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[B-181983]

Officers and Employees—Transfers—Relocation Expenses—"Settlement Date" Limitation on Property Transactions—Extension

Employee who was transferred from Washington, D.C., to San Francisco, California, and had decided not to sell home in Fairfax, Virginia, since he had been advised that he would be rotated back to Washington within 2 years, but was given subsequently permanent assignment in Sacramento, California, may be granted extension to 1-year time limitation relating to completion of real estate transaction, even though his request was made after expiration of initial 1-year period but before expiration of 2-year period allowed by section 2-6.1e of the Federal Travel Regulations.

In the matter of an extension of 1-year time limitation to complete real estate transaction, January 3, 1975:

By letter of July 29, 1974, the authorized certifying officer for the Federal Highway Administration (FHA), Region 9, United States Department of Transportation, requested an advance decision regarding the circumstances under which an extension of the 1-year time limitation relating to the completion of real estate transactions may be approved. More specifically, the request concerns the agency's authority to approve an employee's written request after the initial year period has expired, but within the overall 2-year limitation provided for by section 2-6.1e of the Federal Travel Regulations (FPMR 101-7).

In September 1972, the employee in question, Mr. James R. Link, was transferred from Washington, D.C., to the Region 9 office in San Francisco, California, with the verbal understanding that he would be rotated back to Washington, D.C., in approximately 2 years. Based upon this understanding, Mr. Link maintained his home in Fairfax, Virginia, with the intention of moving back to the Fairfax home at the end of his San Francisco assignment. However, on July 12, 1974, he accepted a new career assignment in Sacramento, California. This altered his earlier plans to return to Washington and led to his decision to sell his Fairfax home.

In regard to the employee's request for a 1-year extension, FTR 2-6.1e states:

Time limitation. The settlement dates for the sale and purchase or lease termination transactions for which reimbursement is requested are not later than 1 (initial) year after the date on which the employee reported for duty at the new official station. Upon an employee's written request this time limit for completion of the sale and purchase or lease termination transaction may be extended by the head of the agency or his designee for an additional period of time, not to exceed 1 year, *regardless of the reasons therefor* so long as it is determined that the particular residence transaction is reasonably related to the transfer of official station. [Italic supplied.]

While no mention is made of when, within the 2-year period, the employee must make his request for an extension, we believe that restricting the period during which an employee may make such a request to the initial 1-year period would be an unnecessarily restrictive interpretation of the above regulation. The General Services Administration (GSA), the agency given authority under Executive Order 11609, July 22, 1971, to issue regulations concerning the relocation benefits of employees of the Federal Government, commenting on the background of this regulation, stated:

Background. The pertinent regulations in OMB Circular No. A–56 originally permitted an exception to the time limitation of 1 year for the completion of the sale or purchase of a residence only when settlement was delayed because of litigation. In 1969 the regulations were amended to permit an extension of time for reasons other than litigation when a valid contract of sale/purchase had been executed within the initial 1-year period from the time an employee reported to his new duty station. *Experience has shown that there are instances in which employees, acting in good faith, do not possess valid contracts of sale/purchase at the expiration of the initial 1-year period due to reasons beyond their control. Therefore, the regulations are being amended to authorized heads of agencies or their designees to grant extensions of the 1-year period when they are justified.*
Federal Register, Vol 37, No. 209 Saturday, October 28, 1972. [Italic supplied.]

It is presumed that GSA meant the benefits of this regulation (FPMR 2–6.1e) to be extended not only to those employees who need additional time to complete a sale or purchase, commenced during the initial 1-year period, but also to those employees who for one reason or another may not have been able to execute a valid contract of sale or purchase during the initial 1-year period. We believe the circumstances in the present case are similar to the situation in which an employee cannot execute a contract of sale or purchase until after the expiration of the initial 1-year period. In any case, the amended regulations permit an extension to be granted in the discretion of the agency for any justifiable reason as long as the transaction is reasonably related to the employee's transfer.

Accordingly, we have no objections to the FHA's approval of Mr. Link's request for a 1-year extension for the sale of his residence not to exceed 2 years from the effective date of his transfer to San Francisco, provided the request has been made in writing within the time limitation as required by the regulation.

[B–106116]

Travel Expenses—Interviews, Qualifications, etc.—Competitive Service Positions

Civil Service Commission (CSC) request that we modify decisions, such as 31 Comp. Gen. 175 (1951), which do not allow Federal agencies to pay prospective employees' travel expenses incident to interviews for purpose of permitting agency to determine their qualifications for appointment to positions in the

competitive service is granted insofar as the CSC concludes that the positions are of such high level or have such peculiar characteristics that the agency is better suited to determine through such interviews certain factors of the appointees' suitability for the positions which the CSC itself cannot determine since such interviews are necessary to determine the prospective employees' qualifications.

Travel Expenses—Interviews, Qualifications, etc.—Reimbursement

Civil Service Commission (CSC) request that we modify decisions, such as 31 Comp. Gen. 175 (1951), which do not allow Federal agencies to pay prospective employees' travel expenses incurred in traveling to place of interview for purpose of permitting agency to determine prospective employees' qualifications for appointment to positions in the competitive service is granted in part, even though Congress has refused to pass a law allowing such payments generally because it was concerned about wide abuses, since this decision limits payment to interview expenses incurred where CSC believes agency interview is necessary to properly determine prospective employees' qualifications.

In the matter of travel expenses for preemployment interviews—Civil Service Commission, January 6, 1975:

This is an advance decision requested by the Chairman of the Civil Service Commission, Mr. Robert E. Hampton, concerning the propriety of reimbursement by Federal agencies to certain prospective employees for travel expenses incurred in traveling to a place of interview for the purpose of permitting the employing agency to determine the prospective employees' qualifications for appointment to positions in the competitive service.

The Commission acknowledges that the general rule, as stated at 31 Comp. Gen. 175 (1951), does not permit a Government agency to pay or reimburse a prospective employee for the expenses incurred in traveling to a place of interview for the purpose of determining the individual's qualifications for appointment to a position in the competitive service since the function of ascertaining the qualifications of prospective employees is a matter within the jurisdiction of the Civil Service Commission. The Commission states that under existing law it determines the qualifications of applicants for positions in the competitive service. The employing agency is required to select for appointment to a vacancy one of the highest three eligibles available for appointment from a list furnished by the Commission. The Commission argues, however, that there is a clear and very basic distinction between its responsibility for screening and examining candidates for the competitive service and an agency's responsibility to make the final decision on qualified applicants it wishes to select. In view of this distinction and various circumstances which are outlined below, the Commission requests that we reconsider our holding in 31 Comp. Gen. 175, *supra*, and permit agencies to pay the

travel expenses of prospective employees incurred incident to pre-employment interviews.

The Commission also cites our decisions 38 Comp. Gen. 483 (1959) and 31 Comp. Gen. 480 (1952), in which we held that if an appointment were to be made in the excepted service, the expenses of travel incurred in connection with a preemployment interview may be paid by the employing agency since the agency, not the Commission, has the responsibility for determining the employee's qualifications for employment. Further, we have held that, even though an appointment may be subject to Commission approval of the qualifications of the proposed appointee, where the duty of selecting and proposing an appointee is imposed by Executive order upon an employing body, travel expenses determined by the employing body to be necessary for the fulfillment of that duty are properly chargeable to funds available for administrative expenses. 40 Comp. Gen. 221 (1960). Moreover, the rule at 31 Comp. Gen. 175, *supra*, does not apply to certain scientific and professional positions, even though such positions are in the competitive service, as the statute providing for such positions places the duty of selecting appointees upon the employing agency. 41 Comp. Gen. 482 (1962). The Commission requests us in light of the above to reconsider the decision at 31 Comp. Gen. 175, *supra*, since, although the Commission has responsibility for examining certain candidates for the competitive service, it is the employing agency's responsibility to make the final decision on qualified applicants it wishes to select.

The Commission also observes that it has become increasingly apparent that many of the top-level career positions in the Federal Government can only be filled after a selection interview has been conducted by the agency concerned. In this connection it is noted that agencies spend money on availability inquiries, telephone interviews, and expenses agency officials incur in traveling to interview candidates. Moreover, agencies have told the Commission that it is more expensive to send officials to visit candidates than it would be to bring the candidates in to see the officials.

Another factor in connection with this matter is the advice from various agencies to the Commission that highly qualified candidates may not consider a position with a particular agency if they do not have the opportunity to meet prospective supervisors and co-workers, observe the environment in which they would work, discuss potential assignments, etc. Since it is common in the private sector to pay a prospective employee's travel expenses in order that he may meet the people with whom he might work, as well as to give the employer the opportunity to inspect the candidate, the Commission believes that the prohibition against the agencies paying for preemployment

interviews places the Government at a disadvantage in the competition for the most highly qualified employees.

Finally the Commission states that it would work with the agencies, if they were permitted to pay the travel costs of preemployment interviews, to provide sufficient safeguards in order to prevent possible abuses by agencies or applicants. In addition, agencies would be urged to restrict the use of such authority to pay preemployment interview travel expenses to the filling of key professional, managerial or difficult-to-fill positions demanding top-quality talent. The Commission also asserts that usually expenses would be payable only to one or more of the top three available eligibles certified by it for the position.

In decision B–172279, May 20, 1971, which was in response to an identical request from the Commission that we overrule our previous decision at 31 Comp. Gen. 175, *supra*, we reaffirmed that decision and stated in part:

> * * * We find no basis to depart from the general rule that travel expenses in such situations may not be paid by the agencies concerned in the absence of specific statutory authority therefor. In that connection we note that the Congress in the past has declined to enact legislation authorizing expenses for interviews of prospective employees such as here involved. See Senate Report No. 2185, 85th Congress on H.R. 11133. Compare House Report No. 881, on H.R. 9382, 90th Congress, 1st Session. Also, see S. 1770 and S. 2275, 91st Congress, 1st Session.

It would appear that our decision B–172279, *supra*, was partially based on the belief that there is a difference between an agency's authority to select from a list of eligibles provided by the Commission under 5 U.S. Code 3318(a) (1970) and an agency's authority to appoint an individual under the situations described in 41 Comp. Gen. 482, 40 *id.* 221, 38 *id.* 483, and 31 *id.* 480, *supra*. It was felt that in the latter situations the initial responsibility for determining the qualifications of an applicant rests with the employing agency, but in the former situation the role of the agency is limited to selecting from a list of eligibles an applicant whom the Commission has already investigated and determined to be qualified.

On reconsideration, we believe this interpretation of the law is unecessarily restrictive with respect to the special situations the Commission has described above. The basic authority to select an employee rests with the employing agency. 5 U.S.C. 3318(a). Ordinarily the agency can state its personnel requirements in such a way that the Commission may determine the qualifications of prospective employees to such a degree that the agency need not interview the employee when the Commission forwards it a list of eligibles. However, we agree with the Commission that there are certain positions in the competitive service which, for hiring purposes, due to their complex nature, do not properly lend themselves to the more basic review

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which the Commission makes of qualifications of those proposed for employment. Such positions contemplated in this respect are those which are of such high grade level or which have such unique or peculiar qualifications that the Commission finds that it cannot make a complete determination on the applicant's merits. In these situations it is necessary for the employing agency to conduct a preemployment interview so that the agency may obtain necessary information as to the employee's suitability to work in a given position. This information is peculiarly suited for the agency to determine but it may very well be outside of the Commission's competence in its review of an applicant's qualifications. Therefore, we hold that where the Commission rules that a position is of such nature that it could only be properly filled after the applicant has had a preemployment interview with the employing agency, we would have no objection to the agency paying the travel expenses of an eligible to that position incident to an interview.

We recognize that the holding in B–172279, *supra*, was based in part upon the failure of Congress to pass legislation specifically authorizing the payment of travel expenses for preemployment interviews for prospective appointees to the competitive service. However, upon reconsideration of the legislative history we do not believe the payment of the proposed interviews would be contrary to the intent of the Congress. It appears that Congress' refusal to enact such legislation sprung from a concern regarding the abuses it felt such payments may have engendered. See S. Report No. 2185, 85th Cong., 2d Sess. 2–3 (1958). Our interpretation of the law here, however, strictly limits the payment of preemployment interviews to those few high grade or unique positions in the competitive service for which the Commission believes it cannot itself fully gauge the qualifications of the applicants and where it finds that a final determination of an appointee's qualifications can only be made after an interview with the employing agency has been held. This cannot be construed as blanket authority to pay preemployment interview travel expenses to applicants of all competitive service positions. Moreover, as noted above, the Commission stated that it would work with the agencies to prevent any abuses if authority were granted to the agencies to pay the expenses in question.

For the above reasons, therefore, we modify our decisions at 31 Comp. Gen. 175, *supra*, and B–172279, *supra*, so that an agency may pay, in appropriate situations as set out above, the travel expenses of a prospective employee incured in traveling to a place of interview for the purpose of permitting the agency to determine the prospective employee's qualifications for appointment to the competitive service.

[B-172531]

Contracts—Increased Costs—Fixed Price—Freight Rate Increase

Where a contractor has entered into a fixed price contract with the Government and there is a subsequent increase in transportation expenses as a result of a freight rate increase, the contractor and not the Government must bear the increased expense.

In the matter of Browne & Bryan Lumber Company, January 9, 1975:

Browne & Bryan Lumber Company has presented a claim for $429.78 for increased freight costs incurred in connection with Contract No. DOT-CG03-5155, dated June 30, 1971.

Browne & Bryan entered into this contract with the Commander, Third Coast Guard District, Governors Island, New York, to provide 15 timber logs, camel type. The logs were to be delivered to the U.S. Coast Guard Base Industrial Division Lima Pier on Governors Island, F.O.B. destination, utilizing lighterage delivery, with all transportation charges prepaid.

The shipment moved under a Burlington Northern, Inc., commercial prepaid bill of lading dated September 16, 1971, routed Burlington Northern, Inc. (BN), via Chicago, care of the Penn Central Transportation Company (PC) to destination (lighterage delivery). The shipment was delivered to the consignee's premises on October 13, 1971. Final payment of $7,650 was made to Browne & Bryan on October 26, 1971, under the contracting officer's Bureau Schedule 03-4704-72.

Subsequently, the contracting officer at the Coast Guard Base received a Penn Central Transportation Bill No. 20529 dated December 2, 1971, for $429.78 for lighterage delivery service performed relative to the shipment of the untreated poles. By letter dated December 13, 1971, Mr. R. C. Waterman, Contracting Officer of the New York Coast Guard Base, declined payment of the PC lighterage charge and advised the carrier that such charge was for the account of the Browne & Bryan.

Browne & Bryan was then billed for the lighterage charge and now contends that the Government should pay it. The unexpected charge resulted from a freight rate increase which became effective after the date of award, but before the date of delivery. Browne & Bryan argues that it should not bear this additional expense because the rate increase was put into effect without notice and because it is standard commercial practice to pass on to the purchaser any freight rate increases.

We have examined the contract and have found no express agreement on the part of either party with respect to the assumption of the risk of increased freight costs. In the absence of such an agreement, it is a fundamental principle of contract law that a contractor must bear the burden of charges which make performance of a contract more expensive than anticipated. See *Restatement of Contracts* § 467 (1932); 23 Comp. Gen. 957 (1944); 47 *id.* 313 (1967); B–175388, May 8, 1972.

Accordingly, the claim of Browne & Bryan is and must be denied.

[B–173933]

Labor Department—Training Programs—Comprehensive Employment and Training Act

The legislative intent of the Comprehensive Employment and Training Act of 1973, Public Law No. 93–203, approved December 28, 1973, is that facilities of agencies other than the Department of Labor are to be used for the purposes of fulfilling objectives of the Act. Modifies 51 Comp. Gen. 152.

Departments and Establishments—"Hosts"—Enrollees or Trainees—Comprehensive Employment and Training Act

Agencies of the Federal Government are not precluded from serving as "hosts" to enrollees under the Comprehensive Employment and Training Act of 1973, Public Law No. 93–203, approved December 28, 1973, by 31 U.S.C. 665(b). Modifies 51 Comp. Gen. 152.

In the matter of participation of Federal agencies in the Comprehensive Employment and Training Act of 1973, January 14, 1975:

This decision is rendered at the request of the Chairman, United States Civil Service Commission (CSC) to provide guidance as to the extent to which agencies of the Federal Government are authorized to make facilities available for training, work experience and employment for participants in programs undertaken pursuant to the Comprehensive Employment and Training Act of 1973 (CETA), Public Law 93–203, approved December 28, 1973, 29 U.S. Code 801 note.

Section 608 (29 U.S.C. 988) of CETA reads as follows:

UTILIZATION OF SERVICES AND FACILITIES

SEC. 608 (a) In addition to such other authority as he may have, the Secretary is authorized, in the performance of his functions under this Act, and to the extent permitted by law, to utilize the services and facilities of departments, agencies, and establishments of the United States. The Secretary is also authorized to accept and utilize the services and facilities of the agencies of any State or political subdivision of a State, with their consent.

(b) The Secretary shall carry out his responsibilities under this Act through the utilization, to the extent appropriate, of all resources for skill development available in industry, labor, public and private educational and training institutions, vocational rehabilitation agencies, and other State, Federal, and local agencies, and other appropriate public and private organizations and facilities, with their consent.

The language of section 608 and the references throughout the legislative history of CETA to the use of Federal facilities leads us to the conclusion that it was the intent of Congress that services and instrumentalities of agencies of the Federal Government could be utilized by the Secretary of Labor in administering the act. We have no doubt that Congress meant to make available for purposes of the program whatever facilities of the Federal Government could be useful in accomplishing its purposes. See S. Report No. 93–304, 93d Cong., 1st Sess., § 29 (1973); H.R. Report No. 93–659, 93d Cong., 1st Sess. § 26 (1973).

The basic issue involved, then, is whether there exists any provision of law that may be regarded as prohibiting Federal agencies from accepting the free services of trainees or enrollees paid with Federal grant funds by local sponsors. In this regard one of the concerns of the CSC with respect to the matter is whether 31 U.S. Code § 665(b), as interpreted by our Office in 51 Comp. Gen 152 (1971), would constitute such a prohibition. The cited section of Title 31 reads as follows:

> No officer or employee of the United States shall accept voluntary service for the United States or employ personal service in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property.

31 U.S.C. § 665(b) has been interpreted as barring "the acceptance of unauthorized services not intended or agreed to be gratuitous and, therefore, likely to afford a basis for a future claim on Congress." 30 Op. Atty. Gen. 51 (1913). The enrollees or trainees here involved would be participating in a program authorized and funded pursuant to a Federal statute designed to utilize the Federal establishment to the maximum extent feasible in providing work and training opportunities for those in need thereof. Under the circumstances considering that the services in question will arise out of a program initiated by the Federal Government, it would be anomalous to conclude that such services are proscribed as being voluntary within the meaning of 31 U.S.C. § 665(b). That is to say, it is our opinion that the utilization of enrollees or trainees by a Federal agency under the circumstances here involved need not be considered the acceptance of "voluntary services" within the meaning of that phrase as used in 31 U.S.C. § 665(b).

In light of the foregoing it is our view that Federal agencies may participate as hosts for enrollees or trainees by providing work, training projects and on-site experience—on tasks and operations involving the agency's mission—to trainees who are sponsored and paid from Federal grant funds by non-Federal organizations, including State and local governments under the youth programs provided for in title III of the CETA.

To the extent the rationale expressed in 51 Comp. Gen. 152 (1971) is inconsistent with the foregoing it will no longer be followed.

[B-181738]

Contracts—Negotiation—Cost, etc., Data—National Aeronautics and Space Administration Procedures—Normalization of Proposed Costs

Where objections to National Aeronautics and Space Administration evaluation of Mission Suitability, request for proposals' (RFP) most important evaluation criterion, are not sustained, but review casts doubts on reasonableness of normalization of certain costs and reevaluation might increase cost differential between offerors—considering that source selection of higher cost offeror for award of cost-plus-award-fee contract is based on significant mission suitability superiority, reasonableness of cost, and lack of significant cost difference among offerors—Source Selection Official should judge whether those doubts are of sufficient impact to justify cost reevaluation or reconsideration of selection decision.

Contracts—Negotiation—Evaluation Factors—Manning Requirements—Propriety

Use in Mission Suitability evaluation of manning and staffing guideline, developed by evaluation board based on its knowledge of work requirements, is not improper, and its judgment in downgrading protester's proposal because of technician demotions and staff salary reductions, while proposing to substantially retain present work force, resulting in low skill mix and expected difficulties in personnel retention, is not unreasonable. Insufficient basis exists to conclude that NASA erred in regarding proposal deficiencies as coming within exception to 10U.S.C. 2304(g) requirement for "written or oral discussions," or that exception itself represented failure to comport with statute.

Contracts—Negotiation—Cost, etc., Data—Labor Costs—Direct

Where request for proposals allows flexibility to offerors in developing proposals for site support services, apparently contemplating individual approaches, reasonableness of agency's normalization in probable cost evaluation of certain direct labor costs is in doubt, because normalization is not keyed to individual approaches and may encourage inflated technical proposals.

Contracts—Negotiation—Cost, etc., Data—Upward Cost Adjustment

Upon review, agency's upward cost adjustments (for low skill mix, project management and staff costs, and G&A) were not improper since, based on Government cost estimate, evaluation board could properly compensate for deficiencies in protester's approach. Also, no objection is found to downward treatment of proposed fee.

Contracts—Negotiation—Evaluation Factors—Tax Benefits

National Aeronautics and Space Administration's normalized treatment in probable cost analysis of costs proposed by offerors for payment of New Mexico Gross Receipts Tax is not objectionable, because tax and agency's treatment of costs for tax payment are factors applicable to all offerors, and cited State revenue ruling does not indicate with certainty that continuation of incumbent contracor's privileged tax position is certain.

In the matter of Dynalectron Corporation; Lockheed Electronics Company, Inc., January 15, 1975:

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I. Introduction

Dynalectron Corporation has protested to our Office against the selection by the National Aeronautics and Space Administration (NASA) of Lockheed Electronics Company, Inc. (LEC), for final negotiations leading to the proposed award of a contract under request for proposals (RFP) No. 9–WSRE–3–3–1P.

The protester's contentions, discussed in detail *infra*, present numerous challenges to the NASA evaluation procedure and the selection decision. In general, it is alleged that evaluation errors by NASA caused the protester's proposals to be underrated technically, and its proposed costs to be improperly adjusted upwards. Dynalectron further contends that, in spite of these errors, its proposals still provided for an acceptable level of work at the lowest cost of any offeror. Dynalectron contends that the selection of LEC, a higher cost offeror, was therefore in violation of applicable law and regulations. The remedy requested is basically that our Office investigate the evaluation and correct NASA's errors, and based on the results of these actions, that we either instruct the Source Selection Official (SSO) to reconsider his selection and reach a new decision, or that we request NASA to form a new Source Evaluation Board (SEB) to review the proposals *de novo*.

As discussed *infra*, we believe that the protester has failed to substantiate its contentions as to the unreasonableness of the Mission Suitability evaluation. However, our review of the cost evaluation has raised some doubts concerning the propriety of the normalization approach used in evaluating certain elements of the offerors' cost proposals. We believe it is for the SSO to weigh these doubts against his selection decision, and to determine whether they are of sufficient impact to justify a cost reevaluation, or a reconsideration of the selection decision.

Our decision was reached after review and consideration of written submissions and documentation from the protester, NASA, and LEC,

and a conference conducted with all interested parties. While all of the numerous contentions raised in the submissions have been considered, development of the case has tended to narrow the areas of disagreement to certain basic issues. This decision focuses on those issues which we believe are central to a proper disposition of Dynalectron's protest.

It is further to be noted that as the protest involves a negotiated procurement in which no award has been made, a substantial amount of the procurement information furnished by NASA to our Office was withheld by the contracting agency from Dynalectron and LEC. In general, while the interested parties were provided with an indication of the overall technical scores and the range of cost differences, they did not receive the detailed scoring and cost breakdowns. Our discussion of the issues is presented in a manner which safeguards the confidential treatment of nondisclosed procurement sensitive information.

Also, it is to be noted that several different Dynalectron proposals were within the competitive range, and that under the terms of the RFP each was to be considered on its own merits. The discussion of the issues, *infra*, concerns itself largely with the proposal which was most favorably evaluated by NASA (Dynalectron's alternate proposal No. 2) except as otherwise indicated.

II. Background

The RFP was issued on January 22, 1974, pursuant to a determination and findings to negotiate a contract under 10 U.S. Code § 2304 (a)(10) (1970). The solicitation called for offers to perform site support services for the Johnson Space Center's White Sands Test Facility (WSTF) in New Mexico. The statement of work (SOW) covered:

(1) Propulsion and power systems and subsystems development tests

(2) Materials testing and evaluation

(3) Component evaluation and certification

(4) Operation of chemistry, physical metallurgy, and radiography laboratories

(5) Operation and maintenance of radio and frequency devices and equipment for calibrating force, pressure, flow, and other electromechanical and mechanical measuring devices

(6) Repair, calibration, and maintenance of electrical and electronic instruments

(7) Contamination control and precision cleaning of parts and components

(8) Providing base support services including security, safety, fire protection, maintenance, operation and repair of all facilities and ground support equipment.

The RFP requested offers for a specified level of effort and contemplated the award of a cost-plus-award-fee contract pursuant to 41 C.F.R. § 18–3.405–5 (1974) for a 1-year period, with an option for a second 1-year period, and possibly through third, fourth and fifth years. Offerors were requested to provide complete and detailed staffing and manning information and summary cost information. In this regard, the RFP Specific Instructions contained the following information on the evaluation of proposals:

A. *Introduction:*

Proposals will be evaluated by a Source Evaluation Board (SEB) appointed by the Associate Administrator for Manned Space Flight. The Administrator, NASA Headquarters, will be the Source Selection Official (SSO). Failure of a proposal to be accepted for award will not necessarily reflect any deficiencies, but will mean only that another proposal was considered to be more advantageous to the Government.

B. *Evaluation Criteria and Relative Importance:*

In the evaluation of proposals, the SEB is interested in determining the quality of the service and probable cost of that work that will be delivered if a particular contractor is selected. In this light, the major factors to be considered in the proposal evaluation process are identified as follows:

1. *Mission Suitability:*
   a. Operating Plan
   b. Key Personnel
   c. Organization and Manning

All criteria under Mission Suitability will be assigned numerical weightings. The relative importance of the Mission Suitability Evaluation Criteria is as follows:

Most Important—Operating Plan
Very Important—Key Personnel
Important—Organization and Manning

2. *Cost:* In addition to the major criteria identified above, each offeror's proposed cost will be analyzed and presented to the Source Selection Official (SSO) for his consideration in making a selection.

3. *Other Factors:* Other factors which will be considered by the SSO include but are not necessarily limited to past performance, company experience, equal employment opportunity, utilization of small business, utilization of minority business, financial capability, acceptance of contract provisions, labor relations, phase-in plan, company policies, and new technology.

Offerors are cautioned not to minimize the importance of adequate response in any area because it carries less weight than other areas or no weight. In fact, cost or other factors, although not weighted, could be the determining factors in source selection.

Written or oral discussions will be conducted with those firms which have been determined by the Source Evaluation Board to be in the competitive range. As a part of this evaluation process, offerors may be questioned about specific areas of their proposals * * *.

Fourteen proposals were submitted by 10 offerors. Dynalectron, the incumbent contractor, submitted four proposals. After initial evaluation, it was determined that seven of the proposals, including Dynalectron's alternate proposal No. 3, were not within the com-

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petitive range. The remaining proposals within the competitive range were:

Bendix Corporation (Launch Support Division)
Dynalectron (Basic and alternate proposals Nos. 1 and 2)
LEC
Management and Technical Services Company (MATSCO)
Northrop Services, Inc. (Basic proposal)

NASA states that written and oral discussions were conducted with the offerors within the competitive range wherein clarification of ambiguities and uncertainties was sought and that a common cutoff date for submission of revised proposals was established. After receipt of revised proposals, they were evaluated by the SEB.

In the final Mission Suitability rankings, LEC received the highest total score (869 out of a possible 1,000); MATSCO was second highest, with a score of 826, followed by Dynalectron alternate proposal No. 2 (780), Dynalectron basic proposal (776), and Dynalectron alternate proposal No. 1 (772). The Dynalectron cost proposals, both as proposed and as adjusted upwards by the SEB, were the lowest of the offerors within the competitive range; LEC's cost proposal, both as proposed and as adjusted downwards, was higher than any of Dynalectron's. NASA has indicated that the difference in probable costs between the LEC proposal and Dynalectron's alternate No. 2 proposal was $100,000 or 2.43 percent for the first year; $183,000 or 2.40 percent for the second year; and $803,000 or 2.18 percent for the entire 5 years. The adjective ratings for Dynalectron and LEC in the Other Factors subcriteria were identical with two exceptions. In Company Experience, Dynalectron was rated "excellent" and LEC "low good"; and Phase-in, Dynalectron, the incumbent contractor, was not rated, while LEC was rated "good."

On June 27, 1974, the SEB made a presentation of its findings to the SSO. The SSO selected LEC on July 22, 1974, for final negotiations, and stated:

> * * * It was apparent to us that Lockheed's proposal was better than the others by a significant margin in the area of Mission Suitability and that there was no significant difference in the probable costs of the proposals. Specifically, we concluded that the Lockheed proposal offered the best operating plan, the best overall key personnel, and was reasonable in cost. We agreed that Lockheed's technical proposal was significantly better than the technical proposals of MATSCO, Dynalectron, Bendix, and Northrop. We further agreed that the lower Mission Suitability ratings of MATSCO, Dynalectron, Bendix, and Northrop, coupled with substantially the same probable costs for all proposers, warranted the conclusion that those proposals offered no advantage over that of Lockheed. Accordingly, we selected Lockheed for final negotiations leading to the contract award.

III. Mission Suitability Evaluation

Dynalectron contends the LEC proposal was not significantly superior in Mission Suitability to its proposals. It is alleged that the

Dynalectron proposals, if properly evaluated, would be equal or superior to LEC in this regard. While Dynalectron contests NASA's evaluation of its proposals in the "Most Important" and "Very Important" criteria (operating Plan and Key Personnel, respectively), the principal controverted area involves two subcriteria of the "Important criterion (Organization and Manning)—Manning Tables and Staffing.

The RFP provided the following instructions to offerors concerning the preparation of their proposals as regards direct labor requirements (less project management and staff):

> The offeror is permitted full flexibility in proposing the organization, appropriate supervision, and wage classification levels. The only restrictions are the total direct labor and overtime man-hours specified in Item A.1.a and b., Form 6a through 6e and the man-year equivalents and labor classifications set forth in Attachments 1, 2, and 3.

The RFP attachments 1, 2 and 3 listed estimated direct labor requirements (less project management and staff) covering employees in 26 labor categories. The requirements were totaled in man-hours (plus overtime), and man-year equivalents, for each of the five contract years. The total man-hours and overtime were stipulated in item A.1.a and b on the cost proposal forms 6a through 6e.

The RFP provided the following instructions concerning project management and staff:

> No estimates are provided for project management and staff. These are left to the offeror's discretion. They will depend largely on the proposed organization and will be a reflection of management and administrative approaches. These personnel are described in detail in Section 5 of the Statement of Work. Project management and staff will be treated as direct cost for purposes of completion of Forms 6 and 6a through 6e.

The work involved in section 5 of the SOW called for the contractor to provide all necessary management, supervisory and labor personnel to perform all efforts associated with the SOW, including services such as overall contract management administration; transportation; quality assurance and inspection; safety; security; and a number of other described functions.

The RFP also instructed offerors to submit separate manning tables keyed to their organization charts for each functional work element, including all proposed employees described by wage classification levels, or described by qualification requirements in those labor categories not found in the Department of Labor Service Contract Act wage determination. In addition to the manning information, the RFP directed offerors to provide a staffing plan describing recruitment and employment methods and sources to be used in the manning and to relate the plan to the organization charts and manning tables.

Dynalectron believes that the purported LEC superiority in Mission Suitability resulted primarily from improper downgrading

of its proposals in the Manning and Staffing subcriteria. The protester contends that:

(1) NASA, in contravention of the terms of the RFP, used a secret manning and staffing guideline in its evaluation.

(2) NASA misinterpreted the Dynalectron proposals as meaning that 27 technicians would be demoted and that 23 professional personnel would have their salaries reduced, and that Dynalectron's evaluation score was downgraded accordingly.

(3) The misinterpretations could have been avoided had NASA sought clarification of these matters in the discussions, so that weaknesses in the proposals could have been corrected.

In regard to the NASA guideline, Dynalectron, in part, attacks its use in the evaluation, since the RFP allowed full flexibility to the offerors, and, in part, questions the premises on which the guideline is based—i.e., the profile of on-board Dynalectron personnel in various categories as of January 31, 1974. Dynalectron contends that, at that time, its labor force was in a transitionary state with an "hourglass" configuration consisting of a large number of high-skilled "A" technicians, a small number of less-skilled "B" technicians, and a large number of least-skilled "C" technicians. The NASA guideline follows an hourglass configuration, though with larger numbers of technicians in all three categories. In this regard, there is also a fundamental difference in opinion between the parties as to whether the work under the new contract will be of greater scope and complexity than the work performed by Dynalectron in the past. The protester contends that such is not the case, citing the similarity of stated functions in the SOW and its current contract, and contends that it was therefore moving towards an "upright pyramid" labor structure (a low number of "A's" and an increasingly larger number of "B's" and "C's").

NASA defends its use of the guideline, pointing out that it was exactly that, and not an absolute standard, because only significant proposal departures were penalized in the evaluation. Moreover, it is stated that the SEB developed the guideline based upon its detailed knowledge of the technical requirements. NASA further points out that the SOW in the present Dynalectron contract includes only a generic description of work performed during the past 3 years.

We believe that NASA, which has the responsibility of determining its minimum needs and formulating its requirements, is in the best position to assess the scope and complexity of the work required, and that the SEB is in the best position to determine the proper guideline to be used in evaluating proposed efforts to accomplish that work. Dynalectron's differing estimates of the nature of the required work and the proper guideline to be used in evaluation do not, in our view, convincingly show that the agency's and the SEB's determinations

were without a reasonable basis. Accordingly, we see no basis for objection to the guideline as a valid tool to assist the SEB in evaluating Mission Suitability.

The principal dispute in the Manning and Staffing areas involves the SEB's findings that the Dynalectron proposals reduced the skill mixes in certain labor categories and reduced the salaries in most labor categories, including project management and staff, while proposing to retain the current work force. The SEB judged that the wage classification levels *per se* were too low to meet the technical requirements, and also that the demotions of 27 technicians and salary reductions of 23 professional personnel would make retention of these personnel difficult. In the initial evaluation, Dynalectron's staffing plan was thus rated "fair" and its Manning Tables "high fair." After further reductions in wage classifications and skill mix in its best and final offer, Dynalectron was rated "poor" and "low fair," respectively.

In its September 30, 1974, letter to our Office; Dynalectron contends that there is no intention to demote any technicians presently on the job, nor did its proposals indicate that it would do so. The protester states that normal attrition among "A" and "B" technicians would result in their replacement by upgraded "C" technicians, and that higher wage levels resulting from a new collective bargaining agreement will mean that better skilled personnel will be hired in the lower skill classifications. Restructuring of the Dynalectron WSTF work force would also be accomplished by promotions and transfers within the corporation's large existing labor force.

In regard to the 23 professional personnel, Dynalectron states that it proposed average salary rates for particular functional groups, which took into account future 5.5-percent salary increases. Dynalectron believes NASA misinterpreted this information to mean that some individual employees' salaries would be reduced. The protester's contention appears to be that though proposed average salary rates were reduced in the best and final offer, this cannot be taken to mean, as the SEB did, that reductions in any individual salaried employees' rates of pay would make their retention difficult.

In evaluating the proposed number of technicians, it is reported that the SEB undertook the following analysis:

> In evaluating Dynalectron's Form 5 [Manning Tables] submission, the SEB was aware that a majority of Dynalectron non-professional employees were covered by a collective bargaining agreement * * * The wage rates per hour were set forth in that agreement and it was a relatively simple matter to establish the rates for these labor categories. The SEB then compared the on-board strength of Technicians A, B, and C under the Dynalectron contract with the number of Technicians A, B, and C proposed by Dynalectron for the new period of performance. This analysis revealed that the Dynalectron best and final offer reduced the number of technician "A's" from 53 to 26 * * * while at the same time Dynalectron proposed to retain the current work force. (See, for example, the general staffing plan and the number of planned recruitments on Form 5.) There-

fore, the SEB concluded that incumbent technicians would be downgraded, making their retention doubtful or uncertain. * * *

A similar approach was used in evaluating the proposed professional employees. The SEB compared Dynalectron's rates per hour in the best and final offer with the actual rates being paid individuals as of February 12, 1974. In this regard, the majority of the 23 professional personnel were identified by analyzing situations where a labor category covered only a single individual rather than a group. The SEB took a conservative approach in that it compared the proposed rates with only the actual rates being paid (not including future cost-of-living increases). The SEB concluded that the best and final offer clearly and unambiguously showed reductions in salaries both for individuals and in average wage rates in group categories.

Initially, we believe that while the protester's explanations made subsequent to the source selection may shed light on the meaning of its proposals, the basic materials for analysis, as pointed out by NASA, are the proposals themselves. After review of the record, we believe Dynalectron has failed to show that the SEB's judgments in these areas were unreasonable. Dynalectron appears to concede that a certain amount of attrition among its higher-skilled technicians is expected in the course of restructuring its work force to an upright pyramid configuration. We do not believe Dynalectron's conjecture that hiring of higher-caliber "C" technicians can be expected, even if true, essentially meets the objection that its skill mix is too low. In addition, the Dynalectron staffing plan, as NASA has stated, proposes to retain the current workforce. The plan indicates that staffing effort will be minimal for the first year, since most job categories are already employed by Dynalectron at WSTF, and that the hiring of approximately 30 new personnel is planned.

In regard to the professional employees, we agree with NASA that the best and final offer shows clear and unambiguous reductions in salaries, most of which relate to identifiable individual personnel positions. In this light, the SEB conclusion that retention of some personnel might be difficult, and the resulting downgrading of Dynalectron's score does not appear to be an unreasonable exercise of judgment.

Dynalectron also argues that these matters should have been clarified in the discussions, so that its proposals could have been revised to accommodate NASA's desires. While 10 U.S.C. § 2304(g) calls for the conduct of "written or oral discussions," valid exceptions to this requirement under NASA's procedures have been recognized—for instance, where it would be unfair to help an offeror through successive rounds of discussions to bring its original inadequate

proposal up to the level of other adequate proposals by pointing out weaknesses which were the result of the offeror's lack of diligence, competence, or inventiveness in preparing its proposal. 51 Comp. Gen. 621, 622 (1972). In this regard, see NASA Procurement Regulation Directive No. 70-15, September 15, 1972, section III.e(2), which provides that in the conduct of discussions with regard to cost-reimbursement type contracts, where the meaning of a proposal is clear and the SEB has enough information to assess its validity, and the proposal contains a weakness which is inherent in the proposer's management, engineering, or scientific judgment, or is the result of its own lack of competence or inventiveness in preparing its proposal, the contracting officer shall not point out the weakness. In the present case, we do not find a sufficient basis on the record to conclude that NASA erred in determining that Dynalectron's manning and staffing weaknesses came within the section III.e(2) exception to the requirement for discussions, or that the exception represented a failure to comport with the statutory mandate.

A final point to be considered in connection with the proposed demotions and salary reductions concerns the Defense Contract Audit Agency (DCAA) audit report dated July 15, 1974, on evaluation of Dynalectron's basic best and final proposal. This audit study was conducted without consideration of the results of the SEB technical evaluation. The gist of Dynalectron's argument is the suggestion that the DCAA auditor correctly understood the proposal and was satisfied that no reductions in salaries were being made by Dynalectron. It is contended that had the SEB taken advantage of the opportunity, it could have sought clarification of this matter from the DCAA auditor, who would have disabused the SEB of its concern over possible salary reductions.

We agree with the view expressed by NASA that the DCAA audit appears to consist of rate verification and validation. While the audit examined Dynalectron's proposed labor costs, we find nothing in it to indicate support for the above interpretation advanced by Dynalectron. Accordingly, we find no merit in this argument.

A separate Dynalectron contention in regard to the manning and staffing evaluation relates to alleged impropriety of the LEC proposal. The contention is basically that LEC proposed a "goldplated," substantially excessive manning and staffing approach. In this regard, we note that the NASA administrative report dated September 13, 1974, points out that LEC was in fact downgraded for overstaffing (a total of 11 personnel in the first year and 15 in the second) in wage classification levels and project management and staff; also, that LEC

was downgraded because of understaffing and low skill mixes in other areas. NASA strongly rejects the protester's suggestion that it has selected a proposal which is substantially overstaffed.

We believe that as far as the Mission Suitability evaluation of LEC's manning and staffing proposal is concerned, the administrative report has adequately responded to the protester's contention. A related issue for consideration is Dynalectron's contention that the proposed award to LEC runs contrary to representations made by NASA to congressional committees in connection with appropriations of funds for fiscal year 1975. In this connection, the protester cites a statement by NASA before a subcommittee of the House Committee on Appropriations (Hearings on HUD—Space Science—Veterans Appropriations for 1975, 93d Congress, 2d Sess. Part 3, at page 148) to the effect that fiscal year 1975 funds were to provide for a "basic" level of support services at WSTF. We have noted that guidance from congressional committees can have an important bearing on an agency's determination of its minimum needs and the procurement procedures to satisfy those needs. *Matter of Cessna Aircraft Company et al.*, 54 Comp. Gen. 97 (1974). However, we see no basis to conclude that the statements cited by Dynalectron should adversely impact upon the selection decision.

In addition to alleged errors in evaluation of manning and staffing, Dynalectron has also argued that NASA improperly evaluated its Operating Plan and Key Personnel. The protester contends that its Operating Plan should have been evaluated by the SEB as superior, or at least equal to LEC's. In the Key Personnel criterion, Dynalectron contends that its proposals should have been rated "very good" or "excellent," based on the protester's excellent past performance and its view that the new contract will not involve work of greater scope and complexity than the work under the predecessor contract. In this connection, Dynalectron has presented arguments to substantiate its view that its Components and Test Manager, Administrative Services Manager and Program Manager should have been rated higher by the SEB.

While we have taken these contentions into consideration, and viewed them in juxtaposition with the documentation of the SEB evaluation contained in the record, we believe that essentially they constitute an invitation for our Office to substitute its judgment for the SEB's in these areas. In the absence of indications that the evaluation procedures for these criteria were deficient, or of clear evidence tending to show that particular findings of the SEB were unsupported by a reasonable basis, we see no grounds upon which to question the agency's position.

In view of the foregoing, we conclude that Dynalectron has failed to sustain its arguments in regard to Mission Suitability. Thus, we see no basis to question the evaluated 89-point differential between the protester and LEC, found by the SSO to be "significant," in the most important of the RFP's three evaluation criteria.

IV. Cost Evaluation

Dynalectron contends that, regardless of whatever advantage LEC's proposal had in Mission Suitability, it is clearly offset by the superiority of Dynalectron's cost proposal. Dynalectron estimates the cost differential between the two proposals at $5 million over a 5-year period, plus an additional $1.5 million Dynalectron advantage because of its exemption from the New Mexico Gross Receipts Tax. It is contended that, even conceding a significant Mission Suitability superiority to LEC, the substantial Dynalectron cost advantage should have caused the SSO to look to "Other Factors," where Dynalectron was again superior to LEC.

As discussed *infra*, we do not find merit in the protester's specific objections concerning the SEB's treatment of proposed costs for G&A, proposed fee and the New Mexico Gross Receipts Tax. We believe the central issue for consideration in regard to the cost evaluation concerns Dynalectron's contention that the SEB improperly increased its proposed costs by evaluating them against the SEB guideline used in the Mission Suitability evaluation. This process of normalizing offerors' cost proposals also had the effect of reducing LEC's proposed costs. Dynalectron, in this regard, points out a conflict between this cost evaluation approach and the above-quoted RFP instructions which left "full flexibility" to the offerors in proposing direct labor for wage classification positions, subject to certain estimates, and which gave discretion to the offerors in proposing project management and staff.

Where award of a cost-reimbursement contract is contemplated, the importance of analyzing proposed costs in terms of their realism is apparent, since, regardless of the proposed costs submitted, the Government will be obligated to reimburse to the contractor its allowable costs. Thus, it is incumbent upon the contracting agency's personnel to exercise informed judgments as to whether proposals are realistic with respect to proposed costs and technical approach, and lack of realism may result in upward adjustment to an offeror's costs. See, generally, *Matter of Scott Services, Incorporated*, B–181075, October 30, 1974; B–178667, December 14, 1973; and decisions cited therein.

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Normalization is a technique sometimes used within the cost adjustment process in an attempt to arrive at a greater degree of cost realism. It involves the measurement of at least two offerors against the same cost standard or baseline in circumstances where there is no logical basis for differences in approach, or in situations where insufficient information is provided with the proposals, leading to the establishment of common "should have bid" estimates by the agency. See *Matter of Lockheed Propulsion Company*, 53 Comp. Gen. 977 (1974).

In the present case, the record reveals that the SEB utilized a process of normalizing offerors' proposals. The following general approach was taken. The skill level profile for direct labor and numerical staffing range for project management and staff, which were used as a guideline in the Mission Suitability evaluation, were used as a common baseline in cost evaluation.

In developing the common baseline as regards direct labor (less project management and staff), the SEB began with the direct labor hours set forth in the RFP. The direct labor hours were assigned to skill levels, as determined by NASA, applicable to all offerors; skill mix variations among offerors were not recognized. The application of direct labor wage rates based upon consideration of the Department of Labor wage determination, union agreements, payroll records and applicable DCAA audit materials, resulted in a composite labor rate, which included an allowance for escalation.

Given this approach, the result was normalization of this portion of direct labor costs across the board for all offerors. Taking, for instance, the number of labor hours stipulated in the RFP for the first contract year (432,640), multiplied by the NASA composite labor rate (derived from the NASA skill mix) led to the same probable direct labor cost for all proposals. Base overtime hours set forth in the RFP were similarly applied to all offerors, using the composite labor rate; also, the SEB used an assumed overtime premium formula and a standard shift premium differential. In regard to project management and staff, the SEB estimated the hours necessary to fulfill the functions described in section 5 of the SOW; to the estimated hours were applied the particular offeror's labor rates for other than Service Contract Act wage classification positions.

We believe there is merit in Dynalectron's objection that the normalization process is to some extent in conflict with the terms of the RFP. Where the RFP allows full flexibility to the offerors in proposing direct labor, it would appear that individual approaches to meeting the requirements are both being called for and are recognized as technically feasible. It is clear that if an offeror proposes a low

skill mix, it may be downgraded technically, and, in addition, its costs may be adjusted upwards to compensate for the technical deficiency. The agency might examine the costs proposed for the low skill mix, compare them with its own estimate, and adjust the offeror's costs upwards. See, in this regard, B–178667, *supra.* But this type of procedure contemplates adjustment of a particular offeror's costs, taking into account its own approach for meeting the RFP requirements. Where direct labor costs are normalized for all offerors, we believe the result may be, as pointed out by Dynalectron, to encourage unrealistic and inflated technical proposals. By aiming "high," an offeror may risk being downgraded to some extent technically, because significant departures from the technical guideline will be penalized, but at the same time its costs, however excessive they may be, will be reduced to a standard normalized amount. On the other hand, an offeror which aims "low" will not only be downgraded technically, but will also have its costs normalized upwards.

The proper goal in both instructing offerors as to proposal preparation and in conducting the probable cost evaluation itself is to segregate cost factors which are "company unique"—dependent on variables resulting from dissimilar company policies—from those which are generally applicable to all offerors and therefore subject to normalization. See *Matter of Lockheed Propulsion Company, supra.* In the present case, we believe both the RFP instructions and the probable cost evaluation fell short of this goal. It may be that some of the cost elements inherent in proposing direct wage classification labor positions might be subject to normalization because the available labor pool of technicians may be the same for all offerors. For instance, any contractor wanting to hire a certain number of "A" technicians in a labor category would find the costs circumscribed by the Service Contract Act wage determination and market conditions in the WSTF area. Further, NASA has contended that normalization to a realistic common baseline, reflecting the skill levels known to be required, is necessary in order to determine the probable costs of doing the job.

On the other hand, under the RFP terms the offerors were encouraged to propose different technician skill mixes reflecting their own approaches to meet the work requirements. Also, we find it difficult to conceive that some individuality in acceptable technical approaches, with consequent variations in individual offerors' costs, was not possible. Thus, we have doubts concerning the reasonableness of normalizing the costs of these approaches to a common cost baseline gounded upon what NASA has described as a skill mix profile geared to a "nominal" approach to satisfying the work requirements. Since Dynalectron proposed a low skill mix and LEC a higher one, a cost

reevaluation effecting individualized cost adjustments might have the effect of increasing the cost differential between the offerors.

However, while normalization may have disadvantaged Dynalectron to some extent, this disadvantage is limited by the fact that in a cost reevaluation individualized upward adjustments to its proposals would not be inappropriate. The normalized dollar amount for direct labor developed by the SEB has validity as a Government estimate of the probable costs. In view of the low Dynalectron skills mix and other technical deficiencies, *supra*, an adjustment for increase in Dynalectron's probable costs (direct labor and costs flowing from direct labor, such as overtime, overtime premium and fringe benefits) would not be unreasonable. B–178667, *supra*.

In addition, we do not find impropriety in the probable cost evaluation for Dynalectron's project management and staff. In this regard, we see no basis for objection to the SEB's utilization of the 2,080 hours man-year equivalent definition, as specified in the RFP, rather than Dynalectron's reduced figure of 2,043 hours based on expected leave without pay. The SEB judged that all offerors would have some leave without pay, and that to allow a departure from 2,080 figure would result in inequitable treatment. The NASA analysis of probable costs for the first year of Dynalectron's Alternate Proposal No. 2 shows that the 2,080 figure was applied, not to the NASA staffing range of 61–63 personnel, but to 58 personnel (the low end of the staffing range minus three Dynalectron personnel not charged to the contract). Dynalectron had proposed 57 project management and staff personnel. The added personnel cost, therefore, appears to be in the nature of an adjustment to the Dynalectron proposal, rather than normalization of the proposal to a common baseline, and we see no basis on the record to conclude that the upward adjustment was unreasonable.

Dynalectron has also contested the SEB's treatment of its proposed G&A costs and proposed fee. In regard to G&A, Dynalectron contends that since, as required by the terms of the RFP, it offered absolute dollar ceilings for G&A costs, the SEB erred in making upward adjustments above these ceiling amounts. Dynalectron cites RFP instructions which stated:

> Offerors will be required to indicate their willingness to accept their own estimated amounts of particular cost elements as ceilings (i.e., project overhead and G&A) thereby limiting their recovery under any contract to be awarded.

Also, the Form 6 cost proposal called for offers in the following form:

> D. G & A _____% Ceiling Amount $_____

Dynalectron also argues that a comparison of the cost structure of its several proposals, showing no relationship between proposed

direct costs and G&A, further substantiates its contractual intent not to recover G&A costs above the stated dollar ceiling amounts. NASA, on the other hand, believes it is clear that Dynalectron did not offer absolute dollar ceilings. The SEB, because of increases in the probable cost base, adjusted Dynalectron's G&A costs above the quoted dollar amounts.

Besides the RFP terms cited by Dynalectron, we note that the RFP Specific Instructions provide in section G.1.c.: "State the overhead and G&A *rates* that your company would be willing to accept as ceilings * * *" [Italic supplied.]; also, Amendment No. 3 to the RFP, February 5, 1974, stated in response to an offeror's question that "provisional" overhead and G&A costs should be provided in the dollar cost column and ceiling rates in the percentage blank on lines C. & D. on Forms 6, 6a, and 6b, and ceiling rates and costs only should be provided on Forms 6c, d and e. Reading the RFP terms as a whole, and Dynalectron's responses thereto, it appears clear that the G&A ceiling is a percentage and not an absolute dollar amount. Also, we note that in a letter dated May 28, 1974, to the contracting officer, Dynalectron stated in part that "The total combined amounts for G&A and any future overhead (which is now zero) would be limited to the percentages proposed for G&A." In view of the foregoing, we do not believe a reasonable basis exists on the record to conclude that the SEB's action in making upward adjustment of Dynalectron's G&A costs was improper. In regard to Dynalectron's proposed fee, and its objections to assumed increases in the fee made by the SEB, it appears from the record that the SEB's use of performance projections in the evaluation actually resulted in decreases in Dynalectron's fee.

Another controverted aspect of the cost evaluation involves the New Mexico Gross Receipts Tax. Dynalectron objects to NASA's normalization of the nonapplicability of the tax by removing from the probable cost evaluation all dollars proposed by various offerors for payment of the tax.

In this regard, chapter 72, article 16A, section 72–16A–4 of the New Mexico Revised Statutes Annotated states that "For the privilege of engaging in business, an excise tax equal to four per cent [4%] of gross receipts is imposed on any person engaging in business in New Mexico." In addition, amendment No. 3 to the RFP, February 5, 1974, contained the following NASA answer to an offeror's question concerning the tax:

> A tax of 4% of gross receipts is imposed for the privilege of doing business in New Mexico unless an exemption or deduction is applicable. Some activities and industries are largely exempt from these taxes, and others are exempt by virtue of their taxation under other specific laws. Each proposer should indicate whether

he has an exemption under the above. Therefore it is suggested that through your legal counsel or otherwise you determine your particular New Mexico tax liability and propose accordingly.

Dynalectron estimates that LEC proposed about $1,500,000 for payment of the tax over a 5-year period. In contrast, the Dynalectron proposals stated:

No cost has been included for New Mexico Gross Receipts tax, based upon the State of New Mexico Bureau of Revenue Ruling No. 69–085–5 which was issued to Dynalectron on 13 November 1971. This ruling permits the exclusion of all gross receipts from the New Mexico Gross Receipts tax and is a unique factor which, to our knowledge, no other contractor can offer.

In view of these facts, Dynalectron contends that about $1,500,000 must be added to LEC's probable costs, substantially increasing the cost differential between the two offerors.

NASA defends its treatment of the tax in the cost evaluation. The agency has confirmed that, at its urging, Dynalectron applied for and obtained a special ruling for its current WSTF contract. NASA states that there is no basis to assume that LEC would not be granted the same type of ruling under the successor contract. In addition, NASA points out that the legal question of the taxes' applicability is highly confused and uncertain, and that different contractors at WSTF have received quite different treatment in their attempts to claim deduction of the tax. Under the foregoing circumstances, the SEB decided to exclude all dollars proposed for tax payment.

Dynalectron's argument is that it was improper to normalize the nonapplicability of the tax, since the question of whether or not a future WSTF contractor will be able to obtain an exemption is a risk factor which company management must judge in preparing its proposal. The protester contends that, in view of the confused state of the law, it cannot be said there is no logical basis for different approaches, and states: "Whether Lockheed could or could not obtain such an exemption is speculative. In view of that risk, Lockheed made a management decision to include these costs in its proposal. In view of Dynalectron's own assessment of its own risk, Dynalectron made a management decision not to include these costs in its proposal."

Both the tax itself and the contracting agency's treatment of costs incurred for tax payments appear to be factors which are generally applicable to all offerors. See, in this regard, NASA Procurement Regulation (PR) 15.205–41, which provides *inter alia* that taxes which the contractor is required to pay are allowable costs, except for taxes from which exemptions are available to the contractor. Under these circumstances, we do not see that a decision to propose or not to propose costs for tax payment represents a unique company approach or an independent management decision, except in the seem-

ingly unusual circumstances where a particular offeror's future tax exemption is assured. In this connection, we think it is clear that from the above-quoted Dynalectron statement, the protester itself recognizes that continuation of its privileged tax position is not assured. If Dynalectron's alleged exemption under a new contract were a certainty, there would be no need for it to enter into an assessment of risk in preparing its proposal. In addition, we have examined the revenue ruling cited in the Dynalectron proposals and do not believe it demonstrates with any certainty that Dynalectron would be allowed an exemption or deduction for the work under the new contract.

Under the circumstances, we see no merit in this portion of the protest. In passing, we note that it might be more realistic to normalize the applicability of the tax rather than its nonapplicability—i.e., to add 4 percent to each offeror's probable costs. However, in either event the relative cost positions of the offerors would be the same.

V. Conclusion

Several additional contentions of the protester concerning post-selection matters must be considered. One of these is Dynalectron's contention that only its proposals can be considered for award at the present time, since all other proposals, including LEC's, have expired. Dynalectron believes that to consider LEC's proposal for award at this time would in effect amount to an opportunity for LEC to submit a late proposal, abridging the common cutoff procedure for best and final offers and violating the integrity of the procurement process.

We find no merit in this contention. While LEC's initial proposal, March 2, 1974, stipulated an expiration date within 180 days after submission, we note that since that time LEC submitted a best and final offer (May 17, 1974); moreover, after selection by the SSO, we understand that NASA and LEC have been engaged in negotiations with a view towards definitizing a final contract. We are of the view that by participating in the continuing series of offers and counter-offers involved in the negotiations process, LEC has indicated its intent to extend its offer. Moreover, by letter of December 6, 1974, to the contracting officer, LEC stated that it extended its offer by 180 days from December 6, 1974. Also, we have held that NASA's final negotiation procedures do not abridge the common cutoff requirement. See *Matter of Sperry Rand Corporation (Univac Division) et al.*, 54 Comp. Gen. 408 (1974).

Concerning the selection decision itself, Dynalectron has raised a number of conjectural arguments to the effect that the SSO was misinformed and confused by the SEB's presentation, due to the

allegedly erroneous SEB conclusions in the Mission Suitability evaluation. Since, as indicated, *supra*, we have found no basis to object to the Mission Suitability evaluation, we believe these contentions are without merit. LEC's superiority in what was clearly stated to be the most important of the evaluation criteria is unaffected by our decision.

The SSO's selection of LEC, as indicated in the above-quoted selection statement, is clearly premised in part of a "significant" LEC margin in Mission Suitability; in addition, the decision makes reference to the "reasonable cost" of the LEC proposal, and to the lack of a "significant difference," and to the "substantially similar" probable costs of all the offerors. The only question for consideration is what recommendation, if any, is mandated by our doubts concerning certain aspects of the probable cost evaluation. (See pp. 19–21.) In this regard, we note that although a cost reevaluation might reveal an increase in the probable cost differential between Dynalectron and LEC, this development would not necessarily have a decisive effect on the selection decision, since a wider differential might not exceed the range of uncertainty which exists in estimating for cost-type contracts over a period of years.

Accordingly, we recommend that the SSO determine, in light of the views expressed in this decision, whether a reevaluation of costs is called for under the circumstances, or whether our doubts relating to the evaluation of the criterion which was second in importance are not, in the SSO's judgment, of sufficiently serious impact to affect the validity of his selection decision. In the event the SSO determines that a cost reevaluation is called for, we recommend that he then determine whether the results of the reevaluation mandate a reconsideration of his selection decision.

[B-181670]

Contracts—Negotiation—Assignments—Offers or Proposals—Validity of Assignment—Sale, etc., of Business

While provisions of anti-assignment statutes are not applicable to assignment of proposals, rationale for position that transfer or assignment of proposals is prohibited unless such transfer is effected by operation of law to legal entity which is complete successor in interest to original offeror is analogous to that of such statutes and "by operation of law" should be interpreted as including by merger, corporate reorganization, sale of an entire business, or that portion of business embraced by proposal, or other means not barred by anti-assignment statutes.

Contracts—Negotiation—Offers or Proposals—Substitute Offeror

Where protester attempted to substitute itself as offeror of proposal submitted by other firm before contract award, contracting officer did not act unreasonably in refusing to allow substitution although protester could have been recognized as successor in interest in light of all circumstances.

In the matter of Numax Electronics, Inc., January 16, 1975:

On February 8, 1974, the United States Army, Frankford Arsenal, Philadelphia, Pennsylvania, issued request for proposals (RFP) DAAA25–74–R–0227 dated February 5, 1974 in contemplation of a firm-fixed-price contract for laser tank gunnery trainers. Award was to be made to the responsible offeror making the lowest conforming offer.

By letters dated April 8, 1974, the five offerors submitting timely proposals were advised that their proposals were in the competitive range and that price negotiations were being conducted. Each offeror was required to submit its best and final offer no later than April 19, 1974. The ranking of the offerors after receipt of best and final offers, in ascending order starting with the lowest priced, was as follows:

Maxson Electronics Corporation
Applied Devices Corporation
Philadelphia Scientific Controls, Inc.
Kollsman Instrument Company
Frequency Engineering Laboratories

On April 30, 1974, a preaward survey was conducted at Maxson Electronics Corporation (Maxson) by the Defense Contract Administration Services District (DCASD), Garden City, New York, with engineering and technical personnel from Frankford Arsenal in attendance. During the survey, Government personnel were informed by representatives of Maxson that the equipment and personnel to be used to perform the contract would remain the same but would be transferred to a facility owned by Numax Electronics, Inc. (Numax), in Hauppauge, New York, and that the contract would be performed at the Numax facility. The preaward survey team surveyed the Hauppauge facility to determine its adequacy.

We have been informed by counsel for Numax that "for some months prior to the submittal of the * * * proposal by Maxson, negotiations had been conducted among the Government, Maxson, and Tempo Instruments and Controls Corporation (Tempo) to explore the possibility of a transfer of assets from Maxson to Numax. Under the plan, Numax would become a subsidiary of Tempo once the transfer of assets was completed. The first formalization of this proposed transfer was a document dated March 26, 1974, which was in effect a 'letter of intent' executed by Maxson and Numax." By preaward survey report dated May 9, 1974, Maxson received an affirmative report on all factors surveyed except financial capability. Since the contract negotiator believed that the pending execution of a novation agreement involving

Maxson and Numax would have the effect of making Numax eligible for award, the determination of Maxson's financial capability had been deferred.

Even though the novation agreement had not yet been executed, the contracting officer, on May 30, 1974, requested the DCASD to make an unqualified recommendation concerning the financial capability of Maxson no later than June 5, 1974. This request was made in the interest of expediting contract award. By preaward survey report dated June 5, 1974, Maxson received a negative financial capability rating. Based upon this report, the contracting officer determined Maxson to be nonresponsible on June 12, 1974.

On May 31, 1974, the transfer of assets from Maxson to Numax was accomplished pursuant to a bill of sale and assignment. The bill of sale effected a transfer of assets, subject to the execution of a novation agreement. The novation agreement was signed on May 31, 1974, by Maxson and Numax and on June 24, 1974, by the Government. In the agreement, the Government recognized Numax as the lawful successor in interest to all of the contracts listed therein.

By letter dated June 4, Numax informed the contracting officer of the following:

> * * * Numax Electronics Incorporated has purchased certain assets, rights and materials, and has absorbed the total work force of Maxson Electronics Corporation. Accordingly, Numax has, in effect, succeeded Maxson as the offeror under Subject Solicitation, and Numax pledges to honor the terms and conditions of the bid as though Numax had been the original offeror.
>
> We respectfully request, therefore, that any award to be made as the result of referenced proposal be made to Numax Electronics Incorporated.

In response to an inquiry by the contracting officer, legal counsel for Frankford Arsenal concluded by memorandum dated June 17, 1974, that the Government could not consider the June 4 offer of Numax or make award to that firm if it was found to be responsible. Counsel determined that the offer of Numax was a late proposal, and an attempted substitution of offerors which was prohibited.

Since the contracting officer determined that Maxson was nonresponsible, and upon the advice of counsel that Numax's offer could not be considered, award to either Numax or Maxson was not contemplated further.

On June 21, 1974, award of the contract was made to Applied Devices Corporation, the next low offeror. By letter of the same date, the contracting officer informed Maxson of the following:

> This is to notify you that I have made award to Applied Devices Corporation of Hauppauge, L.I., New York of Contract DAAA25-74-C0656 resulting from subject Request for Proposal.
>
> * * * * * * *
>
> Your company's offer was not considerd acceptable because it was determined that you lacked the financial capability to successfully perform the contract. You

should also note that your company, namely Maxson, would probably not be able to comply with the Walsh-Healey Act since you no longer possess a manufacturing capability. I was unable to consider Numax's offer to take over your offer since substitution of offerors is prohibited. 51 Comp. Gen. 145 (B-171959, 3 Sep 71); 43 Comp. Gen. 353, 372 (B-150978, 10 Oct 63).

In the circumstances, I had no alternative but to determine that you were not able to demonstrate affirmatively your responsibility to receive award under the criteria set forth in ASPR 1-902.

In addition, by letter of June 21, the contracting officer informed Numax of the following:

We are in receipt of your letter of 4 June 74 regarding referenced proposal Maxson Electronics Corporation under subject solicitations.

Your offer to take over Maxson's offer must be treated as a late proposal in accordance with Section C-1, p. 10 of the RFP. We are required to consider only those companies who submitted initial timely proposals. Numax was not one of those companies. Your offer would constitute a substitution of offers, a practice prohibited by the Comptroller General. 51 Comp. Gen. 145 (B-171959, 3 Sep 71); 43 Comp. Gen. 353, 372 (B-150978, 10 Oct 63).

Hence, Maxson's proposal under this request for Proposal has been treated a submitted, i.e., as an offer by Maxson Electronics Corporation.

Counsel for Numax protested the award of the contract to any other offeror. Pursuant to section 20.9 of our Interim Bid Protest Procedures and Standards, 4 CFR part 20 (1974), counsel for Numax requested a conference on the protest. On October 2, 1974, a conference was held with counsel for Numax and representatives of the Department of the Army and our Office.

The fundamental issue raised is whether Numax should have been allowed to substitute itself as the offeror of the proposal submitted by Maxson.

We have countenanced the transfer or assignment of rights and obligations arising out of proposals only where "such transfer is effected by operation of law to a legal entity which is the complete successor in interest to the original offeror." *See* 43 Comp. Gen. 353, 372 (1963) and 51 *id.* 145, 148 (1971).

The anti-assignment statutes, 41 U.S. Code § 15 (1970), and 31 U.S.C. § 203 (1970), prohibit the assignment of Government contracts and claims. The purpose of these statutes is as follows:

* * * to secure to the government the personal attention and services of the contractor; to render him liable to punishment for fraud or neglect of duty; and to prevent parties from acquiring more speculative interests, *Francis* v. *United States*, 1875, 11 Ct. Cl. 638 and from thereafter selling the contracts at a profit to bona fide bidders and contractors, 1888, 19 Op. Atty. Gen. 187. *Thompson* v. *Commissioner of Internal Revenue*, 205 F. 2d 73, 76 (3d Cir. 1953).

Accordingly, these statutes have been interpreted as prohibiting voluntary assignments of Government contracts and claims. Involuntary assignments such as those effected by operation of law are not prohibited by the above-referenced statutes. See Shnitzer, *"Assignment of Claims Arising Out of Government Contracts,"* 16 Federal Bar Journal 376 (1956); and Armed Services Board of Contract Appeals Nos. 18304 and 18218, 74-1 BCA 10,470 (1974). In

addition, the transfer of Government contracts and claims incident to corporate mergers and reorganizations, and to the sale of an entire business or of an entire portion of a business are not prohibited by the anti-assignment statutes. See *Seaboard Air Line Railway* v. *United States*, 256 U.S. 655 (1921); *Mitchell Canneries, Inc.* v. *United States*, 111 Ct. Cl. 228 (1948); *Kingan & Co., Inc.* v. *United States*, 44 F.2d 447 (1930); and 9 Comp. Gen. 72 (1929).

While the provisions of the anti-assignment statutes are not applicable to the assignment of proposals, the rationale for the position taken by our Office concerning the assignment of proposals is analogous to that of the above-referenced statutes.

Consequently, the phrase "unless such transfer is effected by operation of law. * * *" as used in 43 Comp. Gen., *supra*, and 51 Comp. Gen., *supra*, should not be construed literally. Rather, it should be interpreted as permitting the assignment of proposals when such transfer is effected by operation of law, or merger, or corporate reorganization, or sale of an entire business, or sale of an entire portion of a business embraced by the proposal, or any other means not barred by 41 U.S.C. § 15 or 31 U.S.C. § 203.

Numax contends that the transfer of assets from Maxson to Numax constitutes a sale of an entire business and that the rationale for permitting substitution of offerors when transfers are effected by operation of law is applicable. As discussed above, we are in agreement with the position of Numax that the rationale for permitting substitution of offerors when transfers are by operation of law is applicable to those situations in which the transfer is incident to the sale of an entire business.

The letter of intent, executed by Maxson and Numax on March 26, 1974, provides in pertinent part as follows:

1. *Sale of Certain Assets.* Upon the terms and subject to the conditions set forth in this Agreement, the Seller [Maxson] hereby agrees to convey, assign and deliver to Purchaser [Numax], and Purchaser hereby agrees to acquire and accept assignment, transfer and delivery from the Seller of the following assets, as same shall exist on the Closing Date hereinafter referred to:

(a) all of Seller's right, title and interest in and to all contracts listed on *Schedule A* annexed hereto [includes no reference to the instant proposal] and made a part hereof; and all of Seller's right, title and interest in and to any contract entered into by Seller between the date hereof and the Closing Date for the manufacture or assembly of any product or system, provided Purchaser has given its prior written consent to the execution of such contract by Seller;

(b) the machinery, equipment, furniture and fixtures owned by Seller and required in the performance of the contracts listed on *Schedule A* hereto or required in the performance of any contract entered into between the date hereof and the Closing Date (provided Purchaser has given its prior written consent to any contract entered into between the date hereof and the Closing Date). Prior to Closing Seller and Purchaser shall agree in writing on the items of machinery, equipment, furniture and fixtures to be assigned, transferred and delivered at Closing;

* * * * * * *

(d) all of Seller's right, title and interest in and to all inventory related to the contracts listed on *Schedule A* hereto and the inventory related to any contract entered into with Purchaser's consent between the date hereon and Closing.

* * * * * * *

2. *Assumption of Liabilities by Purchaser.* Upon the terms and subject to the conditions set forth in this Agreement, Purchaser will assume on the Closing Date and satisfy as they mature and become due (a) all accounts payable in existence at January 27, 1974 as set forth on *Exhibit 1* hereto (except to the extent that any such payables have been paid prior to the Closing Date); (b) all liabilities and contractual obligations embodied in the contracts set forth on *Schedule A* hereto; (c) all liabilities and contractual obligations embodied in contracts entered into between the date hereof and the Closing Date for the manufacture or assembly of any product or system, provided Purchaser has given its prior written consent to the execution of such contract by Seller, and (d) all liabilities (including accounts payable) of Seller incurred between January 27, 1974 and the Closing Date and in existence on the Closing Date, provided such liabilities are related to the performance of the contracts listed on *Schedule A* hereto or contracts entered into between the date hereof and Closing with Purchaser's consent, and further provided that such liabilities are incurred in the ordinary course of Seller's business.

It is the intention of the parties hereto that Purchaser shall assume on the Closing primarily those liabilities of Seller related to the performance of the contracts listed on *Schedule A* hereto as such liabilities exist on the Closing Date. The liability related to the performance of such contracts as of Jauuary 27, 1974, are set forth in *Exhibit 1* hereto. * * *

The bill of sale and assignment executed by Maxson and Numax on May 31, 1974, provides that Maxson for consideration paid by Numax does—

* * * hereby grant, bargain, sell, assign, alien, remise, release, bargain and sell, and by these presents does grant and convey unto the Purchaser, its successors and assigns, forever, the following assets:

(a) all of the Seller's right title and interest in and to all contracts listed on Schedule A annexed hereto and made a part hereof;

(b) all of Seller's right, title and interest in and to the machinery, equipment, furniture and fixtures listed on Schedule B annexed hereto and made a part hereof;

(c) all of Seller's right, title and interest in and to all inventory related to the contracts listed on Schedule A hereto; * * *

The novation agreement signed by Numax and Maxson on May 31, 1974, and executed by the Government on June 24, 1974, provides, in pertinent part, as follows:

11. The Government hereby recognizes the Transferee [Numax] as the Transferor's [Maxson's] successor in interest in and to the Contracts [listed in Schedule A]. The Transferee hereby becomes entitled to all right, title and interest of the Transferor in and to the Contracts in all respects as if the Transferee were the original party to the Contracts. The term "Contractor" as used in the Contracts shall be deemed to refer to the Transferee rather than to the Transferor.

* * * * * * *

17. The Government shall have no claim against Transferee and Transferee shall have no liability to the Government by right of offset or otherwise under any contracts or purchase orders between the Government and Transferor, except with respect to the Contracts and purchase orders set forth on Exhibit A (the novated contracts). * * *

In support of its contention that the sale constituted the sale of an entire business, Numax has informed us that all employees formerly at Maxson have been transferred to Numax; that all the Government

contracts of Maxson which were in an active status were assigned to Numax; and that Maxson continues to exist only as a corporate shell for the purpose of winding up outstanding contracts (all of which were in an inactive status). However, counsel for the procurement activity advised the contracting officer to the contrary as follows:

a. The date for receipt of initial proposals was 1 April 1974. Negotiations closed, 19 April 1974. Therefore, if the relationship between Numax and Maxson is ignored, it is apparent that Numax's and Maxson is ignored, it is apparent that Numax's 4 June 74 letter is a late proposal and must be rejected.

b. However, the file shows that the Government is going to approve a novation agreement between Numax and Maxson. The important point is that this agreement will not transfer bids and offers submitted by Maxson. In fact the comptroller General prohibits substitution of offerors and bidders because of considerations of public and procurement policy. 51 Comp. Gen. 145 (B-171959, 3 Sep 71), 43 Comp. Gen. 353, 372 (B-150978, 10 Oct 63).

c. This is not a change of name situation. Maxson is selling most of its assets and moving its labor force to a different and non-affiliated corporation. That corporation was not legally obligated to carry out the promises made by Numax [Maxson] by its initial offer.

4. Therefore, the Government may not consider Numax's offer and must determine responsibility by analysis of Maxson's capability as the responsible entity. This has been done.

We believe that the contracting activity could have recognized that Numax was a successor in interest to the Maxson proposal in light of all the circumstances flowing from the letter of intent and bill of sale and assignment, considering also the practical aspects of the purported substitution of offerors. But we cannot say that the contracting officer acted unreasonably in refusing to allow the substitution.

Our view is, of course, based on a record which reflects not only the administrative position but also the opposing comments of the protester's counsel. As indicated above, the administrative decision was arrived at after review of existing precedent as interpreted by counsel. Though it now appears to us from the entire record that the action taken was bottomed upon an overly technical interpretation of precedent without regard to the practical, viable aspects of the attempted substitution, we do not feel that the award made to the Applied Devices Corporation should be questioned by our Office.

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

[B-181704]

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

Low offer for mess attendant services which proposed use of 64.5 percent of Government's estimate without presenting detailed justification required by request for proposals as to why offeror could perform at that level was improperly accepted; fact that incumbent contractor submitted offer of 73.9 percent of estimate, that Small Business Administration representative felt offeror could perform at that level, and that offeror was successful subcontractor at another base does not constitute contemplated justification.

Contracts—Negotiation—Evaluation Factors—Manning Requirements—Dollar Hour Ratio

Where request for proposals requires offeror's dollar/hour ratio to exceed offeror's basic labor expense, offer containing dollar/hour of $3.77 and basic labor expense of $3.41 is acceptable.

Contracts—Disputes—Conflict Between Administrative Report and Contractor's Allegations

In absence of any evidence to contrary, contracting officer's statement that no telegram prohibiting "offset bid" was ever sent to any party must be accepted.

Contracts—Negotiation—Awards—Notice

Contracting officer is not required to follow 5-day notification rule to enable unsuccessful offerors to file protest concerning small business size status as provided in Armed Services Procurement Regulation (ASPR) 1-703(b)(1) (1973 ed.) in view of exception in ASPR 3-508.2(b) (1973 ed.) which permits awards on basis of urgency without prior notice.

Contracts—Negotiation—Offers or Proposals—Mess Attendant Services—Man-Hour Estimates

In Navy mess attendant solicitation, where successful offeror proposes to use 64.5 percent of Government estimate with no justification as to why job can be performed at that level and contracting officer admits that if there were more time available for negotiations Government estimate might have been in need of downward revision, under Armed Services Procurement Regulation 3-805.4(c) (DPC #110, May 30, 1973) failure to reopen negotiation on amended estimate coupled with award on basis of unsubstantiated low offer requires that contract be terminated for convenience of Government.

In the matter of Dyneteria, Inc., January 16, 1975:

Dyneteria, Inc. (Dyneteria) protested the award of a contract under request for proposals (RFP) N00140-74-R-0703, which called for the performance of mess attendant services at the Naval Support Activity, Philadelphia, Pennsylvania, for the period of July 1, 1974, to June 30, 1975. The RFP, issued on April 26, 1974, resulted in nine proposals being received by June 3, 1974, the amended date specified for receipt of offers. All nine offers were found to be within the competitive range.

On June 17, 1974, the contracting officer requested that best and final offers be submitted by 4 p.m. on June 20, 1974. Five offerors lowered their prices after receipt of this message. Dyneteria's offer in the amount of $280,960.16 remained unchanged, while Broken Lance Enterprises, Inc. (Broken Lance), ultimately the successful contractor, lowered its price from $238,843 to $196,163.04. Award was made on June 24, 1974, and performance commenced as required on July 1, 1974.

Dyneteria contends that all offers were not evaluated on an equal basis by the contracting office since the solicitation required that if an offeror proposed substantially fewer hours than the Government's estimate that it specifically submit documentation justifying the use of those fewer hours and Broken Lance failed to do so. Dyneteria also maintains that the amount of money bid by Broken Lance does not cover, as the RFP requires, the actual labor costs involved. Dyneteria further alleges that it received a warning from the contracting officer, in the form of a telegram that any "offset bid" related to increasing or decreasing of meals served would be considered as "nonresponsive." Finally, Dyneteria objects to the contract being awarded without 5 days prior notice being given to the other bidders to protest the size status of the successful offeror as required by the Armed Services Procurement Regulation (ASPR).

The RFP as amended stated that all offers were to be evaluated in accordance with section D of the solicitation. That section read as follows:

SECTION D—EVALUATION AND AWARD FACTORS

Evaluation of Offeror's Manning and Prices

(a) Manning levels offered must be sufficient to perform the required services. For the purpose of evaluating proposals the Government estimates that satisfactory performance during the contract period of 365 days will require a total of 80,676 manning hours (including management/supervision). This estimate is based upon approximately 247.50 hours and a representative weekday multiplied by 252 weekdays, and 162 hours on a representative weekend/holiday multiplied by 113 weekend/holidays. Submission of manning charts whose total hours fall below the total of 80,732.50 hours for the total of 365 days during the contract period as stated above may result in rejection of the offer *unless* the offeror clearly substantiates the manning difference with specific documentation demonstrating that the offeror can perform the required services satisfactorily with fewer hours. Such documentation should accompany the offer.

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

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

(2) the total manhours offered must be supported by the price offered when compared as follows. The total of all hours offered for the total days during the contract period will be divided into the total offered price (less any evaluated prompt payment discount) to assure that this dollar/hour ratio is at least sufficient to cover the following basic labor expenses:

(i) the basic wage rate;

(ii) if applicable, fringe benefits, (health and welfare, vacation, and holidays) (a factor of 5% of the basic wage rate will be used in this evaluation to cover vacation and holidays); and

(iii) other employee-related expenses as follows:

(A) FICA (including Hospital Insurance) at the rate of 5.85% (this percentage will be applied to the basic wage rate plus the health and welfare benefits, unless the offeror submits satisfactory evidence that these benefits are not paid to employees in cash);

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

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

Failure of the price offered to thus support the offeror's manning charts may result in rejection of the proposal.

(c) Award will be made to the responsible offeror whose proposal, meeting the criteria set forth in (a) and (b) above, offers the lowest evaluated total price after application of the evaluation factors for monthly volume variations as provided in Section E.

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

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

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

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

The record shows that the original offer from Broken Lance indicated that 80,676 hours (the Government's estimate) would be provided and accordingly the offer contained manning charts reflecting manhours identical to the Government estimates of 247.5 manhours for a representative weekday and 162 manhours for a representative weekend/holiday. However, Broken Lance's best and final offer stated its belief that satisfactory service could be accomplished with total manning of only 52,004.5 hours (164 manhours per weekday and 94.5 manhours per day on weekends). Accordingly, the total manhours proposed by Broken Lance was only *64.15* percent of the Government's estimate but more importantly was submitted with no detailed documentation to justify the proposed use of less than the Government's estimate. The contracting officer states that: "no such documentation was furnished because the revised offer was submitted by telegram."

Notwithstanding this failure to justify, the contracting officer concluded, that satisfactory performance of the contract would be possible with substantially fewer hours than those contained in the Government estimate. This position was based primarily on the fact that the incumbent contractor proposed 59,598 hours (73.9 percent of the Government estimate) and had included in its proposal a statement that it was currently performing the contract within those manhour levels.

Moreover, the contracting officer prior to award (1) received information from representatives of the Small Business Administration which "assured her that Broken Lance's revised offer was entirely valid and based on a thorough and knowledgeable review of perform-

ance requirements;" and (2) knew that Broken Lance was currently a satisfactory subcontractor to SBA for mess attendant services. On the above noted bases, the contracting officer made award to Broken Lance. The contracting officer's report does note, however, that "If more time had been available for the conduct of negotiations it might have been desirable to consider whether the Government estimate of necessary manhours should have been revised in light of the responses received."

As noted above, the RFP states that documentation indicating the justification for proposing less than the Government's estimate should accompany the offer, (Section D, *supra*). The RFP states that a failure to furnish said material *may* result in the rejection of an offer proposing less than the Government's estimate, our Office has, however, found that the submission of an offer of less than what the Government has stated is its initial cutoff point without such substantiation is improper (here the cutoff point was 100 percent of the Government estimate while in previous cases, see *infra*, 95 percent of the total Government estimate was viewed as the cutoff). *Matter of ABC Management Services, Inc.*, 53 Comp. Gen. 710 (1974) at 715–716. In *Matter of ABC Management Services, Inc., supra*, the RFP provided that if proposal exhibiting less than 95 percent of the Government's estimate "*may* result in the rejection of the offer without further negotiations unless the offeror clearly substantiates the manning difference with specific documentation demonstrating that the offeror can perform the required service with such fewer hours." [Italic added and deleted.] There we held that the submission of an offer of 94.94 percent of the Government's estimate without any substantiation was improper. Accordingly, if the fact that an offeror failed to justify a .06 percent deviation mandated rejection in *Matter of ABC Management Services, Inc., supra*, we feel even stronger that the failure to justify a 35.5 percent deviation in the case at hand must render the award improper.

It may be that Broken Lance as an experienced contractor did understand the requirements of the task. However, unless under the terms of the solicitation it documented the specific reasons why it felt it could perform at less than the Government estimate, irrespective of any views of any SBA officials, that offer could not properly be accepted.

As to Dyneteria's assertion that Broken Lance's offered hours are not supported by the proposed price in accordance with section D(b)(2) of the RFP, we calculate Broken Lance's basic labor costs as follows:

	Per hour
Minimum hourly wage	$2.91
Health and welfare	0.12
Vacation and holiday (5 percent of minimum wage)	0.145
FICA (5.85 percent of minimum wage and health and welfare)	0.177
Unemployment insurance (1 percent)	0.029
Workman's compensation (1 percent)	0.029
Total (3.41)	[1] 3.41

[1] The agency calculated Broken Lance's basic labor cost as $3.44, having added $0.03 to the proposers' costs due to the wage determination requirement to pay $0.03 per hour to employees for uniform maintenance. While there appears to be no prejudice attached to including this uniform maintenance factor in the evaluation, this factor was not stated in section D of the RFP. If the Navy desired to include the uniform maintenance factor in its section D formula, it would have been preferable to have amended section D to so state.

Secondly we compute Broken Lance's dollar/hour ratio to be:

$$\frac{\$196{,}163.04 \text{ (price less any evaluated discount)}}{52{,}004.5 \text{ (hours offered)}} = \$3.772$$

Since Broken Lance's dollar/hour ratio ($3.77) exceeds its basic labor cost ($3.41), we see no basis to sustain Dyneteria's protest in this regard.

Dyneteria further asserts that it received a telegram from the contracting officer prohibiting an "offset bid" related to the increase or decrease of meals served. However, in absence of any evidence to the contrary, we must accept the contracting officer's statement that he never communicated with Dyneteria or any other offeror in any such manner.

Finally, Dyneteria's objection that it did not have the opportunity to protest the small business status of Broken Lance is apparently based on ASPR § 1-703(b)(1) (1973 ed.), which provides, in pertinent part, as follows:

> * * * In procurements requiring the submission of proposals, the contracting officer shall, except under the circumstances specified in 3-508.2(b), notify the apparently unsuccessful offerors in writing of the name and location of the apparently successful offeror(s) and establish a deadline date (at least five working days plus a reasonable time for the notice to reach the unsuccessful offerors) by which any size protest on the instant procurement must be received.

However, ASPR § 3-508.2(b) (1973 ed.) provides that the notification procedure shall not apply to any urgent procurement action.

The contracting officer made a written determination on June 24, 1974, that preaward notice to unsuccessful offerors as required by ASPR would not be issued since prompt award of the contract without delay was necessary in order for the program to be continued on July 1, 1974, without interruption. He noted that best and final offers were due no

later than 4 p.m., June 20, 1974, and that the evaluation of these responses was not completed until June 24, 1974. Award was made because the successful offeror needed immediate notice to proceed in order that sufficient personnel could be hired and available for service when the old contract expired. Since Broken Lance had been previously identified as a minority owned small business firm by the SBA and was currently performing a mess attendant contract as a small business subcontractor, the contracting officer concluded that an affirmative determination of Broken Lance's small business status had been made by SBA. Under the circumstances, this procurement would, in our opinion, come within the exception to prior notice provided in ASPR § 3-508.2(b) (1973 ed.).

As noted above, we feel that the award to Broken Lance was improper. The successful offeror proposed only 64.5 percent of the Government's estimate which was accepted in the absence of the justification required by the RFP and even though the contracting officer admits that the Government's estimate might have been in need of downward revision. The case at hand is distinguishable for other situations where offers substantially less than the Government estimate have been accepted—*Matter of ABC Management Services, Inc., Tidewater Management Services, Inc., Chemical Technology, Inc.*, 53 Comp. Gen. 656 (1974); 53 *id.* 198 (1973); B-179041, October 26, 1973—for in each of those cases the successful offeror submitted the required justification. There, we felt that in each situation the Government believed throughout that its good-faith estimate was a reasonably accurate measure of required performance but that the awardee had been able to demonstrate, as provided for in the RFP, that another reasonable measure of required performance existed.

The acceptance in this case of Broken Lance's offer *without justification* while a violation of the RFP also indicates to us the contracting officer's belief, which was subsequently stated, that the Government estimate was overstated.

ASPR § 3-805.4(c) (DPC #110, May 30, 1973) states that:

> (c) When a proposal considered to be most advantageous to the Government involves a departure from the stated requirements, all offerors shall be given an opportunity to submit new or amended proposals * * * on the basis of the revised requirements, provided this can be done without revealing to the other offerors the solution proposed in the original departure or any information which is entitled to protection under 3-507.1.

Accordingly, subsequent to receipt of best and final offers the contracting officer should have amended the RFP to downwardly adjust the Government estimate and reopen negotiations. The contracting officer's belief that there was no time to accomplish this amendment and reopening since best and finals were received on June 20 and performance was necessary as of July 1, neglects the fact that as in

many other such situations, e.g., *Matter of ABC Food Service, Inc.*, B–181978, December 17, 1974, the Navy can and will hold over an incumbent contractor for a short period so as to permit further necessary negotiations. It should be noted that the incumbent contractor did not appear unwilling to continue performing as it was also a participant in the instant solicitation.

We believe that the failure to reopen negotiations on an amended Government estimate coupled with the fact that the award was made on the basis of an unsubstantiated low manhour offer, requires us to recommend that the instant contract be immediately terminated for the convenience of the Government since all offerors did not compete on an equal basis. We would further recommend that the Navy recompete the remaining portion of the contract requirement.

Since this decision contains a recommendation for corrective relief a copy is being forwarded to each of the Committees referenced in § 236 of the Legislative Reorganization Act of 1970, 31 U.S. Code 1176.

[B–181905]

Bids—Modification—After Bid Opening—Color Substitution—"Or Equal" for Brand Name

Contractor who was permitted after bid opening to substitute "or equal" color for brand name color bid should have awarded contract terminated, since substitution is beyond contemplation of invitation for bids requirements and procurement law.

Bids—Invitation for Bids—Cancellation—Preservation of Competitive System

When low bidder proposed post-bid opening change from brand name to "or equal" color in brand name or equal invitation for bids (IFB), contracting officer acted imprudently in accepting, without verification, allegation that brand name was not available, since another bidder bid on basis of brand name color and if not available proper course would have been cancellation of IFB and readvertising to permit all bidders opportunity to submit bids on new basis.

In the matter of S. Livingston & Son, Inc., January 16, 1975:

S. Livingston & Son, Inc. (Livingston) protested the award by the Bureau of Prisons under invitation for bids (IFB) 100–4486 of a requirements contract to Kenneth David Ltd. (David) for blazers for fiscal year 1975.

Under the IFB bids were solicited for estimated quantities of double knit blazers and trousers in accordance with the Bureau specifications attached to the IFB. Only the award for blazers is protested. The blazer specification required the color of the blazer to be:

Mariner Blue #2643
Antique Gold #4372 } Deering Milliken or equal

Included in the IFB was a simple requirement provision as follows:

One sample of the blazer shall be forwarded either with bids or separately in sufficient time to be received in the bid opening room PRIOR to the date opening. Samples shall accurately reflect the attached specifications; where deviations exist but the bidder proposes to make such modifications that will result in meeting specifications, he shall so indicate. The Government reserves the right to accept minor deviations in style and workmanship where the resultant product will not significantly conflict with the uniform items currently in use within the Bureau of Prisons. The preproduction sample must be submitted in the fabric that will be furnished but not necessarily in the colors required. Colors may be represented by swatches accompanying the sample garments.

The IFB also included a brand name or equal clause as follows:

BRAND NAME OR EQUAL

(As used in this clause, the term "Brand Name" includes identification of products by make and model.)

(a) If items called for by this invitation for bids have been identified in the schedule by a "brand name or equal" description, such identification is intended to be descriptive, but not restrictive, and is to indicate the quality and characteristics of products that will be satisfactory. Bids offering "equal" products (including products of the brand name manufacturer other than the one described by brand name) will be considered for award if such products are clearly identified in the bids and are determined by the Government to meet fully the salient characteristics requirements listed in the invitation.

(b) Unless the bidder clearly indicates in his bid that he is offering an "equal" product, his bid shall be considered as offering a brand name product referenced in the invitation for bids.

(c)(1) If the bidder proposes to furnish an "equal" product, the brand name, if any, of the product to be furnished shall be inserted in the space provided in the invitation for bids, or such product shall be otherwise clearly identified in the bid. The evaluation of bids and the determination as to equality of the product offered shall be the responsibility of the Government and will be based on information furnished by the bidder or identified in his bid as well as other information reasonably available to the purchasing activity. CAUTION TO BIDDERS. The purchasing activity is not responsible for locating or securing any invormation which is not identified in the bid and reasonably available to the purchasing activity. Accordingly, to insure that sufficient information is available, the bidder must furnish as a part of his bid all descriptive material (such as cuts, illustrations, drawings, or other information) necessary for the purchasing activity to (i) determine whether the product offered meets the salient characteristics requirement of the invitation for bids, and (ii) establish exactly what the bidder proposes to furnish and what the Government would be binding itself to purchase by making an award. The information furnished may include specific references to information previously furnished or to information otherwise available to the purchasing activity.

(2) If the bidder proposes to modify a product so as to make it conform to the requirements of the Invitation for Bids, he shall (i) include in his bid a clear description of such proposed modifications and (ii) clearly mark any descriptive material to show the proposed modifications.

(3) Modifications proposed after bid opening to make a product conform to a brand name product referenced in the Invitation for Bids will not be considered.

Bids were opened May 24, 1974. David submitted the low bid for the blazer at $28.50 per unit. Livingston was the next low bidder at $30.70 per blazer. David furnished a sample blazer with its bid and a Deering Milliken color swatch. On June 17, 1974, David forwarded a letter from Binder Industries, Inc., indicating that it could supply a double knit fabric that would satisfy the specification

requirement, including color. David also informed the contracting officer that it was told by Deering Milliken that it was no longer producing 12 to 12½ ounce fabric and the Binder Industries fabric was submitted as an "or equal." By letter of June 21, 1974, the contracting officer requested David to furnish swatches showing color and verification that the proposed style would meet the specifications. By a June 26, 1974, letter, David submitted color swatches and affirmed that the blazer would be manufactured in accordance with the sample submitted previously. Contract J100C–2223C was awarded to David on July 1, 1974.

Livingston has protested the award on several grounds, most significantly, that it was impermissible to allow the post-bid opening change by David to an "or equal" color.

Federal Procurement Regulations (FPR) § 1–1.307–6(a)(2) (1964 ed. amend. 117) provides that the brand name or equal clause quoted above shall be inserted in an IFB when a brand name or equal purchase description is included in the IFB. Further, FPR § 1–1.307–6(b) states:

> Where a component part of an end item is described in the invitation for bids by a "brand name or equal" purchase description and the contracting officer determines that application of the clause in (a)(2) of this § 1–1.307–6 to such component part would be impracticable, the requirements of (a)(1) and (2) of this § 1–1.307–6 shall not apply with respect to such component part. In such cases, if the clause is included in the invitation for bids for other reasons, there also shall be included in the invitation a statement identifying either the component parts (described by "brand name or equal" descriptions) to which the clause applies or those to which it does not apply. * * *

There was nothing in the IFB indicating that the brand name or equal clause does not apply to color. Therefore, since color is the only brand name or equal component in the specifications, the clause must have applied to color.

Since David did not indicate that its bid was based upon an "or equal," under the terms of the brand name or equal clause, it is deemed to be an offer to furnish the brand name color, i.e. Deering Milliken. Indeed, the swatch submitted as a part of the bid and the post-bid correspondence from David confirm that it was the intention of David at the time the bid was submitted to furnish the Deering Milliken color. Moreover, paragraph (a) of the brand name or equal clause states that "Bids offering 'equal' products * * * will be considered for award if such products are clearly identified in the bids * * *." David did not identify any "or equal" color in the bid. To permit the substitution of an "or equal" color after bid opening is to change the brand name bid. While in this case color may not be paramount in the context of the totality of the procurement and the color substituted will satisfy the Government's color requirement

and ostensibly would have been acceptable had it been offered before bid opening, it is nevertheless a different offer than the one submitted by David before bid opening. Such a substitution is beyond the contemplation of the IFB requirements and procurement law which we believe must control if the integrity of the bidding system is to be preserved.

Where a bidder inadvertently or otherwise neglects to indicate that it is offering an "or equal," its bid is an offer for the brand name item and it must furnish the brand name item or be subject to termination for default. *Magnusonics Industries, Inc.*, GSBCA No. 1620, December 10, 1965. Further, it is a fundamental rule of advertised bidding that a bidder may not be permitted to change its bid after bids are opened. B–178090, April 27, 1973. To permit public officers to allow bidders to vary their proposals after bids are opened would soon reduce to a farce the whole procedure of letting contracts on an open competitive basis. 50 Comp. Gen. 42, 44 (1970). In *City of Chicago* v. *Mohr*, 74 N.E. 1056, 1058 (1905), it was said:

> * * * where a bid is permitted to be changed [after bid opening] it is no longer the sealed bid submitted in the first instance, and, to say the least, is favoritism, if not fraud—a direct violation of law—and cannot be too strongly condemned.

See B–178090, *supra;* 40 Comp. Gen. 668, 671 (1961); and 37 *id.* 110, 112 (1957). Thus, the contracting officer was not free to permit David to revise its bid after bid opening to furnish an "or equal" in lieu of the brand name color.

Moreover, when David proposed the post-bid opening change due to the alleged unavailability of the brand name item, the contracting officer did nothing to confirm the assertion with the brand name manufacturer. The contracting officer did not act prudently in accepting the allegation, particularly since Livingston also bid on the basis of the Deering Milliken fabric. If the brand name item were unavailable and all bidders had bid on the brand name item, the proper course to follow would have been to cancel the IFB and readvertise to permit all bidders the opportunity to submit bids on the new basis. In any event, such action would not have been necessary, since Livingston has submitted a letter from Deering Milliken which indicates that the specified fabric and color were, and continue to be, available. Our Office has confirmed that fact.

In view of the foregoing, the contract should be terminated for the convenience of the Government. An award to Livingston would be appropriate if it is determined to be a responsible and responsive bidder and it will reinstate its bid.

The other aspects of the Livingston protest are rendered academic by this decision and will not be considered.

As this decision contains a recommendation for corrective action, 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-182203]

Officers and Employees—Transfers—Relocation Expenses—House Purchase—Pro Rata Expense Reimbursement

Employee purchased 43.003 acres of land on which she located mobile home. The administrative agency should determine how much of the land is "reasonably related to the residence site" as directed by Federal Travel Regulations (FPMR 101-7) paragraph 2-6.1f (May 1973) by taking into consideration zoning laws, valuation by local real estate experts on basis of location and use of land, percolation of soils, etc., and the manner in which real estate brokers, attorneys and surveyors charge their fees, i.e., whether they are percentage derivatives of the purchase/sale price or flat fees.

Officers and Employees—Transfers—Relocation Expenses—Pro Rata Expense Reimbursement—House Purchase or Sale—Doubtful Cases to GAO

Where employee purchases or sells land in excess of that reasonably related to a residence site and there is doubt as to the propriety of the agency proration determination under Federal Travel Regulations (FPMR 101-7) paragraph 2-6.1f (May 1973) or the employee takes exception to the agency determination, the case should be forwarded to the Comptroller General with supporting evidence for review and disposition.

In the matter of pro rata reimbursement of real estate expenses, January 16, 1975:

This matter is before us on a request for an advance decision from Mr. Maurice S. Walker, Jr., an authorized certifying officer in the Environmental Protection Agency (EPA) and concerns the proper method of settling the supplemental claim of Miss K. Diane Courtney for certain real estate expenses which were administratively suspended from her original claim. The expenses were incurred in connection with the transfer of Miss Courtney's official duty station in August 1973.

The facts in this case are not in dispute. Upon her transfer to Research Triangle Park, North Carolina, Miss Courtney purchased 43.003 acres of land in White Oak Township on which she placed a mobile home to be used as her residence. The record contains a statement from Miss Courtney that the land purchase was not made for speculation nor subdivision but for the sole purpose of utilizing the land as a place where her living quarters will be located. The closing statement provided by the law firm of Holleman, Savage and

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Mooring of Apex, North Carolina, shows, among other things, that the purchase price for the land was $64,500, the title examination fee was $350, and the survey fee was $195. The attorney's fee for title examination and the surveyor's fee, which are otherwise payable under the Federal Travel Regulations (FPMR 101-7) para. 2-6.2c (May 1973), were suspended on the ground that FTR para. 2-6.1f (May 1973) provides among other things the following:

> f. *Payment of expenses by employee pro rata entitlement.* * * * The employee shall also be limited to pro rata reimbursement when he sells or purchases land in excess of that which reasonably relates to the residence site.

The crucial point in this directive is the determination of how much land "reasonably relates to the residence site" and how much land of the purchase or sale is "in excess." This is the first determination that has to be made in order to ascertain the amount of reimbursement. We believe that such determination should be initially made by the administrative agency to which the claim is submitted based on the prevailing and customary practices in the locality of the official duty station. It is an old and well-established rule of law that in matters pertaining to the acquisition, disposition, and devolution of land, the law which governs is the law of the situs of the land. *See* 15A C.J.S. *Conflict of Laws* § 19(1) (1967). Therefore, it is our opinion that at the agency level, the officer concerned with determining what constitutes "excess land" in cases where large tracts of land are involved should inform himself first of the zoning laws of the jurisdiction where the land is located. If the township or village is incorporated, the local regulation will prevail. If the land is located in an unincorporated community, then the county or the State zoning laws, if any, will prevail if applicable.

Absent any zoning laws or regulations for the building of residential dwellings or if the area is generally zoned for agricultural use and the sale or purchase involves a farm dwelling with appurtenant outbuildings, the certifying officer should take into account such factors as the use to which the land has been put in the past, its present utilization and the potential for future use. That will include consideration of crop growing, standing timber, other income producing use, fencing, irrigation, etc. In cases of unimproved land which could be subdivided and sold as lots in the future, it is suggested that the officer take into account the size of the lots in other subdivisions in the area and the requirements of the local or State Department of Health which is usually concerned with the waste disposal systems and the percolation quality of the soils. It might be that in a certain locality a house or mobile home could be located on a three-fourths acre lot whereas in other localities the requirement might be at least

5 acres in order to properly place the drain fields for the septic tank system.

Also, in matters concerning land, we are cognizant of the fact that location is of paramount importance. Here consideration should be given to accessability, road frontage, water supply, easements through the land, topography, etc. It might be that a 5-acre tract which is sold in a district which has 1-acre zoning has only one buildable site of about one and one-half acres and the rest of the land was sold with it because, for all practical purposes, it was indivisible, provided more privacy and was sold with the building site at a total price far below the price of 5 buildable lots and yet above the price of a 1-acre tract.

In reaching his determination on the matters covered above, the certifying officer should resort to the aid of experts in the real estate field. Information on such matters could be obtained locally from reliable real estate brokers or appraisers and/or employees of the Farmers Home Administration who could also set a valuation on the land that goes with the residence and appurtenant buildings *vis-a-vis* the remaining tract of land. The valuation of the excess land for proration purposes would be the difference between the purchase or sale price less the valuation of the residence, the residence site and its appurtenant buildings.

In prorating the expenses, however, the certifying officer should also take into account the practice of billing by attorneys, real estate brokers and surveyors in his locality. There are certain legal services which are provided for a flat fee such as recording of a document or drawing a deed whereas a settlement fee might be based on a percentage of the purchase/sale price of the property and might include a flat fee for title search. In this connection, brokerage fees are almost always based on a percentage of the sale price. If the title examination, for example, is based on a percentage of the purchase price, the amount of the expense should be prorated in accordance with a ratio formula of residence site value to purchase price of the property. On the other hand, if the attorney charges a flat fee for title examination, whether it concerns 1 acre or 5 acres, the reimbursable expenses should not be prorated at all but should be paid in *toto*, providing the fee is reasonable in amount and in line with other charges for similar services in the locality concerned.

Similar considerations should be applied to the surveyor's fee. We understand that a surveyor's fee might be composed of a charge for the surveyor's search of the land records and a charge for the field work covering the actual measurement of the land necessary for the legal description of the property. In such cases careful consideration should be given to the charges. Those that are related to the field work

should be prorated according to the size of the property and the ratio formula determined as above while all charges attributable to work on the land records should be paid because a searcher could spend as much time working on the land records tracing the evolution of a small parcel of land as he/she would on a large tract.

The above methods of determination of the portion of land which "reasonably relates to the residence site" were offered as examples of the kinds of considerations which agencies should take into consideration in determining the amount of charges which are attributable to fees subject to the prorating directive of FTR para. 2–6.1f (May 1973). They are by no means intended to be exhaustive. In case of any doubt as to the propriety of certifying a particular voucher for payment, or in case the employee takes exception to the administrative determination, the matter may be forwarded to our Office, but should be accompanied by the type of supporting evidence on which the original determination was made as described herein, for review and disposition.

[B–180588]

Pay—Retired—Annuity Elections for Dependents—Annulment of Widow's Remarriage

Annuity payments to a widow of a deceased member under 10 U.S.C. 1434 of the Retired Serviceman's Family Protection Plan which were terminated because the widow remarried in Nevada, may be resumed from the date of termination since a California State court declared such marriage a nullity and since the effect of such decree under the California conflict of laws rule is that the marriage became void *ab initio* when the decree of annulment was entered.

In the matter of reinstatement of Retired Serviceman's Family Protection Plan annuity, January 17, 1975:

This action is in response to a letter with enclosures, from Mr. N. R. Breningstall, Chief, Accounting and Finance Division, Headquarters Air Force Accounting and Finance Center, requesting an advance decision as to the propriety of making payment on a voucher in the amount of $6,816 in favor of the unremarried widow of a late Lieutenant Colonel, Retired, in the circumstances described. The submission was forwarded to this Office by the Office of the Deputy Assistant Comptroller for Accounting and Finance, United States Air Force and has been assigned Air Force submission No. DO–AF–1218 by the Department of Defense Military Pay and Allowance Committee.

The submission states that the member was retired from the United States Air Force on August 31, 1960, and died on August 3, 1966. Having previously elected to participate in the Retired Serviceman's

Family Protection Plan (RSFPP), a monthly annuity in the amount of $170.40 was established effective August 1, 1966, payable to the unremarried widow of the deceased retiree. The annuity was continued through July 1970, when her entitlement terminated pursuant to 10 U.S. Code 1434(a)(1) because of her remarriage on July 4, 1970.

On December 4, 1972, 2 years and 5 months after the marriage ceremony, the widow and her second husband separated. Thereafter, a petition for annulment was filed in the Superior Court of California, County of Los Angeles under section 4425(d) of the California Civil Code, which provides that a marriage may be declared a nullity if at the time of the marriage the consent of either party was obtained by fraud unless such party afterwards, with full knowledge of the facts which constituted the fraud, freely cohabited with the other as husband or wife. On May 22, 1973, the court decreed the marriage to be a nullity, but it was not stated in the decree whether the marriage was annulled from its inception or only from the date of the decree. However, based upon that decree, the claimant seeks reinstatement of her annuity as the unremarried widow of the Lieutenant Colonel.

A decision by this Office is requested on the question as to whether the claimant, following the annulment of the remarriage, qualifies as the unremarried widow of the member and if so, the date annuity payments may be resumed. In this regard, doubt is expressed as to the propriety of such payment, citing certain decisions of this Office concerning void and voidable marriages which may be for application.

Section 1434(a) of Title 10, U.S. Code, provides that an eligible member may make an annuity under the RSFPP payable to his surviving spouse, ending when the spouse dies or remarries.

It is the general rule that the validity of a marriage is determined by the law of the place where contracted. *See* 37 Comp. Gen. 188 (1957), and cases cited therein. It is also the general rule that an annulment decree renders a purported marriage void from the beginning. See 55 C.J.S. 951, note 54. See also *McDonald* v. *McDonald*, 58 P.2d 163 (1936); *Folson* v. *Pearsall*, 245 F.2d 562 (1952); and *Starace* v. *Celebreze*, 233 F. Supp. 452 (1964). However, in certain instances, the statutes tend to recognize that an annulled marriage has sufficient status to support certain rights which flow from the "marriage." See *Hahn* v. *Gray*, 203 F.2d 625 (1953); *Nott* v. *Folsom*, 161 F. Supp. 905 (1958); *Gloss* v. *Railroad Retirement Board*, 313 F.2d 568 (1962); and *Sadowitz* v. *Celebreze*, 226 F. Supp. 430 (1964). See also in this regard, the California case of *In re Gosnell's Estate*, 146 P.2d 42 (1944), upon which we relied significantly in arriving at our conclusion in 37 Comp. Gen. 188, *supra*.

Under the law of the State of Nevada, where the purported marriage took place, a marriage may be annulled on the grounds of fraud and if the consent of either party was obtained by fraud and the fraud proved, the marriage shall be void from the time its nullity shall be declared by a court of competent jurisdiction. Sections 125.300 and 125.340, Nevada Revised Statutes.

While it does not appear that the Nevada courts have ever interpreted section 125.340, Nevada Revised Statutes, the United States District Court, Northern District of California, Southern Division, considered in the case of *Santuelli* v. *Folsom*, 165 F. Supp. 224 (1958), a situation where a widow's social security benefits were terminated because of her remarriage in Nevada. On the question of the annulment of that marriage in California, the court distinguished the facts therein from those in the *Gosnell* case, *supra*, and held that since a void marriage is a nullity under Nevada law from its inception, a voidable marriage becomes void *ab initio* when "a court of competent authority" enters its decree of annulment. Also, in the case of *Thurber* v. *United States*, Civil Action No. 5729, United States District Court for the Western District of Washington, Northern Division (1963), involving the annulment in Nevada on the ground of fraud of a marriage celebrated in Hawaii, the court held citing *Folsom* v. *Pearsall*, *supra*, that the plaintiff was entitled to reinstatement of annuity under the RSFPP, from the time it was discontinued, thus concluding, in effect, that she had not remarried within the meaning of 10 U.S.C. 1434(a)(1). A similar conclusion was reached in *Holland* v. *Ribicoff*, 219 F. Supp. 274 (1962), involving the Social Security laws.

In the circumstances and since the California court in the present case entered a Judgment of Nullity and declared that the parties "be restored to the status of unmarried persons" the decree may be accepted as establishing that the claimant remains the unremarried widow of the Lieutenant Colonel. *See* B–171355, January 13, 1971. *Cf.* B–175226, May 15, 1972.

With regard to the date on which the annuity should be reinstated, in decision B–167960, dated October 23, 1969, we considered the situation where a State Court of Kansas, on the basis of the law in Kansas, annulled a marriage which had taken place in Nevada. We held that the widow was entitled to reinstatement of annuity payments from the time that they were discontinued. Our decision was based on *Thurber* v. *United States*, Civil Action No. 5729 (W.D. Wash. 1963) the holding of which was that a widow, who is entitled reinstatement of an RSFPP annuity, is entitled to reinstatement from the time that it was discontinued. It appears that all of the decisions of this Office since the decision of October 23, 1969, *supra*,

have consistently followed the holding in *Thurber*. See *e.g.*, B–171355, January 13, 1971; B–175226, May 15, 1972. Of course, such payments may not be made if payment of the annuity has been made to a contingent beneficiary after the subsequently voided remarriage and prior to the annulment.

Accordingly, the widow is entitled to have her annuity reinstated and paid effective with the month of August 1970, unless paid to a contingent beneficiary for all or part of that period and if otherwise proper. The voucher enclosed with the submission will be returned for action in accordance herewith.

[B–180974]

Pay—Service Credits—Cadet, Midshipman, etc.—Retired Pay

Service as cadet-midshipman, Merchant Marine Reserve, United States Naval Reserve, at the United States Merchant Marine Cadet Basic School, Pass Christian, Mississippi, from March 1945 until December 1946, is Reserve service for purposes of 10 U.S.C. 1331(c) and, therefore, a person so attending must have performed "wartime service" as defined in that subsection in order to be eligible for retired pay based on non-Regular service under Chapter 67 of Title 10, United States Code.

In the matter of eligibility for retired pay, January 17, 1975:

This action is in response to a letter from the Assistant Secretary of the Army (Financial Management), requesting an advance decision on the question as to whether attendance as a midshipman at a Merchant Marine school from March 1945 until December 1946 is to be considered as service in a Reserve component of an armed force, which would require the person so attending to perform the requisite wartime service as provided in section 1331(c), Title 10, U.S. Code, in order for such individual to be eligible for retired pay under Chapter 67 of Title 10. The submission has been assigned submission number SS–A–1213 by the Department of Defense Military Pay and Allowance Committee.

The submission states that the Commander, First United States Army, questions the eligibility of Lieutenant Colonel Paul R. M. Miller to receive retired pay under Chapter 67, Title 10, U.S. Code. It appears that the officer, currently a commissioned member of the Army Reserve in an active status, was appointed a midshipman, Merchant Marine Reserve. United States Naval Reserve, on March 14, 1945, to attend the Merchant Marine Cadet Basic School, Pass Christian, Mississippi, and on December 2, 1946, was discharged therefrom prior to the normal date of graduation. He enlisted in the United States Naval Reserve on September 15, 1947, and was discharged therefrom on July 26, 1949, to accept a commission in the

United States Army Reserve; however, the submission indicates that he has performed no extended active duty during his service in the Naval Reserve or Army Reserve.

The submission states that an opinion rendered by the Judge Advocate General, Department of the Army, dated June 13, 1973, stated that service as a midshipman, Merchant Marine Reserve, United States Naval Reserve, was considered service as a Reserve of an armed force within the meaning of section 1331(c), Title 10, U.S. Code. However, it was further stated therein that a person with such service before August 16, 1945, would not be entitled to retired pay under provisions of Chapter 67, Title 10, U.S. Code, unless he had the requisite wartime service as provided in section 1331(c) of the same title.

The submission goes on to state that an opinion rendered by the Judge Advocate General, Department of the Navy, dated March 24, 1955, held that if a Merchant Marine cadet was not called to active duty in the Naval Reserve, he would be under the jurisdiction of the United States Maritime Commission which would not constitute membership in a Reserve component. As a result, such a person would not be precluded from qualifying for retirement pay under Title III, subsection 302(a) of the Army and Air Force Vitalization and Retirement Equalization Act of 1948, approved June 29, 1948, ch. 708, 62 Stat. 1087, as amended, and presently codified as 10 U.S.C. 1331.

With regard to the above, the submission makes reference to 38 Comp. Gen. 797 (1959), wherein we held that the time during which cadets at the United States Merchant Marine and State Maritime Academies held appointments as midshipmen, Merchant Marine Reserve, was not creditable in the case of officers for longevity pay purposes under the Pay Readjustment Act of 1942, nor was it creditable for basic pay purposes under the Career Compensation Act of 1949. We said, however, that such service may be included by enlisted personnel in the computation of their years of service for basic pay purposes even though the Naval Reserve status is inactive and exists concurrently with his status as a cadet.

Additional reference is made to 47 Comp. Gen. 221 (1967), wherein we held that inactive service as a Reserve midshipman constitutes "service (other than active service) in a Reserve component of an armed force" within the meaning of the phrase contained in clause (4), section 1333 of Title 10, U.S. Code. Therefore, we decided that inactive Reserve m idshipman service prior to July 1, 1949, should be creditable servi ce in establishing the multiplier factor for retired pay in formula No. 3, 10 U.S.C. 1401.

Consequently, in view of the conflict in the Judge Advocate General opinions, a decision is requested as to whether attendance as a midshipman at the United States Merchant Marine Cadet Basic School, Pass Christian, Mississippi, from March 1945 until December 1946 is "service (other than active service) in a Reserve component of an armed force" which would require the person so attending to perform the "wartime service" (active duty) as provided in section 1331(c), Title 10, U.S. Code, in order to be eligible for retired pay for non-Regular service under Chapter 67 of the same title (10 U.S.C. 1331–1337).

Section 1331 of Title 10, U.S. Code, provides in pertinent part:

(c) No person who, before August 16, 1945, was a Reserve of an armed force, or a member of the Army without component or other category covered by section 1332(a)(1) of this title except a regular component, is eligible for retired pay under this chapter, unless he performed active duty after April 5, 1917, and before November 12, 1918, or after September 8, 1940, and before January 1, 1947, or unless he performed active duty (other than for training) after June 26, 1950, and before July 28, 1953.

In our decision of August 11, 1971, 51 Comp. Gen. 91, concerning a former member of a Reserve component and his entitlement to receive retired pay based upon the non-Regular retirement law presently in effect, we stated that at the time the 1948 law was first enacted Congress stipulated that for those individuals who were members of a Reserve component prior to August 16, 1945, only those who served on active duty during World War I or World War II could become eligible for retired pay on the basis of non-Regular service. For those who were Reserves of an armed force before August 16, 1945, and who had no such service, the only manner in which they could subsequently become entitled to retired pay benefits for non-Regular service (Title III of the 1948 act and Chapter 67 of the current Title 10, U.S. Code) would be as the result of active service in one of the later periods of war or national emergency added by subsequent legislation. We concluded therein that, in the absence of that active service, no right to retired pay existed under the present law. The restriction on receipt of retired pay, however, does not apply to any person who was not a Reserve of an armed force before August 16, 1945.

In our decision of November 25, 1969, 49 Comp. Gen. 356, involving a cadet-midshipman, MMR, USNR, who attended the United States Merchant Marine Cadet School at San Mateo, California, from August 1943 until April 1945, in answer to question 2, we held that while attendance at the school may not be credited in computing years of service on retirement under Chapter 67 of Title 10, U.S. Code, such a cadet-midshipman is to be credited for that service under 10 U.S.C.

1333(4), as "service (other than active service) in a reserve component * * *."

In arriving at that decision, we made reference to title 46, Code of Federal Regulations, Cumulative Supplement, Chapter III, Part 310 and the 1945 and 1946 Supplements thereto, which governed the appointment and training of enrollees in the Merchant Marine, including cadets in the U.S. Merchant Marine Cadet Corps who attended different academies and schools there mentioned, which included both the United States Merchant Marine Cadet School, San Mateo, California, and the United States Merchant Marine Cadet School at Pass Christian, Mississippi, and provided in part in section 310.2 of Part 310:

(c) All cadets at State Maritime Academies will be enrolled in the Maritime Service, and in the U.S. Naval Reserve, as midshipmen, Merchant Marine Reserve (inactive) * * *.

Since the member, while attending the United States Merchant Marine Cadet School, Pass Christian, Mississippi, from March 1945 until December 1946, was required to have a status as a member of the United States Naval Reserve, such service being properly creditable under the provisions of 10 U.S.C. 1333(4), the restriction imposed by 10 U.S.C. 1331(c) which requires the member to have had the requisite "wartime service" must be applied. The question presented is answered accordingly.

[B-182337]

Contracts—Negotiation—Requests for Proposals—Master Agreement—Use of List

Department of Agriculture's proposed use of an annual Master Agreement prequalifying 10 consulting firms in each of 8 subject areas is unduly restrictive of competition. Unlike Qualified Products List/Qualified Manufacturers List-type procedures, which limit competition based on an offeror's ability to provide a product of the required type or quality, the proposed procedure would preclude competition of responsible firms which could provide satisfactory consulting services based only upon a determination as to their qualifications compared to those of other interested firms.

In the matter of Department of Agriculture's use of Master Agreement, January 20, 1975:

By letter of October 1, 1974, the Assistant Secretary for Administration, Department of Agriculture, has requested an advance decision concerning the propriety of a proposed procedure by which offers for each of 8 specific categories of consulting services would be solicited from predetermined classes of 10 offerors.

The Department explains that it is burdensome and impractical from an administrative viewpoint to evaluate the large numbers of

proposals which are regularly received in response to its solicitations for consulting services. Reportedly it is not unusual for the Department to receive in excess of 20 proposals for a single job requirement. The evaluation of such large numbers of proposals is costly in terms of manpower expended for the actual evaluation and in terms of the manpower that must be redirected to this task from other duties. In addition, it is reported that the time involved in evaluating large numbers of proposals decreases the Department's ability to respond quickly to needs for consulting services and may delay the initiation or completion of a project.

To simplify the solicitation procedure and minimize the administrative burden and expense of evaluation, the Department of Agriculture proposes to award a 1-year Master Agreement for its consulting requirements on projects estimated under $100,000 in the Washington, D.C. area. The Department has issued a request for proposals (RFP) qualifying firms under the Master Agreement. Copies of the RFP have been sent to 280 firms and it has also been advertised in the Commerce Business Daily. Under the RFP, the Department's consulting needs have been divided into 8 subject matter areas as follows:

1. Accounting, audit and budget systems analysis and developmental services.
2. Data processing and information systems analysis and developmental services and related software studies.
3. Organizational review.
4. Personnel analysis.
5. Planning—project management assistance.
6. Program evaluation—cost benefit analysis.
7. Work measurement programs.
8. Telecommunications and telecommunications software studies.

From among the 127 firms which have responded by submitting proposals for qualification under the Master Agreement, the Department of Agriculture proposes to select the 10 most qualified firms in each subject matter area. By the terms of the Master Agreement, firms so qualified will not be obligated to provide any particular services. For the 1-year period for which the Master Agreement is operative, however, only those firms will be eligible to submit proposals to fulfill the Department's consulting needs in the particular subject matter area. In this manner the Department believes it will be assured of receiving no more than 10 proposals for any particular task and will be assured in advance that all offerors possess the capability to satisfactorily perform.

The RFP solicits proposals containing substantially the following information:

IX. SUBMISSION OF PROPOSALS FOR [MASTER] AGREEMENT

Each contractor submitting a proposal shall provide the following information:

A. Indicate the service areas listed on the SCOPE OF WORK, paragraph IV to which your proposal is in response. It is not necessary to include all service areas.

B. Provide qualifications for performing work against the services areas indicated. Include experience and capacity in doing similar work for the Government or private industry. Name and telephone number of customer's contract representative should be provided.

C. The contractor shall provide the criteria to be used in his process of selection of project managers and senior staff on individual task orders. These internal criteria should include the contractor's training program as well as other personnel development programs to ensure that the contractor's system provides the most highly qualified individuals.

D. Provides resumes of typical professionals who would be available to work on individual task order. Resumes should identify—previous experience, education—specific qualifications, and previous assignment responsibilities which are relevant to the service areas.

E. Designate a contractor's representative who can be contacted regarding (Include a resume).

—Proposed task orders and staff availability
—Contract performance
—Contract administration questions
—Contract negotiations

It is clear that the Master Agreement as conceived by the Department of Agriculture is in fact a mechanism for prequalification of offerors. Any system for prequalification of offerors, or otherwise limiting the number of offers, is to some degree in derogation of the principal tenet of the competitive system that bids or proposals be solicited in such a manner as to permit the maximum amount of competition consistent with the nature and extent of the services or items being procured. *See* 41 U.S. Code 253(a); Federal Procurement Regulations 1-1.301-1, 1-1.302-1(b). The inquiry pertinent to determining the validity of any procedure limiting the extent of competition is not whether it restricts competition *per se*, but whether it unduly restricts competition.

In considering legitimate restrictions on competition in Government procurement, we have upheld the use of Qualified Products Lists (QPL). In 36 Comp. Gen. 809 (1957) we indicated that the

Government's interest in obtaining maximum competition is to be weighed against a *bona fide* administrative determination that the exigencies of a particular procurement program are such that the delay involved in obtaining maximum competition would adversely affect the Government's interest. Similarly, in B-135504, May 2, 1958, we upheld the use of a Qualified Manufacturers List (QML) in the "make, trim and cut" clothing industry. In upholding the use of a procedure for prequalification of manufacturers similar to that for qualifying products for the QPL we relied heavily upon the clear showing that had been made in the course of Congressional hearings that a policy of obtaining maximum competition was in fact discouraging reputable companies from bidding on Government contracts with the result that the clothing items procured were often of inferior quality. We there recognized that while the QML procedure was somewhat restrictive of competition, it was not unduly restrictive under the circumstances and might in fact encourage competition between responsible clothing manufacturers. Based on similar considerations of necessity, in 50 Comp. Gen. 542 (1971), we considered and interposed no objection to the National Aeronautics and Space Administration's prequalification of microcircuitry manufacturers by means of a production line certification procedure.

While the QPL/QML-type procedures referred to above are similar to those proposed under the Department of Agriculture's Master Agreement in that all involve a form of prequalification, they differ in several critical respects. Under QPL/QML-type procedures, no manufacturer or producer is necessarily precluded from competing for a procurement for which he is able to provide a satisfactory product and such manufacturer or producer may become eligible to compete at any time that it demonstrates under applicable procedures that it is able to furnish an acceptable item meeting the Government's needs. Under the procedures proposed by the Department of Agriculture, disqualification of an offeror would not be predicated upon a finding that it could not provide a satisfactory study, but that other firms could in all likelihood furnish a study of superior quality. Whereas disqualification under the QPL/QML-type procedures is based on a determination as to a potential offeror's ability to furnish the particular item needed by the Government, the Master Agreement would exclude a potential offeror upon a general finding as to the relative qualification of that firm to perform consulting services in the general area in which the Government might require a study. Moreover, we point out that the QPL/QML-type procedures have been sanctioned based not merely on a showing of administrative expediency, but on a showing that the restrictive procedures were essential to assure the procurement of a satisfactory end product. The Department of

Agriculture has offered no such evidence as to essentiality for restricting competition, but has indicated only that obtaining maximum competition is administratively burdensome.

In fact the procedures proposed by the Department are somewhat analogous to those considered in 53 Comp. Gen. 209 (1973). In that case we considered a solicitation procedure employed by the National Highway Traffic Safety Administration (NHTSA) for the establishment and operation of a Qualified Offerors List (QOL). The QOL as established by the NHTSA included contractors which had received awards during the prior 2 fiscal years, contractors whose proposals submitted during the previous 2 fiscal years had been evaluated as technically acceptable, and other firms which had been determined to be qualified based on "capability descriptions" submitted by them and evaluated in advance of any procurement. The NHTSA procedure was an attempt to predetermine the responsibility of potential offerors. There we found the use of a QOL to be an undue restriction upon competition because NHTSA had stated no reason to justify the need for predetermination of bidder/offeror responsibility beyond the need to restrict the available number of solicitations.

Since the sole justification for use of the Master Agreement is administrative expediency, we consider the procedure proposed by the Department of Agriculture to be unduly restrictive of competition under the foregoing rationale and, therefore, improper.

[B-180124]

Transportation—Rates—Tariffs—Incorporation by Reference

A common carrier may by reference incorporate into a Government rate tender the transportation services and charges published in other tariffs.

Transportation—Rates—Light and Bulky Articles

Application of the light and bulky rule in carrier's published tariff is premised on each article transported and not on the size of the package or the shipment as a whole.

In the matter of Wells Cargo, Inc., January 24, 1975:

Wells Cargo, Inc., a motor freight common carrier operating in interstate commerce, has requested the Comptroller General to review the claims settlements which disallowed additional amounts claimed by the carrier on several shipments of property transported for the United States.

Five of the carrier's claims involve shipments of ammunition and explosives which moved between California and Nevada. On those shipments our Transportation and Claims Division applied the rates named in Wells Cargo rate tender I.C.C. 34 (a section 22 quotation

issued pursuant to 49 U.S. Code 22, 317 (b)) for the line-haul services, and the charges published in Rocky Mountain Motor Tariff Bureau Tariff 7–C, MF–I.C.C. 186, for the hand-to-hand signature services requested on the shipments.

The carrier contends that the line-haul rates named in tender I.C.C. 34 cannot be used for computing the line-haul charges on these shipments because item 16 provides that no accessorial charges are involved. The carrier's contention, however, omits application of item 18 of the tender which provides:

> Except as otherwise provided herein, shipments made under the provisions of this tender are entitled to such additional services and privileges as are provided in separately published tariffs or tenders to which the carrier is a party, subject to the tariff or tender charges, allowances, rules and regulations applicable to such services and privileges.

When considered together, items 16 and 18 provide that the line-haul rates named in the rate quotation do not include any accessorial services by the carrier, but that the carrier will furnish the accessorial services named in any other tariffs in which it participates at the charges specified. Since Wells Cargo, Inc. is named as a participating carrier to the services and charges published in Rocky Mountain Motor tariff 7–C, the hand-to-hand signature services and charges named in that tariff are proper for application on shipments rated under rate tender I.C.C. 34. The basis used in the settlements is therefore proper and the settlement actions are sustained.

The carrier also requests review of other settlements which disallowed the additional freight charges claimed on 26 shipments of empty aluminum aerial bombs transported from Hawthorne, Nevada, to Port Chicago, California. In the bases of settlement, our Transportation and Claims Division computed the freight charges on the actual weight of articles shipped at the rates published in Wells Cargo, Inc., Tariff 1–B, MF–I.C.C. 4. The claimant contends that higher charges apply based on the provisions of Rule 140 of the tariff which relates to light and bulky articles. Rule 140 reads as follows:

> When a shipment is composed of or includes a light and bulky article or light and bulky articles whose total measurement (or such light and bulky article or articles) is in excess of 64 cubic feet and when such article or articles weigh less than fifteen (15) pounds per cubic foot of space occupied, charges shall be assessed by applying the class or commodity rate applicable thereto on the basis of fifteen (15) pounds for each cubic foot of space occupied by such article or articles. (See Notes 1, 2 and 3 below.)
>
> Note 1—The provisions of this rule shall be deemed to relate to each article in the shipment separately and not to the shipment as a whole.

Notes 2 and 3 are not relevant to the question here.

The shipping records in our Office show that each bomb was separately packaged in a wire bound crate and that six of the crated bombs were strapped to a pallet for transportation. Wells Cargo

contends that the light and bulky article rule in the tariff applies on the shipments because the contents of the pallet package exceeded 64 cubic feet. In support of the contention, the carrier cites the decision in *Standard Electrica, S.A.* v. *Hamburg Sudamerikanische Dampfschiffaharts-Gesellschaft*, 375 F.2d 943 (2d Cir. 1967), certiorari denied, 389 U.S. 971. The court there found that the skidded commodities shipped were within the meaning of the word "package" as used in the Carriage of Goods by Sea Act. Section 1303, paragraph 5, 46 U.S.C. 1304(5), provides that:

> Neither the carrier nor the ship shall . . . become liable for any loss or damage . . . of goods in an amount of $500 per package.

The decision cited, however, is not relevant because the light and bulky article rule in tariff 1–B by its terms applies to each article and not to the package or to the shipment as a whole. Since application of the rule is premised on the cubic measurement of each article and since the articles shipped were crated bombs which did not exceed 64 cubic feet, the light and bulky article rule is not for application on the shipments. The settlements issued on the claims are therefore proper and are sustained.

[B–181387]

Contracts—Negotiation—Two-Step Procurement—First Step Procurement—Technical Approaches

Contracting officer's rejection of technical proposal submitted under first step of two-step formally advertised procurement was proper exercise of discretion since proposal was determined unacceptable and there is no evidence of record that the determination was unreasonable or made in bad faith. Since evaluation and overall determination of technical adequacy of proposal is primarily function of procuring activity, which will not be disturbed in absence of clear showing of unreasonableness or an abuse of discretion, judgment of agency's technical personnel will not be questioned where such judgment has a reasonable basis merely because there are divergent technical opinions as to proposal acceptability.

Contracts—Negotiation—Requests for Proposals—Offer—Additional Information

While solicitation under two-step formally advertised procurement provided contracting officer with authority to request additional information from offerors of proposals which were considered reasonably susceptible of being made acceptable, fact that protester was not afforded opportunity to revise or modify its proposal was not improper since procuring activity reasonably determined proposal unacceptable and that it could not be made acceptable by clarification or additional information, but would require major revision.

Contracts—Negotiation—Offers or Proposals—Prequalification of Offerors—Restrictive of Competition

Federal Aviation Administration's publication of qualification criteria in Commerce Business Daily to assure that only qualified firms received copies of request for technical proposals appears to be unduly restrictive of competition and

should be eliminated from future procurements in absence of appropriate justification on basis that prequalification of offerors is in derogation of principal tenet of competitive system that proposals be solicited in such manner as to permit maximum competition consistent with nature and extent of services or items to be procured.

In the matter of the METIS Corporation, January 24, 1975:

On January 11, 1974, request for technical proposals (RFTP) No. WA5M–4–7573, was issued by the Federal Aviation Administration (FAA), as the first step of a two-step procurement. The RFTP solicited technical proposals for an automated radar terminal system (ARTS II), consisting of highly complex electronic hardware to provide alphanumerics to follow and identify each target on radar display screens at terminal air traffic control facilities.

To assure that only qualified firms receive the RFTP, the FAA published qualification criteria covering design, engineering, fabrication and delivery experience in the Commerce Business Daily on October 11, 1973. Eleven interested firms submitted qualification data in response thereto. Based on a review of the data, the procuring activity determined that eight firms were qualified to receive a copy of the solicitation. Of the eight qualified for participation in the procurement, six firms, including a joint venture of METIS Corporation (METIS) and General Telephone and Electronics Information Systems, Inc., submitted technical proposals in response to step one of the solicitation. These proposals were forwarded to an FAA technical evaluation team for evaluation and classification in compliance with the RFTP, which stated in pertinent part:

* * * The technical proposals, as submitted, will be categorized as (i) acceptable, (ii) reasonably susceptible of being made acceptable by additional information clarifying or supplementing, but not basically changing the proposals as submitted, or (iii) in all other cases, unacceptable. Any proposal which modifies, or fails to conform to the essential requirements or specifications of, this Request for Unpriced Technical Proposals will be considered non-responsive and categorized as unacceptable. * * *

The FAA technical evaluation team evaluated the technical proposals on the basis of five major areas as follows: (1) understanding of the requirements; (2) proposed method of approach; (3) major problem areas and proposed solutions; (4) technical capabilities for design and production; and (5) program management capability including consultants and subcontracting. The record indicates that on May 6, 1974, the evaluation team concluded that while none of the technical proposals were acceptable as submitted, five of the six proposals were determined to be reasonably susceptible of being acceptable. Only the technical proposal submitted by METIS was found to be technically unacceptable and not reasonably susceptible of being made acceptable by additional information clarifying

or supplementing, but not basically changing the proposal as submitted. The technical evaluation team determined that any attempt to upgrade the METIS proposal would require unreasonable efforts on the part of the Government and a major resubmission of the proposal with subsequent reevaluation. Accordingly, the contracting officer, by letter dated May 15, 1974, advised METIS that its proposal was technically unacceptable and indicated the principal areas in which the proposal was considered deficient. At the request of METIS, a debriefing conference was held on May 21, 1974, whereat FAA technical personnel described the weaknesses/inadequacies of the METIS technical proposal and explained the reasons for its rejection.

Following the debriefing conference, METIS, by letter dated May 28, 1974, protested to our Office the procuring activity's rejection of its technical proposal and its decision not to issue the second-step invitation for bids to the firm. METIS contends that the determination that its technical proposal was unacceptable resulted from arbitrary, capricious and incorrect action on the part of the contracting officer and his immediate superiors. In addition, the protester alleges that while the other competitors were permitted to clarify and modify their technical proposals, the procuring activity advised METIS that revisions to its proposal would not be considered.

The contracting officer's letter of May 15, 1974, advising METIS that its proposal was determined technically unacceptable described the principal areas in which the proposal was considered deficient. In addition, the FAA, in its administrative report of August 12, 1974, furnished our Office a detailed summary of the ARTS II technical evaluation teams's evaluation of the METIS proposal. Since copies of such documents were furnished to the protester, we will not restate the specific reasons for rejection of the METIS proposal. METIS, in turn, specifically rebutted all of the particular deficiencies stated in the FAA's letter of May 15, and in addition, responded with a detailed rebuttal of the evaluation performed by the FAA technical personnel. Although we have examined the submissions of both the FAA and METIS, for the reasons stated below we believe it would serve no useful purpose to recount these essentially technical arguments.

While it is clear that there is strong disagreement between METIS and the FAA as to the validity of the technical deficiencies raised by the technical evaluation team, it is not the function of our Office to resolve technical disputes of this nature. *See* 52 Comp. Gen. 382, 385 (1972). The overall determination of the relative desirability and technical adequacy of proposals is primarily a function of the procuring agency and in this regard, we have recognized that the contracting officer enjoys a reasonable range of discretion in the evaluation of

proposals and in the determination of which offer or proposal is to be accepted for award as in the Government's best interest. *Matter of Kirschner Associates, Inc.*, B–178887(2), April 10, 1974; B–176077(6), January 26, 1973. Since determinations as to the needs of the Government are the responsibility of the procuring activity concerned, the judgment of such activity's specialists and technicians as to the technical adequacy of proposals submitted in response to the agency's statement of its needs ordinarily will be accepted by our Office. B–175331, May 10, 1972. Such determinations will be questioned by our Office only upon a clear showing of unreasonableness, an arbitrary abuse of discretion, or a violation of the procurement statutes and regulations. *Matter of Ohio State University; California State University*, B–179603, April 4, 1974; B–176077(6), *supra*. This is particularly the case where the procurement involves equipment of a highly technical or scientific nature and the determination must be based on expert technical opinion. *See* 46 Comp. Gen. 606 (1967).

Here, although METIS has provided detailed technical arguments in support of its protest, we are unable to conclude on the basis of our examination of the record that the procuring activity's determination that its technical proposal was unacceptable was arbitrary or unreasonable. It appears from the record that the proposal was evaluated in accordance with the specifications and the stated evaluation criteria and was found to be technically unacceptable and not reasonably susceptible of being made acceptable without major revisions on the basis of a comprehensive evaluation, supported by a 21 page detailing of specific deficiencies. We see nothing in the record which indicates that this evaluation was improper or unfair or that the contracting agency abused its discretion in finding the METIS proposal unacceptable. While METIS obviously does not agree with the FAA's evaluation of its proposal, there is nothing in the record to indicate that the rejection of the METIS proposal was the result of anything other than the reasonable judgment of the FAA's technical experts. We do not believe it is appropriate for this Office to question the FAA's technical judgment when the judgment has a reasonable basis merely because there may be divergent technical opinions as to the acceptability of a proposal. Thus, we are unable to agree with METIS' claim that its proposal should have been regarded as acceptable. See *Matter of Honeywell, Inc.*, B–181170, August 8, 1974.

In regard to the protester's second allegation that it was not permitted to clarify or modify its technical proposal, the RFTP advised offerors to submit proposals which were "fully and clearly acceptable" without additional explanation or information since the Government

reserved the right to determine the acceptability or unacceptability of a proposal solely on the basis of the proposal as submitted without requesting or permitting the submission of further information. The RFTP further provided that:

> * * * If the Government deems it necessary to obtain sufficient acceptable proposals to assure adequate price competition in the second step, or deems it otherwise desirable in its best interest, the Government may, *in its sole discretion*, request additional information from offerors of proposals which the Government considers reasonably susceptible of being made acceptable by additional information clarifying or supplementing but not basically changing any proposals as submitted and, for this purpose, the Government may discuss any such proposal with the offeror. * * * [Italic supplied.]

In this regard, Federal Procurement Regulations (FPR) § 1-2.503-1(b)(4) (1964 ed.) states:

> If, however, it is determined at any time that a technical proposal is not reasonably susceptible to being made acceptable, it should be classified as unacceptable and no discussions of it need thereafter be initiated.

While the solicitation provided the contracting officer with authority to request additional information from offerors of proposals which the Government considered reasonably susceptible of being made acceptable, it did not so provide for proposals determined unacceptable. Furthermore, concerning the above quoted provision of the FPR, we stated in B-165457, March 18, 1969:

> We view the above provision as investing in the technical and procurement personnel * * * considerable latitude in framing the requirements to be met by proposals and in their evaluation. * * * Whether a proposal needs clarification to be deemed acceptable, whether a proposal can be made acceptable by clarification and reasonable effort by the Government * * * are all matters of judgment on the part of the procurement agency, which we will not question unless there is evidence of fraud, prejudice, abuse of authority, arbitrariness or capricious action.

Since we find no evidence of such conduct in the instant case, there is no basis for our Office to question the determination not to seek clarification or modification of the protester's proposal. *Matter of F. A. Villalba Company*, B-179286, January 30, 1974.

Finally, the protester has alleged other action by the agency which it is contended demonstrates arbitrariness on the part of the FAA designed to allow only a few specific contractors to participate in the second step of the procurement. Specifically, METIS contends that two firms were determined to be qualified sources while not satisfying the source-selection criteria; that the performance requirements of the system were significantly degraded to allow a favored contractor to participate more effectively in the procurement; and that there was expressed antagonism by contracting officials against METIS' participation in the procurement. Since METIS has not advanced any evidence to support these charges or to controvert the administrative position that the procurement was conducted fairly in accordance with the applicable regulations, there is no basis for action by our Office.

However, we note that the FAA reports that in order to assure that only qualified firms received copies of the RFTP, the agency, prior to the issuance of the solicitation, published qualification criteria in the Commerce Business Daily. In this connection, we have held that any system for prequalification of offerors, or otherwise limiting the number of offers, is to some degree in derogation of the principal tenet of the competitive system that bids or proposals be solicited in such a manner as to permit the maximum amount of competition consistent with the nature and extent of the services or items to be procured. *See* 53 Comp. Gen. 209 (1973). The question to be answered in determining the validity of any procedure limiting the extent of competition is not whether it restricts competition *per se*, but whether it unduly restricts competition. In the instant case, while the validity of FAA's prequalification procedure was not raised as an issue of protest, it appears to us that the procedure was unduly restrictive of competition as no justification for the procedure, other than administrative expediency, was stated, and as several firms were excluded from competing on the basis of their noncompliance with the prequalification criteria. Accordingly, we are recommending to the Administrator, FAA, that utilization of the above procedure be eliminated from future procurements in the absence of appropriate justification for its inclusion. 53 Comp. Gen. 209, *supra*.

For the foregoing reasons, METIS' protest is denied.

[B-181750]

Panama Canal—Panama Canal Company—Employees—Overtime—Standby, etc., Time—Home as Duty Station

Vessel employees of the Panama Canal Company are protected by the Fair Labor Standards Act, but under the act they need not be compensated for off-duty time spent at home awaiting telephone notification.

In the matter of overtime compensation for Panama Canal Company pilots, January 24, 1975:

The Panama Canal Company has requested the General Accounting Office to furnish an advisory opinion in a matter involving compensation and work schedules of certain of its employees. The question that has been presented concerns the compensability of certain periods of time during which Panama Canal pilots, who pilot vessels through the Canal, are off duty, but are expected to be available for notification by telephone of their proximate duty assignment.

Ship traffic in the Canal is handled on a continual basis, 7 days a week, and an individual pilot may be scheduled to commence duty at any time of the day or night. In order to provide the pilots with

as much advance notice as can be given consistently with efficient operation, their assignments to transmit duty are made by telephone at prescribed hours each day. The procedure is to require the pilot to be available to receive the telephoned notice between 8 and 9 a.m., and in some cases between 5 and 6 p.m., on any day on which the employee is subject to call. The pilots contend that they are entitled to compensation for time during which they are required to wait by their telephones for notification of duty assignments.

The Canal Company takes the position that the pilots have no statutory entitlement to any element of basic or premium pay; that their basic salary rate is fixed administratively within the range prescribed by 35 C.F.R. § 253.131(c) as determined by the Canal Company; and, that as "vessel employees" within the meaning of 5 U.S. Code § 5348(b), pilots are excluded by 5 U.S.C. § 5541(2)(xii) from the premium pay benefits applicable to Federal employees generally. *Christian* et al. v. *Panama Canal Co.*, D.C.Z. civil 2676.

The question for resolution here is not the pay rate at which the pilots should be compensated, but whether they should be compensated at all for time spent awaiting telephone notification. We agree that the overtime provisions of Title 5 do not apply to "vessel employees" of the Panama Canal Company. However, we need not look only at the Canal Zone regulations, which establish the pay rate, to determine whether telephone availability time is compensable working time. In resolving this question it seems necessary to look at the Fair Labor Standards Act (FLSA), 29 U.S.C. § § 201–219 (1964), and regulations promulgated pursuant to that act.

Section 3(e) of FLSA, 29 U.S.C. § 203(e), as amended by Public Law 93–259 (1974), includes all Government employees within coverage of the act:

> In the case of an individual employed by a public agency, such term means—
> (A) any individual employed by the Government of the United States—
> * * * * * * *
> (ii) in any executive agency (as defined in section 105 of such title [title 5, United States Code])

5 U.S.C. § 105 defines executive agency as including Government corporations (corporations owned or controlled by U.S. Government—5 U.S.C. § 103). As a Government corporation, the Panama Canal Company is an executive agency whose employees are protected by coverage of FLSA and its regulations.

FLSA provides for a minimum wage for time worked (29 U.S.C. § 206) and further provides for overtime compensation (29 U.S.C. § 207) for time worked in excess of 40 hours in a workweek. Whether telephone availability time qualifies as time worked under FLSA is the question to be answered.

With regard to the compensability of waiting time in general under the act, 29 C.F.R. § 785.14 provides:

> Whether waiting time is time worked under the act depends upon particular circumstances. The determination involves "scrutiny and construction of the agreements between particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the circumstances * * *." (*Skidmore* v. *Swift*, 323 U.S. 134 (1944).)

With regard specifically to no-call time, 29 C.F.R. § 785.17 provides:

> An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on-call". An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call. (*Armour & Co.* v. *Wantock*, 323 U.S. 126 (1944) * * *.)

In the case of *Armour & Co.* v. *Wantock*, *supra*, at p. 133, the Supreme Court, in determining what constituted work under the Federal Employees Pay Act, used the criterion of whether the time in question was spent "predominantly for the employer's benefit or the employee's" and concluded that this was "dependent upon all the circumstances of the case." In *Rapp* v. *United States*, 167 Ct. Cl. 852 (1964) and *Moss* v. *United States*, 173 Ct. Cl. 1169 (1965), the Court of Claims in considering overtime claims of employees who performed standby duty at their homes, outside of regular duty hours and in excess of their regular 40-hour workweeks, applied the test of whether the time in question was spent predominantly for the employer's benefit. In each case the employee was required to be within hearing distance of his home telephone in order to receive calls and take appropriate action. In each of those cases the court held that where an employee is allowed to stand by in his own home with no duties to perform for his employer except to be available to answer the telephone, the time spent in such standby status does not amount to "hours of work" within the meaning of 5 U.S.C. § 5542, relating to overtime compensation. The court concluded in each case that it could not be said that the employees had spent their time predominantly for their employer's benefit when they performed such duty at home. In the *Moss* case, the court pointed out that: "Except for the requirement that he remain within hearing distance of the telephone, the claimant was free to eat, sleep, read, entertain friends, and otherwise enjoy his normal pursuits while acting as a duty officer at home."

Although we are dealing with a different statute and regulation in the present case, the words being interpreted ("time worked") are substantially the same as those interpreted in the above cases ("hours of work"). Furthermore, the regulation itself cites the *Armour* case. The *Rapp* case and the *Moss* case merely expand upon and further refine the *Armour* case. Thus, it seems appropriate to apply the above reasoning to the present case.

Applying such reasoning here, we are compelled to conclude that the Canal Company is not required by the FLSA to compensate the pilots for the time in question. Since the time is spent at home, the pilots are free to eat, sleep, read, entertain friends and enjoy their normal pursuits so long as they are within hearing distance of the telephone. The time spent is predominantly for the employees' own benefit, not predominantly for the employer's benefit. The pilots do not fit within the category of working while on-call as set forth in 29 C.F.R. §785.17, *supra*, because they are not "on the employer's premises or so close thereto that [they] cannot use the time effectively for [their] own purposes."

[B-181181]

Mileage—Military Personnel—Travel by Privately Owned Automobile—Recruiters—Automobile Insurance Coverage

Although under 37 U.S.C. 428 and 1 Joint Travel Regulations paragraph M5600 a member of armed services whose primary assignment is to perform recruiting duty may be reimbursed for actual and necessary expenses incurred in connection with performance of those duties, recruiter is not entitled to reimbursement by Government for increased cost of extended insurance coverage incurred in connection with use of privately owned automobile in performance of duties where a mileage allowance is authorized incident to such duties since such allowance is a commutation of the expense of operating an automobile including the cost of insurance.

In the matter of reimbursement for automobile insurance coverage for recruiters, January 27, 1975:

This action is in response to letter dated April 15, 1974, from the Acting Assistant Secretary of the Air Force, Manpower and Reserve Affairs, requesting an advance decision concerning reimbursing Armed Forces recruiters for increased insurance costs they may incur as a result of using their privately owned automobiles in the conduct of their recruiting duties. The request was assigned Control Number 74-17 and forwarded to this Office by Per Diem, Travel and Transportation Allowance Committee letter dated April 18, 1974.

The Acting Assistant Secretary's letter indicates that frequently, due to the shortage or nonavailability of Government motor vehicles, members of the Armed Forces whose primary assignment is to perform recruiting duty are authorized to use their privately owned automobiles for official travel in the conduct of their duties. Incident to such travel and duty the members are entitled to mileage allowance and reimbursement for various actual necessary expenses.

The Acting Assistant Secretary further indicates that a recruiter's automobile insurance company would, in all likelihood, deny liability for damages resulting from an accident occurring while the recruiter

was acting on official business, unless the recruiter had previously notified his insurance company that he was using his automobile for business purposes. Apparently, insurance coverage for such "business" use of their automobiles will result in increased insurance premiums for recruiters which, the Acting Assistant Secretary indicates, will make recruiters reluctant to use their privately owned automobiles in carrying out their duties.

The Acting Assistant Secretary points out that 37 U.S. Code 428 (Supp. II, 1972) authorizes reimbursement of recruiters for actual and necessary expenses incurred in connection with recruiting duties. He also notes that the implementing regulations (1 Joint Travel Regulations (1 JTR), paras. M5600–M5603), while authorizing reimbursement for various expenses incurred incident to recruiting duty, do not specifically authorize reimbursement for insurance. The Acting Assistant Secretary states that it would appear that the statutory authority is sufficiently broad in scope that such an expense would be within the intent of the legislation. However, he indicates that it is not free from doubt that such an expense is "necessary" within the meaning of 37 U.S.C. 428. Accordingly, he asks "whether the increased cost of insurance to obtain proper coverage incurred as a result of the use of a recruiter's privately owned automobile in the conduct of his duties would be properly reimbursable."

Section 428 of Title 37, U.S. Code, which was added by the act of September 28, 1971, title II, section 205(a), Public Law 92–129, 85 Stat. 348, 359, provides as follows:

> In addition to other pay or allowances authorized by law, and under uniform regulations prescribed by the Secretaries concerned, a member who is assigned to recruiting duties for his armed force may be reimbursed for actual and necessary expenses incurred in connection with those duties.

The purpose of that provision of law is stated to be as follows in a letter dated January 29, 1971, from the Deputy Secretary of Defense to the President of the Senate, proposing its enactment:

> The purpose of the proposed legislation is to provide reimbursement to members of the armed forces on recruiting duty for actual and necessary out-of-pocket expenses incurred by them incident to their recruiting duties.
>
> In recruiting work, personnel on recruiting duty must project themselves as being willing to discuss their service's selling qualities with any interested party at almost any hour. Consequently, luncheons, snacks, coffee, and even dinner engagements with prospects or their families are not unusual. Parking fees while at itinerary stops, telephone calls while working away from the office, purchase of photostatic copies of vital documents for prospective recruits and candidates, and other small but necessary expenditures are costs that the serviceman must pay from his own pocket.
>
> All of the above items of expense represent costs incurred in the recruitment of personnel for the armed forces. *None of these costs are borne by the Government for whose benefit they are incurred.* Members of the armed forces assigned to recruiting duty find themselves obliged to bear these costs out of their own pockets in order to do the most effective job of recruiting personnel for the armed forces. *The members receive no reimbursement for these out-of-pocket expenses.* Enactment

of this legislation would assist the member in meeting costs he incurs in the performance of his recruiting duties and would, therefore, contribute substantially to the total recruitment effort. [Italic supplied.]

See Senate Report No. 92–93, 92d Cong., 1st Sess., May 5, 1971, which accompanied H.R. 6531 in the Senate, the bill which eventually became Public Law 92–129.

Pursuant to 37 U.S.C. 428 and in accordance with its legislative history 1 JTR para. M5600 authorizes reimbursement to recruiters for snacks, nonalcoholic beverages, and occasional lunches and dinners purchased for prospective recruits, candidates and certain others; parking fees incurred at itinerary stops; official telephone calls; purchase of photographic copies of vital documents for prospective recruits and candidates; and other small but necessary expenditures related to recruiting duty that the member must pay from personal funds. In addition paragraph M5600 specifically provides that reimbursement is not authorized for expenses "covered by other regulations or elsewhere in this volume (e.g., temporary duty and local travel expenses * * *)."

Under the provisions of 37 U.S.C. 404 and 408 (1970), mileage rates are provided for the use of a privately owned automobile for the performance of official business in lieu of actual expenses. See 1 JTR paras. M4203, M4414, and M4502–1. In this regard, this Office has long held that a mileage allowance for the use of a privately owned automobile is a commutation of all the expenses of operating such automobile and precludes reimbursement in addition thereto for any actual expenses incurred unless otherwise authorized by law. *See* 7 Comp. Gen. 284 (1927), 21 *id.* 507 (1941), 41 *id.* 637 (1962), and B–174669, February 8, 1972. Since the cost of automobile insurance, like the cost of fuel, oil, repairs and depreciation, is one of the expenses of operating an automobile, which expense is reimbursed to the member through the mileage allowance, the cost of additional insurance is in fact reimbursed in the mileage rate paid and may not also be reimbursed as an out-of-pocket expense under 37 U.S.C. 428.

Accordingly, the Acting Assistant Secretary's question is answered in the negative.

[B–182273]

Compensation—Removals, Suspensions, etc.—Back Pay—Nonselection Due to Discrimination

Agency determined applicant's nonselection was based on discrimination. Although applicant declined subsequent offer of position, she is entitled to backpay from date of nonselection to declination of offer. Applicable retirement deductions should be made against gross salary entitlement even though amount payable is reduced by interim earnings.

In the matter of backpay—nonselection due to discrimination, January 27, 1975:

The Internal Revenue Service, Department of the Treasury, submitted a voucher in the amount of $516.89 in favor of Mrs. Kathleen M. Brinkman for backpay under the provisions of 5 C.F.R. § 713.271(a)(1) (1974) relating to remedial action for employment discrimination. The Service requested our decision, assuming the voucher was properly payable, as to the amount of retirement deductions to be made.

The facts in summary were stated in an attachment to the submission as follows:

On July 2, 1974, Mrs. Brinkman filed a sex discrimination complaint with the Cincinnati Regional EEO Officer. Mrs. Brinkman alleged discrimination because she was not selected for a Law Clerk Trainee (excepted appointment) position.

An investigation was conducted by a duly authorized EEO Investigator. Our review of the Investigation report indicated that Mrs. Brinkman had been discriminated against because of her sex. As provided by FPM Section 713.271 (a)(1), we determined that except for the discrimination, Mrs. Brinkman would have been hired. We obtained the concurrance of this determination, as required by TPM 713-B-11(a)(1), from the Acting District Director Donald E. Bergherm and the Acting Regional Commissioner Patrick Ruttle. An offer of employment of the type and grade denied Mrs. Brinkman was made to her on August 19, 1974.

Mrs. Brinkman declined our offer of employment and therefore, in accordance with FPM Section 713.271(a)(1) and TPM 713-B-19a(1)(b) is entitled to a lump-sum payment equal to the back pay she would have received from the date she would have been appointed (6-10-74) to the date the offer of appointment was made (8-19-74).

The amount of $516.89, shown on the voucher, was computed as follows:

a. Date of "would be" appointment to "refusal" of offer, 6-10-74 to 8-21-74, 10 weeks and 3 days at $4.793 per hour	$2,032.23
b. For 5 pay periods, 20 hours of annual leave earned at $4.793 per hour	95.86
	$2,128.09
c. Same period employed with Cincinnati Gas & Electric Company at $3.80 per hour	$1,611.20
d. Difference	$516.89

In addition to propriety of payment, the agency asked whether the Civil Service Retirement of 7 percent is to be made from the gross amount of $2,128.09 or the net amount of $516.89.

The provisions of 5 C.F.R. § 713.271(a)(1) read as follows:

REMEDIAL ACTIONS

713.271 *Remedial actions.*

(a) *Remedial action involving an applicant.* (1) When an agency, or the Commission, finds that an applicant for employment has been discriminated against and except for that discrimination would have been hired, the agency shall offer the applicant employment of the type and grade denied him. The offer shall be made in writing. The individual shall have 15 calendar days from receipt of the offer within which to accept or decline the offer. Failure to notify the agency of his decision within the 15-day period will be considered a declination of the offer, unless the individual can show that circumstances beyond his control prevented him from responding within the time limit. If the offer is accepted, appointment shall be retroactive to the date the applicant would have been hired, subject to the limitation in subparagraph (4) of this paragraph. Backpay, computed in the same manner prescribed by § 550.804 of this chapter, shall be awarded from the beginning of the retroactive period, subject to the same limitation, until the date the individual actually enters on duty. *The individual shall be deemed to have performed service for the agency during this period of retroactivity for all purposes except for meeting service requirements for completion of a probationary or trial period that is required.* If the offer is declined, the agency shall award the individual a sum equal to the backpay he would have received, computed in the same manner prescribed by § 550.804 of this chapter, from the date he would have been appointed until the date the offer was made, subject to the limitation of subparagraph (4) of this paragraph. The agency shall inform the applicant, in its offer, of his right to this award in the event he declines the offer. [Italic supplied.]

Since the agency findings as to the facts appear to be within § 713.271(a)(1), the payment as proposed would be proper. With respect to Civil Service retirement deductions, it should be noted that the provisions of 5 C.F.R. 713.271, *supra*, that the entire period of "retroactivity"—i.e., the period between the date she should have been hired and the date she was offered employment— is to be treated as a period of "service" for all purposes except fulfilling probationary requirements. Therefore, all Federal pay earned during that period is subject to deductions for retirement fund contributions in the absence of any Civil Service regulation stating otherwise. 28 Comp. Gen. 333 (1948); 34 *id.* 657 (1955).

Accordingly, the amount of Civil Service retirement deductions is to be made against the gross amount of $2,128.09, which represents the total earnings subject to retirement deductions.

[B–149372]

Treasury Department—Secret Service Agents—Protection for Secretary of Treasury—Reimbursable Basis

Where it is administratively determined that the risk to a Government official would impair his ability to carry out his duties and hence affect adversely the efficient functioning of his agency, then agency funds if not otherwise restricted are available to protect him. However, without specific legislative authority in 18 U.S.C. 3056(a) (1970) or elsewhere, funds appropriated to the Secret Service are not available for such protection. Secret Service protection may be provided to the Secretary of the Treasury or others for whom it is not specifically authorized only on a reimbursable basis pursuant to 31 U.S.C. 686(a) (1970).

In the matter of Secret Service protection for the Secretary of the Treasury, January 28, 1975:

We have considered the question of whether the protective services being provided by the Secret Service for the Secretary of the Treasury at his direction are authorized by law. We have concluded that they are authorized but that funds appropriated to the Secret Service are not available for the purpose of providing such protection.

We have carefully considered the applicable legislation and its history, and the contentions of the General Counsel of the Treasury Department concerning this matter, as set forth in his memorandum to the Secretary of March 19, 1974. The statute authorizing Secret Service protection is 18 U.S. Code § 3056(a) (1970). It provides in this respect as follows:

> Subject to the direction of the Secretary of the Treasury, the United States Secret Service, Treasury Department, is authorized to protect the person of the President of the United States, the members of his immediate family, the President-elect, the Vice President or other officer next in the order of succession to the office of President, and the Vice President-elect; protect the person of a former President and his wife during his lifetime, the person of the widow of a former President until her death or remarriage, and minor children of a former President until they reach sixteen years of age, unless such protection is declined; protect the person of a visiting head of a foreign state or foreign government and, at the direction of the President, other distinguished foreign visitors to the United States and official representatives of the United States performing special missions abroad; * * * and perform such other functions and duties as are authorized by law * * *.

See also Public Law 90–331, set out as a note to 18 U.S.C. § 3056, providing for protection of "major presidential or vice presidential candidates who should receive such protection."

As the opinion of the General Counsel in effect acknowledges, the Secretary of the Treasury is not among those classes of people which the Secret Service is authorized by 18 U.S.C. § 3056(a) to protect. Recognizing this, the General Counsel takes the position that the statutory enumeration, in 18 U.S.C. § 3056(a), of those categories of people for whom protection is specifically authorized to be provided by the Secret Service—

> * * * does not preclude the Secret Service from affording protection to individuals who do not fall within the specific categories * * * if there are circumstances present which make such protection reasonable as a matter of both law and public policy. Because of the nature of what is in issue, *i.e.*, the protection of people whose lives are considered to be in danger, [the Department of the Treasury has] not regarded Congress' enumeration of specific classes of persons to be protected as intended to preclude protection which is in the public interest when ordered by the President on a temporary basis or protection for which there is other authority * * *.

The opinion by the General Counsel discusses first the contention that the President can order protection on a temporary basis of cate-

gories of persons not included within 18 U.S.C. § 3056(a). We need not consider that argument, however, since the protection of the Secretary was not ordered by the President but by the Secretary himself. The opinion goes on to say, concerning the protection of the Secretary, that—

> The deployment of security personnel is an executive function essential to the management of a department and the performance of its business. Thus, it is reasonable that if considered necessary in view of demonstrable evidence of risk, the Secretary * * * be assigned an appropriate number of professionally trained Secret Service agents. Section 301 of 5 U.S.C. provides, in part, that "the head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business . . . ." Reorganization Plan 26 of 1950 (5 U.S.C. App., p. 544) transferred all duties and functions of employees of the Department of the Treasury, including those of the Secret Service, to the Secretary. Accordingly, the Secretary is empowered by law to supervise and direct the activities of Secret Service officers. Such officers, like all Treasury personnel, could be assigned to render him direct assistance to carry out any Treasury responsibilities. In the past, in response to a White House request, the Secretary has deployed Secret Service officers as sky marshals to protect commercial aircraft from hijacking. The Secret Service has trained security personnel from other departments so they could protect their own department heads. The Secret Service also at times conducts investigations for Treasury bureaus which do not have their own investigative capabilities. None of these functions are specifically set out in 18 U.S.C. 3056(a). Each activity has been discussed in appropriation hearings before Congress and none has been critized as beyond the Service's authority as set forth in 18 U.S.C. 3056(a).
>
> During World War II Secretary Morgenthau was supplied a Secret Service detail to insure his personal safety. Given the present national environment and evidence of specific risks, it seems reasonable to the Treasury that the Secretary * * * also be assigned Secret Service agents who have been trained to provide personal protection.
>
> * * * * * * *
>
> For the reasons stated above, the Treasury believes that the basic protective statute is not exclusive and that additional Secret Service protection may be directed in cases not specifically covered by the statute where the risk of harm and the public interest justify such protection * * *. (Footnotes omitted.)

Section 301 of Title 5, U.S. Code, cited by the General Counsel, appears to be of no particular relevance to the issue before us, *i.e.*, whether the Secret Service has legal authority to protect the Secretary of the Treasury on his order. The authority conferred on department heads by 5 U.S.C. § 301 is administrative only. *U.S.* v. *George*, 228 U.S. 14 (1913). (Section 301 is the enactment into positive law, without substantive change, of former 5 U.S.C. § 22, which in turn was in pertinent part identical to R.S. § 161. Accordingly, the construction in *U.S.* v. *George* of R.S. § 161 is directly applicable to 5 U.S.C. 301.) The question therefore remains first whether authority exists in law for protection of the Secretary, and if it does, whether funds of the Secret Service are available to provide it.

The General Counsel cites various precedents in support of his contention that authority exists for the Secretary to direct Secret Service protection in cases not specifically provided for by the statute.

One such precedent relied upon is the protection of Secretary of the Treasury Morgenthau during World War II.

We are not aware of the circumstances of that protection. In any event, it occurred before the enactment of 18 U.S.C. § 3056(a), the first permanent legislation prescribing the protective responsibilities of the Secret Service. Prior to the enactment of the act of July 16, 1951, Ch. 226, 65 Stat. 122, which, as amended, is codified at 18 U.S.C. § 3056(a), the protective responsibility of the Secret Service was prescribed in annual appropriation acts for the Treasury Department. We therefore do not consider the protection of Secretary Morgenthau as a significant precedent in interpreting the present authority of the Secret Service under the 1951 act, as amended.

The General Counsel also cites the training by the Secret Service of security personnel from other departments in support of the contention that the Secret Service has authority beyond that set forth in 18 U.S.C. § 3056(a). Specifically, he refers to the following discussion during hearings on the Treasury, Postal Service and General Government Appropriation, 1974:

> Mr. MYERS. Before we go off the record I only have one more general area and that is your area of providing protection on a routine basis.
>
> In the past year or so a number of Cabinet officers have made remarks about what the Secret Service told them to do and what they couldn't do. I didn't realize that the Secret Service was providing protection to Cabinet Officers.
>
> Mr. ROWLEY [Director of the Secret Service]. No, sir. Each Cabinet Officer today may have, in addition to Defense and the State Department and the Attorney General, to name a few, have their own security officers.
>
> What they are talking about is we train them in the basics of protection. We don't advise them one way or another except that if they want to select a certain number of their personnel for training we accept them and we train them on the basics of personal protection, but we are not involved in protecting Cabinet Officers.
>
> Mr. MORGAN [then Assistant Secretary of the Treasury for Enforcement, Tariff and Trade Affairs, and Operations]. And as far as State, Defense, and the Attorney General, we are talking about security of the FBI in those cases. *The Secret Service doesn't protect the Cabinet Officers with the exception of the Secretary of the Treasury.*
>
> Mr. MYERS. Then the areas of responsibility have not changed. You still have not gotten the authorization.
>
> Mr. ROWLEY. No, sir. [Italic supplied.]

Hearings before the House Subcommittee on the Treasury, Postal Service, and General Government Appropriations, 93d Cong., 1st Sess., Part 1, 392 (1973).

Specific statutory authority exists for agencies of the Government to establish training programs. 5 U.S.C. § 4103 (1970). Moreover, that authority has been implemented by an Executive order which provides that the head of each agency shall "extend agency training programs to employees of other agencies * * *." Executive Order 11348, § 302(d), 3 C.F.R. 188, 190 (1974), 5 U.S.C. § 4103 (1970). *See also* 31 U.S.C. § 686 (1970). Thus, authority exists, independent

of 18 U.S.C. § 3056(a), for the Secret Service to provide such training. Accordingly, the fact that the Secret Service trains employees of other agencies to protect officials of those agencies does not support the argument that 18 U.S.C. § 3056(a) authorizes protection by the Secret Service of categories of persons not listed therein.

Nor do we consider it to be particularly significant that, according to the General Counsel of the Treasury, the Secret Service has, at the direction of the Secretary of the Treasury, conducted personnel investigations for other divisions within the Treasury Department which do not have their own investigators. Hearings on the Treasury Department Appropriation for 1958 before the House Subcommittee on Treasury-Post Office Departments Appropriations, 85th Cong., 1st Sess. 533–34 (1957). The nature of these investigations is not entirely clear from the cited testimony. While the Hearings indicate that the other divisions were not charged with the costs of the investigations, it is not shown whether or not funds were requested by or appropriated to the Secret Service for such purpose.

The use of Secret Service agents as "sky marshals," also cited by the General Counsel of the Treasury Department, does not appear to be pertinent inasmuch as such services were performed on a reimbursable basis, whereby the Secret Service was compensated by the Department of Transportation. Hearings on Treasury, Post Office and General Government Appropriations, 1972, before the House Subcommittee on Treasury, Post Office and General Government Appropriations, 92d Cong., 1st Sess., Part 1, 262–63 (1971). Federal agencies are authorized by 31 U.S.C. § 686 to provide services for one another on a reimbursable basis, as will be discussed further below.

The foregoing precedents cited by the General Counsel of the Department in support of its actions are thus not too persuasive.

Aside from these precedents, the Department argues that "the deployment of security personnel is an executive function essential to the management of a department and the performance of its business." While we do not concede that either the precedents cited or the law establishes the existence of the broad Secretarial discretion to order protection in cases not specifically provided for by 18 U.S.C. § 3056 which the General Counsel argues for, we would agree that, in general, if a Government official were threatened or there were other indications that he was in danger, and if it were administratively determined that the risk were such as to impair his ability to carry out his duties, and hence to affect adversely the efficient functioning of the agency, then funds of his agency, the use of which was not otherwise restricted, might be available to protect him, without specific statutory authority.

This follows from the premise that appropriations are generally available for necessary expenses to carry out their purposes.

For example, although the State Department now has specific legislative authority to protect the Secretary of State using its own officers and employees (22 U.S.C. § 2666 (1970)), the Department considered that it had such authority even in the absence of legislation, and for many years prior to the enactment of 22 U.S.C. § 2666 assigned its employees to protect the Secretary. S. Report No. 552, 84th Cong., 1st Sess. 2 (1954). The bill which became 22 U.S.C. § 2666 was proposed by the Secretary of State, not in order to authorize such protection, but to allow State Department security officers to carry firearms for the protective purposes set forth therein. *Id.*

Similarly, we would generally not object in like circumstances—*i.e.*, where there is legitimate concern over the safety of an official and where the agency's functioning may be impaired by the danger to that official—to an agency, including the Department of the Treasury, protecting such an official using its own appropriated funds. However, the Secret Service, although subject to the direction of the Secretary of the Treasury, derives its operating authority with respect to providing protection generally from 18 U.S.C. § 3056(a), and its funds are therefore not available, without specific authorization, to perform protective duties not authorized by that statute.

As already noted, we believe there is no authority for the Secretary of the Treasury to enlarge by administrative action the scope of the protection which the Secret Service is authorized by 18 U.S.C. § 3056(a) to provide. That statute is very specific in identifying the categories of persons for whom protection may be provided. When it has been considered necessary to extend Secret Service protection to categories of persons not previously identified in section 3056(a), the Congress has typically done so by enacting specific authorizing legislation, either by amendment to section 3056(a) (*e.g.*, the Act of January 5, 1971, Public Law 91-651, 84 Stat. 1941, 18 U.S.C. 713, authorizing protection of the person of a visiting head of state and, at the direction of the President, other distinguished foreign visitors) or by separate authorizing legislation (*e.g.*, Public Law No. 90-331, 82 Stat. 170 (June 6, 1968) (18 U.S.C. 3056 note), authorizing protection of major presidential or vice presidential candidates; and the Treasury, Postal Service, and General Government Appropriation Act, 1975, Public Law No. 93-381, 88 Stat. 613 (August 21, 1974), authorizing protection of the immediate family of the Vice President). Since the Secretary of the Treasury is not among those categories of

individuals entitled to protection under 18 U.S.C. § 3056(a), and since, in our view, no other legislative authority to protect him exists, he cannot order the Secret Service, using funds appropriated to it, to protect him, any more than he could order it to use its funds to protect any other official not within the purview of section 3056(a).

The view of the General Counsel of the Treasury Department appears to be that only officials of that Department are entitled to Secret Service protection with the cost thereof charged to the appropriation for operating expenses of the Secret Service; officials of other agencies who might be equally in need of protection must provide it either through use of their own agency personnel or, under 31 U.S.C. § 686(a)(1970), through reimbursement of the Secret Service with funds of their own agencies. We do not believe that it was intended, by virture of the Secret Service being a component of the Treasury Department, that Department officials could enjoy protection by the Secret Service without any burden on the appropriations for their particular offices and notwithstanding the specific limitations in 18 U.S.C. § 3056(a), while officials of other agencies could not.

On the contrary, we see no reason why the Secretary of the Treasury (and other Treasury Department officials) should not be in precisely the same position with respect to Secret Service protection as any other official of the Government not listed in 18 U.S.C. § 3056(a). That is, the Secretary—in a proper case—may arrange for his protection by personnel of the Department of the Treasury or by the Secret Service, but in the latter case only on a reimbursable basis pursuant to 31 U.S.C. § 686(a) (1970), which provides expressly for intra-agency purchases of services. Reimbursement of the Secret Service has been, as noted in the General Counsel's memorandum, the procedure followed with respect to protection of the Secretary of State (on an interagency basis in that instance). As to the source of reimbursement for protection of the Secretary of the Treasury, it may appropriately be made from the appropriation for the Office of the Secretary, Salaries and Expenses.

We note that, within the Secret Service, there is a uniformed component known as the Treasury Security Force. This Force, according to the Secret Service budget justification for fiscal year 1974, is charged with the responsibility of protecting life and property in the main Treasury building and the Treasury annex. Moreover, the Force "provides security for the Secretary's press conferences * * *," among other functions. Hearings on the Treasury, Postal Service, and General Government Appropriations For Fiscal Year 1974

before the House Subcommittee on the Treasury, Postal Service, and General Government Appropriations, 93d Cong., 1st Sess., Part I, 346 (1973). We do not intend to suggest herein that funds are not available for those authorized activities of the Treasury Security Force, as described in the budget justification, which may involve protection of the Secretary.

Finally, we note that on several recent occasions, the question before us has been the subject of testimony by Treasury Department officials before congressional committees. On February 27, 1974, then Secretary of the Treasury Shultz appeared before the Senate Committee on Appropriations to testify on the budget for fiscal year 1975. Senator Chiles questioned Secretary Shultz concerning the Secret Service protection being provided both for Secretary Kissinger and for Mr. Simon, then Deputy Secretary of the Treasury. After some discussion, it was agreed that the Department would submit, for the record, the legal justification for these actions. Hearings before the Senate Committee on Appropriations on the Budget of the United States For Fiscal Year 1975, 93d Cong., 2d. Sess., 62-64 (1974). The opinion of the Treasury Department General Counsel which was provided to us was prepared as a consequence of the questions raised at that hearing.

The Secret Service, at the request of Senator Montoya in a hearing on March 20, 1974, before the Senate Subcommittee on Treasury, Postal Service, and General Government on the Second Supplemental Appropriations For Fiscal Year 1974, provided a list of individuals not specifically mentioned in authorizing legislation who were then being afforded protection on a temporary basis, the duration of such protection, and the cost thereof. On page 796 of those hearings the list shows: Deputy Secretary Simon (February 11—March 20, 1974) at a cost of $16,781; Secretary Shultz (July 1, 1973—March 20, 1974) at a cost of $260,790; and Secretary Kissinger (September 21, 1973—March 20, 1974) at a cost of $744,220, under a reimbursable agreement with the Department of State pursuant to 31 U.S.C. § 686.

No further discussion took place at that time, but on May 22, 1974, during hearings on the Secret Service's budget request for fiscal year 1975, Senator Montoya, referring to his request on March 20 for the list, asked about the current status of, and justification for, the protection given the individuals listed. Hearings before the Senate Subcommittee on Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1975, 610-612 (1974). In the ensuing colloquy the Assistant Secretary for Enforcement, Operations, and Tariff Affairs acknowledged that Mr. Simon, by then having become

Secretary of the Treasury, was still receiving protection. Senator Montoya asked Assistant Secretary Macdonald if it is customary to provide protection to the Secretary:

> Mr. MACDONALD. It was originally provided to Secretary Morganthau [sic].
> Senator MONTOYA. That was during the big war.
> Mr. MACDONALD. Yes. That was started during the administration of President Roosevelt, and has been provided, I believe—am I correct to every Secretary of the Treasury since?
> Mr. BOGGS [Deputy Director of the Secret Service]. Yes.

The remaining discussion was devoted to the protection of Secretary Kissinger under the authority of 22 U.S.C. § 2666 (1970) and 31 U.S.C. § 686.

Nothing in the cited hearings, or in the legislation to which they pertained, causes us to change our conclusion in this matter. All that can be concluded from this material is that the Senate Committee on Appropriations was aware that protection was being provided for Mr. Simon by the Secret Service. The Committee did not indicate its approval of such protection, however. In fact, the Department of the Treasury was, as noted, asked to provide its legal justification for this action.

As to the testimony on May 22 that every Secretary since Mr. Morgenthau has been protected, we have already pointed out that precedents prior to the enactment in 1951 of the original version of 18 U.S.C. § 3056(a) are of doubtful relevance. Moreover, the opinion of the General Counsel of the Treasury, in reviewing the precedents for protection of the Secretary, mentions the protection of Mr. Morgenthau but does not mention, as the Assistant Secretary and the Deputy Director of the Secret Service did in their testimony, that every Secretary since then has received protection. The reference in the testimony may be to the activities of the Treasury Security Force which protects the Secretary as part of its duty to protect life and property at Department buildings, an activity which, as already noted, is not at issue herein. In any event, there is no indication that protection of previous Secretaries (other than Mr. Morgenthau and Mr. Shultz), if it did take place other than by the Treasury Security Force, was ever disclosed to the Congress prior to May 22, 1974.

Finally, in this connection, while the testimony was given during hearings on the appropriation for the Secret Service for fiscal year 1975, neither the Senate report based on the cited hearings (S. Report No. 93–1028 (1974)) nor the resulting legislation (Treasury, Postal Service, and General Government Appropriation Act, 1975, Public Law No. 93–381 (August 21, 1974)) shows any intention that Secret Service funds bear the cost in fiscal year 1975 for protection of the Secretary of the Treasury. Accordingly, we cannot conclude that the

Congress intended to sanction expenditure in fiscal year 1975 of Secret Service funds (without reimbursement) for protection of the Secretary of the Treasury, or to approve such expenditures made in prior fiscal years.

We must advise, in light of the foregoing, that appropriations for the operations of the Secret Service are not available, without reimbursement, to pay the costs of furnishing the Secretary of the Treasury with Secret Service protection. Any such protection provided hereafter should be on a reimbursable basis pursuant to 31 U.S.C. § 686(a). Funds appropriated for salaries and expenses for the Office of the Secretary of the Treasury should be used for such reimbursement.

[B–179739]

Statutes of Limitation—Claims—Transportation—Property Damage, Loss, etc.—Warsaw Convention

Air carrier's claim for amount administratively deducted to reimburse Government for loss of personal effects is proper for allowance where action at law was not brought by the Department of the Air Force within 2 years as required by Article 29 of Warsaw Convention. The 6-year statute of limitation in 28 U.S.C. 2415 does not abrogate holding in *Flying Tiger Line, Inc.* v. *United States*, 170 F. Supp. 422, 145 Ct. Cl. 1 (1959).

In the matter of the Department of the Air Force—Warsaw Convention, January 29, 1975:

The Department of the Air Force, Office of the Judge Advocate General, requests reconsideration of our position on the applicability of Article 29 of the Warsaw Convention (hereafter Convention). 49 Stat. 3000, 49 U.S. Code 1502, note (1970). The Convention was signed by the United States in 1934 and Article 29 provides a 2-year statute of limitation on loss and damage claims resulting from international air transportation. In a letter dated December 19, 1973, our Transportation and Claims Division told the Air Force that such a claim, filed by Seaboard World Airlines for $722.48, would be allowed because although the Air Force collected the claim by setoff, it failed to bring an action at law within the required 2 years.

In addition, the Air Force has, for various reasons, requested reconsideration of the 6-month period for referring claims to the General Accounting Office as set forth in a circular letter of August 4, 1960, B–139598, B–139994, and B–114365. The Air Force also contends that it is almost impossible to comply with the 7-day written notice of damage required by the Convention (Article 26).

Both the Air Force and the Department of the Army have filed legal briefs in support of their request for reconsideration of the claim. The legal briefs disagree in part, but agree in their final conclusions

and in their main arguments: (1) Section 2415 of Title 28 of the U.S. Code (U.S.C. post dates the holding in *Flying Tiger Lines, Inc.* v. *United States*, 170 F. Supp. 422, 145 Ct. Cl. 1 (1959), and thus the 6-year limitation provided in the act is applicable; (2) Article 29 of the Convention is a limitation on liability and must be mentioned on the Government bill of lading (GBL) explicitly or be incorporated by reference; (3) GBL's that do not incorporate Article 29 are governed by the provisions contained in condition 7 on the reverse side of the GBL.

Section 2415 of Title 28 of the U.S.C. was enacted in 1966. It provides in pertinent part:

> Subject to the provisions of section 2416 of this title, *and except as otherwise provided by Congress*, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later * * *. [Italic supplied.]

In *Flying Tiger, supra*, an administrative setoff was held not to be the equivalent of the lawsuit prescribed by Article 29. The court stated:

> All that it [the United States] did was to make up its mind to pay itself out of money otherwise due the plaintiff, record that decision on its account books, and advise the plaintiff of what it had done. These actions were in no sense the substantial equivalent of the lawsuit prescribed by the Convention. 170 F. Supp. at 426.

The *Flying Tiger* case has never been overruled nor distinguished. It has been cited approvingly on this specific point in a subsequent decision. *Erie Lackawanna Railway Co.* v. *United States*, 439 F.2d 194, 194 Ct. Cl. 504 (1971). The case states:

> But an administrative deduction is not the equivalent of a lawsuit * * * 439 F.2d at 200.

The Army correctly contends that it long has been the law that treaties and Acts of Congress are on the same footing but where the two are in conflict, the latest in time must prevail. *The Cherokee Tobacco*, 11 Wall 616 (1871); *Whitney* v. *Robertson*, 124 U.S. 190 (1888); *The Chinese Exclusion Case*, 130 U.S. 581 (1889).

However, the Army contends that the statute passed in 1966 abrogates both the terms of the Convention of 1934, and the *Flying Tiger* case of 1959. We disagree, as the Army fails to fully explain the effect of the provision "except as otherwise provided by Congress" contained in the statute. We agree with the Air Force that the legislative history of Public Law 89–505, at 1966 U.S. Code Cong. & Ad. News, page 2509, indicates that the bill does not affect existing statutes of limitations. Further, both the House and the Senate stated their intent to leave preexisting statutes of limitation untouched

as indicated in the following statements: "* * * the bill does not affect existing statutes of limitation. There are a number of such statutes on the books." Hearings on H.R. 13652 before a Subcomm. of the House Comm. on the Judiciary, 89th Cong., 2d Sess. 15 (1966). "The Committee points out that the bill does not affect existing statutes of limitations." S. Report No. 1328, 89th Cong., 2d Sess. 1298 (1966).

The bill was passed by Congress without amendment. 112 Cong. Rec. 13737 (1966).

We cannot agree that the GBL should contain a notice of the Article 29 2-year statute of limitations in order to be effective. Assuming the Convention is applicable, it is also necessary to determine whether or not article 29 is operative. The Air Force argues that article 29 is inoperative if the carrier has failed to comply with articles 3, 4, 8 or 9. Article 3 deals with the passenger ticket, article 4 with the baggage check, and articles 8 and 9 with the air waybill. These four articles provide that if the ticket, check, or waybill fails to inform the passenger or shipper "that the transportation is subject to the rules relating to liability established by this convention," then the carrier "shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability." Arts. 3(1)(e), (2). *See also* arts. 4(4), 8(q), 9. The GBL is the equivalent of the air waybill and it does not contain the language required by articles 8 and 9.

The question of whether or not article 29 excludes or limits liability, and therefore falls within the language of articles 3, 4, 8, and 9, has already been decided in *Molitch* v. *Irish International Airlines*, 436 F.2d 42 (2d Cir. 1970) and *Bergman* v. *Pan American World Airways*, 299 N.Y.S. 2d 982 (App. Div. 1969). Both these cases have held that article 29 remains effective whether or not its applicability is stated on the air waybill. The Air Force doubts the strength of these holdings in light of a more recent decision, *Sofranski* v. *KLM Dutch Airlines*, 326 N.Y.S. 2d 870 (Civ. Ct. 1971). These doubts lack all basis in fact for the following reasons.

The general rule is that a ticket or air waybill must be delivered to the passenger or shipper in such a manner as to afford him a reasonable opportunity to take self-protective measures. This rule, first enunciated in *Lisi* v. *Alitalia-Line Aerre Italiane*, 370 F.2d 508 (2d Cir. 1966), affirmed 390 U.S. 455 (1968), has been consistently applied in subsequent cases, resulting in two distinct lines of decisions. (1) In order to limit its liability under the monetary limitations of article 22, the carrier must properly notify the passenger or shipper of the existence of the limitation. *Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965), cert. denied 382 U.S. 816 (1965). (2)

However, in order to invoke the 2-year statute of limitations of article 29, the carrier need not notify the passenger or shipper of the existence of the limitation. *Molitch* v. *Irish International Airlines, supra.; Bergman* v. *Pan American World Airways, supra.*

In the Bergman case, the court studied the minutes of both the Warsaw and the Hague Conventions and concluded that article 3 was included in order to apply only to article 22. 299 N.Y.S. 2d at 985. In the *Molitch* case, the court considered the *Lisi* rule and concluded that notification of the article 29 statute of limitation would not provide the plaintiff with an opportunity to take self-protective measures, and therefore such notification was unnecessary. 436 F.2d at 44.

In *Sofranski,* the case relied on by the Air Force to throw doubt on the *Bergman* and *Molitch* holdings, the court dealt with the timely notice requirement of article 26 which provides in pertinent part:

(2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and at the latest, within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest within 14 days from the date on which the baggage or goods have been placed at his disposal.

The court recognized the "two well established and diverse lines of authority advanced by the respective parties," and concluded that the timely notice requirement was closer by analogy to limitations on the amount of liability than to a statute of limitations. 326 N.Y.S. 2d at 871. The Court reached its decision by applying the *Lisi* rule. It concluded that if a passenger knew of the limitations on the amount of liability in advance, he could take steps to protect himself, "whereas with respect to the statute of limitations there is nothing a passenger could do and anyhow he has plenty of time after the event to learn about it and comply; see *Molitch* v. *Irish International Airlines, supra.*" 326 N.Y.S. 2d at 872. The court also explained that a statute of limitation does not exclude or limit liability as does a timely notice requirement, but instead extinguishes the cause of action. 326 N.Y.S. 2d 872. The *Sofranski* case therefore preserves and solidifies the *Bergman* and *Molitch* holdings that article 29 cannot be avoided even though the carrier has failed to notify the shipper of the existence of the provision.

The Air Force states that *Molitch* would require the Department of Defense to take specific measures to counteract the costs of law suits required by Article 29. The measures are: (1) the purchase of independent damage insurance to cover international air shipments; (2) the demand for lower freight rates from international carriers; and (3) the use of its own aircraft for goods shipped overseas.

These measures, although having merit, would appear to be against policy or already implemented. It has long been the policy of the Government to be self-insured. Thus, a plan of self-insurance would seem to require statutory authority and appropriation of the necessary funds. Also, it long has been a policy of the Military Traffic Management Command to negotiate for the lowest possible rate (the shipment here in question moved under the authority of Seaboard World Airlines, Inc., Local and Joint Military Air Cargo Tariff No. C-MS-2, C.A.B. No. 18, presumedly at a lower rate than that available to the general public). And we understand that the present policy of the Department of Defense is to maintain the current level of the use of its own aircraft for the transportation of overseas shipments. We also have to assume that military traffic managers are aware of the fact that all commercial international shipments are subject to the terms of the Convention. Applicable regulations exist for the guidance of Federal agencies. 5 GAO 5015.30 (July 15, 1968).

Finally, Article 32 of the Convention reads in part:

> Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void.

Therefore, any alteration of the GBL contract in terms of extending the 2-year limitation would be void. The Army agrees with this point.

Condition 7 on the reverse of the GBL reads:

> 7. In case of loss, damage, or shrinkage in transit, the rules and conditions governing commercial shipments shall not apply as to period within which notice thereof shall be given the carriers or to period within which claim therefore shall be made or suit instituted.

The shipment here involved was transported under the authority of Seaboard World Airlines, Inc., Tariff C.A.B. No. 19. Rule No. 5 of this tariff states that the International Cargo Rules Tariff No. CR–1, C.A.B. No. 5, is the governing tariff for applicable rules and regulations. C.A.B. No. 5 contains all the provisions of the Convention including the time limitation on claims and actions. It long has been the policy of the Civil Aeronautics Board (CAB) to strictly enforce duly published tariffs and their regulations. In *Tishman & Lipp, Inc.* v. *Delta Air Lines*, 413 F.2d 1401 (2d Cir. 1969), the court held that tariffs filed with the CAB, if valid, are conclusive and exclusive, and that the rights and liabilities between airlines and their passengers are governed thereby. This case also held that limitations of liability in tariffs are binding on passengers and shippers whether or not the limitations are embodied in the transportation documents. See, also, *Vogelsang* v. *Delta Air Lines, Inc.*, 302 F.2d 709 (2d Cir. 1962), cert. denied 371 U.S. 826. In *Slick Airways, Inc.* v. *United States*, 292 F.2d

515, 154 Ct. Cl. 417 (1961), it was held that tariffs filed with the CAB are both conclusive and exclusive and may not be added to through reference to outside contracts or agreements. Under these circumstances, and even if the Convention were not applicable in and of itself condition 7 of the GBL would not be for application if the carrier had on file with the CAB a tariff containing contrary regulations.

Article 29 of the Convention applies here and no cause of action at law was brought by the Air Force against Seaboard World Airlines within the required 2 years. Accordingly, the carrier's claim for $722.48 will be allowed.

We are referring the Air Force's request for an extension of time beyond the 6 months period to our Transportation and Claims Division with the recommendation that a longer time be considered as long as the 2-year statute of limitations in the Convention can be complied with. The 7-day notice provision cannot be waived as it is incorporated in the Convention.

[B-182162]

Transportation—Household Effects—Actual Expenses—In Lieu of Commuted Rate—Teamsters' Strike

Employee who, incident to transfer of station, was authorized and paid for transportation of household goods under commuted rate system claims reimbursement for actual expenses in excess of such reimbursement since he was required to have goods moved at higher rates than those of another carrier with lower rates because of a teamsters' strike. Employee is not entitled to such reimbursement since rights and liabilities regarding travel orders vest at time of transportation of goods and may not be revoked or modified retroactively to increase or decrease benefits in absence of evidence of administrative error in orders.

Officers and Employees—Transfers—Relocation Expenses—Temporary Quarters—Time Limitation

Employee, who was transferred from California to Florida effective July 9, 1973, and who was unable to move into newly acquired home until September 11, 1973, because of delay in mortgage closing, may not be reimbursed for temporary lodging expenses beyond initial 30 days since Federal Travel Regulations paragraph 2-5.2a (1973) provides for maximum 30-day time limitation when employee is transferred between areas in continental United States and, being a statutory regulation, its provisions may not be waived.

In the matter of relocation expenses, January 29, 1975:

An advance decision has been requested from an authorized certifying officer of the Equal Employment Opportunity Commission concerning the reimbursement of certain relocation expenses incurred by Mr. John I. Otero, incident to a permanent change of station from Los Angeles, California, to Miami, Florida. He asks first whether Mr. Otero may be paid an amount of $472.87 for actual costs of

movement of household goods in excess of the reimbursement under the commuted rate; and second, whether he may be allowed temporary quarters allowance for a period in excess of 30 days because of special justifications in each case.

Effective July 9, 1973, Mr. Otero was transferred from Los Angeles, California, to Miami, Florida. In moving his household goods he incurred actual expenses of $472.87 in excess of the amount reimbursed him under the commuted rate system for which is is seeking reimbursement. He states that he had to ship his goods by a local express and transfer company from his old home to his new duty station because there was a teamsters' strike in California at the time he was required to ship his goods, and he was unable to secure the services of an interstate moving company at a lower cost. The administrative agency is willing to amend the employee's permanent change of station travel authorization to provide for actual expenses of transportation by a local cartage carrier in order to permit payment of the higher transportation charges if such an amendment is permissible.

It is well established that legal rights and liabilities in regard to travel allowances vest as and when the travel is performed under the traveler's orders and that such orders may not be revoked or modified retroactively so as to increase or decrease the rights and benefits which have been fixed under the applicable statutes or regulations. An exception may be made only when an error is apparent on the face of the order and all facts and circumstances clearly demonstrate that some provision previously determined and definitely intended has been omitted through error or inadvertence in preparing the orders. *See* 23 Comp. Gen. 713 (1944); 24 *id.* 439 (1944); 47 *id.* 127 (1967); and B–175433, April 27, 1972.

The commuted rate system was authorized by 5 U.S. Code 5724(c) (1970) and was implemented, at the time of Mr. Otero's transfer, by the Federal Travel Regulations (FPMR 101–7) para. 2–8.3a (May 1973). Neither the statute nor the regulation provides for reimbursement beyond the rate contained in the commuted rate schedule. In the instant case, it was intended and determined at the time of transfer that Mr. Otero would be authorized reimbursement of transportation and storage expenses on the commuted rate system. Since this determination was properly made under the applicable law and regulation, and since no error or omission is alleged or demonstrated, the administrative agency may not amend the employees' Permanent Change of Station Travel Authorization retroactively to permit payment of the higher transportation and storage charges. Accordingly, Mr. Otero is not entitled to additional reimbursement for the actual cartage charges incurred.

Mr. Otero also seeks additional reimbursement in the amount of $291.20 for expenses incurred incident to occupancy of temporary quarters from August 8 to September 11, 1973, minus a vacation period from August 11 to 25. He states that he had purchased a permanent residence within a 30-day period following his transfer, but he was unable to occupy his new residence until the mortgage closing day of September 6, 1973, and was therefore required to occupy temporary quarters for the 65-day period of July 9 through September 11, minus the above-mentioned vacation. Mr. Otero was reimbursed for his subsistence expenses for the first 30 days only thereby receiving no reimbursement for the period of August 8 to September 11, minus the vacation.

Reimbursement of expenses incurred incident to occupancy of temporary quarters in connection with a transfer is governed by 5 U.S.C. 5724a(a)(3) (1970) which provides in pertinent part as follows:

> (a) Under such regulations as the President may prescribe * * * appropriations or other funds available to an agency for administrative expenses are available for the reimbursement of all or part of the following expenses of an employee for whom the Government pays expenses of travel and transportation under section 5724(a) of this title:
>
> * * * * * * *
>
> (3) Subsistence expenses of the employee and his immediate family for a period of 30 days while occupying temporary quarters when the new official station is located within the United States, its territories or possessions, the Commonwealth of Puerto Rico, or the Canal Zone. The period of residence in temporary quarters may be extended for an additional 30 days when the employee moves to or from Hawaii, Alaska, the territories or possessions, the Commonwealth of Puerto Rico, or the Canal Zone * * *

The statutory provision is implemented by Federal Travel Regulations (FPMR 101–7) paras. 2–5.2a and b which set forth the time limits in the statute. The law and its implementing regulation are clear and unambiguous. Reimbursement of temporary quarters subsistence is limited to a period of 30 days by FTR para. 2–5.2a (May 1973). Under the provisions of FTR para. 2–5.2b (May 1973), an extention of time, not to exceed 30 days, may be made if the employee is transferred either to or from Hawaii, Alaska, the territories and possessions, the Commonwealth of Puerto Rico, or the Canal Zone. Since Mr. Otero was not transferred to or from any of the areas cited in para. 2–5.2b, para. 2–5.2a constitutes the basis of his claim and contains the time limitation pertaining to reimbursement. Being a statutory regulation having the force and effect of law, it may not be waived, modified or extended, regardless of extenuating circumstances. *See* B–176078, July 14, 1972. Therefore, Mr. Otero may not be authorized additional subsistence expenses beyond the initial 30 days, notwithstanding his inability to occupy his new home "until mortgage closing day."

In view of the foregoing, the reclaim voucher may not be certified for payment.

[B-180835]

Travel Expenses—Military Personnel—Leaves of Absence—Station Changes During Leave

Where the member departed from his last duty station in a leave status pursuant to permissive rest and recuperation leave orders ofter receipt of permanent change of station (PCS) orders, but prior to the effective date of the PCS orders and not pursuant to them, and after arrival at his leave point he was granted emergency leave and subsequently was directed to proceed directly to his new duty station, the provisions of case 7(a), paragraph M4156, 1 Joint Travel Regulations, are controlling and, therefore, the member is not entitled to reimbursement of the cost of transportation from his last duty station to his leave point or to per diem allowances for such travel.

In the matter of travel allowances, January 30, 1975:

This action is taken pursuant to letter dated January 9, 1974, file reference ACF, with enclosures, from the Accounting and Finance Officer, Headquarters 86th Combat Support Group (USAFE), APO New York 09012, requesting an advance decision concerning the entitlement of Major Robert S. Lynn, USAF, SSAN 568-36-4897, to reimbursement of the cost of commercial transporation from Honolulu, Hawaii, to Dayton, Ohio, and to per diem allowances in the described circumstances. The request was forwarded to this Office by endorsement dated March 11, 1974, with enclosure, from the Per Diem, Travel and Transportation Allowance Committee and was assigned PDTATAC Control No. 74-14.

The record shows that by Special Order No. T-1926, dated May 4, 1973, "PERMISSIVE ORDERS FOR OUT-OF-COUNTRY TRAVEL," the member was authorized special category rest and recuperation and 7 days of leave, at Dayton, Ohio. On May 18, 1973, Major Lynn departed from his permanent duty station, Udorn Air Base, Thailand, and arrived at Don Muang Air Base, Thailand. On May 20, 1973, the member utilized Military Airlift Command transportation from Don Muang Air Base and the next day he arrived at Hickam Air Force Base, Hawaii. On May 21, 1973, Major Lynn procured commercial transportation at his own expense for travel from Honolulu, Hawaii, to Dayton, Ohio.

While the member was on leave, two emergencies arose—his child became ill and his wife had a serious operation. As a result, the member's commanding officer granted him emergency leave until June 10, 1973. On June 4, 1973, the member received a message from Udorn Air Base, Thailand, stating that since he had less than 90 days remaining on his tour of duty, he was directed not to return to Thailand but to proceed directly to his next duty station. At the time the

member departed from Udorn Air Base, he was in possession of Special Order No. A–3071, dated May 4, 1973, which directed his permanent change of station to Sembach Air Base, Germany, with a transfer effective date of August 10, 1973.

On June 13, 1973, Major Lynn departed from Dayton, Ohio, and arrived later the same day at McGuire Air Force Base, New Jersey, from where he departed via Government air and arrived at Rhein Main Air Base, Germany, the next day. On June 14, 1973, he proceeded by private auto and arrived that same day at Sembach Air Base, Germany.

Major Lynn has claimed reimbursement of the cost of commercial transportation from Honolulu, Hawaii, to Dayton, Ohio, and mileage from Dayton, Ohio, to McGuire Air Force Base, New Jersey, and from Rhein Main Air Base, Germany, to Sembach Air Base, Germany. Also, he claims per diem allowances incident to such travel.

The Executive, *Pro Tempore*, Per Diem, Travel and Transportation Allowance Committee has expressed the view that case 7(a) of paragraph M4156 of Volume 1, Joint Travel Regulations (1 JTR), is applicable to Major Lynn's claim. However, the Chief, Pay and Travel Division, Directorate of Accounting and Finance, Headquarters United States Air Forces in Europe, in a letter dated January 24 1974, says that since the member departed from his last duty station after receiving permanent change of station orders but prior to the effective date of such orders and since after the member traveled to his leave point at his own expense, he was advised to proceed to his new duty station, the provisions of case 7(a) of paragraph M4156, 1 JTR, do not prohibit reimbursement

It appears that Major Lynn is of the opinion that since "The government sent me to Thailand at government expense ergo the government should return me from Thailand at government expense."

Section 404 of Title 37, U.S. Code (1970), provides that under regulations prescribed by the Secretaries concerned, a member of a uniformed service is entitled to travel and transportation allowances for travel performed under orders, upon a permanent change of station or otherwise, or when away from his designated duty station. Paragraph M3050–1, 1 JTR, issued pursuant to this authority, provides that members are entitled to these allowances only while actually in a travel status and they shall be deemed to be in a travel status while performing travel away from their permanent duty station, on public business, pursuant to competent travel orders. The regulatory provision here in question, paragraph M6454, 1 JTR, expressly provides that expenses incurred during periods of travel under orders

not involving public business are not payable by the Government, and case 7(a) therein, provides in pertinent part as follows:

> * * * when the station of a member * * * is changed while he is on leave of absence, he will, on joining the new station, be entitled to allowances from the place where he received the orders directing the change, not to exceed the distance from the old to the new station. * * *

It consistently has been held that travel allowances authorized for members are for the purpose of reimbursing them for the expenses incurred in complying with the travel requirements imposed upon them by the needs of the service over which they have no control and are not for travel performed solely for personal reasons. Travel allowances are not payable for travel performed solely for leave purposes, since such travel is considered as performed for personal reasons rather than on public business. *Perrimond* v. *United States*, 19 Ct. Cl. 509 (1884); *Day* v. *United States*, 123 Ct. Cl. 10, 18 (1952); 49 Comp. Gen 663 (1970); *cf.* 42 Comp. Gen. 27 (1962). *See* decision B–165886, March 24, 1969, and decision B–166674, December 23, 1969.

When the member traveled from Udorn Air Base, Thailand, to Dayton, Ohio, he was on leave. Since it is well settled that travel performed solely for leave purposes is considered as performed for personal reasons rather than on public business, the member is not entitled to travel allowances for the travel from Thailand to Ohio.

The fact that when the member departed from his duty station on May 18, 1973, he was in receipt of permanent change of station orders with a transfer effective date of August 10, 1973, makes no difference in this case since at that time he was scheduled to return to that duty station. The case 42 Comp. Gen. 27 *supra* is distinguished from this situation since in that case the member was to be granted emergency leave when he had less than 60 days remaining on his tour of duty. Accordingly, he was given a permanent change of station and he performed travel in accord with his permanent change of station orders. However, in the present case, the member's travel during the period May 18–21, 1973, was not performed pursuant to permanent change of station orders, but incident to permissive orders for rest and recuperation leave.

Since Major Lynn was in a leave status when he received the message directing that he proceed directly to his new duty station, the provisions of case 7(a), paragraph M4156, 1 JTR, are controlling in the case and he is entitled to allowances from the place where he received the orders directing the change, Dayton, Ohio. He is not entitled to reimbursement for the cost of commercial air transporta-

tion from Honolulu, Hawaii, to Dayton, Ohio, or to per diem allowances incident to such travel. *See* decision B–151394, May 8, 1963.

[B–181899]

Debt Collections—Waiver—Military Personnel—Prior Consideration of Debt Effect

An application for waiver under 10 U.S.C. 2774, which was originally received within the 3-year statutory period and denied, may be given reconsideration based on new evidence, notwithstanding the request for reconsideration is received after expiration of the 3-year limitation period.

In the matter of reconsideration of previously denied requests for waiver, January 30, 1975:

This action is in response to a letter dated July 18, 1974, from the Assistant Secretary of Defense (Comptroller) requesting a decision on a question presented in the Department of Defense Military Pay and Allowance Committee Action No. 510, enclosed with the letter, concerning reconsideration of previously denied waiver requests after expiration of the 3-year limitation period prescribed in 10 U.S. Code 2774 (Supp. II, 1972).

The question presented in the Committee Action is as follows:

If, in accordance with 10 USC 2774, a request for waiver of an erroneous payment of pay or allowances is submitted and denied within the 3-year limitation in subsection (b) of that law, would a request for reconsideration based on new evidence be barred by the law if submitted subsequent to the 3-year limitation?

The Committee Action notes that 10 U.S.C. 2774 authorizes the Comptroller General or the Secretary concerned to waive claims of the United States arising out of erroneous payments of any pay or allowances, other than travel and transportation allowances, the collection of which would be against equity and good conscience and not in the best interest of the United States. The Committee Action further points out that neither the language of 10 U.S.C. 2774, its legislative history, nor the Standards for Waiver (4 C.F.R. 91–93 (1974)), issued pursuant to the statute, specifically address the question presented. However, the Committee Action states that it seems reasonable that the Comptroller General or Secretary concerned be authorized to grant reconsideration of an application for waiver when such a request for reconsideration is based upon new material evidence or is intended to correct a manifest error in calculation.

Under the provisions of 10 U.S.C. 2774(b)(2) the Comptroller General or the Secretary concerned, as the case may be, may not exercise his authority under section 2774 to waive any claim:

> If application for waiver is received in his office after the expiration of three years immediately following the date on which the erroneous payment of pay or allowances * * * was discovered.

In decision B–175449, July 27, 1972, a question similar to that presented in the Committee Action was considered concerning the waiver of a claim against a civilian employee of the Government under 5 U.S.C. 5584 (1970). In that decision it was held in effect,, that the 3-year statutory limitation then provided in 5 U.S.C. 5584(b)(2) did not prohibit reconsideration and waiver of a claim after expiration of the statutory period when that claim was previously considered for waiver within the statutory period.

The legislative history of the act of October 2, 1972, Public Law 92–453, 86 Stat. 758, which, among other things, added 10 U.S.C. 2774 and made certain changes in 5 U.S.C. 5584, indicates that one of its purposes was to provide authority to waive claims arising out of erroneous payments made to members of the uniformed services similar to the waiver authority provided by 5 U.S.C. 5584 relating to civilian Government employees, and language similar to that used in 5 U.S.C. 5584 is used in 10 U.S.C. 2774. Therefore, it is our view that the result reached in B–175449, *supra*, would also be applicable to claims considered for waiver under 10 U.S.C. 2774.

Accordingly, the question presented in the Committee Action is answered in the negative.

[B–182161]

Courts—Tax Court of United States—Court of Record—Status of Procurement

U.S. Tax Court, which prior to 1969 was independent agency in Executive Branch and therefore subject to Federal Procurement Regulations (FPR), is now court of record under Article I of Constitution and thus no longer subject to FPR. Nevertheless, in its relevant procurement practices, Court is still required to comply with 41 U.S.C. 5 (1970).

Courts—Reporters—Limitation on Electronic Reporting

U.S. Tax Court invitation seeking electronic reporting services is not contrary to provisions of 28 U.S.C. 753(b) (1970), which limits electronic reporting to augmenting role, as that provision concerns U.S. District Courts, and does not purport to include U.S. Tax Court within its purview.

Courts—Tax Court of United States—Reporting—Stenographic *v.* Electronic

Contention that 26 U.S.C. 7458 (1970) precludes U.S. Tax Court from soliciting for electronic reporting method because provision authorizes "stenographic reporting" is without merit as Congress, in enacting provision in 1926, was not specifically concerned with limiting reporting to traditional written means but rather with accurate reporting of hearings and testimony. Therefore, Court can solicit for any method of reporting which effectuates said purpose.

Contracts—Specifications—Restrictive—Justification

Contention that invitation for bids provision which limits court reporting only to electronic method improperly restricts competition is not sustained since record shows that court's determination of its needs is supported by reasonable basis. In such technical areas as this, where there may well be differences of opinion, agency's evaluation of own needs should be given great weight because agency is in best position to assess its own requirements.

Bids—Subcontracts—Limitations on Subcontracting

In view of agency's past unsatisfactory experience with subcontractor attempts to provide court reporting services under prime contract, agency may impose reasonable limitations on prime contractor's right to subcontract all or part of such work.

In the matter of CSA Reporting Corporation, January 31, 1975:

By letter of September 4, 1974, CSA Reporting Corporation (CSA) protested to this Office against the allegedly restrictive requirements of an invitation for bids (IFB) issued by the United States Tax Court, Washington, D.C., on August 28, 1974, for the verbatim reporting requirements of its proceedings throughout the United States. Pursuant to this invitation, the Court required, *inter alia*, that the reporting in question was to be effected pursuant to electronic means consisting of a 4-track system and back-up equipment, supervised by a competent court reporter. Bidders were also advised that the successful contractor would be required to utilize its own employees in at least 90 percent of the sessions of the Court. The contract period contemplated by the IFB was November 1, 1974, through August 31, 1975. While three bids were submitted, we have been advised that an award has not yet been made pending our decision on the protests.

CSA protests that the invitation's requirement that reporting be restricted to electronic means using the contractor's employees in 90 percent of the Court's sessions is improper and contrary to the expressed desire of Congress. CSA contends that Congress has required that all reporting in Federal courts shall be by shorthand or mechanical means and only augmented by electronic sound recording, and that Congress has also stated any reporting in the Tax Court must be done stenographically. CSA also argues that electronic reporting is, at

best, no more effective than shorthand or stenotype reporting, and moreover that there is no justification underlying the requirement that the contractor's employees must be utilized in 90 percent of all reported sessions.

Prior to 1969, the U.S. Tax Court (formerly the Board of Tax Appeals) was an independent agency in the executive branch of the Government. Internal Revenue Code of 1954, ch. 736, § 7441, 68A Stat. 879, 26 U.S. Code § 7441 (1964). As such, it was subject to the provisions of the Federal Procurement Regulations (FPR), 40 U.S.C. §§ 472, 474, 481(a) (1964), even though it possessed the power to contract for the reporting of its proceedings. 26 U.S.C. § 7458 (1964). In 1969, however, Congress amended Title 26 of the U.S. Code to provide that the Tax Court is a court of record under Article I of the Constitution of the United States. Tax Reform Act of 1969, Public Law No. 91-172, Title IX, § 951, 83 Stat. 730, 26 U.S.C. § 7441 (1970). While the Court is no longer required to adhere to FPR as the Court is not part of the executive branch, it appears that the Tax Court is still subject to the general provision of 41 U.S.C. § 5 (1970). In its report to this Office dated September 18, 1974, the Court indicated t will follow the requirements of that provision.

Initially, CSA contends that the Court's use of electronic reporting is improper because Congress, pursuant to 28 U.S.C. § 753(b) (1970), mandated that all reporting in Federal Courts shall be by shorthand or mechanical means. That provision does in fact provide that electronic reporting shall be used only to augment shorthand or mechanical means of reporting. However, 28 U.S.C. § 753(a) (1970) restricts the application of that section to the District Courts of the United States, Canal Zone, Guam, and the Virgin Islands. Therefore, the Tax Court is not required to restrict its procedures so as to comply with this provision.

CSA next contends that, pursuant to 26 U.S.C. § 7458 (1970), the Court is constrained from reporting testimony in hearings before the Court by other than "stenographic" means. As CSA essentially construes stenographic reporting to be reporting by shorthand or mechanical means, as opposed to electrical or electronic means, it argues that the Court's IFB improperly requires 4-track electronic recording. The Court, in its report to this Office, points out that the phrase "stenographically reported" was first used in the Revenue Act of 1926, was probably used by the Congress at that time to describe reporting generally, and since that time has been expanded to include other systems of reporting. As such, the Court, pursuant to this authority, has used various means of shorthand, mechanical,

and electronic reporting systems. In response to this argument, CSA argues that if the term in question is all-inclusive, then the IFB should reflect this diversity of acceptable systems. CSA, however, reiterates its belief that the term is not all-inclusive. It points to instances in the past where Congress has amended statutes concerning reporting to expressly permit the use of electronic reporting, and argues that if Congress had wished the Tax Court to utilize electrical recording means, the statute would have been amended to specifically so state.

The Board of Tax Appeals, now the Tax Court, was established in 1924 to permit taxpayers to secure a determination of tax liability before payment of the deficiency. *Flora* v. *United States*, 362 U.S. 145 (1960). The Board was originally required to make a report in writing of its findings of fact and decision in each case, and, should the amount of tax in controversy have been more than $10,000.00, the oral testimony taken at the hearing was required to be reduced to writing. Revenue Act of 1924, ch. 234, Title IX, §§ 900(g),(h), 43 Stat. 337. A precise means of reduction was not specified. In 1926, Congress amended this act substantially, to provide for more formalized procedures and avenues of appeal. Pursuant to this revision, Congress provided, for the first time, that the Board's hearings were to be stenographically reported. Revenue Act of 1926, ch. 27, Title X, § 907(a), 44 Stat. 107. The reports on this legislation do not expressly comment on the addition of the phrase "stenographically reported." However, the Senate did note that the Board's decisions were considered judicial by the Senate Committee on Finance, court review of Board decisions was made to conform to the procedure in the case of an original action in the Federal District Court, and review of the decision "may" be limited to the record made before the Board. S. Report No. 52, 69th Cong., 1st Sess. 36–37 (1926).

Traditionally, stenography has been defined as the art of writing in shorthand, and a stenographer has been considered to be one who writes in shorthand. 40 Words and Phrases, Stenographic, Stenography (1964). From our review of the legislative history of the above provision, however, it appears that Congress, in requiring "stenographic reporting," was primarily concerned with having certain proceedings and testimony recorded, especially for purposes of appeal. The reports of the House and Senate attach no special significance to the phrase "stenographically reported," and there is no indication therein that Congress wished to limit the reporting it desired to stenographic means. The protester has not furnished this Office with any material which would indicate that such a restriction was in fact

desired. In the absence of such documentary evidence, the interpretation favored by CSA would unduly restrict the Tax Court in contracting for the reporting of such hearings in a manner we believe not intended by the Congress. Therefore, the Tax Court is not in our opinion precluded by 26 U.S.C. § 7458 (1970) from soliciting for electrical means of recording.

Regarding the restrictive nature of the IFB, CSA considers as restrictive both the requirement that only a 4-track electrical system can be used for recording and the stipulation that this system must be operated by the contractor's employees in at least 90 percent of the Court's sessions. CSA contends that 41 U.S.C. § 5 (1970) prohibits any restriction on the method used for the reporting of hearings in the Federal Government. From a technical point of view, CSA argues that electronic recording systems are no better for courtroom recording than shorthand and/or stenotype and points out that in several recent studies electrical recording has been considered to be a less acceptable reporting method. CSA also points to recent Congressional hearings concerning 28 U.S.C. § 753(b)(1970) which, in the protester's view, conclusively establishes the desirability of court reporting by shorthand or stenotype. Regarding the so-called 90 percent employee requirement, CSA perceives no basis for this provision, as all the IFB requires is a transcript, and it is allegedly immaterial by whose personnel the transcript is produced so long as the method used is acceptable.

As justification for the provisions in question, the Tax Court informs this Office that the problems experienced by the Court in the past have all related to subcontractors and/or stenographic reporting systems. The Court reports that its experience with various reporting methods, including shorthand, stenotype, stenomask, and electrical means, has indicated that electronic reporting has consistently produced the highest quality transcripts, particularly in the area of accuracy. The transcripts furnished in the past from reporting contractors using electrical means have generally been highly accurate and timely received, with any errors therein attributed to transcription rather than reporter input. In this connection, the Court has furnished this Office with a number of joint motions to correct transcripts which tend to support this proposition. We have also been supplied with a study conducted under the auspices of the Law Enforcement Assistance Administration which is considered to support the Court's technical conclusion. In the view of the Court, another benefit of the use of the electronic system is its playback capability, which enables a judge to replay the recorded testimony so as to immediately resolve problems or questions which may arise.

Allied with, and a possible cause of, the difficulties experienced by the Court concerning shorthand and mechanical reporting is the performance record of subcontractors using these same types of reporting methods. In fact, it appears from the Court's report that these difficulties are the genesis of the 90 percent employee requirement. As at least 90–95 percent of the Court's sessions are outside Washington, D.C., past contractors have utilized the services of subcontractors to perform a very large part of the contract reporting requirements. It appears that these subcontractors have generally used shorthand or stenotype for reporting. The Tax Court reports, however, that the subcontractors so engaged have produced less than acceptable transcripts, particularly in the area of accurate reporting of testimony. Also, subcontractors have created problems by failing to appear at trial sessions and refusing to be available for sessions scheduled in the evening or on weekends. The Court has therefore determined that, in order to eliminate such difficulties, employees of the prime contractor must be utilized in at least 90 percent of the Court's sessions. While it is recognized that this requirement will most probably restrict potential bidders to those large or so-called "national" reporting companies, the Court believes such a provision is necessary to the successful production of accurate transcripts.

The question whether electrical or electronic reporting means are superior to the more traditional methods of court reporting, i.e., shorthand, stenotype, stenomask, has been extensively discussed over the past several years. Many State and municipal courts are now employing electronic reporting means, and one State, Alaska, has successfully used electronic reporting as its court reporting system since 1960. We also note, however, that in its report to Chief Judge Harold H. Greene dated February 1, 1973, the Court Reporters Division of the District of Columbia Courts stated that the Court's electronic reporting system, installed on an experimental basis in November 1970, in Superior Court, was inadequate to meet the needs of the Court. The report recommended that the recorders be phased out and replaced with court reporters.

The United States Congress has also considered and debated this matter. In order to provide for the expeditious production of transcripts, a bill was proposed which would have permitted, if directed, electronic sound recordings of any proceedings in any U.S. District Court without a court reporter in attendance. S. 952, 91st Cong., 1st Sess. § 8(a)(1969); *Hearings on S. 952 Before Subcommittee No. 5 of the House Committee on the Judiciary*, 91st Cong., 1st Sess., ser. 10,

at 5, 14 (1969). The sole use of electronic recording devices was given support in Senate hearings by the Honorable John Biggs, Jr. Senior Judge of the Third Circuit. *Hearings on S. 952, S. 567, S. 474, S. 585, S. 852, S. 898, S. 1036, S. 1216, S. 1509, S. 1646, S. 1712, S. 2040 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 91st Cong., 1st Sess. 62–63, 67 (1969). The Senate Report on this measure, supported in principle by many witnesses in the above-cited hearings, favored the use of sophisticated sound recording techniques in U.S. District Courts, in place of court reporters, so as to enable expeditious production of transcripts. S. Report No. 91–262, 91st Cong., 1st Sess. 356 (1969). When this provision was before the House of Representatives, however, there was considerable opposition to the Senate provision regarding electronic recording by many advocates of the court reporter method of reporting. *See, e.g., Hearings on S. 952 Before Subcommittee No. 5 of the House Committee on the Judiciary, supra*, at 296–311, 323–35, 335–37, 447–57, 457–59. Accordingly, the House amendments to the Senate bill deleted the Senate's proposal concerning electronic recording. H.R. Report No. 91–887, 91st Cong., 2d Sess. 5 (1970). In conference, the Senate essentially acceded to the position of the House. H.R. Report No. 91–1086, 91st Cong., 2d Sess. 6–7 (1970). While the above indicates that Congress has, for the present, decided against allowing the substitution of electronic recording techniques for the court reporters, we note that it is recognized that considerable advances have been made in electronic equipment in the past several years. Court Reporting Study (California), *A Feasibility Study of Alternative Methods of Preparing Court Transcripts* (hereinafter referred to as the *Sacramento Report*) 9 (1973).

The comparative merits of electronic recording versus shorthand or mechanical recording for courtroom reporting have also been analyzed in three different studies made in the past 4 years. In order to determine the desirability of implementing electronic recording techniques in New York State Courtrooms, a committee to study the matter was appointed by the Presiding Justices, Appellate Divisions, First and Second Judicial Departments, State of New York. After comparison of several types of electronic recording equipment with court reporters, the Committee concluded that the transcripts of the court reporters were far superior to those of recording machines, and that recording machines were not viable substitutes for court reporters. *Report of the Committee To Evaluate Electronic Recording Techniques* (hereinafter referred to as *New York Report*) 11 (1971). These con-

clusions were based on test results which produce findings that, among other things, the electronic recording transcripts suffered from problems relating to accuracy, completeness, speaker identification, quality, extraneous noises, and transcription delay. *New York Report* at 5–7. In his statement accompanying the report, the Committee Chairman noted that the Committee's conclusions were not inconsistent with prior reports on the matter. See *Statement of Louis Waldman* (10/13/71) to accompany *New York Report.*

Subsequent to this report, Los Angeles County and its court system conducted an evaluation of electronic recording devices to determine their practicality and costs. Various types of electronic recording devices were parallel-tested with the Official Court Reporters of the Los Angeles Superior Court for a period of 15 court days. At the conclusion of the testing, analysis of the test data indicated that, as a rule, the court reporters were more accurate than the electronic devices in question. City of Los Angeles Superior Court, *Study To Determine Potential Use of Electronic Recording and Computer Translation System* 33 (1972) (hereinafter referred to as *Los Angeles Study*), as reported in *Sacramento Report* at 8. It was also reported that transcription processing time was not reduced by the use of electronic devices. *Los Angeles Study* at 25–26.

The third and final Report considered by this Office was conducted by Sacramento County, California, administered by the California Council on Criminal Justice, and funded primarily by a grant from the Law Enforcement Assistance Administration, U.S. Department of Justice. The study, which was specifically for the purpose of analyzing alternative methods of preparing court transcripts and which lasted 1½ years, parallel-tested transcripts produced by court reporters and electronic devices and compared the results in terms of accuracy, speed of preparation and cost. Briefly stated, it was concluded that the electronic devices used were more accurate than court reporters by an error rate of 1 to 3.22, the time expended in case completion (dailies) by both methods was generally equal, and the cost of electronic devices for the year 1972 was approximately 70 percent of the cost of the court reporter system. *Sacramento Report* at 67–68. After reviewing the report, and also considering an analysis of the report by Arthur Young and Company, the Evaluating Committee of the Court Reporting Study concluded that the proper use of electronic equipment for court reporting was a feasible alternative to the present traditional method of reporting by shorthand or mechanical means. *See* Appendix E to *Sacramento Report.*

While reviewing the findings and conclusions of these three reports, this Office was presented with several analyses and critiques of these reports, particularly the *Sacramento Report*. In arriving at our decision on this protest, these materials were given appropriate consideration.

The instant procurement was advertised pursuant to 41 U.S.C. § 5 (1970) which contemplates free and open competition for the actual needs of the Government, with opportunity for all qualified persons to compete. 20 Comp. Gen. 903, 907, 912 (1941). Consistent with the purpose of the statute, solicitations must be such as to allow competition on an equal basis, and conditions or limitations which have no reasonable relation to the Government's needs are improper. *United States* v. *Brookridge Farms, Inc.*, 111 F. 2d 461, 463 (10th Cir. 1940).

In the instant case, evidence has been presented to support the protester's contention that electronic recording is not superior to the more traditional methods of reporting (e.g., shorthand and mechanical devices). The record shows that the traditional methods of reporting in fact are considered acceptable by many Federal agencies utilizing reporting services for their hearings and conferences. These agencies include the Environmental Protection Agency, the Department of Justice, the Interstate Commerce Commission, the Federal Maritime Commission, the Federal Communications Commission and the Civil Aeronautics Board.

On the other hand, we note from the studies which have been cited that the electronic method is now considered to be an effective means of reporting courtroom proceedings. The *Sacramento Report* suggests that in some respects the electronic method of reporting may be superior to the more tranditional methods. The Tax Court reports that it has used both the traditional methods and electronic systems and that the electronic method "has produced the finest transcripts the Court has experienced and really the only verbatim transcript since it is the actual voice of the parties." It is reported that:

> When the Court, in conference, was apprised of the fact that a substantial amount of transcribing by the two lowest bidders [under an invitation issued prior to the subject invitation, which was canceled] would be either stenotype reporting or stenomask reporting by subcontracting, the Court determined that the reporting must be of electrical recordings and primarily by the prime contractor to eliminate the errors that the Court has experienced in the past. On occasions the judges trying cases have had some problem or question about the transcript and have asked for the tape to replay that portion where there was a problem.

Based on its experience over the years the Court has come to the conclusion that for its purposes the electronic recording system "is

far superior to any other system." In reaching this conclusion, the Court places particular emphasis on the desirability of listening to the recorded voices of the parties. By means of electronic recording the Court is able to recapture not only the exact words of the parties but also the manner in which the words were said. These features, of course, are unique to the electronic method of reporting and are not available under the more traditional methods.

As the studies cited above indicate, differences of opinion exist as to the relative merits of electronic recording versus the more traditional methods of reporting. We have recognized, however, that where a procurement is for services or supplies of a highly technical or specialized nature, there may well be differences of opinion as to how an agency's needs should be accommodated but that in the absence of a clear showing of unreasonableness the agency's determination in the matter will not be questioned by this Office. *Matter of Digital Equipment Corporation*, B–181336. September 13, 1974; B–174775, June 5, 1972. In this case, although the traditional methods of reporting are being used by many Federal agencies, we cannot say that the Tax Court's determination to restrict its procurement to electronic recording systems is without a reasonable basis.

With respect to the IFB's requirement that the successful contractor utilize its own employees in 90 percent of the Court's sessions, as the overwhelming majority of these sessions are outside Washington, D.C., the practical effect of this requirement would be to limit bidding to national contractors or those contractors with nationwide affiliations, and to discourage the competition of smaller contractors who in the past have relied heavily on subcontractors. The Court's report to this Office informs us, however, that in the past it has, as previously detailed, experienced great difficulties with subcontractor service. Accordingly, this restriction has been implemented to insure service by prime contractors.

An agency does have authority to impose reasonable limitations on the right of the prime contractor to subcontract all or a portion of the work in question. B–149096, August 9, 1962; 37 Comp. Gen. 678 (1958). This restriction reasonably may be based on historical experience of poor performance under similar circumstances. *Matter of Plattsburgh Laundry and Dry Cleaning Corp. et al.*, 54 Comp. Gen. 29 (1974). In our opinion, the Tax Court has established that, to a large extent, past subcontractor reporting service has been unsatisfactory. Therefore, we believe the agency may reasonably restrict the extent of subcontracting, and have no basis to disagree with the restriction in the subject solicitation.

In view of the foregoing, the protest is denied.