Decisions of The Comptroller General of the United States

VOLUME 54 Pages 937 to 998

MAY 1975

UNITED STATES
GENERAL ACCOUNTING OFFICE

PCN 45300107000

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1975

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.

COMPTROLLER GENERAL OF THE UNITED STATES

Elmer B. Staats

DEPUTY COMPTROLLER GENERAL OF THE UNITED STATES

Robert F. Keller

GENERAL COUNSEL

Paul G. Dembling

DEPUTY GENERAL COUNSEL

Milton J. Socolar

ASSOCIATE GENERAL COUNSELS

F. Henry Barclay, Jr.

John J. Higgins

Paul Shnitzer

TABLE OF DECISIONS NUMBERS

Cite Decisions as 54 Comp. Gen. —.

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

[B–180199]

Bids—Preparation—Costs—Recovery

Costs incurred by firm in attempt to persuade agency to expand specifications are not properly to be considered as bid preparation costs.

Contracts—Negotiation—Requests for Proposals—Unsolicited—Preparation Costs

Submission of unsolicited proposal where offeror knew that consideration of proposal was contingent upon item offered complying with agency requirements does not give rise to compensable bid preparation cost claim where agency had not advised offeror that item would meet agency's needs. Expenses incurred in preparing proposal cannot be recouped for failure of above-noted contingency, for under circumstances, submission of unsolicited proposal did not give rise to any obligation to fairly and honestly consider proposal.

In the matter of Bell & Howell Company, May 1, 1975:

The Navy Air Development Center (NADC), Warminster, Pennsylvania, entered into a prime contract with the Autonetics Division of North American Rockwell for the design, development fabrication and test of fast time analyzer systems. The contract specifications permitted the prime contractor to furnish a tape transport "essentially similar to Minneapolis Honeywell Model 7625C." For the first 2 years of its contract, Autonetics furnished Bell & Howell model VR 3700B. The Navy relates that although the model 3700B may have met the specifications set forth in the Autonetics subcontract with Bell & Howell, the 3700B did not, in fact, meet the requirements of the prime contract.

Honeywell subsequently developed an updated version of the 7625C—its model 96N. On October 19, 1973, the Navy issued the following change order:

> The Contractor is hereby required to provide ten Honeywell Tape Transports Model 96 in lieu of Bell & Howell Tape Transports for contract items 0008A, 0010 & 0010a. * * *
> Pending negotiation of the price adjustment for this change, the Government shall not be obligated in excess of $317,648.

Bell & Howell contends that it had a new model—the VR–3700*D*—which also met the objectives of the instant contract specifications. In this regard, the Navy states that Bell & Howell was given two opportunities to test the VR–3700*D* at NADC on October 4 and October 10, 1973, to substantiate its claims as to the essential equality of its VR–3700*D* with the Honeywell 96N. The agency further advises that:

> Bell & Howell postponed the 4th of October date to the 10th of October due to technical difficulties with their tape transport and allowed the testing appointment scheduled for Oct. 10th to lapse without notification or reason given * * *.

Bell & Howell relates that, upon learning of the sole-source procurement, it conducted discussions on September 26, 1973, with a Washington-based official of NADC who stated that, if test data on the Bell & Howell VR–3700*D* demonstrated compliance with present require-

ments, Bell & Howell equipment would be competitively considered for the third-year buy.

In reliance upon this agency position, Bell & Howell states that it shipped a VR–3700*D* to Autonetics for testing. Bell & Howell relates that it specifically invited representatives of NADC to witness the the tests but that the Navy declined. However, it was assured by the manager of the technical staff at NADC that the test data would be accepted as valid data on the performance capabilities of the 3700*D*. On October 12, 1973, Bell & Howell submitted a proposal to the Navy.

Bell & Howell further states that, on October 15, 1973, 4 days prior to the issuance of the change order, it presented NADC with the Autonetics test data but then it was advised that the matter was a "closed issue" and the data was not reviewed by NADC.

NADC officials at a conference held in our Office stated that it is and was the position of the cognizant procurement officials that prime contractor data from Autonetics was not acceptable. Indeed, the Navy relates that in the past the Autonetics test results have been discounted as being outside Navy test guidelines. Moreover, the Navy further states that the manager of the technical staff at NADC did not have the actual authority to conclude that prime contractor testing was acceptable.

It should be noted at the outset that the subcontract with Honeywell pursuant to the contract modification has long since been fully performed. In light of this, we believe any discussion of the issues surrounding the award of the subcontract would serve no useful purpose.

Bell & Howell has submitted a claim for proposal preparation expenses in the amount of $223,000 for "* * * all of its costs and expenses incurred in connection with and related to its efforts regarding the subject subcontract and the Bell & Howell proposal with respect thereto."

Counsel for Bell & Howell crystallizes the issue presented in the case as follows:

> The basis of this protest is that the Navy affirmatively encouraged Bell & Howell to participate in the subject subcontract procurement and to modify its equipment and submit a proposal with respect thereto and then refused to consider or permit Autonetics to consider Bell & Howell equipment for such procurement.

Bell & Howell argues that the Navy's conduct did not amount to the fair and honest consideration of its proposal to which it was entitled.

The concept of adjudicating aggrieved bidders' claims for their expenses of bidding has been considered by the courts. See *Heyer Products Company, Inc.* v. *United States*, 140 F. Supp. 409, 135 Ct. Cl. 63 (1956); *Keco Industries, Inc.* v. *United States*, 428 F.2d 1233, 192 Ct.

Cl. 773 (1970) (Keco I); *Continental Business Enterprises, Inc.* v. *United States*, 452 F.2d 1016, 196 Ct. Cl. 627 (1971); *Armstrong & Armstrong, Inc.* v. *United States*, 356 F. Supp. 514 (E.D. Wash. 1973); *Keco Industries, Inc.* v. *United States*, 492 F.2d 1200 (Ct. Cl. 1974) (Keco II); *The McCarty Corporation* v. *United States*, 499 F.2d 633, 204 Ct. Cl. 768 (1974). Those cases were premised on the existence of a governmental obligation to fairly consider a bid where in fact the Government had solicited bids. Indeed, in each of the cited cases, the Government formally advertised for bids. Therefore, the encouragement or inducement to potential bidders to submit bids in response to the Government's request for bids was direct, public and made with the intention that any bidder meeting Government-imposed conditions could, if found to be low, be awarded the contract pursuant to procurement statutes and the implementing regulations.

The instant case is somewhat similar and yet quite different, for this is a subcontract situation in which no solicitation was ever issued. However, we do not feel compelled to answer the question of whether a subcontractor can be awarded bid preparation costs.

The Court of Claims in *Keco I*, *supra*, at 1245, stated that if the claimant's bid was not fairly and honestly considered, then the claimant should be allowed to recover only those costs incurred in *preparing* its bid. See also, *The McCarty Corporation* v. *United States*, *supra*, at 637. If the obligation to fairly and honestly consider is breached and the claimant "* * * is put to needless expense in preparing its bid, it is entitled to recover such expenses." *Heyer Products Company, Inc.* v. *United States*, *supra*, at 413, 414. *Keco II*, *supra*, at 1203, refers to "* * * the [claimant's] right to be compensated for the expense of undertaking the bidding process."

Aside from these general judicial statements, there has been a lack of judicial standards or guidance as to what costs are to be included within the parameter of bid preparation. In those cases where claims for bid preparation costs have been denied, the question as to what costs could properly have been included in the judgment was not discussed, apparently for the reason that the courts never reached the issue of quantum. Moveover, the only cases to date where bid preparation costs have been recovered provide no standards or guidance for in both situations the parties stipulated to the amount. *The McCarty Corporation* v. *United States*, *supra; Armstrong & Armstrong, Inc.* v. *United States*, *supra.*

On the other hand, there have been decisions, both judicial and administrative, indicating what is not to be considered compensable as bid preparation costs. More specifically, in *Matter of Ionics, Inc.*, 53 Comp. Gen. 909 (1974), we stated that recovery of damages and reward for valuable suggestion was not compensable. Similarly, in

Descomp, Inc. v. *Sampson*, 377 F. Supp. 254 (1974), the court found that the costs of pursuing a bid protest were noncompensable. See *Matter of Frequency Electronics, Inc.*, B–178164, July 5, 1974. Also, in *Heyer Products Company, Inc.* v. *United States*, *supra*, and its progeny, arguments for recovery of anticipated profits have continually been rejected.

The costs of Bell & Howell for which recovery is claimed, as we understand them, were incurred in an attempt to persuade the Navy to expand or broaden the needs of the Government from what was essentially a brand name, sole-source specification into a brand name or equal specification. The record discloses that Bell & Howell was aware that the Navy was in the process of requiring the prime contractor to provide the Honeywell 96N, but still expended its efforts and money in an attempt to develop its model VR–3700*D* to show essential equality with the Honeywell 96N. We recognize that the Navy did not discourage this effort. Nevertheless, costs incurred in an attempt to expand or broaden the needs of the Government are not, in our view and in the absence of definitive judicial guidelines, properly to be considered as costs incurred in undertaking the bidding process. In this regard, we note that the only two cases in which the courts have granted claims for bid preparation costs concerned construction contracts where, unlike here, costs of development concurrent with the attempted broadening or expansion of Government needs were not involved. See *The McCarty Corporation* v. *United States*, *supra*, and *Armstrong & Armstrong, Inc.* v. *United States*, *supra.*

Furthermore, we recognize that a portion of the amount claimed by Bell & Howell for proposal preparation costs consisted of various costs directly related to the preparation and submission of the unsolicited proposal which might very well be compensable as proposal preparation costs. However, Bell & Howell submitted the unsolicited proposal knowing that the consideration of the proposal was contingent upon the test data on the VR–3700*D* demonstrating compliance with the Navy's requirements. Such a contingent submission does not, we believe, give rise to a compensable claim for bid preparation costs since, prior to submission, Bell & Howell had received no indication from the Navy that its model would, in fact, meet the Government's needs. Therefore, Bell & Howell incurred costs in preparing its unsolicited proposal in a situation where there was a distinct possibility that the proposal would not be considered by the Navy. Accordingly, on the failure of this contingency, for whatever reason, Bell & Howell cannot now recoup its costs.

As was stated in *The McCarty Corporation* v. *United States*, *supra*, at 637:

* * * it is an implied condition of every invitation for bids issued by the Government that each bid submitted pursuant to the invitation will be fairly and honestly considered (Heyer Products Co. v. United States, 140 F. Supp. 407, 412, 135 Ct. Cl. 63, 69 (1956)) and if such obligation was breached and he was put to needless expense in preparing his bid, he is entitled to his bid preparation costs.

Where the claimant knew that consideration of its unsolicited proposal was contingent on Government determination of acceptability of the claimant's product, we cannot say that the submission of the unsolicited proposal gave rise to any obligation on the part of the Government to fairly and honestly consider the proposal.

Accordingly, Bell & Howell's claim must be denied.

[B-178054]

Pay—Retired—Computation—Retirement on Effective Date of Active Duty Pay Increase

Air Force warrant officer, retired under 10 U.S.C. 1293, effective July 1, 1968, which was first day of general increase in active duty pay rates, must compute retirement pay based on rates in effect on June 30, 1968, rather than July 1, 1968, since explicit statutory language contained in Formula 4 of 10 U.S. Code 1401, requires computation on basis of active duty pay rate in effect on day before retirement, absent any applicable formula more favorable to him.

In the matter of an adjustment of retired pay, May 2, 1975:

This action is in response to a letter dated July 10, 1974, with enclosures (file reference RPTT), from Chief, Accounting and Finance Division (Comptroller), Headquarters Air Force Accounting and Finance Center, requesting an advance decision as to the propriety of making payment on a voucher in the amount of $1,559.80, in favor of W-4 Ray A. Kellam, 495 07 3726, USAF, Retired, representing the difference in retired pay computed from basic pay rates in effect on June 30, 1968, rather than the rates which went into effect July 1, 1968, for the period July 1, 1968, to June 30, 1974. The request was forwarded to this Office by letter dated August 30, 1974, from the Office of the Directorate of Accounting and Finance, Department of the Air Force, and has been assigned Air Force Submission No. DO-AF-1228 by the Department of Defense Military Pay and Allowance Committee.

The submission states that the member was retired effective June 30, 1968, under the provisions of 10 U.S. Code 1293, and authorized retired pay computed under Formula 4 of 10 U.S.C. 1401. At the time of his retirement, the member had completed 28 years, 9 months and 10 days of active service, with over 30 years of service for basic pay purposes and percentage multiple purposes under 10 U.S.C. 1405. Further, the member's retired pay was computed on the basic pay rates in effect on June 30, 1968, rather than the higher rates effective July 1, 1968, based on our decision 48 Comp. Gen. 239 (1968).

It is suggested in the submission, however, that the case of *Chester* v. *United States*, 199 Ct. Cl. 687 (1972), 53 Comp. Gen. 135 (1973), may be applicable to the member and entitle him to receive retired pay computed on the basic pay rates established by Executive Order 11414, effective July 1, 1968. In this regard, it is stated in the submission that while no mandatory retirement statutes are applicable in the present case, the question of computation is similar to the *Chester* case, in that his retired pay was computed at the lower rate in effect on the last day he was on active duty rather than the higher rate in effect on the first day for which he received retirement pay.

In our decisions, B–165038, January 6, 1969, and B–165038(1) and (2), June 2, 1969, we held that an officer subject to the provisions of 14 U.S.C. 288(a)—which provides for mandatory retirement for certain Coast Guard members under stated circumstances on June 30 "if not earlier retired"—may not retire voluntarily under other provisions of law when such voluntary retirement would be effective on the same date that mandatory retirement was required and that the member's retirement pay had to be computed on the basis of the active duty pay rates in effect on June 30, 1968, rather than the rates in effect on July 1, 1968. We concluded therein that even if the Coast Guard captain involved was retained on active duty beyond his mandatory retirement date, this could not add to his rights in any way in the computation of retirement pay.

The court in *Chester*, however, construed the language of 14 U.S.C. 288(a) "shall, if not earlier retired, be retired on June 30" as not precluding voluntary retirement on that date under a different statute, so as to permit computation of retirement benefits based on active duty pay rates in effect on July 1.

In 53 Comp. Gen. 94 (1973), we decided to follow the court's interpretation of the statute and that we would no longer follow B–165038, January 6, 1969, and June 2, 1969, and other similar decisions regarding Coast Guard members who were retired under 14 U.S.C. 288(a).

In 53 Comp. Gen. 135, *supra*, we considered the applicability of the *Chester* decision to twelve Regular Air Force officers who were being mandatorily retired under the provisions of 10 U.S.C. 8916, 8921, and 8922, all of whom had been held on active duty beyond their mandatory retirement dates for physical evaluation. Nine were ultimately retired for disability pursuant to 10 U.S.C. 1201 and three were placed on the Temporary Disability Retired List under 10 U.S.C. 1202.

We held therein that since all of the mandatory retirement sections involved contained language similar to that construed in the *Chester* case, the reasoning in *Chester* was applicable. We concluded that since the members were retired under other provisions of law, they were

not precluded from receiving the benefit of an increase in the monthly basic pay for retired pay computation purposes which went into effect on the day after their mandatory retirement dates but before their actual release from active duty. In this decision we said:

> While the mandatory retirement statutes applicable to the Air Force and the other armed services are not identical to those of the Coast Guard, in view of the general Congressional policy in recent years to treat the services uniformly in pay and allowances matters, when practicable, we will follow the rules enunciated in the *Chester* case to the extent feasible in computing the disability retired pay of members of the other services, including the Air Force. * * *

In 53 Comp. Gen. 610 (1974), we again followed the principle of the *Chester* case in a case involving a Marine Corps member who sought to be retired voluntarily under the provisions of 10 U.S.C. 6323 rather than be mandatorily retired pursuant to section 1(i) of the act of August 11, 1959, Public Law 86-155, 73 Stat. 335 (10 U.S.C. 5701 note). We said therein that in view of the similarity between the statutes in the *Chester* case and those involving mandatory retirement in the Marine Corps member's case, we would permit the member to compute his retired pay under the provisions of 10 U.S.C. 6323, as though he was voluntarily retired on June 30, 1968. Under those provisions, his retired pay was to be computed based on the active duty pay rate in effect on July 1, 1968.

In 48 Comp. Gen. 239, *supra*, we considered a number of cases involving members of the Navy who were subject to involuntary retirement on July 1, 1968, but who were permitted to voluntarily retire effective that date. The question in that decision was whether those members would be entitled to use the active duty pay rates which became effective on that date for the purpose of computing their retired pay. In every case except the two cases of CHMACH Noonan and CHELCTECH Arnott, which involved retirements under 10 U.S.C. 1293, we answered in the affirmative.

In the Noonan case, the facts showed that the member, a warrant officer, was scheduled for involuntary retirement effective July 1, 1968, but prior thereto and at his request his voluntary retirement under 10 U.S.C. 1293, 1315, and 1371, was approved effective the same date. We held therein that the method of computation of his retired pay was limited to either the provisions of Formula 4, 10 U.S.C. 1401, or those contained in subsections (d) and (e) of 10 U.S.C. 1401a, whichever gave him the greater amount of retired pay. The same conclusion was reached in the Arnott case.

It is suggested in the submission that under the ruling in the *Chester* case anyone who voluntarily retired effective the day of an increase in active duty rates is entitled to computation of his retirement benefits on the basis of those increased rates.

We do not believe the *Chester* case stands for that principle. It is our view that the *Chester* case stands for the proposition that where a member is to be mandatorily retired from the service, and there are other provisions of law which would permit him to be voluntarily retired on the same date, such a member will not be precluded from retiring under the retirement law which will provide the greater benefit.

In the present case, the member was voluntarily retired as a warrant officer under the provisions of 10 U.S.C. 1293 (1964 ed.), with retired pay entitlement computed under Formula 4 of Title 10 U.S.C. 1401 (both code sections are derived from section 14 of the Warrant Officer Act of 1954, approved May 29, 1954, ch. 249, 68 Stat. 157, 162, and is applicable to all warrant officers who retire as such).

Under that formula, a member's retired pay is required to be computed on the basis of the "Monthly basic pay * * * on day before retirement * * *." In this regard, it is to be observed that Formulas 1 and 2 of section 1401, as well as other computation formulas (see for example, the formulas contained in 10 U.S.C. 3991 and 8991), contain qualifying footnotes which specifically provide that the monthly basic pay rate to be used for retired pay computation purposes are the rates in effect on the first day of retirement. However, there is no such qualifying footnote reference in Formula 4 computations.

It is also to be observed that section 1401 provides in pertinent part that:

> * * * if a person would otherwise be entitled to retired pay computed under more than one pay formula of this table or of any other provision of law, he is entitled to be paid under the applicable formula that is most favorable to him.* * *

We are not aware of any other formula of section 1401 or other provisions of law under which the member would be entitled to compute his retired pay that would be more favorable to him. Therefore, it is our view that he is not entitled to have his retired pay computed on the basis of the active duty pay rates in effect on July 1, 1968, and the decision in 48 Comp. Gen. 239, *supra*, regarding computation of retired pay as discussed in connection with CHMACH Noonan and CHELCTECH Arnott, will continue to be followed in such cases.

[B-182007]

General Services Administration—Services for Other Agencies—Space Assignment—Including Leasing

Although Administrative Office Act of 1939 provides that Director, Administrative Office of U.S. Courts, shall "provide accommodations" for Judiciary, Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 271 *et seq.*)

provides that General Services Administration shall perform centralized property management function (including leasing) for agencies of Federal Government. Therefore Judiciary, included by definition in provisions of Property Act of 1949, may not perform its own leasing functions.

Courts—Administrative Matters—Purpose of Administrative Office of U.S. Courts

Legislative history of Administrative Office Act of 1939 indicates purpose of Administrative Office was twofold: to divorce Judiciary from administrative and financial control of Department of Justice and to provide centralized administration for the various circuits. Therefore, duty of Director, Administrative Office of U.S. Courts under 28 U.S.C. 604(a)(11) to "provide accommodations" was meant to confer administrative authority via coordination of needs and budget responsibility for the courts rather than responsibility for actually leasing the space for accommodations.

Statutory Construction—Legislative History, Title, etc.—Limiting Money for Leasing—Applicable to All of Federal Government—Including Judiciary

Since laws are presumed to be consistent and legislative history of Federal Property and Administrative Services Act of 1949 indicates General Services Administration (GSA) was to perform centralized property management functions for Government agencies generally while legislative intent of Administrative Office Act of 1939 was to have Director of Administrative Office of U.S. Courts coordinate needs and budget for judicial branch, GSA's leasing function is consistent with Director's duty to provide accommodations for courts.

General Services Administration—Authority—Space Assignment—Leasing—Freeze

In performing its centralized leasing functions pursuant to Federal Property and Administrative Services Act of 1949, as amended, General Service Administration's (GSA) imposition of freeze on monies appropriated to Judiciary for fiscal year 1975 for new leases is consistent with Congressional intent of GSA's appropriation act for 1975 to limit monies expended for leasing for all of Federal Government.

In the matter of General Services Administration's freeze on funds available to Administrative Office of U.S. Courts for new leased space, May 6, 1975:

This decision to the Director, Administrative Office of the United States Courts (AOC) is in response to his request for an opinion regarding the freezing by the General Services Administration (GSA) of monies appropriated to the Judiciary for fiscal year (FY) 1975 for leasing of new space and facilities for the Federal court system for FY 1975.

Specifically, the Director poses two questions:

1. * * * whether GSA can, under existing law, impose a moratorium on the expenditure of funds appropriated to the Judicial Branch for the acquisition of new leased space.
2. In the event GSA can place a freeze on such funds, * * * is it possible for this Office independently to acquire space under Section 604(a)(11) of Title 28 without reference to the landlord-tenant scheme contained in the Public Buildings Act Amendments of 1972.

The Department of State, Justice, and Commerce, the Judiciary and Related Agencies Appropriation Act, 1975, Public Law 93-433, 88

587-396 O - 75 - 3

Stat. 1187 (hereafter called the Judiciary 1975 Appropriation) contains the following pertinent provision:

For the rental of space, tenant alterations, and related services for the United States Courts of Appeals and District Courts, the Court of Customs and Patent Appeals, the Customs Court, the Court of Claims, the Administrative Office of the United States Courts and the Federal Judicial Center, pursuant to the Public Buildings Amendments of 1972, Public Law 92-313, June 16, 1972 (86 Stat. 216), $66,100,000, to be available for transfer to the General Services Administration which shall be responsible for administering the program in compliance with standards or guidelines prescribed by the Director of the Administrative Office of the United States Courts under the supervision and direction of the Judicial Conference of the United States.

As to this provision, it is stated in Senate Report No. 93-1110, that:

For this new appropriation the Committee recommends $66,100,000, the House allowance and a reduction of $12,400,000 in the budget estimate. This appropriation, pursuant to language included by the House and recommended by the Committee authorizes the transfer of these funds to the General Services Administration and will be administered in cooperation with the Administrative Office of the United States Courts. The sum recommended will be used for the rental of space, utilities, alterations, maintenance and other tenant services for the United States Courts of Appeals and District Courts, the Court of Customs and Patent Appeals, the Customs Court, the Court of Claims, the Administrative Office of the United States Courts and the Federal Judicial Center.

The original budget estimate of $78,500,000 was informally reduced by the Judiciary to $72,600,000. The sum was further reduced by the House by the application of a 10 percent reduction in the standard level user charge levied by the General Services Administration. The 10 percent reduction has been applied by the House to all appropriations for these purposes.

The Director states that under the above quoted appropriation provision GSA's authority over the availability of space and facilities funds is to be regulated pursuant to standards and guidelines prescribed by the Director of the Administrative Office under the supervision and direction of the Judicial Conference of the United States. It is the Director's position that when Public Law 93-433 is considered with section 304(b) of the so-called Administrative Office Act of 1939, as amended, 28 U.S. Code § 604(a)(11), regulatory control over administrative matters is vested in the Director of AOC. Subsection 604 (a)(11) provides that the Director of AOC shall, among other things:

Provide accommodations for the courts, the Federal Judicial Center, and their clerical and administrative personnel.

The Federal Property and Administrative Services Act of 1949 (Property Act), 63 Stat. 377, as amended, 40 U.S.C. § 471, *et seq.*, authorizes GSA to enter into leasing agreements for the benefit and accommodation of Federal agencies. Section 103 of the Property Act transferred to GSA control over all public buildings owned or leased by the Federal Government in the District of Columbia previously handled by the Federal Works Agency.

Specifically, section 210(h)(1) of that Act (40 U.S.C. § 410(h)(11)) provides as follows:

> The Administrator [of GSA] is authorized to enter into lease agreements with any person, copartnership, corporation, or other public or private entity, which do not bind the Government for periods in excess of twenty years for each such lease agreement, on such terms as he deems to be in the interest of the United States and necessary for the accommodation of Federal agencies in buildings and improvements which are in existence or to be erected by the lessor for such purposes and to assign and reassign space therein to Federal agencies.

With certain exceptions not applicable here, the authority of other Government agencies to lease and assign space in federally occupied buildings outside the District of Columbia was transferred to the Administrator of GSA by Reorganization Plan No. 18 of 1950, 64 Stat. 1270 (40 U.S.C. § 490 note). Section 1 of the Reorganization Plan provides in pertinent part as follows:

> All functions with respect to acquiring space in buildings by lease, and all functions with respect to assigning and reassigning space in buildings for use by agencies (including both space acquired by lease and space in Government owned buildings), are hereby transferred from the respective agencies in which such functions are now vested to the Administrator of General Services * * *.

Subpart 101–18.1 of the Federal Property Management Regulations (FPMR) implements section 210(h)(1) of the Property Act of 1949 and the provisions of the Reorganization Plan. Section 101–18.101 of FPMR provides in pertinent part:

> (a) GSA will perform all leasing functions of building space and land incidental thereto, for Federal agencies except as provided in this Subpart 101–18.1.

None of the exceptions provided for in Subpart 101–18.1 applies to the Judiciary (although section 101–18.104(a) does permit agencies to lease space if there is to be no rental fee or only nominal consideration of $1 per annum).

Although the term "Federal agency" is not defined in the regulations, section 3 of the Federal Property and Administrative Services Act (40 U.S.C. § 472) defines "Federal agency" for purposes of that Act in the following manner:

> (b) The term "Federal agency" means any executive agency or any establishment in the legislative or *judicial* branch of the Government (except the Senate, the House of Representatives, and the Architect of the Capitol and any activities under his direction). [Italic supplied.]

Under this provision the Supreme Court building is exempted because the building is under the control of the Architect of the Capitol. *See* 40 U.S.C. § 13a.

The legislative histories of both the Property Act of 1949 and Reorganization Plan No. 18 indicate that it was the intent of Congress to simplify utilization of Government property, eliminate competition among agencies, and to realize savings through merger of common services with a resultant reduction of overhead and elimination of duplicative activities. *See* H.R. Report No. 670, 81st Cong., 1st Sess. 4, 7 (1949) and S. Report No. 1675, 81st Cong., 2nd Sess. 3 (1950), re-

spectively. Therefore, in view of the apparent intent of the Congress that GSA perform a centralized leasing function for most of the rest of the Federal Government (including the Judicial branch), and since laws are presumed to be consistent with each other (73 Am. Jur. 2d, Statutes § 254), the legislative intent concerning the duties of the Director, AOC, in the Administrative Office Act of 1939 must be examined.

The AOC was created as a distinct entity with assigned functions. However we find no substantive basis in the history or the language of the 1939 Act to warrant the conclusion that the Act was intended to maintain the independence of the Federal Judiciary of controls applicable to other Federal establishment to the extent suggested by the AOC. Moreover, as will be discussed later, the Judiciary's lack of independence from GSA in this area was addressed during consideration of the Judiciary's 1975 appropriation and Congress did not change the law to specifically exempt the Judiciary from GSA's authority.

The purpose of the 1939 Act was basically twofold. One purpose was to divorce the Judiciary from the Department of Justice. Testimony of Chief Justice Groner of the United States Court of Appeals for the District of Columbia as set forth in the Senate report is illustrative:

> * * * So that the result of the provisions of the bill as now written, it is expected, will provide, first of all the separation of the Department of Justice from the immediate and actual and intimate participation in the monetary affairs of the courts * * *. S. Report No. 426, 76th Cong., 1st Sess. 3 (1939).

See also H.R. Report No. 702, 76th Cong., 1st Sess. 3 (1939) where it was stated that under the system then in effect an Attorney General could interfere with the function of the courts and his negligence could impair the functions of the judiciary and—to the same effect—the January 24, 1938, testimony of Attorney General Cummings during the hearings before the Senate Committee on the Judiciary on S. 3212, 75th Congress, 8–9.

The second purpose of the Administrative Office Act of 1939 was to place administrative responsibilities for all the circuits in one office, rather than allowing the individual circuits to remain adminstratively independent. See H.R. Report No. 702, 76th Cong., 1st Sess. 3 (1939). Therefore, although subsection 604(a)(11) of Title 28, U.S. Code, provides that the Director, AOC, shall "provide accommodations," that responsibility must be considered in light of GSA's duties regarding leasing as provided by the Federal Property and Administrative Services Act of 1949, as amended by the Public Buildings Amendments of 1972. When this is done it is apparent that Congress did not intend to confer upon the Director, AOC, the authority to physically provide accommodations, but rather the administrative

responsibility to do so through coordination of the needs of the various courts in budget preparation.

In view of the foregoing, we do not find an inconsistency between the intent of the Property Act of 1949 of eliminating competition among agencies and realizing a savings through a merger of common services in the GSA and that of the Administrative Office Act of 1939 to divorce the administrative and financial functions of the Judicial branch from the Department of Justice while providing in AOC the facility for coordinating the administrative needs of the various circuits in one office.

Therefore, in view of the inclusion of the judicial branch in the definition of "Federal agency" in the Property Act, the General Accounting Office cannot say that Congress intended the Judicial branch (AOC) to perform leasing functions for itself. Accordingly, question two is answered in the negative.

With regard to the moratorium question the Director states that GSA's rationale for imposing a "freeze on new commercial lease monies payable out of the fund of the Federal Judiciary" is that Congress, in the Treasury, Postal Service, and General Government Appropriation Act, 1975, Public Law 93-381 (88 Stat. 613), limited the amount of money which could be expended by GSA for the lease of *all* space to $350 million. This limitation in the appropriation act is pursuant to the authority contained in section 3 of the Public Buildings Amendments of 1972 (Act), Public Law 92-313, 86 Stat. 219 (40 U.S.C. 603 note). The Supplemental Appropriations Act, 1975, Public Law 93-554 (88 Stat. 1771), has since increased to $364 million the amount available to GSA for rental of space. According to GSA this will permit it to acquire additional space necessary for the courts.

Public Law 92-313 amended both the Public Buildings Act of 1959, as amended, 40 U.S.C. § 601, *et seq.*, and the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. § 471, *et seq.*, to provide for the financing, acquisition, construction, alteration, maintenance, operation and protection of public buildings. One of the major purposes of the 1972 Act was the establishment under section 3 of a fund (Federal Buildings Fund) to finance real property management and related activities of GSA. Among revenues and collections to be deposited into the fund are user charges to be made to GSA pursuant to section 4. Section 4 amends section 210 of the Property Act of 1949, as amended, 40 U.S.C. § 490, in pertinent part by adding subsection (j) as follows:

(j) The Administrator is authorized and directed to charge anyone furnished services, space, quarters, maintenance, repair, or other facilities (hereinafter referred to as space and services), at rates to be determined by the Administrator from time to time and provided for in regulations issued by him. Such rates and

charges shall approximate commercial charges for comparable space and services, except that with respect to those buildings for which the Administrator of General Services is responsible for alterations only (as the term "alter" is defined in section 13(5) of the Public Buildings Act of 1959 (73 Stat. 479), as amended (40 U.S.C. § 612(5)), the rates charged the occupant for such services shall be fixed by the Administrator so as to recover only the approximate applicable cost incurred by him in providing such alterations. The Administrator may exempt anyone from the charges required by this subsection if he determines that such charges would be infeasible or impractical. To the extent any such exemption is granted, appropriations to the General Services Administration are authorized to reimburse the fund for any loss of revenue.

The legislative history of Public Law 92–313 indicates that it was the intent of Congress to provide both for a more expeditious manner of procuring needed office space for Federal agencies and to require each agency to justify their individual space needs while leaving full control over expenditure of monies from the revolving fund with the Congress. The Director contends, however, that the provision of a $350 million ceiling for leasing functions in GSA's appropriations for FY 1975 (Public Law 93–381) and GSA's imposition of a freeze on monies appropriated to the Judiciary for new leases is in direct conflict with the authority given to the Director, AOC, in the (the above quoted provision from) Judiciary's appropriations act for FY 1975 (Public Law 93–433) to set the standards or guidelines that GSA is to follow in furnishing space and facilities to the Judiciary. In this regard, the rule that laws are presumed to be consistent with each other is particularly applicable to statutes passed at or about the same time since it is not to be presumed that the same body of men would pass conflicting and incongruous acts. 73 Am. Jur. 2d, Statutes § 254.

In the hearings on GSA's appropriations for FY 1975 before the Senate Committee on Appropriations the purpose of establishing limitations on the availability of revenues in the revolving fund by major functions performed by GSA is indicated in the following discussion:

MR. FRIEDLANDER. The amounts that we have presented in this budget before you are for authorization for expenditure in an annual appropriation act. They total $980 million. If $980 million is authorized for expenditure in fiscal year 1975 more than that cannot be expended from this fund even if we collect more.

SENATOR MONTOYA. I understand that.

MR. FRIEDLANDER. But the breakdown of how it is spent is proposed in this budget in this manner; for example, the $364 million is for rental payments. But there is *no limitation* on each one of these entries in the budget as the appropriation language is proposed.

SENATOR MONTOYA. No. If you are telling this committee that you are going to spend $364 million for rental payments and you have necessity because of your renegotiation of some of these leases are going from one expensive location to a cheaper location, effectuate a savings let's say of $10 million, do I understand you to say that you will expend this savings of $10 million for other expenses within the GSA budget?

MR. FRIEDLANDER. We may or may not.

SENATOR MONTOYA. That is the point I want to make.

MR. ROUSH. We may choose, sir, in some cases to remodel or renovate space which otherwise would become unusuable [sic] with the savings that you mention. It is highly unlikely in the real estate market as it exists today that we would come up with that type of a savings.

SENATOR MONTOYA. I am just making an assumption. Whether it is $1, $3, or $100.

MR. ROUSH. It is possible to be moved into another area.

MR. TRIMMER. But only within the real property management area, Mr. Chairman. It couldn't be used, for example, for ADP fundings or anything like that.

MR. SAMPSON. It has to be within the Public Building Service. [Italic supplied.]

Hearings on H.R. 15544 Before the Senate Committee on Appropriations on the Treasury, Postal Service, and General Government Appropriations, 93d Cong., 2d Sess. at 1710–1711 (1974).

In addition, the language of section 3 of the Public Buildings Amendments of 1972 creating a "fund" provides for a single accounting method by a merger of the monies from individual agencies. This centralized accounting method was recognized in the FY 1975 appropriation acts for both GSA and the Judiciary.

Underlying the issues raised by the Director, AOC, is his conclusion that to allow GSA to, in effect, impose a moratorium on the leasing of space for the courts raises the Constitutional problem of separation of powers. Suffice it to say that if there is a separation of powers problem it will have to be resolved in Congress in the consideration of an exemption for the Judiciary. As already pointed out the Supreme Court Building is exempted from GSA control. The precise separation of powers issue was raised and discussed in the hearings on the Judiciary's 1975 appropriation when Chief Judge Boe of the Customs Court purposely left out of his budget request a line item for the sum of $2,255,177 assessed his court by GSA under Public Law 92–313 for space and services. *See* Hearings before the Committee on Appropriations, United States Senate, on H.R. 15404, 93d Congress, Part I, pp. 42–49. *See also* the Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, 93d Congress, on the Departments of State, Justice, and Commerce, the Judiciary, and related agency appropriations for 1975, pp. 21, 23–25, wherein on page 24 the following appears:

JUDGE BOE. I presume we should have put it as a line item here. Our court has taken the stand, and sometimes you have to do that which you feel honestly in your own heart, that this is an attempt on the part of an executive branch of government now to assume jurisdiction over another branch of government which historically has been separate and distinct. It is an intrusion upon the doctrine of the separation of powers. This is the feeling of all of the nine members of our court. They requested this statement be made.

MR. WYATT. If it is an intrusion it is by the legislative branch.

JUDGE BOE. The only thing is this, Congressman Wyatt—we are not doubting at all the wisdom of Congress to say here is an accounting system and we will provide funds, whether you do it by appropriating for the maintenance of our building and giving it to GSA or paying rent and letting it go that way. However, GSA assumes a different relationship. They are already assuming a landlord-tenant relationship. I have a letter from the Administrator of GSA to our court in which he speaks about the continuation, a profitable continuation,

or a landlord-tenant relationship. If the judiciary is to become a tenant of the GSA I feel there we are walking on some very, very dangerous ground, gentlemen.

MR. CEDERBERG. We passed the legislation so GSA has to carry it out.

We recognize that Congress may apparently have tried to alleviate in the Judiciary's 1975 appropriation Judge Boc's concern over GSA's control over the Judiciary by directing that GSA must follow standards or guidelines prescribed by the Director, AOC, in obtaining space for the Judiciary. However, as matters now stand, the Congress has given GSA the responsibility for the actual construction or lease of space for the Judiciary and until such time as Congress specifically exempts the Judiciary from Public Law 92-313, GSA will continue to perform this function for the Judiciary with that branch of the Government being subject to any appropriation restriction that may be imposed on or—with Congressional acquiescence—by GSA in the leasing of space. In other words, we agree with GSA that the language used in the above-quoted Judiciary branch appropriation provision concerning "standards or guidelines" cannot be interpreted to permit GSA to exceed the rental limitation established by Congress. Nor in our opinion, in light of the legislative histories of the GSA and Judiciary branch appropriations for FY 1975, can such language be considered as placing control of the funds appropriated in such provision for rental purpose in the Director of the AOC for the purpose of requiring GSA to make expenditures for rentals from the Federal Building Fund in excess of the statutory limitation on such expenditures prescribed by Congress.

The first question is answered accordingly.

[B-182156]

Pay—Active Duty—Duty Performance Part of Month—Payment Basis

A member of a uniformed service, who was obligated to serve on active duty for 30 days or more but who was released from the service before performing such active duty for at least 30 days, is entitled to receive pay and allowances on a day-to-day basis, including the 31st day of the month, computed in accordance with the provisions of 37 U.S.C. 1004 (1970) and not under the provisions of 5 U.S.C. 5505, since these latter provisions establish the general rule relative to the computation of pay for those individuals who performed such active duty for 30 days or more before being released.

In the matter of computation of pay and allowances, May 6, 1975:

This action is in response to a letter dated August 27, 1974, with enclosure, from the Assistant Secretary of Defense (Comptroller), requesting a decision concerning entitlement to pay and allowances of members who were obligated to serve on active duty for 30 days or more but who were separated before serving on active duty for at

least 30 days. The circumstances pertaining to this request are set forth in Department of Defense Military Pay and Allowance Committee Action No. 514.

The Committee presents this question:

Is a member who was obligated to serve on active duty for 30 days or more but who was separated before serving on active duty for at least 30 days entitled to pay and allowances on a day for day basis or a monthly basis?

To illustrate this question, the Committee provides the following examples which show that the amount of pay and allowances a member in the above circumstances is entitled to receive depends upon whether his pay and allowances accrue on a monthly or daily basis:

a. Enlisted for 4 years on the 31st of January and was separated on 28 February (Not Leap Year) of the same year.
b. Enlisted for 4 years on the 16th of January and was separated on the 10th of February of the same year.
c. Enlisted for 4 years on the 1st of February (Not Leap Year) and was separated on the 1st of March of the same year.
d. Commissioned on the 31st of March and was separated on the 28th of April of the same year.
e. Enlisted for 4 years on the 31st of January and was separated on 28 February (Leap Year) of the same year.

Above Examples	Number of Days Pay and Allowances Accrued	
	Daily Basis	Monthly Basis
a	29	30
b	26	25
c	29	31
d	29	28
e	29	28

The Committee Action states that the general rule for computing pay is found in section 5505 of Title 5, U.S. Code, which in effect provides that, for the purposes of computing pay for services performed by persons paid on a monthly basis, each calendar month consists of 30 days and the 31st day of a month is excluded from the computation of pay and February is treated as if it had 30 days.

The Committee Action further states that an exception to the general rule of computation of pay is contained in section 1004 of Title 37, U.S. Code, which provides as follows:

A member of a uniformed service who is entitled to pay and allowances under this title for a continuous period of less than one month is entitled to his pay and allowances for each day of that period at the rate of 1/30 of the monthly amount of his pay and allowances. The thirty-first day of a calendar month may not be excluded from the computation under this section.

The Committee Action also states that our decisions at 46 Comp. Gen. 100 (1966) and 47 *id.* 575 (1968), which applied section 1004 to certain Regular and Reserve members who were ordered to active duty for less than 30 days, held that the computation of pay on a

daily basis in such instances is clearly an exception to the general rule established in 5 U.S.C. 5505. Further, that these decisions seem to imply that when a member is ordered to active duty for 30 days or more, pay shall be computed on a monthly basis in accordance with the general rule and that our decision 45 Comp. Gen. 395 (1966) appears to lend support to this view.

The Committee states that after reviewing the law and implementing regulations (paragraph 10211 of the Department of Defense Pay and Allowances Entitlements Manual (DODPM)), doubt exists as to the appropriate method of computing pay for (a) a Regular commissioned officer, warrant officer, or enlisted member, or (b) any Reserve member who is ordered to active duty for 30 days or more, who is separated before serving 30 days on active duty.

In our decision 46 Comp. Gen. 100, *supra*, we examined the meaning of the phrase "A member of a uniformed service" as that phrase is used in 37 U.S.C. 1004. We concluded therein that the word "member" included a commissioned officer, commissioned warrant officer, warrant officer, flight officer, and enlisted person of the uniformed services and that the term "uniformed services" included the Army, Navy, Air Force, Marine Corps, Coast Guard, and all Regular and Reserve components thereof. Therefore, the method of computing pay is the same for a Regular commissioned officer, warrant officer, or enlisted member or any Reserve member.

In our decision 47 Comp. Gen. 515, *supra*, we considered the meaning of the phrase "for a continuous period of less than one month" as that phrase is used in 37 U.S.C. 1004. After examining the legislative history of that section, we concluded that there was no intention on the part of Congress in any reenactment of what is now 37 U.S.C. 1004 to limit the effect of our earlier decision A–71273, March 2, 1936, which held that the term "month" in the above-quoted phrase meant "thirty days." Therefore, a member who is entitled to pay and allowances for a continuous period of less than 30 days, shall have his pay and allowances computed by the method outlined in 37 U.S.C. 1004.

In our decision 45 Comp. Gen. 395, *supra*, we considered the claim for submarine duty pay for 4 days (one of which was the 31st day of a month) of a member, who was in an active duty pay status for a period in excess of 30 days. We held that the law which authorized submarine duty pay did so on a monthly basis predicated on the right to receive pay and allowances; therefore, under the rules set forth in 24 Comp. Gen. 131 (1944), since pay and allowances do not accrue on the 31st day of a month for a member entitled to pay and allowances for a continuous period of 30 days or more, the 31st day of a month is excluded from the computation of submarine duty pay.

We also stated in 45 Comp. Gen. 395, *supra*, that 37 U.S.C. 1004 is not applicable to a member serving on extended active duty. Clearly, this statement, in the full context of the facts in that decision, simply meant that a member, who has actually served in an active duty pay status for a period in excess of 30 days, was not entitled to have the 31st day of the month included in the computation of his basic pay. It is our view, therefore, that 45 Comp. Gen. 395, *supra*, does not lend support for the position suggested by the Committee that in all cases where a member is ordered to active duty for 30 days or more, pay shall be computed on a monthly basis in accordance with the general rule.

Our examination of the legislative history of 37 U.S.C. 1004 indicates that Congress intended that the phrase "who is entitled to pay and allowances under this title," is to be given its ordinary and usual meaning. Ordinarily, a member is entitled to receive active duty pay and allowances beginning on the date of his enlistment or the first day of service on a call-up for active duty and that such entitlement continues until he is released from such duty, plus allowable travel time, or until discharged, unless such discharge involves a fraudulent enlistment. *See* Tables 1–2–1, 1–2–3 and 1–2–4, DODPM.

Since 5 U.S.C. 5505 rules are based upon "services performed" when a period of service is 30 days or more, it is our view that, where a member's ordered period of active duty is in excess of 30 days, if the date he was released, plus allowable travel time is within 30 days of his entrance upon that duty, then he is entitled to receive active duty pay and allowances on a daily basis computed in accordance with 37 U.S.C.1004.

Your question is answered accordingly.

[B–182855]

Contracts—Protests—Timeliness

Protest filed with General Accounting Office on December 16 after contracting agency failed to rescind cancellation of invitation for bids at December 11 meeting requested by protester within 5 days of notice of cancellation is timely under 4 C.F.R. 20.2(a) (1974), since filed within 5 days of adverse agency action (failure to rescind cancellation).

Bids—Invitation for Bids—Cancellation—Change in Delivery Requirements

Change in time required for delivery of unaccompanied baggage from 2-day requirement to less stringent condition was a significant change and compelling reason to cancel invitation for bids after bid opening.

Bids—Competitive System—Delivery Provisions—Changed Conditions

Bidder, performing transportation services under contract having less stringent delivery schedule than new invitation for bids (IFB) bid upon, did not obtain

competitive advantage on new IFB, since bid was on stringent schedule in new IFB; however, fact that advantage was not obtained does not affect determination to cancel IFB, since there was subsequent change in delivery requirement that provided basis for cancellation.

Bids—Competitive System—Equal Bidding Basis for All Bidders—Delivery Requirements—Area Scheduling

Contention by bidder that it was aware of "area scheduling" requirement and would not have bid differently if included in invitation for bids (IFB) is not dispositive of issue of whether award should have been made under IFB, since to permit award on "area scheduling" would have resulted in contract which was not same offered to competition and more stringent requirement in IFB may have restricted competition.

Bids—Discarding All Bids—Specifications—Conflicting Provisions

Where all bidders, except one not low bidder, were nonresponsive to invitation for bids (IFB) because of conflicting bid acceptance provisions, there is no objection to cancellation and resolicitation under proper IFB; however, where all bidders for transportation service awarded under another IFB were nonresponsive because of similar conflict, there is no objection to continuation of awards in view of agency contention that it would not be in Government's interest to terminate and since no bidder was prejudiced by awards and none has protested awards.

Contracts—Awards—Erroneous—Termination of Contract

Protest by bidder that it had been awarded contract and was later advised such award was made through administrative error is beyond authority of General Accounting Office because if there was valid contract, then it may be that it was constructively terminated for convenience and matter would be for resolution as termination for convenience claim which is contract administration.

Contracts—Awards—Protest Pending—Failure To Notify GAO—Legality of Award

Failure of agency to comply with requirement in agency regulations that it notify General Accounting Office that award will be made notwithstanding protest does not affect legality of award.

Purchases—Blanket Purchase Agreement—Pending Resolution of Protest

Service being performed under Blanket Purchase Agreement (BPA) awarded and extended to June 30, 1975, pending resolution of protests should be resolicited for period commencing July 1, 1975, notwithstanding agency desire to continue until December 31, 1975, since BPA was interim measure which has served purpose for which intended and to extend agreement would penalize bidders who protested defective invitation for bids by not allowing them to compete for requirement and there would be no termination costs if service was resolicited effective July 1, 1975.

In the matter of Columbia Van Lines, Inc.; District Moving and Storage, Inc., May 14, 1975:

Invitation for bids (IFB) No. DAHC30-75-B-0002 was issued in August 1974 by the Department of the Army and contemplated a requirements type contract for the preparation of personal property (household goods and unaccompanied baggage) for movement or storage, drayage and related services.

Bids were opened on October 2, 1974, and two bids were received for the portion of the contract relating to unaccompanied baggage (sched-

ules I and II) with Columbia Van Lines, Inc. (Columbia), being the low bidder. On November 26, 1974, the contracting officer, based on information received after bid opening, determined to cancel the baggage portion of the solicitation and to readvertise the requirement.

The reason for the cancellation, as contained in the Determination and Findings made by the contracting officer, was that there had been a change in the manner of making deliveries under the prior year contract with Columbia and that it was the intention of the Army's operating personnel to continue the new method of delivery under the contract to be awarded under IFB–0002. The specifications in the prior year contract as well as IFB–0002 required deliveries to be made within 2 working days after arrival of the baggage. During the course of performance of the prior contract, the time for delivery was altered to require the contractor to deliver to Virginia addresses on Monday, Wednesday and Friday and the addresses in Maryland and the District of Columbia on Tuesday and Thursday. The contracting officer reasoned that only Columbia, as the incumbent contractor, had knowledge of the new relaxed delivery requirements which resulted in its obtaining a competitive advantage over other bidders. Therefore, IFB–0002 was canceled and on December 2, 1974, the resolicitation (IFB No. DAHC30–75–B–0032) was issued.

Columbia has protested the cancellation of IFB–0002 contending that the contracting officer did not have a cogent and compelling reason to cancel.

Before discussing the merits of the protest, the procuring activity has raised the matter of the timeliness of Columbia's protest under our Interim Bid Protest Procedures and Standards (4 C.F.R. Part 20 (1974)), which question will be considered first.

On November 29, 1974, the contracting officer sent letters to all bidders advising that the IFB was canceled and the requirement would be readvertised. This letter was received by Columbia on December 3, 1974. On December 4, 1974, an official of Columbia called the contracting officer and requested an explanation of the reason for the cancellation and on December 6, another official of Columbia called for the same reason. The Army contends that at these times, Columbia was advised of the reason for the cancellation, namely the omission of "area scheduling" from the IFB. Columbia states that during these phone conversations the only reason given for the cancellation was "legal problems." The Army maintains that as Columbia knew of the reason for the cancellation on December 4, 1974, its protest filed with GAO on December 16, 1974, is untimely under 4 C.F.R. § 20.2(a) which requires that protests be filed with our Office within 5 days from the time the basis of the protest was known or should have been known.

587-396 O - 75 - 5

However, even if Columbia knew the reason for the cancellation on December 4, 1974, we note that it requested a meeting which was held between the contracting officer and its officials on December 11, 1974, to discuss the cancellation. We believe the request within 5 working days of the notice of cancellation for a meeting constituted a timely protest by Columbia to the procuring activity of its decision to cancel. The failure of the contracting officer on December 11 to rescind the cancellation constituted the adverse agency action under 4 C.F.R. § 20.2(a) which Columbia was required to protest to our Office within 5 days. Columbia did this on December 16, 1974, and was therefore timely.

Columbia argues that the change in the manner of making deliveries is minor and not of sufficient import to have required cancellation of IFB -0002. Further, Columbia states that at the date of bid opening, it was bidding on the basis of the specifications contained in the IFB, 2-day deliveries, because it knew that the "area scheduling" was an interim measure because of the fuel crisis of 1974. Finally, Columbia states that the only other bidder for the baggage portion of the solicitation, District Moving and Storage, Inc. (District), stated in a letter dated January 10, 1975, to the contracting officer that it was aware of the "area scheduling" arrangement and if that type of delivery schedule had been included in the IFB, its bid would have still been the same.

Columbia's first contention is that the change in delivery was minor and did not constitute a compelling reason to cancel the IFB under § 2-404.1(a) of the Armed Services Procurement Regulation (ASPR) (1974 ed.). ASPR § 2-404.1(b)(ii) (1974 ed.) provides for cancellation of IFB's if the specifications are revised. Since the contracting agency decided to change the delivery terms after bid opening from a 2-day delivery requirement to a less stringent condition, there was a significant change and a compelling reason to cancel the IFB.

The second basis of protest advanced by Columbia, in response to the contracting officer finding that Columbia obtained a competitive advantage as the incumbent, is that on the date of bid opening it had to assume that the 2-day delivery requirement contained in IFB -0002 would be followed. We agree. Columbia submitted its bid and stated no exception to the delivery specification in the IFB. Therefore, we must assume that Columbia was bidding on the basis of the 2-day delivery requirement. However, the fact that Columbia did not obtain an advantage over other bidders does not affect the determination to cancel the IFB, since there was a subsequent change in requirements that provided a basis for cancellation.

The fact that the only other bidder under the solicitation has stated that it was aware of the "area scheduling" arrangement and would not have bid differently if "area scheduling" had been included in the specifications is not dispositive of the issue of whether an award should have been made under the IFB. To permit award under this circumstance would have resulted in a contract which was not the same offered to competition. 41 Comp. Gen. 593 (1962). Further, the 2-day delivery requirement may have restricted competition, since on resolicitation (IFB -0032), there were bidders in addition to Columbia and District. On the record, therefore, we have no objection to the cancellation of IFB -0002 and the subsequent resolicitation under IFB -0032. Because of this holding, it is unnecessary to consider the responsiveness of Columbia's bid under IFB -0002.

In the report to our Office on the above protest, the Army has raised another issue which affects IFB's -0002 and -0032 and the contracts for household goods awarded under the uncanceled portion of IFB -0002. Both IFB's contained conflicting bid acceptance periods. Standard Form (S.F.) 33, included in both IFB's contained a statement regarding the bid acceptance period which had a blank for the bidder to provide the period the bid would be open for acceptance, with a notation that, if nothing was inserted, a 60-day acceptance period was offered. In the schedules of the IFB's it stated that bids offering less than 90 days for acceptance would be considered nonresponsive. The only bidder under both solicitations who completed the blank on the S.F. 33 with 90 days was Columbia. All other bidders, including the firms which were awarded contracts for household goods under IFB -0002, either did not complete the blank or inserted 60 days. Therefore, they offered a 60-day acceptance period and were nonresponsive.

Based on a past decision of our Office, 52 Comp Gen. 842 (1973), the Army proposes to cancel IFB -0032. The above-cited decision held that where an IFB contained conflicting bid acceptance provisions and the provisions were not cross-referenced to alert bidders of the problem, the solicitation, by misleading bidders and placing too great a premium on bidder attentiveness, was defective and should be canceled. In that case, involving three solicitations, 10 of 13 bids were rejected as nonresponsive for failure to comply with the bid acceptance provisions.

In IFB -0032, only Columbia, not the low bidder, was responsive. All other bids are nonresponsive because of the bid acceptance provisions. Therefore, based on the above decision, we would have no objection if the Army canceled IFB -0032 and resolicited the requirement

under an IFB comporting with the requirements of 52 Comp. Gen., *supra.*

However, the question remains as to what action should be taken regarding the household goods contracts awarded under IFB –0002 to bidders who were nonresponsive because of an inadequate bid acceptance period. The Army has submitted its views on the question and contends that it would not be in the best interest of the Government to terminate the contracts because of (1) the termination costs which would be incurred if the incumbent contractors were not successful on the resolicitation; (2) the difficulty in evaluating bids for only the high volume months of the summer and fall; and (3) the disadvantage to incumbents who have absorbed losses during low volume months of winter, which losses new bidders would not have to allow for in their bids. In addition, we note that all bidders under the household goods portion of the IFB failed to offer a 90-day bid acceptance period, that no bidder was prejudiced by the awards which were made since each had the same deficiency and that no one has protested the awards. In the circumstances, we have no objection to the continuation of the household goods contracts awarded under IFB –0002.

Another protest has been filed with our Office involving this series of solicitations. District has protested the award of a Blanket Purchase Agreement (BPA) to Fidelity Storage Corporation (Fidelity) by the Army for supplying the services required under the canceled portion of IFB–0002 until a resolicitation and award could be made. This award was made based on urgency and the fact that a continuing requirement for the services existed.

District's protest is based on the premise that it had been awarded a valid contract under IFB–0002 on December 3, 1974, as evidenced by the award notice signed by the contracting officer. District was the second low bidder for the unaccompanied baggage portion of IFB–0002 and the low bidder for the household goods portion of the invitation. The award notice which it received showed that it was the primary contractor for household goods and the secondary contractor for unaccompanied baggage. District contends that since Columbia, as low bidder for unaccompanied baggage, did not receive the award, it became the contractor for that portion of the solicitation as well as for the movement of household goods. The award notice, dated December 3, 1974, was attached to a cover letter from the contracting officer advising that the unaccompanied baggage portion of the IFB was being canceled. On January 29, 1975, District received a letter from the contracting officer advising that the insertion of it as the secondary bidder was made through administrative error and, therefore, no contract resulted. District contends that it had a valid

contract which could not be rendered a nullity simply by stating that award was made through "administrative error," and that the awarding of the BPA to Fidelity violated its contract.

If District had a valid contract with the Army as it contends, then it may be that the contract was constructively terminated for the convenience of the Government and the matter would be for resolution as a termination for convenience claim which is contract administration beyond the authority of our Office. See *Matter of Astrodyne, Incorporated*, B–180877, April 18, 1974.

District also protests the failure of the Army to notify our Office that it was making an award to Fidelity under the BPA in violation of Army Procurement Procedure § 2–407.8(i) which requires that our Office be notified that an award will be made notwithstanding the pendency of a protest. However, failure to comply with the notice requirement does not affect the legality of the award. B–178303, June 26, 1973.

Finally, the Army has stated that it desires to extend the BPA with Fidelity until December 31, 1975, contending that it is not in the best interest of the Government to resolicit the baggage portion of the conceled IFB.

The BPA, originally issued until March 31, 1975, has presently been extended until June 30, 1975, so that the required services will be available pending the resolution of the protest. The Army contends that the extenison of the BPA until the end of the calendar year would be the most economical method of providing the services.

As pointed out by the Army, the BPA was originally intended as an interim measure to provide the services until the protests were resolved. The BPA has served this purpose and we believe that a further extension of the agreement past June 30, 1975, would, in effect, penalize the bidders who protested to our Office by not giving them an opportunity to compete for the requirement contained in IFB–0032 which we have held was defective. Further, there would be no termination costs involved if the service was resolicited and the new contract awarded effective July 1, 1975. Therefore, the unaccompanied baggage service presently being performed by Fidelity under the BPA should be resolicited for the period commencing July 1, 1975.

By letter of today, we are advising the Secretary of the Army of this recommendation and also of the need for steps to be taken to avoid a recurrence of the problem caused by the conflicting bid acceptance provision in the IFB's which were the subject of these protests.

[B-183808, A-51604]

Appropriations—Obligation—Sec. 1311, Supplemental Appropriation Act of 1955—Liability Under Pending Litigation

Court order, entered prior to expiration of availability period for fiscal year 1973 Food Stamp Program appropriation, which required that the impounded balance of such appropriations be recorded as obligated under 31 U.S.C. 200(a)(6), as a liability which might result from pending litigation, was effective to obligate the impounded 1973 appropriation balance and thereby prevent its lapse. Therefore, 1973 balance so obligated may be used during fiscal year 1976 without further appropriation action.

In the matter of the status of impounded Food Stamp Program appropriations obligated by court order, May 15, 1975:

This decision to the Secretary of Agriculture responds to a request by the Acting General Counsel of the Department of Agriculture (DA) concerning whether the unexpended balance of approximately $278.5 million in the fiscal year 1973 appropriation for the Food Stamp Program may be used during fiscal year 1976 without further appropriation action as a result of the order issued by the United States District Court for the District of Minnesota in *Joseph Bennett, et al.* v. *Earl L. Butz, et al.*, Civil Action No. 4–73 Civ. 284.

The unexpended balance in question derives from the fiscal year 1973 appropriation of $2.5 billion for the Food Stamp Program, Public Law 92–399, approved August 22, 1972, 86 Stat. 591, 610, which was available for obligation through June 30, 1973. Plaintiffs in *Bennett* alleged that the predicted unobligated balance in the 1973 Food Stamp appropriation was attributable to DA's failure to administer the program in accordance with the Food Stamp Act, including, *inter alia*, failure to properly implement the "outreach" requirements set forth in 7 U.S. Code § 2019(e)(5) (Supp. III, 1973). On June 25, 1973, the District Court granted plaintiffs' motion for preliminary injunctive relief and ordered, *inter alia*, that defendants:

1. shall no later than June 29, 1973, record as an obligation of the United States pursuant to 31 U.S.C. § 200(a)(6) and (8) all such sums appropriated for the Food Stamp Program for the fiscal year ending June 30, 1973, pursuant to Public Law 92–399, including the contingency reserve specified therein, which are not otherwise obligated as of that date or to become duly obligated thereafter, and,
2. shall refrain from withdrawing any unobligated balance from said appropriation in any manner which would cause or permit the reversion of said unobligated balance to the general fund, and,
3. shall retain all such sums obligated pursuant to paragraph one (1) of this order as an obligated balance against the appropriation referred to herein until further order of this Court.

The Court concluded that plaintiffs had raised substantial questions concerning administration of the Food Stamp Program, and that the June 25 order was necessary in light of 31 U.S.C. §§ 200(d) and 701 *et seq.* so as to prevent the unexpended balance from lapsing and

reverting to the General Fund of the Treasury, with attendant irreparable injury to plaintiffs. Findings of Fact, ¶¶ 6–10; Conclusions of Law, ¶¶ 4, 7, 12–13 (filed June 25, 1973). The Court further stated that its order "constitutes documentary evidence of an obligation of the United States pursuant to 31 U.S.C. § 200(a)." Conclusions of Law, ¶ 9.

On October 11, 1974, the Court issued a final memorandum opinion wherein it held that the unexpended 1973 appropriation balance resulted from DA's noncompliance with the statutory outreach requirements and, therefore, had been unlawfully "impounded." 386 F. Supp. 1059, 1071. The accompanying final order required, *inter alia*:

> 3. That defendants herein, their successors in office, agents and employees shall take all measures necessary to make available for present expenditure all surplus funds from the appropriation for the Food Stamp Program for fiscal year 1973 which have been retained as an obligated balance against said appropriation pursuant to the order of this Court dated June 25, 1973. *Id.* at 1072.

DA's Acting General Counsel advises that no appeals were taken by the Government from either order in *Bennett* and, therefore, they constitute the final judgment of the Court. As such, the Acting General Counsel suggests that the judgment must be complied with. He expresses the position that no further appropriation action by the Congress is necessary; and, to the contrary, that an attempt to secure additional appropriation action might be construed as a contempt of the Court's decree. Further, he points out that, by section 3(j) of the Act approved August 10, 1973, Public Law 93–86, 87 Stat. 248, the Food Stamp Act was amended to make appropriations thereunder available until expended. 7 U.S.C. § 2025 (Supp. III, 1973). In view of the foregoing, DA proposes to expend the 1973 balance here involved during fiscal year 1976, and to notify the cognizant appropriations subcommittees of this intent in connection with its 1976 budget presentations. The Department of the Treasury has informally advised DA that it is inclined to accept this approach, but would rather defer to the judgment of our Office in the matter.

The principal statutory provision bearing upon the instant matter is section 1311 of the Supplemental Appropriation Act, 1955, as amended, 31 U.S.C. § 200 (1970). This statute governs the recording of appropriation obligations, and provides in subsection (d):

> No appropriation or fund which is limited for obligation purposes to a definite period of time shall be available for expenditure after the expiration of such period except for liquidation of amounts obligated in accord with subsection (a) of this section; but no such appropriation or fund shall remain available for expenditure for any period beyond that otherwise authorized by law.

Initially it must be pointed out that, while the Court's disposition in *Bennett* constitutes a final judgment, to the extent that the expenditure of funds is mandated its implementation is still dependent upon

an appropriation duly available therefor. See U.S. Constitution, Article I, § 9, cl. 7, *Knote* v. *United States*, 95 U.S. 149, 154 (1877); *Reeside* v. *Walker*, 52 U.S. (11 How.) 272, 289–292 (1850); *Spaulding* v. *Douglas Aircraft Co.*, 60 F. Supp. 985, 988–89 (S.D. Cal. 1945), *aff'd.*, 154 F. 2d 419 (9th Cir. 1946); *cf.*, *Glidden Company* v. *Zdanok*, 370 U.S. 530, 569–70 (1962). 31 U.S.C. § 200(d), quoted above, expressly limits the authority to expend fixed year appropriations after expiration of their period of availability to the liquidation of obligations meeting the criteria set forth in subsection (a) of that section. Thus, in our view, the fundamental issue to be resolved is whether or not the *Bennett court's* June 25, 1973 order satisfied the criteria of 31 U.S.C. § 200(a), so as to preclude the balance of the impounded Food Stamp appropriation from lapsing on June 30 of that year.

The Court ordered the unexpended balance to be "record[ed] as an obligation" under subsections (a)(6) and (8) of 31 U.S.C. § 200, which provide:

> (a) * * * no amount shall be recorded as an obligation of the Government of the United States unless it is supported by documentary evidence of—
>
> * * * * * * *
>
> (6) a liability which may result from pending litigation brought under authority of law; or
>
> * * * * * * *
>
> (8) any other legal liability of the United States against an appropriation or fund legally available therefor.

The fundamental purpose of 31 U.S.C. § 200 was to counter the practice existing at the time of its enactment whereby some agencies applied overly broad concepts of "obligation" in order to minimize the amount of unexpended appropriation balances which would lapse after expiration of their period of availability for obligation. *See*, *e.g.*, 51 Comp. Gen. 631, 633 (1972) and legislative history cited therein. The remedy was to limit the recording of obligations to those meeting the specific statutory criteria established in subsection (a). We have generally construed the section 200(a) criteria with a view toward this restrictive purpose. Thus our basic rule concerning the subsection 200 (a)(6) criterion for recording obligations in the case of pending litigation is stated in 35 Comp. Gen. 185, 187 (1955), as follows:

> Subsection 6 was included in section 1311(a) for the purpose of permitting obligations to be recorded in the case of land condemnation proceedings under the Declaration of Taking Act, 40 U.S.C. 258, and similar cases. See the Department of Defense's section by section analysis of section 1111 (the present section 1311) of H.R. 9936, 83d Congress, as passed by the House of Representatives on page 994, Hearings before the Committee on Appropriations, United States Senate, 83d Congress, 2d Session on H.R. 9936. In land condemnation and similar cases, a liability of the Government has been established, the only question being an exact determination of the amount of the liability. An intent to permit obligations to be recorded in every case where litigation is pending against the Government, which may or may not result in a liability, cannot possibly be imputed to the Congress. In view thereof and since the overall purpose of section 1311 was to

restrict the amounts recorded as obligations, it is our view that obligations may be recorded under section 1311(a)(6) only in those cases where the Government is definitely liable for the payment of money out of available appropriations and the pending litigation is for the purpose of determining the amount of the Government's liability. In the cases mentioned in your letter, whether or not the employees are entitled to be reinstated on account of being wrongfully discharged, with resulting entitlement to "back pay," has not been determined and no definite liability on the part of the Government has been established.

We have not specifically addressed subsection 200(a)(6) since the above-quoted 1955 decision.

In assessing the effect of the June 25 order in *Bennett*, it must be recognized at the outset that 31 U.S.C. § 200 and related statutory provisions (see 31 U.S.C. §§ 701–708) comprise a highly technical, and somewhat esoteric, statutory system to control the accounting for and disposition of appropriation balances. As such, its operation has rarely been a subject of judicial consideration. However, these statutes have necessarily come before the courts in a number of recent actions concerning "impoundment." Several courts have followed the same approach as in *Bennett* by preliminarily ordering impounded funds to be obligated under 31 U.S.C. § 200(a) prior to expiration of their period of availability in order to prevent lapse. *See, e.g., Guadamuz* v. *Ash*, Civil Action No. 155–73 (D.D.C., Order for Preliminary Injunction and Findings of Fact and Conclusions of Law filed June 29, 1973) (subsequent opinion and judgment reported at 368 F. Supp. 1233); *National Council of Community Mental Health Centers, Inc.* v. *Weinberger*, Civil Action No. 1223–73 (D.D.C., Order Granting Preliminary Injunction and Findings of Fact and Conclusions of Law filed June 28, 1973) (subsequent opinion reported at 361 F. Supp. 897); *Commonwealth of Pennsylvania* v. *Weinberger*, Civil Action No. 1125–73 (D.D.C., Order for Preliminary Injunction and Findings of Fact and Conclusions of Law filed June 28, 1973). See also *City of New York* v. *Train*, 494 F. 2d 1033, 1049 (D.C. Cir. 1974), *aff'd.*, 43 U.S.L.W. 4209 (U.S., February 18, 1975); *State of Maine* v. *Fri*, 486 F. 2d 713 (1st Cir. 1973).

In our view, the construction of section 200(a)(6) adopted in 35 Comp. Gen. 185, *supra*, is correct as applied to pending litigation generally. However, we also believe that anti-impoundment litigation must be considered unique in this context. As previously noted, the basic purpose of 31 U.S.C. § 200 was to remedy the administrative practice of overstating "obligations" in order to minimize the amount of lapsing appropriations. Considering this basic purpose, as well as the specific legislative history concerning subsection 200(a)(6), we concluded in 35 Comp. Gen. 185 that the Congress could not have intended to permit all potential liabilities as a result of pending litigation to be recorded as obligations. Of course, neither our prior decision nor the legislative history of section 200(a)(6) considered the possible effect of anti-

impoundment litigation. The basic premise of such litigation is that the refusal of the Executive branch to use appropriations through the normal obligation processes is itself in derogation of the congressional design in providing appropriations. Consequently, the concern here is precisely the opposite of that underlying 31 U.S.C. § 200, *i.e.*, the potential frustration of the will of Congress by underobligating, rather than overobligating, appropriations. In the context of this litigation, therefore, it would be incongruous to construe 31 U.S.C. § 200(a)(6) in a manner permitting its application to frustrate congressional objectives unless such a result is unavoidable by the express terms of the statute. We do not believe that it is. The granting of a preliminary order (in an action to compel the release of appropriation by the Executive branch) requiring the obligation of such appropriations reflects an independent judicial determination that the issues raised are at least substantial. Moreover, such an order, when entered within the period of appropriation availability, is consistent with normal concepts permitting obligations based upon *bona fide* fiscal year needs even though the obligation will not be liquidated until later. *Cf.* 33 Comp. Gen. 57, 61 (1953); 50 *id.* 589, 590–91 (1971).

For the foregoing reasons, it is our opinion that the June 25, 1973 order in *Bennett* is consistent with both the letter and spirit of 31 U.S.C. § 200(a)(6), and effectively established a valid obligation against the unexpended balance of the 1973 Food Stamp appropriation. Accordingly, the balance so obligated did not lapse and may be expended during fiscal year 1976.

Finally, we have considered the possible application in the instant matter of section 501 of the Supplemental Appropriations Act, 1974, approved January 3, 1974, Public Law 93–245, 87 Stat. 1077, which provides:

> Any funds necessary to be appropriated for full obligation of a fiscal year 1973 appropriation determined to have been unlawfully impounded by the executive branch of the United States Government in a civil action filed on or before June 30, 1974, are hereby appropriated out of any money in the Treasury not otherwise appropriated. Since [sic] appropriations shall remain available for obligation through the later of the day on which a final judicial determination finding the impoundment legal is made or one year following the day on which the impoundment is found illegal.

This provision was explained in the Senate Appropriations Committee's report on the legislation enacted as Public Law 93–245, S. Report No. 93–614, 34 (1973), as follows:

> IMPOUNDMENT OF APPROPRIATED FUNDS
>
> The Committee has included language to insure the availability for obligation of illegally impounded fiscal 1973 appropriations. *Various cases brought after June 30, 1973, are now seeking to effect the release of these impounded funds.* The intent of the Congress was clear that fiscal 1973 appropriations for certain Department of HEW activities be fully obligated in fiscal 1973. *However, the Admin-*

istration is now contending in these cases, that these funds, although unlawfully impounded, may not now be ordered obligated because they were brought after the close of the fiscal year. This issue is currently before the courts and need not be directly addressed. To avoid such a technical defense, however, this provision appropriates these impounded sums and makes them fully available for obligation pursuant to court order, and thus effectuates the original intent of the Congress. [Italic supplied.]

If section 501 applied in the instant matter, it would constitute a reappropriation of the impounded balance of the 1973 Food Stamp appropriation, to remain available until 1 year following the final disposition in *Bennett*, *i.e.*, until October 11, 1975. However, section 501 applies only where reappropriation is "necessary" to remedy fiscal year 1973 impoundments found to be unlawful. In view of our conclusion that the June 25 order in *Bennett* constituted a valid obligation of the original appropriation, we do not believe that section 501 need be relied on here. Rather, it appears that this section was designed in effect to validate court orders in anti-impoundment actions entered *after* expiration of the appropriation availability period which, absent such reappropriation, would raise serious issues under Article I, § 9, cl. 7 and the cases cited hereinabove. *See*, *e.g.*, *State of Louisiana* v. *Weinberger*, 369 F. Supp. 856, 859–860 (E.D. La. 1973); *Commonwealth of Pennsylvania* v. *Weinberger* (Civil Action No. 1606–73), 367 F. Supp. 1378, 1385–87 (D.D.C. 1973); *National Ass'n of Regional Medical Programs, Inc.* v. *Weinberger*, Civil Action No. 1807–73 (D.D.C., filed February 7, 1974), for anti-impoundment actions in this category.

We are sending a copy of this decision to the Secretary of the Treasury.

[B–183114]

Bids—Evaluation—Alternate Bases Bidding—Fiscal *v.* Multi–Year Procurement

Because it included nonrecurring costs in first program year, multiyear bid deviated from requirement that like items be priced same for each program year. Bid may nevertheless be accepted if otherwise proper under analogous rationale applicable to single year procurement with option provisions because no other bidder was prejudiced, since bid was low on all program years and low overall. B–161231, June 2, 1967, will no longer be followed to the extent it is inconsistent with rationale herein.

Contracts—Protests—Timeliness

Protest filed by high bidder—during consideration of protest of low bidder against determination of bid nonresponsiveness by agency—against possible acceptance of second low bid based on alleged nonresponsiveness on face of bid is untimely and will not be considered on merits because high bidder, at latest, knew of nonresponsiveness determination and low bidder's protest almost 1 month prior to filing of protest.

Bids—Options—Provisions—Correction

Option provision should be corrected to: (1) warn bidders of consequences of failure to abide by its terms; (2) clarify whether requirement that option prices be no higher than initial quantity refers to first program year or each year; and

(3) exclude contingency in option price that covers possibility that option may be exercised when costs exceed bid price thereby avoiding payment of premium by Government in cost of firm quantity.

In the matter of Keco Industries, Inc., May 19, 1975:

Keco Industries, Inc. (Keco), submitted the low bid on the Naval Air Engineering Center (Navy) multiyear invitation for bids (IFB) N00156–74–B–0250 for mobile airconditioning units. Bids were permitted only on multiyear basis with either first article testing (Lot I, items 0001–0004) or waiver of first article testing (Lot II, items 0007–0010). Bids were received only on the basis of items 0001–0004 (first article testing). Item 0001, the first program year, was for 27 units; item 0002 was certain technical data and first article tests (nonrecurring costs); item 0003 was 22 units for the second program year; and item 0004 was 30 units for the third program year.

Bids were timely received by November 26, 1974, from Keco, American Air Filter (AAF), ACL–Filco Corp. (ACL), and United Aircraft Products, Inc. (UAP), as follows:

Unit Price	0001	0002	0003	0004
Keco	$43, 523	(*)	$41, 694	$41, 694
AAF	49, 900	$43, 940	49, 900	49, 900
ACL	50, 868	58, 193	50, 868	50, 868
UAP	89, 992	27, 610	89, 992	89, 992

*Keco indicated in its bid that costs of item 0002 were "Included in Item 0001."

Paragraph 2 of the SPECIAL EVALUATION FACTORS, section "D," requires that "* * * The unit price of each like item shall be the same for all Program Years included herein."

By telegram dated November 26, 1974, received by the Navy after bid opening, Keco attempted to change its prices for various items. With regard to item 0002, the telegram reflected Keco's intention to delete the notation that the prices were included in item 0001. Instead, separate prices for each requirement of item 0002 were listed as provided in the bidding schedule. Since the telegram was received after the time set for bid opening, it was not considered by the Navy.

On December 3, 1974, the Navy received a protest from AAF (the second low bidder) that Keco's bid was nonresponsive for failing to bid the same price for like items for each program year. By correspondence of December 5, 1974, to the Navy, Keco indicated that although the bid price for item 0001 was not on its face the same as items 0003 and 0004, it was in fact the same. That is, the total price for item 0001, $43,523, reflects a bid of $41,694 per unit as bid for items

0003 and 0004, plus $1,829 per unit for the nonrecurring tooling and data items applicable to item 0002.

Due to a transfer of responsibility for procurements over $100,000 from the Naval Air Engineering Center (the issuing activity) to the Naval Regional Procurement Office in Philadelphia, no action was taken on either AAF's protest or Keco's letter until January 24, 1975. At that time, the Purchase Division Officer informed Keco that the contracting officer had determined Keco's bid nonresponsive because its prices for like items were not the same for each program year. The letter states that the nonrecurring costs—item 0002—should either have been priced separately, as provided for in the bidding schedule, or apportioned equally among all three program years.

On January 27, 1975, Keco protested the proposed rejection of its bid. Alternatively, Keco argues that: (a) its bid price was the same for all three program years, but, additionally, the first program year included the nonrecurring costs associated with item 0002; (b) the IFB was defective because the requirement that like items be equally priced in all program years was not sufficiently conspicuous to put bidders on notice; and (c) the intent of Armed Services Procurement Regulation (ASPR) § 1-322.2(b)(iv) (1974 ed.) has not been violated since Keco's bid was low even if the procurement is canceled after the first year. In part, Keco asserts that ASPR § 1-322.2(b)(iv) (1974 ed.) is designed to prevent a bidder from submitting an unrealistically high first program year price and lower subsequent year prices, thereby gambling that the program would be discontinued before completion.

The Navy has responded that it considers Keco's bid nonresponsive for failing to comply with a material provision of the IFB. Reliance for this proposed action is found in our decision B-161231, June 2, 1967. That case concerned a multiyear IFB requiring that unit prices bid for each matching item under the multiyear requirement be the same for all program years. The Electrosolids Corporation was rejected as nonresponsive because its prices for one unit were not the same for both program years. As Keco did in this instance, in the space provided to separately price certain nonrecurring items, Electrosolids noted that the costs were included in the first program year item. Electrosolids also submitted a post-bid opening explanation of the discrepancy which was not accepted. Under those circumstances, we held that the requirement that like items be priced the same for all program years was a material provision of the IFB that could not be disregarded or waived as a minor informality.

Notwithstanding the similarity of the Electrosolids case to Keco's, and despite the failure to comply with the level pricing requirement

of the IFB, the Keco bid may be accepted for award if otherwise proper. For the reasons that follow, we will no longer adhere to the rule in the Electrosolids case. Rather, upon reexamination, the rationale of analogous cases concerning single year procurements with option provisions more accurately represents the philosophy of our Office on this matter.

ABL General Systems, Corporation, 54 Comp. Gen. 476 (1974), involved an IFB which contained a requirement that the option price be bid no higher than the basic quantity. Bidders were not forewarned what the penalty would be for failing to comply with the bid instructions. The low bidder on the firm quantity bid a higher price for the option quantity. In upholding the rejection of the ABL bid, we stated:

> * * * The determinative issue is whether or not this deviation [from the manner of bidding specified in the IFB] worked to the prejudice of other bidders for the award.

Our Office found the deviation from the bidding requirement prejudicial to other bidders who adhered to the bid instructions. It was conceivable under those circumstances that another bidder that disregarded the option pricing instructions could have lowered its basic quantity price below ABL's.

In 44 Comp. Gen. 581 (1965) a bidder deviated from the IFB requirement that the option and basic quantity be bid the same price. The deviant bidder was low on the basic quantity, low on the option and low overall. We held the failure to bid level prices could be waived as a minor informality since it was not conceivable that any bidder, under those circumstances, was prejudiced. This rationale was followed in B-176356, November 8, 1972, which also involved a deviant bidder which was low on the basic quantity, low on the option and low overall. We note that while these cases are compatible with *ABL General Systems, Corporation, supra*, they are distinguishable on their facts.

Here, the spread between Keco and AAF was so significant that we are convinced that even had AAF been permitted to bid in the manner Keco did, it would not have been low. We reach this conclusion in view of the fact that Keco's bid was $6,377 lower per unit than AAF's bid which did not include the costs of item 0002. Keco's bid was low on all alternatives: first program year (including item 0002), second program year, third program year and aggregate amount. If the procurement is canceled after the first program year, Keco's bid would be lower than AAF's bid by $216,119; lower than ACL's bid by $256,508; and lower than UAP's bid by $1,280,383. These figures all include the cost impact of item 0002. If the program runs the full 3 years, the savings generated by Keco's bid will amount to $642,831 over AAF's bid; $733,556 over ACL's bid; and $3,788,239 over UAP's bid.

At a conference held at our Office on March 18, 1975, attended by representatives of the Navy, Keco, AAF, UAP and our Office, counsel for UAP, in effect, filed an oral protest which was reduced to a formal written protest by letter of March 19, 1975. UAP had submitted the highest bid. Counsel agreed with the Navy's proposed action to reject Keco's bid. Further, UAP alleged that the next low bid, AAF, was nonresponsive due to the manner it bid on the "OPTION FOR INCREASED QUANTITY" clause of section "J," SPECIAL PROVISIONS. That provision reserved the option to the Government to increase the quantity up to 50 percent for each program year "* * * at a price no higher than that for the initial quantity, excluding those expenses incurred by the prime contractor or his subcontractor which have been equitably amortized in the unit prices for the entire MULTIYEAR contract period." For the option, AAF bid the same prices as those submitted for the basic multiyear requirements. We observe here that, for the option, Keco bid in a similar manner. Essentially, UAP contends that AAF must have included certain nonrecurring costs in the option price since nothing had been excluded as equitably amortized.

Section 20.2(a) of our Interim Bid Protest Procedures and Standards (4 C.F.R. part 20 (1974)) requires that a protest be filed within 5 days of the date the basis for protest was known, or should have been known, whichever is earlier. Bids were opened on November 26, 1974 (over 3½ months before the conference), and representatives of UAP were present at bid opening. Viewing the matter in a light most favorable to UAP, any possible protest against the manner in which the second low bidder bid would not have to be filed until it was known that some basis existed to challenge the low bid. Therefore, we think UAP was justified in not filing a protest against the acceptance of the AAF bid until it became aware of the fact that the low Keco bid had been rejected as nonresponsive, and the subsequent protest filed by Keco. At the latest, UAP was aware of the determined nonresponsiveness of the Keco bid, the Keco protest and the bases therefor on February 21, 1975, when a copy of the protest was furnished to representatives of UAP by our Office. Included in that package was a copy of our bid protest procedures. Therefore, any possible protest to be filed against an award to AAF should have been immediately pursued. This was not the case here. The entire bid protest file (excluding any information protected from dissemination under the Freedom of Information Act, 5 U.S. Code § 552) was available for inspection at our Office. Moreover, on March 7, 1975, counsel for UAP requested an opportunity to and eventually did inspect the bids at our Office. In these circumstances, the oral protest mentioned on March 18, 1975, at the conference, and the written protest filed on March 19, 1975, are un-

timely and will not be considered on the merits since not brought to our attention within 5 days after the basis for protest should have been or was actually known.

Section 20.2(b) of our procedures provides that an otherwise untimely protest may be considered if it is determined that the protest was untimely filed for good cause or it presents issues significant to procurement practices or procedures. "Good cause" refers to some compelling reason beyond the protester's control which prevented the filing of a timely protest. 52 Comp. Gen. 20 (1972). "Issues significant to procurement practices or procedures" refers to the presence of a principle of widespread interest. 52 Comp. Gen., *supra*. The issue raised by counsel for UAP falls within neither exception. UAP has not alleged that any circumstances existed which prevented it from filing timely. Further, the fact that UAP has raised an issue that relates to bid responsiveness in an isolated situation is not sufficient to raise it to the status of a significant issue. *Emerson S. Ellett, Incorporated*, B-181925, September 4, 1974.

However, we do feel it necessary to comment on certain matters. We note that nowhere in section "D," EVALUATION FACTORS, is there a precautionary legend warning bidders that the failure to comply with the like pricing requirement for all program years may require rejection of the bid as nonresponsive. In this sense, Keco's contention that the provision was not sufficiently "flagged" has some merit. We are, therefore, recommending to the Secretary of the Navy that corrective measures be taken to insert such a warning in future multiyear solicitations.

Also, the option provision is unclear. As presently phrased, there is no way that the Government can determine if costs are included in the option which were equitably amortized in the unit prices for the entire multiyear period. The bidders are not told what the penalty will be in the event that a price higher than the multiyear unit price is specified. It is conceivable that a price, the same as bid on the multiyear quantity, may exclude costs equitably amortized, but include such other costs as to require the price to be the same. It is also unclear whether the term "initial quantity" used in the option refers to the initial quantity of program year one, each successive program year or that program year in which the option is exercised. We believe the Government's intent should be clearly stated in these regards to avoid future problems.

We noted in *ABL General Systems, Corporation, supra*, that this type of option provision may cause a bidder to include a contingency in the bid to cover the possibility that the option may be exercised at a time when costs might exceed the unit price. If the option is not

then exercised, the Government may be paying a price in excess of that which reasonable competition would have brought. We suggest that the language of these clauses be reviewed to devise an option provision which will eliminate this problem. A revised option provision and guidelines for its use were developed and transmitted to the ASPR Committee for consideration as a result of our recommendation in *ABL General Systems, Corporation, supra.*

We also note that ASPR § 7-104.47 (1974 ed.) provides an option provision to be included in multiyear solicitations which clearly sets forth the obligations of the bidder and clearly how the Government intends the option situation to be construed.

[B-183274(1), B-183274(2)]

Bidders—Invitation Right—Failure to Solicit Bids—All Bids Discarded

Where contracting agency failed to solicit incumbent contractor, one of limited number of manufacturers of items being procured, and failed to synopsize procurement in Commerce Business Daily, its determination to cancel solicitation and readvertise for bids on basis that requirement for full and free competition was precluded was not improper.

In the matter of Scott Graphics, Inc.; Photomedia Corporation, May 19, 1975:

Scott Graphics, Incorporated (Scott) and Photomedia Corporation (Photomedia) have protested the determination made to reject all bids submitted in response to Solicitation No. FPHP-N-29709-H-1-21-75, issued by the General Services Administration (GSA), and to readvertize the procurement.

The subject procurement is for micro-photographic duplicating films (diazotype and thermal) for the period July 1, 1975, through June 30, 1976. The solicitation was issued on December 16, 1974, by GSA to 176 prospective bidders. In response, five bids, three for diazotype and two for thermal, were received and opened on January 21, 1975, and apparently Scott was the low bidder on diazotype film, while Photomedia was low on thermal film.

At the time of bid opening it was noticed that Xidex (the incumbent contractor) had not submitted a bid. Investigation revealed that Xidex had been deleted from the automatic bidders mailing list maintained by GSA (and had not received a copy of the solicitation) because it had not responded to a previous solicitation for cameras. The failure to respond to the camera solicitation justified removal of Xidex from the list for cameras but not for other items such as film. A buyer for GSA who was manually cross checking and supplementing the automatic list for film did not notice the omission because he mis-

read the name of a solicited company, Xerox, as Xidex. In addition the procurement was never synopsized in the Commerce Business Daily because there was confusion on the part of the GSA buyer as to proper transmittal procedures.

Xidex protested to GSA by telegram dated January 24, 1975, and GSA decided to cancel the solicitation and readvertise. A new solicitation (FPHP-N-29709-RA-3-13-75) was issued February 21, 1975, and bids were opened March 13, 1975. No award has been made pending our decision in this matter.

This Office recognizes that the authority vested in the contracting officer to cancel a solicitation and readvertise is extremely broad, and we will ordinarily not question his action. In exercising such authority, however, the contracting officer must consider the impact upon the integrity of the competitive bidding system. As was stated by the Court of Claims in *Massman Construction Company* v. *United States*, 102 Ct. Cl. 699, 719 (1945), 60 F. Supp. 635, 643, *cert. denied* 325 U.S. 866 (1945):

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

To the same effect, see Federal Procurement Regulations 1-2.404-1 (1964 ed.).

The difficulty in this case results from the necessity to apply the above standards to the circumstances here so as to insure the full and free competition contemplated by statute (41 U.S. Code 253(a)), and at the same time preserve the integrity of the competitive bidding system. The opposing views as to how to reach these objectives are expressed below.

Although GSA does not contend that unreasonable prices were obtained under the initial solicitation, GSA takes the position that because one of a limited number of manufacturers for these items was not solicited, full and free competition was precluded. Specifically, GSA reports that the incumbent was one of only three known manufacturers of thermal film and one of only seven known manufacturers of diazotype film (two of which had not bid in recent years). We have been advised by GSA that the film manufacturers have received substantially all the awards for these procurements. In short, GSA feels its failure to solicit the incumbent in effect tainted the competition. Under the circumstances, GSA believes that its actions in canceling and readvertising "enhanced the integrity of the competitive bidding system." Moreover, GSA believes that our decision, B-160975, March 28, 1967, is directly on point and supports its actions in this case.

The protesters have drawn attention to a number of our decisions which hold that inadvertent action on the part of the agency which

precludes a potential supplier (even an incumbent contractor) from submitting a bid is not a compelling reason for a resolicitation so long as adequate competition and reasonable prices were obtained and there was no deliberate or conscious attempt to preclude the potential supplier from bidding. B–167379, August 15, 1969; B–171213, December 31, 1970; B–175217, April 6, 1972; B–176261, August 14, 1972.

In none of these decisions, however, have we addressed a situation in which there was cumulatively a deletion from the bidders mailing list of a current contractor, the failure to synopsize in the Commerce Business Daily, and only a small number of known manufacturers of the items. In one decision in which we have considered a resolicitation based upon circumstances similar to the present case, we refrained from applying the standard advocated by the protesters and instead we determined that there was no legal objection to the determination by the agency that a compelling reason for resolicitation existed. B–160975, *supra*. In that decision we took note that: (1) the current contractor who had requested that its name be placed on the bidders mailing list had, due to the agency's misunderstanding, not received a solicitation; (2) the procurement had not been synopsized in the Commerce Business Daily; and (3) there was a small number of firms on the bidders mailing list. On that basis we determined that resolicitation was not objectionable.

In the present case, the situation is similar except that 176 firms were solicited. However, we do not believe this distinction is significant since, as noted above, only a limited number of those 176 firms were manufacturers, while one film manufacturer, the incumbent, was not solicited. As indicated, in recent years only a few film manufacturers have received substantially all of the awards made for these procurements. Therefore, we see no basis for deviating from our rationale in B–160975, *supra*.

Furthermore, it is our view that in the circumstances the objectives of obtaining full and free competition and of preserving the integrity of the competitive bidding system may best be achieved by sustaining the administrative decision to resolicit bids.

Finally, Scott has alleged that Xidex was not prejudiced and its protest to GSA was untimely as it had actual or constructive knowledge of the solicitation prior to bid opening and remained silent until after bid opening. Xidex has denied this allegation, and we do not have sufficient evidence to resolve this factual dispute.

Accordingly, the protests are denied.

[B–182629]

Appropriations—Availability—Gifts—To Educators

Voucher covering cost of decorative key chains given to educators attending Forest Service (FS)-sponsored seminars, with intent that Sawtooth National Recreation Area (SNRA) and FS symbols on key chains would generate future responses from participants and depict positive association between SNRA and FS, may not be certified for payment, since such items are in nature of personal gifts and, thus, expenditure therefor would not constitute necessary and proper use of appropriated funds.

In the matter of expenditure for key chains for educators attending Forest Service seminars, May 20, 1975:

A certifying officer of the Forest Service, Department of Agriculture, has requested our opinion as to the propriety of certifying for payment a voucher in favor of Graphic Services & Supply Co., in the sum of $168.75, covering the cost of 225 specially made key chains which were distributed to educators attending one of two Forest Service-sponsored seminars held in July and August 1974.

In his letter the certifying officer states, in part, that:

> The 1974 seminars illustrated to these influential college and university educators and administrators the programs of the National Forests and the National Recreation Areas including management practices and research activities. The educators and Forest Service management people discussed several regional and national issues. The Forest Service gained from the educators their viewpoints, advice, and experience.
>
> The Forest Service gave a key chain depicting the Forest Service and the National Recreation Area symbols to each participant with maps, pictures, and other printed information relative to the tour. * * *.

The records disclose that reasons for giving the key chains to the educators as follows:

> The token key chains presented to participants of the 1974 Educators Tour were an important part of a total environmental educators package designed to stimulate advice and council from these highly qualified individuals regarding the management direction being pursued by the Forest Service in the Sawtooth National Recreation Area. These key chains, depicting the SNRA and FS symbols, will psychologically trigger future responses because they will be used and serve as a constant reminder of our request for each individual's expert assistance. The symbology also depicts a positive association of the SNRA as a part of the Forest Service.

The appropriation (Public Law 93–120, October 4, 1973, 87 Stat. 429, 440–441) proposed to be charged with payment for the items in question is available for "* * * expenses necessary for forest protection and utilization * * *." Since the appropriation is not specifically avilable for giving key chains to individuals, in order to qualify as a legitimate expenditure it must be demonstrated that the acquisition and distribution of such items constituted a necessary expense of the Forest Service.

We have previously held that an expenditure by the Small Business Administration (SBA) for the distribution of decorative ashtrays to

Federal officials at an SBA-sponsored conference, with the intent that the SBA seal and lettering on the ashtrays would generate conversation relative to the conference and serve as a continuing reminder to the officials of the purposes of the conference, thereby furthering SBA objectives, was unauthorized. We held that those items were in the nature of personal gifts, and, therefore, the expenditure did not constitute a necessary and proper use of appropriated funds. *See* 53 Comp. Gen. 770 (1974). Similarly, we have held that appropriated funds could not be used to purchase and distribute cuff links and bracelets as promotional items under the International Travel Act of 1961, since such items were more properly in the category of personal gifts rather than promotional material and, thus, did not constitute a necessary and proper use of funds appropriated to carry out that act. *See* B–151668, December 5, 1963.

As the certifying officer points out, it is true that in 17 Comp. Gen. 674 (1938) we held that an appropriation item for "Vehicle Service" made by the Post Office Appropriation Act for 1938 for "accident prevention" was available to purchase medals and insignia for awards to Government mail truck operators for careful driving. We noted in that decision that appropriations in general terms are not available for purchase of medals, trophies, insignia, etc., in the absence of specific statutory authority therefor. However, it was recognized therein that the award of some form of merit for safe driving was widely considered to be effective in encouraging safe operation of motor vehicles. Hence, we felt that the use of that appropriation to implement an administrative determination to issue such awards would be appropriate in those circumstances to achieve the "accident prevention" referred to in the Act. Thus, that case is distinguishable from the aforementioned decisions and the present case.

With respect to the instant situation the Congress has recognized that the total forestry research efforts of the State colleges and universities and of the Federal Government will be more effective if there is close cooperation between such programs. The Secretary of Agriculture was authorized to cooperate with the several States by providing financial assistance to qualified State institutions of higher learning. Public Law 87–788, October 10, 1962, 76 Stat. 806, 16 U.S.C. § 582a (1970). Other legislatively authorized programs also seek to foster cooperation between the Secretary and the States and other public and private agencies and individuals. However, we do not feel that the Congress, in encouraging cooperation, intended that funds appropriated to the Forest Service could properly be used to purchase personal gifts. In other words, we regard the key chains in the present case as being in the nature of personal gifts from the Forest Service to the educators, and, therefore, in the absence of statutory authority

therefor, they do not constitute a necessary and proper use of appropriated funds.

Hence, the voucher in question, which is retained here, may not be certified for payment.

[B-181732]

Bids—Competitive System—Equal Bidding Basis for All Bidders

Allegation that inclusion of patent and latent defect clause contravenes full and free competition requirement of 10 U.S.C. 2305 is without merit because clause lends itself to only one reasonable interpretation—to discover all patent defects and account for them in bid price—and this requirement does not preclude bidders from competing equally on basis of own reasoned judgment.

Contracts—Specifications—Ambiguous—Patent and Latent Defect Clause

Contrary to allegations that purchase description, drawings and sample are not sufficiently definite and complete to satisfy mandate of 10 U.S.C. 2305 and Armed Services Procurement Regulation 1-1201, inclusion of patent and latent defects clause does not constitute admission that specifications are ambiguous. Rather, inclusion is merely acknowledgment that any specification may have defects even though checked by contracting agency technical personnel.

Contracts—Protests—Administrative Reports—Timeliness

Allegations that procuring activity delayed its handling of protest in order to proceed with award under Armed Services Procurement Regulation (ASPR) 2-407.8(b)(3) (1974 ed.) and that procuring activity did not comply with ASPR provision have no merit since even if this Office had been furnished complete administrative report within time limits provided in Interim Bid Protest Procedures and Standards, it is doubtful that a decision would have been rendered by date upon which award needed to be made; furthermore, receipt by protester of oral, rather than written notice of award as provided by ASPR, has no effect upon legality of award.

Contracts—Specifications—Patent and Latent Defect Clause—Use—Authorized

Contentions that technical data package fails to fall within standards of NAVMAT Notice for utilization of patent and latent defects clause and Armed Services Procurement Regulation (ASPR) 1-108 or 1-109 was not followed for use of subject clause are not substantiated since use of patent and latent defects clause is authorized in two different situations, and this procurement comes within purview of one of these situations and use of clause is authorized by ASPR 1-108(a)(vii).

Bids—Invitation for Bids—Errors—Disclosure

Contention that activity's failure to disclose known errors in solicitation invalidates invitation for bids (IFB) is not sustained when IFB included seven changes, deviations and waiver forms detailing patent defects discovered by procuring activity and activity states it possesses no further knowledge of any patent defects.

Contracts—Protests—Conferences

Section 20.9 of Interim Bid Protest Procedures and Standards does not impose time limits within which conference must be either requested or held and we have determined that value of holding conference in this case outweighed possible detrimental effects that delay might have occasioned.

In the matter of AMF Incorporated Electrical Products Group, May 28, 1975:

Invitation for bids (IFB) No. N62306–74–B–0141 was issued by the United States Naval Oceanographic Office (NAVOCEANO) on April 26, 1974, for a specified quantity of Mark III Ocean Current Meters. A firm-fixed-price contract was contemplated. The invitation required that the meters were to be manufactured from Government-furnished engineering drawings. The invitation was sent to four companies and was synopsized in the Commerce Business Daily. The synopsis resulted in 51 additional firms requesting copies of the invitation.

Paragraph 30 of the invitation provided that a bidders' conference would be held on May 23, 1974, at NAVOCEANO, Washington, D.C. All prospective bidders were requested to attend. Government equipment to be furnished under the contract was to be made available for viewing at that time. At the conference, two NAVOCEANO employees answered questions concerning the drawing package and the Government-furnished equipment. The questions and answers were recorded and copies of the transcript were sent to the prospective bidders who attended the conference.

By the time of bid opening on July 8, 1974, only the bid of the L'Garde Products Corporation was received. Award was made to that firm on August 28, 1974, notwithstanding the pendancy of this protest.

By letter dated July 8, 1974, and subsequent correspondence, counsel for AMF Incorporated Electrical Products Group (AMF) protested the award of a contract to any firm under the above-referenced IFB.

Pursuant to section 20.9 of our Interim Bid Protest Procedures and Standards (4 C.F.R. part 20 (1974)), the Department of the Navy requested a conference on the protest. On December 5, 1974, a conference was held with representatives of the Navy and our Office. Both AMF and L'Garde declined our invitation to attend.

First, AMF contends that the patent and latent defect provision of the IFB is ambiguous, unworkable and improper. Further, it is alleged that the inclusion of this provision contravenes 10 U.S. Code § 2305 and decisions of our Office. In support of its contentions, AMF maintains (1) that the requirement for a prebid review of the drawings constitutes an admission on the part of the Government that the drawings are unsatisfactory; (2) that the bidder at his peril was to discover the patent defects and take these into account in his bid; (3) the only inference that can be drawn from the fact that the four companies (including AMF) experienced in the manufacture of current meters did not bid was that the specifications were defective due to the number of undisclosed patent and latent defects; and (4) that,

in all likelihood, the net effect of the inclusion of the latent and patent defects clause is that award will go to the least vigilant bidder.

Clause 31 of the IFB provided as follows:

31. This solicitation contains the Correction of Patent and Latent Defects Clause:

Bidders are advised to:

(a) be aware of contractor's responsibility thereunder to correct all apparent or "patent" defects . . . whether or not he reviewed and examined the technical data package and whether or not during that review and examination he discovered all apparent or "patent" defects;

(b) be advised that under this clause "latent" defects will be handled in accordance with this clause and, where corrections are ordered, the changes clause;

(c) be warned that, because of the contractual liabilities, bidders should make a review and examination of the technical data package for the purposes of determining

(i) the apparent or "patent" defects the engineering drawing contain, and

(ii) the cost and time to correct all apparent or "patent" defects; and

(d) be advised to include in the proposed price and delivery terms the estimates of cost and time to correct all apparent or "patent" defects.

Subsection A of Section J of the special provisions of the IFB contained the referenced patent and latent defects clause as follows:

SECTION J—SPECIAL PROVISIONS
A. CORRECTION OF PATENT AND LATENT DEFECTS

1. The technical data package consist of

(a) the product description designated by Section F, and,

(b) the engineering drawings designated in the product description.

2. For the purpose of contract performance, it is to be considered that equipment manufactured or assembled in accordance with the engineering drawings will meet the requirements of the product description. Therefore, the Contractor is required to perform in accordance with the engineering drawings and in case of conflict between the drawings and the product description, the drawings shall govern. Accordingly, the Contractor is obligated, as an element of contract performance, to find and expose all patent defects in the engineering drawings as revised and corrected hereunder. Furthermore, whether or not he conducted an inspection of the documentation package as he was urged to do in the solicitation for this contract, and whether or not he discovered the patent defect if he did conduct such an inspection, the Contractor shall not be entitled to any compensation over and above the price set forth in the schedule or any extension in the delivery dates therefor because of the accomplishment of these obligations with respect to patent defects.

3. (a) The engineering drawings, which term includes the documents referenced thereon, are furnished to the Contractor under this clause and no other; however, the engineering drawings are "Government-furnished data" within the meaning of that term as used in paragraph (b)(1)(iii) of the "Rights In Technical Data" clause hereof.

(b) A "patent defect," as used in this clause, is any failure (by omission or commission) of an engineering drawing, or document referenced thereon, to depict completely and accurately the equipment described in the product description, which failure could or should be found by a reasonable, diligent inspection of the technical data package by competent engineers or technicians experienced in the field of which the equipment is a part.

(c) A "latent defect," as used in this clause, is any failure (by omission or commission) of an engineering drawing, or document referenced thereon, to depict completely and accurately the equipment described in the product description which is not a "patent defect."

4. (a) The Contractor shall notify the Contracting Officer in writing of each latent defect. Such notification, which shall be given within five days of the

discovery of the defect by the Contractor, shall describe the defect and its effect on the balance of the equipment, identify both the particular engineering drawing(s) and the portion(s) of the equipment involved, and explain why the defect is not patent. The Contractor shall supply such additional information supporting notification as the Contracting Officer may require.

(b) Upon receipt of such notification, the Contracting Officer may direct the Contractor

(i) to continue performance with respect to the asserted latent defect in accordance with the engineering drawings;

(ii) on the basis of the Contracting Officer's determination that the defect is patent and not latent, to revise and correct the defect in the engineering drawing and to perform in accordance with the Contractor's obligations with respect to patent defects; and/or

(iii) to submit a proposal for correcting such latent defect.

(c) With respect to (iii) above, each proposed correction shall be submitted to the Contracting Officer within a reasonable time and in accordance with Engineering Change Procedures set forth elsewhere herein. Thereafter, the Contracting Officer shall issue a change order to the engineering drawings and/or to the product description in respect of the latent defect and such equitable adjustment shall be made in the line item price for the equipment and/or in the delivery schedule therefor as is appropriate under the Changes clause.

5. The Disputes clause of this contract shall apply to disputed questions of fact arising under this clause.

NAVMAT NOTICE 4341 dated March 15, 1974, sets forth, as a policy matter, the situations in which the patent and latent defects clause is to be used and its purpose. The purpose of the clause is to relieve the prospective contractor of certain risks when requested to use Government-furnished technical data. The clause imposes liability for any latent defects upon the Government and imposes liability upon the contractor for those defects in the technical data package which "could or should have been found by a reasonable diligent inspection of the data package by competent personnel experienced in the field of related hardware."

Absent such a clause there would be for consideration the general rule as to contractor liability discussed in B–169838, B–169839, July 28, 1970:

* * * when the Government requests performance in accordance with Government specifications, there is an implied warranty that if those specifications are followed, a satisfactory product will result. *United States* v. *Spearin*, 248 U.S. 132 (1918). However, where there is an apparent conflict between Government drawings and specifications, or when the contractor detects major discrepancies or errors in the Government specifications or drawings, it is incumbent upon the contractor to bring such matters to the attention of the Government, and failure to do so is at his peril. But this obligation on the part of the contractor, absent a clear warning in the contract, does not normally require him to seek clarification of any and all ambiguities, doubts, or possible differences in interpretation. *WPC Enterprises, Inc.* v. *United States*, 323 F. 2d 874 (1963); *Kraus* v. *United States*, 366 F. 2d 975 (1966).

The above decisions recognize that, while the Government impliedly warrants that if its specifications are followed by a contractor a satisfactory product will result, a contractor may nevertheless assume the risk of performance under Government specifications * * *.

The above-quoted decision concerned the inclusion of a clause in an IFB which provided for review of Government-furnished drawings, subsequent to award, "to determine, identify and correct the existence

of any omission discrepancy, error, or deficiency in design or technical data which might preclude practical manufacture of the assemblies * * *." In the July 28, 1970, decision we concluded that there was no legal objection to the use of the clause or to the awards which were made to the lowest responsive and responsible bidders. This decision was affirmed upon reconsideration (October 30, 1970).

AMF contends that these decisions do not support the use of the patent and latent defects clause. AMF states "* * * In that case [B–169838, B–169839] the requirement was for *post award* bidder review of drawings and resolution of discrepancies which was held not to render the IFB defective *because the clause did not evidence an admission of unsatisfactory drawings and allowed no more than could be otherwise accomplished under the 'changes' clause.* The significant difference between the situation as described in B–169838 and B–169839 and here is in the requirement for prebid review of the drawings which constitutes an admission on the part of the Government of 'unsatisfactory drawings.'" We are not persuaded that a prebid requirement for review of drawings constitutes any more of an admission that the drawings are unsatisfactory than does a postaward requirement. Rather, the Navy acknowledges in both situations that even though checked for accuracy by Navy engineering personnel, there exists a very real possibility of error. *See* 52 Comp. Gen. 219, at 222 (1972).

With regard to AMF's contention concerning the failure to bid of the three companies experienced in manufacture of current ocean meters, the record is silent. There are other valid business reasons that may have influenced the decisions not to compete. Consequently, the conclusion AMF urges our Office to draw from their failure to bid is merely speculative.

AMF asserts that the effect of the inclusion of the patent and latent defects clause is that award will go to the least vigilant bidder. AMF argues that "The most capable offerors will in all likelihood discover most if not all of the defects they 'conclude' are patent, and perhaps some of the 'latent' ones, and will bid accordingly. Some less capable bidders undoubtedly will not discover all of the 'patent' defects and perhaps none of the otherwise 'latent' defects * * * The net effect in all likelihood is that award will go to the least vigilant bidder with the ultimate contract price paid to such bidder exceeding that which adequate specifications would have brought forth."

We agree with AMF's general observation that not all contractors possess equal technical capabilities. A firm with superior technical capability may well discover defects in the specifications that would go undetected by less capable concerns. Even assuming this to be true, it would be impossible, from a practical viewpoint, to establish different

standards of accountability to compensate for varying levels of ability. The only workable common standard is the test of reasonableness. Under this approach, each firm must employ its best judgment in characterizing as patent or latent any defects it discovers. The judgment must be predicated upon a standard of reasonableness. While technical ability is certainly a consideration, in a formally advertised procurement, it is not overriding. The problem of unequal technical abilities is inherent in all competitive procurements, but is not so prejudicial as to preclude the full and free competition consistent with the procurement, as required by 10 U.S.C. § 2305(a) (1970).

It may be presumed that only relatively skilled and experienced firms will be competing for such complex items as here. Even when the patent and latent defects clause is not used, when a contractor discovers a patent defect, he must bring it to the attention of the Government. This is implicit in the definition of a patent defect, i.e., a defect that should have been discovered by a reasonable, diligent inspection of the technical data packaged by one experienced in the field. That is not to say that the possibility does not exist that a change order may be issued where there are two reasonable interpretations that may be presumed in resolving and pricing a patent defect discovered in the specifications, and the one chosen is not eventually accepted by the Government. It does seem the intent of the Navy to receive, as nearly as possible, an accurate estimate of the total cost of the meters. In so doing, the Navy is calling upon the best engineering efforts of the commercial sector to review its technical work package. In our view, this approach is reasonable.

In the present situation, if the contractor fails to take into account any patent defects in his bid price, this failure will defeat his claim for an increase in contract price. Consequently, any bidder under the IFB in question must bear the risk of possible miscalculation of his bid due to failure to discover all patent defects. We do not believe that the use of the clause places the contractor in a better position to successfully argue that a defect is latent, rather than patent. Nor do we see any basis for concluding that the use of the clause rewards less diligent bidders because, under the clause, they will not be permitted to partake of the fruits of their lack of diligence in the form of contract changes. *See*, in this regard, B–169838, B–169839, October 30, 1970. Additionally, AMF presented no evidence to substantiate its assertion that the terms of the clause are ambiguous or unworkable.

AMF's next contention is that the inclusion of the clause in the IFB contravenes 10 U.S.C. § 2305 and decisions of our Office. In addition, AMF contends that the purchase description, drawings, and sample or previous prototype do not meet the standards of the above-refer-

enced statute or of Armed Services Procurement Regulation (ASPR) § 1–1201 (1974 ed.).

Section 2305(a) of 10 U.S. Code (1970) provides that whenever formal advertising is required, the specifications and invitations for bids shall permit full and free competition as is consistent with the procurement of the property needed by the agency concerned. In addition, 10 U.S.C. § 2305(b) provides that "The specifications in invitations for bids * * * must be sufficiently descriptive in language and attachments, to permit full and free competition." Consistent with this statutory direction ASPR § 1–1201 (1974 ed.) provides in pertinent part:

> Plans, drawings, specifications or purchase descriptions for procurements should state only the actual minimum needs of the Government and describe the supplies and services in a manner which will encourage maximum competition and eliminate, insofar as possible, any restrictive features which might limit acceptable offers to one supplier's product, or the products of a relatively few suppliers.

AMF contends that as a result of the inclusion of the latent and patent defects clause "bidders * * * cannot bid on any intelligent bases and evaluation of the bids cannot be made on an equal basis." Therefore, AMF concludes that the inclusion of the clause precludes full and free competition, contrary to 10 U.S.C. § 2305. The issue for consideration "is whether more than one reasonable interpretation could be placed on such a provision in the solicitation thereby giving rise to different interpretations by bidders and resulting failure to bid on a common basis as required by the procurement statute [now 10 U.S.C. § 2305] and regulations." B–169838, B–169839, July 28, 1970. In our view, the language of the patent and latent defects clause is clear and lends itself to only one reasonable interpretation. The clause requires that all bidders assume liability for those technical defects (patent defects) which could or should have been found by a diligent inspection of the data package. The requirement to discover and account for all patent defects in the bid price does not preclude bidders from bidding upon a common basis. In bidding upon any solicitation, including one containing a latent and patent defects clause, a bidder must exercise his judgment and calculate his price upon his own interpretation of the requirements of the specification. This exercise of reasoned judgment is a necessary part of all competitive procurements. As long as the IFB requirements are clear, then bids submitted to that common statement of the Government's needs may be evaluated on a par with each other.

We have reviewed the decisions of our Office cited by AMF in support of its position that the use of such a clause contravenes 10 U.S.C. § 2305. These decisions fail to support AMF's position. AMF contends

that 52 Comp. Gen. 219 (1972), upon which the Navy relies to support its use of the clause, is not in point. AMF states "In that case bidders were advised that they would have to bear the cost of technical data changes determined to be essential to the accomplishment of six specified tasks involved in the technical data package. Obviously under such circumstances all bidders were in an equal position. Here, since the bidders themselves had to determine in what areas they would have to bear the cost of defects, they were not all equal, since * * * there was no assurance that the bidders would find all the same latent [patent] defects. Thus, each bidder would be bidding, not on the same specifications, but on the specifications as corrected to eliminate patent defects by each individual bidder."

In 52 Comp. Gen., *supra* at 222, 223, we stated in pertinent part:

> * * * Among the "other things" provided by the "Production Evaluation Concept" provision, however, is the agreement by the contractor to bear the cost of technical data changes determined to be essential to accomplishment of the following six tasks:
>
> * * * * * * *
>
> The * * * enumerated contractor-assumed responsibilities represent, we think, an admission that no data package or specification can be expected to be totally without defects. Furthermore, all bidders to this invitation can be considered to be sophisticated in the ways of Government procurement and in solving problems encountered in the construction of complicated radio sets so that the special notice provision, coupled with the "Production Evaluation Concept" provision, serves as adequate notice to them to scrutinize carefully the technical requirements and to price accordingly any significant unknowns for which they will bear the burden of correcting. The contract terms place the responsibility of anticipating such defects on the contractor, not the Government. While these contract terms might not withstand attack if specification defects encountered are substantially greater than could have been contemplated at the time of bidding, we think they are sufficient to reasonably allocate performance risk and to assure competition, particularly in view of the administrative position that no significant design defects exist. *See*, in this regard, B–165953, October 27, 1969.

While the decision quoted above specifically sets forth the six tasks for which the contractor must bear the cost of technical data changes, the tasks themselves are stated so broadly that the "Production Evaluation Concept" provision is not, in fact, more limited in scope than the patent and latent defect clause. Accordingly, it is our view that 52 Comp. Gen., *supra*, does support the Navy's position as to the use of the clause.

In support of its contention that the purchase description, drawings and sample do not meet the requirements of the above-referenced statute, AMF states that the drawings have never been used to manufacture parts from the drawings but were generated after the fact. In addition, AMF contends that sections 3.5, 3.6 and 3.8 of the Product Description are unclear and are illustrative of the defects contained in the data package.

With regard to the manufacture of the meter, the fact that an ocean current meter has not been manufactured from the drawings does not *per se* provide any basis for concluding that the specifications precluded full and free competition contrary to 10 U.S.C. § 2305. Consideration of unimpaired full and free competition concerns, in this case, whether the specifications are sufficiently definite and clear without imposing unnecessarily restrictive requirements so that all bidders can intelligently formulate their bids to the stated minimum requirements. In this regard, we agree with the position of the Navy, as stated in its supplemental report as follows:

3. Reference (a), page eight, refers to questions concerning Sections 3.5 and 3.6 of the Product Description. The question concerning the theoretical impossibility of filling the vane follower assembly and compass with any substance which is completely free of bubbles and air pockets is viewed to be primarily a legalistic consideration rather than a practical engineering problem. It is a standard commercial practice to fill compasses and other fluid filled devices utilizing a vacuum chamber to remove residual entrapped gasses. This was explained to the attendees at the bidders conference in general terms, Record of Bid Conference 23 May 1974, page 18, lines 20–25. We disagree with the approach suggested in AMF letter 3 July 1974, as the issue becomes academic if the standard commercial filling procedure is utilized. In addition, any attempt to specify internal pressure would essentially be meaningless since it would not relate to the presence or absence of bubbles in these devices. The other question raised appears again to be an issue of legalistic absolutes: ". . . . How much dirt and other foreign matter is acceptable; what are the tolerence limits?" Contrary to the inference that the specifications require the recorder be assembled free of dirt and other foreign substances; a careful reading of paragraph 3.8 of the specifications will show all that was requested is that care be exercised to prohibit dirt and other foreign matter from coming in contact with all components of the assembly. This requirement is of course, nothing more than standard commercial practice which should be employed by any qualified bidder. This was further explained by Mr. Kuhn during the briefing portion of the bidders conference and it was noted that the grey room techniques currently employed by current meter manufacturers would be satisfactory. The common "Grey Room" concept was utilized to avoid the requirement for full compliance with Federal Standard 209a which might have unnecessarily prevented smaller companies from bidding and could have resulted in a higher final cost * * *.

Furthermore, AMF states that there are at least two current meters presently available on the market and listed on the Federal Supply Schedule which satisfy the requirements of NAVOCEANO and that it "perceive[s] no valid reason for absence of such an intelligible specification."

The Navy has taken the position that "* * * We have researched, tested and evaluated current meters available on the open market and the GSA schedule including the AMF meter mentioned in reference (a). The decision to design and purchase the Government developed Mark III Current Meter was a result of the fact that the market *did not* offer a current meter that met *all* of the requirements of NAVOCEANO."

We stated in *Matter of United Paint Manufacturing, Inc.*, B–181163, June 25, 1974, 74–1 CPD § 343:

> Our Office has consistently held that the administrative agencies have the primary responsibility for drafting specifications which reflect the minimum needs of the Government, and in the absence of evidence of a lack of a reasonable basis for the action taken we are not required to object to same. B–175942, August 24, 1972; B–174103(1), November 18, 1971.

Since no evidence has been presented that demonstrates the determination of the Navy, in this regard, was unreasonable, we will not question it.

AMF's third contention concerns the Navy's delay in its handling of the protest and its failure to comply with ASPR § 2–407.8(b)(3). AMF notes that its protest was filed on July 8, 1974, and that the Navy did not submit its administrative report until September 4, 1974, with no reason for the delay given. In addition, AMF points out that after it submitted its comments on the administrative report, NAVOCEANO submitted a supplemental report to the Naval Supply Systems Command, which was not forwarded to our Office until October 30, 1974.

While the Navy failed to furnish us with an administrative report within 20 working days as provided in section 20.5 of our Interim Bid Protest Procedures and Standards (4 C.F.R. part 20 (1974)), it has been the consistent position of our Office that such failure does not justify the rejection of the report. However, in the circumstances where the delay appears to be unreasonable, we call such matters to the attention of appropriate agency officials. See *Matter of Leasco Information Products, Inc. et al.*, 53 Comp. Gen. 932 (1974), 74–1 CPD § 314, citing B–177557, July 23, 1973, and B–175854(2), September 1, 1972.

It should be noted that the Navy's administrative report of September 3, 1974, confined itself almost exclusively to the timeliness aspect of AMF's protest. After the Navy was advised by our Office that AMF had protested to GAO prior to the opening of bids and therefore filed a timely protest in accordance with § 20.2(a) of our Interim Bid Protest Procedures and Standards, it became necessary for the Navy to furnish our Office with a supplemental report discussing the substantive issues raised by AMF.

ASPR § 2–407.8(b)(3) (1974 ed.) provides that when a preaward protest has been received, award shall not be made until the matter is resolved, unless the contracting officer determines that the items are urgently required, that delivery or performance will be unduly delayed by failure to make award promptly, or that a prompt award

will be otherwise advantageous to the Government. On August 28, 1974, the contracting officer determined that an award of a contract under the IFB in question was advantageous to the Government in order to have the current meter available in time for a comparative analysis of commercially available meters conducted under a separate contract. The meter eventually considered best under this evaluation will be the subject of a large procurement effort. This determination was approved at a higher level than the contracting officer. In accordance with ASPR § 2–407.8(b) (2) (1974 ed.), the Navy notified this Office on the same day of its intention to make award. The findings quoted above are consistent with the delivery schedule contained in section "H" of the IFB which provided for a desired delivery schedule of 120 days and for a required delivery schedule of 180 days from the effective date of award. The determination to proceed under the foregoing procedures is not subject to question by our Office.

With regard to whether the preparation of the administrative reports was deliberately delayed so that an award could be made under the provisions of ASPR § 2–407.8(b) (3) (1974 ed.), it should be noted that if the Navy had furnished us a complete report within 20 working days (which would have been by August 5, 1974), it is doubtful that our Office would have been able to issue a decision prior to September 6, 1974, the date by which award had to be made. Consequently, we find no basis for concluding that the Navy intentionally delayed the submission of its reports in order to make an award under ASPR § 2–407.8(b) (3) (1974 ed.). Nor do we regard any delay as prejudicial to AMF's protest under the circumstances since the need to proceed with award would have surfaced in any event.

With regard to the Navy's alleged failure to comply with ASPR § 2–407.8(b) (3) (1974 ed.) AMF contends that: " * * * [the Navy] did not 'give written notice of the decision to proceed with the award to the protester.' The only notice that the protester had of the award was by telephone call from the Office of Counsel for Naval Supply Systems Command. No notice was received from the contracting officer." Although the above-referenced ASPR section does provide for written notice, the fact that AMF received oral rather than written notice has no effect upon the legality of the award and in no way prejudiced AMF. *See* B–177587, April 3, 1973.

AMF's fourth contention is that the technical data package does not meet the standards set forth in the NAVMAT Notice for using the clause. In addition, AMF contends that neither ASPR § 1–108 (1974

ed.), § 1–109 (1974 ed.), nor any other ASPR provision, provides authority for the use of this clause. In support of the first part of its contention, AMF states that:

> Clearly the NAVMAT NOTICE * * * authorizes the use of the patent defects clause only in those cases involving—
> "procurements of equipment developed and only *produced* previously in Government plants, . . ."

Since the current meter in question has never been "produced previously in Government plants" AMF argues that the standards for use of the clause, as set forth thereon, have not been met.

Subsection (a) of 7–104.506 *Government Responsibility for Technical Data Furnished Contractor for Production Purposes*, NAVMAT NOTICE 4341, provides that a correction of patent and latent defects clause shall be utilized as follows:

> (a) *General.* In certain instances, involving initial competitive procurements, or initial non-competitive procurements of equipment developed and only produced previously in Government plants, the accuracy and adequacy of the related technical package has not been or cannot be firmly established in advance of contracting * * *.

It is our position that the grammatical structure of the phrases in question—"initial competitive procurements, or initial noncompetitive procurements of equipment developed and only produced previously in Government plants"—admits only one interpretation. The use of a comma after the phrase "initial competitive procurements" coupled with the use of the word "or" immediately following this phrase evidences that this phrase is separate from those that follow. The phrase "of equipment developed and only produced previously in Government plants" modifies only the phrase immediately preceding it—"or initial noncompetitive procurements." Consequently, the NAVMAT Notice in question permits using a patent and latent defects clause in the following situations: (1) initial competitive procurements; and (2) initial noncompetitive procurements of equipment developed and only produced previously in Government plants. Since the issuance of the IFB in question was for an initial competitive procurement, the use of the latent and patent defects clause in the IFB was in accord with the NAVMAT Notice.

In addition, AMF contends that the ASPR does not appear to provide any authority for the use of a patent and latent defects clause. If its use is permissible, there is no indication that either ASPR § 1–108 or 1–109 was followed in deviating from ASPR. ASPR § 1–108(a) (1974 ed.) provides that:

> (a) The Departments and their subordinate organizations shall not issue instructions, including directives, regulations, contract forms, contract clauses,

policies, or procedures implementing the ASPR or covering the procurement of supplies or services or the administration of contracts for such supplies or services, unless permitted by one of the following and if consistent with (b) below:

* * * * * * *

(vii) material determined by the ASPR Committee to be inappropriate for ASPR coverage, but appropriate for inclusion in Departmental publications.

(b) Instructions issued in accordance with (a) above shall not contain material which duplicates, is inconsistent with, or increases or restricts the use of, any authority contained in this Regulation.

We have been informally advised by the Navy that the above-quoted subsection was utilized as the basis for the use of the patent and latent defects clause contained in the NAVMAT Notice. Consequently, it is our position that the use of the patent and latent defects clause contained in the NAVMAT Notice is authorized by ASPR § 1–108(a) since the Notice comes within the purview of the above-quoted subsection of ASPR § 1–108(a) and is consistent with ASPR § 1–108(b). This is the type of deviation from ASPR permitted by ASPR § 1–109.1(viii). In any event, we iterate that the procuring agency has considerable latitude in formulating the terms of its solicitations and stating its minimum needs.

The fifth contention raised by AMF concerns the failure of the Navy to dislose known errors in the solicitation. AMF contends that "It is obvious that the Naval Oceanographic Office knows of the existence of 'patent' defects in the drawings, and documents referenced therein, of the referenced Solicitation. It should be required to disclose these, as well as all others that a 'diligent' inspection by its own technical people would disclose. Its failure to do so invalidates the Solicitation, as it did in Comp. Gen. Dec., B–148265, *supra*," (42 Comp. Gen. 17 (1962)). In 42 Comp. Gen., *supra*, the procuring activity conceded the existence of errors in the specifications by stating that: " * * * the Contracting Officer intends to point out actual errors contained in the drawings to the low offeror presently under consideration for award."

The IFB under consideration includes seven Changes, Deviation and Waiver Forms detailing patent defects which the Government found. NAVOCEANO states that it possesses no further knowledge of any patent defects remaining in the solicitation. Since it appears that the NAVOCEANO has not failed to disclose any known defects, this situation is distinguishable from 42 Comp. Gen., *supra*, and does not provide a basis for invalidating the solicitation in question.

Lastly, AMF contends that the Navy's request for a conference was untimely and that the holding of the conference on December 5, 1974, was consequently untimely. Section 20.9 of our Interim Bid Protest Procedures and Standards does not impose a time limit within which

a conference must be either requested or held. As stated in *Matter of AEL Service Corporation et al.*, 53 Comp. Gen. 800 (1974), 74-1 CPD § 217:

> * * * The purpose of a conference is to crystallize the issues before our Office and to afford all interested parties an opportunity to present their views on the merits of the protest. Also, our Office gains further insight, not readily discernible from the record, into significant factors inherent in the particular procurement being protested * * *.

While a request for a conference should be made within a reasonable time after the written record is complete, we believe that the value of holding a conference, as discussed above, ofttimes outweighs the possible detrimental effects the delay might occasion. It should be noted that the Navy wanted to submit an additional supplemental report. In the interest of expeditious consideration of the merits of the protest, we suggested the Navy forego such action. The Navy complied with this suggestion.

For the reasons set forth above the protest of AMF is denied.

[B-183449]

Alaska—Employees—Separation, etc.—Returned to U.S. for Separation by Retirement—No Reimbursement for Real Estate Expenses

Employee located in Alaska whose position was abolished was returned to continental United States for separation by retirement. His claim for reimbursement of real estate expenses in selling his Alaska residence is not allowable since pertinent statutes and regulations permit such reimbursement only when then there is a permanent change of duty station. Return from Alaska for purpose other than assuming a new Government position does not constitute a permanent change of station. Returning employees in these circumstances are considered as in the same category as "new appointees" under 5 U.S.C. 5724(d), and new appointees are not eligible for real estate allowances.

In the matter of real estate allowances upon return from Alaska position, May 29, 1975:

This matter concerns an appeal from settlement action by our Transportation and Claims Division which denied the claim of Percy Daniels, a former employee of the Federal Aviation Administration stationed in Anchorage, Alaska, for reimbursement of real estate expenses upon his retirement and return to the continental United States.

The record indicates that Mr. Daniels retired after his Alaska position was abolished. Failing to receive another offer of Federal employment, he sold his residence in Alaska and returned to the continental United States for separation by retirement. Mr. Daniels has cited several provisions of the Federal Travel Regulations (FTR), FPMR

101–7 (May 1973) in support of his position that his return from Alaska to the continental United States should be considered the same as a permanent change of station so as to entitle him to reimbursement for real estate expenses incurred in selling his residence in Anchorage.

We have reviewed the FTR provisions cited by Mr. Daniels, but cannot agree that they provide any basis for allowing his claim. The real estate expenses claimed are authorized under 5 U.S. Code § 5724a (1970) which provides in part:

> (a) Under such regulations as the President may prescribe and to the extent considered necessary and appropriate, as provided therein, appropriations or other funds available to an agency for administrative expenses are available for the reimbursement of all or part of the following expenses of an employee for whom the Government pays expenses of travel and transportation under section 5724(a) of this title:
>
> * * * * * * *
>
> (4) Expenses of the sale of the residence (or the settlement of an unexpired lease) of the employee at the old station and purchase of a home at the new official station required to be paid by him when the old and new official stations are located within the United States, its territories or possessions, the Commonwealth of Puerto Rico, or the Canal Zone. * * *

An employee for whom the Government pays travel and transportation expenses under 5 U.S.C. § 5724(a) (1970) is defined as:

> (1) * * * an employee transferred in the interest of the Government from one official station or agency to another for permanent duty * * *.

Since Mr. Daniels was not transferred from Anchorage to another location for permanent duty, he failed to satisfy one of the statutory criteria. Return to the continental United States for separation by retirement, or any other type of separation, cannot be substituted for this statutory requirement.

Furthermore, it is clear under 5 U.S.C. § 5724(d) (1970) that when an employee transferred to a position located in Alaska returns to a location in the 48 States, he is entitled to travel and transportation expenses "with the same limitations prescribed for a new appointee" under 5 U.S.C. § 5722 (1970). The latter provision of law allows reimbursement only for (1) the travel expenses of the new employee and (2) transportation expenses of his immediate family and his household goods and personal effects to and from the place of employment outside the continental United States. Expenses incident to real estate transactions cannot be considered as travel or transportation expenses under the above cited statute. Therefore, since employees returning from Alaska positions to which they had been previously transferred are considered the same as new appointees, such returning employees are not entitled to reimbursement by the Government for real estate expenses. This interpretation is confirmed by FTR para. 2–1.5g(2) (c)

(May 1973) which provides among other things that reimbursement of real estate sale and purchase expenses is not allowable for new appointees.

Mr. Daniels contends that his return travel to the continental United States for purposes of separation by retirement should be considered the same as a permanent change of station. He points out that the phrase "permanent change of station" is not defined in the FTR and should therefore be construed by this Office to include a situation like his. Although he correctly observes that the subject phrase is not expressly defined in those terms, we note that the phrase "Official station or post of duty" is defined in FTR para. 2–1.4i (May 1973) to mean the "building or other place where the * * * employee regularly reports for duty." Relating this definition to the conditions of eligibility for real estate allowances set forth in chapter 2, part 6 of FTR (May 1973) supports no other conclusion but that real estate expenses are allowable only when the employee is permanently leaving one official duty station in the United States and assuming new duties at another such station. Moreover, FTR para. 2–6.4 (May 1973) specifically excludes new appointees from eligibility for reimbursement of expenses incurred in connection with residence transactions and as has been discussed above, employees returning to the continental United States for separation after having been transferred to posts such as Alaska, are considered in the same category as "new appointees."

In view of the foregoing we must conclude that the interpretation suggested by Mr. Daniels is not permitted by the applicable statutory and regulatory provisions. Therefore, the settlement action taken by our Transportation and Claims Division in denying his claim is hereby sustained.

[B–183437]

Officers and Employees—Transfers—Relocation Expenses—Pursuant to Travel Orders—Prior to Actual Transfer

Employee who has incurred reimbursable relocation expenses in accordance with travel orders prior to effective date of transfer has sufficiently complied with statutory and regulatory requirements to permit payment of such expenses prior to actual transfer in certain circumstances. Since such payments may be recoverable if transfer is not effected, the Government's interests are reasonably protected by recovery procedures.

Officers and Employees—Transfers—Relocation Expenses—Travel Orders—Required for Reimbursement

Proper means for agency to provide lead time for employee to prepare for transfer is to issue travel order authorizing reimbursement for relocation expenses. Where agency advises employee of transfer but does not or cannot issue travel order at that time, agency should not encourage employee to incur relocation

expenses in anticiaption of transfer and has duty to advise employee that he cannot be assured that he will be reimbursed for such expenses unless or until a subsequent travel order is issued and that he cannot be reimbursed for particular relocation expenses at all if incurred in anticipation of transfer, but before travel orders are issued. 52 Comp. Gen. 8, modified.

In the matter of payment of relocation expenses prior to actual transfer, May 30, 1975:

This decision involves the propriety of the Department of Health, Education, and Welfare (HEW) certifying for payment, prior to the effective date of the transfer, a voucher submitted by Mr. James Jacobsen, an employee of the Western Program Center, Social Security Administration (SSA), San Francisco, California, representing relocation expenses incurred by him in connection with the transfer.

For a number of years the SSA had been seeking a site in the San Francisco Bay Area on which to build a new facility for its Western Program Center. Employees of the Center were kept informed of the progress in relocating the Center through a publication issued by the Center. On December 7, 1972, the head of the Center notified the employees through that publication that the General Services Administration had named Richmond, California, as the site for the construction of the Center and that construction was expected to start the next March and to be completed in 2 years. Reimbursement of Center employees for relocation expenses incurred by them in connection with the move to Richmond was discussed in later issues of that publication and in a special travel guide issued by the Center. The travel guide states that the announcement on December 7, 1972, constituted the date of official notification of the employees of the transfer for the purpose of their eligibility for reimbursement for relocation expenses.

Although the new Center will not be ready for about 6 months, Mr. Jacobsen has submitted a travel voucher claiming reimbursement for travel, transportation, and relocation expenses incurred by him in connection with this transfer. The record indicates that he was issued a travel order on May 10, 1974, authorizing reimbursement for such expenses. That travel order also notes a journal entry reflecting the issuance of a "Notification of Personnel Action" (SF-50), dated May 2, 1974, transferring his official station to Richmond, effective July 1, 1975. On March 11, 1974, Mr. Jacobsen signed the required service agreement. The record also indicates that settlement was held for the sale of Mr. and Mrs. Jacobsen's former residence and the purchase of their new residence on April 3 and 9, 1974, respectively.

The determination by HEW that Mr. Jacobsen and other Center employees may be reimbursed for relocation expenses incurred incident to the transfer after the date of the December 7, 1972 announcement is based on our decisions 48 Comp. Gen. 395 (1968), and 52 Comp. Gen. 8 (1972). Those decisions held that when an employee incurs relocation expenses in anticipation of a transfer, reimbursement for such expenses is authorized if a travel order is subsequently issued to him authorizing reimbursement for the expenses on the basis of a previously existing administrative intention, clearly evident at the time the expenses were incurred by the employee, to transfer him. Although 52 Comp. Gen. 8, *supra*, further held that claims for reimbursement for relocation expenses incurred in anticipation of a transfer may not be properly paid until and unless the transfer is consummated or canceled, HEW has questioned whether that portion of the decision is applicable to the present case. HEW points out that in 52 Comp. Gen. 8, *supra*, the employee was officially notified of the transfer but that a travel authorization had not been issued, whereas in the present case a travel order and personnel action have been issued and Mr. Jacobsen has signed a service agreement. If it is determined that the ruling in 52 Comp. Gen. 8, *supra*, is applicable to the present case, HEW has requested reconsideration of that decision. In the alternative HEW has asked whether employees who have received travel orders may be allowed an advance of funds prior to the actual transfer.

In the present case Mr. Jacobsen did incur relocation expenses in anticipation of the transfer in that he incurred the expenses after official notice of the transfer but prior to the authorization of the transfer. Since 52 Comp. Gen. 8, *supra*, provided that reimbursement for relocation expenses is authorized when a travel order is subsequently issued, the statement in that decision that claims for reimbursement for such expenses may not be properly paid until the transfer is consummated or canceled is based on the assumption that the transfer would be authorized prior to that time. Moreover, Federal Travel Regulations (FPMR 101–7), para. 2–1.3 (May 1973), provides in part that in the case of a transfer of an employee for permanent duty, relocation expenses are payable when the transfer is authorized or approved by proper agency officials. Thus, there is no authority to reimburse an employee for relocation expenses unless the transfer has been authorized or actually effected and approved. Accordingly, we do not believe that the present situation is distinguishable from that involved in 52 Comp. Gen. 8, *supra*.

Section 2 of Public Law 89–516, approved July 21, 1966, 80 Stat. 323, added section 28 to the Administrative Expenses Act of 1946, now codified in 5 U.S. Code 5724(i) (1970), and provides that travel,

transportation, and relocation expenses incident to a transfer within the continental United States may not be allowed unless and until the employee agrees in writing to remain in the Government service for 12 months following his transfer. Prior to that requirement, an employee was not required to perform a specified period of Government service after a transfer within the continental United States to be entitled to travel and transportation expenses. Accordingly, prior to enactment of Public Law 89–516, our decisions generally involved a question of whether employees who did not report for duty at the new duty station or separated after serving a minimal period of service at this new duty station were entitled to reimbursement for these expenses.

Where an employee incurred relocation expenses incident to a transfer but failed to report for duty, our decisions held that he was not entitled to reimbursement. The basis for this conclusion was that the transfer could not be considered to be in the interest of the Government since no duty had been performed at the new station. 32 Comp. Gen. 280 (1952) and B–157961, January 6, 1966. However, where an employee complied with transfer orders by actually reporting for duty at his new station, our decisions held that the transfer had been consummated and that reimbursement for travel and transportation expenses was proper even if the employee resigned the same day he reported for duty. B–128219, June 29, 1956, and B–157961, January 6, 1966.

Upon reconsideration we do not believe that the rule stated in those decisions would necessarily be applicable to the situation involved in this case or 52 Comp. Gen. 8, *supra*. Our decisions prior to the enactment of 5 U.S.C. 5724(i) did not generally involve the question of when an employee may be reimbursed for travel and transportation expenses incident to a transfer. Those decisions were primarily concerned with the question of whether an employee who failed to report for duty at his new station or separated shortly after reporting for duty could be reimbursed for expenses of the transfer. Moreover, the problem of entitlement to reimbursement for real estate expenses, involved in the present case, would not have generally been a problem at the time of those decisions since only travel and transportation expenses were allowable at that time. These expenses would generally be incurred just before reporting for duty at the new station and an advance of funds could be authorized for these expenses. Furthermore, although an employee is currently generally required to actually report for duty at his new station to be entitled to reimbursement, this requirement is no longer as critical since in addition to reporting for duty, an employee is required to sign and fulfill a 12-month service agreement.

Sections 5724 and 5724a of Title 5, U.S. Code (1970), authorize payment of travel, transportation, and relocation expenses of an employee transferred in the interest of the Government. Our Office has held that the word "transferred" appearing in the statute relates to an employee who has been ordered or directed to make a permanent change of station. 37 Comp. Gen. 203 (1957) and 27 *id.* 737 (1948). Thus, an employee would be eligible for reimbursement for relocation expenses already incurred under the statutory provisions when he has been ordered or directed to make a permanent change of station in the interest of the Government.

The primary concern in approving and certifying travel vouchers prior to the consummation or cancellation of the transfer is the protection of the Government's interests should the employee fail to fully comply with the transfer orders. In those circumstances any amounts previously paid to the employee as reimbursement for relocation expenses would be recoverable from him. This situation is not significantly different from that of an employee who receives an advance of funds incident to a transfer and fails to effect the transfer or from that of an employee who effects a transfer and is reimbursed for relocation expenses or who is reimbursed for relocation expenses incurred prior to the cancellation of his transfer and fails to fulfill the service agreement. The fact that Congress has authorized such payments even though the amounts may subsequently be recoverable from the employee indicates that Congress has determined that the Government's interests are reasonably protected by recovery procedures. Accordingly, where an employee has received transfer orders, has commenced compliance with such orders by incurring relocation expenses properly authorized by those orders, and has met the other regulatory requirements, such as signing a service agreement, we would have no objection to certifying for payment, prior to the actual consummation or cancellation of the transfer, claims for those expenses.

Paragraph 2–1.6a(1) (May 1973), FTR, provides that an employee may be advanced funds for use while traveling and for certain expenses which he may incur incident to a transfer based on his prospective entitlement to reimbursement for those expenses after they are incurred. Accordingly, where travel orders have been issued incident to a transfer, the employee may be advanced funds on the basis of his prospective entitlement to reimbursement for those expenses set forth in FTR, para. 2–1.6a(3).

In view of the present case and of certain others which have come to our attention, we believe that our decisions relating to reimbursement of employees for relocation expenses incurred in anticipation of a transfer need further clarification. As previously indicated, there

is no authority under the Federal Travel Regulations or our decisions to reimburse an employee for relocation expenses unless the transfer is authorized or actually effected and approved. Although the Federal Travel Regulations do not expressly state what constitutes the authorization of a transfer, travel orders are generally required by agency regulation to be, or at least are generally recognized as being, the authorizing document. Thus, an employee cannot be assured that he will be reimbursed for relocation expenses incurred by him until he has received a travel order. Our decisions, 48 Comp. Gen. 395, *supra*, and 52 Comp. Gen. 8, *supra*, relating to reimbursement for relocation expenses merely provide that an employee's eligibility for reimbursement for *certain* relocation expenses will not be adversely affected if they are incurred in anticipation of the transfer, where the transfer is subsequently consummated or canceled. Moreover, certain relocation expenses may not be reimbursed if they are incurred in anticipation of a transfer since the Federal Travel Regulations require a specific authorization for the reimbursement of the expense or provide that the period of the claim may not begin until the transfer is authorized. *See* FTR, para. 2–4.3c (May 1973) (house hunting), and FTR, para. 2–5.2e (May 1973) (temporary quarters subsistence expenses).

In view of the above, we believe that the proper means for an agency to provide lead time for the employee to prepare for a transfer is to issue travel orders to him a reasonable time in advance of the effective date of the transfer. Moreover, the agency should balance the need to provide lead time for the employee to prepare for the transfer with its duty to control travel and the fact that if a travel order is issued the agency may be responsible for paying relocation expenses incurred in reliance on such order even if the transfer is subsequently canceled. Where, however, an employee is aware of an impending transfer or an agency needs to advise an employee of its plans to transfer him before it can issue a travel order, the agency has a duty to inform the employee of his right to reimbursement for expenses incurred in anticipation of a transfer. In these situations an agency should advise the employee that he cannot be assured that he will be reimbursed for relocation expenses incurred in anticipation of the transfer, but before receipt of travel orders, and that certain expenses will not be reimbursable at all if they are incurred in anticipation of the transfer. Furthermore, the agency should not encourage the employee to incur relocation expenses in anticipation of the transfer.

If the voucher submitted by Mr. Jacobsen is otherwise proper, it may be certified for payment in accordance with this decision. To the extent 52 Comp. Gen. 8 (1972) is inconsistent with this decision, it should no longer be followed.

U. S. GOVERNMENT PRINTING OFFICE : 1975 O - 587-396