Institute Research Foundation is nonprofit, State-created institution affiliated with educational institution does not preclude it from competing for Government contract involving other than research and development in competition with commercial concerns since unrestricted competition on all Government contracts is required by laws governing Federal procurement in absence of any law or regulation indicating a contrary policy.

Licenses—States and Municipalities—Government Contractors

Whether action of nonprofit, State-created institution affiliated with educational institution in bidding for other than research and development contract was ultra vires in violation of Massachusetts law enabling its establishment, like matter of general compliance with State and local licensing requirements, is for resolution between the bidder and State. Furthermore, bidder's authority to perform work in various States is matter for determination by those jurisdictions.

In the matter of E.I.L. Instruments, Inc., December 13, 1974:

By letter of August 7, 1974, E.I.L. Instruments, Inc. (EIL), protests the United States Coast Guard's award of a contract for calibration and minor repairs of electronic test equipment under solicitation 03-6192-74 to the Lowell Technological Institute Research Foundation (Lowell). The basis for EIL's protest, as amplified by its letter of October 18, 1974, is three-fold. First, EIL contends that Lowell, as a nonprofit entity affiliated with the Lowell Technological Institute of Massachusetts, is ineligible to bid on Government contracts for other than research and development (R&D) effort. Secondly, EIL maintains that Lowell's action in bidding on a contract to perform other than R&D work is an ultra vires act. Lastly, the protester ques-

tions Lowell's authority to perform work outside the State of Massachusetts as called for by the solicitation.

Citing 10 U.S. Code 2358, EIL claims that while R&D contracts may be awarded to State or federally subsidized institutions in competition with private industry, such institutions cannot bid on other than R&D work. EIL further asserts that it is unfair to expect private commercial concerns to compete with nonprofit organizations given the advantageous tax posture and the lack of a need for profit on the part of the latter.

Section 2358 of the U.S. Code, Title 10, authorizes the Secretary of Defense to perform research and development projects by various specified means, including contracting with educational or research institutions. The statute in question does not deal with educational institutions as such and, indeed, it does not prohibit such institutions from receiving contracts for any category of work. In fact, EIL has not cited any Federal procurement statute or procurement regulation which prohibits institutions of the State involved here from bidding on Government contracts.

As stated by EIL, the entitlement of State universities and their affiliates to compete for R&D contracts has been considered by this Office. In B–156838, July 13, 1965, B–160640, March 7, 1967, and B–164715, October 24, 1968, we considered the matter of such nonprofit institutions' competition with commercial concerns and concluded that there is no legal prohibition against such competition by nonprofit institutions in the absence of a statutory or regulatory policy to that effect.

In the absence of any legislative or administrative enactment indicating a contrary policy, we believe that unrestricted competition on all Government contracts between commercial concerns and nonprofit educational institutions is required by the statutes governing Federal procurement. *See* 10 U.S.C. 2305(a) and 41 U.S.C. 253(a).

As its second basis for protest, EIL questions the legal authority of Lowell to perform the calibration and minor repair work required under the Coast Guard's contract and contends that Lowell's action in bidding for the specific contract was an ultra vires act. In this connection, it is argued that the Massachusetts statute under which Lowell was created indicates that its function is limited to research.

We have generally regarded questions concerning a bidder's legal capacity to perform under State or local law a matter for resolution between the State or local authority and the potential contractor. The issue has in the past arisen chiefly in the area of State or local licensing or other such requirements. In this context we have held that whether a particular license is required is a matter to be settled by the contractor

by agreement with State or local officials or by judicial determination if necessary. In 51 Comp. Gen. 377 (1971), we considered a protester's contention that a successful bidder had not complied with the State of Minnesota's requirement for licensing of protective agents. There we explained:

> If a State determines that under its laws a bidder on a Federal contract must have a license or permit as a prerequisite to its being legally capable of performing the required services for the Federal Government within the State's boundaries, the State may enforce its requirements against the bidder, provided the application of the State's law is not opposed to or in conflict with Federal policies or laws, or does not in any way interfere with the execution of Federal powers. See *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187 (1956); *United States* v. *Georgia* Public Service Commission, 371 U.S. 285 (1963); *Charles Paul* v. *United States*, 371 U.S. 245 (1963). In those instances where the requirements of a State law do not violate this proviso, the State may proceed to enforce its requirements against a contractor who failed to comply. However, if as a result of enforcement by the State the contractor chooses not to perform the contract or is prohibited from doing so by an injunction won by the States, the contractor may be found in default and the contract terminated to its prejudice.

More recently, in 53 Comp. Gen. 51 (1973), we distinguished the case in which a solicitation requires offerors to meet a specific licensing requirement from that in which the issue involves general compliance with State or local licensing requirements that may or may not be applicable. We there recognized that while an offeror's compliance with a specific licensing requirement may be made a matter of responsibility for determination by the contracting officer, the contracting officer should not have to determine what State or local requirements generally may pertain and whether an offeror has complied therewith. Previously, we stated in B–125577, October 11, 1955, that "No Government contracting officer is competent to pass upon the question of whether a particular local license or permit is legally required for the prosecution of Federal work and for this very reason the matter is made the responsibility of the contractor." In general, therefore, we believe that questions relating to the legal capacity of State created or chartered institutions are for resolution between the institution and State.

EIL's final contention is that Lowell is not empowered to perform work in States other than Massachusetts as called for under the contract. The matter of Lowell's authority to perform work in New York, New Jersey and Connecticut is for determination by those jurisdictions. In this regard, we refer generally to our discussion, above, with respect to State and local licensing laws and specifically to our holdings that matters relating to the applicability of or compliance with State requirements are for determination between the potential contractor and the State.

For the reasons discussed above, the protest of E.I.L. Instruments, Inc., is denied.

[B-179047]

General Accounting Office—Recommendations—Withdrawn

Because resolicitation cannot be effectively implemented before expiration of contract recommended for resolicitation in prior decision and normal procurement cycle on upgraded specification is about to begin, HEW is advised that prior recommendation need not be followed. 53 Comp. Gen. 895, modified.

In the Matter of Linolex Systems, Inc., December 16, 1974:

The Department of Health, Education, and Welfare (HEW) has requested reconsideration of our decision of June 4, 1974, 53 Comp. Gen. 895, in this matter wherein we recommended resolicitation of request for proposals (RFP) No. 42-73-HEW-OS for installation and maintenance of a Terminal Data Collection Service because of certain defects in the evaluation of offers under the RFP.

The request for reconsideration does not challenge the correctness of our decision of June 4, 1974, but is directed against the corrective action which we recommended. Our decision recommended that the requirement be resolicited and after the resolicitation, the contract awarded improperly be terminated and a new contract awarded. The termination was to be effected under the paragraph of the RFP entitled "Discontinuance of Use and Rental" which allows the Government to terminate upon 30 days notice and fulfill its obligation under the contract by payment of the rental for the 30-day period, thereby limiting the costs of termination usually incurred under the standard termination for convenience clause.

The original contract was awarded on June 22, 1973, for 1 year with a 1-year option. On January 30, 1974, a contract amendment was issued which extended the contract for an additional 6 months to assure a systems life of 2 years. This was made necessary because of the 60-day delay in installation of the terminals contained in the delivery schedule of the RFP. We note that this action cured the defect pointed out in our decision of June 4, 1974, regarding the 36-day rental credit offered by Sycor, Inc., the successful offeror under the RFP. Under the original contract period HEW would not have received the benefit of this credit notwithstanding the fact that it was employed in the evaluation of offers. This was because no equipment would have been in use for 24 months prior to the expiration of the contract.

One of the grounds upon which HEW has requested reconsideration, as stated in its letter of July 22, 1974, is that it will take approximately 15 months to resolicit and to install the new contractor's equipment (if Sycor is not the successful offeror). This would only shorten the existing contract by 2 months while causing disruption

of the system and forfeiting the 36-day rental credit for a number of the terminals. Secondly, based on the experience gained under the first year of operation of the system, HEW desires to make certain changes in the specifications to upgrade the equipment. Therefore by resoliciting on the original specification, HEW will be procuring systems which will not meet its needs.

Because of the delays occasioned in the development of this matter as a result of a request by Linolex for extension of the time allowed for the submission of its comments on the request for reconsideration and various conferences at HEW with Linolex in an attempt to reach a compromise agreement, so much time has passed that about 1 year remains in the contract with Sycor. Therefore, using HEW's timeframe for a reprocurement action and phasing in of a new contractor's equipment, the present contract would expire before the resolicitation would be effectively implemented.

In any event, we have been informally advised by HEW that the solicitation for the contract to follow the present contract expiration will be issued around January 1, 1975, with award contemplated by March 1, 1975.

In view of the fact that the normal reprocurement cycle is about to begin and due to the time constraints which make our initial recommendation impossible to meet, we hereby withdraw the recommendation for resolicitation of the present contract made in our June 4 decision, 53 Comp. Gen. 895, and are so advising the congressional committees named in section 232 of the Legislative Reorganization Act of 1970, Public Law 91-510, 31 U.S. Code § 1172 (1970).

[B-181598]

Sales—Auction—Procedure—Propriety

Protest of sale of generators as group, listed on invitation for bids (IFB) as items 56 through 72 and item 75 at auction of Department of Defense surplus property on basis that word "count" as used in part 6A(b) of Sale by Reference pamphlet which provides that sale of all items cataloged by weight, count or measure will be sold in like units is ambiguous and that generators are not like units has no basis since word "count" includes any item described by number in IFB and would therefore include generators listed as one each and generators, while not identical, were sufficiently similar in nature to constitute like units; therefore it must be concluded sale was in accordance with provisions of part 6A(b) and not in contravention of part 6A(a).

Sales—Auction—Group *v.* Numbered Items—Disputes—Conflict Between Auction Records and Protester's Allegations

Contentions that protester was not advised of auctioneer's intent to sell generators in group and that auctioneer did not state that successful bidder on item 56 could choose among remaining items in group have no merit since contentions concern questions of fact and pursuant to subsection (e) of part 6 must be resolved

by Government records of auction, and records evidence that auctioneer stated that items in question would be grouped and that items were offered with option, and use of term option coupled with earlier explanations of its meaning constitutes adequate notice to bidders.

Sales—Lot Basis—Numbered Items

While, as contended, bidders were denied opportunity to bid on each numbered item from 57 through 72, and 75, since bid on item 56 would not merely be bid on that item but would constitute bid on any items in group, sale of like items by group is both practical and expedient method of sale and does not preclude bidder from purchasing single item in group and is specifically authorized by part 6A(b) of the Sale by Reference pamphlet.

In the matter of Okaw Industries, Inc., December 16, 1974:

On May 16, 1974, invitation for bids (IFB) 41–4347, an auction for the sale of Department of Defense (DOD) surplus personal property, was conducted by the Defense Property Disposal Service (DPDS), Bartow, California.

Items 56 through 72 and item 75, all of which were described in the IFB as generator sets, used and in poor condition, were offered for sale in a unit or group. The high bidder on item 56 had the privilege of choosing any one or more of the items in the group without regard to numerical sequence. The high bidder chose all of the items in the group.

On May 17, 1974, Okaw protested to the Defense Property Disposal Region, Defense Supply Agency (DSA), the award of items 56 through 75 under the subject IFB. By letter dated June 5, 1974, the DPDS, DSA, informed Okaw that there was no basis upon which to set aside the award in question. By letter dated June 14, 1974, and subsequent correspondence Okaw protested to our Office.

We have been informed by the procuring activity that the generators in question were turned over to the high bidder in June 1974. In addition we have been informally advised by the president of Okaw that he is aware that the generators have been released to the high bidder and that as a consequence he has no further opportunity to obtain one of the generators listed in the IFB for sale, but that he feels that an investigation of the general practice of grouping items for sale at an auction and the sale of generators in particular is warranted.

Specifically, Okaw contends that it was denied the opportunity to bid on items numbered 57 through 72 and item 75 since the auctioneer grouped items 56 through 72 and item 75 together. Furthermore, Okaw contends that (1) it was denied the opportunity to make a reasonable bid for item 56 since this item "was known, or thought to be known, by others as one of several to be bid upon, depending upon the

individual bidder's subjective determination of the quantity he would buy;" (2) such grouping was in contravention of subsection A(a) part 6 of the Sale by Reference pamphlet; (3) although the generators grouped together were similar by catalog description, they were different in condition, service time, accessories and mounting trailers; (4) an ambiguity exists as to the word "count;" (5) Okaw was not advised of the auctioneer's intent to group items 56 through 72 and item 75 so that a timely objection could be raised; and (6) the auctioneer did not state that the successful bidder on item 56 could choose among the remaining items.

The pamphlet "Sale by Reference" (August 1973) containing instructions, terms, and conditions applicable to sales of surplus property was incorporated into the IFB. Part 6 of the pamphlet provided the following instructions concerning procedures to be followed at auction sales:

A. SUBMISSION OF BIDS AND AWARD.

(a) The Auctioneer will offer each numbered item separately. Bidders will communicate the amount of their bids either orally or by such other means as may be recognized by and acceptable to the Auctioneer. Unless otherwise provided in the Invitation, bid offers will not be recognized from any person not properly registered and where applicable issued a numbered paddle.

(b) All items cataloged by weight, count or measure will be sold in like units unless specifically changed by announcement by the Auctioneer. The Government reserves the right to sell in such units or groups thereof as it deems most expedient. Items will not be subdivided or grouped unless specific announcement is made.

* * * * * * *

(e) Records of the Government, certified by the Contracting Officer, as to name and number of the Bidder, the bid, and amount thereof shall be prime facie evidence of the circumstances of the sale, and all disagreements will be resolved in accordance with such records.

The procedure applicable to the auction sale of items by group, as authorized by part 6A(b) is contained in a DPDS letter of November 8, 1972, from the Acting Deputy Commander to the Chiefs of all disposal regions and provides in pertinent part as follows:

1. Even though the Government specifically reserves the right to sell in such units or groups thereof as it deems most expedient, it has been determined that an unfair result can occur when items are grouped together, unless the high bidder is given the privilege of selecting a single item or more from within the group without regard to item numerical sequence.

2. Accordingly, in all auction sales when the auctioneer(s) group items for sale (unless the items are unused and in identical condition) and offer with "The Option," the high bidder will be permitted to select any one or more of the items from within the group. The only alternative to this procedure will be to offer every single line item on an "each" basis. This procedure does not apply to those items for which no bids were received, or for which bids were rejected during the sale. These items may be grouped at the end of the sale in order to expedite disposition, if considered advisable.

The generators in question were listed in the IFB as "1 each," and described as sixty cycle, 3 phase, used generators, in poor condition.

While Okaw contends that the word "count" as used in the first sentence of part 6A(b) is ambiguous, it is our understanding that

this word includes any item described by number such as 1 each, or 10 each, and would, therefore, include the generators listed as items 56 through 72 and item 75. With regard to Okaw's allegation that the generators are not like units, we note that the generators in question were all used, in poor condition of the same cycle and phase. While the generators were not identical, they were sufficiently similar in nature to be considered like units. In this regard, it should be noted that when offering the generators for sale, the auctioneer specifically excluded items 73, 74 and 76 from the group and offered them separately because these three units were 400 cycle. Consequently, we see no basis for questioning the sale of the generators in question by group and conclude that such sale was in accordance with the provisions of part 6A(b) and therefore did not contravene the general rule set forth in subsection (a) of this part.

The last two issues raised concern whether Okaw was advised of the auctioneer's intent to group the items in question and whether the auctioneer stated that the successful bidder on item 56 could choose among the remaining items in the group. Part 6A(b) provides that "* * * Items will not be subdivided or grouped unless specific announcement is made * * *." These contentions concern questions of fact, and pursuant to subsection (e) of part 6, they must be resolved by the records of the Government. In this instance, the records consist of tape recordings of the auction. These tape recordings evidence that, with regard to items 56 through 72, the auctioneer stated the following:

> OK Ladies and Gentlemen, now listen carefully on these generators what I'm going to say, as you notice we are going to offer them with the option here item 56—they go clear over there. And also item 75 is the same thing. They go right straight through to item number 72 including 72 and also 75 is a 60 cycle.
> So we are going to give you the opportunity to take 75 too, I see no problem here if we just pay attention and you can step back to 73, 74 and 76 which are 400 cycle.

During the auction of item 56, the auctioneer stated:

> * * * with the option now, take them all if you want to. You don't have to take them all, you can take one.

The high bidder on item 56, who bid $1,900, chose to take all of the generators offered. The auctioneer concluded this sale by stating:

> * * * that is the way we offered them, you could buy one or buy them all.

It should be noted that five other group sales were conducted prior to the sale of the generators; items 28 and 29; 30 through 33; 34 through 46; 49 and 50; and 54 and 55.

When offering items 28 and 29, the auctioneer stated that:

> The next 28 and 29 with the option, the same way. The next will be 28 and 29, you can take one or them both, same thing.

When the auctioneer asked the high bidder on item 28 if he wanted both items, the high bidder chose item 29. The auctioneer then stated:

> OK folks that is the way we offered them and that is the way I have to sell it to him since he requested. I don't like it. We like to sell them right down the line. But, according to a new rule which I'm against if he wants 29, he can take it ahead of 28. * * *

Furthermore, with regard to group 34 through 36, he made the following statement:

> Now ladies and gentlemen, you look at item 34 right through over to and including item 46 with the option, take as many as you want right down there. You don't have to take them all now, you can take one lot—or you can take as many as you want. So it doesn't delete the single buyer—if he only wants one dolly that is all he has to take.

The tape recording clearly shows the auctioneer stated that items 56 through 72 and item 75 would be grouped and these items were to be offered with the option. While the auctioneer did not state explicitly that the high bidder on item 56 could choose among the remaining items in the group, his use of the term option, coupled with his earlier explanations of its meaning constitutes adequate notice to the bidders that the high bidder on item 56 could choose among the remaining items in the group. In this regard, it should be noted that Okaw could have requested a clarification of the procedure utilized from the auctioneer at the time the generators were offered. However, the tape recording does not evidence that such a request was made.

It is true that Okaw could not bid on each numbered item in the group and that its bid on item 56, or for that matter on the first item offered in any group, would not be merely a bid on that item but would constitute its bid on any of the items offered in the group. However, the sale of the items by group is both a practical and expedient method of sale and does not preclude a bidder from purchasing a single item in a group. Furthermore, it is specifically authorized by part 6A(b) of the Sale by Reference pamphlet. Consequently, we see no basis upon which to question this practice.

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

[B-180478]

Contracts—Federal Supply Schedule—Mandatory Use Requirement—Defense Department

Without General Services Administration (GSA) approval, the Navy lacked authority to procure reels of instrumentation recording tape valued in excess of $5,000 and of a type not covered by a Federal Supply Schedule (FSS) contract, because the Federal Property Management Regulations require procurements in those circumstances to be approved by GSA.

Contracts—Federal Supply Schedule—Mandatory Use Requirement—Waiver

The item procured by the Navy on a sole-source basis was "similar" to that available through protester's Federal Supply Schedule (FSS) contract, within the meaning of 41 C.F.R. 101-26.401-3 (1973), and therefore the Navy should have requested General Services Administration to waive the requirement for use of the FSS.

Contracts — Specifications — Federal Specifications — Deviation Justification

The Navy did not unreasonably deviate from Federal Specification W-R-175C/GEN because no manufacturer had qualified thereunder the type of product which in the Navy's judgment was required to satisfy its minimum needs.

In the matter of Ampex Corporation, December 17, 1974:

Ampex has protested two procurement actions undertaken by separate activities of the Naval Supply Systems Command, alleging that proposed and completed purchases of reels of magnetic tape from Minnesota Mining and Manufacturing Company (3M) violate various provisions of the Federal Property Management Regulations (FPMR) (41 C.F.R. ch. 101 (1973)) requiring the procurement of these items from a Federal Supply Schedule (FSS) contract held by Ampex.

Ampex's protest against the proposed award was mooted because the procuring activity later determined that its requirements could be met under Ampex's FSS contract.

Remaining for consideration is the propriety of contract No. N00383-74-C-1877, awarded by the Navy Aviation Supply Office to 3M for the supply of 2,352 reels of magnetic tape. The items furnished consisted of instrumentation recording tape wound on semi-precision reels with phenolic hubs for use on AN/AQH-1 and AN/AQH-4(v) airborne recorders in conjunction with communication systems of P-3 aircraft.

Ampex contends that it should have been the primary source for this procurement, because it holds a FSS contract for instrumentation recording tape. The Navy does not assert that Ampex's tape would not meet its needs. However, the Navy observes that the Ampex reel is of all-aluminum construction, and it reports that in the past it has experienced mechanical distortion with aluminum reels in this application. Therefore Ampex's product was not regarded as meeting the Navy's needs. We are advised that the mechanical distortion was eliminated through the use of 3M's phenolic-hub reel, which was

purchased noncompetitively since the article was a 3M part number manufactured to that company's specification.

For the reasons stated below, we have concluded that this requirement should have been submitted to the General Services Administration (GSA) for purchase action approval. We believe that 3M's product was sufficiently "similar" to Ampex's, within the context of the FPMR, to have obligated the Navy to request of GSA that it waive the requirement for use of Ampex's FSS contract. The procurement was not submitted to GSA nor did the Navy request a waiver. However, since delivery of and payment for 3M's product transpired during the early stages of the development of this protest, no corrective action appears feasible.

Procurement by Federal agencies of wide and intermediate band instrumentation tape is governed by 41 C.F.R. § 101–26.508 (1973). This regulation generally requires agencies to satisfy their needs for instrumentation tape through contracts (such as Ampex's) under Federal Supply Schedule FSC Group 58, Part V, Section C. 41 C.F.R. § 101–26.508–1 (1973). However, a phenolic-hub reel is not available under Ampex's FSS contract. In these circumstances, the regulations provide:

> Requirements for * * * instrumentation tape (wide and intermediate band) not covered by Federal Supply Schedule contracts shall be submitted to GSA for purchase action if the dollar value of the requirements exceeds or is estimated to exceed * * * $5,000 for instrumentation tape (wide and intermediate band). However, regardless of the amount involved * * *, no purchase action by GSA or an agency shall be taken unless a waiver of the requirement for using tape available from Federal Supply Schedule contracts has been furnished in accordance with § 101–26.401–3. Requests for waivers shall be submitted to [GSA]. Such requests shall fully describe the type of tape required and state the reasons Federal Supply Schedule items will not adequately serve the agency's needs. GSA will notify the requesting agency in writing of the action taken on such requests. * * *. 41 C.F.R. § 101–26.508–2(b) (1973).

The instant procurement falls within this definition since it is for instrumentation tape of a value in excess of $5,000 and of a type (phenolic hub) not covered by a Federal Supply Schedule contract. It follows that this requirement should have been submitted to GSA for purchase action.

The above-quoted provision provides that GSA or an agency cannot undertake a separate purchase action unless a waiver of the requirement from using tape available from FSS contracts has been furnished in accordance with 41 C.F.R. § 101–26.401–3 (1973). The latter section enunciates a general policy that Federal agencies should procure from FSS contracts in lieu of procuring "similar" items from other sources if the FSS item will "adequately serve the functional end-use purpose." However, when an agency determines that items available from FSS contracts will not serve the required functional

end-use purpose, the agency is to request from GSA a waiver of the requirement to use the FSS.

The Navy contends that it was under no obligation to request a waiver from GSA because 3M's product was not "similar" to Ampex's. We do not think this position is supported by the record in light of the purpose of 41 C.F.R. § 101–26.401–3 (1973).

The most closely comparable item available under Ampex's FSS contract No. GS–00S–23765 was Federal Stock No. 5835–995–7518, generally described as tape, instrumentation type, standard resolution, 1.0 mil thick by 1 inch wide by 3600 feet long, polyester backing, wound on a straight-flange aluminum precision reel 10½ inches in diameter, with a 3-inch center hole. Apparently the Ampex and 3M tapes are comparable, and the major respect in which the reels differ is that 3M's reel is constructed with a phenolic hub. Thus, in many respects, the two products resemble one another.

The Navy insists that the use of a phenolic hub is a prerequisite to satisfactory performance in this particular application. That is a technical issue which we shall not decide. In any event, we do not think it dispositive of the question of whether the products are "similar" within the meaning of 41 C.F.R. § 101–26.401–3 (1973).

We are given no definition of "similar" as it is used in that provision, which is broad in scope and clearly intended to preclude the erosion of the FSS system which would occur if agencies were permitted to procure similar items directly from commercial sources. We therefore believe that the "similarity" of items should be viewed from a broad rather than a narrow perspective. "Schedule" and "non-Schedule" items may bear sufficient similarity to each other that, in the interest of enforcing the FSS system, an agency proposing to use the "non-Schedule" item should be required to seek a waiver from the requirement to use the "Schedule" item, and yet still could obtain that waiver upon a showing that the "Schedule" item did not meet the agency's minimum needs. In short, our view that the similarity between Ampex and 3M products should have prompted the Navy to request a waiver would not preclude GSA from ultimately granting the waiver on the basis that the Ampex product does not adequately serve the required functional end-use purpose.

Even if we agreed with the Navy's position that the Ampex and 3M products are dissimilar, however, that would not alter our view that the Navy lacked the authority to conduct this procurement. It is unequivocally stated in 41 C.F.R. § 101–26.508–2(b) (1973) that requirements in excess of $5,000 for wide and intermediate band instrumentation tape "not covered" by Federal Supply Schedule contracts "*shall* be submitted to GSA for purchase action." [Italic

supplied.] GSA is then charged with the responsibility of determining whether or not a similar article available from a Federal Supply Schedule contractor would satisfy the using agency's needs. Therefore, the basic authority for procuring this commodity rests with GSA and the "similarity" issue relates only to the source from which those needs are to be satisfied.

Ampex also argues that this sole-source procurement of reels made to a commercial specification was an unauthorized deviation from the requirement to utilize Federal Specification W–R–175C, the current general specification for reels and hubs for magnetic recording tape. Ampex asserts that it produces metallic hub reels qualified to this "performance" specification; that the specification does not "require" the use of phenolic hub reels; and that the specification is mandatory for use by the Navy in the absence of a determination that the specification is inapplicable. Armed Services Procurement Regulation § 1–1202(a)(i) (1974 ed.).

We have carefully examined Federal Specifications W–R–175C/GEN, May 15, 1973, and W–R–175/3C, May 15, 1973, which accompanies it. There are essentially four observations which we have about them.

First, these specifications enumerate the materials, method of construction, dimensions and permissible tolerance of magnetic tape reels so thoroughly that we regard them more as design than performance specifications. Second, paragraph 6.2 of W–R–175C advises purchasers to "select the preferred options permitted herein" including "Reel and hub classification." Third, paragraph 3.3 of W–R–175C provides that:

> * * * reels and hubs supplied under this specification shall be products which have been tested, and passed the qualification tests prescribed herein, and have been listed on or approved for listing on the applicable qualified products list * * *.

Fourth, and very importantly, paragraphs 4.2 and 4.3 of W–R–175/3C make it clear that qualification of the metallic hub reel sample does not constitute qualification for metallic reels with phenolic hubs, and *vice versa*.

The qualified products list furnished us by the Navy indicates that several manufacturers, including Ampex, have qualified metallic hub reels. However, none has qualified a metallic reel with a phenolic hub, which as we have seen above is an entirely distinct matter.

The Navy first observes that paragraph 6.2 of W–R–175C provides it with the option of designating the type of reel and hub to be furnished. The Navy would not select a metallic hub reel because of

unsatisfactory performance by such reels furnished under a prior Federal specification. On the other hand, a phenolic hub reel could not be procured under W-R-175C since no manufacturer has qualified such a reel to that specification. Therefore, the Navy has determined that W-R-175C is inapplicable to this particular use, and it has satisfied its requirements through the purchase of the 3M reel.

We have observed in a prior and somewhat similar situation that:

> * * * since determinations as to whether an existing Federal Specification will meet the actual needs of the Government in a particular situation and the drafting of appropriate contract specifications to reflect those needs are primarily the responsibility of the agency concerned, this Office cannot conclude that the determination that the particular needs of the procuring activity justified a deviation from the Federal Specification was arbitrary or capricious. 44 Comp. Gen. 27, 31 (1964).

We believe the same conclusion is warranted in the instant case.

With regard to future procurements to satisfy this need, ASPR § 1-1202(d) (1974 ed.) and 41 C.F.R. § § 101-29.205-1 and -2 (1973) generally place upon the agency authorizing a deviation from a Federal specification an obligation to recommend appropriate revisions or amendments thereto. It is our understanding that Navy technical personnel have been requested to review Federal Specification W-R-175C to determine what changes may be made thereto to enable its use in future procurements. However, for the reasons stated above, we do not propose to disturb the instant procurement.

[B-180545]

Pay—Retired—Survivor Benefit Plan—Effective Date

The effective date of entitlement to an annuity under section 4, Public Law 92-425, is the date on which the requirements of the law are met or the effective date of the law, whichever is later. Regulations to the contrary are inconsistent with the law and invalid.

Pay—Retired—Survivor Benefit Plan—Beneficiary Payments—Deceased Beneficiary's Estate

Amounts of annuity payments due a beneficiary under section 4, Public Law 92-425, but unpaid at the beneficiary's death either because annuity checks were not negotiated or because payments had not been established, may be paid to the estate of the deceased beneficiary.

Debt Collections—Military Personnel—Retired—Survivor Benefit Plan—Contribution Indebtedness

Debts of a deceased member, not the responsibility of his widow, in view of 10 U.S.C. 1450(i) may not be offset against an annuity payable to such widow under 10 U.S.C. 1450, the Survivor Benefit Plan. However, such reasoning does not apply to reduction of annuities due to insufficient deductions having been made from member's retired pay to cover cost of such annuities.

In the matter of Survivor Benefit Plan annuities, December 17, 1974:

This action is in response to letter dated November 28, 1973, from the Principal Deputy Assistant Secretary of Defense (Comptroller) requesting decision on three questions presented in Department of Defense Military Pay and Allowance Committee Action No. 498, enclosed with the letter, concerning the Survivor Benefit Plan (Public Law 92–425, approved September 21, 1972, 86 Stat. 706, as amended, 10 U.S. Code 1447–1455 (Supp. II, 1972)).

The first question presented in the Committee Action is as follows:

1. Would the effective date of entitlement to an annuity under Section 4, PL 92–425 be—
a. The date initial correspondence was received from the widow or from another party on her behalf;
b. The date an official application is received from her or on her behalf;
c. The first day of the month following that in which the document referred to in "a" or "b" above is received; or
d. The date on which the requirements of the law are met or the effective date of the law, whichever is later?

In regard to such question, the Committee Action states that the annuity authorized by section 4 of Public Law 92–425 is payable to a qualified person who, on the effective date that law is, or within 1 calendar year after that date becomes, a widow of a person who was entitled to retired or retainer pay when he died. For administrative reasons an application form (DD Form 1885—Survivor Benefit Plan—Minimum Income Claim) was issued for use by the several services to obtain the information necessary to determine entitlement to an annuity under this section.

The Committee Action points out that the statute contains no requirement for submission of a claim for such benefit nor a "cut-off date" for submitting a claim. However, interim Department of Defense instructions provide that the effective date of an annuity under section 4 of Public Law 92–425 is "the first day of the month following receipt by the Secretary concerned of a valid application for this type of annuity." See section 601d of Department of Defense Directive 1332.27, January 4, 1974.

The Committee Action sta tes that while the application is necessary, it can be argued that the effective date of entitlement is that date on which the requirements of the law are met or the effective date of the law, rather than the first day of the month following the date the Secretary receives the application form. Further, that there is nothing in the legislative history of Public Law 92–425 or the language of the statute which can be construed as authority to bar payment retroactively merely because the administrative action necessary to cause payment is initiated at a later date.

Section 4 of Public Law 92-425 provides as follows:

SEC. 4. (a) A Person—

(1) who, on the effective date of this Act is, or within one calendar year after that date becomes, a widow of a person who was entitled to retired or retainer pay when he died;

(2) who is eligible for a pension under subchapter III of chapter 15 of title 38, United States Code, or section 9(b) of the Veterans' Pension Act of 1959 (73 Stat. 436); and

(3) whose annual income, as determined in establishing that eligibility, is less than $1,400;

shall be paid an annuity by the Secretary concerned unless she is eligible to receive an annuity under the Survivor Benefit Plan established pursuant to clause (3) of the first section of this Act. However, such a person who is the widow of a retired officer of the Public Health Service or the National Oceanic and Atmospheric Administration, and who would otherwise be eligible for an annuity under this section except that she does not qualify for the pension described in clause (2) of this subsection because the service of her deceased spouse is not considered active duty under section 101(21) of title 38, United States Code, is entitled to an annuity under this section.

(b) The annuity under subsection (a) of this section shall be in an amount which, when added to the widow's income determined under subsection (a)(3) of this section, plus the amount of any annuity being received under sections 1431-1436 of title 10, United States Code, but exclusive of a pension described in subsection (a)(2) of this section, equals $1,400 a year. In addition, the Secretary concerned shall pay to the widow, described in the last sentence of subsection (a) of this section, an amount equal to the pension she would otherwise have been eligible to receive under subchapter III of chapter 15 of title 38, United States Code, if the service of her deceased spouse was considered active duty under section 101(21) of that title.

As the Committee Action indicates, there is nothing in the language of the statute or its legislative history which would support the proposition that the effective date of an annuity authorized thereby is to be based on the date of receipt by the Secretary of an application therefor. Instead, it seems clear from the language of the statute that a person who meets the requirements of the statute "shall be paid an annuity." While the application form may be used to determine entitlement to such an annuity, the regulation establishing the date of entitlement to such an annuity as being the date of receipt of such application does not appear to be consistent with the law and, therefore, is invalid. Compare *Seagrave* v. *United States*, 131 Ct. Cl 790(1955) and 53 Comp. Gen. 921 (1974).

Accordingly, in answer to question 1, the effective date of entitlement to an annuity under section 4 of Public Law 92-425 is the date on which the requirements of the law are met or the effective date of the law, whichever is later.

The second question presented by the Committee Action is as follows:

2. A widow of a member retired prior to 21 September 1972 who has applied and is qualified for an annuity under the provisions of Section 4, PL 92-425 dies before payments were established or prior to negotiating an annuity check. Are the payments payable to anyone else to include the estate?

The Committee Action states that clearly under section 4 of Public Law 92-425 and section 601d of Department of Defense

Directive 1332.27, *supra*, the widow in such circumstances is entitled to the annuity and, despite the fact that the widow did not receive the money which accrued, the legal entitlement exists. The view is expressed in the Committee Action that in the absence of any indication to the contrary, and regardless of the cost-free nature of the annuity, the annuity payments should be made in accordance with the law applicable to the estate of the deceased widow.

It is well established that a check issued in payment of a Government obligation pursuant to statute does not constitute payment unless and until the check is negotiated, except when the statute expressly provides otherwise. *See* 33 Comp. Gen. 99 (1953) and 31 *id.* 422 (1952). Public Law 92-425 makes no such provision. Therefore, a widow such as described in question 2 who dies before annuity payments were established or a similar widow whose payments were established but who dies before negotiating one or more annuity checks presents the same situation. That is, they died after becoming entitled to such an annuity but prior to receiving some or all of it.

Presumably question 2 arises because the annuities payable under section 4 of Public Law 92-425 are "cost free," that is, no contribution was made to such annuity by the widow's deceased husband during his lifetime. Therefore, the question arises as to whether such annuities are "gratuities" the right to which, it has long been held, is personal to the person to whom it is to be paid and lapses at the death of such person and does not become a part of his estate so as to form the basis of a valid claim by his heirs or personal representative. *See* 24 Comp. Gen. 673 (1945) and cases cited therein.

The annuity payable under section 4 of Public Law 92-425, while cost free, is not a gratuity. It is a payment authorized by law to be paid to the person entitled to receive it and constitutes a claim which may be enforced by such person. Thus, it appears to be a claim which is not abated by the death of the person having the claim but passes to his legal representative, who can prosecute it to judgment. *Cf. Campbell, Administrator* v. *United States*, 80 Ct. Cl. 836, 842 (1935) and 22 Comp. Gen. 736 (1943). Therefore, question 2 is answered by saying a claim for such amounts which are due and unpaid at the annuitant's death may be paid to the estate of the deceased. Doubtful cases should be transmitted to the General Accounting Office for determination.

The third question presented by the Committee Action is as follows:

3. The retired pay of a member is in suspended status in satisfaction of a Federal Civil Employment checkage, an overpayment of military severance pay, and an indebtedness to the Veterans Administration. May the balance of these overpayments be offset against the SBP annuity payable to the widow?

The Committee Action states that regardless of the fact that the member did not physically receive his retirement pay, 10 U.S.C. 1450(i) and section 301(f) of Department of Defense Directive 1332.27 bar an annuity from execution, levy, attachment, garnishment, or other legal process. It is also indicated that the widow has legal entitlement to the annuity under 10 U.S.C. 1450(a), and there is no authority for offsetting the annuity by the amount of the member's indebtedness.

Presumably question 3 refers to an annuity payable under 10 U.S.C. 1450, subsection (a) of which sets forth the classes of beneficiaries of such annuities (including the eligible widow or widower). Subsection 1450(i) to which the Committee Action refers provides as follows:

(i) An annuity under this section is not assignable or subject to execution, levy, attachment, garnishment, or other legal process.

Concerning a similar provision (10 U.S.C. 1440) in the Uniformed Services Contingency Option Act of 1953 (later renamed the Retired Serviceman's Family Protection Plan), this Office held that no part of an annuity payable to a beneficiary could be involuntarily withheld to pay a general debt owed by the beneficiary's husband and for which the beneficiary was not responsible. *See* B–139217, August 12, 1960, and 41 Comp. Gen. 28 (1961). It is the view of this Office that such reasoning would also apply to 10 U.S.C. 1450. Accordingly, assuming that the debts which are the subject of question 3 are debts of the member, question 3 is answered in the negative.

While it was not included in question 3, it should be noted, however, that such reasoning does not apply in cases in which no deductions were made, or insufficient deductions were made, from members' retired pay to cover the cost of annuities. In such cases under the Uniformed Services Contingency Option Act and the Retired Serviceman's Family Protection Plan it was held that, in effect, since such plans were intended to be self-sustaining, annuities could be reduced or withheld to make up the cost of such annuities. *See* 35 Comp. Gen. 12 (1955), 41 *id.* 28, *supra*, and 41 *id.* 500 (1962). Such reasoning would also apply in the case of annuities payable under the Survivor Benefit Plan.

[B–181885]

Contracts—Modification—Mutual Mistake—Price Adjustment

Where company's mistaken proposal to repair roofs was based on misinformation given it by Government's agent and also on its own negligence in not studying blueprints and specifications thoroughly enough, the position of the parties is that of persons who have made a mutual mistake as to material fact and contract may be reformed to allow additional compensation for repairing correct contract area.

In the matter of Morgan Roofing Company, December 17, 1974:

By letter of July 18, 1974, the Supply Service Director of the Veterans Administration's (VA's) Department of Medicine and Surgery recommended that we grant relief to the Morgan Roofing Company (Morgan) for a mistake made in its proposal on a job to repair and replace roofs and flashings of several buildings at the VA Hospital in Lake City, Florida. The relief sought is an increase of $5,000 in the contract price.

Morgan was awarded contract 594C-219 on January 30, 1974, at its proposed price of $18,500. The only other proposal was $45,498 and the Government estimate for the job was $27,263. Consequently, Morgan was requested to review its offer and to submit a breakdown of materials and their costs which it did in writing on January 18, 1974.

Morgan claims that prior to submission of its proposal, the Government agent who showed Morgan's representative the job site indicated to its representative that the job Morgan was submitting a proposal on did not include any work on certain roof areas known as "penthouses". However, according to the blueprints and specifications for the job, which the company had in its possession but apparently did not study thoroughly enough, the job did include work on the "penthouses".

In spite of Morgan's contributory negligence, the rule applied in *Matter of Crawford Paint Company*, B-182257, November 20, 1974, and in B-159064, May 11, 1966, to relieve the contractors involved in those cases, applies to the instant case with like effect. A statement of the rule appears in B-159064 as follows:

> It has been held that where, in connection with a Government contract, the Government apparently negligently misstated a material fact and thereby misled the plaintiff to its damage, and where the plaintiff was negligent in not discovering the misstatement and ascertaining for itself what the facts were before submitting its bid, the position of the parties is that of persons who have made a mutual mistake as to a material fact relating to the contract and the court should therefore, in effect, reform the contract by putting them in the position they would have occupied but for the mistake. *Virginia Engineering Co., Inc.* v. *The United States*, 101 Ct. Cl. 516. The general rule is that a contract made through mutual mistake as to material facts may either be rescinded or reformed. See 12 Am. Jur., Contracts, Sec. 126 and 17 C.J.S., Contracts, Sec. 144. Further, it is an additional rule that mistake on one side and misrepresentation, whether willful or accidental, on the other, constitute a ground for reformation where the party misled has relied on the misrepresentation of the party seeking to bind him. 76 C.J.S., Reformation of Instruments, section 29. Restitution in these circumstances may be obtained on the premise that it would be unjust to allow one who made the misrepresentation, though innocently, to retain the fruits of a bargain which was induced, in whole or in part, by such misrepresentation. See Williston on Contracts, Rev. Ed., sections 1500 and 1509 and the cases therein cited. * * *

At the present time Morgan Roofing has nearly completed the contract. Even with the addition of $5,000 to the contract price Morgan will be receiving an amount of money far below that of the

only other proposal on the job, and also below the Government's estimate. Therefore, as administratively recommended, Contract 594C–219 may be reformed so as to increase the price to be paid the Morgan Roofing Company by $5,000.

[B–181199]

Contracts—Awards—Protest Pending

Where award is made by agency after protest filed at General Accounting Office but before agency received notice of protest, agency did not act improperly even though, due to decision on merits of protest, it appears that protester may have been prejudiced by award.

Contracts—Specifications—Conformability of Equipment, etc., Offered—Commercial Model Requirement—"Off the Shelf" Items

Where purchase description covers salient characteristics of "commercial, off the shelf" item and agency specifically informs all offerors that specifications are not sufficient to permit design and manufacture of item, commercial, off-the-shelf characteristic was invitation for bids requirement.

General Accounting Office—Contracts—Contractor's Responsibility—Contracting Officer's Affirmative Determination Accepted—Exceptions

Question of responsive bidder's manifestation after bid opening of inability to comply with specification requirement for commercial, off-the-shelf item is situation where our Office will continue to review affirmative responsibility determination, even in absence of allegation or demonstration of fraud to determine if determination was founded on reasonable basis.

Bidders—Qualifications—Preaward Surveys—Unsatisfactory

In situation where it becomes evident in preaward survey that low responsive bidder does not have intention or ability to provide required "commercial, off the shelf" item by time set for delivery, there is no reasonable basis upon which bidder could properly have been found responsible. Accordingly, award to such bidder was improper and should be terminated, with award being made to next low responsive and responsible bidder willing to accept award at its bid price.

In the matter of Data Test Corporation, December 20, 1974:

Invitation for bids (IFB) WA5M–4–7215 was issued on April 4, 1974, by the Federal Aviation Administration (FAA), seeking bids on 20 automatic printed circuit board testers with peripheral equipment, spare parts and related material. The testers in question were required to be furnished "* * * in accordance with Purchase Description FAA–P–2576 * * *." The IFB stated that the award would be made on the basis of the lowest aggregate bid for all items with the exception of items 7 and 10. Item 7 was an optional item regarding test programming while item 10 pertained to the contractor's training of FAA personnel and the price for which it was to be negotiated within 30 days of award.

In response to the IFB, four bids were received. The pertinent portion of the abstract of bids was as follows:

	Total Price Excluding Items 7 and 10
Systron-Donner Corporation	$435, 785
Atec, Inc	476, 585
Data Test Corporation	789, 317

Accordingly, award was made to Systron on June 28, 1974. Data Test protested to our Office against any award being made in a telegram sent at 7:29 p.m. P.d.t. June 27, 1974, and filed in our Office at 9:33 a.m., Friday, June 28, 1974. (However, telephonic notification to FAA by our Office of this protest did not occur until Monday, July 1.) The FAA states that the award to Systron was made on the morning of June 28, and that it did not become aware of the protest until 1:05 p.m. e.d.t. on June 28 when it received a telephone call from the protester. (Note: A copy of the telegram to GAO arrived at FAA at 1:56 p.m. e.d.t. on June 28.) While the protest was technically filed prior to award, since there is no evidence that the FAA was on notice of the protest at the time of award, we cannot fault the agency for its actions even though unlike the situation described in *Matter of Solar Laboratories, Inc.*, B–179731, February 25, 1974, as noted below Data Test may have been prejudiced by the award.

Parenthetically, we note that our protest procedures and standards, 4 C.F.R. § 20.1(b) (1974), require that a copy of any protest to GAO should be filed concurrently with the contracting officer to prevent the occurrence of such situations.

Data Test argues that the award to Systron was improper since—

1. Systron's bid was nonresponsive for failure to comply with the purchase description;

2. Systron was not a responsible bidder as the preaward survey indicates;

3. the contract between the Government and Systron is void *ab initio* because the contracting officer essentially did not take all steps necessary to preclude Systron from subsequently alleging and prevailing on a theory of mistake in its seemingly low bid; and

4. Systron has, in effect, bought-in and, therefore, should not be permitted to negotiate changes in the delivery schedule or price.

With regard to the issue of Systron's alleged failure to comply with purchase description FAA–P–2576, the purchase description in outlining its scope states that:

> This purchase description covers the salient characteristics of a commercial, off the shelf, digital, noncomputer operated, Printed Circuit Board (PCB) Tester.
> * * *

Data Test argues that since Systron does not have such a "commercial, off the shelf" item, its bid should have been declared nonresponsive. (Note: Systron does not contradict the statement as to its not having an off-the-shelf item.) The agency, on the other hand, argues that even though the purchase description was indeed written to describe such an off-the-shelf item, "* * * the document is certainly definitive enough to permit design and fabrication by competent companies * * *." However, it should be noted that in a preaward memo from the Chief of the FAA Radar and Navaids Section sent to all prospective bidders the following relevant exchange occurred:

Question: Is the specification definitive enough to permit the construction of printed circuit boards?
Answer: FAA–P–2576 was not written as a specification. It is a purchase description for the type of tester the FAA has determined by evaluation that will satisfy the agency's needs. It describes an off-the-shelf item and was not intended to be a specification that a contractor could manufacture and design a printed circuit board tester from.

From a reading of this material and the purchase description, it is clear to us that the FAA conveyed to all offerors the fact that an off-the-shelf, commercially available item was being sought. The argument that the answer in the above-noted memo does not preclude the supply of a newly designed tester, we feel, is not persuasive in view of the FAA characterization of the purchase description. Thus, we are of the view that the commercial, off-the-shelf characteristic was a requirement of the IFB.

The protester argues that since Systron does not have such an off-the-shelf item, it must be declared nonresponsive. However, in a similar situation, where the IFB sought a "manufacturer's standard commercial product," our Office stated that:

Since * * * [the awardee who allegedly did not have such an item] took no exception to, or otherwise manifested an intention in the bid not to be bound by, any provision of the solicitation, including the Standard Product clause, it is our view that the issue in the present case is one of responsibility * * * B–176896, January 19, 1973.

See 49 Comp. Gen. 553, 556–557 (1970).

Similarly, as in the instant case, the revelation subsequent to bid opening of the bidder's intention not to comply with the specifications would seem to support a determination to reject the bid on the basis of the bidder's nonresponsibility. B–178112, July 24, 1973, citing B–176896, *supra*, and 49 Comp. Gen., *supra*.

Our Office has recently indicated that it would not review situations involving contracting officer's affirmative determinations of responsibility absent allegations or demonstrations of fraud since such determinations are based in large measure on subjective judgments which are not readily susceptible to reasoned review. *Matter of Central*

Metals Products, Incorporated, 54 Comp. Gen. 66 (1974). See *Keco Industries* v. *United States*, 428 F. 2d 1233, 1240 (192 Ct. Cl. 773). However, where, as here, there is a question concerning whether the bidder meets definitive guidelines or requirements, such as in this case whether the product to be delivered meets the specification requirement for a commercial, off-the-shelf item, we will continue to review the affirmative determination of responsibility to determine if it was founded on a reasonable basis.

The preaward survey performed on Systron states that "The item being procured in the proposed contract is not a standard product for the proposed contractor" and that it "* * * is not a stock item with the prospective contractor." The survey also states that:

> * * * the Bidder's engineering staff is considered competent, but were not well versed in the specific requirements of the purchase description. It is also concluded that the Bidder has under-estimated the required task and the proposed engineering staff is not adequate to perform the proposed contract within the required schedule.

We view the above-quoted portions of the preaward survey as clear evidence of Systron's intention not to, or more precisely its inability to, provide a "commercial, off the shelf" item which we have found to be an IFB requirement.

The case at hand is distinguishable from the situation expressed in B–176896, *supra*. There the solicitation required a "manufacturer's standard commercial product" and even though the low bidder did not have such an item available at the time of bidding, since the preaward survey confirmed that the bidder was capable of meeting all the specifications including the standard commercial product requirement, by the time set for delivery, our Office believed that the affirmative preaward determination of the responsible bidder was proper. Moreover, in that case (1) the bidder intended to furnish its model 433 which was an updated version of its commercially available model 270; (2) a preproduction model of the 433 had been manufactured more than 3 years prior to bid opening; (3) the model 433 had undergone thousands of hours of test operation; (4) a corporate decision was made at or about the time of the preaward survey to release the equipment commercially 3 months thereafter; (5) engineering drawings were released, assembly areas were prepared, and production tooling installed; (6) production schedules had been planned; (7) commercial manuals were being prepared; (8) materials from outside sources were both on order and in inventory; and (9) the model 433 was to have been in commercial use several months before the first article was due under the contract.

The instant case is specifically distinguishable from B–176896, *supra*, for the following reasons: first, the preaward survey here gives no positive indication that Systron could provide a "com-

mercial, off the shelf item" within the requisite 120-day period between award and initial delivery, nor does it indicate that Systron had made definite preparations to include this product in its commercial line; and, secondly, the instant preaward survey states substantial doubt as to the Systron engineering department's knowledge of the task required of it. Moreover, the contracting officer never determined that Systron could provide a commercial, off-the-shelf item in timely fashion. (Note FAA did not consider this to be an IFB requirement.)

Indeed, we do not believe that there was a reasonable basis upon which it could have been properly concluded, prior to award, that Systron had the ability to meet *all* of the IFB requirements. Accordingly, Systron should have been declared nonresponsible. Therefore, we believe that the award to Systron was improper and recommend that the contract in question be terminated for the convenience of the Government, with award made to the next low responsive and responsible bidder willing to accept the award at its bid price. 51 Comp. Gen. 792 (1972).

With regard to Data Test's remaining arguments, we feel that in view of the findings that the contractor should have been found nonresponsible, these contentions become academic. Also, in the interest of implementing some form of prompt corrective action, we will decline to rule on these points.

Since this decision contains a recommendation for corrective action to be taken by the agency, a copy is being transmitted to each of the committees named in section 236 of the Legislative Reorganization Act of 1970, 31 US Code 1176.

[B-182521]

Leaves of Absence—Annual—Agency-Forced—Curtailment of Agency Operations

American Federation of Government Employees requests ruling invalidating Air Force Logistics Command (AFLC) policy to reduce operations at its installations during 1974 Christmas holiday period and force employees to take annual leave on basis that AFLC is not authorized to promulgate policy that violates collective bargaining agreements between installations and local unions. Since matter is presently before Assistant Secretary for Labor Management Relations as unfair labor practice complaint, Comptroller General declines to rule on issue.

In the matter of union protest against agency-forced annual leave policy, December 20, 1974:

This case concerns a request for a decision from the American Federation of Government Employees (AFGE) as to whether the United States Air Force Logistics Command (AFLC), which has discretionary authority under statute and regulations to prescribe the time periods in which annual leave may be granted to employees, may, in the

exercise of this discretion, close all AFLC bases from December 21, 1974, to January 1, 1975, and require employees to take annual leave, which allegedly supersedes collective bargaining agreements negotiated by subordinate elements purporting to cover this subject.

Headquarters, AFLC, Wright-Patterson Air Force Base, Ohio, directed subordinate activities and installations through message, R161515Z, February 1974, Subject: Curtailment of Operations, to reduce operations during the holiday period of December 21, 1974, through January 1, 1975, in order to maximize energy conservation. The text of the message reads as follows:

SUBJECT: CURTAILMENT OF OPERATIONS.
1. THIS MESSAGE HAS PRECEDENT OVER PREVIOUS HQ AFLC CORRESPONDENCE CONCERNING WORKLOAD AND LEAVE SCHEDULE PLANNING.
2. AFLC ACTIVITIES WILL OPERATE UNDER A MINIMUM WORKLOAD SCHEDULE DURING 21 DECEMBER 1974 THROUGH 1 JANUARY 1975. ONLY MINIMUM ESSENTIAL PERSONNEL NECESSARY TO PROVIDE SUPPORT WILL BE REQUIRED DURING THIS PHASE DOWN PERIOD. PLANNING WILL INCLUDE THE CAPABILITY TO RESPOND TO EMERGENCY SITUATIONS AND TO ASSURE THAT ESSENTIAL WORK, SUCH AS MEETING NCRS, IS ACCOMPLISHED.
3. DEVIATIONS FROM THE ABOVE POLICY, WHEN NECESSARY TO ASSURE REQUIRED CUSTOMER SUPPORT, COMPUTER OPERATIONS AND PAY OF PERSONNEL WILL BE WORKED OUT BY THE APPROPRIATE OPR WITH THEIR COUNTERPART HQ AFLC OCS.
4. THE ABOVE POLICY IS DESIGNED TO MAXIMIZE ENERGY SAVINGS BY REDUCING INDUSTRIAL OPERATIONS TO THE MAXIMUM EXTENT POSSIBLE CONSISTENT WITH YOUR MISSION. EARLY AND CAREFUL PLANNING TO ASSURE THIS OBJECTIVE IS A NECESSITY.
5. ANNUAL LEAVE WILL BE SCHEDULED IN ADVANCE TO COVER THE ABOVE DATES EXCEPT FOR THE ACTUAL HOLIDAYS INVOLVED. EMPLOYEES CAN VOLUNTEER FOR LEAVE WITHOUT PAY. ENFORCED ANNUAL LEAVE POLICIES WILL BE UTILIZED DURING THE ABOVE PERIOD. EMPLOYEES WHO DO NOT HAVE SUFFICIENT ANNUAL LEAVE ACCRUED OR TO BE ACCRUED SHOULD BE ASSIGNED TO OTHER USEFUL WORK. THE POLICIES TO BE USED FOR THOSE WHO DO NOT HAVE SUFFICIENT ANNUAL LEAVE TO COVER THE PERIOD WILL BE IN ACCORDANCE WITH FPM SUPPLEMENT 990-2 BOOKS 610 AND 530. FURLOUGHS WILL NOT BE USED. RECOGNIZED UNIONS SHOULD BE ADVISED OF THESE POLICIES AND CONSULTED ON LOCAL IMPLEMENT POLICIES AND PRACTICES.

The AFGE has also filed an Unfair Labor Practice (ULP) complaint with the Assistant Secretary for Labor-Management Relations (A/SLMR), Department of Labor, charging that the Secretary of the Air Force and Commander, AFLC, violated sections 19(a)(1) and 19(a)(6) of Executive Order 11491, as amended, 3 C.F.R. § 254 (1974), hereinafter referred to as the Order, in that the agency had no authority to promulgate the superseding regulations covering the scheduled annual leave policy in connection with the holiday base closures and that it failed to consult, confer, or negotiate the matter with the union prior to the promulgation.

Annual leave for Federal employees is governed by the provisions of 5 U.S.C. Ch. 63 (1970), and regulations promulgated by the Civil Service Commission (CSC) under authority granted by 5 U.S.C. § 6311 (1970). The CSC has issued regulations setting forth agency authority in granting annual leave to employees in Federal Personnel Manual Supplement 990-2, § S3-4b (Revised July 1969), which reads as follows:

> b. Agency authority. *(1) Legal Basis. (a) Law.* "*(d) The annual leave provided by this subchapter, including annual leave that will accrue to an employee during the year, may be granted at any time during the year as the head of the agency concerned may prescribe.*" (Section 6302(d) of title 5, United States Code.)
>
> (b) *Taking of leave.* The taking of annual leave is an absolute right of the employee, *subject to the right of the head of the department or establishment concerned to fix the time at which leave may be taken* (39 Comp. Gen. 611, citing 16 Comp. Gen. 481). [Italic supplied.]

The above-quoted regulation indicates that agency heads have discretion in granting employees annual leave and in requiring employees to take annual leave. Moreover, we have consistently ruled that an agency head's discretion under statute and regulation is sufficiently broad to enable him to deny employees annual leave during one period of time and instruct them to take annual leave at other specific times to satisfy the needs of the Federal service. 31 Comp. Gen. 581, 586 (1952); 32 *id.* 204 (1952); 40 *id.* 312, 314 (1960).

The AFGE argues that once collective bargaining agreements covering a particular matter such as the scheduling of annual leave have been negotiated between AFLC bases and the AFGE local unions on an individual basis, higher level commands, including the agency headquarters, may not through the promulgation of regulations supersede these agreement provisions. In this connection, section 12(a) of the Order provides:

> SEC. 12. *Basic provisions of agreements.* Each agreement between an agency and a labor organization is subject to the following requirements—
>
> (a) in the administration of all matters covered by the agreement, officials and employees are governed by existing or future laws and the regulations of *appropriate authorities,* including policies set forth in the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of *appropriate authorities,* or authorized by the terms of a controlling agreement at a higher agency level * * * [Italic supplied.]

The AFGE contends that in *Department of the Navy, Supervisor Shipbuilding and Repair, Pascagoula, Mississippi,* A/SLMR No. 390, a case involving a ULP complaint filed by the union under section 19(a)(6) of the Order, the A/SLMR ruled pursuant to section 6 of the Order that, for a superseding regulation to be considered a regulation of an "appropriate authority," it must be issued by an authority outside the agency which has the legal jurisdiction to bind that agency.

No such outside authority has dealt with this matter. (Although the AFLC cites a General Services Administration (GSA) Federal Management Circular on Federal Energy Conservation as justification for the closing, such closing was never directed by the Circular.) Therefore, the AFGE urges us to issue a ruling invalidating the AFLC directive requiring subordinate activities and installations to schedule leave for employees during the holiday period where such order violates provisions of existing collective bargaining agreements.

We are of the opinion that it would be inappropriate for this Office to rule on the aforementioned issue inasmuch as it is the subject of a ULP complaint presently before the A/SLMR who has jurisdiction to decide such matters under provisions of section 6 of the Order.

In addition to the question set forth above, the AFGE has also requested us to rule on the issue of whether employees who lose annual leave through the AFLC base closures policy, if the policy is subsequently determined to be in violation of collective bargaining agreements or is found to be a ULP by an arbitrator or other appropriate decision maker in accordance with negotiated grievance or ULP procedures, have a right to recover any leave lost as a result of such violation.

We are unable to render a decision at this time on this question as it applies specifically to the situation described for two reasons. First, the particular findings of fact in each individual case would govern our decision, and no such findings have been made by an arbitrator or other appropriate fact finder to date. For example, we have no basis for concluding that any breach of a collective bargaining agreement has in fact taken place or that the Order has been violated in any respect. Second, it would be impossible for us to obtain an administrative report within the time frame requested.

The AFGE concedes and we agree that the Secretary of the Air Force originally had discretionary authority, which he delegated to the Commander, AFLC, to require civilian employees within his command to schedule annual leave during the Christmas holiday period between December 21, 1974, and January 1, 1975. It is, of course, possible for an agency head, or one to whom he has delegated such discretionary authority, to fully or partially relinquish his discretion with regard to scheduling annual leave of employees through the promulgation of agency regulations or through the negotiation of collective bargaining agreements which include provisions which, in effect, make the time that leave is scheduled for employees a nondiscretionary matter. However, we do not presently have any documents before us which establish that the discretion to schedule leave was in fact relinquished in whole or in part.

As a general principle, without regard to the specific facts as presented by the AFGE, we think an employee would be entitled to have his leave restored when an appropriate decision maker has made a definitive finding that the Order or a collective bargaining agreement, which contains nondiscretionary provisions with respect to the scheduling of leave, was violated by the base closure and, as a direct consequence, a particular employee has suffered an unjustified or unwarranted personnel action within the meaning of the Back Pay Act of 1966, 5 U.S.C. § 5596 (1970). 54 Comp. Gen. 312 (1974) 54 *id.* 403 (1974); B-181173, November 13, 1974. In this regard, the decision maker would have to show a direct connection between the violation of the agreement or Order and the harm to the employee. Supported by such determination, an agency could legally implement an arbitrator's award or Order directing that lost annual leave be restored to an employee in compliance with requirements of applicable statutes and regulations.

Should the closure of the base take place and any of the anticipated problems arise, it is assumed that both the AFLC and the AFGE will avail themselves of the established procedures for processing any claims for restoration of leave, including the opportunity to take an exception to any award that may be made to the Federal Labor Relations Council, if appropriate. Any further questions that may arise as to whether an award restoring lost leave may be legally implemented can, of course, be submitted directly to this Office as well.

[B-182700]

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

Contractor's claim for correction of contract price to include Nurse Call/PA/Intercom cost is denied, since contracting officer did not have actual or constructive notice of possible error prior to award in only bid received, as bid price was considered reasonable although considerably higher than Government estimate, and Engineering Service recommended that award be made.

In the matter of Vee See Construction Company, Inc., December 23, 1974:

Vee See Construction Company, Inc. (Vee See), has requested an increase in its contract price in connection with an error alleged to have been made in its bid which is the basis of Veterans Administration (VA) contract No. V537C–891, dated June 21, 1974.

Invitation for bids (IFB) No. 537–106–74 solicited bids for the furnishing of all necessary labor, material, and equipment for the remodeling of the nursing stations at the VA (West Side) Hospital,

Chicago, Illinois. The bid submitted by Vee See was the only one received and award was made to that firm on June 21, 1974, for the remodeling work at its lump sum price of $52,000. The Government's estimate for the cost of the work was between $10,000 and $25,000.

By letter dated July 19, 1974, Vee See notified the contracting officer that there was an omission in its bid in that the amount bid did not include the price for section XIV, Nurse Call/PA/Intercom. In Support of the allegation, Vee See submitted its original worksheet. The claim for correction was submitted to our Office by the VA for determination.

Where a bidder or offeror has made a mistake in its bid or offer that was not induced or shared by the Government, the bidder or offeror must bear the consequences of its mistake, unless the contracting officer was on actual or constructive notice of the error prior to award. *Saligman* v. *United States*, 56 F. Supp. 505 (E. D. Pa. 1944); *Chernick* v. *United States*, 372 F. 2d 492, 178 Ct. Cl. 498 (1967); 48 Comp. Gen. 672 (1969). In addition, we have found that where only one bid or offer is received, there is no basis for comparison to other bids so that there is normally nothing to place a contracting officer on notice of the probability of a mistake. 26 Comp. Gen. 415 (1946); *Matter of The Murphy Elevator Company, Inc.*, B–180607, April 2, 1974; B–175760, June 19, 1972.

In this regard, contractors will naturally seek to impose upon con. tracting officials a rather high level of responsibility for error detection. However, the test is one of reasonableness, whether under the facts and circumstances of the particular case there were any factors which reasonably could have raised the presumption of error in the mind of the contracting officer. *Wender Presses* v. *United States*, 343 F. 2d 961, 170 Ct. Cl. 483 (1965); B–176772, May 23, 1973.

The position of our Office is that the contracting officer is not normally required to make a detailed analysis or breakdown of a contractor's bid, but only to note any discrepancies between the offered price and a reasonable price. B–167795, March 16, 1970. Especially is this the test to be applied in a situation as existed here where only one bid is received, there are no other bids which can be used for comparison of prices, and the bid price rather than being considerably lower than the Government's estimate is considerably higher.

There is nothing in the record to support a conclusion that the price of $52,000 submitted by Vee See was unreasonable, albeit higher than the Government's estimate. Moreover, paragraph 6 of the contracting officer's October 10, 1974, letter states that:

> * * * and we were not put on constructive notice of the mistake before the award since only one bid was received and our Engineering Service requested that award be made to the only bidder, Vee See Construction Co., Inc., at a cost of $52,000.00

At the time of acceptance of Vee See's bid, the contracting officer had received no notice or claim of error and, in view of the circumstances discussed above, we are unable to conclude that the contracting officer was on constructive notice of the likelihood of error in the Vee See bid. The acceptance of the bid in these circumstances consummated a valid and binding contract which fixed the rights and liabilities of the parties. See *United States* v. *Purcell Envelope Company*, 249 U.S. 313 (1919), and *American Smelting and Refining Company* v. *United States*, 259 U.S. 75 (1922).

Accordingly, no legal basis exists for increasing the contract price.

[B-180988]

Bids—Ambiguous—Two Possible Interpretations—Absent

Although protester contends bidding same price for item requiring life testing as was bid for items not requiring testing raises doubt as to bidder's intention to perform testing, there is no basis to reject bid, since bid on every item in invitation for bids, without exception being stated, was responsive, contracting officer obtained verification of bid and reaffirmation of verification against possible error in bid, and there was no ambiguity on face of bid as to intended price.

Bids—Responsiveness—Responsiveness *v.* Bidder Responsibility

Information required in invitation for bids on bidders' design and production experience for "comparable items" (silver-zinc battery cells of configuration being procured) is matter of responsibility rather than responsiveness, since request recognized information was related to responsibility and was required only after bid opening.

Contractors—Responsibility—Contracting Officer's Affirmative Determination Accepted—Exceptions—Distinguished

Where invitation for bids provides for offerors' furnishing information as to experience in designing and producing items comparable to item being procured, record will be examined to determine if bidder to whom award was made meets experience requirement and rule that affirmative determinations of responsibility will not be reviewed except where there are allegations that contracting officer's actions in finding bidder responsible are tantamount to fraud is distinguished.

Contracts—Protests—After Bid Opening

Protest after bid opening that invitation for bids is restrictive is untimely, since Interim Bid Protest Procedures and Standards provide that apparent improprieties in solicitations must be protested prior to bid opening.

In the matter of Yardney Electric Corporation, December 24, 1974:

Invitation for bids (IFB) N00024-74-B-7196, issued by the Naval Ship Systems Command on February 1, 1974, sought bids on silver-zinc submarine batteries for the AGSS-555 in accordance with Ship Systems Command Contract specification SHIPS-B-5692A, December 21, 1973.

Only two bids were received in response to the IFB. Molecular Energy Corporation (MEC) bid $494,840 while Yardney Electric Corporation (Yardney) bid $591,387. MEC was awarded the contract on March 28, 1974. Thereafter, Yardney filed a protest with our Office alleging that the award to MEC was improper for the following reasons:

1. MEC's bid price did not provide for certain life testing required by the IFB and MEC's price for item 0003 substantially differed from Yardney's;

2. Yardney is the only bidder that meets the experience requirements of the IFB; and

3. the IFB is overly restrictive of competition.

With regard to Yardney's first contention, it relates that MEC's bid for item 0004 is insufficient to cover the costs of life testing. The IFB called for:

Item	Quantity	
0001	1	Submarine battery 330 cells (silver-zinc).
0002	6	Spare cells for item 0001.
0003	1	Accessories for item 0001.
0004	6	Acceptance/life test cells.
0006	6	Laboratory cells.

The specification indicates the following definitions and requirements:

3.5.2 *Batteries* [(item 0001)]. Each battery shall consist of the grouping of 165-individual cells (55 cells from each of 3 groups). The 2 batteries shall be treated as specified in 4.4, and 4.5 and shipped where directed in accordance with 4.4.2.

3.5.3 *Spare cells* [(item 0002)]. The 6 spare cells (1 randomly selected cell from each group) shall be kept dry and shipped with the battery.

3.5.4 *Acceptance test cells* [(item 0004)]. The 6 sample cells (1 randomly selected cell from each group) shall be filled, formed and assigned to acceptance testing in accordance with 4.3 at the manufacturer's plant.

3.5.5 *Life test cells* [(item 0004)]. After completion of the acceptance tests, the same 6 cells of 3.5.4 shall be submitted to life testing in accordance with 4.3.4 at the manufacturer's plant.

4.3.4 *Life tests.* The life tests shall be run at room temperature, in the range of 60° to 90° F. After completion of the acceptance tests, the 6 sample cells of 3.5.4 shall be submitted to life testing at the manufacturer's plant on the following regimes over a period of 19 months.

(a) 3 cells shall be tested as a 3-cell battery on a monthly routine consisting of 12 discharges at 50 percent depth, consecutively and repeatedly at the 1-hour, 3-hour, 6-hour rates with approximately equal intervals for recharge and float at the voltage recommended in the manufacturer's service manual. The entire routine shall fit in a period of one month. On the 3rd month, the last discharge at the 6-hour rate shall be run at 100 percent depth to the cut-off voltage to determine the total capacity of the 3-cell battery. The quarterly report (see 3.6.4.1) shall include all the 12 discharges run within a period of 90 days. The life test procedure (see 3.6.2.2) shall describe the test sequence in detail and the data to be collected: Among others average voltages during discharges, electrolyte level positions at appropriate times, electrolyte additions, float current and voltage at beginning and end of float as well as 2 readings in-between.

(b) 3 cells shall be tested as a 3-cell battery on a simulated ship operation regime, based on monthly data received from the ship. Until the battery is installed and becomes operational, the 3-cell battery will be tested on the same regime as (a), except only 6 discharges will be required in lieu of 12, with the last being 100 percent at the 6-hour rate. This quarterly test discharge will still be required after the simulated regime starts.

* * * * * * *

3.5.6 *Laboratory test cells* [(item 0006)]. The last 6 cells (1 randomly selected cell from each group) shall be kept dry and shipped, with all necessary parts and instructions for activation, within 30 days after acceptance of the dry battery by DCAS to a Government laboratory for laboratory testing as specified in 4.3.5.

* * * * * * *

4.3.5 *Laboratory tests.* The 6 cells reserved in 3.5.6 for laboratory testing shall be tested at a Government laboratory on the same regime as specified in 4.3.4 or equivalent as defined by NAVSEC in accordance with the requirements of this specification. The laboratory testing may be waived upon NAVSEC specific instructions and the cells used for other purposes.

MEC's bid was as follows:

Item		
0001	Battery	$459,525.
0002	Spare Cells	1,392.50/unit.
0003	Accessories	2,850.00.
0004	Acceptance/Life Test Cells	1,392.50/unit.
0006	Laboratory Cells	1,392.50/unit.

For comparison, Yardney's bids on items 0002, 0003 and 0004 were $1,439/unit, $13,100 and $11,641/unit, respectively.

Yardney implies that, since section 4.3.4 of the specification requires substantial contractor effort to discharge its responsibility for life testing the cells in question, bidding the same price for item 0004 (life testing) as was bid for items 0002 and 0006 (similar cells without the contractor life test requirement) raises doubt as to whether MEC actually intended to perform the life testing.

In certain circumstances, our Office has ruled that a bidder cannot be effectively allowed the option subsequent to bid opening of arguing that a self-inserted ambiguity or "mistake" in bid should be interpreted in the manner most favorable to the bidder. 51 Comp. Gen. 498 (1972); 39 *id.* 185 (1959); 35 *id.* 33 (1955); B–147397, October 24, 1961. Those cases, however, are predicated on the bidder's insertion in its bid of an apparent ambiguity as to the intended price. There the bidder could after opening contend that one view of the ambiguity was correct as opposed to the other as it suited the bidder's purpose. The case at hand does not, however, present such a situation since on the face of the MEC bid there is no ambiguity as to the price MEC stated for the work. This is not to say, however, that the contracting officer's error detection duty was lessened in any respect by the fact that the price was unambiguous.

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Here, upon bid opening, the contracting officer pursuant to the provisions of Armed Services Procurement Regulation (ASPR) § 2–406.1 (1973 ed.) properly sought verification of MEC's bid price. MEC did, on March 11, verify its prices for all items. It did not at that time indicate that it had made any mistake which could have led to correction or allowance to withdraw its bid. However, in order to assure himself that MEC had not made any unconscious or inadvertent errors not corrected as a result of a failure to appreciate the significance of verification, the contracting officer because of the significant disparity in prices for items 0003 and 0004 sought MEC's reaffirmation of its prices and understanding of those items.

MEC responded by specifically stating on March 27 that:

WE HAVE AGAIN REVIEWED ITEMS 0003 ACCESSORIES FOR ITEM 0001, AND ITEM 0004 ACCEPTANCE/LIFE TEST CELLS OF IFB N00024–74–B–7196 AND CONFIRM THAT WE UNDERSTAND MEANING OF THESE ITEMS AND THAT PRICE REMAINS AS QUOTED.

In 47 Comp. Gen. 732 (1968) we held that a contracting officer need not determine before contract award that every production cost element had been considered in connection with a bidder's price in order to discharge his duty to verify under ASPR § 2–406. However, in B–177405, November 29, 1972, we did state that where the facts clearly and convincingly establish that the contracting officer was or should have been on notice that a bidder could not have recognized the significance of the request for verification of the bid, the contracting officer should request a reaffirmation of the bid. Here the contracting officer did so. Moreover, since in this case as in *Matter of Aerospace America, Inc.*, B–181439, July 16, 1974, the contracting officer made an effort to place the bidder on notice of the basis upon which the Government suspected that a mistake might have been made and the bidder not only verified but reaffirmed its price (and his understanding of the items in question), allowable correction of MEC's bid after award would seem quite unlikely. Accordingly, MEC as of the date of award is bound to perform all the requirements stated in the IFB at its bid price.

In summary, we believe that, by submitting a price on each and every item in the solicitation without any exception being stated, MEC's bid was responsive and the cases cited by Yardney where bidders submitted delivery schedules differing from those in the IFB or offered nonconforming products (53 Comp. Gen. 32 (1973); B–174391, April 5, 1972; 51 Comp. Gen. 518 (1972)) are clearly distinguishable from the instant case. Moreover, the question of any error in MEC's bid was considered, acted upon and resolved to the Government's satisfaction to the extent that MEC would not at some later date be in a position to contend that the Government had taken

unfair advantage of it. Thus, neither was there a basis to reject MEC's bid on grounds of lack of responsiveness nor does there appear to be a basis to suggest that MEC could at some later date successfully have its bid price adjusted upward.

Regarding the protest relating to MEC's alleged lack of experience, paragraph 38 of the IFB, as amended, read in pertinent part:

> In order to assist the Naval Ship Systems Command in determining the *responsibility* of any offeror on this procurement, the Naval Ship Systems Command reserves the right to require, after time set for receipt of offer and on ten (10) days notice, any offeror to submit a technical report in writing. This report shall be sufficiently complete and detailed to permit the Naval Ship Systems Command, without reference to any other data, to determine whether the offeror is technically qualified to produce the supplies as specified in this Solicitation and capable of furnishing them by the required delivery date(s). To this end, *the report must include the offeror's experience in designing and producing items of a quality, complexity and purpose comparable to the items called for by this Solicitation. The Naval Ship Systems Command considers that such comparable items are Silver-Zinc cells of the configuration used in AGSS-555.* The report should also set forth the facilities, plant equipment, tooling and test equipment, and the background and experience of the key personnel which the offeror has available for designing and producing the supplies called for by the Solicitation. [Italic supplied.]

The protester contends that notwithstanding the Navy's designation, the matter of experience in this instance is a question of responsiveness rather than responsibility for it alleges the experience requirement "* * * concerns the history of product performance rather than bidder experience * * *. 52 Comp. Gen. 647 (1973)."

As we stated in 49 Comp. Gen. 553 (1970), at page 556—

> * * * [T]he test to be applied in determining the responsiveness of a bid is whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the invitation, and upon acceptance will bind the contractor to perform in accordance with all the terms and conditions thereof. Unless something on the face of the bid, or specifically made a part thereof, either limits, reduces or modifies the obligation of the prosective contractor to perform in accordance with the terms of the invitation, it is responsive. * * *

Since the IFB specifically stated that (1) the matter of experience went to responsibility, and (2) the Navy could require *after bid opening* that an offeror submit a technical report which included the offeror's related experience, there is no basis upon which to consider the matter as one going to responsiveness.

Therefore, the contention made by Yardney with regard to MEC's experience essentially questions the agency's affirmative determination of MEC's responsibility. In this regard, our Office has recently held that we would not review such cases except where there are allegations or demonstrations that the contracting officer's actions in finding a bidder responsible are tantamount to fraud. *Matter of Central Metal Products, Incorporated,* 54 Comp. Gen. 66 (1974); *Matter of United Hatters, Cap and Millinery Workers International Union,* 53 Comp. Gen. 931 (1974); *Matter of Kelly Services,* B–182071, October 8, 1974; *Matter of Commercial Office Furniture Company,*

B–182115, September 16, 1974; *Matter of Waldman Manufacturing Company*, B–181883, August 27, 1974; *Matter of International Brotherhood of Teamsters (Local 814)*, B–181068, August 13, 1974; *Matter of Hooper Construction Company*, B–181486, August 1, 1974; *Matter of Continental Cablevision of New Hampshire, Inc., et al.*, B–178542, July 19, 1974; *Matter of General Dynamics*, B–181756, July 19, 1974; *Matter of Seal Bond, Inc.*, B–180696, June 17, 1974; *Matter of Wilkinson Manufacturing Company*, B–181076, June 5, 1974. These cases, however, contained questions of responsibility essentially turning on the general business judgment of the contracting officer. In situations like the instant case, where the question of responsibility revolves around the bidder's meeting or failing to meet certain specific and objective responsibility criteria expressed in the solicitation, our Office will review, to the extent possible, the determinations of the contracting officer to see if the specified responsibility criteria have been met. Accordingly, the above-cited cases are distinguished.

With regard to the instant question of MEC's relevant experience, that Navy states that:

> [MEC has] * * * supplied advance prototype cells on the NR–1 and Dolphin cells under R&D contracts N00024–73–C–5043 and N66314–73–C–9250 showing that they have the capability of building large cells and large size electrodes for the Dolphin Batteries. * * *

Our Office has examined the above-noted contracts. Contract –9250, awarded on August 9, 1972, called for the furnishing of two experimental, developmental silver-zinc cells of 4,100- and 880-ampere-hour capacity, respectively, for use on experimental submarines AGSS–555 and NR–1. Contract –5043, awarded on July 31, 1972, called for the furnishing of two 850-ampere-hour rated silver-zinc cells and two 4,000-ampere-hour rated silver-zinc cells. These cells were also to be used in submersible vehicles and were based upon cell designs for the NR–1 and AGSS–555, respectively.

Yardney not only challenges the existence of MEC's experience, but, more precisely, questions the quality of MEC's experience, since it alleges that the hardware (terminals, heat exchangers, fire walls, flash arresters, level indicators, valves and cell case liners) used by MEC in constructing cells under these prior contracts was not manufactured by or under the direction of that firm but rather was provided MEC by the Navy.

In this regard, the IFB required that there be objective evidence presented indicating that an offeror had experience in designing and providing silver-zinc cells of the configuration used in the AGSS–555 submarine. As noted above, we believe that whether this evidence has been produced is a matter cognizable by this Office. Accordingly, we believe that the work performed under the previously noted MEC

contracts is evidence that MEC has had experience in silver-zinc cells of the requisite configuration.

However, the relative quality of MEC's experience is a matter of judgment reserved to the contracting officer in determining the offeror's responsibility. It is this type of subjective judgment leading to an affirmative determination of responsibility which the Court of claims recognized in *Keco Industries* v. *United States*, 428 F.2d 1233, 1240 (192 Ct. Cl. 773 (1970)), as "not readily susceptible to reasoned judicial review," and which GAO has declined to review in the absence of actions which are tantamount to fraud. See *Matter of Central Metal Products, Incorporated, supra.* Therefore, while we do believe that MEC has relevant experience, we will not review the sufficiency of that experience and hence cannot in the absence of allegations of fraud further consider the matter of this affirmative determination of responsibility.

With regard to the alleged restrictiveness of the IFB, we refer to our Interim Bid Protest Procedures and Standards, 4 C.F.R. § 20.2(a) (1974), which provides that any apparent impropriety in the solicitation must be protested to our Office prior to bid opening to be considered timely. Since bid opening occurred on March 7, 1974, with the protest filed thereafter, we must consider Yardney's protest untimely in this regard.

For the reasons noted above, the protest is denied.

[B-181275]

Compensation—Overtime—Traveltime—Congested Traffic

Time spent in travel outside of his scheduled workday by wage board employee in return travel to official duty station after receiving medical examination at temporary duty station, although delayed by congested traffic, does not constitute travel away from official duty station occasioned by event which could not be scheduled or controlled administratively as contemplated by 5 U.S.C. 5544(a)(iv) as condition for payment of overtime compensation, since such travel outside regular duty hours was not necessitated by congested traffic but resulted from scheduling of medical examination which was within administrative control and, therefore, is not compensable as overtime.

In the matter of overtime compensation for delayed travel, December 24, 1974:

This is a request for an advance decision from Major F. P. Spera, Finance and Accounting Officer, Department of the Army, Aberdeen Proving Ground, Maryland, reference STEAP-CO-F, concerning the claim of the International Association of Machinists and Aerospace Workers (IAMAW), Local Lodge 2424, on behalf of one of its members, Mr. Paul W. Jones. The request for an advance decision

was forwarded to our Office by the Office of the Comptroller of the Army by letter of May 15, 1974.

The record shows that on June 15, 1973, Mr. Jones and four other wage board employees of the Aberdeen Proving Ground (APG) Command departed from APG at 7:15 a.m. and traveled to Fort Myer, Virginia, by Government vehicle pursuant to temporary duty travel authorization for the purpose of receiving medical examinations. After intermediate stops at Fort Meade, Maryland, and Walter Reed Hospital, Washington, D.C., the employees arrived at Fort Myer at 11:30 a.m. It appears that medical examinations were conducted and that, afterwards, the employees departed from Fort Myer at 3 p.m., again traveling by Government vehicle, and arrived back at APG at 5:45 p.m., 2 hours after their scheduled daily tour of duty ended. The record further shows that the employees passed through the Baltimore Harbor Tunnel during their return travel to APG and encountered congested traffic which delayed their return approximately 45 minutes.

The union contends that Mr. Jones is entitled to overtime compensation for the 2 extra hours under Article XXXVI, section 1, of the agreement between APG and Local Lodge 2424, which states:

Section 1. Time spent by a Unit employee on official orders actually traveling outside his regularly scheduled tour of duty is not considered hours of employment unless one of the exceptional conditions exist:

a. The travel involves actual performance or work while traveling.

b. The travel is incident to work performed while traveling.

c. The travel is carried out under arduous and unusual conditions such that it is inseparable from work.

d. The travel results from an emergency or other event requiring immediate official action that could not have been realistically scheduled or controlled administratively.

In view of the foregoing, travel for Unit employee will be scheduled, as far as practicable so that the travel time coincides with the employee's regularly scheduled hours of work. However, when employees are required to travel outside their regularly scheduled tour of duty under one of the exceptional conditions listed above, overtime will be paid provided the overtime is officially ordered in advance or is approved following the travel. When employees are required to travel outside their regularly scheduled tour of duty and none of the above exceptional conditions applies, overtime pay will not be approved. In the latter event, the Employer will record the reasons of ordering such travel and, upon request, will furnish a copy to the employee concerned.

The above-quoted section of the employment agreement in the instant case is based on section 5544(a) of Title 5, U.S. Code, which governs overtime compensation for wage board employees and provides in pertinent part that:

* * * Time spent in a travel status away from the official duty station of an employee subject to this subsection is not hours of work unless the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling, (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively.

The issue presented is whether the return travel performed outside the regular duty hours of the employee resulted from an event which could not be scheduled or controlled administratively and which, therefore, came within the language of section 5544(a)(iv), mentioned above.

Federal Personnel Manual, page 550–8.02, implements the above statutory provision as follows:

> (iv) *Conditions under which travel is considered hours of work.*
>
> * * * * * * *
>
> Travel which results from an event which cannot be scheduled or controlled administratively is also a new condition under which travel is considered hours of work. The phrase "could not be scheduled or controlled administratively" refers to *the ability of an executive agency* (as defined in section 105 of title 5, United States Code) and the government of the District of Columbia *to control the event which necessitates an employee's travel.* * * *
>
> For example, training courses throughout the country generally are scheduled to start at the beginning of the workweek, and usually start at 9 a.m. daily. Attendance at training centers located away from an employee's duty station, therefore, usually will require the employee to travel outside his normal work hours. *Since the agency which is conducting the training course can schedule the hours of training, the training course is an event which can be scheduled or controlled administratively;* and employees who attend the course will not be paid for time in travel status regardless of whether employed by the agency conducting the training course or another agency.
>
> On the other hand, travel will be considered hours of work when it results from unforeseen circumstances (e.g., a breakdown of equipment) or from an event which is scheduled or controlled by someone or some organization outside of Government. (See Comptroller General decision B–163654, April 19, 1968.) [Italic supplied.]

The above-quoted passage clearly indicates that payment of overtime compensation for travel in connection with an uncontrollable event is proper when the uncontrollable event necessitates the travel originally rather than when it merely occurs during and delays such travel. Moreover, this Office has taken the position that in order for such travel to constitute hours of employment within the meaning of section 5544(a)(iv), "* * * there must have existed *an immediate official necessity* occasioned by the unscheduled and administratively uncontrollable event for travel by the employee during hours outside his scheduled workweek * * *." [Italic supplied.] B–163654, April 19, 1968. *See also* 51 Comp. Gen. 727 (1972); 50 Comp. Gen. 674 (1971); B–170683, November 16, 1970; B–160928, April 16, 1970; and 49 Comp. Gen. 209 (1969).

It is stated that the travel in returning to APG from Fort Myer was delayed by congested traffic at the Baltimore Harbor Tunnel with the result that arrival back to the duty station at APG extended 2 hours beyond the normal workday. Information obtained from the Baltimore Harbor Tunnel Police shows that the Harbor Tunnel traffic northbound on June 15, 1973, from approximately 3 p.m. to

7 p.m. was heavy and a 45 minute delay would not have been unusual. There is no explanation of what caused the additional delay of 1 hour and 15 minutes, so that at best, only 45 minutes could be attributed to the uncontrollable event. However, we believe that the return travel outside regular hours of duty in the instant case, although it may have been delayed by congested traffic in the Baltimore Harbor Tunnel, an administratively uncontrollable event, was not occasioned by that delay but rather, the return travel outside normal duty hours resulted from the scheduling of the medical examinations, which was administratively controllable. Accordingly, the 2 hours of return travel by Mr. Jones outside his scheduled workday did not constitute hours of employment within the meaning of the exception contained in 5 U.S.C. 5544(a) so as to entitle him to overtime compensation.

[B–178772]

Compensation—Double—Exemptions—Dual Compensation Act—Independent Officers' Organizations

The pay of a retired Regular Naval officer employed by the Naval Academy Athletic Association (NAAA) is not subject to reduction under the Dual Compensation Act since it appears that NAAA is a private, voluntary association not established pursuant to any law or regulation and therefore it cannot be regarded as a nonappropriated fund instrumentality of the United States.

In the matter of retired pay, U.S. Navy, December 26, 1974:

This action is in response to a letter dated April 25, 1973 (file reference XO:PH:slv 037 26 7754) from Lieutenant C. R. Davies, Disbursing Officer, Retired Pay Department, Navy Finance Center, Cleveland, Ohio, requesting an advance decision regarding the applicability of the Dual Compensation Act, 5 U.S. Code 5531 (1970), *et seq.*, to Captain Wesley R. Gebert, Jr., USN, Retired, while he was employed by the Naval Academy Athletic Association (NAAA). The request was assigned control number DO–N–1192 by the Department of Defense Military Pay and Allowance Committee and was forwarded to this Office by Office of the Comptroller of the Navy letter dated May 30, 1973 (file reference NCF–411 7220/MPAC 73–64).

The Dual Compensation Act (5 U.S.C. 5532) provides for a reduction in the retired or retirement pay of a retired officer of a Regular component of a uniformed service during a period in which he holds a "position" and receives the pay therefor. "Position" is defined by 5 U.S.C. 5531(2) as:

* * * a civilian office or position (including a temporary, part-time, or intermittent position), appointive or elective, in the legislative, executive, or judicial branch of the Government of the United States (including a Government corporation and a non-appropriated fund instrumentality under the jurisdiction of the armed forces) or in the Government of the District of Columbia.

It is reported that Captain Gebert was transferred to the retired list on July 1, 1972, pursuant to 10 U.S.C. 6322, and on that date was employed by the NAAA for a temporary period to last 6 months. Captain Gebert, in his Statement of Employment (DD Form 1357) filed with the Navy Finance Center, indicated that he was employed by NAAA at the United States Naval Academy, Annapolis, Maryland, and that his duties were to "render services as directed by the Director of Athletics U.S. Naval Academy from 1 July 1972 for a period of six (6) months." The Navy Finance Center, believing that such employment was covered by our decisions 42 Comp. Gen. 73 (1962) and B–165534, December 17, 1968, reduced Captain Gebert's retired pay in accordance with 5 U.S.C. 5532(b). However, the matter was submitted here because the Naval Academy and counsel for NAAA claim that NAAA is a private association which is not an official part of the Naval Academy or of the Federal Government.

The constitution of NAAA provides that the "object of the Association shall be to promote and assist in financing the athletic program of the Midshipmen of the U.S. Naval Academy in accordance with the policy of the Superintendent of the * * * Academy," and that the Association shall be headquartered at the Naval Academy. It further provides that NAAA policy shall be made by a Board of Control composed of the Commandant of Midshipmen of the Academy, the President and Vice President of the Association, and other officers attached to the Academy. The Director and Assistant Director of Athletics at the Academy are designated as the Association's President and Vice President, respectively. NAAA membership is open to Naval Academy graduates, officers and civilian instructors at the Academy, and certain other individuals, including persons who donate $500 to the Navy-Marine Corps Memorial Stadium Fund but who need not otherwise be associated with the Navy or the Naval Academy. According to the constitution, all acts and appointments of the Association are subject to the approval of the Superintendent of the Academy.

It is reported that NAAA employs approximately 125 individuals, occupies 6,000 square feet of space in an Academy building paid for in part by NAAA, performs tasks in connection with the conduct of varsity intercollegiate sports, and pays the salaries of personnel who administer, equip, and coach the Academy's intercollegiate athletic teams.

Counsel for NAAA has also pointed out certain facts in support of the assertion that NAAA has always been treated as a private association rather than a Federal instrumentality by both the Federal Government and the State of Maryland. These facts include the listing of NAAA by the Internal Revenue Service as a tax-deductible

charitable organization, the condemnation by Maryland of land owned by NAAA, and a Maryland law enacted to provide exemption of NAAA's stadium property from State and local taxes.

In 42 Comp. Gen. 73, *supra*, it was held that an employee of the United States Air Force Academy Athletic Association held a position "under the United States Government" and was therefore subject to the retirement pay reduction provisions of section 212 of the Economy Act of 1932, approved June 30, 1932, Ch. 314, 47 Stat. 382, 406. In B-165534, *supra*, we held that such an employee was also subject to the Dual Compensation Act (which repealed the Economy Act provision) because the Association was a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces. These holdings were based on the fact that the Secretary of the Air Force specifically authorized the Superintendent of the Air Force Academy to form the association, which was to be "an activity of the Department of the Air Force" and the operating activity through which the Superintendent was to exercise control over cadet participation in intercollegiate athletics. The Superintendent, subject to the general supervision of the Air Force Chief of Staff, was made responsible for the operation and supervision of the Association's activities, and was authorized to utilize the officials necessary for the management and operation of the Association. The Association was officially established by Air Force Academy General Order No. 10, October 7, 1954. See also Air Force Academy General Order No. 22, August 29, 1957, and Air Force Academy Regulation 20-3, December 16, 1969.

The situation here, however, is materially different. From the record, it appears that the NAAA was not established pursuant to Navy Department directives or orders, but rather was formed by individuals who happened to be primarily Naval Academy officers. It further appears that the connection of these officers with the Association is not a requirement of official duties but is a personal, voluntary matter. In this connection, this case is strikingly similar to 45 Comp. Gen. 289 (1965), in which it was held that the U.S. Marine Corps Association was not an instrumentality of the Government within the meaning of the Dual Compensation Act. In that case, it was held that while the Association's governing membership was constitutionally limited to Marine Corps officers holding specified positions of leadership and authority, with the Commandant of the Marine Corps designated as Association president, those designations and restrictions "were self-imposed by the members of the Association rather than being required by law or regulation." It was further stated that there was "nothing in the information furnished which

would indicate that authority of the Commandant of the Marine Corps was a requisite to establishment of the Association" and that it appeared that "no supervision over the Association is exercised by Marine Corps personnel or civilian employees of the Government as part of their official duties." 45 Comp. Gen. 289, 291 (1965). Accordingly, it appears that NAAA is a purely voluntary organization not required by law or regulation to function under the jurisdiction of the Navy, and that it cannot be regarded as a nonappropriated fund instrumentality of the Government. Therefore, Captain Gebert's retired pay should not have been regarded as subject to reduction under the Dual Compensation Act during the period he was employed by NAAA, and amounts thus withheld should be paid to him.

[B-180247]

Contracts—Negotiation—Reopening—Recommendation Withdrawn

Recommendation in B-180247, July 11, 1974, 54 Comp. Gen. 16, that negotiations be reopened to either cure deviation in accepted proposal or to issue amendment to RFP deleting option price ceiling is withdrawn in light of contracting agency's position that to do so would not be in the best interests of Government based upon significant termination costs.

In the matter of Bristol Electronics, Inc., December 26, 1974:

By decision in the *Matter of Bristol Electronics, Inc.*, 54 Comp. Gen. 16 (1974), our Office sustained the protest of Bristol Electronics, Inc. (Bristol), against the award of a contract to E-Systems, Inc. (MEMCOR Division) (E-Systems), under request for proposals (RFP) No. DAAB05-74-R-0362, issued by the United States Army Electronics Command (ECOM), because ECOM improperly considered the proposal submitted by E-Systems for award, as it contained an option price that exceeded the basic quantity price. The RFP had requested proposals for a specified quantity of AN/PRC ( ) radio sets and RT-841 ( )/PRC transmitters, and included an option provision for the purchase of up to an additional 100 percent of the specified quantity of items.

Our recommendation in the above-cited decision was as follows:

Accordingly, it is our opinion that the appropriate course of action for the contracting officer to have taken would have been to again reopen negotiations to either cure the deviation in E-Systems' proposal or issue an amendment to the RFP deleting the option price ceiling. See ASPR 3-805.3(a) and 3-805.4(a). Consequently, we conclude that the contract to E-Systems was improperly awarded, and recommend that negotiations be reopened for another round of best and final offers. After the negotiations, the present contract should be terminated for the convenience of the Government and a new contract entered into with the successful offeror, if other than E-Systems, at its newly offered price. If E-Systems

remains successful, the existing contract should be modified in accordance with its final proposal.

By letter dated September 6, 1974, ECOM, agreeing with the "procurement philosophy expressed in the decision," has requested that we reconsider our recommendation for corrective action in this matter. It is ECOM's position that a reopening of negotiations at this stage of the procurement would result in a delay in delivery that would be detrimental to the best interests of the United States. Additionally, ECOM contends that should it be necessary to terminate the contract held by E-Systems for convenience, it would cost the Government an estimated $1,671,306 (as of September 1, 1974). Finally, ECOM asserts that effective competition cannot be expected to result if negotiations are reopened. In view of these contentions, ECOM is of the belief that the interests of the Government can best be served by permitting E-Systems to complete its present contract.

When our initial decision was rendered in this matter on July 11, 1974, we were aware that some time would be required to reopen negotiations and reaward the procurement, if necessary. Since the terms and conditions of the RFP had been thwarted by the award to a nonconforming offeror, we had expected that ECOM would cooperate by immediately expediting the reopening of negotiations in accordance with our recommendation.

However, it now appears that if our recommendation were to be followed, significant termination for convenience costs might result if E-Systems were unsuccessful in the further negotiations. The significant increase in the possible termination costs between the date of our initial decision and today's decision has vitiated the feasibility of compliance with our recommendation. Accordingly, we are withdrawing our July 11 recommendation. However, since to date there has been no exercise of the option provision under the contract awarded to E-Systems, and since it is E-Systems' pricing of the option items that was the gravamen of the protest, we recommend that the option not be exercised. Moreover, in the case of future similar protest decisions as to which questions arise as to the practicality of our termination for convenience recommendations, the matter, properly documented, should be promptly brought to our attention for consideration rather than vitiate the feasibility of compliance with the recommendation through delay, as here.

As concerns Bristol's suggestion that a quantity of radios similar to that involved in this procurement be set aside as a sole source award for itself to compensate for the loss of business resulting from the improper award to E-Systems, while such a solution may appear to be equitable from Bristol's viewpoint, our Office cannot sanction a circumvention of the rules of the competitive procurement system.

There would be no legal basis to allow a sole source procurement for the item involved in this RFP, as other firms are available to compete for requirements of this nature. Therefore, our Office cannot agree with this recommended solution.

This decision in no way affects the Department of the Army's obligation to explain the actions taken under this procurement pursuant to the Legislative Reorganization Act of 1970, 31 U.S. Code 1176, as required by our decision of July 11, 1974.

[B-181504]

National Guard—Death or Injury—While on Training Duty—Under Military Control

Claims for death gratuity and medical expenses by beneficiaries of member who was to attend inactive duty training on September 8–9, 1973, and then report for full-time training duty on September 9–10, 1973, but who suffered heart attack and died during early morning of September 9, may be allowed since member was under military control in his training area at time of heart attack and death and was, therefore, on inactive duty training at such time, which is basis for payment of such benefits under 32 U.S.C. 321(a)(1) and 32 U.S.C. 320.

National Guard—Death or Injury—Burial Expenses

Claim for burial expenses by wife of member who was to attend inactive duty training on September 8–9, 1973, and then report for full-time training duty on September 9–10, 1973, but who died during early morning of September 9, is returned for payment, since, at time of his death, member was in a pay status while on inactive duty training for the purpose of 10 U.S.C. 1481.

In the matter of claim for death gratuity and medical and burial expenses, December 26, 1974:

This action is in response to a letter dated May 15, 1974, from Lieutenant Colonel Ray L. Vaught, Jr., Finance and Accounting Officer, Fort Sill, Oklahoma, requesting an advance decision regarding the entitlement of the beneficiaries of Major General Thomas M. Phillips, AR ARNG, SSAN 429–18–6488, deceased, to a death gratuity and to medical and burial expenses incurred in connection with the member's death on September 9, 1973. The letter was forwarded to this Office by the Office of the Comptroller of the Army and has been assigned Control No. DO–A–1223 by the Department of Defense Military Pay and Allowance Committee.

The submission indicates that the member was scheduled to attend a Multiple Unit Training Assembly 4 (MUTA 4), which is inactive duty training performed under the authority of 32 U.S. Code 502 (1970), on September 8 and 9, 1973, to direct Arkansas Army National Guard units in a statewide immunization drive for the benefit of the

children of Arkansas. Subsequent to that scheduling, by Special Orders Number 168, issued by the Office of the Adjutant General, Military Department of Arkansas, the member was ordered to full-time training duty for a period of 2 days to attend the Fifth United States Army Commanders Training Conference at Fort Sam Houston, Texas, on September 9 and 10, 1973, in what was apparently an active duty for training status. In connection with those orders, the file shows that the member was scheduled to depart from Little Rock, Arkansas, on a commercial airline flight at 10:20 a.m. on September 9 and report for duty at Fort Sam Houston by 6:45 p.m. the same day.

The file indicates that on September 7, 1973, the member departed from his home in Fayetteville, Arkansas, and reported for duty at the MUTA 4 at Camp Robinson, Arkansas, on the morning of September 8. The file further indicates that the member's activities on September 8 with respect to the MUTA 4 concluded with his appearance on a statewide television program that evening. The member remained overnight at Camp Robinson following his television appearance and was to proceed from Little Rock to Fort Sam Houston the following morning. However, the file indicates that the member suffered an apparent heart attack at approximately 1:30 a.m. on September 9, was taken to a nearby hospital and died at 5:20 a.m. on the same morning.

The submission points out that the member's death was not due to an injury incurred while traveling in compliance with the order calling him to full-time (active) training duty. Further, that while doubt is expressed as to the legality of payments of a death gratuity, medical and burial expenses, the submission notes that in accordance with paragraph 10243 of the Department of Defense Military Pay and Allowances Entitlements Manual (DODPM), the day of reporting is charged as a day of travel and the entire day would be included in the active duty pay period of entitlement. However, Note 4 of Table 1–2–1 of the DODPM, entitled "When Active Duty Pay Begins," provides: "Pay status does not begin if the NG or ANG member is unable to respond to the call to AD [active duty] because of illness or other reason." Since the member had not begun to perform travel pursuant to his full-time training duty orders, he never became entitled to pay under those orders.

Entitlement to a death gratuity in the case of a member of the National Guard is governed by section 321 of Title 32, U.S. Code, which provides in pertinent part:

(a) * * * [T]he Secretary of the Army * * * shall have a death gratuity paid to or for the survivor prescribed by subsection (e) immediately upon receiving official notification of the death of a member of the National Guard who--

(1) dies while performing * * * duty under section 316, 502, 503, 504, or 505 of this title * * *.

Since 32 U.S.C. 502 provides for the performance of inactive duty training including MUTA 4 training, the member would be entitled to a death gratuity if he were performing such duty at the time of his death. Further, under the provisions of section 320 of Title 32, U.S. Code, a member of the National Guard, not entitled to the benefits prescribed in 32 U.S.C. 318 because of the fact that he is not called or ordered to perform training for more than 30 days and disabled in line of duty from disease while so employed, may be hospitalized and receive appropriate medical care.

Under that provision it appears that medical benefits also would be proper in the present case if the member could be considered as being on inactive duty training at the time of his heart attack and death.

This Office has long taken the position that inactive duty training begins with muster and ends with dismissal from the particular drill or other training duty involved. *See* 52 Comp. Gen. 28 (1972); 43 *id.* 412 (1963); and 38 *id.* 841 (1959). Compare *Meister* v. *United States*, 162 Ct. Cl. 667 (1963).

In our decision B–156628, June 1, 1965, we considered a situation involving a National Guard member who was ordered to participate in four inactive duty training assemblies on two consecutive days and was injured while playing softball in the bivouac area after completion of the drills scheduled for the first day. We held therein that the member received the injuries while in an inactive duty training status since, at the time of the injury, he was still under military control in the training area where he was required to remain.

Our decision B–164204, July 12, 1968, involved a National Guard member ordered to two consecutive days of annual range firing who, after performance of the first day's training, was given permission by his unit commander to leave the training area in order to visit Hattiesburg, Mississippi, for his own convenience. The record showed that he was injured in an automobile accident during that absence. We took the position in that case that it could not be concluded that during the period of the member's absence from the training area and from military supervision he continued to be in an inactive duty training status and "was so employed" within the meaning of the law.

In the present case, the member remained at Camp Robinson, his inactive duty training location, after his scheduled duties were completed on September 8. There appears to be two reasons for his staying at the base: first, he planned to participate in the MUTA 4 the morning of September 9 before departing for Fort Sam Houston; and, second, the member's full-time training duty orders inhibited his

movement after his inactive duty training obligations were concluded on September 8.

With regard to the above, the file indicates that due to the prevailing airline schedules it was physically impossible for General Phillips to return from Camp Robinson to his home in Fayetteville after his appearance on the television program the evening of September 8, and from there obtain transportation enabling him to arrive in San Antonio in time for the scheduled commanders conference. Therefore, we regard the present case as being analogous to B–156628, *supra*, and are of the view that the member was still in an inactive duty training status at the time of his heart attack and death. Accordingly, payments of a death gratuity and medical benefits pursuant to 32 U.S.C. 321(a)(1) and 320, respectively, are proper in the present case.

The third type of benefit sought by the member's beneficiaries, burial expenses, is governed by the provisions of section 1481 of Title 10, U.S. Code, which provides in pertinent part that:

> (a) The Secretary concerned may provide for the recovery, care, and disposition of the remains of—
>
> * * * * * * *
>
> (3) any member of the Army National Guard * * * who dies while entitled to pay from the United States and while * * * (C) on authorized inactive duty training * * *.

For the reasons previously stated, there appears to be little question that the member was in an inactive duty training status at the time of his death. However, under the provisions of 10 U.S.C. 1481, more than mere status is required. In order for payment of burial expenses to be proper, the member must also have been in a pay status at the time of his death.

The material associated with the submission indicates that the member was in a pay status during inactive training duty here in question. In this regard, the Army National Guard Pay Voucher Summary and Certification Sheet, covering the member's National Guard unit for the period of September 1 to November 30, 1973, shows that the member was paid for the MUTA 4 assemblies he attended on September 8. While entitlement to pay for September 9 had not yet occurred at the time of the member's death, since the inactive training duty status continued to the time of death and since that duty was in a pay status, it is our view that the member was in the requisite pay status at the time of his death. Therefore burial expenses may be paid.

For the reasons stated, payment may be made on the vouchers under consideration if otherwise correct.

[B-181599]

Contracts—Termination—"No-Cost"

Where party requests no-cost cancellation of fixed-price supply contract on basis of sovereign acts of Government (dollar devaluation and embargo) and general inflation, although contract does not contain either escalation or excuse by failure of presupposed condition clause, fact that contract did contain changes, Government delay of work and default clauses is sufficient to establish all rights and duties of parties without resort to Uniform Commercial Code.

Contracts—Increased Costs—Government Activities—Sovereign Capacity

Request for no-cost cancellation of contract option because of increased costs of performance not granted where alleged cause for cost increase due to (1) acts done by Government in its sovereign capacity (dollar devaluation and embargo), and (2) tremendous inflationary pressures, because contract contained no basis for such cancellation. Moreover, mere fact that contract performance becomes burdensome or even results in loss due to unanticipated rises in material costs does not entitle fixed-price contractor to relief.

Contracts—Options—Exercised—Performance

Cases dealing with agency decision to exercise option (46 Comp. Gen. 874 (1967); B-151759, November 11, 1963) are distinguishable from instant case regarding whether to require performance of already exercised option.

General Accounting Office—Jurisdiction—Contracts—Equitable Jurisdiction—Specific Statute Requirement

Holding in 28 Ops. Atty. Gen. 121 (1909) cannot be followed since it was based on concepts of equity and principles of morality. General Accounting Office equitable jurisdiction can be exercised only where specifically granted by statute. There is no authority applicable to considering request for no-cost cancellation on equitable basis.

In the matter of the R. H. Pines Corporation, December 26, 1974:

The R. H. Pines Corporation (Pines) was awarded contract No. DSA700-73-C-5299 by the Defense Supply Agency (DSA) on March 27, 1973, on a fixed-price basis for a quantity of barbed wire. The contract called for delivery of a basic quantity, within 150 days and also provided for a 100-percent option available to the Government for 1 year after award.

By contract modification No. P00001, issued May 8, 1973, the Government exercised its option and delivery was to have occurred within 150 days thereafter. Subsequent modifications reduced the amount of the contract by $1,170.45 while extending the delivery date for the option quantity until June 15, 1974, and the delivery date

for the original quantity until May 18, 1974. It appears that delivery of the basic quantity has been accomplished.

Pines, after requesting and then withdrawing a request for relief under Public Law 85–804 (50 U.S. Code 1431–1435), now contends that in view of (1) tremendous inflationary pressures, and (2) sovereign acts of the Government—a scrap metal embargo and dollar devaluation—the contractual requirement for delivery of the option quantity has become "commercially impracticable" to perform in accordance with Uniform Commercial Code (UCC) § 2–615, "Excuse by Failure of Presupposed Conditions." Pines therefore seeks a no-cost cancellation of its existing contract.

The applicability of the UCC to Government contracts has been addressed at length in many cases. The general rule is that the validity and construction of contracts of the United States and their consequences on the rights and obligations of the parties present questions of Federal law not controlled by the laws of any State. *United States et al.* v. *County of Allegheny*, 322 U.S. 174, 183 (1944); *United States* v. *Latrobe Construction Company*, 246 F. 2d 357 (8th Cir., 1957); but see, *The Padbloc Company, Inc.* v. *United States*, 161 Ct. Cl. 369 (1963). In the absence of any such Federal statute, regulation or contract provisions, our Office has looked to the UCC principles as a source of Federal common law. *See* 51 Comp. Gen. 613 (1972).

With regard to the instant situation, we feel that, although the contract did not contain either an escalation or an excuse by failure of a presupposed condition clause, the fact that the subject fixed-price contract contained standard changes, Government delay of work and default clauses is sufficient to establish all the rights and duties of the parties and no resort to the UCC is necessary.

In *Matter of Veterans Administration*, B–108902, May 17, 1974, our Office was faced with a request for a no-cost "settlement" under the termination for convenience provisions of the contract in question. There, we held that:

> A termination for convenience clause is designed for the Government's benefit and not as a means of relieving contractors from the burdens of contract performance. It appears to us, however, that the primary reason for terminating these contracts is to relieve certain contractors from the increased costs of contract performance resulting from the passage of Public Law 93–86. In this connection, it is well established that the Government is not liable to a contractor because of its acts as a sovereign. 53 Comp. Gen. 157 (1973); B–180054, December 9, 1973. Therefore, while we recognize that the decision of whether to terminate these contracts rests with the contracting agency, we do not recommend in favor of terminating these contracts.

While in the instant case we are not requested to sanction an ending of existing contractual obligations under a termination for convenience clause, we feel that the same reasoning must be applied to any other "no-cost" methods of relieving the contractor of his duty to perform.

Since, as in *Matter of Veterans Administration, supra,* the critical acts here complained of were done by the Government in its sovereign capacity, we do not feel that any direct Government liability exists. See *Matter of Ferry Creek Rock & Concrete, Inc.*, B–172531, October 24, 1974, and 53 Comp. Gen. 157 (1973), where we denied requests for upward contract modifications due to inflation and the devaluation of the dollar. Moreover, the mere fact that performance of the contract becomes burdensome or even results in a loss due to unanticipated rises in material costs does not entitle a fixed-price contractor to relief. See *Matter of Ferry Creek Rock & Concrete, Inc., supra.* Accordingly, we find no legal authority for granting the relief requested.

46 Comp. Gen. 874 (1967) is cited by Pines wherein circumstances which increased cost to the contractor as a result of post-award sovereign acts of the Government do form a basis for the Government to excuse the performance of subsequent options. In that decision, during the initial period of the fixed-price contract, Congress enacted the Service Contract Act of 1965 (41 U.S.C. § 351–357), which provided for higher wages to be paid to the contractor's employees. While our Office did not in that instance rule favorably on a proposed modification which would have raised the contract price, we did state that:

> In view thereof, you are advised that this Office will not object to failure of your Department to exercise any remaining options on storage contracts of the type here involved when it is determined by the contracting officer, based upon evidence submitted by the contractor, that a requirement for compliance with the Service Contract Act of 1965 on other contracts will, as a practical necessity, also require the payment of wages for work to be performed under the option contracts at rates which would necessarily result in a net loss to the contractor in performing the option contracts.

See, also, B–151759, November 13, 1963.

We feel that those cases are distinguishable from the instant situation in that both cited cases deal with the decision to exercise an option rather than, as here, whether to require performance under an already exercised option. Accordingly, we see no present need to either further discuss or reexamine the position stated in those cases.

In addition, we cannot follow the holding in 28 Ops. Atty. Gen. 121 (1909) cited by the protester as an instance where the Government refrained from compelling performance of an exercised loss option. That opinion was based upon concepts of equity and principles of morality. In 46 Comp. Gen., *supra,* we stated that this Office exercises equitable jurisdiction only where such jurisdiction is specifically granted by statute. There is no authority applicable to our Office considering a request for a no-cost cancellation on an equitable basis.

We do note that legislation has been introduced in the Congress which would grant relief to small businesses which presently have

fixed-price Government contracts and have encountered significant and unavoidable difficulties during the performance of their contracts because of the energy crisis or rapid and unexpected cost escalation. *See* H.R. 17125, 93rd Cong., 2nd Sess. (1974); S. 3619, 93rd Cong., 2nd Sess. (1974); H.R. 16207, 93rd Cong., 2nd Sess. (1974); H.R. 16014, 93rd Cong., 2nd Sess. (1974).

[B-181782]

Contracts—Negotiation—Requests for Proposals—Amendment—Equal Competitive Basis for All Offerors

Where, after receipt of proposals, procurement agency decides that it has a preference for a particular approach to satisfy its needs, request for proposals should be amended to afford all offerors an equal opportunity to revise their proposals and to participate in meaningful negotiations. See Armed Services Procurement Regulation 3-805.4 (1974 ed.).

Contracts—Negotiation—Evaluation Factors—Additional Factors—Not in Request for Proposals

Consideration of additional evaluation factors not contained in Request for proposals was improper since prospective offerors are entitled to be advised of evaluation factors which will be applied to their proposals.

Contracts—Negotiation—Requests for Proposals—Omissions—Prejudicial

Request for proposals which failed to list relative importance of price vis-a-vis listed evaluation factors should be amended where record indicates such failure resulted in prejudice to competing offerors.

Contracts—Negotiation—Competition—Discussion With All Offerors Requirement—Written or Oral Negotiations

Failure to conduct oral discussions or written communications with offerors to extent necessary to resolve uncertainties relating to work requirements or price to be paid violates requirement for meaningful negotiations.

Contracts—Negotiation—Evaluation Factors—Price Elements for Consideration—Cost Estimates

Cost proposals offered on cost-reimbursement basis should be subject to independent cost projection to determine realism and reasonableness of proposed costs since evaluated costs provide sounder basis for determining most advantageous proposal.

In the matter of Signatron, Inc., December 26, 1974:

This protest before award questions the legality of the proposed award of a contract to CNR, Inc. (CNR), under request for proposals (RFP) No. DCA100-74-R-0052, issued by the Defense Communications Agency (DCA). Counsel for Signatron, Inc. (Signatron)

contends that the proposed award to CNR would be contrary to applicable statutes and regulations. For the reasons discussed below, we conclude that negotiations, in accordance with 10 U.S. Code § 2304(g) (1970), should be reopened. Although paragraph 3-507 of the Armed Services Procurement Regulation (ASPR) (1974 ed.) limits disclosure of information during the preaward or preacceptance period, certain information which DCA has already disclosed to the interested parties will be included in our discussion of this protest.

On April 10, 1974, DCA issued the subject RFP to 34 firms for technical and cost proposals for the delivery and installation of a Digital TROPO/LOS Simulation System with the capability for real time, repeatable simulation of present and future digital DCS TROPO and LOS network configurations. The RFP stated that the total effort and work requirements were definitively set forth within the attached DCA Statement of Work entitled "Digital TROPO/LOS Simulation System." The proposed procurement had previously been publicized in the *Commerce Business Daily* in accordance with ASPR § 1-1003 (1974 ed.). Offerors were advised that the type of contract proposed should result, if possible, in assumption of cost responsibility by the offeror, such as a firm fixed price or incentive type related to performance or cost (or both) covering the work as outlined in the proposal.

The RFP stated that "Selection of the contractor will be based on the quality of the technical proposal as evaluated in accordance with the criteria set forth in paragraph (6) below, price and other factors considered." Paragraph (6) of the RFP stated:

> Technical proposals will be evaluated using the following criteria, which will be the only criteria used:
> (a) Technical Considerations—Approx. 75%
> This rating factor includes:
> 1. Understanding of the requirement.
> 2. Soundness of technical approach.
> 3. Compliance with requirements.
> 4. Special technical factors.
> (b) Management Capability—Approx. 25%
> This rating factor includes:
> 1. Specific related experience.
> 2. Technical organization.
> 3. Level of effort and support proposed.
> 4. Specific technical equipment and facilities.

The evaluation criteria did not establish a weight for "price and other factors."

The following firms responded by the May 13, 1974, closing date: CNR, Inc.; Signatron, Inc.; and Computer Sciences Corporation (CSC). The three proposals were technically evaluated by the Defense Communications Engineering Center (DCEC) evaluation team. Adjective ratings of "excellent, good, average, poor, unsatisfactory" were used in evaluating the technical proposals. Counsel for DCA

reports that in order to arrive at these adjective ratings, the Chairman of the Evaluation Committee established procedures whereby stated value (numeric) ranges were established. Under these procedures a rating of "excellent" would be derived from a technical consideration numeric of 126–150 and a management rating of 43–50 for a total of 169–200. Under this rating system, CNR and Signatron were rated "excellent" and CSC was rated "good" in both the technical and management categories.

The evaluation team's report listed various items which might be considered for negotiation with each of the offerors, and the determination was made that those items, when combined with questions regarding pricing, were such as to warrant conducting negotiations.

The contracting officer reports that the three offerors were contacted and advised that negotiations would be conducted. Signatron was told that the evaluation team had reported that it had unearthed no discrepancies or ambiguities to be resolved, and CSC was told that there were certain discrepancies to be resolved regarding their simulation of a "timing jitter" problem. It is reported by DCA that negotiations were conducted with CNR and Signatron by telephone on May 30 and 31, 1974. The contracting officer states that Signatron in its negotiations conducted by telephone introduced nothing new regarding its original approach to and manner of performing the work requirements as presented. Negotiations were conducted with CSC on June 3, 1974, in the office of the contracting officer.

The three firms submitting proposals were advised by telephone on June 3, 1974, to submit any desired revision(s) to their original proposals by June 12, 1974. CNR submitted a letter dated June 4, 1974, addressing the items discussed and reducing their original estimated CPFF price from $278,519 to $267,404. Signatron submitted a letter dated June 11, 1974, advising that their original estimated CPIF target price was reduced from $242,795 to $239,850. By letter dated June 12, 1974, CSC submitted revisions to their proposal and reduced their original estimated CPIF target price from $379,385 to $314,334. After reviewing the revisions, the DCEC evaluation team reported that the "excellent" ratings of CNR and Signatron were unchanged but that CSC's rating had been raised to "excellent." The contracting officer indicates that the evaluation team recommended award to CNR on the basis of technical excellence. We note, however, that its estimated cost plus a fixed-fee-estimated price was approximately $28,000 higher than Signatron's estimated price.

According to the contracting officer, a decision to make an award to CNR, which received the highest technically rated proposal, was made after considering the declaration by DCEC that adapting the system

proposed by Signatron would result in the following additional expense to DCEC:

a. The estimated cost to add the duplex capability to Signatron's system (already provided by CNR as part of their offer) was approximately $25,000 and could be considerably more.
b. The additional hardware modems required for the Signatron system in the future, in addition to the need to train operator personnel and purchase special test equipment, would prove very costly. Estimates of costs of LOS and TROPO modems made by DCEC, ECOM, RADC and others, ran from $10K to $60K each, *after* initial engineering costs.
c. Costly overhead associated with operation of the Signatron system.
d. Costs associated with investigating the effects of other modems.
Taking into consideration technical excellence and the factors listed above pertaining to the overall expenses of adapting the Signatron system, we determined that award to CNR would be in the best interests of the Government, nothwithstanding the fact that another firm had offered a lower (estimated) price.

Signatron filed a protest with this Office by telegram dated July 10, 1974, protesting any award of a contract to CNR. This telegram was supplemented by additional material from both Signatron and its counsel. Signatron contends that an award to CNR would be illegal since it would (1) be contrary to the terms of the advertised notice and RFP; (2) would be based on considerations and evaluation factors not delineated in the RFP, and (3) fails to comply with all applicable procurement regulations, including the necessity for "meaningful discussions" and "negotiations." In accordance with section 20.9 of our Interim Bid Protest Procedures and Standards, Signatron exercised its right to offer oral argument in support of its position. Our Office extended the opportunity to all parties expressing an interest in this matter to attend an informal conference on September 30, 1974.

We do not agree with Signatron's first contention that the RFP restricted proposals to hardware approaches. We believe any form of simulation approach could be submitted, i.e., all hardware or a combination of software hardware simulation approach. However, our review of this procurement leads us to the conclusion that negotiations should be reopened to correct certain deficiencies discussed below. In seeking to resolve some of the issues raised in this protest, we made a technical review of the RFP statement of work. It was concluded that the statement of work did not require offerors to furnish both a simplex and a duplex operation system.

Paragraph 2.2.1 of the Statement of Work provides that "The simulation system is considered to operate simplex, *but shall be designed to provide for duplex operation where the two directions of transmission have independent statistics, or the media parameters may be different for each direction of transmission.*" [Italic supplied.] In response to this requirement, Signatron proposed to furnish a "simplex" operation system which was designed to provide for the potential for adding a duplex operation. Signatron's technical proposal received a rating of Excellent.

CNR proposed a system which provided a simplex as well as an actual duplex operation system which was also rated Excellent.

In evaluating Signatron's proposal, DCEC stated that the estimated cost to add the duplex "capability" to Signatron's system was approximately $25,000 and could be considerably more. While DCEC throughout its evaluation process, as well as in its report on the protest, makes reference to duplex capability, it is apparent that DCEC is equating the word "capability" with "actual" duplex operation and thus considered the estimated cost for an actual duplex operation as a significant criteria for award although it was not stated as an evaluation factor. As an example, the record contains a memorandum dated June 28, 1974, from DCEC which states in pertinent part: "DCEC must *immediately upgrade* the system for the duplex capability." [Italic supplied.] In our opinion, this memorandum indicates that DCEC had come to the conclusion at that time that it required an actual duplex operation system although this requirement was not communicated to the offerors in the RFP or during the course of negotiations. Therefore, DCEC's consideration of an evaluation factor not stated in the RFP or in an amendment had a prejudicial effect on competing offerors.

In our view, the procurement procedures followed deviated from applicable procurement regulations. Subparagraph (a) of ASPR § 3-501 (1974 ed.) "Preparation of Request for Proposals or Request for Quotations" states in part:

> * * * Solicitations shall contain the information necessary to enable a prospective offeror or quoter to prepare a proposal or quotation properly. * * *

Further, ASPR § 3-805.4 (1974 ed.) "Changes in Government Requirements" provides:

> (a) When, either before or after receipt of proposals, changes occur in the Government's requirements or a decision is made to relax, increase or otherwise modify the scope of the work or statement of requirements, such change or modification shall be made in writing as an amendment to the solicitation.

Signatron has advised that it interpreted paragraph 2.2.1 of the Statement of Work as requiring that proposals contain only the "potential" for adding a duplex operation system rather than as imposing a requirement for an "actual" duplex operation system. We have been informally advised that DCEC made the same interpretation. Our Office agrees with this interpretation. DCEC's later preference for a system which included an "actual" duplex operation as indicated in its June 28 memorandum, should have been clearly communicated to all offerors by written amendment to the RFP and by later appropriate discussions with all offerors submitting proposals. Counsel for Signatron states that at no time was Signatron requested

to quote a price for furnishing an actual duplex operation system which it contends would have been significantly less than the $25,000 considered. In our opinion, the failure on the part of DCA to convey this important technical preference to Signatron before submission of its final proposal violated the fundamental concept that offerors for Government contracts should be treated in a fair and impartial manner. *See* B–174492, June 1, 1972.

The record also indicates that in considering the cost involved in Signatron's approach, DCEC stated "The additional hardware modems required for the Signatron system *in the future.* would prove very costly." We find nothing in the stated evaluation criteria which would permit evaluation of the cost of additional hardware modems which might be required in the future.

It is our view that the statement of work was written in general terms and did not explain properly the operation requirements for a simulation system. We believe that the RFP was deficient in failing to indicate the relative weight to be given to price. *See* ASPR § 3–501 (1974 ed.), Section D "Evaluation Factors for Award." Offerors were on notice that price would be an evaluation factor as the RFP contained the following:

> (3) Selection of the contractor will be based on the quality of the technical proposal as evaluated in accordance with the criteria set forth in paragraph (6) below, price and other factors considered.

However, the failure to show the relative importance of price vis-a-vis the evaluation factors which were listed is contrary to the view of our Office that intelligent competition requires, as a matter of sound procurement policy, that offerors be advised of the evaluation factors to be used and the relative importance of those factors. We believe that each offeror has a right to know whether the procurement is intended to achieve a minimum standard at the lowest cost or whether cost is secondary to quality. Competition is not served if offerors are not given any idea of the relative values of technical excellence and price. See *Matter of AEL Service Corporation et al.*, 53 Comp. Gen. 800 (1974); 52 *id.* 161 (1972).

In our view, deficiencies noted above are material deviations from the statutory and regulatory negotiation requirements as to require that negotiations should be reopened. *See* 52 Comp. Gen. 409, 412 (1973). The amended RFP should clearly indicate the work requirements, the evaluation criteria and the weight to be given to price.

There is no indication that the Government performed an independent cost projection of the offerors' proposed costs. We believe such an examination of offerors' proposed costs should be made prior

to determining the most advantageous proposal. In 50 Comp. Gen. 390, 410 (1970), we stated:

> Our Office has noted that the award of cost-reimbursement contracts requires procurement personnel to exercise informed judgments as to whether submitted proposals are realistic concerning the proposed costs and technical approach involved. B-152039, January 20, 1964. We believe that such judgment must properly be left to the administrative discretion of the contracting agencies involved, since they are in the best position to assess "realism" of costs and technical approaches, and must bear the major criticism for any difficulties or expenses experienced by reason of a defective cost analysis.

Since the RFP contemplated a cost-type reimbursement contract, evaluated costs rather than proposed costs provide a sounder basis for determining the most advantageous proposal, especially when contending offerors are essentially equal as to technical abilities. Thus, we believe that the amended RFP should indicate that the procurement agency will evaluate cost factors to determine that reasonableness and realism of cost under the technical approaches proposed. See *Matter of Raytheon Company*, 54 Comp. Gen. 169 (1974). As this decision contains a recommendation for corrective action to be taken, it is being transmitted by letters of today to the congressional committees named in section 232 of the Legislative Reorganization Act of 1970, Public Law 91-510, 31 U.S. Code 1172.

[B-182088]

Gratuities—Reenlistment Bonus—Eligibility—Public Law 93-277

Members of military service who were discharged or separated prior to June 1, 1974, and who reenlisted within 3 months but were not on active duty on June 1, 1974, the effective date of Public Law 93-277, are not entitled to receive the regular reenlistment bonus under prior law, as saved by section 3 of Public Law 93-277 since the law as enacted specifically limits save-pay to those members who were on active duty on the effective date of the act and there is nothing in the legislative history of that act which would furnish a basis upon which that limitation could be disregarded.

In the matter of eligibility for regular reenlistment bonus under Public Law 93-277, December 26, 1974:

This action is in response to a letter dated August 15, 1974, from the Assistant Secretary of Defense requesting an advance decision concerning entitlement to a regular reenlistment bonus pursuant to section 3 of the Armed Forces Enlisted Personnel Bonus Revision Act of 1974, approved May 10, 1974, Public Law 93-277, 88 Stat. 119, 121, in the circumstances discussed in Department of Defense Military Pay and Allowance Committee Action No. 513 which was enclosed with the request.

The question presented in the Committee Action is as follows:

> Is an enlisted member who was discharged prior to 1 June 1974, or an officer who is otherwise qualified and who was separated prior to 1 June 1974, who

reenlisted after 1 June 1974, but within a three month period after discharge or separation entitled to a regular reenlistment bonus?

The discussion contained in the Committee Action states that the Department of Defense Military Pay and Allowances Entitlements Manual, paragraph 10922, interim change 129 (effective June 1, 1974), specifies that a regular reenlistment bonus may be paid to an enlisted member who was on active duty on June 1, 1974, in the Armed Forces, completed required service and enlisted in the regular component of the same service within a three-month period. This interim change was promulgated pursuant to the save pay provision contained in section 3 of Public Law 93–277, which became effective June 1, 1974.

The discussion points out that the June 1, 1974, active duty requirement has caused an inequity to accrue to any member who was discharged or separated before June 1, 1974, and reenlisted within a three-month period but after June 1, 1974, in that he is ineligible for such a bonus. It is further pointed out that the inequity is intensified when that result is compared to the case of a member on active duty on June 1, 1974, who is subsequently discharged or separated and reenlists within a three-month period and is entitled to the regular reenlistment bonus.

With regard to the above, the view is expressed in the Committee Action that it does not appear to have been the intent of Congress to exclude members from this entitlement if they were discharged or separated prior to June 1, 1974, and reenlisted within a three-month period.

Public Law 93-277, approved May 10, 1974, 88 Stat. 119, and entitled the Armed Forces Enlisted Personnel Bonus Revision Act became effective on June 1, 1974. This law was enacted to revise the special pay bonus structure relating to members of the Armed Forces by establishing a new critical skill retention incentive to replace both the variable reenlistment bonus and the regular reenlistment bonus. However, section 3 of that act authorizes the continuation of payment of the regular reenlistment bonus previously authorized to all reenlistees in nonselective reenlistment bonus specialities who were on active duty on June 1, 1974. That section provides as follows:

Notwithstanding section 308 of title 37, United States Code, as amended by this Act, a member of a uniformed service on active duty on the effective date of the Act, who would have been eligible, at the end of his current or subsequent enlistment, for the reenlistment bonus prescribed in section 308 (a) or (d) of that title, as it existed on the day before the effective date of this Act, shall continue to be eligible for the reenlistment bonus under that section as it existed on the day before the effective date of this Act. If a member is also eligible for the reenlistment bonus prescribed in that section as amended by this Act, he may elect to receive either, one of those reenlistment bonuses. However, a member's eligibility under section 308 (a) or (d) of that title, as it existed on the day before the effective date of this Act, terminates when he has received a total of $2,000 in reenlistment bonus payments, received

under either section 308(a) or (d) of that title as it existed on the day before the effective date of this Act, or under section 308 of that title, as amended by this Act, or from a combination of both. [Italic supplied.]

With regard to the intent of Congress in the enactment of that provision, House of Representatives Report No. 93-857 (1973) contains the following language at page 6:

Under the bill any member on active-duty service prior to the first day of the month following the date of enactment, the effective date of the bill, will not be denied a Regular Reenlistment Bonus.

The purpose of this provision is to ensure that every enlisted member on active duty on the effective date will not be denied a reenlistment incentive which was available at the time he or she joined the Armed Forces.

This saved-pay feature is desirable because many of the individuals now entitled to receive a reenlistment bonus will not continue to be so entitled under the proposed legislation. The saved-pay feature precludes those currently on active duty from losing their $2,000 reenlistment entitlement which by law they expected to receive. *Conversely, it denies his entitlement to anyone entering on active duty after the date this proposed law becomes effective who does not reenlist in a critical specialty.* [Italic supplied.]

See also S. Report 93-659 (1973), 5.

Although the history of section 3, as typified by the above, does not clearly show that Congress intended to deny the saved regular reenlistment bonus to individuals who happened to be between enlistments on June 1, 1974, the words enacted are clear. Since the law provides that the saved regular reenlistment bonus is authorized for members on active duty on the effective date thereof and does not provide such a benefit for other classes of individuals we would not be justified in expanding that saved pay provision even though there may be some indication in the legislative history of that provision that Congress may not have realized that the class of individuals here under consideration would be excluded.

Accordingly, members who were separated prior to June 1, 1974, and were not on active duty on that date but who subsequent thereto and within 3 months of separation reenlisted are not entitled to a regular reenlistment bonus under the provisions of section 3 of the Armed Forces Enlisted Personnel Bonus Revision Act of 1974. Your question is answered accordingly.

[B-181271]

Arbitration—Award—Retroactive Promotion With Backpay—Entitlement

Arbitration award based on compromise settlement by union and Office of Economic Opportunity that grants employee retroactive promotion, but makes increased pay for higher level position prospective, is improper to the extent that it does not provide for backpay since salary is part of position to which employee is appointed and may not be withheld. Thus, employee is entitled to backpay incident to retroactive promotion under provisions of 5 U.S.C. 5596.

Arbitration—Award—Modification

Arbitrator's effective date of June 29, 1973, for retroactive promotion based on earlier findings of grievance examiner cannot be sustained since evidence shows agency head had not exercised his discretion to promote employee until July 7, 1973. Thus, award is modified to make effective date of retroactive promotion at beginning of first pay period after July 7, 1973, when official authorized to make appointments acted.

Arbitration—Award—Implementation by Agency- Retroactive Promotions—Back Pay Act

Where arbitrator's award cannot be legally implemented and contains no findings and conclusions, our Office favors returning it to arbitrator with our objections and for modification. However, where this is unfeasible, this Office will in special cases modify the award to conform to requirements of law and regulations.

In the matter of retroactive promotion pursuant to arbitration award, December 30, 1974:

This matter concerns a request for a decision from the Office of Economic Opportunity (OEO), as to whether that agency has authority to implement a labor relations arbitration award granting a retroactive promotion without backpay to Barbara N. Copeland, an OEO employee. The arbitration award resulted from a grievance filed by the National Council of OEO Locals, American Federation of Government Employees (AFGE), AFL–CIO, on behalf of Ms. Copeland, dated August 23, 1973, with Mr. Randal Teague, Special Assistant to the Director, the OEO official authorized to resolve grievances in accordance with article 16, section 7, of the National Agreement between Office of Economic Opportunity and AFGE (AFL-CIO) for National Council of OEO Locals, dated March 1972.

The record indicates that in the prearbitration stage of the grievance, Mr. Teague reviewed the record and met with the employee and a representative of the union. From the evidence in the case, he found that Ms. Copeland's supervisors in the Migrants and Seasonal Farm Workers Branch, Programs Operation Division, had made an official finding during March 1973 that she had performed "duties at the GS–9 level at an acceptable level of competence" and in June 1973 had recommended her for promotion from grade GS–7 to GS–9. Further, Mr. Teague found that the OEO Director-designate, Alvin J. Arnett, had approved promotion documents for Ms. Copeland on July 7, 1973, and forwarded them to the OEO personnel office for administrative processing. However, the personnel office failed to process Ms. Copeland's promotion.

Mr. Teague found for the employee on August 27, 1973, and in the exercise of his authority executed documents granting Ms. Cope-

land a retroactive promotion effective June 29, 1973, and forwarded them to the OEO Office of Administration for approval. These promotion forms were not approved and on September 26, 1973, the union initiated action to submit the grievance to binding arbitration. An arbitrator was selected and hearings were held on December 13 and 17, 1973, during which agency and union representatives presented evidence and arguments.

A review of the transcript of the arbitration proceedings reveals the following relevant information, derived from the earlier grievance proceedings and other documents. The bargaining agreement incorporated by reference all existing agency regulations, including a regulation that required routine personnel actions, such as promotions, to be processed within 8 days after submission of the request by a properly authorized official. Ms. Copeland's promotion request was submitted by her immediate supervisor on June 29, 1973, and approved by the agency head, Mr. Arnett, on July 7, 1973. However, the OEO personnel office did not complete the administrative processing of the approved request.

On July 6, 1973, Mr. Arnett signed documents transferring the office to which Ms. Copeland was assigned, the Migrant and Seasonal Farm Workers Branch, to the Department of Labor. The effective date of this transfer was set as August 5, 1973. As a result of this action, the Assistant Secretary for Administration and Management of the Department of Labor, forwarded a letter dated July 16, 1973, to all members of the staff of the Migrant and Seasonal Farm Workers Branch, including Ms. Copeland, offering these employees employment with the Department of Labor. The letter extended an offer to transfer into the Department at the employees' same grade and salary and with the same tenure. In response to this letter, Ms. Copeland, on July 17, 1973, signed and returned the form provided as an attachment to the aforementioned letter. On this form she checked the following statement: "I accept the offer to transfer at my same grade and salary and with my same tenure from the Office of Economic Opportunity to the Department of Labor." Immediately after this statement, Ms. Copeland wrote, "Presently GS–7. Will only accept a GS–9." Management contends that by conditioning her transfer, Ms. Copeland had in effect declined the offer to transfer to the Department of Labor with her position duties, upon which her request for promotion was based.

Other evidence in the record indicates that on July 25, 1973, OEO promulgated a letter to provide information to employees that had evidenced a desire to decline the offer of transfer, indicating the

consequences of their election and the future status of their employment with OEO. This letter read in part:

> If an employee declines an offer of transfer (either directly or by failing to return the offer letter), he will be retained at OEO at least 30 days after the scheduled transfer date (that is until September 4 for those who had already received offer letters and September 18 for those who will be identified through the volunteer process.)
>
> After the 30-day period, management may lay the employee off, without RIF competition. However, Mr. Arnett has committed the agency to making every effort to place employees who decline in bona fide continuing OEO positions particularly when there is hardship involved, such as commutation or regionalization possibilities.

Ms. Copeland remained in the Office of Operations after August 5, 1973, as an administrative assistant to the former Director of the Migrant's Division, Mr. Griffith, until her unofficial detail on September 15, 1973, to the Office of Human Rights. Subsequently, on October 26, 1973, Ms. Copeland was reassigned as a grade GS–7, administrative assistant in the Office of Human Rights.

After receiving all the above evidence in the record, the arbitrator remarked late in the morning of the second day of hearings, "* * * that the equity certainly does not seem on Management's side * * *," and inquired if there was any way that both parties could settle the matter. The parties had an "off the record" discussion, at the conclusion of which the arbitrator stated for the record, without objection, that an agreement had been reached, whereupon the hearing was immediately ended.

On the same date, December 17, 1973, the arbitrator made his award, which we presume must have been based on the aforementioned agreement although the arbitrator stated no findings of fact or conclusions of law to support his award. This presumption is supported by the union in a letter to this Office dated November 19, 1974, in which the union states: "An award implementing the agreement was then and there issued by Arbitrator Daugherty * * *." The award was as follows:

> It is decided that Barbara N. Copeland is awarded a promotion to G.S. 9 effective June 29, 1973. However, no back pay is awarded. The G.S. 9 salary shall take effect next pay period after the date of this decision.

It is noted that June 29, 1973, is the same date that Mr. Teague had previously assigned as the effective date for Ms. Copeland's promotion and we assume that this particular date stemmed from that finding.

The OEO petitioned the Federal Labor Relations Council (FLRC) for review of the above-quoted award on January 8, 1974. The petition was denied consideration because it was filed one day late. The OEO now requests a decision of this Office as to whether it has authority to implement the award as fashioned by the arbitrator.

The record indicates that the award in this case was the result of a compromise and settlement reached by the parties during the arbitration proceeding. Public policy favors the amicable settlement of litigation and agreements accomplishing this result will be disregarded only for the strongest of reasons. *Cities Service Oil Co.* v. *Coleman Oil Co., Inc.*, 470 F. 2d 925 (1st Cir. 1972); *Lichtenstein* v. *Lichtenstein*, 454 F. 2d 69 (3d Cir., 1972). In view of the foregoing, we are of the opinion that the OEO must implement the award if it may legally do so. Thus, the only question that is before us at this point in time concerns the legality of the award.

It has long been held that the power of appointment is within the discretion of the head of a department. It is an executive function which involves exercising the discretion of the executive. *Keim* v. *United States*, 177 U.S. 290 (1900); *Amundson* v. *United States*, 128 Ct. Cl. 80, 120 F. Supp. 201 (1954); *Donnelly* v. *United States*, 133 Ct. Cl. 120, 134 F. Supp. 635 (1955); *Goldstein* v. *United States*, 131 Ct. Cl. 228, 130 F. Supp. 330 (1955), *cert. denied* 350 U.S. 888 (1955); *Tierney* v. *United States*, 168 Ct. Cl. 77 (1964); *Wienberg* v. *United States*, 192 Ct. Cl. 24, 425 F. 2d 1244 (1970).

It would appear from the award and the settlement on which it was based that all parties agree that Mr. Alvin J. Arnett, the OEO Director-designate, exercised his discretion to appoint by approving Ms. Copeland's promotion on July 7, 1973. After the exercise of discretion, all that remained was the performance of ministerial acts which could be compelled by a writ of mandamus. *Murray* v. *Vaughn*, 300 F. Supp. 688 (D.R.I. 1969). Thus failure by the personnel office to accomplish the ministerial administrative tasks incident to effecting the promotion within the prescribed time frame could reasonably have been found to constitute an unjustified and unwarranted personnel action within the meaning of the Back Pay Act of 1966, 5 U.S. Code § 5596 (1970), although the arbitrator failed to state this finding explicitly. Similarly, this unjustified or unwarranted personnel action appears to have been aggravated by the personnel office's determination that Ms. Copeland declined the Department of Labor offer to transfer and thus nullified her promotion when she insisted that her transfer be at grade GS-9, although it is apparent that she was unaware of Mr. Arnett's approval of her promotion at that time. In fact, there is every indication that had the employee's promotion been properly processed administratively, she would have transferred to the Department of Labor in her position at the GS-9 level. Although again we must infer that this was the arbitrator's conclusion since otherwise there would have been no basis to award a retroactive promotion.

In 53 Comp. Gen. 1054 (1974), we stated that where an arbitrator has made a finding that an agency has violated a collective bargaining

agreement to the detriment of an employee, the agency head may accept that finding and award the employee back pay for the period of the erroneous personnel action, so long as the circumstances surrounding the erroneous action fall within the criteria set forth in the Back Pay Act of 1966, codified in 5 U.S.C. § 5596 (1970), and the implementing regulations for that act, contained in 5 C.F.R. § 550.803 (d) and (e).

The CSC has interpreted these regulations so as to permit the implementation of arbitration awards by agency heads. This interpretation is contained in attachment 2 to FPM Letter No. 711-71, June 13, 1973, and provides as follows:

> The regulation (5 C.F.R. 550.803) says in effect the employee is entitled to back pay when the . . . [agency head] or other appropriate authority makes a decision on his own initiative that the adverse personnel action was unjustified or unwarranted. The context of the regulation shows that the expression *on his own initiative* does not prevent him from acting on the award of an arbitrator, but only distinguishes this case from the case in which he acts on an appellate decision.

In light of the foregoing, we conclude that the arbitrator's award in this case is tantamount to a finding by the arbitrator under the provisions of article 17 of the National Agreement between Office of Economic Opportunity and AFGE (AFL-CIO) for the National Council of OEO Locals dated March 1972 that Ms. Copeland underwent an unjustified or unwarranted personnel action with respect to her promotion to grade GS-9 within the contemplation of the above-quoted regulations. However, the corrective action set forth in the award does not conform to the requirements of 5 C.F.R. § 550.804(a) (1974) in two respects. Section 550.804 provides:

> § 550.804 Corrective action.
>
> (a) When an appropriate authority corrects an unjustified or unwarranted personnel action, the agency shall recompute for the period covered by the corrective action the pay, allowances, differentials, and leave account (limiting the accumulation to the maximum prescribed by law or regulation for the employee) of the employee as if the unjustified or unwarranted personnel action had not occurred and the employee shall be deemed for all purposes to have rendered service in the agency for the period covered by the corrective action. * * *

It is fundamental that the salary of a Government job is incident to and attaches to the job. It is thus a part of the job and goes with it. Because of this principle, the salary is payable only to the person appointed to the job, and a Government employee is entitled only to the salary of the position to which he has been appointed. See *Borax* v. *United States*, 78 F. Supp. 123, 110 Ct. Cl. 236 (1948), *cert. denied*, 335 U.S. 821; *Price* v. *United States*, 80 F. Supp. 542, 112 Ct. Cl. 198 (1948); *Ganse* v. *United States* 376 F. 2d 900, 180 Ct. Cl. 183 (1967); *United States* v. *McLean*, 95 U.S. 750 (1877); *Amundson* v. *United States*, 120 F. Supp. 201 (Ct. Cl. 1954); *Dvorkin* v. *United States*, 101 Ct. Cl. 296, *cert. denied*, 323 U.S. 730 (1944). Similarly, where an employee has received the salary of the office to which he was appointed, he has

received his full entitlement. *Price* v. *United States, supra; Ganse* v. *United States, supra.*

While as a general rule, an administrative change in salary may not be made retroactively effective in the absence of specific statutory authority to do so, we have permitted retroactive promotions upon the findings of an arbitrator that an employee would have been promoted on a specific date but for an agency's unwarranted or unjustified personnel actions. 54 Comp. Gen. 312 (1974), and 54 Comp. Gen. 435 (1974).

However, because the salary is a part of the position, it is not legally possible to make a promotion appointment retroactively and withhold part of the salary for the new grade level. Hence, it was improper to specify that Ms. Copeland was not to receive back pay for the period in which the erroneous personnel action was in effect. She is entitled to the grade and salary of the position to which she was appointed retroactively from the date the appointment became or should have become effective.

The June 29, 1973, date selected by the arbitrator as the date on which her promotion must be deemed effective is not supported by findings of fact or conclusions of law, although, as mentioned, *supra,* it is possible that the arbitrator merely adopted the findings of the grievance examiner in this respect. While we wish to give the maximum effect possible to arbitration awards, such awards must be in conformance with applicable laws and regulations. *Cf.* B–180010, *supra,* 1974. We are aware of no legal basis for promoting Ms. Copeland retroactively as of June 29, 1973, since it was not until July 7, 1973, that her promotion was approved by the proper authorizing official, Mr. Arnett. Personnel had no authority to process Ms. Copeland's promotion prior to July 7, 1973, and therefore, there was no unjustified and unwarranted personnel action prior to that date. Accordingly, we find that the retroactive promotion should be made effective as of the beginning of the first pay period after July 7, 1973.

In situations where an arbitration award does not conform to statutory or regulatory requirements, as in this case, we would prefer to recommend that the parties agree to return it to the arbitrator, along with our objections, for his revision or modification. However, in the instant case the arbitrator has since died and this course of action has become impossible. To return the case to a different arbitrator might require lengthy proceedings to determine all the facts de novo which in this instance seems unduly burdensome for the employee since there is no basic disagreement as to her entitlement to a promotion. Accordingly, we would not object to OEO implementation of the award modified to retroactively grant Ms. Copeland a promotion to grade GS–9 together with full back pay and allowances effective at the

beginning of the first pay period after Mr. Arnett approved the promotion request on July 7, 1973.

[B-180679]

Bids—Mistakes—Verification—Adequacy

Totality of information on record reasonably supports conclusion, disputed by bidder, that contracting officer, who suspected mistake in bid, did request bidder to verify its bid and that bidder did so; contracting officer's failure to document verification request does not necessitate finding that verification request was not sufficient.

Contracts—Mistakes—Contracting Officer's Error Detection Duty—Price Range

Contracting officer, who reasonably had no suspicion of specific mistake in bid and who informs bidder of complete basis for his general suspicion that bidder might have made mistake, i.e., wide disparity among three lump-sum bids submitted, and requested and received verification from bidder, has fulfilled Armed Services Procurement Regulation 2-406 verification duty; verification request requires no special language and contracting officer need not specifically state that he suspects mistake, so long as he apprises bidder of mistake which is suspected and basis for such suspicion.

Bids—Mistakes—Verification—Government Responsibility

Although contracting officer should disclose Government estimate to bidder when requesting bid verification, failure to disclose sketchy, informal "control estimate," prepared for budgetary purposes only, does not violate Armed Services Procurement Regulation 2-406 verification requirements.

Contracts—Mistakes—Contracting Officer's Error Detection Duty—Sufficiency of Verification

Contracting officer, who suspected mistake in low bid and requested verification but failed to mention unsuccessful bidder's doubts that low bidder could meet invitation for bids specifications, did not contribute to low bidder's failure to detect its omission of site installation costs from bid price and did not violate Armed Services Procurement Regulation 2-406 verification requirements, since these doubts formed no part of basis for contracting officer's suspicion of mistake and did not relate to site installation costs.

Bids—Mistakes—Verification—Oral—Request

Low bidder, who is requested to verify bid over a week prior to award after being informed of large disparity between bids received, was not required to give insufficient "on the spot" confirmation and had sufficient time to review bid for possible mistakes.

Bids—Mistakes—Unconscionable to Take Advantage of—Rule

In case where other bids received are 58 and 132 percent, respectively, above low bid, award to low bidder after asking for and receiving verification in accordance with Armed Services Procurement Regulation 2-406 is not unconscionable, since mistake is not so great that Government can be said to be "*obviously* getting something for nothing." Matter of Yankee Engineering Company, Inc., B-180573, June 19, 1974, distinguished.

In the matter of Porta-Kamp Manufacturing Company, Inc., December 31, 1974:

Invitation for bids (IFB) DACA45–73–B–0011 was issued on July 17, 1972, by the United States Army Corps of Engineers, Omaha District, Omaha, Nebraska, for the furnishing and site placement of portable buildings at six locations. On the date set for bid opening, August 15, 1972, three lump-sum bids were received as follows:

Porta-Kamp Manufacturing Co., Inc. (Porta-Kamp)	$719, 563
The Atlantic Mobile Corporation (Atlantic)	1, 136, 902
Trans-World Housing, Inc	1, 670, 848

Inasmuch as the second and third low bids were 58 percent and 132 percent, respectively, in excess of the low bid, the Army suspected a mistake in the Porta-Kamp bid and concluded that its bid would have to be verified before award.

In a sworn affidavit, the then Chief of the Procurement Supply Division of the Omaha District, Mr. Glen M. Langford, has given his recollection of a telephone conversation with Mr. Russell Brient, vice president of Porta-Kamp, on the day following bid opening:

> In view of the price range of the bids submitted and pursuant to applicable regulations, I deemed it necessary to contact the low bidder to assure that it was aware of the amounts of the other bids submitted and request that its bid be verified. Before I had an opportunity to do so, however, I received a telephone call at approximately 8:50 a.m. on 16 August 1972 from Mr. Russell Brient, Vice-president of Porta-Kamp Manufacturing Company, Inc., the signer of the bid submitted by Porta-Kamp. He stated that he understood that their firm was the apparent low bidder and asked if I knew when award would be made. I told him that I did not know the exact date but that it would be with the least possible delay because of the site readiness schedules. I then advised him of the amount of the other bids submitted and asked him if he would verify his bid and whether he had any exception to the specifications. He stated that he was satisfied with his bid as submitted, that he took no exception to the specifications and that the work would be performed as specified. Immediately following that conversation I then prepared a handwritten memo setting forth the gist of the conversation * * *.

Mr. Langford's contemporaneous handwritten memo supports his recollection of the telephone conversation.

Mr. Brient has contradicted in several respects Mr. Langford's recollection of their telephone conversation in his sworn affidavit giving his recollection of the facts as follows:

> On August 16, 1972, one day after the bid opening on the Omaha contract, I telephoned the Corps of Engineers in Omaha to check on the results of our bid. I talked with Mr. R. C. Berger who told me there were only three bidders and that Porta-Kamp was low. He gave me the bidders and their bids as follows:
>
> | | |
> |---|---|
> | Porta-Kamp | $719, 563 |
> | Atlantic Mobile | 1, 136, 902 |
> | Trans-World Housing | 1, 670, 848 |
>
> Mr. Berger said that any further dealings would have to be through procurement and he gave me the name of Mr. Glen Langford, Chief of Procurement, and Mr. Irving Holtz, Assistant Chief of Procurement.
>
> On the same day, I telephoned Mr. Langford and told Mr. Langford that it appeared Porta-Kamp was the low bidder. I asked if we could expect the contract

and he said all that was needed was "paper mill approvals" and we should get the contract any time.

At no time did Mr. Langford advise me that he considered Porta-Kamp's bid to be in error. Neither he nor Mr. Berger informed me of the Government's estimate. He did not ask me to verify Porta-Kamp's bid. Had he indicated that there was a possible mistake and asked me to verify the bid, I would have taken some time and gone back and checked our bid.

Mr. Brient also made a contemporaneous contact report memo which contains no indication that verification was either requested or given.

On August 24, 1972, award of contract No. DACA45–73–C–0058 in the amount of $719,563 was made to Porta-Kamp pursuant to the IFB, which Porta-Kamp acknowledged by telegram of that same date.

Porta-Kamp states that it noticed for the first time on September 7, 1972, that it had omitted the cost of site installation of the portable buildings from its bid price. Porta-Kamp notified the Army of this mistake in its bid on September 12, 1972.

Porta-Kamp explains that although it has been fabricating portable buildings for over 15 years, it never before had to perform or price site installation work. Consequently, it hired a consultant who prepared several estimates for it, including one for site installation costs, and departed until work under the contract was scheduled to start. However, Porta-Kamp personnel inadvertently omitted the site installation cost estimate from the final bid price. The error was discovered only when the consultant, who had prepared the estimate, returned to work on the project.

Porta-Kamp initially claimed $111,046 for its mistake in bid. This claim was denied by the Army because Porta-Kamp had verified the accuracy of its bid price and it was felt that Porta-Kamp had not presented clear and convincing evidence of the intended bid price. Porta-Kamp has now revised its claim to $104,798.

With regard to mistakes alleged after the award of a contract, the general rule is that the bidder must bear the consequences of its mistake unless the contracting officer knew or should have known of the mistake at the time the bid was accepted. See *Saligman* v. *United States*, 56 F. Supp. 505 (E. D. Pa. 1944); *Wender Presses Inc.* v. *United States*, 170 Ct. Cl. 483 (1965); 48 Comp. Gen. 672 (1969); *Matter of Titan Environmental Construction Systems, Inc.*, B–180329, October 1, 1974.

In cases, such as the present one, where the contracting officer is on notice of a possible mistake in bid, he is required by Armed Services Procurement Regulation (ASPR) § 2–406 (1972 ed.) to request from the bidder a verification of its bid. In this regard, ASPR § 2–406.1 (1972 ed.) states in pertinent part:

After the opening of bids, contracting officers shall examine all bids for mistakes. In cases of apparent mistakes, and in cases where the contracting officer

has reason to believe that a mistake may have been made, he shall request from the bidder a verification of the bid, calling attention to the suspected mistake. * * *.

Also, ASPR § 2–406.3(e)(1) (1972 ed.) states in pertinent part:

* * * In the case of any suspected mistake in bid, the contracting officer will immediately contact the bidder in question calling attention to the suspected mistake, and request verification of his bid. The action taken to verify bids must be sufficient to either reasonably assure the contracting officer that the bid as confirmed is without error or elicit the anticipated allegation of a mistake by the bidder. To insure that the bidder concerned will be put on notice of a mistake suspected by the contracting officer, the bidder should be advised, as is appropriate, of (i) the fact that his bid is so much lower than the other bid or bids as to indicate a possibility of error, (ii) important or unusual characteristics of the specifications, (iii) changes in requirements from previous purchases of a similar item, or (iv) such other data proper for disclosure to the bidder as will give him notice of the suspected mistake. If the bid is verified, the contracting officer will consider the bid as originally submitted * * *.

As indicated in ASPR § 2–406.3(e)(1) (1972 ed.), when a bidder is requested to and does verify its bid, generally the subsequent acceptance of the bid consummates a valid and binding contract. See *Alabama Shirt & Trouser Co.* v. *United States*, 121 Ct. Cl. 313 (1952); 37 Comp. Gen. 786 (1958); *Matter of General Time Corporation*, B–180613, July 5, 1974. It is equally well settled that in cases where a contracting officer is on notice of a mistake but fails to ask for verification by the bidder, no valid contract comes into existence. *See* 48 Comp. Gen., *supra; Matter of Memphis Equipment Company*, B–181884, August 15, 1974. Moreover, a contracting officer cannot discharge his verification duty under ASPR § 2–406 (1972 ed.) merely by requesting confirmation of the bid price—he must apprise the bidder of the mistake which is suspected and the basis for such suspicion. See *United States* v. *Metro Novelty Manufacturing Co.*, 125 F. Supp. 713 (S.D.N.Y. 1954); 44 Comp. Gen. 383, 386 (1965); B–167954, October 14, 1969; B–168607, January 14, 1970.

As noted above, there is a conflict in the record regarding the telephone conversation between Mr. Langford and Mr. Brient, and whether Porta-Kamp was asked to and did verify its bid. Porta-Kamp contends that since the burden of requesting verification is on the contracting officer, the Army's failure to document the record as to the specifics of the alleged request for verification should weigh heavily against the Government, in view of the conflicting affidavits. However, there is no requirement in ASPR § 2–406 (1972 ed.) that the request for verification be in written form or that it be documented. Consequently, we do not believe that the contracting officer's failure to document his verification request in the record should necessitate a finding that the request for verification was not sufficient in cases where the agency and the bidder, who made the mistake in bid, disagree on whether a verification was requested and given.

In any case, we have reviewed the evidence on record in the present case and believe the totality of information on this matter more reasonably supports the conclusion that Mr. Langford requested Mr. Brient to verify Porta-Kamp's bid price and that Mr. Brient did so. The question remains, however, whether Mr. Langford's request for verification adequately discharged his duty of apprising Porta-Kamp of the mistake suspected and the basis for such suspicion.

Porta-Kamp contends that the contracting officer must tell the bidder, whose bid is suspect, not only of the mistake suspected and the basis for such suspicion, but also he should specifically state the reason he is requesting verification, i.e., that he suspects a mistake in the bidder's bid. We have found no indication that Mr. Langford made any statements regarding the specific reason verification was being requested, but rather, from his own account, it appears he merely stated the amounts of the bids received and asked Mr. Brient if he would verify Porta-Kamp's bid and whether Porta-Kamp was going to take any exception to the specifications.

We do not believe the contracting officer is required by ASPR § 2–406 (1972 ed.) to specifically state that he suspects a mistake, so long as he apprises the bidder of the mistake which is suspected and the basis for such suspicion. *See* 47 Comp. Gen. 616 (1968); B–169188, June 11, 1970. A verification request requires no special language. 47 Comp. Gen., *supra;* B–165273, January 15, 1969; B–166191 *et al*, March 26, 1970; B–169188, *supra.*

We believe the verification by the Government substantially complies with ASPR § 2–406 (1972 ed.). According to Mr. Langford's statement, he advised Porta-Kamp of the bid prices—the wide discrepancy was obvious—and requested verification of its bid price. From our review of the record, we believe Mr. Langford disclosed his complete basis for suspecting that Porta-Kamp might have made a mistake in its bid, i.e., the wide disparity between the three lump-sum bids received. No "magic words" are required for proper verification. The wide disparity between the bid prices, together with Mr. Langford's verification request and inquiry concerning Porta-Kamp's intent to comply with the specifications, should have reasonably apprised Porta-Kamp that a mistake was suspected. *See* 47 Comp. Gen., *supra.* Porta-Kamp had ample time in the period (more than a week) before award was made to thoroughly check its figures.

Porta-Kamp further contends the Army did not disclose all pertinent facts, which would have apprised Porta-Kamp of the mistake, in that it did not disclose the amount of the Government estimate for the contract. However, the Army states that its estimate in the amount of $975,540 was merely a "control estimate" for budgetary purposes

only. This estimate was informal, very sketchy, handwritten, unsigned and had no backup sheets. Also, the estimate included a 10-percent markup for the Army's contingencies under the contract and 5-percent for the Army's supervision and administration expenses under the contract. The estimate, after subtracting out the anticipated administration costs, would be $844,620, which the Army feels is at best a "ball park" figure for bid comparison purposes. The facts concerning the preparation of this estimate are supported by a sworn affidavit of the Chief of Estimating Section, Design Branch, Engineering Division, Omaha District, who directed its preparation.

Ordinarily, a contracting officer should disclose the Government estimate as part of his bid verification duty. *See* 48 Comp. Gen. *supra;* B–177405, November 29, 1972. And, Government estimates should not be rationalized away as excessive after award is made by merely evolving a possible hypothesis which might explain a lower bid. *See* 48 Comp. Gen. *supra; Matter of James R. Sloss,* B–180402, February 4, 1974; *Matter of The Murphy Elevator Company, Incorporated,* B–180607, April 2, 1974. However, we have recognized that a rough Government estimate far in excess of the low bid, which was prepared for budgetary purposes only and which the Government in good faith did not regard at bid opening as being useful for bid comparison purposes, does not necessarily put a contracting officer on constructive notice of a possible mistake in bid; nor need it be fatal to the fulfillment of his verification duty where he does not disclose this rough estimate to the low bidder in whose bid error is suspected. *See* 50 Comp. Gen. 39 (1970); B–178078, May 18, 1973.

Under the circumstances of the present case, we do not believe the failure to disclose the sketchy, informal "control estimate," which was intended only for budgetary purposes, should be fatal to the contracting officer's fulfillment of his ASPR § 2–406 (1972 ed.) verification duty. Moreover, we do not believe the contracting officer should be found to be derelict in his verification duty by virtue of his failure to disclose a fact which he and the procuring agency reasonably and in good faith regarded as being of no real value to the bidder in apprising the bidder of the agency's basis for suspecting an error in bid. *See* 50 Comp. Gen. *supra.* Furthermore, in view of the roughness of the $844,620 revised Government estimate, we believe its disclosure could well have detracted from any notice concerning the probability of an error received by Porta-Kamp from its knowledge of the wide disparity between bid prices, since the revised estimate was only 17-percent higher than Porta-Kamp's bid price.

Porta-Kamp also contends that the Army failed in its verification duty by not informing Porta-Kamp of its meeting of August 23, 1972, with Atlantic, the second low bidder, in which Atlantic allegedly

pointed out that Porta-Kamp was apparently misinterpreting the IFB specifications. Porta-Kamp alleges the content of this meeting was apparently set forth in Atlantic's letter to the Army dated August 25, 1972, which set forth Atlantic's version of how the IFB specifications should be interpreted. Porta-Kamp states that if it had been aware of these facts, it would have carefully reviewed its bid and probably found its mistake.

The Army states that it had no meetings with Atlantic prior to the award of the contract, but rather Atlantic made an oral protest, over the telephone, which it later withdrew, regarding Porta-Kamp's responsibility and the ability of Porta-Kamp's commercial model to meet the IFB specifications. Moreover, the content of Atlantic's letter, which admits Porta-Kamp's bid was apparently valid, could not have been communicated to Porta-Kamp prior to award since the Army did not receive it until after award. In any case, Porta-Kamp's site installation costs were not mentioned in these communications and did not form any part of the basis for the contracting officer's suspicion that Porta-Kamp had made a mistake. Therefore, we are unable to see how the Army's nondisclosure of Atlantic's doubts that Porta-Kamp could meet the IFB specifications prejudiced Porta-Kamp in its failure prior to award to detect the omission of site installation costs from its bid price, or how this nondisclosure violated the Army's (ASPR § 2-406 (1972 ed.)) bid verification duty.

Porta-Kamp also makes reference to the statement made by the successor contracting officer in the administrative report on this claim that the disparity "is difficult to explain, other than the fact that site placement costs were omitted by the contractor in its bid." Porta-Kamp claims proper fulfillment of the Army's verification obligation required disclosure of the suspicion that these costs had been omitted from its bid price. However, the statements of the contracting officer and other contracting personnel in this regard, which have been referred to by Porta-Kamp, were made after award. There is no indication that any such suspicion on the part of the Army existed or reasonably should have existed prior to the award of the contract.

Porta-Kamp also apparently alleges that it was not given sufficient time to verify its bid. We have found that an "on the spot" confirmation, in which a bidder is not given enough time to properly verify its bid, is insufficient. *See* B-167954, *supra;* B-172986, August 30, 1971; B-173990, December 29, 1971. However, in the present case, there is no indication that Mr. Brient was required to give such an "on the spot" confirmation. Award was not made for over a week after verification was requested, so Porta-Kamp had sufficient time to carefully review its bid for any possible mistakes. Porta-Kamp, an experienced Government contractor admittedly aware of the wide

disparity between its bid and the others received, reasonably should have completely reviewed its bid.

Porta-Kamp has cited various authorities in support of its position that the contracting officer failed in his verification duty, particularly relying upon B–144252, October 20, 1960; B–170691, January 28, 1971; and B–177405, *supra*. However, the facts and circumstances of those cases are clearly distinguishable. In B–144252, *supra*, the contracting officer did not even apprise the low bidder that there was a large difference between the low and the next low bid. In B–170691, *supra*, the procuring agency admitted that it was unaware as to whether it had disclosed to the bidder the basis for its suspicion of a possible mistake in bid. In B–177405, *supra*, the Government not only failed to disclose the Government estimate, but also failed to even inform the bidder that its bid was lower than the Government's estimated cost of materials alone.

These cases are to be contrasted to the facts and circumstances of the present case, since the contracting officer disclosed all of his bases for believing that a possible mistake in bid had occurred, i.e., the wide disparity between the bids received under the IFB, when he requested Porta-Kamp to verify its bid. *See* 37 Comp. Gen., *supra;* 47 *id.*, *supra;* B–173792, December 29, 1971; B–179257, August 3, 1973; *Matter of General Time Corporation*, *supra*.

Finally, Porta-Kamp makes reference to *Matter of Yankee Engineering Company, Inc.*, B–180573, June 19, 1974, wherein we found that relief could be granted under the circumstances of that case, notwithstanding the verification by the bidder of its extremely low bid, since acceptance of the bid resulted in an unconscionably priced contract, so gross that it could be said that the Government "was *obviously* getting something for nothing." [Italic supplied.] See *Kemp* v. *United States*, 38 F. Supp. 568 (D. Md. 1941); 45 Comp. Gen. 305 (1965); 53 *id.* 187 (1973). However, in *Yankee*, the record showed that the Army realized it was essentially "getting something for nothing," even after the verification by the low bidder. Compare *Matter of Aerospace America, Inc.*, B–181439, July 16, 1974. There is no such indication here. Also, *see* B–176517, September 6, 1972; B–177432, December 21, 1972; B–178713, June 6, 1973; *Matter of Aerospace America, Inc.*, *supra*. Contrast 53 Comp. Gen., *supra*.

Inasmuch as we have found the Army's verification was sufficient and the award to Porta-Kamp was not unconscionable, we need not decide whether the evidence submitted by Porta-Kamp in support of its claim of mistake was clear and convincing. Accordingly, Porta-Kamp's claim is denied as administratively recommended.

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Bid of corporation, which submitted defective bid bond in name of joint venture consisting of corporation and two individuals, must be rejected as nonresponsive and defect cannot be waived by contracting officer, since 1FB requirement for acceptable bid bond is material and GAO is unable to conclude on basis of information bidder submitted with bid that surety would be bound in event bidder failed to execute contract upon acceptance of its bid 271

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Underwriting limitation

Allegation that bid bond is invalid because bonding company exceeded underwriting limitation is unsupported since Treasury Department circular shows underwriting limit of $3,547,000 per risk for bonding company and bid bond was for $462,036 345

Government employees

Surety's liability

Employee's assets

Where a surety has indemnified the Government for a portion of loss occasioned by employee's embezzlement of public funds and the employee is entitled to receive military retired pay, such pay cannot be withheld for the benefit of the surety on theory that the surety is subrogated to the Government's right of setoff, since such action would be contrary to the language of 32 C.F.R. 43a.3, the Government's policy against accounting to strangers for its transactions and against having the Government serve as agent for collection of private debts 424

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Fair Labor Standards Act *v.* other pay laws

Civil Service Commission's interim instructions, requiring agencies to compute overtime benefits under both the Fair Labor Standards Amendments of 1974 and under various provisions of Title 5 of the U.S. Code, and to pay according to computation most beneficial to the employee are not illegal, as Canal Zone Acting Governor contends, but are in accord with statutory construction principle to harmonize statutes dealing with the same subject whenever possible, and is consistent with congressional intent 371

CHECKS

Payees

Depositary bank

Holder in due course

Depositary bank which credits Government checks to depositor's account and allows withdrawals of the amount of the deposit without notice of any defects is holder in due course, entitled to receive payment of checks in full from Treasury Dept. without setoff for tax or other debts owing by the payee, notwithstanding stop order placed on payment 397

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Set-off. (*See* **SET-OFF**)

Transportation

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Weekend or holiday vehicle detention charges for overdimensional shipments are proper only when the carrier has a valid highway permit for the day preceding and the day following the Saturday, Sunday or holiday. Expenses incurred through the use of a transceiver to obtain State highway permits are properly reimbursable, but only when proven. 308

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Additional

Court reporters

Maximum limitation

Court reporter who served in dual capacity as court reporter-secretary under authority of 28 U.S.C. 753(a) is not entitled to additional pay for performance of secretarial duties in excess of maximum established under 28 U.S.C. 753(e) as in effect prior to June 2, 1970. While language of 753(a) does not clearly so limit compensation for combined positions, the derivative language of Public Law 78–222 which was revised, codified and enacted without substantive change by Public Law 80–773, expressly provided that the salary for such a combined position was to be established subject to the statutorily prescribed maximum 251

Back pay. (*See* **COMPENSATION, Removals, suspensions, etc., Back pay**)

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Independent officers' organizations

The pay of a retired Regular Naval officer employed by the Naval Academy Athletic Association (NAAA) is not subject to reduction under the Dual Compensation Act since it appears that NAAA is a private, voluntary association not established pursuant to any law or regulation and therefore it cannot be regarded as a nonappropriated fund instrumentality of the United States 518

Increases. (*See* **COMPENSATION, Promotions**)

Jury duty

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Military pay. (*See* **PAY**)

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Aggregate limitation

Reemployed annuitant

Computation

In computing aggregate rate of pay for determining maximum limitation on premium pay under 5 U.S.C. 5547, amount of annuity for pay period received by reemployed annuitant is to be included. See 32 Comp. Gen. 146 (1952) 247

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Traveltime

Congested traffic

Time spent in travel outside of his scheduled workday by wage board employee in return travel to official duty station after receiving medical examination at temporary duty station, although delayed by congested traffic, does not constitute travel away from official duty station occasioned by event which could not be scheduled or controlled administratively as contemplated by 5 U.S.C. 5544(a)(iv) as condition for payment of overtime compensation, since such travel outside regular duty hours was not necessitated by congested traffic but resulted from scheduling of medical examination which was within administrative control and, therefore, is not compensable as overtime---------- 515

Wage board employees. (*See* **COMPENSATION, Wage board employees, Overtime, Traveltime**)

Prevailing rate employees. (*See* **COMPENSATION, Wage board employees**)

Promotions

Effective date

Retroactive

While GAO would have no objection to processing retroactive promotion in accordance with arbitrator's award to employee of Defense Supply Agency, there is no legal basis under which promotion may be effective retroactive to July 1, 1969, as ordered by arbitrator. Since arbitrator's award was based on finding that agency had not afforded employee priority consideration due him for promotion, effective date of retroactive promotion must conform with one of dates on which a position was filled for which employee was entitled to priority consideration but did not receive it and date is determined to be July 22, 1969---- 435

Arbitrator's effective date of June 29, 1973, for retroactive promotion based on earlier findings of grievance examiner cannot be sustained since evidence shows agency head had not exercised his discretion to promote employee until July 7, 1973. Thus, award is modified to make effective date of retroactive promotion at beginning of first pay period after July 7, 1973, when official authorized to make appointments acted---------- 538

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Civilian employee, assigned temporarily to perform the duties of a higher level position, may be retroactively temporarily promoted for that period since provision in collective bargaining agreement in effect at the time provided that employees so assigned for more than one pay period would be temporarily promoted. If such provision is valid under Executive Order 11491, then agency acceptance of agreement made provision a nondiscretionary agency policy and General Accounting Office has permitted retroactive changes in salary when errors occurred as the result of a failure to carry out a nondiscretionary agency policy..... 263

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Concerning proper step in grade in which employee should be placed upon processing retroactive promotion, there is no legal basis for placing him in step 10 of GS–13 as ordered by arbitrator. Under 5 U.S.C. 5334(b) an employee who is promoted to higher grade is entitled to basic pay at lowest rate of higher grade which exceeds his existing rate of basic pay by two step increases. Since employee was in grade GS–12, step 7, on effective date of retroactive promotion, he is only entitled to promotion to grade GS–13, step 4..... 435

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Single *v.* multiple awards

Protest of bidder on partial quantity against award to only other and high bidder (bidding "all or none") is denied since "all or none" bid lower in aggregate than any combination of individual bids available may be accepted by Government although partial award could be made at lower unit cost. Moreover, award to higher priced "all or none" bidder in lieu of partial award to low bidder and resolicitation of remaining quantity was not illegal as contracting officer determined higher price was nevertheless reasonable 416

Cancellation

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Bid evaluation base

Release of draft RFP for marine salvage and ship husbanding contract to incumbent contractor approximately 5 months before other competitors received official RFP, resulting in incumbent's sole knowledge of approximate weights of evaluation criteria in violation of ASPR 1-1004(b) and 3-501(a); and consideration of criteria not stated in RFP, which were unequally applied to favor incumbent results in appearance of partiality which calls for recommendation that contract be terminated 375

Bidder responsibility

In situation where it becomes evident in preaward survey that low responsive bidder does not have intention or ability to provide required "commercial, off the shelf" item by time set for delivery, there is no reasonable basis upon which bidder could properly have been found responsible. Accordingly, award to such bidder was improper and should be terminated, with award being made to next low responsive and responsible bidder willing to accept award at its bid price 499

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Where award is made by agency after protest filed at GAO but before agency received notice of protest, agency did not act improperly even though, due to decision on merits of protest, it appears that protester may have been prejudiced by award 499

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Recommendation withdrawn

Because resolicitation cannot be effectively implemented before expiration of contract recommended for resolicitation in prior decision and normal procurement cycle on upgraded specification is about to begin, HEW is advised that prior recommendation need not be followed. 53 Comp. Gen. 895, modified 483

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Contention that award to Canadian firm would violate ASPR 6–502(d) is not supported where evidence presented does not demonstrate that "performance in Canadian Government-owned or controlled installations" is contemplated 363

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Negotiated contracts. (*See* **CONTRACTS, Negotiation, Conflicts of interest prohibitions**)

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

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Where party requests no-cost cancellation of fixed-price supply contract on basis of sovereign acts of Government (dollar devaluation and embargo) and general inflation, although contract does not contain either escalation or excuse by failure of presupposed condition clause, fact that contract did contain changes, Government delay of work and default clauses is sufficient to establish all rights and duties of parties without resort to Uniform Commercial Code 527

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Defense Department

Without GSA approval, the Navy lacked authority to procure reels of instrumentation recording tape valued in excess of $5,000 and of a type not covered by a Federal Supply Schedule (FSS) contract, because the Federal Property Management Regulations require procurements in those circumstances to be approved by GSA 488

Waiver

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Request for no-cost cancellation of contract option because of increased costs of performance not granted where alleged cause for cost increase due to (1) acts done by Government in its sovereign capacity (dollar devaluation and embargo), and (2) tremendous inflationary pressures, because contract contained no basis for such cancellation. Moreover, mere fact that contract performance becomes burdensome or even results in loss due to unanticipated rises in material costs does not entitle fixed-price contractor to relief 527

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Compliance

Although protester alleges that it was requested to furnish Equal Employment Opportunity (EEO) information indicative of award 2 weeks before proposed awardee in furtherance of allegation of improper manipulation of funding available for additive items and record contains conflicting information as to when EEO information was obtained from bidders, once additional funding became available, increasing amount of additive items to be included for award and displacing protester as low bidder, it was appropriate to secure EEO information from resulting low bidder---- 320

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Notice of error

Lacking

Contractor's claim for correction of contract price to include Nurse Call/PA/Intercom cost is denied, since contracting officer did not have actual or constructive notice of possible error prior to award in only bid received, as bid price was considered reasonable although considerably higher than Government estimate, and Engineering Service recommended that award be made---- 507

Price range

Contracting officer, who reasonably had no suspicion of specific mistake in bid and who informs bidder of complete basis for his general suspicion that bidder might have made mistake, i.e., wide disparity among three lump-sum bids submitted, and requested and received verification from bidder, has fulfilled ASPR 2–406 verification duty; verification request requires no special language and contracting officer need not specifically state that he suspects mistake, so long as he apprises bidder of mistake which is suspected and basis for such suspicion---- 545

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Contracting officer, who suspected mistake in low bid and requested verification but failed to mention unsuccessful bidder's doubts that low bidder could meet IFB specifications, did not contribute to low bidder's failure to detect its omission of site installation costs from bid price and did not violate ASPR 2–406 verification requirements, since these doubts formed no part of basis for contracting officer's suspicion of mistake and did not relate to site installation costs---- 545

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Where company's mistaken proposal to repair roofs was based on misinformation given it by Government's agent and also on its own negligence in not studying blueprints and specifications thoroughly enough, the position of the parties is that of persons who have made a mutual mistake as to material fact and contract may be reformed to allow additional compensation for repairing correct contract area---- 497

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In view of agency's primary responsibility with respect to determinations of highly technical nature, GAO will not disturb award where record reasonably supports administrative determination that successful offeror's technical approach was best operational and most cost effective method 363

Awards

Cancellation

Release of draft RFP for marine salvage and ship husbanding contract to incumbent contractor approximately 5 months before other competitors received official RFP, resulting in incumbent's sole knowledge of approximate weights of evaluation criteria in violation of ASPR 1–1004(b) and 3–501(a); and consideration of criteria not stated in RFP, which were unequally applied to favor incumbent results in appearance of partiality which calls for recommendation that contract be terminated 375

Propriety

Evaluation of proposals

In RFP setting forth Government's best estimate of workload and skill requirements (115 man-years of effort) and further indicating that 115 level is not fixed but significant deviation must be adequately explained, award to contractor proposing 104 man-years is not improper since RFP places no man-year floor to limit proposers and ultimate determination of reasonableness and feasibility of any offeror's proposing significantly less than 115 man-years is that of technical evaluators. Moreover, 6 of 7 proposers proposed less than 106 man-years and contractor is now performing satisfactorily at or below 104 man-year level 352

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"Buying in"

Legality

In cost reimbursement situation award to offeror submitting lowest cost cannot be considered "buy-in" (offering cost estimate less than anticipated cost with expectation of increasing costs during performance) because agency was aware of what realistic estimate cost of contractor's performance was before award and made award based on that knowledge 352

Competition

Discussion with all offerors requirement

"Meaningful" discussions

While protester presents general challenge to NASA procedure of conducting "discussions" with offerors in competitive range, with "negotiations" limited to definitization of contract with selected offeror, charging that procedure violates statutory and regulatory requirements for meaningful negotiation with all offerors in range and abridges requirement for common cutoff date, after review of discussions conducted here, and adherence to common cutoff date for proposal revisions, it cannot be concluded that procedures leading to selection of offeror found significantly superior in mission suitability, and lower in cost than protester, varied materially from requirements of 10 U.S.C. 2304(g) 408

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Not prejudicial

Cost realism evaluation which contained improper upward adjustment for erroneously determined omission of cost for two employees was not prejudicial to protester's position for even assuming all other cost adjustments to protester's proposal were erroneous with the exception of state tax, proper evaluation of awardee's costs would have indicated that it had proposed lower realistic cost than protester 352

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Administrative determination

In RFP setting forth Government's best estimate of workload and skill requirements (115 man-years of effort) and further indicating that 115 level is not fixed but significant deviation must be adequately explained, award to contractor proposing 104 man-years is not improper since RFP places no man-year floor to limit proposers and ultimate determination of reasonableness and feasibility of any offeror's proposing significantly less than 115 man-years is that of technical evaluators. Moreover, 6 of 7 proposers proposed less than 106 man-years and contractor is now performing satisfactorily at or below 104 man-year level 352

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Once requirement for meaningful negotiations has been met and best and final offers have been submitted, it is incumbent upon agency to evaluate these offers, and agency's failure to disclose quantum of subsequent cost realism adjustments, with opportunity for offerors to point out errors, does not constitute failure to have meaningful negotiations. Negotiation process cannot be indefinitely extended for purpose of providing offeror opportunity to take issue with cost realism analysis 352

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Release of draft RFP for marine salvage and ship husbanding contract to incumbent contractor approximately 5 months before other competitors received official RFP, resulting in incumbent's sole knowledge of approximate weights of evaluation criteria in violation of ASPR 1–1004(b) and 3–501(a); and consideration of criteria not stated in RFP, which were unequally applied to favor incumbent results in appearance of partiality which calls for recommendation that contract be terminated. 375
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Although untimely filed under its Interim Bid Protest Procedures and Standards, GAO considers protests which raise significant issues concerning procurement agency's partiality toward incumbent to prejudice of other competitors for award of ship salvage contract 375
Contracting officer's affirmative responsibility determination
General Accounting Office review discontinued
Exceptions
Reasonableness
Question of responsive bidder's manifestation after bid opening of inability to comply with specification requirement for commercial, off-the-shelf item is situation where our Office will continue to review affirmative responsibility determination, even in absence of allegation or demonstration of fraud to determine if determination was founded on reasonable basis 499
Timeliness
Considered on merits
Under 4 C.F.R. § 20.2(a), requiring bid protests to GAO to be filed within 5 days after basis of protest is known or should have been known, protest received on the morning of the 6th day although untimely is considered on merits because the protest raises issues with respect to the interpretation of 10(c) of SF 33A and decision on issues raised may be significant to procurement practices and procedures. 4 C.F.R. 20.2(c) 416

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Protests—Continued
Timeliness—Continued
Negotiated contract
Allegation that agency improperly failed to conduct discussions was dismissed as untimely since it was filed almost two months after award was made ---- 276
Objection to upward NASA cost adjustment in offeror's cost proposal, made because NASA perceived deficiency in offeror's response to RFP spare parts formula, is untimely because record shows clear disagreement between offeror and agency at close of discussion, as to realism of RFP terms and adequacy of response thereto, and inaction by agency in failing to accede to protester's objection by date established for receipt of revised proposals notified offeror that it must timely protest. Also, other objections to cost adjustments, even if sustained, do not alter relative ranking of offerors ---- 408
In situation where protester after award received copy of awardee's proposal on May 21 and noted alleged deficiency therein, protest filed more than 5 working days thereafter is not untimely because (1) agency had scheduled debriefing conference for May 28 and (2) protest was filed within 5 working days of debriefing. 4 CFR 20.2(a) (1974) urges protesters to seek resolution of complaints with contracting agency and does not require filing of protest at GAO where it was reasonable to withhold protest until contracting agency explained its position at debriefing ---- 468
Solicitation improprieties
Apparent prior to bid opening
Contention that IFB failed to provide special instructions concerning the order of selection priority of additive items is untimely raised and will not be considered by GAO as 4 C.F.R. § 20.2(a) (1974) cautions bidders that protests based upon alleged improprieties in solicitation apparent prior to bid opening, must be filed prior to bid opening ---- 320
Reformation. (*See* **CONTRACTS, Modification**)
Requirements
Specification deviation
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Contract clause which states that "when helicopters in addition to the *one under contract* are required * * * the Contractor agrees to furnish * * * [same] if available [at a rate set out in the IFB]" does not allow for supplying of helicopters at any base other than one under contract. More permissive interpretation would render competitive bidding process virtual nullity and allow its circumvention at whim of contracting officer ---- 390
Research and development
Conflict of interest prohibitions
No law or regulation precludes an award to national association which it is contended will be in conflict of interest because one goal of project under contract is to enjoin parents to lobby for improved education for handicapped children and for increased funds for purpose, the recipients of which funds would be association members ---- 421

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Research and development—Continued

Participation prohibitions

Fact that Lowell Technological Institute Research Foundation is nonprofit, State-created institution affiliated with educational institution does not preclude it from competing for Government contract involving other than research and development in competition with commercial concerns since unrestricted competition on all Government contracts is required by laws governing Federal procurement in absence of any law or regulation indicating a contrary policy ---------- 480

Resolicitation

Recommendation withdrawn

Because resolicitation cannot be effectively implemented before expiration of contract recommended for resolicitation in prior decision and normal procurement cycle on upgraded specification is about to begin, HEW is advised that prior recommendation need not be followed. 53 Comp. Gen. 895, modified ---------- 483

Sales. (*See* **SALES**)

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

Sole source procurements. (*See* **CONTRACTS, Negotiation, Sole source basis**)

Specifications

Adequacy

Minimum needs standard

Reasonable

Though stated laundry system requirements, including need for independent batch processing, are questioned, agency determination of minimum needs is not shown to be without reasonable basis. Protester's blanket offer to supply acceptable system, including proposed use of washer and extractor not shown to meet requirements, provides insufficient basis to question determination to procure sole-source (10 U.S.C. § 2304(a)(10), ASPR § 3-210.2(i) (1973 ed.)) from only concern offering acceptable system. However, in future laundry system procurements, use of two-step advertising procedure might be desirable -- 445

Conformability of equipment, etc., offered

Approximate requirements

Record does not support contention that specifications in negotiated procurement precluded consideration of design proposed by successful offeror because such design was not specifically called for, as specifications were performance type, leaving exact design and approach to meet performance parameters to inventiveness and ingenuity of offerors - 363

Commercial model requirement

"Off the shelf" items

Where purchase description covers salient characteristics of "commercial, off the shelf" item and agency specifically informs all offerors that specifications are not sufficient to permit design and manufacture of item, commercial, off-the-shelf characteristic was IFB requirement -- 499

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Bid bond principal and bidder variance
Bid of corporation, which submitted defective bid bond in name of joint venture consisting of corporation and two individuals, must be rejected as nonresponsive and defect cannot be waived by contracting officer, since IFB requirement for acceptable bid bond is material and GAO is unable to conclude on basis of information bidder submitted with bid that surety would be bound in event bidder failed to execute contract upon acceptance of its bid ---- 271
Prejudicial to other bidders
Bid submitted which contained price for base quantity and greater price for option quantity in derogation of IFB provision imposing ceiling limitation on option quantity (option price was not to exceed price bid on base quantity) may not be considered for award since deviation would be prejudicial to all bidders who submitted bids in conformance with option ceiling provision ---- 476
Federal specifications
Deviation justification
Navy did not unreasonably deviate from Federal Specification W-R-175C/GEN because no manufacturer had qualified thereunder the type of product which in the Navy's judgment was required to satisfy its minimum needs ---- 488
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Without GSA approval, the Navy lacked authority to procure reels of instrumentation recording tape valued in excess of $5,000 and of a type not covered by a Federal Supply Schedule (FSS) contract, because the Federal Property Management Regulations require procurements in those circumstances to be approved by GSA ---- 488
Minimum needs requirement
Review recommended
Prohibition in IFB of all-or-none bids to encourage competition in situation where contracting officer believes one supplier has a monopoly and is acting in restraint of competition through use of all-or-none bids is improper since net effect is simply to increase cost to Government of items on which competition exists. Competitive items should be re-advertised. Sole-source items should be subject of separate negotiated procurement ---- 395
Stenographic reporting
Prices
Bid
Protester's allegation that prices quoted by low bidder were excessive and violate invitation provision, implementing P.L. 92-463, which requires that rates bid for a page copy of transcript be actual cost of duplication, based upon unsubstantiated inference in bidder's manner of bidding, is not supported by record since bidder has furnished satisfactory explanation as to its manner of bidding and its prices are consistent with those of other bidders on this and prior procurements for same service -- 340

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Subcontractors
Listing
Alternate subcontractors
Evaluation
Where successful offeror submitted qualifications of two alternative subcontractors for evaluation with its proposal and contracting officer verified offeror's ability to commit highest evaluated of two subcontractors, even though offeror had made no firm commitment to either, merely having obtained firm quotes from both, unlike listing of subcontractor requirements in formally advertised invitations by certain Federal agencies, award was not improper since neither applicable procurement regulations nor RFP required firm subcontractor commitment or precluded proposal of alternate subcontractors and Govt. had right to approve subcontractors 468
Termination
Award to next low responsive and responsible bidder
In situation where it becomes evident in pre-award survey that low responsive bidder does not have intention or ability to provide required "commercial, off the shelf" item by time set for delivery, there is no reasonable basis upon which bidder could properly have been found responsible. Accordingly, award to such bidder was improper and should be terminated, with award being made to next low responsive and responsible bidder willing to accept award at its bid price 499
Convenience of Government
Erroneous awards
Low bidder who inserted dashes rather than prices for some of the dining facilities to be priced for kitchen police services but who also bid a high per meal price for an estimated 10 million plus meals has submitted a responsive bid since the dashes were, in effect, "no charge" bids covering unpriced dining facilities where only the high per meal price would be payable by Government. Contract awarded to higher bidder should be terminated for convenience of Government 345
Negotiation procedures propriety
Release of draft RFP for marine salvage and ship husbanding contract to incumbent contractor approximately 5 months before other competitors received official RFP, resulting in incumbent's sole knowledge of approximate weights of evaluation criteria in violation of ASPR 1-1004(b) and 3-501(a); and consideration of criteria not stated in RFP, which were unequally applied to favor incumbent results in appearance of partiality which calls for recommendation that contract be terminated 375
"No-cost"
Where party requests no-cost cancellation of fixed-price supply contract on basis of sovereign acts of Government (dollar devaluation and embargo) and general inflation, although contract does not contain either escalation or excuse by failure of presupposed condition clause, fact that contract did contain changes, Government delay of work and default clauses is sufficient to establish all rights and duties of parties without resort to Uniform Commercial Code 527

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Jurors

Fees

Grand jurors

Increases

Effective date

Fees of grand jurors sitting in the June 18, 1973 grand jury in the Eastern District of Louisiana and fees of the June 5, 1972 grand jury sitting in Washington, D.C., may be increased retroactively to the amount provided for in 28 U.S.C. 1871 at the discretion of and beginning with the dates determined by the presiding judge, in accordance with the limitations imposed by the statute ---------- 472

Reporters

Additional compensation

Maximum limitation

Court reporter who served in dual capacity as court reporter-secretary under authority of 28 U.S.C. 753(a) is not entitled to additional pay for performance of secretarial duties in excess of maximum established under 28 U.S.C. 753(e) as in effect prior to June 2, 1970. While language of 753(a) does not clearly so limit compensation for combined positions, the derivative language of Public Law 78–222 which was revised, codified and enacted without substantive change by Public Law 80–773, expressly provided that the salary for such a combined position was to be established subject to the statutorily prescribed maximum ---------- 251

DEBT COLLECTIONS

Military personnel

Retired

Survivor Benefit Plan

Contribution indebtedness

Debts of a deceased member, not the responsibility of his widow, in view of 10 U.S.C. 1450(i) may not be offset against an annuity payable to such widow under 10 U.S.C. 1450, the Survivor Benefit Plan. However, such reasoning does not apply to reduction of annuities due to insufficient deductions having been made from member's retired pay to cover cost of such annuities ---------- 493

Set-off (*See* **SET-OFF**)

Waiver

Military personnel

Dependents

Erroneous Survivor Benefit Plan payments

Overpayment resulting from erroneous annuity payments under Survivor Benefit Plan made to member's widow should be considered for waiver as authorized by 10 U.S.C. 1453 under rules similar to those contained in 35 Comp. Gen. 401 (1956), which applied to the Uniformed Services Contingency Option Act of 1953 (now Retired Serviceman's Family Protection Plan). Thus, waiver should be granted only where there is not only a showing of no fault by widow but also that recovery would result in a financial hardship to the widow or for some other reason would be contrary to purpose of Plan and therefore against equity and good conscience ---------- 249

DEPARTMENTS AND ESTABLISHMENTS Page

Promotion procedures. (*See* **REGULATIONS, Promotion procedures**)

ENLISTMENTS

Fraudulent

Determination

Waiver of fraud *v.* avoidance of enlistment

The date of determination of the fraud and the date of the decision to either waive the fraud or avoid the enlistment and release the individual from military control should be contemporaneous or as close to contemporaneous as possible so as to avoid retaining control over an individual whose status as a military member is void. Regulations may be changed in line with 47 Comp. Gen. 671 (1968) to place the authority to waive fraud in enlistment on the same level as the authority to determine the fact of a fraudulent enlistment 291

Pay rights, etc.

Members who fraudulently enlist (voidable enlistments) are entitled to receive pay and allowances until the fact of the fraud is definitely determined at which time either the fraud should be waived and the member continued in the service with pay and allowances or, the enlistment should be avoided by the Government and the member released from military control with no entitlement to pay and allowances beyond the date of determination of the fraud 291

Minority

Discharge

Within 90 days of enlistment

Under 10 U.S.C. 1170 a member enlisted between the ages of 17 and 18 years and who is discharged upon application of parents or guardian made within 90 days of enlistment, is entitled to pay and allowances through the date of discharge 291

Pay rights, etc.

The enlistment of an individual below the minimum statutory age for enlistment is void, however, if such individual continues in a military status after reaching the minimum age he enters a voidable military status which enlistment may be avoided at the option of the Government 291

Pay rights, etc.

Contractual

An enlistment is more than a contract, it effects a chapge of status and once that status is achieved the member is entitled to his military pay and allowances and such pay and allowances are not dependent upon the duties he performs but, rather, upon the status he occupies ... 291

Discharge before expiration of enlistment

Medically unfit

Members who subsequent to enlistment are determined to have been medically unfit at the time of enlistment may be paid pay and allowances through the date of discharge since the determination of medical fitness is primarily a function of the servlce and no statute affirmatively prohibits their enlistment, such as in the case of insane persons (10 U.S.C. 504) 291

ENLISTMENTS—Continued Page
Void
Medically unfit and minority
The enlistments of individuals enlisted below the minimum statutory age who are still below that age when that fact is discovered and the enlistments of individuals who are insane are void and upon a definite determination of such facts the individual's pay and allowances are to be stopped and he should be released from military control ---------- 291
EQUAL EMPLOYMENT OPPORTUNITY
Compliance with regulations
Contractors
Allegation that contractor may not be responsible because it did not perform satisfactorily under prior contract and was not in compliance with Equal Employment Opportunity regulations will not be considered, since no fraud has been alleged or demonstrated ---------- 421
Contract provision. (*See* **CONTRACTS, Labor stipulations, Nondiscrimination**)
Information
Obtaining
Contract award
Although protester alleges that it was requested to furnish Equal Employment Opportunity (EEO) information indicative of award 2 weeks before proposed awardee in furtherance of allegation of improper manipulation of funding available for additive items and record contains conflicting information as to when EEO information was obtained from bidders, once additional funding became available, increasing amount of additive items to be included for award and displacing protester as low bidder, it was appropriate to secure EEO information from resulting low bidder ---------- 320
EXPERTS AND CONSULTANTS
Travel expenses
To and from places other than home, etc.
Although Government consultant employed on when-actually-employed basis returned to his home in St. Louis, Missouri, instead of returning immediately to Las Vegas, Nevada, where he was transacting non-Government business at time he was called for Government meetings in Washington, D.C., he may be allowed the full cost of round-trip airfare between Las Vegas and Washington because the delay was occasioned by the Government assignment ---------- 430
FAIR LABOR STANDARDS ACT
Applicability
Employees of Canal Zone Government
Fair Labor Standards Amendments, Pub. L. 93-259
Civil Service Commission's interim instructions, requiring agencies to compute overtime benefits under both the Fair Labor Standards Amendments of 1974 and under various provisions of Title 5 of the U.S. Code, and to pay according to computation most beneficial to the employee are not illegal, as Canal Zone Acting Governor contends, but are in accord with statutory construction principle to harmonize statutes dealing with the same subject whenever possible, and is consistent with congressional intent ---------- 371

FEES Page

Jury. (*See* **COURTS, Jurors, Fees**)

FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES

Territorial cost of living allowance

Inclusion for aggregate limitation purposes

Judicial staff members

Determination by Judicial Conference that limitation at 28 U.S.C. 753(e) on annual salary payable to court reporters precludes payment of cost-of-living allowance to reporters receiving maximum salary is reasonable exercise of pay-setting authority given the lack of any indication that Congress intended reporters to receive compensation, other than transcript fees, in excess of that maximum. Determination is in line with our holding in B–107827, November 9, 1973, that cost-of-living allowance payable to Judges' secretaries and clerks under 28 U.S.C. 604(a)(5) is subject to appropriations limitations on aggregate salary 251

FUNDS

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

Impounding. (*See* **APPROPRIATIONS, Impounding**)

GARNISHMENT

Military pay, etc.

Where a surety has indemnified the Government for a portion of loss occasioned by employee's embezzlement of public funds and the employee is entitled to receive military retired pay, such pay cannot be withheld for the benefit of the surety on theory that the surety is subrogated to the Government's right of setoff, since such action would be contrary to the language of 32 C.F.R. 43a.3, the Government's policy against accounting to strangers for its transactions and against having the Government serve as agent for collection of private debts 424

GENERAL ACCOUNTING OFFICE

Comptroller General

Impoundment functions

GAO interpretation of Impoundment Control Act of 1974 is that amendment to Antideficiency Act eliminates that statute as a basis for fiscal policy impoundments; President must report to Congress and Comptroller General (C.G.) whenever budget authority is to be withheld; duration of, and not reason for, impoundment is criterion to be used in deciding whether to treat impoundment as rescission or deferral; the C.G. is to report to Congress as to facts surrounding proposed rescissions and, in the case of deferrals, also whether action is in accordance with law; the C.G. is authorized to initiate court action to enforce provisions of the act requiring release of impounded budget authority; the C.G. is to report to Congress when President has failed to transmit a required message; and the C.G. can reclassify deferral messages to rescission messages upon determination that withholding of budget authority precludes prudent obligation of funds within remaining period of availability 453

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Contractor's responsibility

Contracting officer's affirmative determination accepted

Exceptions

Question of responsive bidder's manifestation after bid opening of inability to comply with specification requirement for commercial, off-the-shelf item is situation where our Office will continue to review affirmative responsibility determination, even in absence of allegation or demonstration of fraud to determine if determination was founded on reasonable basis 499

Where IFB provides for offerors' furnishing information as to experience in designing and producing items comparable to item being procured, record will be examined to determine if bidder to whom award was made meets experience requirement and rule that affirmative determinations of responsibility will not be reviewed except where there are allegations that contracting officer's actions in finding bidder responsible are tantamount to fraud is distinguished 509

Protest procedures. (*See* **CONTRACTS, Protests**)

Jurisdiction

Contracts

Equitable jurisdiction

Specific statute requirement

Holding in 28 Ops. Atty. Gen. 121 (1909) cannot be followed since it was based on concepts of equity and principles of morality. GAO equitable jurisdiction can be exercised only where specifically granted by statute. There is no authority applicable to considering request for no-cost cancellation on equitable basis 527

Recommendations

Withdrawn

Because resolicitation cannot be effectively implemented before expiration of contract recommended for resolicitation in prior decision and normal procurement cycle on upgraded specification is about to begin, HEW is advised that prior recommendation need not be followed. 53 Comp. Gen. 895, modified 483

Recommendation in 54 Comp. Gen. 16 that negotiations be reopened to either cure deviation in accepted proposal or to issue amendment to RFP deleting option price ceiling is withdrawn in light of contracting agency's position that to do so would not be in best interests of Government based upon significant termination costs 521

GRATUITIES

Reenlistment bonus

Eligibility

Public Law 93-277

Members of military service who were discharged or separated prior to June 1, 1974, and who reenlisted within 3 months but were not on active duty on June 1, 1974, the effective date of Pub. L. 93-277, are not entitled to receive the regular reenlistment bonus under prior law, as saved by sec. 3 of Pub. L. 93-277 since the law as enacted specifically

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Reenlistment bonus—Continued
Eligibility—Continued
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Six months' death
Inactive duty training
Injury within scope of duties
Claims for death gratuity and medical expenses by beneficiaries of member who was to attend inactive duty training on Sept. 8–9, 1973, and then report for full-time training duty on Sept. 9–10, 1973, but who suffered heart attack and died during early morning of Sept. 9, may be allowed since member was under military control in his training area at time of heart attack and death and was, therefore, on inactive duty training at such time, which, is basis for payment of such benefits under 32 U.S.C. 321(a)(1) and 32 U.S.C. 320 523
GUAM
Employees
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Court reporter who served in dual capacity as court reporter-secretary under authority of 28 U.S.C. 753(a) is not entitled to additional pay for performance of secretarial duties in excess of maximum established under 28 U.S.C. 753(e) as in effect prior to June 2, 1970. While language of 753(a) does not clearly so limit compensation for combined positions, the derivative language of Public Law 78–222 which was revised, codified and enacted without substantive change by Public Law 80–773, expressly provided that the salary for such a combined position was to be established subject to the statutorily prescribed maximum 251
Determination by Judicial Conference that limitation at 28 U.S.C. 753(e) on annual salary payable to court reporters precludes payment of cost-of-living allowance to reporters receiving maximum salary is reasonable exercise of pay-setting authority given the lack of any indication that Congress intended reporters to receive compensation, other than transcript fees, in excess of that maximum. Determination is in line with our holding in B–107827, November 9, 1973, that cost-of-living allowance payable to Judges' secretaries and clerks under 28 U.S.C. 604(a)(5) is subject to appropriations limitations on aggregate salary .. 251
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Bid bond
Discrepancy between bid and bid bond
Bid nonresponsive
Bid of corporation, which submitted defective bid bond in name of joint venture consisting of corporation and two individuals, must be rejected as nonresponsive and defect cannot be waived by contracting officer, since IFB requirement for acceptable bid bond is material and GAO is unable to conclude on basis of information bidder submitted with bid that surety would be bound in event bidder failed to execute contract upon acceptance of its bid 271

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Annual

Agency-forced

Curtailment of agency operations

American Federation of Government Employees requests ruling invalidating Air Force Logistics Command (AFLC) policy to reduce operations at its installations during 1974 Christmas holiday period and force employees to take annual leave on basis that AFLC is not authorized to promulgate policy that violates collective bargaining agreements between installations and local unions. Since matter is presently before Assistant Secretary for Labor Management Relations as unfair labor practice complaint, Comptroller General declines to rule on issue..... 503

Court reporters

Leave accrual

Court reporters paid annual salary to be on call as needed by the court and free otherwise to augment income with earnings from transcript fees do not have regular tours of duty consisting of a definite time, day and/or hour which they are required to work during workweek and are "part-time" employees excluded from annual leave entitlement by 5 U.S.C. 6301(2)(ii). While court reporter-secretary may be entitled to annual leave for secretarial portion of duties performed during a regular tour of duty, record contains no certification of leave earnings and use upon which to base lump-sum leave payment..... 251

Home leave

Accrual. (*See* **OFFICERS AND EMPLOYEES, Overseas, Home leave, Accrual**)

LICENSES

Bidder qualifications. (*See* **BIDDERS, Qualifications**)

States and municipalities

Government contractors

Whether action of nonprofit, State-created institution affiliated with educational institution in bidding for other than research and development contract was ultra vires in violation of Massachusetts law enabling its establishment, like matter of general compliance with State and local licensing requirements, is for resolution between the bidder and State. Furthermore, bidder's authority to perform work in various States is matter for determination by those jurisdictions..... 480

MILEAGE

Military personnel

As being in lieu of all other expenses

Rates

Increase

Effective date

Where Navy member's dependents complete travel to new home port prior to July 1, 1974, and effective date of change of home port order is after July 1, 1974, increased monetary allowance in lieu of transportation rates effective July 1, 1974, may be authorized as effective date of order is controlling without regard to date of dependents' travel (case a)..... 280

Where member's dependents complete travel under normal permanent change of station order prior to July 1, 1974, date of increased monetary allowance in lieu of transportation rates, and effective date of order is after July 1, 1974, increased rates may be authorized as effective date of order is controlling without regard to date of dependents' travel (case b)... 280

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Where member detaches from former permanent station prior to July 1, 1974, date of increased mileage rates, and after utilization of authorized leave, travel and proceed time, reports to new permanent station on or after July 1, 1974, increased rates may be authorized where effective date of orders is on or after July 1, 1974, without regard to actual date of performance of travel (case c)---------- 280
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Claim for burial expenses by wife of member who was to attend inactive duty training on Sept. 8–9, 1973, and then report for full-time training duty on Sept. 9–10, 1973, but who died during early morning of Sept. 9, is returned for payment, since, at time of his death, member was in a pay status while on inactive duty training for the purpose of 10 U.S.C. 1481---------- 523
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Claims for death gratuity and medical expenses by beneficiaries of member who was to attend inactive duty training on Sept. 8–9, 1973, and then report for full-time training duty on Sept. 9–10, 1973, but who suffered heart attack and died during early morning of Sept. 9, may be allowed since member was under military control in his training area at time of heart attack and death and was, therefore, on inactive duty training at such time, which is basis for payment of such benefits under 32 U.S.C. 321(1)(a) and 32 U.S.C. 320---------- 523

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Station allowances. (*See* **STATION ALLOWANCES, Military personnel**)

NATIONAL GUARD

Civilian employees

Technicians

Training duty as guardsman

Injured in line of duty

Return to civilian occupation while disabled

A member of the National Guard who is also a National Guard technician under 32 U.S.C. 709 and who is injured in line of duty while performing training under 32 U.S.C. 502, is entitled in accordance with 37 U.S.C. 204(h)(2) to receive the pay and allowances of a regular member of the Army during the period of his disability for military duty even though he resumes his Government civilian occupation since he is not considered to be on active military service during period of receipt of pay and allowances under 37 U.S.C. 204(h)(2)..... 431

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Claim for burial expenses by wife of member who was to attend inactive duty training on Sept. 8–9, 1973, and then report for full-time training duty on Sept. 9–10, 1973, but who died during early morning of Sept. 9, is returned for payment, since, at time of his death, member was in a pay status while on inactive duty training for the purpose of 10 U.S.C. 1481..... 523

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Training assemblies. (*See* **PAY, Drill, Training assemblies**)

NATIONAL LABOR RELATIONS BOARD

Promotion Procedures

Collective bargaining agreement

When agency agreed in a collective bargaining agreement that it would be policy of the agency to fill vacancies by promotion from within if qualifications of agency applicants are equal to those from outside agency, then at the time that the head of the agency approved the agreement under section 15 of Executive Order No. 11491, such policy, unless otherwise provided in the agreement, became a nondiscretionary agency policy and part of the agency's promotion procedures..... 312

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OFFICE OF ECONOMIC OPPORTUNITY

Employees

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Arbitration award based on compromise settlement by union and Office of Economic Opportunity that grants employee retroactive promotion, but makes increased pay for higher level position prospective, is improper to the extent that it does not provide for backpay since salary is part of position to which employee is appointed and may not be withheld. Thus, employee is entitled to backpay incident to retroactive promotion under provisions of 5 U.S.C. 5596 538

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Arbitration award providing retroactive effective dates of promotions and compensation for 3 Office of Economic Opportunity employees may be implemented under Back Pay Act, 5 U.S.C. 5596, since arbitrator found that bargaining agreement had been breached which incorporated by reference agency regulation requiring promotion requests to be processed in 8 days 403

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Leaves of absence. (*See* **LEAVES OF ABSENCE**)

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Relocation of employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)

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Home leave

Accrual

Disallowance of claim for reimbursement for accrued home leave or credit of such leave to annual leave account is affirmed since legal authority for home leave provides only for its use as such in discretion of agency; moreover, provisions of 5 U.S.C. 6304(d)(1)(A)—restoration of forfeited annual leave—are not applicable since no forfeiture is established on the record 349

Overtime. (*See* **COMPENSATION, Overtime**)

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

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Promotions

Administrative determination

Federal Labor Relations Council review

Question of whether provision in collective bargaining agreement providing for temporary promotion for employees assigned to higher level positions for one pay period or more is valid in light of section 12(b)(2) of Executive Order 11491 which provides that management officials of an agency retain the right to promote employees within the agency is for determination by head of agency involved, subject to review by Federal Labor Relations Council. It is noted, however, that provision appears valid since agency has retained right to make determinations as to whether and whom to assign to higher level position, and 5 CFR 335.102(f) leaves to agency discretion the definition of "a reasonable time" in which to effect such promotions, thus making the time period amenable to negotiation 263

Compensation. (*See* **COMPENSATION, Promotions**)

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Transfers

Relocation expenses

House trailers, mobile homes, etc.

Miscellaneous expenses

When employee uses commercial carriers to transport two mobile homes incident to a permanent change of station and extra equipment is required for pickup and delivery of the trailer, employee would be entitled to reimbursement of such expenses since they do not appear to be expenses for preparing the trailer for movement nor do they appear to be otherwise prohibited by subsection 9.3a(3) of OMB Circular No. A-56 335

More than one mobile home

When employee changes permanent duty stations and it is necessary to transport two mobile homes by commercial carriers, resulting from eligibility status of mother-in-law prescribed by regulations, he may be reimbursed cost of applicable tariff as approved by ICC for transportation of both mobile homes in amount not to exceed maximum amount allowable for transportation and 60 days temporary storage of household goods. Regardless of method used in computing allowances he is entitled to a flat $200 miscellaneous allowance or larger amount not to exceed 2 weeks basic salary of employee at time he reported for duty where claim is supported by acceptable documentation since there is involved only one change of station 335

"Settlement date" limitation on property transactions

Extension

Military service

Civilian employee inducted into military service 5 weeks after transfer in June 1970 and discharged on March 30, 1972, may be reimbursed authorized real estate expenses incident to house purchase effected in November 1973 after his reemployment on July 3, 1972, provided agency grants time extension, commencing on February 24, 1973, when initial 1-year period (as extended by military service) expired 427

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Travel expenses. (*See* **TRAVEL EXPENSES**)
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Army member who received orders as "Referral Recruiter" which did not specify temporary duty for the period of 171 days during which he was to perform recruiting duty at a location away from his permanent station is considered to have been on temporary duty during that period and is entitled to per diem for that period and temporary duty travel allowances for travel to the location where such duty was performed -- 368
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Member who receives permissive orders for temporary additional duty (temporary duty afloat) which are subsequently determined to be directed orders may not be reimbursed for nontemporary storage since nontemporary storage of household effects while on such duty is prohibited by para. M8200–1 and does not come within the exceptions specified in para. M8101–7, 1 JTR ---------- 387
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Members who were ordered to perform temporary additional duty aboard the YRST–2, a nonself-propelled service craft with berthing and messing available onboard, are not entitled to special pay for sea duty as the YRST–2 is not a "vessel" within the meaning of paragraph 10703 of the Department of Defense Pay and Allowances Entitlements Manual. 442
Civilian employees. (*See* **COMPENSATION**)
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Pay and allowances for absence due to injury in line of duty
Return to civilian occupation during disability
A member of the National Guard who is also a National Guard technician under 32 U.S.C. 709 and who is injured in line of duty while performing training under 32 U.S.C. 502, is entitled in accordance with 37

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Drill—Continued
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Pay and allowances for absence due to injury in line of duty—Continued
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Sea duty. (*See* **PAY, Additional, Sea duty**)
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For benefit of surety
Where a surety has indemnified the Government for a portion of loss occasioned by employee's embezzlement of public funds and the employee is entitled to receive military retired pay, such pay cannot be withheld for the benefit of the surety on theory that the surety is subrogated to the Government's right of setoff, since such action would be contrary to the language of 32 C.F.R. 43a.3, the Government's policy against accounting to strangers for its transactions and against having the Government serve as agent for collection of private debts 424
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Impounding appropriations
GAO interpretation of Impoundment Control Act of 1974 is that amendment to Antideficiency Act eliminates that statute as a basis for fiscal policy impoundments; President must report to Congress and Comptroller General (C.G.) whenever budget authority is to be withheld; duration of, and not reason for, impoundment is criterion to be used in deciding whether to treat impoundment as rescission or deferral; the C.G. is to report to Congress as to facts surrounding proposed rescissions and, in the case of deferrals, also whether action is in accordance with law; the C.G. is authorized to initiate court action to enforce provisions of the act requiring release of impounded budget authority; the C.G. is to report to Congress when President has failed to transmit a required message; and the C.G. can reclassify deferral messages to rescission messages upon determination that withholding of budget authority precludes prudent obligation of funds within remaining period of availability 453
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Effective date

Where Navy member's dependents complete travel to new home port prior to July 1, 1974, and effective date of change of home port order is after July 1, 1974, increased monetary allowance in lieu of transportation rates effective July 1, 1974, may be authorized as effective date of order is controlling without regard to date of dependents' travel (case a)..... 280

Where member's dependents complete travel under normal permanent change of station order prior to July 1, 1974, date of increased monetary allowance in lieu of transportation rates, and effective date of order is after July 1, 1974, increased rates may be authorized as effective date of order is controlling without regard to date of dependents' travel (case b)..... 280

Where member detaches from former permanent station prior to July 1, 1974, date of increased mileage rates, and after utilization of authorized leave, travel and proceed time, reports to new permanent station on or after July 1, 1974, increased rates may be authorized where effective date of orders is on or after July 1, 1974, without regard to actual date of performance of travel (case c)..... 280

Where member is directed to perform periods of temporary duty en route to new permanent station prior to July 1, 1974, date of increased mileage rates, and effective date of permanent change of station is on or after July 1, 1974, since all the travel is performed in accordance with the permanent change of station order, the effective date of such order determines the mileage allowance rate applicable to all travel performed in accordance with the order without regard to the date member is required to travel in connection with temporary duty en route (case d)..... 280

Armed Services Procurement Regulation

Additive or deductive items

While ASPR § 2–201(b)(xli) (1974 ed.) requires disclosure of order of selection priority of additive items, FPR has no similar provision and, therefore, IFB issued by civilian agency need not reveal priority of additive items, and failure to indicate priority, with resultant post bid opening discretionary selection of additive items, does not render award of additive items invalid..... 320

Promotion procedures

Collective bargaining agreement

When agency agreed in a collective bargaining agreement that it would be policy of the agency to fill vacancies by promotion from within if qualifications of agency applicants are equal to those from outside agency, then at the time that the head of the agency approved the agreement under section 15 of Executive Order No. 11491, such policy, unless otherwise provided in the agreement, became a nondiscretionary agency policy and part of the agency's promotion procedures..... 312

Following arbitrator's determination that agency had not given employee priority consideration for promotion in accordance with Federal Personnel Manual and collective bargaining agreement and that

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Where Navy member's dependents complete travel to new home port prior to July 1, 1974, and effective date of change of home port order is after July 1, 1974, increased monetary allowance in lieu of transportation rates effective July 1, 1974, may be authorized as effective date of order is controlling without regard to date of dependents' travel (case a)---- 280
Where member's dependents complete travel under normal permanent change of station order prior to July 1, 1974, date of increased monetary allowance in lieu of transportation rates, and effective date of order is after July 1, 1974, increased rates may be authorized as effective date of order is controlling without regard to date of dependents' travel (case b)---- 280
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Auction

Group *v.* numbered items

Disputes

Conflict between auction records and protester's allegations

Contentions that protester was not advised of auctioneer's intent to sell generators in group and that auctioneer did not state that successful bidder on item 56 could choose among remaining items in group have no merit since contentions concern questions of fact and pursuant to subsection (e) of part 6 must be resolved by Govt. records of auction, and records evidence that auctioneer stated that items in question would be grouped and that items were offered with option, and use of term option coupled with earlier explanations of its meaning constitutes adequate notice to bidders 484

Procedure

Propriety

Protest of sale of generators as group, listed on IFB as items 56 through 72 and item 75, at auction of DOD surplus property on basis that word "count" as used in part 6A(b) of Sale by Reference pamphlet which provides that sale of all items cataloged by weight, count or measure will be sold in like units is ambiguous and that generators are not like units has no basis since word "count" includes any item described by number in IFB and would therefore include generators listed as one each and generators, while not identical, were sufficiently similar in nature to constitute like units; therefore it must be concluded sale was in accordance with provisions of part 6A(b) and not in contravention of part 6A(a) ... 484

Lot basis

Numbered items

While, as contended, bidders were denied opportunity to bid on each numbered item from 57 through 72, and 75, since bid on item 56 would not merely be bid on that item but would constitute bid on any items in group, sale of like items by group is both practical and expedient method of sale and does not preclude bidder from purchasing single item in group and is specifically authorized by part 6A(b) of the Sale by Reference pamphlet 484

SAMOA (*See* **AMERICAN SAMOA**)

SET-OFF

Debt collections

Military personnel

Retired. (*See* **PAY, Withholding, Debt liquidation, Retired pay**)

Deposits

Indebtedness of depositor

Taxes, etc.

Depositary bank which credits Government checks to depositor's account and allows withdrawals of the amount of the deposit without notice of any defects is holder in due course, entitled to receive payment of checks in full from Treasury Dept. without setoff for tax or other debts owing by the payee, notwithstanding stop order placed on payment 397

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Military personnel

Excess living costs outside United States, etc.

Fractional cost-of-living allowances

Members without dependents

Enlisted members without dependents assigned to ships home-ported outside the United States, who are not in a travel status, but are required to be away from their station and where a determination has been made that subsistence in a Govt. mess is impractical, are entitled to a fractional cost-of-living allowance under par. M4301–5 of the Joint Travel Regs. for those meals which they must buy away from their station, since it appears that the prorated cost-of-living allowance was authorized for the purpose of defraying the excess costs incurred outside the U.S. for such meals whether a member is assigned to a ship or a shore-based unit 333

STORAGE

Household effects

Military personnel

Nontemporary storage

Member's apartment

Where nontemporary storage of member's household goods otherwise is proper, reimbursement is not authorized for storage in member's apartment as para. M8101–1, 1 JTR, in accord with 37 U.S.C. 406(d) (1970) authorizes such storage only at Government or commercial facilities 387

Temporary duty

Member who receives permissive orders for temporary additional duty (temporary duty afloat) which are subsequently determined to be directed orders may not be reimbursed for nontemporary storage since nontemporary storage of household effects while on such duty is prohibited by para. M8200–1 and does not come within the exceptions specified in para. M8101–7, 1 JTR 387

SUBSISTENCE

Per diem

Fractional days

Excess of ten hours

Beginning or ending hours not for consideration

Although they did not begin travel before 6 a.m. or end travel after 8 p.m., employees who were in travel status for periods of 12 hours and 15 minutes to 13 hours and 15 minutes may be paid per diem allowances under FPMR 101–7, paragraph 1–7.6d(1), since that regulation requires the employees to begin or end the travel at the stated times only when travel of 6 to 10 hours is involved 284

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Aboard nonself-propelled service craft
Members who were ordered to Harbor Clearance Unit Two (HCU–2) but who performed temporary additional duty aboard the YRST–2, which is not a "vessel" for sea duty pay or for travel entitlement purposes may not receive sea duty pay but are not prohibited from receiving per diem by 1 JTR paragraph M4201–10 since while service in HCU–2 is considered sea duty, *i.e.*, onboard a vessel, the temporary additional duty was, in fact, not performed onboard a vessel 442
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Army member who after a period of 171 days of duty as a "Referral Recruiter" which is considered to be temporary duty, received several temporary duty orders continuing the duty at same location for 5 additional months, in absence of approval for temporary duty in excess of 180 days, in accord with 1 JTR, paras. M3003–2 c and d, and AR 310–10, para. 2–5b, is limited to per diem allowances not in excess of 180 days at that location 368
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Members who were ordered to perform temporary additional duty aboard the YRST–2, a nonself-propelled service craft with berthing and messing available onboard, are not prohibited from receiving per diem by paragraph M4201–10, Volume 1, Joint Travel Regulations (1 JTR), as the YRST–2 is not a "vessel" for purposes of travel entitlements ... 442
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Under paragraph C10105 of JTR, Volume 2, an employee of the Department of the Army who is on temporary duty and voluntarily returns to his headquarters on nonworkdays is entitled to round-trip transportation by any mode and per diem en route not to exceed the per diem which would have been allowable had the employee remained at his temporary duty station 299
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When employee uses commercial carriers to transport two mobile homes incident to a permanent change of station and extra equipment is required for pickup and delivery of the trailer, employee would be entitled to reimbursement of such expenses since they do not appear to be expenses for preparing the trailer for movement nor do they appear to be otherwise prohibited by subsection 9.3a(3) of OMB Circular No. A–56 335
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When an employee combines personal travel with official travel, thereby qualifying for a special fare, he is entitled to reimbursement of the lesser of the actual cost of the special fare, or the regular fare by direct route, notwithstanding the fact that the special fare may necessitate the purchase of accommodations or other items normally classified as subsistence or included in per diem which are not reimbursable while the employee is on leave, if such items are included as part of a travel package 268

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Per diem. (*See* **SUBSISTENCE, Per diem, Temporary duty, Return to headquarters for weekends**)

Temporary duty

Return to official station on nonworkdays

Under paragraph C10105 of JTR, Volume 2, an employee of the Department of the Army who is on temporary duty and voluntarily returns to his headquarters on nonworkdays is entitled to round-trip transportation by any mode and per diem en route not to exceed the per diem which would have been allowable had the employee remained at his temporary duty station 299

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To complete moving arrangements

An employee who has reported to new official duty station in Washington, D.C., and thereafter returns to his old duty station in Los Angeles, California, to settle his rental agreement and to complete his moving arrangements is not entitled to additional travel expenses for this purpose even though erroneously advised otherwise 301

When actually employed employees (WAE)

Travel to and from places other than home

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UNIONS Page

Protest against agency-forced annual leave

American Federation of Government Employees requests ruling invalidating Air Force Logistics Command (AFLC) policy to reduce operations at its installations during 1974 Christmas holiday period and force employees to take annual leave on basis that AFLC is not authorized to promulgate policy that violates collective bargaining agreements between installations and local unions. Since matter is presently before Assistant Secretary for Labor Management Relations as unfair labor practice complaint, Comptroller General declines to rule on issue 503

WAIVERS

Compensation

Claim of former Commissioner of Commission on Marihuana and Drug Abuse for compensation previously waived by him is for payment if otherwise proper since an employee may not be estopped from claiming and receiving such compensation when his right thereto is fixed by or pursuant to law. Should additional claims from other Commissioners be submitted, they may also be paid. However, should no balance remain in the applicable appropriation account, a deficiency appropriation would be necessary before payment could be made 393

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WORDS AND PHRASES

"Buy-in"

In cost reimbursement situation award to offeror submitting lowest cost cannot be considered "buy-in" (offering cost estimate less than anticipated cost with expectation of increasing costs during performance) because agency was aware of what realistic estimate cost of contractor's performance was before award and made award based on that knowledge. 352

"Travel package"

When an employee combines personal travel with official travel, thereby qualifying for a special fare, he is entitled to reimbursement of the lesser of the actual cost of the special fare, or the regular fare by direct route, notwithstanding the fact that the special fare may necessitate the purchase of accommodations or other items normally classified as subsistence or included in per diem which are not reimbursable while the employee is on leave, if such items are included as part of a travel package 268

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