Decisions of The Comptroller General of the United States

VOLUME 54 Pages 1 to 74

JULY 1974

UNITED STATES
GENERAL ACCOUNTING OFFICE

PCN 45300106000

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1974

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Price $1.40 (single copy) ; subscription price : $17.75 a year ; $4.45 additional for foreign mailing.

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Cite Decisions as 54 Comp. Gen.—.

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

[B-166506]

Taxes—Ad Valorem—User Charge—Waste Treatment—Recovery of Costs

Statutory requirement that grantees under Public Law 92-500 will adopt system of charges assuring that each recipient of waste treatment services shall pay its proportionate share of treatment works' operation and maintenance costs is not met by use of ad valorem tax since potentially large number of users—i.e., tax exempt properties—will not pay for any services; ad valorem tax does not achieve sufficient degree of proportionality according to use and hence does not reward conservation of water; and Congress intended adoption of user charge and not tax to raise needed revenues.

In the matter of use of ad valorem tax to satisfy statutory requirement for a user charge system, July 2, 1974:

We have been requested to render a decision as to the propriety of the Environmental Protection Agency's (EPA) authorizing grant recipients to meet the user charge requirements of section 204(b)(1) of the Federal Water Pollution Control Act (FWPCA) as amended by Public Law 92-500, 33 U.S. Code (supp. II) 1284(b)(1), through the use of an ad valorem tax system. In connection with the matter, we have considered the views of EPA and other concerned parties.

Subsection 204(b)(1) of the FWPCA provides that EPA's Administrator should not approve any grant for any treatment work after March 1, 1973, "unless he shall first have determined that the applicant (A) has adopted or will adopt a system of charges to assure that *each recipient* of waste treatment services within the applicant's jurisdiction, as determined by the Administrator, *will pay its proportionate share* of the costs of operation and maintenance (including replacement) of any waste treatment services provided by the applicant; * * *." Subsection (2) provides that the Administrator shall issue guidelines applicable to payment of waste treatment costs by industrial and nonindustrial recipients of waste treatment services which—

shall establish (A) classes of users of such services, including categories of industrial users; (B) criteria against which to determine the adequacy of charges imposed on classes and categories of the users reflecting all factors that influence the cost of waste treatment, including strength, volume, and delivery flow rate characteristics of waste; and (C) model systems and rates of user charges typical of various treatment works serving municipal-industrial communities.

One of the major purposes of the aforequoted provisions of section 204 was to assure self-sufficiency on the part of the treatment works. Within that framework S. Report 92-414, dated October 28, 1971, accompanying S. 2770 states in pertinent part:

Although the committee is aware of the many different legal and financial circumstances that characterize state and local governments and agencies throughout the country, the bill directs the Administrator to promulgate guidelines for the establishment and imposition of *user charge systems* as a guide to grant applicants for waste treatment works grants. These guidelines should take into account the diversity of legal and financial factors that exist from jurisdiction to jurisdiction, and each applicant should be permitted reasonable flexibility in the design of a system of *user charges* that meets the unique requirements of his own jurisdiction. *As a general rule, the volume and character of each discharge into a publicly owned system should form basis of determining the rate at which each user should be required to pay.*

The committee devoted a great deal of attention to the difficult issue posed by the discharge of industrial pollutants into publicly owned treatment systems. There is much to be said for encouraging industrial use of public facilities. Each industrial discharge into a public system is one less outfall that must be monitored, and in many cases the economies of scale that characterize public treatment works would permit a net capital saving to the economy as a whole, assuming that the alternative to industrial use of public facilities is the on-site treatment by industry of its own wastes.

The bill would deal with industrial pollutants in this way: *each industrial user of a public system would pay a charge* that would include not only that share of operating and maintenance costs allocable to such user but which would also be sufficient to recover that portion of the Federal share of the capital cost of the facility allocable to such user. That portion of the Federal share of the capital cost allocable to each industrial user would be returned to the federal treasury.

The committee believes that this approach to the issue of industrial use of public facilities appeared to the committee to be the most reasonable and equitable one that can be devised. Any scheme that did not provide for full recovery of the Federal share of capital costs allocable to industrial users would clearly constitute a Federal subsidy of private industry and, more particularly, of those industries that were so situated as to make use of public facilities and industries producing wastes that are compatible with public treatment systems. *Any other approach would discriminate unfairly against those industries which, for whatever reason, were unable to utilize public systems.*

It may be that the Congress will, at some future time, determine that some form of Federal financial assistance to industry in meeting pollution control costs—whether through tax relief. loans, or grants—is appropriate. The committee does not prejudge the propriety or need for such assistance. But the committee does conclude that subsidy of private industry through the waste treatment works grant program would be haphazard and inappropriate.

Discretion is left to the Administrator and to state and local authorities as to the structure of each individual system of *user charges*. A difficult problem associated with industrial discharges is the calculation of the rate of assessing such charges. Industrial wastes vary considerably in their volume and character. The bill authorizes the Administrator to establish guidelines in the development of industrial *user charge rates*, which will at the minimum, consider factors such as strength, volume, and delivery flow characteristics of such waste.

The recovery of the Federal share of capital costs allocable to industry will presumably occur over a rather protracted period of time. Factors that might be taken into account in determining the rate of "pay-back" by industrial users should include the term during which any debt incurred for the non-Federal share of the capital cost will be retired and the term during which each industrial user is expected to make use of the facility. Also, a particular industry should repay that portion of the Federal grant that reflects its percentage use of the plant's total capacity, which should include any firm commitment of increased use of the facility by that industry. The committee does not believe it would be wise to require that existing industry's capital share be computed on that industry's share of the wastes actually treated when the facility initiates operation. The committee affirmatively concluded that capital costs recovered from industry should not include an interest component.

It may prove to be the case in certain instances that individual industrial operations will conclude that it will be more economical to treat their own wastes than to discharge into a public system. If and where such instances arise, it is logical to conclude that a net saving to the taxpayer and to the consumer will result. It is certainly not the intent of the committee to discourage industrial

use of public systems. It is the judgment of the committee that the industrial "pay-back" requirement will not discourage such use in most cases. *It is clear that the environmental costs should be borne by those who place demands on the environment. User charges carry out this principle.* [Italics supplied.]

H. Report 92–911, dated March 11, 1972, accompanying H.R. 11896 states at pages 90–92, in pertinent part:

A major new condition for receiving a grant relates to the establishment of *user charges.* This section specifically provides that the Administrator shall not approve any grant for publicly owned treatment works, after June 30, 1973 unless the applicant has adopted or will adopt a system of user charges to assure that each recipient of waste treatment services within his jurisdiction, as determined by Administrator, will pay its proportionate share of operation, maintenance (including replacement) and expansion costs. The applicant's jurisdiction means his entire service area.

The Committee believes it is essential to the successful operation by public agencies that *a system of fair and equitable user charges be established.* The Commitee recognizes that differing circumstances and conditions in local areas may call for especially designed systems and has therefore proposed that the Administrator promulgate general criteria and that such general criteria allow for variations to meet local conditions. This section contains standards the Committee believes should be taken into account by the Administrator; foremost among these is the underlying objective of achieving a local system that is self-sufficient.

In connection with industrial users of publicly owned systems, the Committee desired to establish within the user charge system an arrangement whereby industrial users would pay charges sufficient to bear their fair portion of all costs including the share of Federal contributions for capital construction attributable to that part of the cost of constructed facilities attributable to use by industrial sources. It is the Committee's view that it is inappropriate in a large Federal grant program providing a high percentage of construction funds to subsidize industrial users from funds provided by the taxpayers at large. Accordingly, the bill imposes an obligation on the part of publicly owned systems to incorporate into their *user charge schedule* a component to recover, without interest, that proportion of the total Federal grant to the community for construction purposes attributable to industrial users. The committee recognizes that there will be some administrative difficulties involved in establishing classes of industrial users and has left to the local system the obligation to set up an effective and equitable system, subject to the approval of the Administrator, inasmuch as the establishment of such a system is a precondition to Federal grants.

Since one of the objectives of the legislation is the development of self-sufficiency among local systems, the Committee has recommended that the revenues obtained by *user charges* covering the Federal contribution attributable to the use of the local system by industrial users remain with the local system. The Committee believes, however, that these funds should be used by the local system only for those purposes related directly or indirectly, to the maintenance, operation and development of the system. The Committee strongly opposes rebates to industrial users or any other form of a special treatment which would thwart the objective of the Committee stated above to prohibit Federal subsidies to industrial users.

Among the purposes for which the Committee believes the revenues so received might be used are the following: (1) construction, operation, maintenance, repair and replacement of sewage systems and for the repayment of principal and interest for indebtedness incurred therefore; (2) support for monitoring the quantity and quality of effluent to the agency's system for industrial, commercial, and residential sources; (3) monitoring of receiving water to ensure maintenance of adopted water quality standards; (4) water pollution control and abatement planning, particularly with respect to developing the interrelationships between such planning and water resources management, air resources management, solid waste management, and land use planning; (5) establish, operate, and maintain, where feasible, central facilities for the storage and analysis of systemwide operating data to promote the most efficient use and operation of the agency's interceptors, regulating stations, pump stations, and

treatment facilities; (6) enhancement of agency-owned property to provide community multi-use facilities over and above the basic function of controlling and abating water pollution; and (7) agency personnel training programs.

The following are examples of items which the Committee believes should not be financed by such revenues: (1) facilities for the pretreatment and monitoring of industrial waste in order to meet the agency's reserve system requirements; (2) reductions in user charges for specific categories of users, especially industrial users; and (3) payments of agency bonds or other long-term indebtedness outstanding for construction financed under the law as it heretofore has existed.

Finally, this section provides that approval of a grant to an interstate compact agency would satisfy any other requirement for congressional authorization.

The Conference Committee Report basically states that its substitute is the same as the Senate bill as revised by the House amendment. (Senate Report 92–1236, September 28, 1972, pp. 111–112.)

EPA cites the relevant committee reports as well as statements by Congressmen Grover and Mizell in support of their view that the Administrator is to promulgate general criteria, taking into account local conditions which may justify variations of approach and charge. EPA states that the Administrator is required to take into account the historical, legal, and financial background of the community.

To achieve proportionality between classes a surcharge will, under EPA's proposal, be levied upon a class from which tax revenue is insufficient to pay that class's proportionate share of operation and maintenance costs attributable to it. EPA feels that the statute does not address the issue of proportionality within classes and with the exception of cases of gross disproportionality, it is not necessary to show that each user within a class is paying the same rate as all other users within its class.

On the other hand, it appears that much testimony was received at congressional hearings in 1970 indicating that user charges could provide the economic incentive to improve efficiency and reduce the volume of waste produced. However, no action was taken on water pollution legislation in 1970. Congressional committees received similar testimony in 1971 in their consideration of the bill which was subsequently enacted into law. At that time, EPA's then Administrator indicated that the Administration believed that all communities should operate waste treatment systems on a "utility" basis with each user paying a fair share of the cost. We might also point out that in the Senate debate over the Conference Report on FWPCA, Senator Boggs, a conferee, inserted a statement into the Congressional Record which reads, in pertinent part, as follows:

The bill requires that a grant recipient establish an equitable user charge system that covers the operating, maintenance, and replacement costs of the project. User charges are designed to assure that the burden of any system's costs will be spread among all users of the system, in relation to the volume of waste discharge, not financed out of local taxes. Cong. Rec., October 4, 1972, p. S16891.

Finally, we note that the bill as passed by the Senate had provided that the Administrator shall determine that there has been adopted "a

system of charges to assure that by each category of users of waste treatment services, as determined by the Administrator, will pay its appropriate share of the costs of operation and maintenance." However, the finally enacted provision provides that the Administrator shall not approve any grant until he has determined that the applicant has adopted a system of charges to assure "that each recipient of waste treatment services within the applicant's jurisdiction, as determined by the Administrator, will pay his proportionate share of the costs." In other words, instead of charges by each category of users, Congress apparently decided to require each recipient of services to pay his proportionate share.

We agree that the issue is clearly a difficult one to resolve. Part of the problem is that in the absence of meters—which no one contends are required—it is difficult, if not impossible, to obtain true proportionality within and among the classes of users. The basic difficulty with EPA's position is that the ad valorem system is clearly a tax based on the value of the property and, conceptually at least, the Congress did not intend that a tax be used to obtain the user charges. In addition, the ad valorem system will not reach tax-exempt property and the users of waste treatment services could constitute a relatively significant segment of the users of sewage systems. This omission is, in our view, one of the major failings of an ad valorem system. Moreover, ad valorem taxes will reach industrial operations and others that do not discharge into a public sewage system. Of major importance also is the fact that the ad valorem tax does not in any way reward conservation of water and this was clearly an important factor in the congressional adoption of the user charge. In addition, as a practical matter, it is difficult to see how EPA could establish guidelines imposing varying surcharges in order to achieve any real degree of proportionality.

We recognize that alternatives to use of the ad valorem method may fall short of achieving absolute proportionality. Nonetheless, such other methods would appear to provide a degree of proportionality with respect to each recipient of sewer services which seemingly cannot be reached by ad valorem taxes. As imprecise a measure as such alternatives might be, they would be more consonant with the intent of Congress that *every user* should pay its fair share of operation and maintenance costs according to its use of the sewage treatment works and the underlying congressional feeling that the operation and maintenance of these works should be financed on a user, and not a tax, basis. Moreover, the alternative would not penalize those who do not use the sewage system.

Accordingly, while the matter is quite complex and not entirely free from doubt, it is our view that the section 204(b)(1) requirement that

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each recipient of sewer services will pay its proportionate share of the treatment works' operation and maintenance expenses may not be met through the implementation of an ad valorem tax system. We understand from an article in the *Environmental Reporter* that EPA's Deputy Administrator has advised several Members of Congress that if this Office were to question the use of an ad valorem user charge system, EPA would seek legislative authority therefor. We agree that if EPA believes that an ad valorem system would be appropriate in certain circumstances, it should seek to obtain statutory authority therefor.

[B-167015]

Bids—Competitive System—Federal Aid, Grants, etc.—Equal Employment Opportunity Programs

Illinois Equal Employment Opportunity (EEO) requirements for publicly funded, federally assisted projects do not comply with Federal grant conditions requiring open and competitive bidding because requirements are not in accordance with basic principle of Federal procurement law, which goes to essence of competitive bidding system, that all bidders must be advised in advance as to basis upon which bids will be evaluated, because regulations, which provide for EEO conference after award but prior to performance, contain no definite minimum standards or criteria apprising bidders of basis upon which compliance with EEO requirements would be judged.

In the matter of Illinois Equal Employment Opportunity regulations for public contracts, July 2, 1974:

The Director of the Office of Federal Contract Compliance (OFCC), Employment Standards Administration, United States Department of Labor has requested our Office to review the equal employment opportunity (EEO) regulations for public contracts of the State of Illinois, prescribed by the Illinois Fair Employment Practices Commission (IFEPC), and to determine whether these regulations are in violation of the basic principles of Federal procurement law. This matter arose out of Illinois' submittal of these regulations to OFCC, pursuant to 41 CFR 60-1.4(b)(2), 39 Fed. Reg. 2365 (January 21, 1974), for a determination whether the regulations are inconsistent with Executive Order 11246, as amended, or incompatible with the effective implementation of the Federal minority hiring and/or training plans in Illinois.

It is stated in the Illinois regulations that they are intended to promote and ensure equal opportunity without regard to race, color, religion, sex, national origin or ancestry in employment related to all Illinois State public works projects. Included in the coverage of the regulations are publicly funded, federally assisted construction contracts in the State. Bidders on these latter projects are also required to accept Federal EEO bid conditions promulgated by the Secretary

of Labor, pursuant to section 201 of Executive Order 11246, as amended.

Section 5.2 of the Illinois EEO regulations requires all bidders on construction contracts subject to Illinois' competitive bidding requirements to submit with their bids, a Bidder's Employee Utilization Form setting forth a projection and breakdown of the total workforce to be hired and/or allocated to such contract work, including a projection of minority and female employee utilization in all job classifications to be used on the contract project. The manpower utilization analysis necessary for this projection requires the bidders to determine whether they are underutilizing minority persons and/or women in any of their job classifications. In order to make this determination, bidders are supposed to take into account the factors listed in section 4.2 of the Illinois regulations, which states in pertinent part:

(a) Underutilization of minorities means having fewer minority workers in a particular job classification than would reasonably be expected by their availability. The availability of minority workers for any job classification shall be determined by the minority population percentages of the area(s) from which the contractor or subcontractor may reasonably recruit and the unemployment rates of minorities as compared to unemployment rates of nonminorities in such area(s). In addition, the contractor or subcontractor shall consider in such recruitment area(s):

(i) the size of the minority unemployment force;

(ii) the numbers of minorities having requisite skills;

(iii) the promotable and transferable minorities within the contractor's or subcontractor's organization;

(iv) the existence of training institutions capable of training persons in the requisite skills; and

(v) the degree of training which the contractor or subcontractor is reasonably able to undertake as a means of making all job classifications available to minorities.

Underutilization of women is defined in similar terms in section 4.2(b).

If the bidder determines that it is, at present, underutilizing minority persons and/or women, it also is required to submit with its bid an affirmative action plan, including a description of its section 4.2 workforce analysis and goals and timetables to which the bidder's recruitment, hiring and promotion efforts will be directed to correct this underutilization.

After the award of the contract but prior to performance, section 5.2 requires that:

(b) The contracting agency letting such a contract shall review the Employee Utilization Form, and workforce projections contained therein, of the contract awardee to determine if such projections reflect an underutilization of minority persons and/or women in any job classification in accordance with the Equal Employment Opportunity Clause and Section 4.2 hereof. If it is determined that the contract awardee's projections reflect an underutilization of minority persons and/or women in any job classification, it shall be advised in writing of the manner in which it is underutilizing and such awardee shall be considered to be in breach of the contract unless, prior to commencement of work on the contract project, it submits an acceptable written affirmative action plan to correct such underutilization including a specific timetable geared to the completion stages of the contract.

Should the contract awardee fail to submit an acceptable written affirmative action plan or otherwise fail to comply with the EEO regulations, IFEPC may terminate the contract and/or issue a show cause notice and proceed to a hearing leading to debarment, suspension, cancellation, withholding progress payments or assessment of statutory monetary penalties.

OFCC has conditionally approved the Illinois regulations under 41 CFR 60–1.4(b) (2) as not being inconsistent with the purposes and objects of Executive Order 11246 and not being incompatible with the Federal EEO plans in effect in Illinois, provided that our Office subsequently determines that these regulations are consistent with the basic principles of Federal procurement law. In this regard, OFCC notes that these regulations are in apparent conflict with the principles enunciated in our decisions in 47 Comp. Gen. 666 (1967) and 48 *id.* 326 (1968). Our decision in 48 Comp. Gen. *supra* concerned Federal EEO requirements on federally assisted construction contracts in which we held:

> * * * We believe it is fundamental that competitive bidding procedures should require invitations for bids to be so drafted as to offer equal and unambiguous terms and conditions to all bidders. No prospective contractor can intelligently compute his bid, or even decide that he wishes to incur the expenses of competing for the contract, without being fully informed beforehand of all factors which will materially affect the cost of his work or his ability to perform including his hiring methods, personnel qualifications and subcontractors. Unless the invitations are definite and complete as to all essential requirements there can be no accurate and indisputable basis on which to determine which bid offers compliance with contract conditions and fulfillment of all project needs at the lowest price. Further, where material conditions and requirements are not clearly defined, such circumstance gives rise to the opportunity for favoritism, arbitrary action and abuse of authority in the awarding, or approving of proposed awards, of the contracts.
>
> We perceive no compelling requirement in the circumstances outlined above for differentiation in the observance and application of the basic principles of competitive bidding, whether such bidding is required by Federal statute as a prerequisite to the obligation of public funds or is required by published regulations, rules and policies formulated by the Departments in the implementation of such statutes. Accordingly, in our view where federally assisted contracts are required to be awarded on the basis of publicly advertised competitive bidding, award may not properly be withheld pursuant to the Plan from the lowest responsible and otherwise responsive bidder on the basis of an unacceptable affirmative action program, until provision is made for *informing prospective bidders of definite minimum requirements to be met by the bidder's program and any other standards or criteria by which the acceptability of such program would be judged.*
>
> Although it may be true that the present lack of specific detail and rigid guideline requirements for an acceptable affirmative action program permits the utmost in creativity, ingenuity and imagination, it is equally true that it permits denial of a contract to the low bidder to be based on purely arbitrary or capricious decisions, and award to be made on the basis of similar decisions. We do not believe that a statement of those *minimum* requirements deemed necessary for an acceptable program would unduly interfere with the proper choice of bidders fully qualified and sincerely desirous of performing in full conformity with all legal requirements. [Italics supplied.]

Specifically, OFCC has asked whether the Illinois EEO requirements included in invitations for bids on federally assisted projects

must comply with the basic principles of Federal procurement law expressed in 48 Comp. Gen. *supra* and, if so, whether the Illinois EEO requirements contain the necessary definite minimum standards and criteria apprising the prospective bidders of the basis upon which their compliance with the EEO requirements will be judged.

It is clear that a grantee receiving Federal funds takes such funds subject to any statutory or regulatory restrictions which may be imposed by the Federal Government. 41 Comp. Gen. 134, 137 (1961); 42 *id.* 289, 293 (1962); 50 *id.* 470, 472 (1970), *State of Indiana* v. *Ewing*, 99 F. Supp. 734 (1951), cause remanded 195 F. 2nd 556 (1952). Therefore, although the Federal Government is not a party to contracts awarded by its grantees, a grantee must comply with the conditions attached to the grant in awarding federally assisted contracts.

We believe that, where open and competitive bidding or some similar requirement is required as a condition to receipt of a Federal grant, certain basic principles of Federal procurement law must be followed by the grantee in solicitations which it issues pursuant to the grant. 37 Comp. Gen. 251 (1957); 48 Comp. Gen, *supra*. In this regard, it is to be noted that the rules and regulations of the vast majority of Federal departments and agencies specify generally that grantees shall award contracts using grant funds on the basis of open and competitive bidding. This is not to say that all of the intricacies and conditions of Federal procurement law are incorporated into a grant by virtue of this condition of open and competitive bidding. *See* B–168434, April 1, 1970; B–168215, September 15, 1970; B–173126, October 21, 1971; B–178582, July 27, 1973. However, we do believe that the grantee must comply with those principles of procurement law which go to the essence of the competitive bidding system. *See* 37 Comp. Gen. *supra*. One of these basic principles is that all bidders must be advised in advance as to the basis upon which their bids will be evaluated, so that they may compete for award on an equal basis. 36 Comp. Gen. 380, 385 (1956); 37 *id. supra;* 48 *id. supra;* B179914, March 26, 1974. Therefore, although our decision in 48 Comp. Gen. *supra* only concerned *Federal* EEO requirements contained in solicitations on federally assisted projects, we believe the principles discussed in that decision go to the essence of the competitive bidding system and, therefore, must also apply to *State* EEO requirements on federally assisted contracts, such as those imposed by IFEPC.

The broad subjective factors set out in section 4.2 of the Illinois regulations, which prospective bidders are supposed to consider in determining whether their proposed workforce underutilizes minority persons and/or women, hardly constitute *definite* minimum requirements, and, therefore, cannot really put any bidder on notice as to

what it must actually do to qualify its workforce in order to receive an effective award. In this regard, it should be noted that the Illinois regulations in no way indicate from what source(s) the prospective bidders are to obtain the statistical data required to give these factors meaning or how the bidders are to interrelate the various factors to come up with even a rough number or percentage, so that the bidders can make some rational judgment as to what will be eventually demanded of them by the contracting agency and/or IFEPC. Moreover, even if a prospective bidder can, by its own subjective standards, determine whether it, in its opinion, is sufficiently utilizing minority persons and/or women, there can be no assurance that the contracting agency and/or IFEPC may find, for their own reasons, that a higher percentage of these persons must be utilized for the particular contract.

Furthermore, these same basic principles of competitive bidding require that award should not be dependent on the low bidder's ability to successfully negotiate matters mentioned only vaguely before bid opening. In the present case, a "successful" bidder is required to so negotiate the elements of his affirmative action plan, pursuant to section 5.2 of the Illinois regulations, as a condition precedent to commencement of performance under the contract. Accordingly, in view of the foregoing, we are of the view that the Illinois regulations do not comply with the basic principles of the competitive bidding system set forth in 48 Comp. Gen. *supra*.

We do not believe the fact that the EEO conference required under the Illinois regulations takes place after award but prior to the contract's performance (to be contrasted with the situation in 48 Comp. Gen. *supra*, where the EEO conference took place after bid opening but prior to award) should exempt the Illinois regulations from the application of these basic principles of the competitive bidding system, since an award in such circumstances must be viewed as an award subject to a condition subsequent. Indeed, there appears to be even greater reason for application of these basic principles in such a case because the contracting agency has more leverage on the "successful" bidder to force him to comply with its version of an appropriate affirmative action plan or else be held in breach of contract even before performance under the contract is begun.

The Illinois EEO regulations were apparently roughly patterned after OFCC's Revised Order No. 4, 41 CFR 60–2, which concerns EEO requirements on Federal nonconstruction contracts. We note that Revised Order No. 4 also seems to be in violation of the basic principles of Federal procurement law and we are bringing this matter to the attention of the Secretary of Labor.

However, it should be noted that there are certain essential differences between the construction industry and the nonconstruction industries, which make permissible different methods for implementing EEO objectives in construction contracts and nonconstruction contracts. Traditionally, the construction industry has had a floating workforce, so that in each new contract there would be essentially a new workforce, which would be susceptible to the setting of definite EEO standards for each contract. This is not the situation in other industries which ordinarily have a relatively fixed basic workforce at each facility, where it would be virtually impossible to set EEO standards on a contract by contract basis.

In view of the foregoing, we believe that the Illinois EEO regulations are inconsistent with the basic principles of Federal procurement law.

[B–158549]

Compensation—Overtime—Early Reporting and Delayed Departure—Guards—Overtime Claim—Retroactive Period

Although decision 53 Comp. Gen. 489 authorized payment of 15 minutes uniform changing and additional travel time to guards in Region III, General Services Administration, through period up to February 28, 1966, guards assigned to Baltimore area may be paid such overtime to December 23, 1970, inasmuch as the regulation requiring that unifroms be changed at assigned lockers, applicable in Baltimore, was not amended to permit wearing of uniforms to and from work until that date.

In the matter of overtime entitlement of General Services Administration guards, July 5, 1974:

This decision involves the claim of Mr. Leon C. Johnson for overtime compensation for preliminary and postliminary duties performed as a member of the Baltimore contingent of the Federal Protective Service, Region III, General Services Administration. Except insofar as explained below, Mr. Johnson's claim is identical to those of the 11 guards assigned within Region III to duty in the Washington metropolitan area whose claims are the subject of our decision, 53 Comp. Gen. 489 (1974).

In that decision we held that pursuant to the holding of the Court of Claims in *Eugie L. Baylor* v. *United States*, 198 Ct. Cl. 331 (1972), guards within Region III are entitled to overtime compensation for the time involved in changing into and out of uniform at assigned locker locations prior to February 28, 1966, on which date the pertinent regulations were amended to permit members of the guard force to wear their uniforms to and from work. We further held that insofar as guards are able to provide evidence that they in fact performed such activities they are entitled under the *Baylor* decision to overtime

compensation for the time involved in performing preliminary and postliminary supervisory responsibilities, in obtaining and replacing firearms, and in traveling between assigned locker locations, gun points and posts of duty. Except as indicated below our holding in that decision is applicable to members of the guard force within Region III assigned to Baltimore, including Mr. Johnson.

In considering that portion of Mr. Johnson's claim for uniform-changing time, we note that the applicable procedures followed in Baltimore are distinguished from those which prevailed throughout the remainder of Region III. Specifically, guards assigned to Baltimore were required to change into and out of uniform at their assigned locker locations until they were notified on December 23, 1970, that they would thence forth be permitted to wear their uniforms to and from work.

In regard to the Baltimore uniform procedures, a letter of December 6, 1973, from Mr. George I. Perryman, Regional Administrator, Region III, states, in pertinent part, as follows:

> The special order issued in 1966 affecting a policy change in the wearing of uniforms was not comprehensive in coverage. Circumstances which precipitated the change were considered to be local in nature by the officials who developed the new policy. In fact, at the time of the change in regulations, guards assigned to outlying areas of the region were directly responsible to their Buildings Managers rather than to the centralized Federal Protective Service which now exists. Thus, policy changes made for the Washington metropolitan area would not have been applicable regionwide.
>
> No official in the Baltimore area was authorized to approve overtime during the period in question. Only the Regional Commissioner, Public Buildings Service, Region 3, or the Director, Buildings Operation Division, could have made such authorizations. * * *
>
> With respect to the entitlements for overtime compensation for uniform changing by Mr. Johnson and the other Baltimore guards, it was not until September 1970, that the policy allowing each guard the option of wearing his uniform to and from work was made applicable regionwide by an amendment of the GSA orders pertaining to guards. The earliest official notification of this policy to the guards in the Baltimore area which we have been able to document is a letter dated December 23, 1970. This correspondence was directed to guard supervisors by Melvin J. Komenda, Captain of the Guard in Baltimore, clarifying the procedures for exercising the uniform option.

Because it appears that members of the Baltimore contingent of the Region III guard force were officially required to change into and out of uniforms at their locker locations until December 23, 1970, those individuals are entitled to overtime compensation for a maximum of 15 minutes per day for changing uniforms through that date rather than through the February 28, 1966, date applicable to guards assigned in the Washington metropolitan area. Consequently, those individuals may be entitled to additional overtime compensation for the time involved in traveling between locker locations and gun points or posts of duty for the periods of their claims prior to December 23, 1970.

Insofar as applicable to members of the Region III guard force

assigned to the Baltimore area, our decision 53 Comp. Gen. 489, *supra*, is modified to authorize payment of uniform changing and travel time as indicated in the preceding paragraph.

[B-179339]

Officers and Employees—Transfers—Relocation Expenses—Temporary Quarters—Beginning of Occupancy

Where an employee occupied temporary quarters beginning more than 30 days from the date he reported for duty at his new official station, but prior to the date his family vacated the residence at the old official station, he is entitled to temporary quarters subsistence expenses under Section 8.2e of the Office of Management and Budget Circular No. A–56, Revised, August 17, 1971.

In the matter of subsistence expenses, July 5, 1974:

This action is in response to letter dated July 12. 1973, from Harvey P. Wiley, Certifying Officer, Soil Conservation Service, Department of Agriculture, East Lansing, Michigan, requesting an advance decision regarding payment of the claim of Ronald P. Church, in the amount of $373.95, for subsistence expenses incurred while occupying temporary quarters in connection with a transfer of official station. The request was forwarded to this Office by letter from the Budget and Finance Division, Soil Conservation Service, Department of Agriculture, Washington, D.C., dated July 31, 1973.

The record discloses that by Travel Authorization No. 89–73 dated November 6, 1972, as amended, Ronald P. Church was authorized reimbursement of expenses incident to transfer of official station from St. Joseph, Michigan, to Grayling, Michigan. In addition to transportation of the employee and his family, transportation of household goods, and per diem allowances, the travel authorization allowed such other expenses "as can be justified under Budget Bureau Circular A–56, Revised October 12, 1966."

Mr. Church reported for duty at his new station on December 3, 1972. Market conditions prevented the sale of his home before departure from his old station. A part of the period from December 3, 1972, to January 6, 1973, was spent on annual leave and holiday leave, when he returned to his home at his old duty station. He completed the sale of his home at his old duty station on February 24, 1973. His family vacated the former residence on March 11, 1973, and moved into permanent quarters upon arrival at the new duty station on the same day.

Mr. Church filed a claim for 30 days temporary quarters subsistence for the period January 8, 1973, through February 7, 1973. The amount of $373.95, claimed for this period was disallowed by the National Finance Center, Department of Agriculture, based upon the

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Department's interpretation of Office of Management and Budget Circular No. A–56, section 8.2e as requiring the period of use of temporary quarters to begin not later than 30 days after the employee reports for duty or within 30 days of the date the family vacates the residence at the old station.

The question for determination is whether an employee who occupied temporary quarters beginning more than 30 days from the date he reported for duty at his new official station, but prior to the date his family vacates the residence at the old official station, is entitled to temporary quarters subsistence expenses. In this regard section 8.2e of the Office of Management and Budget Circular No. A–56, Revised, August 17, 1971, provides:

> * * * The use of temporary quarters for subsistence expense purposes under these provisions may begin as soon as the employee's transfer has been authorized and the written agreement required in 1.5a has been signed. In order to be eligible for the temporary quarters allowance, the period of use of such quarters for which a claim for reimbursement is made must begin not later than 30 days from the date the employee reported for duty at his new official station, or if not begun during this period, then not later than 30 days from the date the family vacates the residence at the old official station but not beyond the maximum time for beginning allowable travel and transportation.

It is our view that this section provides a period of limitation after reporting for duty at a new official station within which the use of temporary quarters must begin; and, if not begun during this period, provides a maximum period after the family vacates the residence at the old official station within which the use of temporary quarters must begin. The section delineates the latest point in time at which an employee's claim for subsistence expenses may commence for reimbursement purposes. It is not viewed as prohibiting reimbursement for such expenses for claims commencing *between* the period ending 30 days after the employee reports to the new duty station and the 30-day period beginning when his family vacates their residence at the old duty station.

Since it is shown that during the period between January 8, 1973, through February 7, 1973, the employee incurred expenses for temporary quarters, payment of the claim would be proper.

[B–180363]

Transportation—Routes—Applicable Tariff Rates—Longer *v.* Shorter Route

Where tariff provides that if transportation charges for longer route are less than charges for shorter route because of avoidance of bridge, ferry, or tunnel charges, then charges for longer route apply notwithstanding the fact that Government did not request longer route.

In the matter of Trans Country Van Lines, Inc., July 5, 1974:

Trans Country Van Lines, Inc. requests review of the settlement certificate which disallowed its claim for additional transportation charges on a shipment transported under Government bill of lading E–6227250 by Trans Country Van Lines, Inc. from Fort Eustis, Virginia, to Camp Drum, Watertown, New York.

The shipment here consisted of steel desks and tables weighing 14,810 pounds. The shipment was unrouted and the record does not indicate that the shipper issued any routing instructions. The carrier originally billed and was paid $657.90 based on a rate of $2.64 per 100 pounds at a minimum weight of 21,000 pounds, equalling $554.40, plus a shipment charge of $30, plus a bridge and tunnel charge of $0.35 per 100 pounds, equalling $73.50. The charge of $2.64 was based on mileage not exceeding 600 miles.

On audit, charges were recomputed based on a distance of 619 miles and a routing which avoided any bridge, ferry, or tunnel charges. For this mileage, the rate was $2.74 per 100 pounds and charges were computed on a minimum weight of 21,000 pounds, equalling $575.40, plus a shipment charge of $30. This resulted in total charges of $605.40 and a notice of overcharge was issued for $52.50 which was set off against funds otherwise due the carrier.

The Movers' and Warehousemen's Association of America, Inc. (MWAA), Government Rate Tender ICC No. 1–W, Item 290, Note 4 provides:

> When a lower charge results from computing mileage via a longer route (eliminating the use of Bridge, Ferry or Tunnel Service) than the shortest practical route, such lower charge will be assessed.

This note was the basis of the audit action.

The carrier disagrees with the auditor's interpretation of the tender. The carrier asserts that Note 4 of Item 290 refers to actual use and not clerical computations and contends that Note 4 must be read in conjunction with Trans Country's published tariff. In support, the carrier quotes Rule 2(c) of MWAA Tariff No. 65, MF–I.C.C. No. 92:

> If the shipper requests a longer route than the shortest practical route as shown in the [mileage guide], the mileage over the longer route, as shown therein, shall apply.

It is apparently the carrier's belief that for the lower charges to apply in this case, it would have been necessary for the Government to have requested the longer route. Since no request was made, the carrier argues, the charges should be based on the actual route.

Both Rule 2(c) and Note 4 provide exceptions to the general rule that the shortest distance is used in computing the charges. But the carrier's interpretation makes Note 4 superfluous. If the shipper had to

request the longer route in order to obtain the lower charges, Rule 2(c) would have been sufficient by itself.

It is apparent from the two provisions that a distinction was intended. Rule 2(c) covers the case where the shipper for his own reasons requires a specific route and the rule requires the shipper to pay for the longer route. But Note 4 covers the case where the standard presumption—the shortest route equals the lowest charges—does not apply. The note preserves the shipper's right to the lowest charge. Nothing in Note 4 indicates that the shipper must request the longer route. It is presumed in Note 4 and confirmed by Rule 2(c) that the shipper wants to incur the lowest charges unless otherwise specified.

The distinction between actual mileage and clerical computation suggested by the carrier is meaningless. Note 4 requires two or more computations of charges and a selection of the lowest total charge. The actual mileage driven by the carrier by his own choice is irrelevant. It is our view that, regardless of the route employed by the carrier, the shipper is entitled to have the charges based over whatever results in the lower charge.

Accordingly, the disallowance of the claim of Trans Country Van Lines is sustained.

[B-180247]

Contracts—Negotiation—Evaluation Factors—Options—Price in Excess of RFP Ceiling

Contract should not have been awarded to offeror who quoted option price in excess of ceiling in request for proposals (RFP), since it was prejudicial to other offerors and contrary to best interests of Government, and therefore, negotiations should be reopened to either cure deviation in accepted proposal or to issue amendment to RFP deleting option price ceiling, notwithstanding action will amount to auction technique, as General Accounting Office does not believe that improper award must be allowed to stand solely to avoid implications of auction situation. Modified by 54 Comp. Gen. — (B-180247, Dec. 26, 1974).

In the matter of Bristol Electronics, Inc., and E-Systems, Inc., Memcor Division, July 11, 1974:

On November 27, 1973, request for proposals (RFP) No. DAABO5-74-R-0362, was issued by the United States Army Electronics Command (ECOM), Philadelphia, Pennsylvania. The RFP solicited proposals for a specified quantity of AN/PRC ( ) radio sets and RT-841 ( )/PRC transmitters, and included an option provision for the purchase of up to an additional 100 percent of the specified quantity of items.

In response to the RFP, five proposals were submitted. Ranked in order of price from lowest to highest, they were as follows:

Cincinnati Electronics Corp. (Cincinnati).
Bristol Electronics, Inc. (Bristol).
Sentinel Electronics, Inc. (Sentinel).
Electrospace, Inc. (Electrospace).
E–Systems, Inc. (MEMCOR Div) (E–Systems).

Cincinnati and Sentinel were determined to be ineligible for consideration as they had not submitted a first article test report for approval, as specifically required by section C.45 of the RFP entitled "Special Notice to Offerors."

On January 17, 1974, section F.12 of the RFP was amended to require interchangeability of units, assemblies, subassemblies, modules and parts. All offerors under consideration were required to submit impact costs, if any, by January 23, 1974. None of the firms in contention altered their cost submissions.

At this stage of the procurement, Bristol was the low offeror as a result of the disqualification of Cincinnati. Negotiations were formally closed on January 28, 1974, and best and final offers were required to be submitted by January 30, 1974. The results of the closing placed the offerors in the following price positions (lowest to highest):

Bristol.
E–Systems.
Electrospace.

However, on February 21, 1974, section F.1.d of the RFP, entitled "Quality Assurance of Electronic, Electric, and Electromechanical Parts," was deleted. The contracting officer considered this deletion to be a material change to the RFP requiring the reopening of negotiations. All offerors under consideration were apprised of this decision and were requested to advise of the cost impact, if any, by February 26, 1974. Again none of these offerors amended their price quotations.

On February 25, 1974, the contracting officer was advised that 1,636 units required by the schedule were Foreign Military Sales (FMS) requirements for which no waiver had been obtained, as required by Armed Services Procurement Regulation (ASPR) 6–705.2, which prohibits sales of unclassified defense articles to foreign Governments unless these articles are not generally available for purchase from commercial sources in the United States. This quantity was identified in a telegraphic notice to the offerors under consideration on February 26, 1974. Those offerors were provided until March 1, 1974, to advise of any cost impact the information would have on their proposals. On March 1, 1974, a waiver was obtained for 110 units of the FMS requirement. All offerors under consideration were notified the same day that

the total RFP quantity had been changed from 6990 to 5464 units and that the time for revision of proposals had been extended to March 8, 1974.

On March 8, 1974, the standing of the three offerors listed above changed so that the order from the lowest to the highest price was as follows:

E-Systems.
Bristol.
Electrospace.

During the course of negotiations, Bristol, on February 9, 1974, protested to our Office against award of a contract to any other offeror under the RFP. However, a determination was made pursuant to ASPR 2-407.8(b)(3) that the procurement was urgent and that an award should be made notwithstanding the protest. Approval of award was granted on March 13, 1974. Award was made to E-Systems on March 14, 1974. All but one of the original grounds of protest were resolved prior to the award. The remaining ground was withdrawn after the award. However, as a result of the award, Bristol protested to our Office, raising the additional issue of an improper option price in E-Systems' offer, rendering the offer unacceptable.

It is Bristol's position that subsection a, of RFP section J.1, "OPTION FOR INCREASED QUANTITY (1971 JUN)," entitled the Government to purchase up to a specified quantity of supplies called for in the schedule at the price specified in the schedule or a lesser price, if so indicated in subsection (d.). Since E-Systems indicated in subsection (d.) an option price in excess of that quoted in the schedule, Bristol alleges that E-Systems offer was not proper for acceptance.

ECOM has taken the position that the RFP did not expressly require the rejection of an offer which did not quote a price for the option quantity equal to or less than the price submitted for the basic quantity. Moreover, offers were to be evaluated for award exclusive of the price submitted for the option quantity (section J.1c.) and neither the option nor any part thereof would be exercised at the time of award. Finally, the contracting officer contends that the option quantity could not be exercised during the option period subsequent to the contract award unless it was determined to be the best price obtainable. In light of this reasoning, the higher option price submitted by E-Systems was considered to have been a minor irregularity, and therefore disregarded.

ECOM also relies on two of our decisions to support the action taken. ECOM refers to the statement in 46 Comp. Gen. 434, 435 (1966), that—

> The failure to quote on the option quantity * * * unquestionably was a material deviation in that it deprived the Government of a substantive and valuable right

to increase the quantity * * * within 180 days after receipt of the notice of award. Furthermore, the invitation specifically provided that "Bidders *must* bid on all items * * * or their bids will be rejected as nonresponsive."

ECOM distinguishes the decision from the present situation by finding (a) no provision in the RFP which requires offerors to be found unacceptable based on a failure to quote a price for the option, and (b) no line item in the schedule covering the option quantity, thus exempting the option quantity from the terms of section C.31 (which required an offeror to quote on all items in the solicitation to be eligible for award).

Further, ECOM refers to the statement in 51 Comp. Gen. 528, 530 (1972), that—

* * * [there is] no substantial difference between a bid with an unreasonably high option price and a bid without any option price. Since an otherwise proper bid could not be rejected because of the high option price where the option quantity was not to be included in the award, we see no reason why the absence of any option price should result in rejection.

ECOM contends that an excessive option price in this procurement can be treated in the same manner as no option price—neither being cause for rejection of the offer.

Counsel for E-Systems, while agreeing with the position taken by ECOM, sets forth the following contentions to support the award to E-Systems. Counsel, citing 44 Comp. Gen. 581 (1965), contends that the inclusion of a higher price for the option items as opposed to the items in the schedule was an immaterial deviation, prejudicial to no other offeror, and therefore properly waivable by the Government. Additionally, counsel contends that a reopening of negotiations based upon a waiver of the option price ceiling would have had the effect of creating an auction atmosphere of the type prohibited by ASPR section 3-805.3(c).

For the reasons set forth below, we find ECOM and E-Systems' reliance on the cited decisions for the most part to have been misplaced, and the contention of Bristol to be meritorious.

With respect to the 46 Comp. Gen. decision, *supra*, while we might agree that the RFP contained no specific mandate requiring a finding of unacceptability due to a failure to quote a price on the option quantity, we are of the opinion that offerors were required to quote a price on the option quantity. Even though the option quantity was not included as a line item, and therefore not subject to the requirements of section C.31, it was section J.1(d.) of the RFP which required offerors to quote a price for the option. Section J.1(d.) states that "The offeror *shall* indicate * * * the unit price(s) for the increased quantities under this option." "Shall" means "imperative" ASPR 1-201.16. Therefore, it was incumbent upon offerors to quote an option price under the

RFP, unless they desired to have the prices quoted in the schedule prevail for the options. [Italic supplied.]

Furthermore, the 51 Comp. Gen. decision, *supra*, is inapplicable. The portion of the decision quoted above is applicable only when two specific requirements are met. The requirements, as stated in the decision are that (1) the IFB does not establish a ceiling for option prices and (2) the option prices are not to be included in the evaluation. Section J.1(c.) specifically excluded the option prices from evaluation. However, section J.1(a.) specifically establishes a ceiling for any option price quoted. It is our opinion that the statement "* * * at the unit price specified in the schedule or the lesser price if specified below * * *" clearly establishes a ceiling for any option price to be quoted. With this type of ceiling contained in the RFP, we find the 51 Comp. Gen. decision, *supra*, and other decisions drawing analogies between a "no-bid" and "excessive bid" to be inapplicable due to the incorporation of the requirement for an option ceiling price.

Turning our attention to the contentions of counsel for E-Systems, it is correct that we considered a case similar in many respects to the present situation in 44 Comp. Gen. 581. In that case bidders were required by the invitation to quote option prices not to exceed their basic unit prices, and the bid evaluation was to be made on the basis of basic prices only. There also, the low bidder on the basic quantity quoted higher option prices, contrary to the invitation requirement. Under those circumstances we had no objection to permitting the low bidder to reduce its option prices to coincide with its basic prices for purposes of award, since the other bidders were not unfairly prejudiced thereby, as both the low bidder's base and option prices were the lowest offered. We pointed out that the purpose for limiting the option price to the basic unit prices was to insure minimum costs to the Government should the option be exercised in whole or in part. In that case, award to the low bidder would obviously result in the lowest cost to the Government whether or not the option was exercised. We noted also that because the low bid as submitted offered the lowest cost to the Government in any case, acceptance of that bid could not be regarded as prejudicial to the other bidders. This rationale was subsequently followed in our decision B–176356, November 8, 1972.

Applying the standards of the above-cited decisions to the instant case, we must conclude that a contrary result must follow. Here the situation is analogous to that in 51 Comp. Gen. 439 (1972), although that solicitation was an IFB whereas here we are dealing with an RFP. Here, as in 51 Comp. Gen. 439, the sum of the low offeror's basic prices for the line items in dispute plus the higher option prices quoted by the

offeror exceed the sum quoted by the next low offeror on these items. As we stated at 51 Comp. Gen. 439, 442:

> If the Government should exercise the option for component parts, it might incur greater costs purchasing the kit and component parts on the basis of the bid submitted by Fourdee rather than on the bid of DC Electronics.
>
> * * * * * * *
>
> Applying the standards in 44 Comp. Gen. 581, *supra*, we must conclude that acceptance of Fourdee's bid as submitted may not result in the lowest cost to the Government, depending upon the exercise of the option. Award on the basis of the Fourdee bid may, therefore, be regarded as prejudicial to the other bidders who, as suggested in the administrative report, may well have bid higher on the basic quantities because of the IFB limitation on the option prices.

Although the line of decisions considered above (44 Comp. Gen. 581; 51 *id.* 439; B–176356, November 8, 1972) involved advertised procurements, we see no logical or reasonable basis to distinguish the rule solely due to the fact that the procurement in this instance was negotiated rather than advertised. In both advertised and negotiated procurements, the procuring agencies' purpose for including a ceiling price in the option is to achieve the identical goal. Therefore, since E–Systems' basic price plus the option price exceeds the same total price as offered by Bristol, the award to E–Systems is both prejudicial to other offerors and contrary to the best interests of the Government. Further, it may well be, as indicated in the 51 Comp. Gen. decision, *supra*, that the prices of Bristol and Electrospace on the basic quantity were higher than E–Systems because of the limitation in the option prices in the RFP. Thus, it was inappropriate to consider the high option price of E–Systems as a minor irregularity and unfair to Bristol and Electrospace to waive the option and make an award to E–Systems as the low offeror based upon the basic quantity price without according them an opportunity to submit a price free of an option requirement.

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

In light of this recommendation, it should be noted that we are cognizant of the contention asserted by counsel for E–Systems that a reopening of negotiations would create an auction atmosphere. Coun-

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sel cites 50 Comp. Gen. 222 (1970) for the proposition that "they [auctions] should be scrupulously avoided, even at the cost of depriving an offeror of other rights under ASPR." However, the decision did not involve a situation where, as here, the award was made to an offeror whose proposal did not meet the requirements of the RFP. Although the procurement regulations provide that auction practices should be avoided, a possible auction is one of the unfortunate consequences of an improper award. We do not believe that an improper award must be allowed to stand solely to avoid the implications of an auction situation.

As the decision contains a recommendation for corrective action to be taken, it is being transmitted by letters of today to the congressional committees named in section 232 of the Legislative Reorganization Act of 1970, Public Law 91-510, 31 U.S.C. 1172.

[B-181391]

Fees—Docket—Government Liability

Docket fee may be awarded as cost against Government as set forth in 28 U.S.C. 1923, since after balancing 28 U.S.C. 2412 prohibition against taxing of attorney fees and expenses (docket fee appearing to be attorney's compensation for docketing suit) against allowance of such fees in sections 1920 and 1923, it appears that allowance of such fee accords with congressional intent in 1966 amendment of section 2412, which appears to be remedial in nature, to bring parity to private litigant respecting costs in litigation with United States.

In the matter of payment of docket fees by United States, July 11, 1974:

This decision to the Attorney General is in response to a request dated May 3, 1974 (your reference SPC:RWP:TBScullen:ts 5-70-508) from the Assistant Attorney General, Tax Division, for our views as to whether docket fees properly may be charged against the United States.

It is explained that an administrative settlement has been approved on behalf of the Attorney General in the suit entitled *Jessie H. Ward, Executrix of the Estate of Louis E. Ward Deceased* v. *United States*, Civil No. 8486, DC ED Tenn., and that a refund check representing refund of estate taxes, will be delivered by the U.S. Attorney upon receipt from the taxpayer's counsel of record of a stipulation that "the above entitled action be dismissed with prejudice, each party to bear its own costs."

However, counsel for the plaintiff has objected to stipulating that each party bear its own costs.

The taxing of costs against the Government is authorized by Public

Law 89–507, approved July 18, 1966, 80 Stat. 308, which amended 28 U.S. Code 2412 to provide in pertinent part as follows:

§ 2412. Costs

Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action.* * * .

We note that 28 U.S.C. 2412 states that costs "but not including the fees and expenses of attorneys may be awarded to" a party prevailing over the United States in a civil action. Therefore, the question is whether a docket fee is an attorney's fee or expense which thus may not be awarded as costs under the act.

It is somewhat unclear exactly what the docket fee represents. We understand that such fee is not one collected by the Clerk of the Court but rather appears to be a form of compensation to an attorney for going to court to have a case put on the court docket. See *Goodyear* v. *Sawyer*, 17 Fed. 7 (1883); also, *Karsoules* v. *Moschos*, 16 F.R.D. 363 (1954). At least three court opinions have held that a docket fee constituted an attorney's fee within the meaning of 28 U.S.C. 2412. See *McConville* v. *United States*, 197 F. 2d 680 (1952), *North Atlantic & Gulf SS Co.* v. *United States*, 209 F. 2d 487 (1954), and *George Jensen Inc.* v. *United States*, 185 F. Supp. 251 (1960). However, such decisions were rendered prior to the 1966 amendment to 28 U.S.C. 2412.

The legislative history of the 1966 amendment does not indicate why taxation of attorneys' expenses as costs was prohibited along with attorneys' fees. However, during hearings held on H.R. 14182, 89th Cong., which when enacted became Public Law 89–507, the Assistant Attorney General John W. Douglas stated:

The kinds of costs that may be awarded by this amendment of 28 U.S.C. 2412 are enumerated in the existing provisions of 28 U.S.C. 1920. Specifically excepted from this enumeration by the bill are fees and expenses for expert witnesses as well as all attorneys' fees. The payment of attorney's fees raises many issues in various types of litigation that should be considered, if at all, in separate legislation. *These costs include fees of the clerk and marshal, necessary transcripts, printing, and docket fees.* These costs, now specified in Section 1920 could be included in the costs awarded to the prevailing party. [Italic supplied.]

In addition, both the Senate and House reports accompanying H.R. 14182 (H. Report No. 1535, 89th Cong., 2d Sess.; S. Report No. 1329, 89th Cong., 2d Sess.) indicate that the amendment's purpose was to put private litigants and the United States on an equal footing regarding cost awards. The reports state that the costs which a private litigant can receive in a successful action against the Government are listed in 28 U.S.C. 1920 "and include fees of the clerk and the marshal, necessary transcripts, printing, and docket fees." Section 1920 refers to docket fees under section 1923 which specifies attorneys' and proc-

tors' docket fees as included in the costs which may be awarded. *See also:* Barron and Holtzoff, Federal Practice and Procedure, § 1200; 7B Moore's Federal Practice § 2412; and, Wright and Miller, Federal Practice and Procedure: Civil § 2672. Consequently, the amendment may be viewed as remedial in nature. Sutherland Statutory Construction § 60.02.

It is necessary, therefore, to balance the section 2412 prohibition against taxation of attorneys' fees and expenses against sections 1920 and 1923 authorizing allowance of docket fees. In doing so the amendment's remedial nature should be considered warranting a liberal construction to effectuate the purpose as expressed in the legislative history, and exceptions should be narrowly construed. *National Automatic Laundry and Cleaning Council* v. *Shultz*, 143 U.S. App. D.C. 274 (1971); Sutherland Statutory Construction § 60.01.

Accordingly, and since payment of docket fees by the Government clearly appears to have been contemplated by the Congress, we view such payment as being authorized by 28 U.S.C. 2412 and proper for awarding as costs against the Government as set forth in 28 U.S.C. 1923.

[B–173766]

Contracts—Disputes—Contract Appeals Board Decision—Acceptance of Fact Determinations

Where primary issue before Armed Services Board of Contract Appeals (ASBCA) was number of hours contractor's employees worked on project and contract contained clause providing for disputes arising out of contract labor standards provisions being resolved under contract, General Accounting Office will follow ASBCA decision notwithstanding contrary Department of Labor opinion, since issue involved matter of enforcement of labor standards reserved for established contract settlement procedures of contracting agencies.

In the matter of Ventilation Cleaning Engineers, Inc., July 15, 1974:

In letter of April 30, 1974, the Acting Administrator, Wage and Hour Division, Department of Labor, contended that Armed Services Board of Contract Appeals (ASBCA) decisions No. 16704 of August 3, 1973, and March 19, 1974, finding that Ventilation Cleaning Engineers, Inc., was entitled to a refund of $5,702.27 withheld under Air Force contract F65501–1–70–C–0137 for alleged labor standards violations should not be followed by our Office in the disbursement of the withholdings because the contracting officer with the concurrence of the Department of Labor found otherwise and the ASBCA was in error in assuming jurisdiction of the matter.

It is contended that the ASBCA was in error in assuming jurisdiction pursuant to Armed Services Procurement Regulation (ASPR) 18–706, since the matter was for determination by the Secretary of

Labor or his authorized representative in accordance with the Secretary's authority and responsibilities under the Davis-Bacon Act, 40 U.S. Code 276a, the Contract Work Hours and Safety Standards Act, 40 U.S.C. 327, the Copeland Act, 40 U.S.C. 276c, Reorganization Plan 14 of 1950, 5 U.S.C. appendix, and the Department of Labor regulations promulgated to implement their provisions, 29 CFR part 5.

The Department of Labor's regulatory functions are based on its authority under Reorganization Plan No. 14 of 1950 to prescribe appropriate standards, regulations, and procedures for the purpose of coordinating the administration of labor standards. Limitations accompanying such authority with respect to the performance of enforcement duties are plainly established in the Presidential message adopting the Plan which states, in pertinent part, as follows:

> The actual performance of enforcement activities, normally including the investigation of complaints of violations, will remain the duty of the respective agencies awarding the contracts or providing the Federal assistance.

Also, in this connection, Senate Report No. 1546 issued by the Committee on Expenditures in the Executive Departments in commenting on Reorganization Plan No. 14 of 1950 states on page 3 "that the enforcement and administration of labor standards are not transferred by the plan but remain vested in the individual agencies and the departments of the Government." Our Office, in commenting on the Plan, has stated that authority to prescribe uniform and consistent standards for observance by contracting agencies in the policing of contractor's obligations does not include power to make individual enforcement determinations involving the settlement of contract conditions through which wage standards of the Davis-Bacon Act are made effective. Neither the Davis-Bacon Act nor the Plan evidences any legislative intent to modify or restrict the established contract settlement procedures of Federal agencies or to so empower the Secretary of Labor. 43 Comp. Gen. 84, 86 (1963). Moreover, it has been our position for many years that the authority placed in our Office by the Davis-Bacon Act to determine violators, impose debarment, and make wage adjustments, was not disturbed by the Plan. 43 Comp. Gen., *supra*, and 40 *id*, 565, 570 (1961). Thus, in the present case, at least in regard to the Davis-Bacon Act violations allegedly arising from the contractor's employees working more hours than they were paid for, our Office is not required to comply with the request of the Acting Administrator, Wage and Hour Division, "that the GAO should disburse the withheld funds to the affected employees, rather than to the contractor." Consequently, our Office may, in appropriate cases, follow the findings of the Board in regard to Davis-Bacon violations. In fact, we have done so previous to this case. Of course, the Department of Labor does have authority to make authoritative rulings in con-

nection with wage determinations and wage rates. 40 Comp. Gen., *supra*, and B-147602, January 23, 1963. See *United States* v. *Binghamton Construction Co., Inc.*, 347 U.S. 171 (1953) and *Nello L. Teer Co.* v. *United States*, 348 F. 2d 533 (1965). *Also, see* 40 U.S.C. 276a(a) concerning the Secretary of Labor's authority to determine minimum prevailing wages.

Apparently, the Department of Labor concurs with the ASBCA determination that there was a Copeland Act violation chargeable to the contractor. Therefore, whether the ASBCA usurped the Department of Labor's jurisdiction in that regard is academic. With respect to the Contract Work Hours and Safety Standards Act underpayments since the Department of Labor's authority under Reorganization Plan No. 14 does not extend to actual administration and enforcement, the Department's authority in this area also is limited. In that regard, ASPR 18-706, in pertinent part, states:

> * * * Disputes arising out of the labor standards provisions of a contract which cannot be settled administratively at the project level shall be subject to the Disputes clause, except for disputes involving the meaning of classification, wage rates contained in the wage determination decisions of the Secretary of Labor, or the applicability of contract labor provisions. Pursuant to the clause in 7-603.26, these shall be referred to the Secretary of Labor for an opinion, in accordance with the procedures of the Secretary of Labor * * *

The clause in ASPR 7-603.26, entitled "Disputes Concerning Labor Standards (1965 JAN)," included in the Air Force contract involved in the present case, states:

> Disputes arising out of the labor standards provisions of this contract shall be subject to the Disputes clause except to the extent such disputes involve the meaning of classifications or wage rates contained in the wage determination decision of the Secretary of Labor or the applicability of the labor provisions of the contract which questions shall be referred to the Secretary of Labor in accordance with the procedures of the Department of Labor.

ASPR 18-706 and the above contract clause carefully delineate the Secretary of Labor's jurisdiction. Clearly it does not include administration and enforcement functions. In that connection, the Boards of Contract Appeals have recognized that there are areas in which the Department of Labor has jurisdiction and have dismissed for lack of jurisdiction cases involving job classifications or rates to be paid employees. *Southwest Engineering Co., Inc.*, ASBCA No. 12091, 68-2 BCA 7176; Appeal of *Gersten Construction Co.*, ASBCA No. 5937, 60-1 BCA 2602; and Appeal of *The Norman Company, Inc.*, ASBCA No. 1643, 65-2 BCA 5250. On the other hand, where there were factual disputes not involving the Department of Labor's jurisdiction, the ASBCA has rendered decisions on the labor violations controversies. *Anaco Reproductions*, ASBCA No. 13779, 70-1 BCA 8236; *Albert C. Rodinelli*, ASBCA No. 10405, 67-1 BCA 6360; *Barry Industries*, ASBCA No. 10289, 66-1 BCA 5357; *Alliance Properties, Inc.*, ASBCA

No. 9665, 65–1 BCA 4648, *Florida Builders, Inc.*, ASBCA No. 9014, 1963 BCA 3892.

The primary issue to be resolved in the immediate case was the number of hours the employees in question worked, which is a factual matter not reserved for the Department of Labor. The fact that the Department by its letter of July 7, 1971, concurred in the contracting officer's findings should not deprive the contractor of its rights under the Disputes clause.

For the above reasons, our Transportation and Claims Division has been instructed today to disburse the contract withholdings in accordance with the findings of the ASBCA. See *S & E Contractors, Inc.* v. *United States*, 406 U.S. 1 (1972).

[B–180133]

Transportation—Rates—Commodity—Basis for Determination—Type of Equipment Required

Application of commodity rates in carrier's tariff is determined solely by whether nature of articles transported is such that use of low-bed equipment is required; tariff requirement for bill of lading notation by shipper showing request for low-bed equipment is construed as directory only and not as condition precedent to application of the rates.

In the matter of Wells Cargo, Inc., July 15, 1974:

Wells Cargo, Inc., by letter dated November 20, 1973, asks for review of five settlements which disallowed its claims for additional charges for services rendered under Government bills of lading (GBLs) C–7938582, D–1612508, D–4244089, F–4657839, and F–4665217, our claim files TK–923746, TK–946339, TK–910262, TK–923744, and TK–935584.

The shipments in question consisted of heavy machinery or other articles in excessive size or weight and were transported by the carrier in low-bed equipment. Charges originally were billed by the carrier at distance commodity rates applicable on shipments requiring the use of low-bed equipment, as published in Section 4 of Wells Cargo, Inc. Local and Joint Freight Tariff No. 1–B, MF–I.C.C. No. 4. The commodity description in Section 4 is followed by a parenthetical reference to Rule 141 of the tariff which provides, among other things, that when low-bed equipment is requested and furnished the shipper shall endorse on the bill of lading or shipping order "low-bed Equipment Requested."

This notation does not appear on the GBLs in question and after the carrier's original bills were paid in full, Wells Cargo submitted supplemental bills for additional charges, based on the class rates in Section 1 of its tariff, on the ground that the commodity rates in Section 4 were inapplicable because the GBLs did not bear the requisite

notations. The settlements here under review disallowed these supplemental claims and the question is whether the notation provision in the tariff is directory only or whether it constitutes a condition precedent to the application of the distance commodity rates contained in Section 4.

It is well settled that where tariff provisions require the making of a particular notation on the bill of lading as a condition precedent to the use of a rate, the shipper is bound by such provisions. *Embassy Distributing Co., Inc.* v. *Western Carloading Co.*, 280 I.C.C. 229, 234 (1951); *American Licorice Co.* v. *Chicago, M. & St. P. Ry. Co.*, 95 I.C.C. 525 (1925). However, the tariff provisions must be specific and unambiguous in their terms respecting the application of the rate upon fulfillment of a condition precedent on the part of the shipper. *Stanley Home Products* v. *Interstate Motor Freight System*, 67 M.C.C. 732, 734 (1956). For reasons set forth below, it is our opinion that the tariff provisions here in question, when read together as a whole, do not specifically or unambiguously identify the notation requirement as a condition precedent to the application of the distance commodity rates in Section 4 of the tariff.

Section 1 of Tariff No. 1–B, containing the class rates which Wells Cargo now claims were applicable to these shipments, provides:

RATES NAMED IN THIS SECTION DO NOT APPLY TO THE TRANSPORTATION OF ARTICLES REQUIRING THE USE OF SPECIAL LOW-BED EQUIPMENT AS DESCRIBED IN ITEM NO. 2100 HEREOF. FOR RATES SEE ITEM NO. 2100.

The title page of Section 4 of Tariff No. 1–B identifies the rates contained therein as:

DISTANCE COMMODITY RATES APPLICABLE ON SHIPMENTS REQUIRING THE USE OF LOW-BED EQUIPMENT

and further provides:

RATES PUBLISHED IN THIS SECTION DO NOT ALTERNATE WITH RATES PUBLISHED IN OTHER SECTIONS OF THIS TARIFF, BUT APPLY IN LIEU OF RATES IN OTHER SECTIONS FOR THE MOVEMENT OF SHIPMENTS DESCRIBED IN ITEM NO. 2100 OF THIS SECTION.

Item No. 2100 of Section 4, under the caption "DISTANCE COMMODITY RATES APPLICABLE ON SHIPMENTS REQUIRING THE USE OF LOW-BED EQUIPMENT," provides:

COMMODITIES: HEAVY MACHINERY OR OTHER ARTICLES OF EXCESSIVE SIZE AND/OR WEIGHT REQUIRING THE USE OF LOW-BED EQUIPMENT. (SEE RULE 141.)

Rule No. 141 purports to be a definition of low-bed equipment and service. It provides:

(A) THE TERM "LOW-BED EQUIPMENT" MEANS A TRAILER OR A SEMI-TRAILER, WITH WHEELS ATTACHED, HAVING A LOAD CARRYING BED OR PLATFORM NOT MORE THAN 45 INCHES ABOVE THE GROUND OR STREET LEVEL.

(B) LOW-BED EQUIPMENT WILL BE FURNISHED ONLY WHEN IT IS REQUIRED AND ORDERED BY THE SHIPPER TO TRANSPORT SHIPMENTS OF UNUSUALLY HEAVY OR BULKY ARTICLES.
(C) WHEN LOW-BED EQUIPMENT IS REQUESTED AND FURNISHED THE SHIPPER SHALL ENDORSE ON THE BILL OF LADING OR SHIPPING ORDER: "LOW-BED EQUIPMENT REQUESTED."

We do not see how these provisions, read together, can be fairly said to offer a shipper a choice of rates dependent upon whether the shipper does or does not endorse the bills of lading in the language specified. Rather, it seems to us, the application of the distance commodity rates is determined solely by whether the nature of the articles transported is such that the use of low-bed equipment is required.

Rule No. 141 explicitly provides that low-bed equipment will be furnished only when it is required and ordered by the shipper. It is indisputable that low-bed equipment was furnished for these shipments and, in accordance with the tariff provisions, it must be concluded that the equipment was required and ordered else it would not have been furnished by the carrier.

We think a fair reading of the tariff provisions as a whole shows that the application of the commodity rates in Section 4 is determined solely by whether the nature of the articles transported is such that the use of low-bed equipment is required. Since this factor alone governs the application of the rates, it follows that the requirement for shipper indorsement on the bill of lading or shipping order is directory only and is not intended as a condition precedent to the application of the Section 4 rates. See *United Welding Co.* v. *Baltimore & O.R. Co.*, 196 I.C.C. 79, 80 (1933); *American Pipe & Construction Co.* v. *Alton & Southern R.R.*, 284 I.C.C. 797, 799 (1952).

The settlements in question were consistent with the construction of the tariff set forth above. Accordingly, they were sustained.

[B–180380]

Contracts—Protests—Timeliness

Where telefax message protesting solicitation's 90-mile geographic restriction is received at General Accounting Office (GAO) at 8:20 a.m. and bids are opened at 2 p.m. same day, protest is timely filed since section 20.2(a) of GAO Interim Bid Protest Procedures and Standards, which requires protests against apparent solicitation improprieties to be filed before bid opening, states protest is "filed" at time of receipt by GAO. Portion of protest objecting to denial of opportunity to submit bid is timely because filed within 5 working days of adverse agency action—rejection by agency of bidder's oral protests.

Contracts—Specifications—Restrictive—Geographical Location

Reasonable expectation that potential contractors located beyond certain distance from installation will not satisfactorily perform laundry contract provides basis for including in solicitation restriction requiring bidders have facilities located within certain radius of miles, and where protester has not presented evidence to overcome contracting officer's finding of marginal historical per-

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formance by contractors located beyond 90 miles from Camp Drum, New York, General Accounting Office cannot conclude that 90-mile restriction was without reasonable basis.

Bidders—Qualifications—Capacity, etc.—Determination—Premature

Refusal to provide incumbent laundry contractor with copy of invitation for bids and opportunity to bid on successor contract because of doubts as to incumbents' capacity to perform is tantamount to premature nonresponsibility determination.

Bidders—Qualifications—Geographical Location Requirement

Ninety-mile geographic restriction in information for bids cannot justify exclusion of incumbent contractor, located at distance of 165 miles, since requirement pertains to responsibility which may be complied with after bid opening and before award.

Bidders—Invitation Right—Incumbent Contractor

Failure to furnish copy of invitation for bids (IFB) to incumbent contractor and solicitation of only three sources afford grounds to recommend that solicitation be canceled so as to provide wider opportunity to bid under new IFB.

In the matter of Plattsburgh Laundry and Dry Cleaning Corporation; Nu Art Cleaners Laundry, July 15, 1974:

Invitation for bids (IFB) No. DAKF36–74–B–0028 was issued December 18, 1973, by Camp Drum, Watertown, New York, for laundering services on a 100 percent small business set-aside basis. The protest arises by reason of section "D" of the IFB, "Evaluation and Award Factors," which provides that "Only those facilities located within a radius of ninety (90) miles of Camp Drum, New York, will be considered for award." Two bids were opened at 2 p.m. on January 7, 1974. The $87,763.40 bid of Nu Art Cleaners Laundry, Felts Mills, New York, was low followed by the $91,524.90 bid of R. Gibson, Inc., of Watertown, New York.

In its telefax message dated January 5, 1974, and letters dated January 21 and March 14, Plattsburgh Laundry and Dry Cleaning Corp. (Plattsburgh) protested to our Office against the 90–mile geographic restriction and the fact that it was not given an opportunity to bid. Plattsburgh, which we understand is located about 165 miles from Camp Drum, was the predecessor contractor for these services. In its letter of March 14, 1974, the protester states that on December 17 and 18, 1973, it telephoned the contracting officer to inquire when the solicitation for the successor contract would be distributed, and it was told that it would receive a copy of the IFB during the week of December 18. However, Plattsburgh states that on December 28, 1973, it was told by a procurement office official that the solicitation had been mailed only to those prospective bidders within a 90-mile radius of Camp Drum. Plattsburgh states that it protested orally to Camp Drum officials on January 2 and 4, 1974, against the restrictiveness of the

geographic limitation and what it terms the denial of its right to receive a copy of the bid package. Finding that it was unable to resolve the matter with the procuring agency officials, Plattsburgh then filed a written protest with our Office.

By letter of March 1, 1974, with enclosures, the Assistant Deputy for Materiel Acquisition, Office of the Assistant Secretary, submitted the Department of the Army report on the protest. It is the agency's position that the protest is untimely, since GAO's Bid Protest Procedures and Standards require that protests against alleged improprieties in solicitations which are apparent prior to bid opening be filed prior to bid opening. 4 CFR 20.2(a). In addition, the agency has pointed out that our Office has held that the need of a contracting agency for prompt service and plant accessibility may afford a reasonable basis for including in an invitation for bids a provision requiring bidders to have facilities located within a specified geographic area for performance of a contract. In this regard, the agency cites B-150703, February 15, 1963, where we upheld a 50-mile restriction in a solicitation for laundry services in Washington, D.C.

In addition, the contracting officer has offered the following explanation of why the 90-mile geographic restriction was adopted:

The requesting activity requested that the area of performance be limited to a ninety (90) mile radius of Camp Drum in order to insure expeditious pickup and delivery of the services required.
Historically, contractors located beyond a ninety mile radius have performed marginally and/or subcontracted the services to facilities located within the ninety mile radius.
Camp Drum is serviced by unimproved two lane highways to the southeast and Interstate highways to the south. Camp Drum and surrounding area is subjected to severe inclement weather during the period October through March.
During the period April through September, approximately 70,000 troops conduct annual training at Camp Drum, and timely pickup and delivery of laundry services is required in order for the installation to perform its mission in support thereof as this installation does not have sufficient stockage for issue when services are not received as scheduled under the contract.

* * * * * * *

* * * the inclusion of an area limitation of ninety (90) miles * * * will insure timely receipt of services required to support Annual Training which will reduce administration costs and will be in the best interest of the Government.

Initially, the record indicates that Plattsburgh's protest to our Office was timely filed. A protest is "filed" with our Office at the time of receipt. 4 CFR 20.2(a). In the present case, the notice of protest was sent by a telefax message dated January 5, 1974, and received at our Office at 8:20 a.m. on January 7, 1974. Since bid opening did not take place until 2 p.m. the same day, the protest against the alleged impropriety in the solicitation was timely. In addition, to the extent Plattsburgh's protest was directed at its exclusion from the competition and denial of an opportunity to submit a bid, the protest filed on January 7, 1974, was timely since it was filed with five working days of

"adverse agency action"—that is, the rejection by Camp Drum officials of Plattsburgh's oral protests on January 2 and 4, 1974. *See* section 20.2(a), GAO Bid Protest Procedures and Standards.

Our Office has recognized that a geographic restriction may constitute a legitimate restriction on competition where the contracting agency has properly determined, after careful consideration of the relevant factors involved, that a particular restriction is required. We have stated that determination of the proper scope of a restriction is a matter of judgment and discretion, involving consideration of the services being procured, past experience, market conditions, and other factors. *See* 53 Comp. Gen. 522 (1974), and decisions cited therein.

A reasonable expectation that potential contractors located beyond a certain distance will not satisfactorily perform can provide a basis for the establishment of a geographic restriction. B–150703, *supra*. In the present case, the contracting officer has cited highway conditions, severe winter weather, and historical experience of marginal performance by contractors located beyond 90 miles as reasons why the 90-mile restriction was included in the solicitation. In its March 14, 1974, letter, Plattsburgh contests the Contracting officer's implication that highways in the area are inadequate, contending that it has not experienced difficulties in this regard. As for the severe winter weather, the protester points out that the bulk of the work occurs during the summer months. However, the protester has not shown the contracting officer's finding that past performance by contractors beyond 90 miles was marginal is without reasonable basis. We therefore conclude that the 90-mile restriction is not objectionable. *Cf.* 53 Comp. Gen. 102, 103–104 (1973).

A more serious issue is raised by Plattsburgh's contention that it was denied a copy of the IFB and thus an opportunity to bid. The inadvertent failure to furnish a prospective bidder with a copy of a solicitation does not ordinarily require a resolicitation of bids where adequate competition and reasonable prices were obtained in the bidding. *See* 49 Comp. Gen. 707 (1970). However, where the omisison appears to be conscious and deliberate rather than inadvertent, a different question is presented. In B–173029, September 1, 1971, we held that a deliberate failure to furnish a copy of the solicitation to an incumbent contractor on the basis that it lacked the capacity to perform was an improper and premature nonresponsibility determination. Where the incumbent is a small business concern—as here—we have held that such failure to solicit tends to undermine the purposes of 15 U.S. Code 637(b)(7), whereunder the Administrator of the Small Business Administration is empowered to conclusively certify to the capacity and credit of a small business concern to perform a particular Government contract. 45 Comp. Gen. 642 (1966).

We do not believe that the apparent refusal to provide the protester with an opportunity to bid could be supported on the basis of doubts as to Plattsburgh's capacity to perform. Moreover, the establishment of the 90-mile geographic restriction could not support such action. A geographic limitation requiring bidders' facilities to be located within a certain area relates to bidder responsibility, not to bid responsiveness, and a bidder may thus be properly allowed to demonstrate compliance with the requirement after bid opening and before award. 50 Comp. Gen. 769, 772 (1971); B-171586(2), April 29, 1971; B-170798, November 13, 1970.

In addition to the failure to provide a copy of the solicitation to the incumbent contractor, we have been informally advised by the Department of the Army of other circumstances indicating that competition was unduly restricted. We are informed that the IFB was not synopsized in the Commerce Business Daily as required by Armed Services Procurement Regulation (ASPR) 1-1003.1(a), and that copies of the solicitation were provided to only three potential sources of supply.

In view of the foregoing, we are recommending to the Secretary of the Army by letter of today that IFB DAKF36-74-B-0028 be canceled and that the protester, and other firms similarly situated, be provided with an opportunity to bid in response to a resolicitation for the laundry services.

[B-179682]

Pay—Reservists—Active Duty—Injured in Line of Duty—Pay and Leave Entitlement

A member of the Marine Corps Reserve who while on his initial period of active duty for training sustains an injury determined to be in line of duty may receive pay and allowances in accordance with 37 U.S.C. 204(1), after expiration of the initial tour of duty while hospitalized and until he is fit for military duty, but during such period reservist is not considered to be in active military service within the meaning of 10 U.S.C. 701(a) which would entitle the member to leave.

Pay—Active Duty—Reservists—Injured in Line of Duty—Ability to Perform Limited Duty Effect

Member of Marine Corps Reserve entitled to receive pay and allowances under 37 U.S.C. 204(i) for period subsequent to the termination of his initial active duty for training, who then returned to his Reserve unit where he performed military duties as a photographer, having agreed to extend his active duty for a period of about 6 months and/or until physically qualified for release from active duty, may be regarded under 10 U.S.C. 683(b) to be on active duty until discharged, and is entitled to active duty pay and allowances, and leave under 10 U.S.C. 701(a).

In the matter of Pay, Allowances and Leave Entitlements of Injured Reservist, July 16, 1974:

This decision is in response to a request for an advance decision concerning whether payment to which Lance Corporal Michael A.

Curtis, 370 50 5380, U.S. Marine Corps Reserve, is otherwise entitled should be reduced to recover payment of active duty pay and allowances and for unused leave resulting from his purported performance of active duty from December 26, 1970, through September 3, 1971. The request was approved for submission by the Department of Defense Military Pay and Allowance Committee and assigned Control Number DO–MC–1202.

The record before us indicates that Corporal Curtis was ordered to a 6-month period of initial active duty for training effective June 26, 1970. These orders did not provide for automatic termination of his active duty status after the initial 6-month period, but included a provision that it would be extended for technical training if he were found qualified. However, these orders were never extended. On August 23, 1970, Corporal Curtis was admitted to U.S. Naval Hospital, Beaufort, South Carolina, with a broken wrist. No action was taken to extend or terminate his active duty status when Corporal Curtis' 6-month period of initial active duty expired on December 25, 1970. Permissive change of station orders were issued on January 19, 1971, based on a request by Corporal Curtis, which authorized his transfer from U.S. Naval Hospital, Beaufort, South Carolina, to Marine Barracks, Naval Training Center, Great Lakes, Illinois, for further treatment at U.S. Naval Hospital, Great Lakes, Illinois.

On January 22, 1971, a report concerning the member's injury was submitted to Headquarters, U.S. Marine Corps, and on March 10, 1971, the Judge Advocate General of the Navy determined that the injury had been incurred in line of duty and not as the result of the member's misconduct.

Report of the U.S. Naval Hospital, Great Lakes, dated March 9, 1971, states that there had been a nonunion fracture of the right carpus (navicular) and that a bone graft was accomplished on February 25, 1971. It was also stated that Corporal Curtis was in a short arm cast on the right arm which was to remain on until about June 1, 1971, and that the patient should be followed by the Veterans Administration. The statement concluded that maximum benefits of hospitalization had been obtained and Corporal Curtis was released to his parent organization which at that time apparently was Marine Barracks, Great Lakes.

The Commanding Officer, Marine Barracks, Great Lakes, prepared a military pay order reflecting Corporal Curtis' release from active duty on March 25, 1971. There is no record of any written release orders for Corporal Curtis. However, on the same day, March 25, 1971, Corporal Curtis reported to his parent Reserve unit, the Marine Air Reserve Training Detachment, Marine Air Reserve

Training Command, Selfridge Air National Guard Base, Michigan, and signed an agreement to extend his active duty for a period of about 6 months and/or until physically qualified for release from active duty. It appears that he thereafter performed the military duties of a photographer.

On June 30, 1971, Corporal Curtis was discharged from further treatment for his injury by the U.S. Naval Hospital, Great Lakes. However, he continued to perform active duty with his parent unit until September 3, 1971, when orders were issued releasing him from active duty on that day.

The member was furnished with an Armed Forces Report of Transfer or Discharge, DD Form 214MC for the period ending September 3, 1971, showing a total of 1 year, 2 months and 7 days of active duty (June 26, 1970–September 3, 1971), which indicated release to inactive duty on expiration of a 6-month obligated period of active duty training, with last duty at Selfridge Air National Guard Base, Michigan.

It is stated that Corporal Curtis has received active duty pay and allowances from the time of his initial entry on active duty, June 26, 1970, until his release on September 3, 1971. Subsequent to September 3, 1971, Corporal Curtis has performed active duty training and inactive duty training which have entitled him to pay and allowances or drill pay.

The disbursing officer concerned questions whether he is authorized to make payments to Corporal Curtis for his attendance at Reserve active duty for training or inactive duty training without reduction to recover payments of active duty pay and allowances and for unused leave because of his status after December 25, 1970. He is in doubt as to the amount, if any, that should be collected from Corporal Curtis based on whether his entitlement to active duty pay and allowances ended (1) on December 25, 1970, when his initial 6-month period of active duty for training expired, (2) on March 9, 1971, when he was released from the hospital because maximum benefits had been obtained, (3) on March 25, 1971, when purportedly he was released from active duty, or (4) on September 3, 1971, when release from active duty orders were issued to him.

Further, if it is determined that Corporal Curtis' entitlement ended on a date other than September 3, 1971, the disbursing officer asked if the corporal may retain pay and allowances he received on the basis of service in a *de facto* status.

In addition, it is asked whether any period from December 26, 1970, to September 3, 1971, constituted "active service" within the meaning of 10 U.S. Code 701(a) which provides for the accrual of 2½ calendar days of leave for each month of active service.

Section 204(i) of Title 37, U.S. Code, provides:

A member of the Naval Reserve, Fleet Reserve, Marine Corps Reserve, Fleet Marine Corps Reserve, or Coast Guard Reserve is entitled to the pay and allowances provided by law or regulation for a member of the Regular Navy, Regular Marine Corps, or Regular Coast Guard, as the case may be, of corresponding grade and length of service, under the same conditions as those described in clauses (1) and (2) of subsection (g) of this section.

Subsection (g) provides as follows:

A member of the Army or the Air Force (other than of the Regular Army or the Regular Air Force) is entitled to the pay and allowances provided by law or regulation for a member of the Regular Army or the Regular Air Force, as the case may be, of corresponding grade and length of service, whenever—

(1) he is called or ordered to active duty (other than for training under section 270(b) of title 10) for a period of more than 30 days, and is disabled in line of duty from disease while so employed; or

(2) he is called or ordered to active duty, or to perform inactive-duty training, for any period of time, and is disabled in line of duty from injury while so employed.

Section 683(b) of Title 10, U.S. Code, provides as follows:

A Reserve who is kept on active duty after his term of service expires is entitled to pay and allowances while on that duty, except as they may be forfeited under the approved sentence of a court-martial or by non-judicial punishment by a commanding officer or when he is otherwise in a non-pay status.

In 33 Comp. Gen. 411 (1954) we stated at page 414:

* * * [T]his Office has held, in cases involving members of the Marine Corps Reserve and Naval Reserve who were injured in line of duty while on training duty, that such members are entitled to active-duty pay and allowances (1) while hospitalized because of disability resulting from their injury; (2) during periods after release from hospital if it be determined that they continue to be disabled for normal pursuits by the disability for which originally hospitalized; and (3) while awaiting action on disability retirement proceedings, if such proceedings are instituted. * * *

However, when a member is in a duty status with pay when the disability was incurred, pay and allowance benefits under 37 U.S.C. 204(i) do not begin to accrue until he is no longer entitled to pay and allowances under his orders. 31 Comp. Gen. 456 (1952) and 33 *id.* 411 at page 415.

In 43 Comp. Gen. 733 (1964), it was stated concerning subsections (g), (h) or (i) of section 204, Title 37, U.S. Code:

It seems reasonably clear that a right to active duty pay and allowances under the above-cited provisions of law while the member concerned is temporarily disabled by injury incurred in line of duty, is based upon physical disability to perform military duty * * *. In each case, the service concerned should determine when the injured reservist recovers sufficiently to be fit to perform his normal military duties. In making that determination, the service should apply the same standards it would apply in the case of a member of the Regular service. * * *

Thus, for the period from December 26, 1970, when Corporal Curtis' initial active duty for training period expired, until March 25, 1971, when he commenced to perform his military duties as a photographer he was entitled to pay and allowances in accordance with section 204

(i) of Title 37, U.S. Code, as he was disabled from the performance of his military duties because of injury incurred in line of duty. While he was released from hospitalization on March 9, 1971, there is no indication he was able to perform his military duties until March 25, 1971.

When he commenced his military duties on March 25, 1971, and until his discharge on September 3, 1971, Corporal Curtis would no longer be entitled to the pay and allowances provided by section 204(i) of Title 37, U.S. Code, but, in accordance with section 683(b) of Title 10, U.S. Code, since he was in fact kept on active duty after expiration of his term of service, he would be entitled to active duty pay and allowances while on that duty. While entitled to the pay and allowances under section 683(b) of Title 10, U.S. Code, Corporal Curtis would be considered to be on "active service" and therefore he would accrue leave in accordance with 10 U.S.C. 701(a).

However, during the period from December 26, 1970, through March 24, 1971, when Corporal Curtis was entitled to pay and allowances in accordance with the provisions of 37 U.S.C. 204(i), since such entitlement was to only pay and allowances and is not considered active military service, he would not be entitled to leave under 10 U.S.C. 701(a). *See* 41 Comp. Gen. 706 (1962).

Therefore, Corporal Curtis is entitled to retain the pay and allowances paid to him through September 3, 1971, the date of his release from active duty. However recovery should be effected for the unused leave payment made to Corporal Curtis for the period from December 26, 1970, until March 25, 1971, during which period he was not entitled to leave.

The questions submitted are answered accordingly.

[B–167006]

Bonds—"Other Safe Bonds"—Investments—Land-Grant Funds

For purposes of investing First Morrill Act land-grant funds, bonds rated "A" or better by one of established and leading bond rating services may be considered by District of Columbia as constituting "other safe bonds" within meaning of that phrase as used in such act. 50 Comp. Gen. 712, modified.

Funds—Land-Grant Funds—Investments—"Other Safe Bonds"—What Constitutes

For purposes of investing First Morrill Act land-grant funds, "prudent man rule" is too broad and subjective to be used as test for what constitutes "other safe bonds" within the meaning of that phrase as used in such act, since men may differ as to what is reasonable and prudent.

In the matter of the definition of "other safe bonds" under section 4 of the First Morrill Act, July 19, 1974:

This decision to the Mayor-Commissioner of the District of Columbia is pursuant to the request of May 10, 1974, from the Special Assistant to the Mayor-Commissioner for our views as to what constitutes "other safe bonds" as that phrase is used in section 4 of the First Morrill Act, 7 U.S. Code 304.

In our decision to the Mayor of the District of Columbia in 50 Comp. Gen. 712 (1971), we discussed several legal problems relating to the investment of the land-grant endowment to Federal City College, authorized pursuant to the provisions of Public Law 90–354, approved June 20, 1968, 82 Stat. 241, (7 U.S.C. 329). We noted that Section 4 of the First Morrill Act requires that the monies be invested in, among other things, "bonds of the United States or of the States or *some other safe bonds.*" [Italic supplied.]

With respect to whether "other safe bonds" could be industrial bonds, in our decisions we stated in pertinent part that:

* * * [I]t appears from the letter of September 2, 1970, from the Associate Commissioner for Higher Education, quoted in part above, that HEW considers bonds approved for investments by fiduciaries by Rule 23 of the Rules of the United States District Court for the District of Columbia to be "other safe bonds." We agree with HEW's determination that bonds approved for investments by fiduciaries may be considered "other safe bonds." Therefore, it is our view that the District may invest its land-grant funds in industrial bonds which are approved for investment by fiduciaries under Rule 23 of the Rules cited above. *id.* p. 716.

Since we issued that decision the courts of the District of Columbia have been reorganized and they no longer maintain a list of approved securities. Rule 23 of the local United States District Court which governed investments in the District by fiduciaries has been revised and is now Rule 306 of the District of Columbia Superior Court. The new rule provides that fiduciaries are to be governed by the so-called "prudent man rule" which, essentially, requires trustees to exercise their judgment in a manner equivalent to that of a reasonable and prudent man engaged in his own affairs taking into account all relevant circumstances.

Your Special Assistant points out that under Rule 306 there is no longer a precise standard and he describes several possible interpretations as follows:

1. that "other safe bonds" include bonds deemed to meet the prudence test of Rule 306.
2. that bonds rated A or better by one of the leading rating services such as Moodys or Standards & Poors be deemed to meet the test.
3. that some other relevant parameter or parameters be required in addition to the one set forth in number two above.

In effect our views are requested on these alternatives.

The First Morrill Act mentions "other safe bonds" in context with Federal and State bond obligations, or where the State has no bonds, with securities agreed to by the State legislature. The legislative history of the act indicates that the monies derived by the States (and the District) are to be invested conservatively with prime importance on the maintenance of the principal amount. If the principal is diminished it would have to be restored by the District. 50 Comp. Gen. 712, 716 (1971). The Department of Health, Education, and Welfare (HEW)—which administers the First Morrill Act and which receives and reviews the annual reports required by the act—felt in 1970 that these funds should be invested in the specific bonds listed by the court under former Rule 23 and we understand that the bonds on that list were selected using very conservative standards.

We feel the so-called "prudent man rule" is both too broad and too subjective to comply with the strict standards which have historically been established for investment of these funds. Men may well differ over what is reasonable and prudent. We understand that in the financial world bonds rated A or better by one of the leading rating services would generally be considered safe bonds. Accordingly, we would not object to defining "other safe bonds" as those rated A or better by one of the leading rating services, subject to any further restrictions which HEW—with which we believe the District should consult—may impose.

[B–178820]

Contracts—Specifications—Tests—Waiver—Invitation Provision

Inclusion in invitation for bids of provision that contracting officer "may" waive initial production testing for bidders which had "previously produced an essentially identical item," when in fact no bidder was eligible for waiver, did not invalidate awarded contract in absence of showing that protester was prejudiced by erroneous provision or that bidders were bidding on unequal bases.

Contracts—Specifications—Tests—Requirements—Administrative Determination

Administrative determination that change in specifications required initial production test to be conducted was not shown to be arbitrary, capricious, or without substantial basis in fact.

In the matter of Met-Pro Water Treatment Corporation; Environmental Tectonics Corporation, July 22, 1974:

An invitation for bids provided for testing by the Government of samples of the contractor's product, but advised bidders that the contracting officer "may" waive the testing requirement for those firms which had "previously produced an essentially identical item." The cost to be incurred by the Government in conducting the test was taken

into consideration through an invitation for bids (IFB) provision which added for evaluation purposes the sum of $80,000 to each bid not qualifying for waiver. Information in the contracting officer's possession before the IFB was issued indicated that one potential bidder, the protester, would qualify for waiver. However, after bid opening, the contracting officer's technical advisors stated that in view of a specification change, "an essentially identical item" had never been produced, and therefore no bidder was eligible for waiver of the testing requirement. The protester would have been the low bidder had the testing requirement been waived for it alone. The protester argues that it was improper for the IFB to hold forth the prospect of a waiver when in fact none would be granted; that as a result of this impropriety, the contract awarded to another bidder was illegal and should be canceled; and that the procurement should be readvertised through an IFB which does not permit waiver of the testing requirement. Alternatively, the protester contends that it has "previously produced an essentially identical item" qualifying it for waiver and, therefore, it should be awarded the contract as the low evaluated bidder. The circumstances from which this protest arose are described in detail below.

The Defense Supply Agency (DSA), Defense Construction Supply Center ("the Center"), Columbus, Ohio, issued IFB No. DSA 700–73–B–2947 for 50 water purification equipment sets, a first article test report, technical data, and an initial production test (IPT) to be performed by the Government.

The IFB required the sets to be constructed in accordance with specification MIL–W–52482C, hereafter referred to as the "C" specification. Section C of the IFB advised bidders that the Government would perform the IPT upon a set selected at random from the contractor's first production lot. However, paragraph f. of Section C provided:

> The contracting officer may waive the requirement for the testing described in specification MIL–W–52482C if an offeror has previously produced an essentially identical item. Consideration for the waiver shall include evaluation of the quality history on produced and delivered articles, evaluation of the contractor's present facilities, evaluation of the monetary consideration, and evaluation of design and performance requirement of the previous and current procurement.
> (1) Date and contract number(s) under which prior accepted item(s) was/were produced———————————.
> Specification No. ———————————

The relationship of the IPT requirement to the evaluation of bids was described as follows in the IFB:

> For evaluation purposes, the estimated cost to the Government of $80,000 for conducting the initial production test set forth in Section C of this Solicitation, will be added to the total price offered by all concerns.
> If it is determined that such test can be waived for certain offerors, then the costs of this test will be deducted from the total price of these offers for evaluation purposes.

Therefore, if your concern believes it is eligible for waiver of this test, it is in your best interest to provide the information needed to establish eligibilty in the space provided in paragraph f, of the IPT Provision, Section C of the solicitation.

The record shows that prior to issuance of the IFB, the contracting officer informally discussed the IPT requirement with the evaluating agency's liaison representative at the Center. The latter advised the contracting officer that one potential bidder, Met-Pro Water Treatment Corporation (Met-Pro), would qualify for waiver since an IPT was to be conducted on water purification sets Met-Pro was furnishing under an existing contract.

Bids were received from A. C. Ball Company, Met-Pro, and Environmental Tectonics Corporation (ETC). Met-Pro and ETC requested in their bids that the IPT requirement be waived in view of their previous production of water purification units. ETC had previously manufactured a 600 gallon-per-hour (gph) unit, which was smaller than the 1,500 gph unit required by the instant IFB. Met-Pro had manufactured a 1,500 gph unit to specification MIL-W-52482B (the "B" specification), which was the predecessor of the "C" specification used in the instant procurement. Additionally, Met-Pro requested waiver of certain data items and the requirement for a maintenance capability model on the basis that it had satisfied these requirements under earlier procurements.

The Army Troop Support Command (TROSCOM) has the responsibility for initiating action to grant waivers of IPT for these water purification units. Therefore, after bid opening, the Center formally requested TROSCOM's opinion concerning the propriety of waiving the IPT requirement for Met-Pro and ETC. The TROSCOM employee in charge of this activity has stated in an affidavit:

Upon receipt of the above inquiry, my office reviewed the applicable specification MIL-W-52482C (The "C" Specification) issued on 25 September, 1972 and compared it with the prior specification MIL-W-52482B (The "B" Specification) issued on 2 September 1971 in as much as we had no deliveries as yet under the "C" specification.

We discovered there were five significant performance requirements not present in the "B" specification as well as testing procedures for each new requirement. These requirements were:

(a) 3.7 *Transportability.*
(b) 3.8 *Environmental.*
3.8.1 *Operating Temperature.*
3.8.2 *Storage Temperature.*
(c) 3.9 *Reliability* and 3.10 *Maintainability.*
(d) 3.17 *Safety.*
(e) 3.18 *Human Factors.*

We concluded that these performance requirements and their related testing procedures were so significant that the "C" specification fell within the coverage of Army Material Command Regulation (AMCR) 700-34, (Attachment A). Paragraph 2a(2)(c) provides this Regulation is applicable where "Items * * * have been altered significantly * * * resulting in modification or product improvement that will lead to a change in the type/model series." This regulation provides at paragraph 4a(1) for the evaluation of items to assure that their performance is up to requirements before being issued for use. It also provides at paragraph

4a(3) for the documentation of performance safety and reliability limitations. Under the guidance provided by this regulation we have concluded that it would be inadvisable to waive the IPT for this procurement for any bidder.

After reaching this conclusion we contacted the Mobility Equipment Research and Development Center (MERDC) who prepared the specification in issue. They were also of the opinion that a waiver of IPT on this procurement would be inappropriate * * *.

In view of this advice, the first article test report and IPT were not waived for any bidder. However, the data requirements and maintenance capability model were waived for Met-Pro. Thus evaluated, ETC was the lowest bidder at a price of $1,017,094.69 and Met-Pro was the second low bidder at $1,086,962.78. The criticality of the application or waiver of the $80,000 IPT bid evaluation factor is shown by the difference of $69,868.09 between these two bids. If the evaluation factor is added to both bids, as it was in fact, or if it is waived for both bids, ETC is the low bidder. However, if the evaluation factor is applied to ETC and waived for Met-Pro, the latter would become the low bidder.

Initially, both ETC and Met-Pro filed protests with our Office in which each asserted that it alone was entitled to the benefit of a waiver of the IPT evaluation factor. ETC contended that its prior manufacture of 600 gph units qualified it for waiver of the IPT, and that if a waiver were granted only to Met-Pro, competition would be unduly restricted. ETC withdrew its protest upon being advised that a waiver would be granted to neither firm and that ETC was to be awarded the contract.

Conversely, Met-Pro contended that ETC's 600 gph unit was so dissimilar from the item being procured that it did not furnish a basis for waiver of the IPT, and further, that Met-Pro's 1,500 gph unit previously produced under the "B" specification was "essentially identical" to the item now being procured, thereby entitling Met-Pro to a waiver of the IPT.

After the contract was awarded to ETC, Met-Pro filed suit in the United States District Court for the District of Columbia, and obtained a temporary restraining order prohibiting the Government from proceeding with the contract. The order was vacated upon its expiration and the Court refused to grant a preliminary injunction.

Apparently since the contract had been awarded and since the Court had refused to grant a preliminary injunction, Met-Pro dismissed its complaint, without prejudice, by stipulation which recited that "certain courses of action have practically rendered moot the dispute." In view thereof, our Office did not develop the protest further. However, Met-Pro subsequently advised us that it did not regard the protest as moot, in view of ETC's alleged unsatisfactory and untimely perform-

ance. In the absence of a judicial determination on the merits, we have proceeded with our consideration of Met-Pro's protest.

Met-Pro first alleges that it was improper for the Center to have indicated in the IFB that waiver of the IPT was possible when, in fact, no bidder would qualify for waiver. It is argued that this deficiency rendered illegal the award to ETC; that the latter's contract should be canceled; and that the procurement should be readvertised under an IFB not providing for waiver of the IPT. Met-Pro claims to have been prejudiced in that it priced its bid in anticipation of receiving a waiver of the IPT, and it asserts that it might have bid differently had it known it was not to enjoy the competitive advantage of a waiver.

Armed Services Procurement Regulation (ASPR) 1–1903(a) provides in part:

> (a) The solicitation for a fixed-price type contract which is to contain a requirement for first article approval shall inform bidders or offerors that where supplies identical or similar to those called for have been previously furnished by the bidder or offeror and have been accepted by the Government, the requirement for first article approval may be waived by the government. * * *
>
> * * * * * * *
>
> (iii) If the Government is to be responsible for first article testing, the cost to the Government of such testing shall be a factor in the evaluation of the bids and proposals to the extent that such cost can be realistically estimated. This estimate shall be documented in the contract file and clearly set forth in the solicitation as a factor which will be considered in evaluating the bids or proposals.

However, ASPR 1–1903(b) states that "Where it is known that first article approval will be required of all bidders or offerors, the provisions of (a) above shall not apply." "First article" includes by definition "initial production samples." ASPR 1–1901(a).

The procuring agency observes that inclusion of the waiver provision in the IFB was appropriate in light of the information originally furnished the contracting officer. This information later was shown to have been erroneous, and the agency concedes that viewed in retrospect, the solicitation should not have contained a waiver provision.

We do not believe, however, that the inclusion of the waiver provision in the solicitation provides a legal basis for questioning the validity of the award to ETC. In our view, the inclusion of the provision did not prejudice Met-Pro in the submission of its bid nor did it place bidders upon an unequal competitive basis. Met-Pro may have harbored the hope that it would enjoy the competitive advantage of being the sole bidder for whom the IPT would be waived. However, that result was not assured by the solicitation, which merely provided that the contracting officer "may" waive the testing requirement "if an offeror has previously produced an essentially identical item" and after consideration of several factors including "evaluation of design

and performance requirement of the previous and current procurement."

Alternatively, Met-Pro argues that it has in fact "previously produced an essentially identical item" and therefore qualifies for waiver of the testing requirement. As indicated above, the "C" specification contains the following requirements not present in the "B" specification which governed Met-Pro's prior production:

3.7 *Transportability.* The water purification unit shall be capable of withstanding the shock and vibration stress encountered during transportation.
3.8 *Environmental.*
3.8.1 *Operating temperature.* The water purification unit shall perform as specified in any ambient temperature from plus 110° F. to minus 25° F.
3.8.2 *Storage temperature.* The water purification unit shall not be damaged by storage at ambient temperatures from plus 160° F. to minus 30° F.
3.9 *Reliability.* The specified mean-time-between-failure (MTBF) of the water purification unit and ancillary equipment shall be 200 hours when tested as specified in 4.6.2.8.
3.10 *Maintainability.* Each maintenance assembling and disassembling operation performed as a result of testing in accordance with 4.6.2.9 shall be accomplished by not more than two men using common tools furnished with the water purification unit. The ratio of manhours of maintenance required to the hours of operation shall not exceed 0.08. A maintenance schedule shall be furnished prior to start of any testing.
3.17 *Safety.* A grounding system shall be incorporated to insure safety from static electricity.
3.18 *Human factors.* The characteristics of the water purification unit shall provide for operation by personnel in all type clothing, and shall be designed in compliance with section 4 of MIL-STD-1472.

Section 4 of the "C" specifications prescribes a series of tests to be performed upon a sample set to assure that these requirements are met.

The administrative position is that as a result of these new requirements, a unit built to the "B" specification would not be "essentially identical" to one built to the "C" specification, thereby precluding a waiver of the initial production test. We have stated that the decision as to whether or not to waive such testing " * * * is essentially an administrative function, and unless the contracting officer's determination that samples should not be waived is shown to be arbitrary, capricious, or without substantial basis in fact, it will not be disturbed by this Office." 46 Comp. Gen. 123, 127 (1966). In view of the inclusion in the "C" specification of new performance requirements, we are unable to conclude that no reasonable basis existed for the contracting officer's decision to require the IPT.

Accordingly, the protest is denied.

[B-179607]

Contracts—Negotiation—Requests for Proposals—Buy American Act—Restriction Not for Application—Canadian Offeror

Protest that proposal offering listed Canadian end product should have been evaluated pursuant to Buy American Act restrictions is denied because regula-

tions implementing Act provide for waiver with respect to listed Canadian end products and General Accounting Office (GAO) has previously upheld Department of Defense's (DOD) discretion in effecting waiver of restrictions and listing products; moreover, action of Canadian Commercial Corporation in submitting offer for Canadian supplier was proper under regulation. In view of Congressional cognizance of Agreements between DOD and Canadian counterpart waiving Act's restrictions, and as Agreement covers matter concerning U.S.-Canadian relations, it is inappropriate for GAO to question regulations' propriety.

Contracts—Negotiation—Evaluation Factors—Criteria—Responsiveness of Proposal

General Accounting Office (GAO) examination of technical and price evaluation of awardee's proposal indicates evaluation was reasonable and in accord with stated evaluation criteria. Although selected design has no operational history or actual cost basis, and has yet to undergo testing procedure, request for proposal contemplated development contract, including testing thereunder, and did not require item to have been aircraft tested. Furthermore, GAO finds record supports agency's conclusion that successful offeror's low price is reasonable because of unique design, type of materials used, and employment of low cost production processes; also, Canadian Commercial Corporation certified reasonableness of awardee's prices pursuant to Armed Services Procurement Regulation 6-506.

Contracts—Negotiation—Evaluation Factors—Timeliness of Consideration

General Accounting Office finds no evidence in record to support allegation that Air Force aided other offerors in price revisions or that such revisions resulted from other than proper negotiation process. Although protester contends time extension for award was made to benefit awardee, record indicates Air Force needed additional time to evaluate proposal revisions submitted pursuant to negotiations with all offerors.

Contracts—Data, Rights, etc.—Disclosure—Timely Protest Requirement

Protest that Air Force request for proposals (RFP) violated protester's proprietary rights is untimely as protester made no attempt to object to alleged disclosure of data until after award of contract approximately five months after protester became aware of RFP's specifications.

Contracts—Negotiation—Requests for Proposals—Specification Requirements—Waiver

Air Force not required to notify other offerors of waiver of specification requirements prompted by competing offeror's unique technical approach and to allow offerors opportunity to submit proposal revisions for technical evaluation pursuant to Armed Services Procurement Regulation 3-805.4. As agency indicates offeror's approach was breakthrough in state of art, General Accounting Office holds that providing other offerors opportunity to submit revised proposal would have improperly involved technical transfusion.

Contracts—Negotiation—Awards—Propriety—Evaluation of Proposals

While protester contends that agency is prejudiced against it because of agency's past actions and alleged conflict of interest on part of agency employees, record indicates no bias on agency's part in evaluation of proposals or selection of awardee. Moreover, claims of similar nature previously have been investigated by Department of Justice and it appears no grounds existed for prosecution.

Contracts—Protests—Timeliness—Solicitation Improprieties

Allegations first made after award of contract that request for proposals (RFP) was ambiguous and that RFP's failure to procure transcribing equipment was arbitrary and exhibited favoritism are untimely pursuant to section 20.2(a) of General Accounting Office Interim Bid Protest Procedures and Standards, which provides protests based upon alleged improprieties in solicitation apparent prior to closing date for receipt of proposals shall be filed prior to closing date for receipt of proposals.

In the matter of Baganoff Associates, Inc., July 25, 1974:

Request for proposals (RFP) No. F33657–73–R–0859 was issued on June 28, 1973, by the Air Force Systems Command, Wright-Patterson Air Force Base, Ohio, for the design development and qualification of a Mechanical Airborne Strain Recorder System. The RFP provided for the procurement of 125 systems, fleet wide instrumentation, fleet monitoring services, a computer program, Aerospace Ground Equipment (AGE), 180 man-days of engineering services, and data for A–37B aircraft. The RFP also included option provisions for a 361 percent increase in the production quantity of the system and for a data transcriber. Under this system, the recorder is attached to the aircraft and measures in flight the stress history of the part being monitored. The stress data is read and converted by a data transcriber from the gage into usable form and is processed onto magnetic tape for subsequent analysis. The performance expected of the successful offeror was stated to be full qualification of a strain gage in accordance with the RFP's Development Exhibit and Statement of Work, installation of strain gages on all Air Force A–37B aircraft based in the continental United States, a fully operating operational data collection system including data reduction, and integration of the data into both the A–37B Aircraft Structural Integrity Program and Aircraft Structural Integrity Management Information System. The RFP also called for a firm-fixed-price contract.

The RFP provided that all technical proposals submitted would be evaluated according to the following five factors, listed in the order of importance:

(1) Special Technical Factors.
(2) Understanding of the Problem.
(3) Soundness of Approach.
(4) Compliance with Requirements.
(5) Ease of Maintenance.

Elsewhere in the solicitation the above evaluation criteria were defined in greater detail. The solicitation stated that the required price and technical proposals would be judged on the basis of audit, price analysis, technical evaluation and a cost analysis (including Life Cycle Costing pursuant to Armed Services Procurement Regulation (ASPR)

3–800). The contract was to be awarded on the basis of the technical approach and price most advantageous to the Government. As special considerations, prospective offerors were advised to submit a strain recorder with their proposals, and that, while Mechanical Strain Recorder (MSR) types A/A32A–36 (A–36) and A/A32A–37 (A–37) would be developed and qualified under the contract, only the A–37 type MSRs would be procured for the production quantity.

In response to the RFP, proposals were submitted by Baganoff Associates, Incorporated (Baganoff), Cessna Aircraft Company, Leigh Instruments, Ltd. (Leigh) (through the Canadian Commercial Corporation (CCC)), and Technology, Incorporated (TI). After an initial technical evaluation offerors were requested to submit additional information to clarify their proposals, and upon receipt of this information the Air Force conducted a further evaluation of the proposals. The result of the evaluations indicated that the technical proposals of Leigh, TI, Baganoff, and Cessna were acceptable, in that order. After conducting discussions with the offerors, the Air Force requested best and final offers. Subsequent to review of the final technical and price proposals, the Air Force awarded the contract to Leigh via CCC on December 7, 1973, on the basis that Leigh submitted the best technical approach and lowest price of the four proposals received.

Baganoff Associates has protested the award to Leigh on the grounds that the award and the procedure used in evaluating Leigh's offer violated the Buy American Act; that the Air Force evaluation of the Leigh proposal was arbitrary and capricious and exhibited favoritism; that the Air Force improperly aided other offerors in the submission of proposal revisions; that the Air Force evaluation team was biased against the Bagnaoff proposal; that any award under this RFP would violate the proprietary rights of Baganoff; that other offerors were allowed to submit revised proposals and Baganoff was prejudiced because it was not extended this opportunity; that Leigh is nonresponsible in certain respects; and that the RFP was ambiguous in certain respects and improperly deleted requirements for items which would have strengthened Baganoff's proposal evaluation score. The protester therefore requests that this Office set aside the award to Leigh, order an impartial team to re-evaluate the proposals, and make a new award on the date submitted.

For reasons discussed below, the protest is denied.

In regard to its contention that the procedure used in evaluating proposals under this RFP and making an award to Leigh violated the Buy American Act, 41 U.S. Code 10a–10d (1970), the protester notes that the act, as implemented by regulations, gives a preference to the procurement of domestic source end products for public use, and that

when a domestic small business concern is competing with a firm offering foreign goods, a 12 percent evaluation factor must be added to the price of the foreign firm. ASPR 6–104.4. It contends that since Leigh is a Canadian Corporation proposing to supply Canadian products through CCC, the 12 percent factor should have applied to Leigh's price. In addition, the protester contends that the ASPR provisions which exempt Canadian products from the Act improperly injure domestic business; that the Secretary of the Air Force improperly allowed foreign companies to be put on the same basis as domestic concerns; that it is unequal protection of the law to allow a small business to obtain a preference against a domestic corporation but not against a foreign business; and that operation of these provisions violates Baganoff's rights under the 14th Amendment to the United States Constitution. Additionally, Baganoff questions whether the Leigh MSR is a listed end product and whether Leigh is being subsidized by the Canadian Commercial Corporation.

Part 5, section 6, of ASPR sets forth the Department of Defense Policy concerning alleviation of the restrictions of the Buy American Act with respect to procurements of Canadian Products. ASPR sections 6–506 and 6–507 set forth basic agreements underlying this policy. With regard to the agreement set forth in ASPR 6–507, we have noted that this agreement is an extension of arrangements between the United States and Canada of various steps which have been taken during and since World War II to coordinate their economic efforts in the common defense. *See*, e.g., Statement of Principles for Economic Cooperation between the United States and Canada, 1 UST 716, T.I.A.S. No. 2136, 132 U.N.T.S. 247 (63 Stat. 1148), cited in part in 52 Comp. Gen. 136, 138 (1972). In this regard, we have stated that the above-referenced "[A]greement was executed in 1963 by the Secretary of Defense in furtherance of recognized congressional and Executive policy. Congress is aware of the agreement and it has been operative continuously since 1963. To our knowledge, question has never been raised regarding its implementation. *See* Senate Hearings Before the Committee on Appropriations, Department of Defense Appropriations, Fiscal Year 1972, part 2, Department of the Army (pages 1477–1479, 92nd Congress, 1st session)." 52 Comp. Gen. at 138. In view of the above, we do not believe it appropriate for this Office to question the propriety of the ASPR provisions. 52 Comp. Gen. 136, 139 (1972).

Concerning the waiver of the Act's restrictions in this case, the RFP incorporated by reference the Buy American clause contained in ASPR 1–104.3. However, the Act's restrictions do not apply in those cases where the head of a Department determines it would be incon-

sistent with the public interest. *See* 41 U.S.C. 10a (1970). In this regard, ASPR 6–103.5 provides in pertinent part:

(a) Listed. The Secretaries of the Departments have determined that it would be inconsistent with the public interest to apply the restrictions of the Buy American Act with respect to certain supplies, which have been determined to be of a military character or involved in programs of mutual interest to the United States and Canada, where such supplies are mined, produced, or manufactured in Canada and either (i) are Canadian end products offered by the lowest acceptable bid or proposal or (ii) are incorporated in end products manufactured in the United States. Each Department maintains a list of these supplies, which is approved by the Secretary concerned. (The Departmental lists provide that parts and equipment for such supplies are considered to be included in the lists, even though not separately identified when they are procured under a contract that also calls for listed supplies.)

* * * * * * *

(c) Application of Canadian Exception. The effect of (a) and (b) above may be summarized as follows.

* * * * * * *

(2) Listed Canadian end products are treated as domestic source end products and neither duty nor the evaluation factors prescribed by 6–104.4 shall be used for evaluation.

Our Office has upheld this exercise of discretion in determining public interest. B–159495, September 9, 1966; B–151898, August 22, 1963. Moreover, we have upheld the exercise of discretion in the assembly and composition of the supply lists. B–157916, November 24, 1965. Since the report indicates that the Leigh MSR was approved by the Air Force as a listed Canadian product, the Air Force acted properly in not applying "Buy American" preferences in this case. B–173819, October 6, 1971; B–150183, April 17, 1963.

With regard to whether Leigh is subsidized by the Canadian Commercial Corporation, we note that the CCC is wholly owned by the Government of Canada and was established in 1946 in order to, among other things, assist in the development of trade between Canada and other nations. The CCC provides varied services to the Department of Defense (DOD), and acts as the prime contractor on any bid or proposal submitted through it to DOD and subcontracts 100 percent of the contract to the Canadian firm submitting the offer. The CCC also confirms and endorses in its own name the bid or proposal of the Canadian supplier. Such actions are authorized pursuant to ASPR 6–501 and 6–504. As CCC's actions under this procurement conformed to those activities outlined in ASPR there is no basis for objection by our Office. B–175496, April 28, 1972.

Baganoff Associates also contends that the Air Force evaluation of Leigh's proposal was arbitrary, capricious, and exhibited favoritism, that the Air Force guided Leigh in its price revisions, that certain time extensions were effected to benefit Leigh, that Leigh was nonresponsible in certain respects, and that Leigh's proposal constituted

a "buy-in." To substantiate its contentions, the protester alleges that the Leigh MSR system has not been operational, and that its proposed data transcriber has not yet been manufactured. Baganoff alleges it was arbitrary for the Air Force to choose such an unproven system when the Baganoff approach has been utilized for a number of years and incorporates the Prewitt-type MSR which the Air Force has also used. The protester questions how the Air Force could determine that the Leigh system will meet its reliability and maintainability standards when the Leigh gage has no operational record. Moreover, the protester queries how a nonoperational system can provide accurate manufacturing costs on which to base a proposal. Baganoff questions how, in view of the above, the Leigh system will reliably provide the Air Force with the higher system accuracy, higher data capacity, and greater transcribing speed the Air Force attributes to the system. Baganoff also alleges that the Leigh gage cannot withstand the Air Force environmental and qualification tests. Finally, the protester alleges that as Leigh would not have a data transcriber available for actual data reduction during the qualification and preproduction tests, the Air Force will be unable to substantiate whether Leigh's equipment meets the RFP's system accuracy and threshold requirements. Thus, Baganoff contends the Air Force choice of Leigh for technical reasons was unsupported.

The Air Force contends that the technical evaluation was performed in strict accordance with the evaluation criteria contained in the RFP, and concluded that the Leigh proposal contained the best technical approach to the problem and had the best chance of meeting the RFP's performance specifications. The Air Force explains that the Leigh approach was unique and from a technical standpoint bore no relationship to the other proposals. The Leigh approach was considered a technical break-through within the state-of-the-art. It appears that Leigh initially proposed two gages to meet the RFP's requirements, but that its unique design exceeded the RFP's gage requirements for accuracy, sensitivity, capacity, and transcription speed, and thus required only one gage to meet both ranges of MSR performance.

A review of the record shows that the RFP contemplated the development and qualification of an acceptable system based upon specified performance specifications, as commercial developmental models were not considered adequate. The Air Force points out that the RFP did not require that the hardware proposed have been aircraft tested prior to submission, nor did the RFP require prior performance to establish reliability and maintainability of the proposed hardware. Such requirements were to be established under the resulting contract. The Air Force reports that its evaluation of Leigh's projected failure modes and wear-out times data submitted with its proposal indicated satis-

factory performance and were realistic. Regarding Leigh's lack of automatic data transcriber ability, the Air Force points out such ability under the basic contract was not needed, and in fact no data reduction technique was specified under the program's preproduction test portion. While the accuracy of the Leigh MSR was obtained from Leigh's analytical calculations and not operational data, we note that operational data was not required. Moreover, the Leigh System's data capacity and transcribing speed were also determined from analytical data submitted with the proposal and such data was considered adequate and reliable. Our analysis of the record indicates that Leigh's technical approach was considered unique, and while more complex than the other methods proposed, it presented the Air Force with a greater operational capability. From our review of the evaluation report, it is clear that the evaluators considered Leigh's proposal as containing sound technical justification for the approach selected and a proposed system exceeding the specified performance. As a result, Leigh received a technical rating of 82.5, compared to Baganoff's rating of 63.5. In view of the above, and as we believe that the evaluation was performed in accordance with the listed factors, we do not consider it to be unreasonable. B–171349, November 17, 1971.

In addition to questioning the technical analysis of Leigh's proposal, Baganoff also alleges that Leigh's prices are too low and that in fact Leigh's proposal is a buy-in. As a basis for this allegation, the protester compares its final price ($448,270) and breakout costs with those of Leigh ($421,841.70, plus $10,000 transportation allowance). For example, under item 0002AA and AB of the Schedule, the protester states that Leigh's price of $226.50 for one MSR and two cassettes is much too low, as Leigh's MSR is considerably more complex than the Prewitt MSR offered at $174.00. Under item 0003AD, Baganoff states that Leigh's price for servicing Tinker Air Force Base does not reflect actual cost, as its cassette price is comparable to Baganoff's MSR-disc price yet the cassette is again more complex. Baganoff also alleges that Leigh's offer on item C of the option for Fleet Monitoring of five bases in the United States is equal to Baganoff's travel costs alone for the same service and that this is also true in regard to the service for the Vietnam bases. On these facts, and on the basis of other price comparisons under the RFP, Baganoff alleges the Leigh pricing proposal is unreasonably low, and that the Air Force therefore acted arbitrarily in accepting it.

The Air Force concluded that the Leigh technical approach allows it to incur substantially less costs for the required services. As stated by the Air Force, Leigh's unique design, the type of materials to be used, and its low cost production processes significantly reduce Leigh's costs. In view of the data transcriber's high speed and the resulting

small number of tapes thus required, Leigh's prices in this respect do not appear unreasonable. Leigh was also able to achieve a significant cost savings because its unique design exceeded the overall requirements for accuracy, sensitivity, capacity, and transcription speed, thereby requiring a single type gage and qualification of 20 rather than 40 gages as required for Baganoff's proposal. These features of Leigh's design also resulted in a life cycle costing analysis which showed the Leigh system to be significantly more cost effective. Moreover, we note that pursuant to ASPR 6–506 the Canadian Commercial Corporation certified Leigh's prices as fair and reasonable and submitted a Certificate of Price. Therefore, the agency's analyses have established that Leigh's prices are realistic and reasonable.

With regard to the contention that Leigh is not a responsible prospective contractor, such determination is within the discretion of the contracting officer and an affirmative determination of responsibility will not be disturbed by our Office in the absence of fraud. Since no fraud has been alleged or demonstrated, we will not consider this matter further.

Concerning the protester's contention that the Air Force "coached" Leigh and TI on line item price revisions, Baganoff alleges that the Air Force desired Leigh as its contractor and that accordingly Leigh was given advice to insure that its revised prices would indeed be low. Baganoff further alleges that Technology, Incorporated, was given the same aid so as to place it in line for award if Leigh's MSR cassette design failed for some reason. As its basis for this contention, the protester indicates that the final prices of Leigh, TI and Baganoff were so close as to be more than coincidence, and that this result becomes more suspicious when viewed in light of the fact that the Cessna Corporation, which builds the A-37B aircraft, was substantially higher in price than any of the other offerors. The protester also questions whether the 60-day time extension for award under the RFP was issued solely to benefit Leigh. It contends that while the award under this RFP was scheduled to be made by October 15, 1973, the Air Force extended this date until December 15, 1973, in order to evaluate the Leigh revisions.

In respect to this allegation, the Air Force has denied that it aided either Leigh or TI in any form of price revision. An examination of the price negotiations reveals no irregularity which in any way supports the protester's allegations, especially since Leigh's price did not vary significantly from initial to final offer. While TI's price was substantially reduced during negotiations, we can not find any indication that this was the result of anything other than the regular negotiation process. Regarding the extension of the schedule for award from October 15, 1973 to December 15, 1973, the Air Force reports

that this extension was necessary to permit the Air Force to properly evaluate the information requested in its September 28, 1973, letter to all offerors requesting clarification or information concerning their proposals. Also, all offerors were properly notified of the extension, and in fact by letter of October 23, 1973, Baganoff agreed to this extension. Pursuant to ASPR 3-805.1 and 3-805.3, contracting personnel are authorized to request clarification and to seek to obtain through discussions the proposal most advantageous to the Government. An extension of time to permit the contracting agency to make a fair, impartial and complete evaluation is proper and frequently necessary. *See*, e.g., B-174122(2), February 25, 1972; B-164728(2), September 3, 1968. The record does not reveal, nor does the protester point out, any documentation or other data which substantiates its claim of coaching or preferential time extensions. Thus, we consider the Air Force actions in this respect to be proper.

The protester next alleges that the Air Force violated its proprietary rights in data by issuing the RFP and by making an award thereunder to a firm other than Baganoff. The data in question concerns the Baganoff-Prewitt Associates method of recording aircraft stress information, extracting the data, and reducing it to usable form. The protester states that its associate, Prewitt, introduced the Air Force to the concept of using MSRs for stress recording. In 1969, the Air Force personnel allegedly asked the protester if there was some means of extracting information from the Prewitt-type MSR discs (as opposed to the Leigh-type MSR cassettes). The protester reports that it then detailed a concept whereby the recording media would be interrogated by using the principle of reflected or refracted light, and a computer would be used for automatic processing of the data. The protester asserts that it developed this process with its own funds and that it presented this data to the Air Force under an Air Force Proprietary Data Material Agreement. Baganoff states that patents for the Baganoff-Prewitt method have been applied for, and that such patents will shortly be issued. The protester has detailed a history of disputes with the Air Force over the years concerning these allegations. The protester's differences with the Air Force culminated in a protest to this Office by Baganoff under RFP No. F33657-72-R-0772, issued on March 27, 1972, by the same installation. Although we denied its protest that TI should be precluded from competing under that RFP, B-175634, May 18, 1972, Baganoff filed for reconsideration and alleged that the RFP, which it contends was essentially the same as the RFP in question here, was an infringement of the Baganoff proprietary process. While the protester then withdrew the protest, it alleges that its action in protesting forced the Air Force to cancel that RFP. Baganoff contends that the Air Force is once again disclosing

this process under the subject RFP and requests this Office to protect its proprietary rights by setting aside the award.

The Air Force takes the position that its RFP and award did not violate the protester's data rights. It points out that the design of the Leigh and Baganoff-Prewitt units are totally different, and the recording media bear little or no relationship to one another. The Air Force also notes that the RFP's specifications were of the performance type and contained no design details. The Air Force contends that its analysis of the Leigh and Baganoff proposals indicates no technical transfusion by the Air Force from Baganoff to Leigh. In the area of patent infringement, the Air Force indicates that to the best of its knowledge only two patents apply to this procurement and both were issued to Prewitt. After a review of these patents, the Air Force concludes that the RFP does not infringe these patents.

In factual disputes of this type, because of the scientific and engineering concepts involved, we have traditionally afforded a significant degree of finality to the administrative position. 46 Comp. Gen. 885, 889 (1967). Furthermore, we note that the RFP was issued on June 28, 1973, that the protester submitted a timely proposal, that it participated in negotiations under this RFP, and that it extended its offers until December 15, 1973. The protester had ample time before award (December 7, 1973) to study the RFP's specifications and to discover and protest that it allegedly disclosed proprietary data. This is especially true in view of the Baganoff protest under the prior RFP and its contention that this RFP is basically a reissuance of the canceled solicitation. There is no indication, however, of Banganoff's protesting under this RFP until it had learned that it would not be awarded the contract.

Courts have generally taken the position that for a party to maintain its proprietary rights in information, it must take reasonable action to prevent or suppress its unauthorized use. *See*, e.g., *Ferroline Corp.* v. *General Aniline Film Corp.*, 207 F. 2d 912 (7th Cir. 1953), *cert. denied*, 347 U.S. 953 (1954). While the protester, prior to the issuance of this RFP, did protest against the alleged Air Force disclosure of its data, Baganoff made no attempt after the issuance of the RFP and prior to the award of the contract to renew its protest against the allegedly improper disclosure. Under these circumstances, we must conclude that Baganoff's protest on this ground is untimely. B–179822, March 25, 1974. Except in extraordinary circumstances, not shown here, this Office will not grant relief where the data owner participates in the competition for the procurement and does not raise any objection until it appears that the contract will be awarded to another. 46 Comp. Gen. 885 (1967). *See also* 49 Comp. Gen. 124, 128 (1969); B–

175741, May 14, 1973. Moreover, insofar as Baganoff's contention in this regard is based upon an alleged impropriety in the RFP, it is untimely under our Interim Bid Protest Procedures and Standards, 4 C.F.R. 20.2(a) (1970), as it was not filed prior to the closing date for receipt of proposals.

Baganoff Associates also raises a question about the actions of the Air Force during the negotiation phase under the RFP. After receipt of the proposals, by letter of September 28, 1973, the Air Force furnished all offerors with certain changes to the RFP and requested clarification concerning certain points in each proposal. Baganoff alleges that, pursuant to this process, the Air Force permitted Leigh to totally revise its delivery schedule concerning services and engineering and its pricing on each applicable line item. Baganoff contends that the primary revision in the schedule under Leigh's proposal was the deletion of the requirement for furnishing 20 A–36 MSRs (item 0001AA) and the attendant testing services. The protester alleges that, while it attempted to do so, it was not allowed to either revise its proposal or effect the same reduction in equipment as Leigh. Baganoff contends that, as a result of this action, it was unable to compete on an equal level with Leigh and was prejudiced in the consideration of its proposal. The protester argues that this is another example of Air Force bias against it.

The record shows that in its letter of September 28, 1973, to Leigh, the Air Force requested clarification concerning whether the MSR proposed for the A–37 MSR requirement (item 0001AB) would also meet the requirements for the A–36 MSR. This question was prompted by the Air Force's technical evaluation which indicated that since Leigh's proposed data capacity was so much greater than the RFP's requirements, one MSR was adequate for both ranges. The Air Force advised Leigh that if the answer was affirmative then it would delete as to Leigh the requirement for the A–36 MSR. In response to this request, Leigh informed the Air Force that its A–37 would meet the A–36 requirement. Therefore, Leigh revised its price for the 20 A–37 preproduction MSRs and deleted the price for the 20 A–36 MSRs. Leigh also submitted a nonrecurring price provided that only the A–37 recorder would require testing. The Air Force disagrees with the protester's characterization of this revision. It asserts each offeror in the competitive range was given an equal opportunity to submit technical clarification and priced revisions. It contends that no change to the delivery schedule or supplies and services was requested or permitted. The Air Force contends that Leigh was not required to offer on both A–36 and A–37 gages because the Leigh MSR provided enough sensitivity and data capacity to cover both ranges. It explains that

based upon the known commercial models the A–36 and A–37 gages were required to cover both ranges; one gage to accurately measure strain cycle data from high load factor aircraft (A–36), and one for low load factor aircraft (A–37) because of the trade-off between sensitivity and capacity. However, it was determined and confirmed that Leigh's unique and innovative design was adequate for both ranges. The Air Force did not delete the requirement for two MSR gages and 40 preproduction models for other offerors, including Baganoff, because their proposed designs required two gages to cover both ranges and the differing mechanical characteristics of the two gages necessitated qualification testing.

Although the applicable regulation provides that when the proposal considered most advantageous to the Government involves a departure from the stated requirements other offerors must be given an opportunity to revise their proposals based upon the revised requirements, it also provides that this should be done without revealing to the other offerors the design proposed in the departure. ASPR 3–805.4. The Air Force engineers report that Leigh's approach to the mechanical strain recorder system was a technical breakthrough within the state of the art. We find no basis on which to disagree with this analysis. Thus, we believe that providing Baganoff and the other offerors an opportunity to submit revised proposals based upon Leigh's design would have involved technical transfusion contrary to the caveat of the regulation and was not, therefore, required.

The protester also alleges that the Air Force military and civilian personnel at Wright-Patterson Air Force Base, and particularly those in the Structural Engineering Department, are prejudiced against the protester and that these individuals structured the RFP and evaluated the proposals submitted thereunder so as to insure that the protester's proposal would not be selected for award. The protester contends that this bias grew out of a conspiracy on the part of Air Force personnel to disseminate to Baganoff's competition information relative to the protester's development of a data transcriber process. Furthermore, the protester argues that this conspiracy also led the Air Force, in conjunction with certain contractor personnel, to determine on the basis of self-interest who would be awarded the initial contracts to develop the Scratch Gage System for the Air Force. The protester bases its allegation on the theory that a certain Air Force Captain learned of the Baganoff process while in the Air Force, transmitted this information to Technology, Incorporated, arranged civilian employment with TI while in the Air Force, and then left the Air Force to work for TI in this very same conceptual area. The protester alleges that this action constituted a conflict of interest and

that it prejudiced Baganoff. To relate these allegations to the present procurement, the protester contends that the former Air Force Captain has now rejoined the Air Force in a civilian capacity and has been working with the same engineering group at Wright-Patterson in which he was formerly employed; that he has influenced the project head under this RFP against the protester; and that as a result the evaluation of the Baganoff proposal was biased. Furthermore, Baganoff contends that the project head is further prejudiced against Baganoff because protest action by Baganoff in the past against certain of his actions resulted in his being "retired" from Air Force active duty.

In response to these allegations, the Air Force denies any prejudice or bias against Baganoff. It maintains that Mr. Baganoff's allegations are unfounded and that while the former Air Force Captain has returned to the Air Force in a civilian capacity, he has been working on another program in California. The Air Force further denies the existence of any conspiracy to either prejudicially evaluate Baganoff's proposal or disseminate its proprietary data.

It is the responsibility of Government contracting personnel to fairly and impartially evaluate offerors' proposals so that the Government will select for award the most advantageous proposal and that the integrity of the competitive procurement system will be maintained. In relation to this procurement, the record does not reveal prejudice or bias on the part of the Air Force in the evaluation of proposals or selection of Leigh's proposal for award. We note that the protester has not presented any documentary evidence to support its contention of prejudice. Our review of the Air Force evaluation of these proposals indicates that its selection of Leigh was not improper, biased, or based upon prejudice. Furthermore, we note from the record that these similar charges by Baganoff were investigated by the Federal Bureau of Investigation and the Office of the United States Attorney for the Southern District of Ohio. It appears that, as a result of these investigations, the Office of the United States Attorney determined that no grounds existed for prosecution. We note that Baganoff Associates also filed suit against Technology, Incorporated, in the United States District Court for the Southern District of Ohio (Western Division) concerning similar charges. Such allegations were also before this Office at that time as a result of a protest by Baganoff Associates in a prior procurement. As Baganoff and TI by mutual agreement subsequently dismissed Baganoff's civil action against TI, and as counsel for Baganoff stated that in his opinion this Office was without jurisdiction over the remaining matters in question, we closed our file on the protest. B-174329, March 23, 1973.

On the basis of the foregoing, we conclude that the record fails to support Baganoff's charges in this respect.

Finally, Baganoff Associates raises two additional grounds of protest which are untimely because they were initially raised after the closing date for receipt of proposals. It alleges that in certain instances the RFP was ambiguous, that this ambiguity influenced its proposal, and that action should be taken to remedy this influence. As examples of this ambiguity, Baganoff points to the type of engineering support to be provided under item 0003AB (Fleet Monitoring) of the schedule and the meaning of the RFP's technical evaluation factors. The protester also alleges that the RFP purposely omitted any requirement for the procurement of a data transcriber under the basic contract, that the previous RFP contained such a requirement, and that the deletion of the transcriber requirement was arbitrary and indicated favoritism. Pursuant to section 20.2(a) of our Interim Bid Protest Procedures and Standards, protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of proposals must be filed prior to the closing date for receipt of proposals. 4 C.F.R. 20.2(a) (1970). The record indicates that initial proposals in response to this RFP were to be submitted by August 10, 1973, that clarification was to be submitted by October 15, 1973, that best and final offers were to be received by the Air Force no later than November 30, 1973, and that award of the contract was made on December 7, 1973. As both of these grounds of protest concern the constitution of the RFP itself, and as they were not asserted until after award of the contract, they are untimely and will not be considered. 52 Comp. Gen. 184, 188 (1972).

Accordingly, the protest is denied.

[B-166506]

Contracts—Negotiation—Sole Source Basis—Broadening Competition

Factors used to justify sole-source procurement of public education and information programs such as: nonprofit organization's makeup; fact that organization would utilize volunteers in performance; organization's rapport and understanding of State and local Government, key memberships, respected position, community support and coalition approach do not represent proper justification for noncompetitive procurements irrespective of fact that nonprofit organization could quote lower price since statutes require full and free competition consistent with what is being procured.

In the matter of Environmental Protection Agency sole-source procurements, July 26, 1974:

This decision relates to our Office's review of certain awards made under the Transportation Control Plan Public Affairs Program of the Environmental Protection Agency (EPA).

The solicitation in question all involve procurement of similar services and will, therefore, be discussed as a whole rather than individually. The services desired were public education and informational programs dealing with transportation control strategies needed to achieve ambient air standards in 38 major metropolitan areas throughout the United States. In all the questioned procurement, awards were made on a noncompetitive negotiated basis.

Each of the awards, save one, was justified on the basis that the services would be performed by nonprofit, tax exempt, volunteer citizens organizations, each having an objective to work for clean air through education. It was determined that the organizations selected were the ideal cross section of the communities involved to publicize the clean air educational program. Moreover, these organizations were selected because the majority of their efforts were to be performed on a volunteer basis by community leaders, university personnel, civil servants, State legislators, businessmen and representatives of area environmental and civic organizations. Further justifications for the noncompetitive procurements were as follows: rapport and understanding of state and local Government, key memberships, respected position, community support, and a coalition approach.

We do not, however, believe that the above-stated reasons represent proper justifications for obtaining the services on a noncompetitive basis.

In the conduct of its procurements, EPA is subject to the Federal Procurement Regulations (FPR), 41 Code of Federal Regulations, chapter 1, as well as its own procurement regulations, EPPR, published at 41 Code of Federal Regulations, chapter 15. FPR 1–1.301–1 states specifically that "All purchases and contracts, whether by formal advertising or by negotiation, shall be made on a competitive basis to the maximum practicable extent." FPR 1–1.302–1(b) provides that "Irrespective of whether the procurement of supplies or services from sources outside the Government is to be effected by formal advertising or by negotiation, competitive proposals * * * shall be solicited from all such qualified sources as are deemed necessary by the contracting officer to assure such full and free competition as is consistent with the procurement of types of supplies and services necessary to meet the requirements of the agency concerned."

In the past, our Office has recognized that noncompetitive awards may be made where the item or services are unique (B–175953, July 21, 1972); where time is of the essence and only one known source can meet the Government's needs within the required timeframe (52 Comp. Gen. 987 (1973)); where data is unavailable for competitive

procurement (B-161031, June 1, 1967); or where it is necessary that the desired item manufactured by one source be compatible and interchangeable with existing equipment (B-152158, November 18, 1963). *See, also*, 50 Comp. Gen. 209 (1970). To the extent that a nonprofit, tax exempt, volunteer citizens group falls within one of the preceding examples, a noncompetitive procurement may be justified.

However, we find no authority justifying a noncompetitive award solely on the basis of a firm's status as either a nonprofit organization, a tax exempt entity, or a volunteer citizens group. Moreover, we can find no authority to support any of the further justifications for making noncompetitive awards. Additionally, the justifications for award contained in the record indicate that there are other firms or organizations available to provide the services, but that these other entities, if awarded a contract, might, in EPA's view, have a more difficult time putting forth EPA's message for one reason or another. The fact that a particular group can perform the services with greater ease than any other group or firm does not, in our opinion, justify a noncompetitive procurement to the exclusion of others. We note, in this regard, that these reasons seem contrary to the specific bases stated for making award to a private firm in the New York City area.

While it may not be in the best interests of the Government at this point in time to disturb the awards in question, we do have serious reservations concerning future sole-source procurements for these types of services. In our opinion, there is no overriding uniqueness in the fact that a firm is either a consortium, tax exempt, or a nonprofit organization. It is clear that several organizations throughout the United States have the ability to disseminate the EPA message. Therefore, while nonprofit organizations may be able to quote a lower price for these services, other organizations should be afforded an equal opportunity to compete.

We, therefore, recommend that EPA eliminate any noncompetitive restrictions in future procurement for this type of service.

[B-180690]

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

General Accounting Office does not believe agency acted unreasonably in pointing out by letter 24 deficiencies in protester's technical proposal rather than conducting "give and take" oral negotiations or in failing to negotiate further when revised proposal was also considered deficient, as there is no inflexible rule used in construing the requirement in 10 U.S.C. 2304(g) for written or oral discussions; rather, extent and content of discussions is primarily for agency determination. Furthermore, it would be unfair for agency to help one offeror

through successive rounds of discussions to bring its proposal up to level of other adequate proposals where offeror's revised proposal contains large number of uncorrected deficiencies resulting from offeror's lack of competence, diligence or inventiveness.

Contracts—Specifications—Conformability of Equipment, etc., Offered—Technical Deficiencies—Negotiated Procurement

Rejection of revised proposal is not improper since determination as to whether proposal is technically acceptable is primarily matter for administrative discretion and record does not show agency conclusion that protester's proposed approach contains deficiencies which present unacceptable risk that proposed system would not meet desired standards is unreasonable.

Contracts—Negotiation—Evaluation Factors—Factors Other Than Price—Technical Acceptability

Although General Accounting Office recognizes that cost should be considered in determining most advantageous proposal in negotiated procurement, protester's proposal was properly rejected as technically unacceptable even though proposed cost was low.

In the matter of Austin Electronics, July 26, 1974:

On August 20, 1973, request for proposals (RFP) No. N61339–74–R–0002 was issued by the Naval Training Equipment Center, Orlando, Florida, for the procurement on a cost-plus-a-fixed-fee basis of one Aviation Wide Angle Visual System with related data and support items. The system is to be integrated with an existing aircraft simulator. It will present the image of an aircraft carrier and respond to inputs from an instructor and a pilot.

Proposals were received from four firms and opened on the amended closing date of October 12, 1973. The initial technical evaluation of proposals resulted in a determination that Austin's and one other proposal were unacceptable because major systems modification would be required. Nevertheless, the Procurement Advisory Board determined that the two unacceptable offerors should be permitted the opportunity to correct their deficiencies. Accordingly, by letter dated December 19, 1973, the agency pointed out 24 areas considered deficient in Austin's technical proposal. Austin submitted a portion of its proposal revisions by letter dated January 7, 1974, while the remainder were submitted via telecopier on January 24, 1974. The revised technical proposals of all offerors were evaluated and by letter dated February 13, 1974, Austin was informed that its proposal as revised was considered technically unacceptable. At the request of Austin a debriefing conference was held on February 26, 1974, during which the reasons for determining Austin's proposal unacceptable were discussed in depth.

Briefly stated, it is Austin's position that had the Navy clearly and completely pointed out the technical deficiencies in Austin's proposal during negotiations, that firm would have been able to bring its proposal up to an acceptable level. Austin insists that its proposal, which

it states offers the lowest cost estimate, was rejected for deficiencies which are either the result of misunderstandings between Austin and the Navy or which can be easily remedied with only an inconsequential impact on its cost proposal.

For reasons discussed below the protest is denied.

The Navy's rejection letter lists six main areas in which Austin's revised proposal was considered technically unacceptable. Although there are additional areas of alleged technical shortcomings in the revised proposal, the dispute concerning the Navy's negotiation techniques and the agency's rejection of the Austin proposal is focused mainly on these six major areas. The first three areas of dispute are concerned primarily with Austin's contention that the agency failed to conduct meaningful negotiations, while the remaining three areas are mainly concerned with the propriety of Navy's technical evaluation of the Austin proposal.

The first area of dispute concerns the Navy's conclusion that: "Target image generation system cannot provide nearly infinite target rotation rates required to simulate bolter near center of carrier model rotation." Austin concedes that its proposed camera gantry design approach, which is based on polar coordinates, is not in accordance with the Navy's design conception which is based on cartesion coordinates. However, Austin insists that had the Navy established meaningful discussions with Austin, it would have been able to convince the agency of the superiority of its polar coordinate design approach. In any event, Austin contends that its design could be easily modified with the addition of one more "servo," to conform to the Navy's requirements.

The agency disagrees with Austin on both counts. It is the Navy's position that protracted discussions with Austin would not have induced it to drop the cartesion coordinate system, which it insists has been proven to be both cost effective and reliable through years of use by commercial airlines. The Navy also feels that Austin's system as proposed would "not work in practice." Concerning the modifications necessary to transform Austin's proposed system to an acceptable one, the Navy argues that Austin's proposed additional "servo" is not a simple modification but would necessitate added complexity in the mechanical structure of the gantry and the computer program.

The next two areas of dispute concern the Navy's second and third reasons for disqualifying the Austin proposal, which are as follows: (2) "Non-linear mapping function of background projection lens would distort insetting hole such that registration of target image with insetting hole would not be possible," and (3) "Background projection lens would distort and compress the carrier wake image out of tolerance near the edge of projection field."

Austin insists that had the Navy specifically pointed out these

problems during negotiations it could have easily provided their solution. In fact, Austin contends that the information needed to answer the first problem area was already included in its initial proposal. Austin also notes that "a few minutes dialog" could have eliminated the second problem area.

The Navy counters that these two "disqualifications" relate directly to question No. 12 of its negotiation letter, which provides as follows: "Compliance is not shown for the display of special effects, such as a band of fog with the specified background distortion tolerance." The agency explains that the two "disqualifications" and question No. 12 are three manifestations of the same problem. Specifically, it is argued that Austin failed to propose a means to compensate for background image distortion, which the Navy reports is inherent in the nonlinear mapping function of the background projection lens. The record indicates that Austin has proposed to project special effects, the insetting hole, and the carrier wake image through the distorted field of the background projection lens. The agency argues that all three areas would require the same type of correction since they are projected through the same lens.

Although, as Austin argues, it is possible that it would have benefited if these deficient areas were the subject of a "give and take" oral negotiation session, we do not believe the Navy's failure to engage in this method of negotiation was an abuse of discretion. Section 2304(g) of Title 10 of the U.S. Code requires that written or oral discussions be held with all responsible offerors determined to be within the competitive range, price and other factors considered. We have held that in order to have meaningful discussions within the intent of 2304(g), generally, offerors should be advised of the areas in which their proposals have been judged deficient so that they may have the opportunity to satisfy the Government's requirements and the Government may thereby obtain the full benefits of competition. 47 Comp. Gen. 29 (1967); *id.* 336 (1967); 51 *id.* 431 (1972); 52 *id.* 466 (1973). At the same time we have recognized that there is no fixed, inflexible rule concerning the requirement for written or oral discussions; rather the content and extent of discussions needed to meet the requirement is a matter of judgment primarily for determination by the procuring agency, and such determination is not subject to question by our Office unless clearly without a reasonable basis. 51 Comp. Gen. 621 (1972). There is no requirement that negotiations be conducted in a "give and take" oral session so long as they are otherwise meaningful. Furthermore, we believe it would be unfair for an agency to help one offeror through successive rounds of discussions to bring its proposal up to the level of other adequate proposals where that offeror has been given the opportunity to correct a large number of deficiencies and such revisions as are made still leave a number of uncorrected deficiencies

as a result of the offeror's lack of competence, diligence, or inventiveness. 51 Comp. Gen. 621 (1972). In the circumstances reported here, we are unable to conclude that the negotiations were not "meaningful" within the contemplation of the applicable statute.

Austin also argues that it was not allowed sufficient time in which to prepare its responses to the Navy negotiation letter, and insists that Navy technical personnel were unavailable to clarify alleged "abstractions" in certain of the Navy's questions.

In this connection, all offerors were notified by letter dated December 19, 1973, of deficiencies in their respective proposals and given until January 8, 1974, to make any revisions. In addition, agency personnel did provide Austin with oral clarifications concerning the computer portion of the proposal when requested and permitted Austin to submit additional proposal revisions. In these circumstances, we do not believe it may properly be said that Austin was deprived of an equitable opportunity to revise its proposal.

Austin points out that the Navy erroneously concluded that its proposal states that it will "use existing spare TRADEC digital-to-synchro converters." Therefore, Austin argues that the Navy had no justification to downgrade the Austin proposal because of the alleged lack of "TRADEC digital-to-synchro converters."

Page 2–72, paragraph 2.11.2, of the Austin proposal provides that "a count of the I/O requirements shows that the existing spares in the TRADEC computing system will be adequate to cover the needs of AWAVS. A list of the AWAVS interface assignments and the TRA DEC spare capacity follows this page." The referenced list shows a requirement for "6 D/S." This was interpreted by the agency to mean digital-to-synchro converters. The record indicates that at the debriefing Austin stated that the number "six" did not refer to digital-to-synchro converters but to digital-to-synchro channels. The Navy concludes that since each synchro channel requires two analog channels, the approach Austin proposed at the debriefing exceeds the available spare TRADEC digital-to-analog channels. Therefore, it is the Navy's position that regardless of the interpretation placed on the symbol "D/S" in the Austin proposal the TRADEC spare capacity is exceeded. There is no evidence in the record which indicates that the Navy's position is erroneous in this regard.

The Navy's rejection letter cites as one of the six major reasons for rejection of Austin's proposal its conclusion that Austin's computer timing and executive scheduling concept is not feasible. We are informed that at the debriefing the Navy admitted that its wording of this deficiency was faulty and that it did not consider Austin's computer timing to be unfeasible. However, we understand that the agency does question the capability of Austin's proposed executive program to provide the required synchronization between the two computers.

Austin asserts that during the debriefing the Navy indicated that its objection to this portion of the proposal was that Austin merely listed interprocessor interrupt equipment in its equipment list without specifying its particular function in the proposed system. Austin notes that in its response to the Navy negotiation letter it indicated that synchronization is to be accomplished by means of the interprocessor. The agency continues to insist that Austin's response is inadequate because, although Austin indicated the general function of the interprocessor, it never specified how the equipment would provide synchronization. We are unable to conclude that the agency's position in this regard is unreasonable or erroneous.

Further, it is Austin's position that in general the six disqualification areas provide little foundation for the rejection of the proposal. The record indicates that Austin's proposal was rejected for several interrelated reasons, "abstraction where detail was required; failure to recognize and/or provide acceptable approaches in certain critical areas; demonstrating originally, and not later adequately curing, many proposal deficiencies." It may be true that one of the areas of disqualification, standing alone would not justify rejection of Austin's proposal; however, it is clear from the record that Austin's proposed approach contained deficiencies which in the Navy's opinion presented an unacceptable risk that Austin's proposed system would meet the desired performance standards. For example, the final proposal evaluation report shows that agency technical personnel concluded that Austin's proposal was unacceptable in the computer area because the Austin proposal indicated that it had not "performed the required analysis to the detail required to clearly indicate the computer capabilities." Further, the report states, "it is apparent they do not fully comprehend the magnitude or the complexity of the AWAVS system." In addition to expressing dissatisfaction with the Austin proposal in such diverse areas as "Installation Requirements," "Simulation Requirements," "Special Effects," "Display Screen" and "Cockpit," the report indicates that the Navy evaluators did not believe that most of Austin's responses to the 24 questions raised in the negotiation letter were acceptable and, therefore, major system redesign and equipment additions would have been required to correct technical deficiencies.

It is not our function to resolve technical disputes of this nature. We have held that the determination as to whether a proposal is technically acceptable is primarily a matter of administrative discretion which will not be disturbed by our Office in the absence of a clear showing that such determination was unreasonable. *id.* 52 Comp. Gen. 382 (1973); 49 *id.* 309 (1969). Furthermore, where a proposal is so materially deficient that it could not be made acceptable without major revisions, there is no requirement that discussions be conducted with the offeror. 52 Comp. Gen. 865 (1973). We have also recognized that even

though a proposal is initially considered within the competitive range, subsequent revisions of that proposal may result in a determination, as in the instant case, that such a proposal is no longer technically acceptable and therefore no longer within the competitive range. 52 Comp. Gen. 198, 208 (1972). Here, although Austin's initial proposal was determined technically unacceptable discussions were conducted with Austin pursuant to Armed Services Procurement Regulation (ASPR) 3-805.2(a) (DPC #110) which provides that when there is doubt as to whether a proposal is within the competitive range that doubt shall be resolved by including it. Austin's proposal revisions submitted as a result of discussions failed to resolve the Navy's initial doubts. It is our view that the evaluation record contains sufficient evidence to reasonably support the Navy's determination that Austin's revised proposal was technically unacceptable.

Throughout Austin's argument it has emphasized the point that the agency exercised "poor business judgment" in ignoring the cost savings inherent in Austin's allegedly lower cost estimate. Although we recognize that cost should be considered in determining the most advantageous proposal for the Government, we have held that a proposal properly may be considered unacceptable solely because of technical unacceptability even though the rejected offeror's proposed costs are lowest. B-176598, December 11, 1972.

We have carefully reviewed the entire record, including Austin's "Deficiency Summary Chart" which summarizes Austin's position in regard to each of the 24 deficiencies cited by the Navy negotiation letter, and the Navy's evaluation reports, and we are unable to conclude that the rejection of Austin's proposal was unreasonable or the result of inadequate negotiation techniques on the part of the agency. The protest is therefore denied.

[B-181724]

Contracts—Protests—Contracting Officer's Affirmative Responsibility Determination—GAO Review Discontinued—Except for Fraud

General Accounting Office has discontinued practice of reviewing bid protests of contracting officer's affirmative responsibility determination except for actions by procuring officials which are tantamount to fraud.

In the matter of Central Metal Products, July 26, 1974:

Central Metal Products protests the selection of Wyott Corporation for award under a solicitation issued by the Veterans Administration, Hines, Illinois, on the basis that Wyott allegedly has no experience in the manufacture of the type of cabinets being purchased by

the Veterans Administration and is therefore unqualifed to receive the award.

In essence the protester questions the responsibility of the low bidder and its eligibility for contract award.

This Office has discontinued its prior practice of reviewing bid protests involving a contracting officer's *affirmative* determination of responsibility of a prospective contractor. 53 Comp. Gen. (B–177512, June 7, 1974). The standards for responsible prospective contractors and the requirements and procedures for responsibility determinations essentially involve a matter of business judgment. *See* Federal Procurement Regulations 1–1.1200 *et seq.* and Armed Services Procurement Regulation 1–900 *et seq.* The courts have held that a party alleging arbitrary action by an agency must meet a high standard of proof by showing that such arbitrary action as alleged did in fact exist. *Keco Industries* v. *United States*, 428 F. 2d 1233, 1240; 192 Ct. Cl. 773 (1970). Moreover, the court has observed that criteria for determining bidder responsibility "are not readily susceptible to reasoned judical review." *Keco Industries* v. *United States*, 492 F. 2d 1200, 1205; (Ct. Cl. No. 173–69, decided Feb. 20, 1974). As a practical matter a bidder protesting the affirmative responsibility of a competitor is not in a position to meet this high standard of proof as contrasted to the degree of first hand knowledge and access to the low bidder's plant and records which the Government has. We believe it is clear that no significant purpose would be served by our continued review of such matters.

For these reasons we do not believe affirmative responsibility determinations should be questioned by this Office except for actions by procuring officials which are tantamount to fraud. No fraud having been alleged or demonstrated, we must decline to further consider the matter.

[B–180811]

Officers and Employees—Transfers—Relocation Expenses—House Sale—Purchase Completed After Transfer

Where an employee entered into a contract for the purchase of a residence at his old duty station, but did not occupy the residence because of a transfer, he may be reimbursed the costs of selling the residence since he was prevented from occupying the residence, as required by the Federal Travel Regulations, by the act of the Government.

Officers and Employees—Transfers—Relocation Expenses—Attorney Fees—House Sale

Where an employee claimed reimbursement for a lump-sum attorney fee incident to the sale of his residence in connection with transfer, payment may not be made until he submits an itemized statement since only those legal fees may be paid which are listed in section 2–6.2e, FPMR 101–7, and the lump-sum fee may include unallowable items.

In the matter of reimbursement of brokerage and attorney fees in sale of residence by transferred employee, July 29, 1974:

An Authorized Certifying Officer, Department of Justice, has requested a decision in a letter dated March 5, 1974, as to whether a transferred employee may be reimbursed for the expenses of selling a residence under the circumstances described below.

Mr. Jay Horowitz, an Assistant United States Attorney for the Southern District of New York, lived in an apartment in Brooklyn with his wife and children. In May 1973 he contracted to purchase a residence in New Rochelle, New York, depositing $7,500, 10 percent of the purchase price, in accordance with the usual practice. Closing was set for August 1, 1973, and Mr. Horowitz arranged to terminate his apartment lease in August as well. After entering into the purchase contract, Mr. Horowitz accepted a transfer to the Watergate Special Prosecution Force in Washington, D.C. He began his work in Washington as scheduled on August 19, 1973. On or about August 10, Mr. Horowitz and his family, at the conclusion of the lease, left the apartment in Brooklyn. Rather than moving his furniture to the house in New Rochelle and a second time to the Washington area, Mr. Horowitz chose to put it in storage. Mrs. Horowitz and the children stayed temporarily with her parents in New Jersey. Mr. Horowitz stayed in hotels in Washington and traveled to New Jersey on weekends to be with his family. He purchased a home in the Washington area in October and sold the house in New Rochelle in November. The question presented for decision is whether the Government may reimburse Mr. Horowitz for the costs of selling the house in New Rochelle since he did not occupy that residence at the time he first was advised of his transfer.

The statutory authorization for the reimbursement of expenses of the sale of the employee's residence at his old duty station is contained in 5 U.S. Code 5724a(a)(4). Section 2-6.1d of the Federal Travel Regulations, FPMR 101-7, implementing that statute provides that reimbursement of expenses of selling the old residence may be made provided the dwelling for which reimbursement of selling expenses is claimed was the employee's residence at the time he was first definitely informed by competent authority of his transfer to the new official station.

In decision B-168818, February 9, 1970, the employee had already contracted to purchase a home when he learned of his transfer. He resold the house soon after purchasing it. The regulation in effect at the time, Bureau of the Budget Circular No. A-56, 4.1d, contained the identical requirement. However, we held that it was not intended to apply where the employee has in good faith entered into a contract for the purchase of a residence at his old duty station prior to receiving his transfer order, is unable to cancel the purchase contract, and is precluded from establishing his residence in the house because of a trans-

fer. A similar situation was involved in decision B–168186, November 24, 1969. In that case an employee contracted for the construction of a house to be used as his residence prior to learning of his transfer. The selling expenses were held reimbursable even though he never occupied the house because "the action of the agency * * * has precluded the employee from establishing his residence in the home when completed." *Cf.* B–172534, May 25, 1971, where reimbursement was denied because the employee was not living in his old house because of personal reasons when first notified of his transfer. Also, reimbursement was denied in B–177643, April 9, 1973, because the employee moved out of his old residence prior to the time he was first definitely informed that he was to be transferred.

In the instant case the record indicates that Mr. Horowitz contracted for the purchase of the residence at New Rochelle prior to being informed of his subsequent transfer and would have occupied the house had he not been transferred. Under such circumstances the voucher may be certified for payment if otherwise proper. In this connection we note that the attorney's fee in connection with the transaction is stated as a lump sum and may contain items which are not reimbursable under the provisions of section 2–6.2c, FPMR 101–7. Therefore, it will be necessary for Mr. Horowitz to obtain from his attorney an itemization of those portions of his fee allocable to the items reimbursable under the cited regulation before any part of the fee may be paid. B–169227, March 31, 1970.

The voucher is returned for handling in accordance with the above.

[B–181223]

Compensation—Administrative Errors—Appointment to Wrong Grade—Retroactive Salary Adjustment

Employees, placed in lower grade at time of appointment than they would have been placed in had there not been an administrative failure to carry out a nondiscretionary agency policy, may have their appointments retroactively changed to the higher grade and paid appropriate back pay. While general rule is that retroactive changes in salary may not be made in absense of a statute so providing, General Accounting Office has permitted retroactive adjustments in cases where errors occurred as the result of a failure to carry out a nondiscretionary administrative policy.

In the matter of retroactive appointments, July 29, 1974:

This matter involves a request from the United States Federal Labor Relations Council for authority to make retroactive appointments, with appropriate back pay, to correct administrative errors which occurred in the hiring of two employees of the Council, namely Mr. Robert A. Remes and Mr. Robert F. Hermann. In the case of Mr. Remes, authorization is sought to make his appointment to GS–11, step 1, retroactive to August 5, 1973, the date he was first appointed

and to pay retroactive salary equivalent to the difference between the salary of GS–9, step 1, and GS–11, step 1, for the period from August 5, 1973, through December 8, 1973. In the case of Mr. Hermann, authorization is sought to make his GS–11 appointment retroactive to August 13, 1973, the date of his appointment and to pay retroactive salary equivalent to the difference between the salary of GS–9, step 1, and GS–11, step 1, for the period from August 13, 1973, through December 22, 1973.

The record indicates that at the time they were first hired by the Council, Mr. Remes and Mr. Hermann were appointed to positions classified as Law Clerk (Trainee), GS–904, at Grade 9, step 1. The Executive Director of the Council states that at the time the employees were interviewed, selected and appointed to their positions, there was a nondiscretionary agency policy in effect which provided that attorney-advisors and law clerk trainees were to be hired at a GS–11, step 1, level if they met the criteria of Federal Personnel Manual Chapter 930, subchapter 3–3(b)(2). Both Mr. Remes and Mr. Hermann met the criteria of that subchapter. The Executive Director further states: "It is clear that, had there not been a misunderstanding as to the FPM criteria and the eligibility of Mr. Remes and Mr. Hermann thereunder, both would have been originally appointed at the GS–11, step 1 level." Although Mr. Remes and Mr. Hermann were appointed at the GS–9, step 1, level, they nevertheless performed the duties and responsibilities of the GS–11 entrance level attorney position from the date of their initial appointments.

Subsequently, the fact that an administrative error had been made in the original appointments of Mr. Remes and Mr. Hermann concerning their eligibility for appointment at the higher grade was brought to the attention of the Executive Director and immediate corrective action was taken to change the grades of the two employees to GS–11. Authority is now sought to make the corrective actions retroactive to the dates of their original appointments.

We discussed the general rule regarding retroactive salary changes in our decision of January 22, 1970, B–168715, as follows:

> As a general rule an administrative change in salary may not be made retroactively effective in the absence of a statute so providing. 26 Comp. Gen. 706 (1947), 39 *id.* 583 (1960), 40 *id.* 207 (1960). However, we have permitted adjustments (retroactively effective) of salary rates in certain cases when errors occurred in failures to carry out *nondiscretionary* administrative regulations or policies. See 34 Comp. Gen. 380 (1955) and 39 *id.* 550 (1960). Also, we have permitted retroactive adjustments in cases where the administrative error has deprived the employee of a right granted by statute or regulation. See 21 Comp. Gen. 369, 376 (1941), 37 *id.* 300 (1957), 37 *id.* 774 (1958).

Subchapter 2–7c of chapter 531 of the Federal Personnel Manual pertaining to determining rate of basic pay provides as follows:

> c. *Administrative error.* When an administrative error is made in determining the correct pay attaching to a position or payable to an employee, correction of the administrative error may be made on a retroactive basis.

In the cited decision, B–168715, January 22, 1970, it was held that the employees involved in that case had no vested right to be promoted at any specific time, but rather that the agency's regional commissioner was given the authority to promote. We recognized in that case that the intent of the administrative instructions involved was that the promotion be made within a reasonable time, but that a delay in effectuating the promotions was, in effect, not administrative error. In the present case, however, it appears that the Federal Labor Relations Council's administrative policy was not to make a newly-hired attorney merely eligible to receive a GS–11 salary, but instead to *require* such grade and pay if the appropriate FPM criteria were met. It does not appear that it was intended, once a decision was made to offer an attorney applicant a position, that there was to be any discretion as to the grade to be offered.

Accordingly, and in view of the statement by the Executive Director that Mr. Remes and Mr. Hermann would have been originally appointed at the GS–11 level had there not been an administrative error in the interpretation of the FPM criteria and the eligibility of the employees thereunder, we would have no objection to the Council effecting the proposed retroactive appointments and paying the appropriate back pay.

[B–180634]

Officers and Employees—Transfers—Service Agreements—Failure to Fulfill—Resignation

Department of the Treasury employee who was paid relocation expenses incurred in connection with a proposed transfer which was canceled is legally obligated to refund relocation expenses paid when he separated from Government service prior to the expiration of 12 months from the date of cancellation, since canceled transfer expenses are payable as though originally-contemplated transfer occurred and employee was retransferred to original duty station. Entitlement to receive and retain transfer expenses is contingent upon satisfaction of agreement to remain in Government service 12 months after cancellation notification under the provisions of 5 U.S.C. 5724(i).

In the matter of enforceability of Service Agreement after transfer has been canceled, July 30, 1974:

This matter is before us based upon a request by the Bureau of Alcohol, Tobacco and Firearms (ATF) of the Department of the Treasury, for a decision concerning the necessity for further collection efforts against Michael F. Kuhns, to recover payments made to him for relocation expenses incurred prior to the cancellation of a proposed transfer.

On August 4, 1972, Mr. Kuhns, who was employed by ATF as a Special Agent in its St. Louis, Missouri Office, was asked by his superior, James Harmon, Chief Special Investigator, if he would accept a promotion and transfer to Washington, D.C., to the position of Explosives Analyst. On September 1, 1972, Mr. Kuhns was

interviewed for that position and was advised not to incur any transfer-related expenses until the required travel authorization was issued. Mr. Kuhns requested that he be given a $2,100 advance to defray his moving expenses. On that day Mr. Kuhns signed a Service Agreement which provided, in pertinent part:

> I agree to remain in the employ of the United States Government for a period of *not less than twelve months after the date on which I report for duty at the official station shown above.*
> If I violate this agreement by resigning or otherwise separating from the service of the United States Government without authority, or if I am removed for cause (as distinguished from a reason beyond my control and acceptable to the United States Government) before the end of the twelve-month period, I will repay the United States Government a sum of money equivalent to that expended by it for travel, transportation, and/or other expenses incident to relocating me at the above-mentioned post of duty. [Italic supplied.]

On September 5, 1972, Mr. Kuhns received Form 4253 "Authorization for Moving Expenses." On September 7, 1972, Mr. Kuhns' household goods were picked up for shipment to Alexandria, Virginia, and were placed in temporary storage at St. Louis, Missouri. The following day settlement for the sale of Mr. Kuhns' residence took place and he went on leave with his famly, in preparation for his transfer. On September 14, 1972, Mr. Kuhns received a $2,100 travel advance. On about the same day, he spoke with Mr. Harmon who informed him that the prospects for his transfer "looked bad." Mr. Kuhns returned to St. Louis, and, on September 21, 1972, his household goods were delivered to a new residence which Mr. Kuhns had leased. Although he was never officially notified, Mr. Kuhns' transfer was in fact canceled, and he returned to his position in the St. Louis Office of ATF.

On January 2, 1973, Mr. Kuhns filed a claim with ATF for reimbursement of the expenses he had incurred as a result of the canceled transfer. The expenses claimed were:

Sales commission from sale of residence	$1,596.00
Storage and shipment of household goods	937.24
Miscellaneous moving expenses	200.00
Total	2,733.24
Less travel advance	2,100.00
Total	633.24

The claim was disallowed by ATF and on February 14, 1973, Mr. Kuhns submitted the same claim to this Office. After recomputing the amount of the claim using the commuted rate schedule for the transportation of the household goods it was allowed in the total amount of $2,908.28 less $359.20 in Federal Withholding Tax and $2,100 Travel Advance, for a net settlement to Mr. Kuhns of $449.08, as evidenced by Settlement Certificate Z–2504400 of April 18, 1973. This settlement was issued based on our holding in B–170259, September 15, 1970, that expenses incurred in complying with a change-of-station order prior to its cancellation may be reimbursed to the extent they would have been payable had the transfer been consummated.

On June 23, 1973, Mr. Kuhns resigned from Government service. The circumstances causing his resignation were apparently not beyond his control and acceptable to the agency. Since the resignation occurred less than 12 months after the proposed reporting date for Mr. Kuhns' transfer, ATF sought reimbursement of the amounts paid him on the basis of the Service Agreement signed by Mr. Kuhns on September 1, 1972. Mr. Kuhns has refused to make any payment, and the Department of the Treasury has requested a decision as to the necessity for further collection efforts.

The statutory basis for requiring the execution of a Service Agreement of the type signed by Mr. Kuhns is found in 5 U.S. Code 5724(i) which provides:

> (i) An agency may pay travel and transportation expenses (including storage of household goods and personal effects) and other relocation allowances under this section and sections 5724a and 5726(c) of this title when an employee is transferred within the continental United States only after the employee agrees in writing to remain in the Government service for 12 months after his transfer, unless separated for reasons beyond his control that are acceptable to the agency concerned. If the employee violates the agreement, the money spent by the United States for the expenses and allowances is recoverable from the employee as a debt due the United States.

The question before us is whether Mr Kuhns is obligated either under the above-quoted provision of law or on the basis of the Service Agreement to remain in the Government service for a period of 12 months notwithstanding that the contemplated transfer to Washington, D.C., did not in fact occur. Mr. Kuhns is of the opinion that any service obligation he may have had under the agreement was contractual and hence that accomplishment of the transfer to the new duty station designated in the Service Agreement—which transfer never occurred—was a condition precedent to any obligation of service he may have had thereunder.

Service Agreements executed pursuant to statutory authority such as here involved are not contracts in the technical sense. See *Denning* v. *United States*, 132 Ct. Cl. 369 (1955). In the case of *Finn* v. *United States*, 192 Ct. Cl. 814 (1970), the court characterized the nature of the obligation of the employee created under a Service Agreement executed pursuant to 5724(i) as a "contractual obligation" but pointed out that execution of the Service Agreement is a condition precedent to payment of relocation expenses. In B–178595, June 27, 1973, we recognized that an employee is bound by the 12-month service obligation as a condition to payment of relocation expenses even though he did not execute a Service Agreement. Absent the execution of a Service Agreement or the actual satisfaction of the 12-month service obligation there is no authority for an employee to receive or retain relocation expense reimbursement.

We have held that the authority of 5724(i) to pay relocation expenses extends to payment of expenses incurred in complying with a change-of-station order prior to its cancellation as well as to pay-

ment of expenses incurred in connection with a consummated transfer. B–170259, *supra*. With respect to canceled transfer expenses we regard the employee to be in the same position he would have been if the transfer had been consummated and he had been retransferred back to his former station. B–173460, August 17, 1971, and B–177898, April 16, 1973.

Our decisions have not specifically addressed the manner in which the condition precedent to payment under 5724(i)—that the employee execute a Service Agreement—is to be met in the canceled transfer situation, other than to indicate that execution of an agreement is an essential prerequisite to payment.

We believe the employee involved in a canceled transfer either should be required to execute a second Service Agreement or an amendment to the original Service Agreement should be issued designating the original duty station as the new duty station. In such cases the 12-month period of required service begins to run from the date on which the employee is advised of cancellation of the originally contemplated transfer.

Although we recognize that the employee is obligated to remain in the service of the Government for 12 months as a condition to payment of canceled transfer expenses regardless of whether there be a second agreement or an amendment to the original Service Agreement, execution thereof would serve to emphasize to the employee that his entitlement to receive or to retain payments in connection with the canceled transfer is contingent upon his remaining in the service of the Government for 12 months unless separated for reasons beyond his control that are acceptable to the agency concerned.

Mr. Kuhns is not legally entitled to retain amounts paid to him as a result of the canceled transfer to Washington, D.C., in view of his premature separation from the Government service. Neither his misapprehension as to his entitlement to retain the amount which he was paid nor the failure of the agency to clarify his service obligation by requiring an amendment to his original Service Agreement will legally excuse his obligation to refund the payments which he has received. It is noted, further, that the employee did receive substantial payments from the Government incident to the canceled transfer and that he had agreed to remain in Government service for 12 months. We do not believe it unreasonable to hold that he should have been on notice that his resignation from Government service for reasons which were not beyond his control and acceptable to his agency prior to the expiration of that 12-month period would result in his liability for repayment of the amount involved.

Accordingly, the Treasury Department should take such action as is necessary to recover the amounts paid to Mr. Kuhns as relocation expenses incident to his canceled transfer.

U. S. GOVERNMENT PRINTING OFFICE : 1975 O - 564-829