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[B-180132]

Transportation—Overcharges—Disputed—Burden of Proof

A carrier claiming that mechanical equipment was used in loading of shipments bears burden of proving that such equipment was actually used. Ramp used to drive fire truck on to carrier's vehicle is not mechanical equipment.

Transportation—Rates—Tariffs—Construction—Against Carrier

Contradiction in tariff language permits consideration of parol evidence in order to ascertain intended meaning. Ambiguities must be resolved against carrier.

In the matter of Wells Cargo, Inc., September 3, 1974:

Wells Cargo, Inc., requests review of the actions taken by our Transportation and Claims Division on seven separate claims. Three of Wells Cargo's claims, identified by General Acounting Office numbers TK-916955, TK-916963, and TK-923742, have been allowed in full so that the request for review is moot on those shipments.

All of the remaining items, one claim number TK-923726, and three protests of overcharge notices, have a common question of tariff interpretation involving use of mechanical equipment for loading or unloading. Generally, Rocky Mountain Motor Tariff Bureau Tariff 7-C, MF-I.C.C. 186 (Tariff 7-C), to which Wells Cargo is a party, does not apply for a Wells Cargo shipment which "require the use of mechanical equipment for loading onto, or unloading from, carrier's vehicle. . . ." Item 1980, Tariff 7-C (1st revised page, Oct. 16, 1969). If Tariff 7-C is not applicable, then the rates in Wells Cargo Local Freight Tariff No. 1-C, MF-I.C.C. No. 10 (Tariff 1-C) do apply. On three of the four shipments, Wells Cargo contends that because mechanical equipment was used in loading, Tariff 1-C is applicable.

The shipment moving under Government bill of lading F-1792414 consisted of one power pack weighing 3,900 pounds, mounted on a trailer with wheels. Nothing in the record here indicates that any mechanical equipment was used in loading. Power packs are shipped on dollies in order to permit handling without the use of special equipment.

The shipment moving under Government bill of lading F-1799870, claim No. TK-923726, consisted of one fire truck weighing 12,400 pounds. Headquarters, Western Area, Military Traffic Management and Terminal Service, has confirmed that the truck was driven on and off of the carrier's vehicle by Government personnel by means of a ramp. A ramp of this type is not special equipment. *United Transports Inc.* v. *United States*, 214 F. Supp. 34 (W.D. Okla. 1962).

The shipment moving under Government bill of lading F-4333031 consisted of two cartons and one box of household goods weighing a total of 3,517 pounds. There is no evidence supporting Wells Cargo's contention that mechanical loading equipment was used.

Wells Cargo suggests that Item 1980 of Tariff 7–C does not require the carrier to present evidence of use of mechanical equipment. However, it is a general rule that carriers have the burden of establishing the validity of the charges claimed. *United States* v. *New York, N. H. & H. R.R.*, 355 U.S. 253 (1957). Unsupported assertions that services were performed do not constitute proof of performance.

The shipment moving from Fallon, Nevada, to Alameda, California, under Government bill of lading F–5459523 consisted of one loose cooling machine weighing 12,000 pounds which was admittedly loaded by means of mechanical equipment. On the three previous shipments, Wells Cargo argued that mechanical loading equipment was used and therefore Tariff 1–C applied. On this shipment, Wells Cargo acknowledges the use of Mechanical equipment but contends that Tariff 1–C does not apply nevertheless.

Rule No. 5 of Tariff 1–C provides that Tariff 1–C applies on shipments between California and Nevada which consist of:

> Commodities which because of size or weight or other physical characteristics, require the use of special equipment, or low-bed equipment, for their transportation (see Notes 2 and 3), or which require the use of mechanical equipment for loading onto, or unloading from, carrier's vehicles, and commodities in bulk, except cement, in tank, bin or hopper type vehicles.

Section 5 of the tariff contains a table of distance class rates for classes 100 and lower. The original page 60 of the tariff provides that the rates in Section 5

> will apply only on shipments of commodities which because of size or weight, or other physical characteristics, require the use of special equipment, or low-bed equipment, for their transportation.

No mention is made of shipments which require the use of mechanical equipment for loading. Except for this omission, the rates in Section 5 could appropriately be applied to this shipment. None of the other rates in Tariff 1–C applies. Thus, while Rule No. 5 includes shipments requiring mechanical equipment for loading within the scope of the tariff, none of the rates in the tariff apply.

While there is an ambiguity in a tariff, parol evidence is admissible to explain the ambiguity. 3 A. Corbin, *Contracts* § 579 (1960). The meaning of an indefinite term of a contract may be made clear by the later action of one party. 1 A. Corbin, *Contracts* § 101 (1963). Here, there is a clear contradiction in the language of the tariff rather than a mere ambiguity.

This difficulty in the tariff was eliminated when the 1st revised page 60 was issued on December 30, 1970. On that revised page, the words "or which require the use of mechanical equipment for loading" were added to the portion of section quoted above. The change is marked by a symbol indicating that the change in wording did not result in an increase or reduction in charges.

From this change, it is reasonable to infer that the omission of the words "or which require the use of mechanical equipment for loading" was inadvertent. Based on this inference plus the well-established rule that ambiguities are to be construed against the carrier, we conclude that the Section 5 rates were applicable to this shipment. See *United States* v. *Great Northern Ry.*, 337 F. 2d 243, 249 (8th Cir. 1964).

Accordingly, the action of our Transportation and Claims Division in denying Wells Cargo's claim TK-923726 is sustained. The notices of overcharge arising out of Government bill of lading numbers F-1792414, F-4333031, and F-5459523 are also sustained.

[B-180414]

Contracts—Negotiation—Competition—Discussion with All Offerors Requirement—Technical Transfusion or Leveling

Procuring agency did not act improperly in not advising protester of preference for "refinements" design approach of successful offeror since agency's statement in response to protest concerning lack of meaningful technical negotiations, that it would have "violated ASPR" if it had influenced change in protesting offeror's design approach indicates that "technical transfusion" of competing offeror's superior design approach would have occurred.

Contracts—Negotiation—Evaluation Factors—Superior Product Offered

Absent clear showing of lack of rational basis for technical judgment reached by procurement activity that proposed design is state-of-art advancement within design-to-production cost limitation of request for proposals, General Accounting Office, on record, as supplemented by comments from interested parties, finds no reason to question judgment exercised by activity.

Contracts—Research and Development—Evaluation Factors—Design—Superiority, Deficiencies, etc.

Procuring agency in source selection process did not disregard procurement guideline directing offerors to design system for protection against certain threats where award was made to offeror receiving excellent rating for protection against threats in question rather than to protesting concern which received rating of "adequate" for same threats.

Contracts—Research and Development—Costs—Analysis—Minimum Standard

On procurement record showing that protesting offeror's cost proposal, encompassing cost elements that are required to be examined under procedures for cost analysis set forth in Armed Services Procurement Regulation 3-807.2(c), was analyzed by evaluators in arriving at offeror's rating in cost area; that during course of negotiations several inquiries were made of protesting concern about cost proposal; and that consideration was given to reports submitted by field pricing support activities, General Accounting Office cannot conclude there was failure to achieve minimum standard of cost analysis under cited regulation.

Contracts—Negotiation—Field Pricing Support Reports—Contracts in Excess of $100,000

Requirement in Armed Services Procurement Regulation (ASPR) 3-801.5(b) that field pricing support report be requested prior to negotiation of contract in excess of $100,000 was complied with in production cost area even though

procurement contracting officer only requested review of offeror's proposed escalation rate for the period in question, the learning curve to be applied in production, and the make-up of the production unit cost estimate, since ASPR 3-801.5(b)(3) provides that contracting officer has right to stipulate "specific areas for which input (field pricing support) is required."

Contracts—Research and Development—Costs—Analysis—Evaluation Factors

Primary reliance on independent "parametric" cost analysis in evaluating projeted production unit costs of offerors in determining successful offeror for award of development contract under "design-to-production-unit cost" concept was not unreasonable since: (1) Department of Defense guidelines for award of development contract terms proposed production unit cost estimates of offerors "inconclusive" at development state; (2) each competing offeror's cost proposal was equally and thoroughly analyzed with "parametric" estimate; and (3) substantial cost additions to each offeror's proposal were made.

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

Negotiations with unsuccessful offeror as to system weight discrepancy should have, at least, indirectly made it aware that cost estimate was questionable; nevertheless it would have been preferable to have advised offerors that submitted cost proposals were considered generally unrealistic and to convey specifics of cost estimate discrepancies so long as another offeror's unique technical and cost approach would not be disclosed.

Contracts — Negotiation — Cost-Plus-Incentive-Fee Contracts—Evaluation

Failure of procuring agency to resolve before award discrepancy between award price on cost-plus-incentive-fee basis of development contract and Government cost estimate for development work was inconsistent with Armed Services Procurement Regulation 3-405.4(b) contemplating negotiation of realistic target cost to provide incentive to contractor to earn maximum fee through ingenuity and effective management.

Contracts—Negotiation—Cost, etc., Data—"Realism" of Cost

Elimination, without formal advice to offerors, of cost realism standard as applied to preproduction development costs, does not require conclusion that selection of technically superior offeror, whose evaluated unit production cost was within request for proposals (RFP) design-to-production-cost limitation but whose development costs were high, was improper under cost evaluation scheme of RFP.

Contracts—Negotiation—Evaluation Factors—Criteria—Administrative Determination

Lacking independent technical and cost analysis of relative merits of competing proposals in "band 8" approaches and operational effectiveness of system without band 8 requirement, General Accounting Office cannot question agency's decision to eliminate band 8 requirement in order to preserve design-to-production cost constraint or subsequent decision, based on possible future importance of requirement to partially restore band 8 coverage via option technique.

Contracts—Research and Development—Optional Technique

Procedural validity of option technique in development contract is unquestionable, since Armed Services Procurement Regulation (ASPR) 1-1501 specifically provides for use of appropriate option provision in research and development contracts, and ASPR 1-1504(c), (d), and (e), contrary to contention of protesting concern, provide that options are to be evaluated only if, unlike the subject procurement, the Government intends to exercise option at time of award or if contract is fixed-price.

Contracts—Negotiation—Competition—Changes in Price, Specifications, etc.

So long as offerors were advised to base production unit costs estimates on cumulative average costs for 241 production units, there was no unfair advantage in permitting one offeror, by insertion of special clause, to make its proposed cost contingent on accurary of projected production figure, since clause makes explicit what is already implicit in proposal instructions. Also, model contract provision furnished to offerors specifically states that equitable adjustment will be made in production unit price for any Government change in production quantity affecting production unit cost.

In the matter of the Raytheon Company, September 3, 1974:

This protest questions the technical and financial rationale supporting an Air Force selection of a development contractor under a "design-to-production-cost" limitation of $1.4 million. For the reasons discussed at length below, we cannot conclude that the selection in question was unreasonable or that it was made without benefit of a "best buy" analysis, encompassing cost and technical considerations.

In November 1971 a request for proposals was issued by the Aeronautical Systems Division, Air Force Logistics Systems Command, Wright-Patterson Air Force Base, for the Radio Frequency Surveillance/Electronic Countermeasures Subsystem (system) (RFS/ECMS) for the B–1 aircraft.

After proposals for the system were received in January 1972, an agency review panel recommended changing the requirements because the Department had "over-stated requirements that were technically beyond the state-of-art" and because the proposed system would cost in excess of that which "the Government could afford."

A revised approach for the system was approved in May 1972. The approach required the award of two fixed-price definition and risk reduction development contracts over a 10-month period. The Department reasoned that "if, at the completion of the risk-reduction development effort, the Air Force determined that one of the technical approaches was acceptable, an award could be made to one of the contractors for the full scale engineering development efforts." Ultimately, a production contract (Phase III effort) for enough systems to protect the entire proposed B–1 fleet was contemplated.

Two fixed-price contracts were awarded to Cutler-Hammer, Inc. (AIL Division), and the Raytheon Company under the revised approach. Eight major tasks, referred to as Phase I effort, were set forth in the contracts. One task was to define a system which could be produced for a production unit cost of $1.4 million or less, predicated on the average production costs for all the systems needed for the B–1 fleet; another task was to fabricate and demonstrate critical hardware components of the proposed system. The final task of the Phase I effort was the submission of a proposal for the Phase II

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development effort (the full scale engineering development of the system, including fabrication, ground and flight test) based on proposal instructions (PI) to be issued subsequently by the Department.

To provide a back-up approach in the event that the Phase I contractors could not demonstrate a workable system, the Air Force started an in-house study for a more conventional system.

In June 1973 the Air Force issued the PI for the development work to the contractors. The type of contract anticipated by the PI was cost-plus-incentive-fee (CPIF) having a standard incentive fee provision, with the exception that the fee would not increase if costs incurred were below the cost target, and a unique design-to-production-unit-cost incentive clause. As explained by the contracting officer:

> The cost sharing [arrangement] states that there will be no share [by the Air Force] of dollars if the Contractor underruns his development target cost. This is to encourage the contractor to invest funds in the development phase so he can produce a low cost subsystem during the production phase. We did not want to incentivize him to underrun at the expense of developing a lower production unit cost. * * *.
>
> The design-to-cost incentive fee is in addition to the target fee on development cost. The contractor may earn additional fee dollars under the Phase II contract, up to $4.8 million, for negotiating a production unit cost on the production contract at lower values * * *.
>
> In summary, the Phase II incentive structure tells the contractor to invest in the development contract by spending all of the dollars of his target, or even more, if he will be able to reduce the production unit cost during Phase III * * *.

Offerors were required to submit complete cost estimates for costs not only associated with the development work, but for the proposed production unit cost under the contemplated production contract for the systems and for "life cycle" costs envisioned for the systems. Offerors were specifically warned to submit cost data which "are sufficient to establish the reasonableness, realism, and completeness of the proposed cost/price."

The PI advised offerors that proposals would be evaluated in three areas, listed in descending order of importance as follows: design-to-cost (this standard was to have "primary consideration"); technical (concept and technical approach); and development program (the first listed consideration here was a minimum development cost consistent with design-to-cost requirements).

To furnish guidance to offerors in designing technical approaches, the PI instructed offerors, in effect, to design a system with greatest effectiveness which included defensive capabilities on as many radio frequency bands as possible within the design to cost limit of $1.4 million and the essential performance parameters set forth elsewhere in the PI. Further, the PI divided the entire radio frequency spectrum into eight frequency bands. The Air Force reports that the reason this was done was to group the radio frequencies of the known and postulated threats into certain bands, thus enabling it to put an

importance factor, or priority, on the bands. Band 1 covers a relatively narrow range of frequencies at the lower end of the entire frequency spectrum; band 8 covers a very wide range of frequencies at the upper end of the spectrum. The eight bands were listed in descending order of priority in the PI as follows:

Priority	Band
1	7 R/T (Defensive capability in both reception and transmission)
2	6 R/T
3	5 R
4	4 R/T
5	5 T
6	8 R
7	8 T (aft section only)
8	2 R/T
9	8 T (fwd sectors)
10	1 and 3 R/T

In conjunction with the listing, offerors were informed that the bands were set forth in decreasing order to allow deletion of the bands in the event the cost limitation could not be met. Consequently, it was stated the system must be of modular design, that is, capable of withstanding addition or deletion of band capability with little or no impact on overall performance.

Both Raytheon and AIL submitted their proposals for the Phase II work in July 1973. In addition the Air Force report on the in-house conventional back-up system was submitted.

The record discloses that the detailed evaluation approach of the evaluators in the cost area (development cost, production unit cost and life cycle costs) included the following scheme as pertinent:

Area: *4.0 Cost*

* * * * * * *

Item 4.1 Reasonableness

* * * * * * *

Item 4.2 Realism

* * * * * * *

Item 4.3 Completeness

* * * * * * *

Item 4.4 Risk

* * * * * * *

The level of risk in this evaluation will be based on the extent to which each bidder deviated from the realism, reasonableness, and completeness standards as established for source selection. The closer the bidder's estimate comes to satisfying the PI requirements, the less the risk.

The evaluators, using a color-coded, adjective rating system, determined that all three proposed systems had moderate technical and

cost risk because of the short development time available and "over ambitious systems designs." AIL proposed a system for priorities 1 through 7; Raytheon proposed a system for priorities 1 through 8; and the Air Force in-house group proposed a system for priorities 1 through 10.

In August 1973 the overall development plan for the B–1 program was changed. This change, in turn, required that the PI be modified. Consequently, on August 22, 1973, both offerors were issued a Modification Request (MR) which, among other things, granted an extension of the schedule time to accomplish the development effort.

After the offerors responded to the modification, the Air Force determined that there was a substantial reduction in the technical risk of both proposals—primarily due, in Air Force's judgment, to the extension of time. The cost risk, however, was still considered moderate in both offerors' proposals due to the number of priorities proposed. Thereafter, a decision was made to reduce the requirements to a priority 1 through 5 system.

The Air Force decision came as a result of several factors. Critical to the decision was the result of an independent cost analysis of each offeror's proposal. This analysis, unlike the standard procedures for cost analysis, was completely independent of the offeror's cost data. Instead, the offeror's technical data was used to determine what the system should cost. Then, and only then, was the offeror's cost data compared with the independent analysis.

In this cost evaluation process, the independent cost analyzing group also compared the development and production costs of analogous systems with its independent cost estimate for the proposal of each offeror. The results of the independent cost analysis, validated by the analysis of analogous systems, indicated that the proposed systems of both offerors would exceed the design to cost limitation of $1.4 million.

Among the other factors influencing the decision to delete priorities 6 through 10 were reviews made by the designated evaluators for the procurement (the Source Selection Evaluation Committee (SSEC)) and an Air Force group independent of the procurement (the McColl Committee).

The SSEC made extensive cost/effectiveness trade studies to determine how many priorities in each offeror's system could be achieved with acceptable risk for $1.4 million, and whether that system would be acceptable in terms of operational effectiveness. The SSEC decided subsequently that both offerors' systems, incorporating priorities 1 through 5, could be achieved with acceptable risk of $1.4 million or less, and that both systems would be operationally effective.

The results of the SSEC's cost/effectiveness studies were then presented to the McColl Committee which concurred in the approach of limiting the development effort to priorities 1 through 5.

On November 8, 1973, MR's were issued to the offerors (MR No. D.3.0.2.65 to Raytheon) stating that "Due to cost considerations, (system) development will be limited to priorities 1 through 5 and the development program schedule must be rephased." The MR's further stated that the offerors' proposed revised systems should retain "inherent growth capability to modularly and gracefully grow from a five priority (system) back to your earlier proposed baseline (system) * * *." Offerors were also advised that December 14, 1973, was the contemplated date for offerors to submit best and final offers.

During November and December 1973, discussions were held with both offerors. The Air Force states that all questions and suggestions brought up by the offerors were entertained. The discussions also included examination of the contractors' proposals as well as contract documents, clarification of any areas heretofore unclear, and identification of any potential areas requiring research or future discussions. At the conclusion of negotiations both offerors were presented with copies of the proposed contract.

On December 12, 1973, offerors were informed by letter that "In accordance with ASPR 3-805.1(b), three properly executed copies of the subject document [the proposed contract] must be received by this office no later than 1700 Hours on 18 December 1973." Both offerors responded by that time and date. On December 19, 1973, the SSEC briefed the McColl Committee on the final evaluation results. At that time a decision was made to add an option for priorities 6 and 7 (band 8) to the PI. The McColl Committee had previously suggested, notwithstanding its concurrence in limiting development work to priorities 1 through 5, that a way should be found to insure that the successful offeror would retain a systems capability to add band 8 when these priorities could be afforded and when they were absolutely required to meet a threat. The method finally chosen was an option technique.

The primary reason for using an option technique rather than issuing a new request for proposals (presumably on a sole-source basis at some later date to the successful contractor for Phase II) was to obtain "the proposals [for the option] from each of the Contractors during the competitive period, thereby receiving the benefits of lower cost proposals."

To carry out the option technique, Proposal Instruction Change Notice (PICN) No. 5 was issued by the Air Force on December 21, 1973.

The notice stated that it was the Government's intent to incorporate in the awarded contract an option (to be exercised within 24 months after the date of contract in the event band 8 became necessary) for development of the offerors' earlier proposed 8 approaches. However, the notice expressly advised offerors that the response to the notice should be independent of, and additive to, the program proposed in the best and final offers submitted on December 18 and that the responses would not be evaluated as a part of the source selection activity.

On December 31, 1973, both offerors submitted their proposals for the band 8 option. The contracting officer states that neither offeror took exception to the option technique.

By separate letter dated December 31, 1973, Raytheon also submitted a separate offer to perform the Phase II work under a fixed-price incentive or CPIF basis with a ceiling price of $29,498,749. With the inclusion of the band 8 option, Raytheon proposed a higher ceiling price of $32,111,264.

According to the independent cost estimate, AIL's proposed production unit and development costs were slightly higher than Raytheon's proposed costs. From this data the Air Force considered that both AIL and Raytheon had high probabilities of success in completing priorities 1 through 5 within the design-to-cost limitation during the production contract and low probabilities of success in completing the development work within the costs proposed.

Because projected costs of the offerors were essentially equal, but since AIL's system was considered technically superior, the Air Force decided AIL's offer had superior merit and awarded the Phase II contract to AIL on January 8, 1974, at an estimated cost and fee of $31,608,697 for priorities 1 through 5. The price of the option for band 8 was not negotiated prior to award.

Raytheon's protest raises six major issues. The Air Force's responses to the issues and our conclusions are set forth under the captions listed below. Raytheon believes the issues should be resolved in its favor. Consequently, the company requests that we direct the Air Force to terminate AIL's contract and award the contract to Raytheon.

I. THE AIR FORCE FAILED TO CONDUCT MEANINGFUL NEGOTIATIONS

This issue relates to the technical differences in design approach proposed by AIL and Raytheon for Phase II and the Air Force's judgment that AIL's approach was more effective within the design-to-cost limitation. Raytheon urges that the Air Force had a fixed preference, determined prior to the conclusion of negotiations, for the AIL design approach. Because of this fixed preference, Raytheon

asserts that the Air Force had a duty to inform it of this preference, via an amendment to the PI under Armed Services Procurement Regulation (ASPR) 3–805.4(a) so that Raytheon, too, could propose such approach. Since the Air Force did not so amend the PI, Raytheon contends that the Air Force failed to conduct meaningful negotiations with it in violation of the principle set forth in several decisions of our Office which require "meaningful discussions" in order to fulfill the statutory requirement for negotiations with all offerors in the competitive range.

The Air Force denies that it had a fixed preference for the AIL system before the completion of the source selection process. Its report on these matters, as the protester knows, is classified.

What can be reported is that, although the Air Force decided that an effective system would have certain characteristics common to both offerors' basic approaches, it says that it did not decide between the relative merits of the refinements of the basic approaches until evaluation was complete. Thus the Air Force reports that although it considered AIL had demonstrated a significant advancement in state-of-the-art development late in Phase I work, it did not know until well into the proposal evaluation process whether the "total systems approach" and the cost of the AIL approach would satisfy the design-to-cost limit. Its interest was in getting a balanced system that could be afforded, was technically sound and offered greatest effectiveness. On this position, the Air Force rejects the view that it had a fixed preference for AIL's approach.

Implicit in the Air Force response is an admission that, prior to the close of negotiation, it was impressed with the AIL "refinements" approach as a state-of-the-art advancement. Given the Air Force preference for the AIL approach, we cannot agree, however, that the decisions of our Office, cited by Raytheon, required the Air Force to disclose this factor to Raytheon.

The general principle that negotiations must be meaningful is well established. This principle is recognized in 51 Comp. Gen. 431 (1972), cited by Raytheon, when we observed:

> * * * discussions must be meaningful and furnish information to all offerors within the competitive range as to the areas in which their proposals are deficient so that competitive offerors are given an opportunity to fully satisfy the Government's requirements.

Following our observation in the cited case and in several other decisions of our Office (see, for example, 47 Comp. Gen. 336 (1967); 50 *id.* 117 (1970)), ASPR 3–805.3(a) requires that "all offerors selected to participate in discussions shall be advised of deficiencies in their proposals."

At the same time we have recognized that inferior aspects of technically sophisticated proposals may not be easily amenable to meaningful negotiations without improperly disclosing the innovative approach of a superior proposal. As we stated in 51 Comp. Gen. 621 (1972):

> Any discussion with competing offerors raises the question as to how to avoid unfairness and unequal treatment. Obviously disclosure to other proposer's innovation or ingenious solution to a problem is unfair. We agree that such "transfusion" should be avoided.

In 52 Comp. Gen. 870 (1973) we further confirmed our opposition to the disclosure during negotiations of an offeror's independent approach to solving a complex research and development problem. We noted that the "specifications" of the RFP in question were primarily performance oriented in order to obtain independent, innovative approaches to attain the performance desired.

This restriction on the requirement for meaningful discussions is also recognized in several recent decisions of our Office, cited by Raytheon for the proposition that the Air Force improperly failed to advise it of the preference for AIL's refinements approach. Thus in B–179030, January 24, 1974, although we questioned whether technical negotiations limited to clarifications discussion of an offeror's proposed manhours and subcontracting would have run the risk of technical transfusion or divulgence of another offeror's concepts, we again recognized the potential in reseach and development procurements for the disclosure to other competitors of the "fruits of an offeror's innovative efforts." Similarly, in B–178989, March 6, 1974, we pointed out that solutions based on the ingenuity of Government technical personnel or derived from competing proposals should not be conveyed during discussions, although we could not see how advising the protesting offeror that his proposal was deficient in low temperature performance or that a 50-second time delay approach improper constituted technical transfusion.

In the present case, the Air Force states that it never attempted to "influence or otherwise cause either AIL or Raytheon to modify, change, or deviate from their * * * design approach * * *. To do so would have been in direct violation of ASPR * * *."

We think this statement indicates, in the Air Force's view, that technical transfusion would have occurred had it advised Raytheon that it preferred the AIL "refinements" approach. Indeed, the circumstances of the procurement resemble those in 52 Comp. Gen., *supra*, where we agreed with the agencies involved that the possibility of technical transfusion prevented meaningful technical discussions of the design approaches. Then, as now, the Government's requirements were stated primarily in performance terms; the offeror's inno-

vative approach to the technical question involved was the essence of the procurement; the weaknesses in the proposal of the offeror claiming the lack of meaningful discussions were relative only; and the weakness related to general design approach rather than to nontechnical matters, technically unsophisticated matters, or minute design deficiencies.

The facts of this case are therefore distinguishable from B–174492, June 1, 1972, cited by Raytheon, which involved a negotiated solicitation containing detailed design specifications for printing presses of a technically unsophisticated character. We held that the procuring agency's preference for a special type of automatic press to be furnished by a subcontractor should have been conveyed to all competing offerors. The innovative design approach for which Raytheon claims Air Force had a fixed preference cannot, in our view, be considered analogous to the approach proposing the press in the cited case.

Under these circumstances, and given the Air Force view that AIL's approach was a significant advancement in the state-of-the-art within the limits of the design-to-cost constraint, we must conclude the possibility of technical transfusion was real. Consequently, we cannot conclude that the Air Force improperly failed to advise Raytheon of the AIL "refinements" approach.

II. AIL'S APPROACH IS NOT A STATE-OF-THE-ART ADVANCEMENT

Raytheon disputes the idea that AIL's approach is a state-of-the-art advancement. It says that it, too, pursued an approach similar to AIL's approach until it was forced to give it up because of the design-to-cost limit and that it will use such an approach under a contract it recently received from the Navy.

Raytheon urges that speed of detection of enemy radar pulses (which Raytheon admits is faster with the AIL system) is not as critical in denying information on the location of the B–1 as "signal measurement accuracy" (which Raytheon urges is more precise with its system). The deficiency in accuracy with the AIL system can be overcome with additional "specialized hardware" but that results in additional delay which more than offsets the faster rate of detection of the AIL system.

The Air Force insists that the AIL approach is an advancement of the state-of-the-art within the funding constraint and that Raytheon's cost and technical experience with an approach similar to that of AIL's under Phase I work and under the Navy contract cannot be considered the standard against which the merits of AIL's system are determined.

Concerning Raytheon's argument that the Air Force has misplaced technical emphasis on speed (of detection) rather than accuracy of

signal measurement, the Air Force has submitted a classified response. We can report, however, that the Air Force technical advisers disagree with Raytheon's assertion that its system excels AIL's system in frequency measurement resolution (which we assume to be identical to "signal measurement accuracy"). Further, the Air Force denies that Raytheon's system has an advantage in reaction time.

Based on our review of the record, as supplemented by comments from the interested parties, we cannot conclude that the Air Force's technical judgment on these issues has been clearly demonstrated to lack a rational basis.

III. THE AIR FORCE DISREGARDED THE PROCUREMENT GUIDELINES DIRECTING OFFERORS TO DESIGN AGAINST CERTAIN THREATS (our treatment of this issue is seriously restricted because of the classified nature of the technical material in question.)

Raytheon contends that selection of the AIL technical approach violated certain guidelines for the technical risk definition involved in Phase I with respect to designing for certain threats. Raytheon believes that design to these threats was the primary requirement of the Phase II procurement. It states that it was told in a debriefing that its system adequately responded to these threats but in other "threat environments" the Raytheon system effectiveness was rated marginal. Thus Raytheon believes the selection of AIL was primarily based on that system's alleged advantage in protecting against these other threats.

We have reviewed the record of the technical evaluation of Raytheon's proposal. Raytheon received a rating of adequate for protection against the threats in question. AIL received a rating of excellent for protection against these same threats. Consequently, we cannot agree that the selection of AIL disregarded the procurement guideline cited by Raytheon or that it was primarily based on AIL's alleged advantage in protecting against the "other threats" in question.

IV. THE AIR FORCE IMPROPERLY EVALUATED COST CONSIDERATIONS

Raytheon alleges that the Air Force procedures on cost evaluation did not comply with ASPR 3-801.5(b) and 3-807.2(c) which provide as pertinent:

3-801.5(b)(1)

Prior to negotiation of a contract * * * in excess of $100,000 * * * when price is based on cost or pricing data * * * submitted by the contractor, the contracting officer shall request a field pricing support report (which includes an audit review by the contract audit activity) unless information is adequate to determine the reasonableness of the proposed cost or price * * *.

3-807.2(c)(1)

Cost analysis is the review and evaluation of a contractor's cost or pricing data * * * and of the judgmental factors applied in projecting from the data to the estimated costs, in order to form an opinion on the degree to which the contractor's proposed costs represent what performance of the contract should cost, assuming reasonable economy and efficiency * * *.

Raytheon contends that the Air Force did not request a full audit review on its proposal and did not examine the data in its production unit cost volume in violation of the above regulations. The effect of this failure, and the primary reliance by the Air Force on independent cost estimates, Raytheon insists, exaggerated Raytheon's proposed costs and understated AIL's proposed costs, especially considering the cost impact of the addition of band 8. Raytheon further suggests that the real effect of the cost impact of the addition of band 8 to the AIL contract will cause the design-to-cost limitation to be exceeded—thus abrogating the limitation which was of primary importance in the evaluation criteria.

Raytheon notes that the contracting officer reported that Raytheon's proposed production unit cost was reasonable and acceptable so far as Raytheon's estimating methodology was concerned, but that he does not explain why effort was not made to investigate the reasons for the "disparity between the independent cost estimate results and the DCAA/DCAS findings." Contrary to the contracting officer's statement, discussed at length below, that analysis of proposed production cost data prior to award of the engineering development contract, rather than the production contract, has severe limitations because data available for examination is only of a forecast nature, Raytheon maintains that extensive data was in fact available at Raytheon.

Collateral to Raytheon's argument that the Air Force improperly evaluated cost considerations, but presented in connection with the company's argument that Air Force improperly determined that Raytheon's December 31, 1973, revised proposal was "late," is Raytheon's position that its December 31 offer of a ceiling on development costs of $29,498,749 should have been considered most advantageous to the Government.

The Air Force insists that it did use proper cost analysis on the offerors' proposals. It points out that ASPR 3-807.2(a) allows the method and degree of cost analysis to be dependent on the facts of the particular procurement and pricing situation.

Analysis of the proposed production unit cost data for a development contract, in the Air Force's view, has severe limits. Nevertheless, the Air Force says that it did obtain a report, prepared by an industrial engineer from the appropriate Defense Contract Administrative Services Regional Office on Raytheon's production unit cost and

that its evaluators did examine the volume 10 of Raytheon's cost proposal concerning production unit cost data. The report expressed the view that there was a "high degree of confidence in the estimates made and proposed for the production of 241 systems." The report also noted than an independent cost estimate was made by Raytheon which was well within "± one sigma values of $27.3 million and $35.6 million." The report cautioned, however, that "no analysis was made nor is any judgment as to reasonableness of the dollars implied." The SSEC also considered a DCAA report on the contractor's cost estimating methods, support labor ratios, and escalation factors used in preparation of the production unit cost estimate.

Because of the severe limitations it perceived in relying on the proposed production unit cost of the offerors, the Air Force felt the independent cost estimating technique was critical to ensuring adherence to design to cost constraints.

Primary reliance on this technique, which the Air Force reports is sensitive to system weight, resulted in conclusions that both offerors' initial proposals exceeded the design-to-cost constraint and final conclusions that both offerors' revised approaches were within the constraint, although the technique finally projected that there was a low probability of either offeror completing the development work within the costs proposed.

Consideration of both the independent cost analyses and the cited field reports complied, in the Air Force's view, with ASPR requirements for cost analysis and all requirements in the DOD "Joint Design-To-Cost Guide" which was not effective until October 3, 1973, after the PI had been issued.

The Air Force states that it did compare its independent cost estimate with Raytheon's independent cost estimate. Both estimates, as Raytheon is aware, are based on the same model. The Raytheon estimate, which tended to confirm its production cost estimate, was considered faulty in several respects. It did not reflect the Air Force view that Raytheon had failed to adequately explain inconsistencies in system weight despite repeated inquiries. Further, the Raytheon estimate did not evaluate four "line replaceable units" which the company considered off-the-shelf, nor did it evaluate the integration and test support subroutine of the model for production costs. In analyzing these differences, the Air Force discovered that the greatest discrepancies between Raytheon's cost estimate and the Air Force's cost estimate were the "line replaceable units" which were currently under development or being produced. Extensive data, the Air Force reports, was available for these units which showed Raytheon's costs were underestimated. Finally, the Air Force believed that Raytheon's pro-

duction cost estimates for certain miniature components was at least 100 percent low.

In specific response to the Raytheon suggestion that the cost impact of the addition of band 8 to AIL's contract will exceed the design-to-cost limit, the Air Force replies that, if the addition occurs, the target production unit cost in the contract will still be well below the $1.4 million ceiling. It adds that during the 24-month period during which the option may be added to AIL's contract the Air Force will be able to determine whether the target cost, independent cost estimate, or some other cost is coming true and that if the reassessed cost value shows that a system with band 8 included can be achieved for $1.4 million, the option will be exercised only if the threat dictates that it is required.

The Air Force also maintains that, contrary to Raytheon's allegation that AIL's "refinements" technical approach, including its band 8 approach, must necessarily be more expensive than Raytheon's "refinements" approach, both the offerors' proposals and the Air Force's independent cost estimate show that Raytheon's refinements approach is approximately 34 percent more costly than the AIL "refinements" approach, and that as to band 8 the Air Force's cost estimate showed Raytheon (although lower in proposed costs) to be 16 percent higher than AIL.

Finally, the contracting officer insists that Raytheon's proposals of a ceiling on *development* costs was not considered advantageous to the Goverment given the primary focus on achieving the production unit cost constraint. If the contractor were to hold development costs to a predetermined fixed level of dollar effort, this might hamper, in the contracting officer's view, his success in achieving the production unit cost goal.

Our review of the record shows that the same approach was used to evaluate the cost proposals of both offerors. Primary reliance was placed on the Government's independent cost estimate as a method of determining and the reasonableness and realism of the proposed development and production costs rather than on an analysis of the offeror's own cost data.

Contrary to Raytheon's allegation, we find that the contracting officer did request a field pricing support report under ASPR 3-801.5(b). With respect to production unit cost considerations, the contracting officer requested analysis of: the proposed escalation rate for the period; the learning curve to be applied in production; and the make-up of the production unit cost estimate, including definition of cost categories, equipments included, and the contractors' rationale supporting the production cost estimate.

We cannot question the right of the procuring contracting officer to stipulate specific areas for which input (audit) is required. *See* ASPR 3-801.5(b)(3).

The record also shows that volumes 9 and 10 of Raytheon's cost proposal, encompassing cost elements that are required to be examined in cost analysis under ASPR 3-807.2(c), were analyzed by the SSEC in arriving at Raytheon's rating in the cost area. Several inquires were made of Raytheon about its cost proposal as a result of this examination. Consideration was also given to the DCAA and the industrial engineer's reports on Raytheon's proposal on production cost. On this record, we cannot conclude that there was a failure to achieve minimum standards of cost analysis under ASPR 3-807.2(c).

The propriety of using independent Government cost estimates as an aid in determining the reasonableness and realism of cost and technical approaches has been approved in several of our decisions. *See* 53 Comp. Gen. 800 (1974); B-176311(2), October 26, 1973; 52 Comp. Gen. 358 (1972); and 50 *id.* 390 (1970). As we stated in 52 Comp. Gen. 870, 874 (1973):

> * * * In view of the fact that the contract will be performed on cost-plus-fixed-fee basis, *evaluated* costs rather than proposed costs provide a sounder basis for determining the most advantageous proposal. [Italic supplied.]

This position reflects the view in ASPR 4-106.5, concerning the evaluation of cost leading to the award of a development contract. Section (a) of the regulation provides that (proposed) cost should not be the controlling factor in selecting a contractor for a development contract; section (c) states that a "Government cost estimate may * * * develop the expected incidence of various cost factors in relation to performance phases * * *."

Further, we have observed that the procuring agency's judgment as to the methods used in developing the Government's cost estimate and the conclusions reached in evaluating the proposed costs are entitled to great weight since the agencies are in the best position to determine realism of costs and corresponding technical approaches and must bear the major criticism for any difficulties experienced by reason of defective analysis. B-176311(2), *supra;* 50 Comp. Gen., *supra.*

At the same time, we have cautioned against absolute reliance on the validity of Government cost estimates, in view of the performance uncertainties inherent in cost-type contracting in a case when meaningful cost negotiations were not conducted with offerors who were rated equal in technical merit. 47 Comp. Gen. 336 (1967). And we have criticized use of a Government cost estimate to exclude offerors whose prices exceeded the Government cost estimate by more than 10

percent from price discussions. *See* 50 Comp. Gen. 16 (1970). However, from our review, we cannot conclude that the Air Force used the independent cost estimates in an unreasonable fashion in this case.

The "Joint Design-To-Cost Guide," which became effective after the issuance of the PI, specifically provides for use of parametric cost estimates in arriving at decisions about production unit cost estimates. Further, in describing contractors selection procedures for the development contract, the Guide notes the inconclusiveness, for evaluation purposes, of actual production cost figures incurred in prototype fabrication during the pre-development phase of the acquisition process. The inconclusiveness is caused, the Guide notes, by the small quantity of units and the likelihood that neither prototype design nor fabrication techniques are likely to be fully representative of the production item. In this context, we must conclude that the Air Force was entitled to place great emphasis on its independent cost estimating technique in evaluating production unit cost proposals.

Further, the Air Force used this technique with equal emphasis and thoroughness on both offerors' cost proposals. Although the technique assessed a relatively higher cost risk penalty on Raytheon's proposal for its system weight inconsistency, AIL's cost proposal was also finally evaluated at production and development cost figures substantially higher than proposed. On this record, we cannot conclude that the Air Force unreasonably estimated Raytheon's proposed cost or unreasonably understated AIL's cost in the manner suggested by Raytheon. Neither can we dispute the Air Force's position that the addition of band 8 to the AIL contract will only be made, under current budgetary limitations, if the estimated projected cost of band 8 is within the design-to-cost limit.

The disparity in projected costs between the Air Force's parametric cost analysis and Raytheon's parametric cost analysis should, in our view, have been explored in more depth during negotiations with Raytheon. We agree with the Air Force view that it did conduct negotiations with Raytheon on the company's system weight discrepancy, which explains to a significant degree, in the Air Force's estimation, the differences in analyzed costs. Because this negotiation was had, we cannot conclude that Raytheon was not, at least indirectly, made aware that its cost estimate was questionable. In any event, we see no evidence that cost negotiations with AIL were more extensive than those with Raytheon or that the Air Force pinpointed specific areas where the AIL proposal was considered unrealistically low.

We think it would have been preferable for the Air Force to have advised the offerors in general terms that the cost proposals were considered unrealistic and in detailed terms the specifics of the cost esti-

mate discrepancies, so far as another offeror's unique technical and cost approach would not be disclosed.

The general unconcern of the Air Force about exploring, through meaningful negotiations, the disparity between the offerors' proposed costs and the Air Force's projected costs, as determined by the parametric estimates, is shown, in our view, by the unresolved discrepancy between the actual price (target cost and fee of $31.6 million) of AIL's awarded contract for the development work and the parametric cost estimate for the work ($40.4 million). We note that at the Air Force's cost estimate level AIL would not earn any of the target fee.

The failure to resolve this discrepancy resulted in an award which, at least in its development cost aspects, was inconsistent with ASPR 3-405.4(b) which contemplates the negotiation of realistic target costs to provide an incentive to the contractor to earn up to the maximum fee through his ingenuity and effective management. *See* 47 Comp. Gen., *supra*, at 346. Further, we think the award eliminated, in effect, the PI direction for offerors to establish the realism of their proposed development costs.

The Air Force position on the unresolved discrepancy is that it is insignificant, compared to the savings, instead of a cost overrun, that may be had if AIL successfully achieves its production unit cost goal on the possible production contract which has an ultimate cost potential of $300 to $400 million. Thus AIL, in the Air Force view, should be encouraged to spend considerably in excess of the awarded price on the development contract, if that is necessary, to achieve ultimate cost success (which is highly probable according to the estimate) in the production contract. This position explains, we think, why the Air Force, firmly believing in the technical superiority of AIL's system, did not consider Raytheon's proposed development cost ceiling to be advantageous.

The Air Force, in our view, eliminated, without formally advising the offerors, the cost realism standard as it applied to development costs. Nevertheless, we are unable to conclude that the selection of AIL, whose evaluated production unit cost for its technically superior offer was within $1.4 million, was inconsistent with the "design-to-production-unit-cost" evaluation criterion which was of paramount importance. Nor can we conclude that had the Government advised offerors of the deletion of the development cost realism standard, Raytheon would have submitted a revised technical proposal and closed the wide technical gap in the rating of the proposals.

We note, in this connection, that production cost limitations, rather than development cost limitations, restricted Raytheon's technical effort. As Raytheon stated at page II-10 of its May 2 rebuttal to GAO:

Those familiar with computers [the RFS/ECMS processer is a computer system] know that size and expense of a computer is determined in large part by the * * * data to be processed * * *. This fact was fundamental to Raytheon's decision to eliminate the (refinements approach). Raytheon considered it prudent because of cost to limit the amount of data * * * *and thus be* * * * *within the $1.4 million production unit cost.* [Italic supplied.]

Further, we recognize that Raytheon has requested only that we terminate AIL's contract and direct the award to Raytheon rather than requesting cancellation of the award and further negotiations with both offerors as a prelude to a new award. We think Raytheon implicitly recognizes, by the limited request, that further negotiations are impossible, as a practical matter, given the disclosure by all parties of considerable technical and cost data during the course of the protest.

On this analysis we must conclude that neither a direct award to Raytheon given AIL's present technical superiority nor further negotiations with both offerors would be appropriate to correct the defects noted. We are, however, recommending that the Air Force take action to prevent a repetition of these deficiencies in the future.

In view of our conclusion that the Air Force eliminated cost realism with respect to development costs, we find it unnecessary to consider whether the SSEC should have considered and evaluated Raytheon's cost ceiling proposal for development costs, even assuming it should not have been considered "late."

V. THE DELETION OF BAND 8 AND ITS PARTIAL RESTORATION BY NOTICE 5 WAS IMPROPER

Raytheon urges that the deletion of band 8 improperly eliminated a known essential requirement. Indeed, Raytheon maintains that the essentiality of band 8 coverage is demonstrated by the Air Force's current action in fitting certain planes with equipment operating at band 8 frequencies.

Raytheon also asserts that the deletion of band 8 permitted the SSEC to maintain illusions that the design-to-cost ceiling had not been breached and that the abbreviated system was still effective. Further, the deletion resulted, in Raytheon's view, in a "tailoring" of the procurement to AIL by eliminating from consideration AIL's band 8 approach which Raytheon believes was higher in technical risk than Raytheon's band 8 approach.

Raytheon also claims that the deletion of band 8 capability could not be sold to those responsible for operational requirements. Because the deletion could not be sold, band 8 coverage was partially restored via the option technique. This partial restoration, Raytheon believes, still did not cure the improper deletion of band 8 since band 8 option approaches were still not evaluated in determining the successful of-

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feror, thus deferring the alleged technical shortcomings of AIL's band 8 proposal for future consideration.

Responding to Raytheon's claim that the deletion of band 8 was designed to tailor the requirement to AIL's approach because of the higher technical risk associated with that approach, the Air Force states, to the contrary, that Raytheon had a higher technical risk in its approach for band 8 than AIL had in its approach for the frequency. Air Force further states that AIL demonstrated certain components of its approach during Phase I; that certain tubes similar to those required by AIL in its band 8 approach had been delivered under "another DOD program;" and that, while there was a problem with efficiency in certain other components, the tubes offered low risk in system development and operations.

By contrast, the Air Force technical advisers, serving as advisers to the SSEC, concluded that fundamental problems remained to be solved in the Raytheon approach without considerable development. Notwithstanding the greater confidence in the AIL approach, the Air Force still felt constrained to delete the band 8 requirement because the Government's estimate of cost risk for the systems with band 8 coverage had too great a risk of exceeding the design-to-cost constraint.

In this perspective, the Air Force maintains that the deletion of band 8 approaches from proposal evaluation served to strengthen Raytheon's proposal rather than detract from its overall rating as Raytheon believes. Consequently, the Air Force rejects the view that the partial restoration of band 8 via the option technique prejudiced Raytheon or that it was an indirect way of deferring the alleged shortcomings of AIL's approach for future consideration.

Regarding band 8, the Air Force agrees that it is important, but that technical and cost risk required its deletion. Notwithstanding its statement about the importance of band 8, the Air Force still considers a system with only band 1 through 5 coverage to be operationally effective. Further, the band 8 approach going into certain planes, the Force points out, has been flight tested and does not present the same risks as the band 8 approach by Raytheon in the subject procurement.

Lacking an independent technical and cost analysis of the relative merits of the offerors' band 8 approaches, of the effectiveness of a system with only band 1 through 5 coverage, and of the stated difference between the band 8 approaches being installed in certain planes and contemplated for the subject system, we are not in a position to question the Air Force technical judgment on these issues. Nor can we question the validity of the Air Force statement that band 8 will only be exercised if the design to cost constraint will not be exceeded and the "threat" requires it.

Consequently, and since the record contains "raw" technical and cost source data which, taken at face value, supports the Air Force's conclusions on these issues, we cannot question its position.

Given our acceptance of the Air Force's conclusions, we cannot question the right of the Air Force to delete band 8 coverage from the basic system design in order to preserve the design-to-cost constraint and to partially restore band 8 via the option technique (even assuming that this technique was dictated by Air Force officials who reversed the previous decision to completely delete band 8).

It is axiomatic that procuring agencies have the right to determine their minimum requirements at every stage of the procurement process subject only to the qualification that there be a rational basis for their determination. We think the record supports conclusions that the Air Force had a rational basis for its decisions to delete band 8 based on technical/cost considerations, and to partially restore band 8 via the option technique given the importance of band 8 coverage for possible future threats and the possibility that the production unit cost estimates during the Phase II contract will permit the addition of band 8 without exceeding the design-to-cost constraint.

As to the procedural validity of the option technique, ASPR 1–1501, concerning option provisions for supplies and services, specifically provides that the use of appropriate option provisions in research and development contracts are not precluded. Using ASPR 1–1504(c), (d), and (e) as guidelines for deciding whether the subject option should have been evaluated in determining the successful offeror, as Raytheon contends, we find that options may be evaluated only if the Government may exercise the option at time of award or if the contract is fixed-price. Since the Air Force did not contemplate exercising the option at the time of award and the contract here was a cost rather than a fixed-price type, we cannot question the procedural validity of the option technique.

VI. AIL WAS ALLOWED TO PROPOSE ON A BASIS NOT GRANTED RAYTHEON

Raytheon finally urges that AIL was improperly allowed to propose a production unit cost which was contingent on a production buy of 24 units at a rate of 4 per month. Raytheon states that it was not allowed to propose on this basis and, thus, was denied equal negotiation opportunity.

The Air Force agrees with Raytheon's charge that the terms of AIL's contract, unlike the terms Raytheon was allowed to propose on, stipulate that the production cost limit is contingent on the Air Force buying 24 systems at the rate of 4 systems per month. The Air Force

maintains, however, that the terms do not conflict with the statement set forth in both offeror's proposals that the design-to-cost limit of $1.4 million is based on the cumulative average cost of 241 systems delivered to the Air Force. It says it permitted this wording at AIL's insistence since a minimum buy was of concern to the company, unlike Raytheon. Further, it says that the production schedule in Raytheon's referenced proposal is the same as that provided in AIL's contract, namely: 4 per month in accordance with "Annex A to the B-1 RFS/ECM Statement of Work." Thus it denies that AIL was permitted an unfair advantage in proposing on this basis.

We agree with the Air Force denial. So long as offerors were told to base their proposed production unit costs on the cumulative average costs for 241 production units, we do not see any unfair advantage in permitting an offeror, if that was its expressed concern, to make its proposed cost contingent on the accuracy of the projected quantity.

Indeed, we think it is implicit in the directive to propose on the basis of 241 units that revision in proposed costs would be allowed if the projection is incorrect, as Raytheon suggests. Our view is strengthened by the presence of clause "k" in section (j) of the "model contract" provisions of the PI which specifically provides that:

> * * * an equitable adjustment * * * will be made * * * in the production unit price amount * * * at the time * * * of any Government change in * * * production quantity, schedule or specifications * * * which impacts the production unit cost, and is incorporated prior to negotiation of the initial production contract.

This case is therefore distinguishable from 49 Comp. Gen. 156 (1969), cited by Raytheon, in which there was considered a situation where an actual change in the Government requirements was not properly communicated to offerors. Here, we find no change in requirements that had to be communicated.

The protest is denied.

[B-180672]

Travel Expenses—Advances—Accountability

Special Agent of the Drug Enforcement Administration whose wallet containing $1,185 in cash travel advance funds was stolen from his locked motel room while he was sleeping may nevertheless not be relieved of liability for the loss of such funds since travel advancements are considered to be like loans, as distinguished from Government funds and hence money in the wallet was private property of the Special Agent and he remains indebted to the Government for the loan, and must show either that it was expended for travel or refund amount not expended.

In the matter of the relief of liability for loss of travel advancement, September 5, 1974:

This matter involves a request for a decision on whether Thomas S. Kostecke, a Special Agent employed by the Drug Enforcement Ad-

ministration (formerly designated as the Bureau of Narcotics and Dangerous Drugs (BNDD)), United States Department of Justice, may be relieved from liability for the loss by theft of $1,185 in cash representing a travel advancement.

Special Agent Kostecke was issued a travel advancement of $1,300 on February 6, 1973, which was to be utilized by him to pay his travel and subsistance expenses while he performed temporary duty away from his permanent post of duty. He was assigned to the Mobile Task Force, Operation "Sandstorm" located at Pittsburgh, Pennsylvania, and maintained his residence at the Holiday Inn Motel, Room 230, Route 8, Allison Park, Pennsylvania.

At approximately 1 a.m., February 16, 1973, Special Agent Kostecke entered his room to retire for the night and secured the self-locking door with the "dead-bolt" locking system which requires a master key to be opened from the outside. When he awoke at 4:30 a.m. he noticed that the door to his room was open and an inventory of his belongings revealed that his wallet containing $1,185 in travel advancement funds was missing. He reported the theft to the management and local police and discovered that similar burglaries had recently occurred at this motel, apparently through the use of a master key. The issue is whether Special Agent Kostecke, on the basis of the situation described above, may be relieved of liability for the lost travel advancement.

Travel advancements are governed by the provisions of 5 U.S. Code 5705 which provides:

5705. *Advancements and deductions.*

An agency may advance, through the proper disbursing official, to an employee or individual entitled to per diem or mileage allowances under this subchapter, a sum considered advisable with regard to the character and probable duration of the travel to be performed. A sum advanced and not used for allowable travel expenses is recoverable from the employee or individual or his estate by—

(1) setoff against accrued pay, retirement credit, or other amount due the employee or individual;

(2) deduction from an amount due from the United States; and

(3) such other method as is provided by law.

This office has always considered travel expense advancements in the nature of a loan, as distinguished from "Government funds," with rare exceptions when the travel funds advanced are greatly in excess of the traveler's travel expense requirements and when the agency has stated that the purpose of the excess funds advanced is to create an impression of affluence for operational purposes. In the instant case, the advance was specifically stated to have been made for the purpose of enabling the agent to pay for his per diem expenses while he performed temporary duty. We must therefore conclude that the agent's wallet contained personal funds on loan from the Government. B-178595, June 27, 1973.

Accordingly, we are unaware of any authority that would permit us to relieve Special Agent Kostecke of this indebtedness, even if we were to assume, without making a finding, that he was free of negligence in regard to the loss.

[B-176994]

Agriculture Department—School Lunch and Milk Programs—Cash Payments in Lieu of Commodities

Department of Agriculture has authority under National School Lunch Act, as amended by Public Law 93-326, to make cash payments to States for school lunch program in lieu of donating any commodities, where distribution of donated commodities is not possible, since such authority is expressly recognized and affirmed in conference report on Public Law 93-326 and is otherwise consistent with statutory language and legislative history.

In the matter of cash payments to States in lieu of donated commodities under the school lunch program, September 6, 1974:

This decision to the Secretary of Agriculture, in response to a submission by Assistant Secretary Richard L. Feltner, concerns the authority of the Department of Agriculture to provide cash payments to States, in lieu of the donation of any commodities, for use in the school lunch program under the National School Lunch Act, 42 U.S. Code 1751 *et seq.*, as amended by the National School Lunch and Child Nutrition Act Amendments of 1974, approved June 30, 1974, Public Law 93-326, 88 Stat. 286 (hereafter "Public Law 93-326").

Public Law 93-326 added a new section 14 to the National School Lunch Act (42 U.S.C. 1762a) which requires the Secretary of Agriculture during fiscal year 1975 to use funds available under section 32 of the Agriculture Act of 1935, as amended, 7 U.S.C. 612c, to purchase agricultural commodities and their products for donation to maintain the annually programmed level of assistance under certain programs, including the school lunch program; and, if stocks of the Commodity Credit Corporation are not available, to use Corporation funds to purchase for such donation agricultural commodities and their products of the types available under section 416 of the Agriculture Act of 1949, as amended, 7 U.S.C. 1431. Public Law 93-326 also adds subsection (e) to section 6 of the National School Lunch Act, as amended by the National School Lunch and Child Nutrition Act Amendments of 1973, Public Law 93-150, approved November 7, 1973, 87 Stat. 560, 562, 42 U.S.C. 1755, which provides, *inter alia*, that for fiscal year 1975 "the national average value of donated foods, or cash payments in lieu thereof, shall not be less than 10 cents per lunch * * *."

The Assistant Secretary's letter indicates that the State of Kansas, anticipating the phaseout of commodity donations, dismantled its food distribution system, so that the State now lacks the personnel, facilities,

and budget to distribute federally donated foods for school lunch programs. For the State to reactivate its distribution system for the remainder of fiscal year 1975 would, in the opinion of the Governor and other officials, be unreasonable and contrary to congressional intent. In this regard, the Assistant Secretary refers to the following statement from the conference report on the legislation enacted as Public Law 93–326, H. Report No. 93–1104, at 7:

> At least one State has phased out its commodity distribution facilities according to the previously-stated intention of the Department of Agriculture to terminate the commodity distribution program and now lacks the personnel, facilities, and budget to distribute commodities for the school lunch program. In such a case, it is the Conferees' expectation that the Secretary of Agriculture will be able to work out with the affected State arrangements for the distribution of commodities made possible through this new legislation. At the same time the Conferees wish to stress that no State is to be penalized because of previous action on the part of the State in phasing out commodity distribution facilities and mechanisms. In the unusual case where commodity distribution is not possible, there is sufficient authority for the Secretary to make cash payments in lieu of commodities. When such payments are made, the State educational agency shall promptly and equitably disburse any cash it receives in lieu of commodities to schools participating in programs under the National School Lunch Act and such disbursements shall be used by such schools to obtain agricultural commodities and other foods for their food service program.

The Assistant Secretary indicates that Kansas is the State described in the foregoing passage from the conference report. He further indicates that it has been concluded that the situation of Kansas meets the criteria set forth in the report, and warrants special consideration to receive solely cash and no commodities. However, the Agriculture Department's Office of General Counsel has determined that the Department lacks authority to provide all cash in lieu of commodities to any State.

The legal determination referred to is a memorandum dated August 5, 1974, from the Director, Community Programs Division, to the Administrator, Food and Nutrition Service. This memorandum states that cash payments may be used under the National School Lunch Act for two purposes: to make up the difference between the annually programmed level of assistance in the form of commodities and the 10 cents per lunch level specified in subsection 6(e), added by Public Law 93–326; and to make up the difference between commodities initially programmed for donation and estimated deliveries, as provided in subsection 6(b), added by Public Law 93–150, 87 Stat. 562, 42 U.S.C. 1786(b). The memorandum then concludes that "the quoted statement in the conference report [on Public Law 93–326, *supra*] may not be construed to provide authority to make distributions in cash other than" for the two purposes indicated above. The memorandum apparently construes the language of the conference report as merely indicating an intent that every effort should be made to facilitate distribution of commodities, particularly in situations where

States have dismantled their distribution facilities. To this end, the memorandum notes that the Department may defray distribution and related costs.

We cannot agree with the construction of the conference report language advanced in the August 5 legal memorandum. It is true that the conference report anticipates and encourages the making of satisfactory arrangements for distribution of commodities. However, the report goes on to state:

> * * * At the same time the Conferees wish to stress that no State is to be penalized because of previous action on the part of the State in phasing out commodity distribution facilities and mechanisms. *In the unusual case where commodity distribution is not possible, there is sufficient authority for the Secretary to make cash payments in lieu of commodities.* * * * [Italic supplied.]

In view of this language, it is obvious to us that the conference report expressly recognizes and affirms the Department's authority to make cash payments in lieu of—*i.e.*, instead of—commodity donations in the unusual circumstances referred to therein. We further believe that the interpretation and statement of intent thus set forth in the conference report must be considered controlling in construing subsection 6(e) unless it is clearly inconsistent with the terms of the statute or conflicts with the legislative history as a whole.

The conference report statement does not appear to be questionable in either respect. As noted previously, Public Law 93–326 amended section 6 of the National School Lunch Act by adding subsection 6(e) to provide for fiscal year 1975 a "national average value of donated foods, *or cash payments in lieu thereof*," of not less than 10 cents per lunch. This language is by its terms phrased in the alternative. Thus while it was clearly envisioned that the alternative of cash payments would normally apply in combination with donation of commodities at the level already programmed for by the Department in its fiscal year 1975 budget—*see, e.g.*, H. Report No. 93–1104, 6; Cong. Rec., June 17, 1974, H5149 (remarks of Mr. Quie)—the statute does not literally require such a combination in all cases. Moreover, the basic mandate of subsection 6(e) as added by Public Law 93–326 is that a national average value of 10 cents per lunch be achieved. To construe this provision as precluding cash payments absent some donated commodities in circumstances where distribution of commodities is not possible would appear incongruous and contrary to the statutory purpose and mandate. [Italic supplied.]

With reference to the legislative history as a whole, we note that the statement in the conference report concerning cash payments may be traced back to developments during Senate debate on the legislation enacted as Public Law 93–326. In the course of Senate consideration of this legislation, Senator Dole offered an amendment to permit States to elect whether to receive cash in lieu of commodity donations.

In support of his amendment, Senator Dole described the situation in Kansas with respect to the dismantling of its commodity distribution system. Senator McGovern, floor manager of the legislation, suggested that, while the Dole amendment appeared to have merit, it should be assessed and discussed in the conference or considered before the Committee on Agriculture and Forestry. Senator Dole then withdrew his amendment, stating:

> * * * I think the amendment would do equity to all States. *Perhaps it can be worked out in conference by some report language or change.* If not, the Senator from Kansas is willing to have early hearings on the amendment. [Italic supplied.]

See generally Cong. Rec., May 21, 1974, S8747–48.

Senator Dole was one of the Senate conferees and it is evident that the statement in the conference report was included in response to the problem raised by him. Therefore, it presumably reflects the considered judgment of the conferees that this problem could be resolved on the basis of the legislation as set forth in the conference report and subsequently enacted. This point was not specifically raised during consideration of the conference report in either House; although Mr. Perkins may have had it in mind when he referred to "* * * the minimum level of 10 cents per lunch assistance in the form of commodities, or possibly in cash in lieu thereof * * *." Cong. Rec., June 17, 1974, H5146. In any event, we find nothing in the legislative history which is inconsistent with the conference report statement. On the contrary, we believe that the legislative history of Public Law 93–326 as a whole tends to reinforce this statement.

In sum, for the reasons stated herein, it is our opinion that the Department of Agriculture has authority—and, in fact, an obligation—to make all cash payments in lieu of commodity donations under the circumstances specified in the conference report, *i.e.*, where commodity distribution is not possible. We have no reason to question the Assistant Secretary's conclusion that such circumstances are satisfied in the case of Kansas. However, as noted previously, it does appear that full cash payments should be made only where arrangements for commodity distribution cannot be effected. In this connection, we would suggest that the possibility of having the Department defray distribution and related costs, as discussed in the Department's August 5 memorandum might be explored with officials of the State of Kansas, if this has not already been done.

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[B-180113]

Equipment—Automatic Data Processing Systems—Selection and Purchase—Competitive Basis

Protester objecting to alleged sole-source procurement is not without standing to have protest considered because of failure to participate in earlier, competitive phase of procurement for automatic data processing systems since it is current noncompetitive procurement action which is basis of protest.

Contracts—Protests—Timeliness—Contract Award Notice Effect

Protest filed within 5 days of protester's reading announcement of procurement action in trade publication but not within 5 days of earlier appearance in same publication of article which revealed procurement actions is not untimely, since trade publication article is not of nature to have put protester on actual or constructive notice of procurement.

Equipment—Automatic Data Processing Systems—Selection and Purchase—Federal Supply Schedule

Army's procurement by renting initially and then purchasing automatic data processing equipment (ADPE) from one vendor pursuant to delivery order issued against Federal Supply Schedule contract 6 years earlier was unauthorized, since delivery order, which Army regarded as long-term contractual arrangement, was effective only with respect to equipment actually ordered for delivery and not with respect to additional equipment listed for possible future acquisition, which could be acquired only through issuance of subsequent delivery orders or contract awards in accordance with then applicable regulations.

Equipment—Automatic Data Processing Systems—Lease-Purchase Agreements—Acquisition of Equipment

Army's procurement of automatic data processing equipment (ADPE) without renewed competition was contrary to Federal Property Management Regulations (FPMR) Temporary Reg. E-25, because Army did not have required delegation of authority from General Services Administration for sole-source ADPE procurements, and to maximum order limitation in ADP Schedule contract. Therefore, Comptroller General recommends that equipment currently installed on rental basis, and additional ADPE proposed to be acquired, not be purchased except in accordance with Comptroller General views and all applicable regulations, including new FPMR Temporary Reg. E-32 promulgated at 39 Fed. Reg. 25421.

In the matter of Comdisco, Inc., September 6, 1974:

This case concerns the Department of the Army's course of dealing with International Business Machines Corporation (IBM) with respect to the lease and subsequent purchase of data processing systems and related equipment for the Army Materiel Command's logistics management program.

The Army's actions were taken pursuant to a contractual arrangement entered into with IBM in 1967. However, the protester asserts that the Army's actions in obtaining certain equipment from IBM in 1973 resulted in sole-source procurements which were not properly authorized. The Automated Data and Telecommunications Service of the General Services Administration (GSA), upon review of the situation, has determined that the Army acted without requisite au-

thority. For the reasons indicated below, we agree with the protester and GSA.

The procurement actions in question had their origin in the mid-1960's, when the Army developed system specifications for automatic data processing equipment (ADPE) for the program, which was originally designated "NAPALM" and now is referred to as "ALPHA." The specifications were provided to 17 ADPE manufacturers, but only IBM responded with a detailed proposal. On May 5, 1967, the Army issued a delivery order to IBM pursuant to IBM's proposal for the lease and installation of a pilot system. Prices were subject to adjustment in that they were to conform to the then current IBM/GSA Federal Supply Schedule (FSS) contract. GSA advised that at that time a "bundled" pricing approach was used and equipment was level-priced on a Government-wide basis and included the costs for software and other associated services. The delivery order further provided for possible future orders of additional systems for installation at various Army facilities upon the occurrence of certain conditions. All systems were to be subject to the right of the Government to exercise an option to purchase. Subsequently additional equipment was ordered on a rental basis and in 1970 the installed systems were purchased pursuant to the option provision.

On January 1, 1973, the Army issued "Modification No. AE" which upgraded some peripheral equipment associated with the systems encompassed by the original delivery order and provided that the Government would issue delivery orders for rental of nine additional systems. Three more systems were then ordered and installed on a rental basis. In June 1973, IBM proposed that the Army purchase those three systems plus an additional six systems, all at a reduced price. The Army decided it would be to its advantage to do so, and on August 23, 1973, it issued "Modification AG," by which it exercised its purchase option with respect to the three installed systems and certain equipment and agreed to order, initially on a rental basis, the remaining six systems during the next 6 months. It further agreed to purchase those six systems upon successful completion of acceptance testing. It is reported that three of the six systems were ordered and installed by January 1974, and that one of them has been purchased.

On November 21, 1973, this Office received a protest from Comdisco, Inc., a company dealing in used computer equipment, against the Army's decision to purchase the nine systems from IBM. In a brief subsequently filed on its behalf Comdisco objected specifically to Modifications AE and AG, claiming that it could have provided the systems and equipment at a significant cost savings to the Government. Comdisco further asserted that the execution of the two modifications represented sole-source procurements and were therefore contrary to the

Brooks Act, Public Law. 89–306, 79 Stat. 1127, 40 U.S. Code 759, and to various regulations, directives and orders pertaining to ADPE procurements. The Army takes the position that it conducted a competitive procurement during 1965, 1966, and 1967 which resulted in the selection of IBM to provide the ALPHA systems and equipment, and that its actions in 1973 were within the scope of its contractual arrangements with IBM and were not new sole-source procurements. It therefore views the Brooks Act and implementing directives as inapplicable to the acquisition of systems and equipment covered by Modifications AE and AG. GSA, however, which is authorized by the Brooks Act to "coordinate and provide for the economic and efficient purchase, lease, and maintenance" of ADPE by all Federal agencies and which subsequent to 1967 has promulgated regulations pursuant to that authority, has refused to ratify or agree to the Army's actions in this case and has concluded that "Modifications AE and AG were entered into by the Army without appropriate authority."

At the outset, we must consider IBM's assertions that Comdisco is without standing to protest and in any event filed a protest that is untimely. IBM questions Comdisco's standing because that firm did not submit a proposal in 1965–1966. However, Comdisco's protest is against what it views as sole-source procurement actions taken by the Army in 1973, and we fail to see the relevance of Comdisco's nonparticipation in the earlier equipment selection stages of the ALPHA program. With respect to the timeliness issue, our Interim Bid Protest Procedures and Standards require that protests be filed "not later than 5 days after the basis for protest is known or should have been known, whichever is earlier." 4 C.F.R. 20.2(a). Comdisco states that it learned in November 1973 that the Army had purchased an IBM system through an announcement in a trade publication. This apparently was in reference to the Army's delivery order BF02 dated October 31, 1973, which exercised the purchase option on another 360/65 IBM system. However, IBM has referred us to an article in the September 10, 1973, issue of that same trade publication, which reported that the Army had recently converted leased IBM equipment "to purchase" as part of the ALPHA program. IBM suggests that Comdisco should have been on notice of Modification AG from September and that its November protest therefore was untimely. The record is not entirely clear as to exactly when Comdisco learned of the actions subsequently protested. However, we are not convinced that the trade publication article is of such nature that it should be regarded as having put Comdisco on notice, actual or constructive, of the Army's decision to purchase from IBM. In any event, 4 C.F.R. 20.2(b) provides that a bid protest which is not timely filed may be considered if it raises issues significant to procurement practices or procedures. We

think this protest, calling into question the Army's procedures for long term acquisition of ADPE, as well as the relationship between those procedures and the acquisition requirements imposed by GSA, raises significant issues.

The Brooks Act, *supra*, authorizes the Administrator of General Services to provide ADPE to Federal agencies by "purchase, lease, * * * or otherwise." The Act further authorizes the Administrator to delegate to other Federal agencies his authority to lease or purchase such equipment. Pursuant to that exclusive authority, the Administrator issued (initially on January 17, 1969) regulations (Subpart 101–32.4 of the Federal Property Management Regulations [FPMR], 41 C.F.R. 101–32.400 et seq.) which are binding on all agencies. 51 Comp. Gen. 457 (1972). The Army regards these regulations as inapplicable to Modifications AE and AG because it views the acquisition of ADPE under the provisions of the modifications as concomitant to the "basic 1967 'selection' contract" and not as new procurement.

According to the Army, its dealing with IBM was in accordance with Bureau of Budget (now Office of Management and Budget [OMB]) Circular A–54 entitled "Policies on Selection and Acquisition of Automatic Data Processing (ADP) Equipment" which, unlike the FPMR provisions dealing with ADPE, was in effect in 1967. The purpose of the Circular, dated October 14, 1961, is to prescribe policies on:

(a) making selections of equipment * * *
(b) making determinations as to whether the ADP equipment to be acquired will be leased, purchased, or leased with an option to purchase.

Section 4 of the Circular states:

The selection of ADP equipment includes the initial selection of ADP equipment, the selection of ADP equipment additional to that on hand, the selection of ADP equipment to replace ADP equipment on hand, the modification of equipment on hand, * * * or combinations of the foregoing.

Certain considerations for the selection process, including the need for competition, are then set forth. Section 5 of the Circular states:

The method of acquiring ADP equipment will be determined after careful consideration of the relative merits of all methods available (i.e., purchase, lease, or lease-with-option-to-purchase).

Section 5 further states:

The lease-with-option-to-purchase method is indicated when it is necessary or advantageous to proceed with the acquisition of the equipment that meets system specifications. but it is desirable to defer temporarily a decision on purchase * * *. This situation might arise when it is determined that a short period of operational experience is desirable to prove the validity of a system design on which there is no previous experience, or where decisions which might substantially alter the system specifications are imminent.

These provisions, according to the Army, address two aspects of the procurement process, "selection" (which requires competition)

and "acquisition" (which implements the selection). Furthermore, the Army states, the Circular recognizes lease-with-option-to-purchase as a distinct method of acquisition. Thus, the Army regards the issuance of the May 1967 delivery order as the acquisition of its ALPHA systems. To regard it otherwise, says the Army, would render the lease-option-purchase method of acquisition recognized in OMB Circular A–54 "a complete nullity" and would require the Army "to embark on a new procurement process beginning with solicitation—a result never intended." Such a result, the Army continues, would be "patently absurd" because the basic contract provided not only for hardware, but also for peripherals, systems engineering training, maintenance service and free test time. Thus, the Army concludes, "an *acquisition* under the lease-option-purchase provision of Section 5 does not result in a '*new procurement*' requiring another *selection* pursuant to the policies in Section 4 of OMB Circular A–54."

It is true that OMB Circular A–54, which continued to have validity after enactment of the Brooks Act by virtue of a provision in the Act making GSA's authority subject to the "fiscal and policy control" of OMB (The control over policy was transferred to GSA by Executive Order 11717 dated May 9, 1973.), lists lease-with-option-to-purchase as a method of acquiring ADPE. We also agree with IBM's statement that "the parties contemplated a mutual relationship which would extend over a number of years and involve acquisitions beyond the initial pilot systems." However, we do not agree that Modifications AE and AG can be regarded as mere administrative implementations of an earlier procurement decision and thus not subject to intervening policies and regulations applicable prospectively to ADPE acquisitions.

First of all, we believe that the OMB Circular, which establishes policy guidance for executive agencies, must be read in conjunction with the implementing FPMR provisions which, as noted above, are binding on all Federal agencies. FPMR 101–32. 402.5 defines procurement as "the acquisition of ADPE, software, maintenance service, or supplies by purchase or lease." Thus, under this regulatory framework, the various FPMR provisions are applicable to the *acquisition* stage and not only to the *selection* stage of ADPE procurements. Furthermore, since the FPMR provisions define procurement only in terms of lease or purchase, it follows that both the initial acquisition by lease (with option) and the exercise of an option to purchase are clearly procurement actions under the FPMR. Although we have recognized that not all of the FPMR and ADP Schedule provisions are applicable to purchases of leased equipment previously installed (see Report B–115369, "More Competition Needed In The Federal

Procurement Of Automated Data Processing Equipment," May 7, 1974, regarding inapplicability of maximum order limitations), neither do we believe that the exercise of an option to purchase ADPE is a mere administrative matter totally unfettered by procurement policies and guidance. We note that GSA has long been providing guidelines to agencies with respect to purchasing leased equipment. For example, GSA alerted all agencies by letter dated April 26, 1971, that recent ADPE marketing changes could offer acquisition opportunities more advantageous than purchasing installed leased equipment. Also, by Special Notice No. 7 dated November 30, 1973, and effective for fiscal year 1974, GSA informed agencies that the on-site presence of rented IBM equipment was "not justification for its conversion to purchase." Instead, the third party market in IBM equipment ordinarily "must be given an opportunity to offer on all requirements for conversion from rental to purchase." *See, also* B-174414, July 19, 1972, in which we recognized that the awarding of a purchase contract contrary to FPMR provisions and "the import of the letter of April 26, 1971" could result in a holding that the contract was illegal and subject to cancellation.

In any event, Modifications AE and AG involved more than the exercise of an option to purchase previously installed leased equipment. They also involved a commitment by the Army to acquire additional systems and equipment by purchase after an initial lease period adequate for acceptance testing. Although the Army apparently also regards these actions as mere acquisitions not subject to the regulations applicable to "selection" of a particular vendor's ADPE, we believe that these actions must be regarded as decisions to procure and thus subject to the regulatory provisions applicable to ADPE procurements.

The original delivery order obligated the Government to order only the pilot system (and even that was made contingent on the availability of funds). It specifically provided that the "Government may place delivery orders" for additional systems, but that "the Government shall not be obligated to place any such delivery order or orders, or be under any other obligation in connection therewith." While it is clear from the delivery order that it was based on IBM's detailed proposal to furnish systems, peripheral equipment, and services over a period of years, it is also clear that no decisions regarding subsequent acquisitions had been made and no rights accrued to IBM to have the Government order additional equipment or exercise a purchase option with respect to the system leased initially. Furthermore, the delivery order itself clearly provided that it was issued pursuant to IBM's FSS contract No. GS-OOS-58109, and that the terms, con-

ditions and prices were to be in accordance with the fiscal year 1968 FSS contract then being negotiated by IBM and GSA. Apparently, the Army views this delivery order as an all-encompassing contractual arrangement providing for IBM to provide whatever ADPE the Army would subsequently decide to obtain for the ALPHA program. We believe, however, that the delivery order, although envisioning subsequent orders, cannot be regarded as a long-term procurement contract. Rather, it must be construed as an order against a current FSS Schedule contract for specified equipment to be delivered by a particular time, with the result that any desired acquisition of additional equipment would necessitate follow-on procurement action such as a contract award or issuance of a delivery order pursuant to the then current Schedule contract. This is consistent with OMB Circular A-54, which recognizes that while purchase/delivery orders issued pursuant to FSS Schedule contracts normally contain detailed provisions to insure that specific agency requirements are met, they are subject to and controlled by the terms, conditions and prices contained in the Schedule contracts. This is also consistent with the views of GSA, which we think are entitled to significant weight since that agency has the statutory responsibility and authority for Government ADPE procurements. GSA regards the Army's acquisition of systems and equipment subsequent to 1967 as having been accomplished through the issuance of delivery orders against then current Schedule contracts rather than pursuant to the original delivery order.

Accordingly, it is our considered opinion that although the Army and IBM viewed the 1967 delivery order as the creation of a long-term contractual arrangement (based at least in part on IBM's position as the sole company willing or able, in 1967, to provide what the Army required), that document, as a delivery order against an FSS Schedule contract, effected the procurement only of the prototype system that was ordered for delivery. Therefore, procurement of the remaining equipment listed in the delivery order for potential future orders necessarily was dependent upon subsequent puchase or delivery orders, the issuance of which was subject to regulations applicable to ADPE procurements. Thus, while we have expressed the opinion that regulations in effect at the time of the execution of a contract fix the rights of the parties under that contract and the adoption of subsequent regulations cannot increase or decrease a party's vested rights, 44 Comp. Gen. 472 (1965), we do not view GSA's regulations promulgated subsequent to the issuance of the 1967 delivery order as having any retroactive effect on that delivery order, but only a prospective effect on procurement actions taken subsequent to their promulgation.

Under the regulations in effect during 1973, agencies were authorized to procure ADPE without prior GSA approval if the procure-

ment was to be effected by placing a purchase/delivery order against an ADP (formerly FSS) Schedule contract; if under a separate contract not exceeding the maximum order limitation (MOL) of the Schedule contract, an agency could negotiate some better terms or conditions than those available under the Schedule contract; or if the value of the procurement did not exceed $50,000. FPMR 101.32.403–1. However, the existence of an ADP Schedule contract did "not preclude or waive the requirements for full and complete competition in obtaining ADPE, software, or maintenance services." FPMR 101–32.407(c). "Except in those instances where a determination as to the lowest overall cost can be reached and documented without further solicitation or negotiation, proposals or bids should be solicited to determine the ADPE, software, or maintenance services which would satisfy agency requirements at the lowest overall cost to the Government, price and other factors considered." FPMR 101–32.407(d). Furthermore, notwithstanding the provisions of FPMR 101–32.403–1, any sole-source procurement of ADPE in excess of $10,000 by either lease or purchase required a specific delegation of authority. FPMR Temporary Reg. E–25 (effective October 11, 1972 through December 31, 1973).

Modifications AE and AG together represent the Army's decision to procure from IBM systems and equipment for the ALPHA program. It is undisputed that the Army dealt only with IBM. The Army claims to have performed cost studies resulting in a determination, pursuant to FPMR 101–32.407(d), that the lowest overall cost available to it was through purchase from IBM, thereby negating the need for a competitive solicitation. However, pursuant to FPMR Temporary Reg. E–25, which defined sole-source procurement as any procurement action in which equal opportunity and appropriate consideration are not provided "to all responsible and responsive offerors capable of meeting the Government's requirements," the Army was still required to obtain a delegation of authority from GSA before procuring ADPE from IBM. The Army did not obtain this delegation of authority. Moreover, the authority in FPMR 101–32.403–1 is limited to placement of an order against a schedule contract under the terms of the contract and GSA points out that the systems and equipment ordered pursuant to these modifications exceeded the maximum order limitation contained in the then current ADP Schedule contracts. Under these circumstances, we must conclude that the Army's procurement of additional ADPE and related items through the execution of Modifications AE and AG and the issuance of delivery orders pursuant thereto was contrary to the applicable regulations and therefore was unauthorized.

In reaching this conclusion, we are aware that in our decision reported at 47 Comp. Gen. 29 (1967) we held that the selection of an

ADPE supplier by a procuring agency was a part of the procurement process and that to view the procurement statutes and regulations as inapplicable would be contrary "to the intent of the policies and laws governing the procurement of" ADPE. 47 Comp. Gen. 29, 51, *supra*. Although there was no discussion in that case of the applicability of procurement laws and regulations to agency acquisition actions taken subsequent to source selection, we think it is clear from the FPMR provisions promulgated since that decision and the various GSA policy and guidance documents which deal explicitly with acquisition and with decisions to purchase installed equipment that the protested acquisition actions taken by the Army in this case were subject to and not consistent with the legal requirements for Government acquisition of ADPE.

As indicated above, four systems have been purchased by the Army pursuant to Modification AG, another two have been delivered and installed on a rental basis and another three systems have yet to be ordered. We do not believe that our Office would be justified in recommending, on the present record, remedial action with respect to the purchased systems or to the lease for the other two systems. However, we believe no further action should be taken with respect to exercising purchase options or acquiring additional systems or equipment for the ALPHA program unless in accordance with current applicable regulations and policy guidance and the views expressed in this decision, and, in this connection, attention is directed to FPMR Temporary Reg. E–32, dated June 28, 1974, which provides new competitive requirements for ADPE acquisition within the United States. *See* 39 Fed. Reg. 25421. Under these current regulations it appears that a delegation of authority from GSA would be required before the Army could acquire, by rental or purchase, additional ADPE. Therefore, it is our view that it is incumbent upon the Army to request a GSA delegation of authority to complete the ALPHA program. We recognize, of course, that the Army's requirements might be satisfied only by the IBM equipment identified in the delivery order and modifications thereto. We also recognize that it might not be economically feasible for the Army to acquire the remaining IBM equipment from any supplier other than IBM at this point. We agree that, should this be the case, acquisition from IBM would be in the Government's best interests and would not be precluded by any applicable regulations. However, those regulations contemplate that GSA, in granting a delegation of authority, will determine whether or not competition is to be required. Accordingly, we expect that the Army, in requesting that delegation of authority, will provide GSA with all relevant data concerning possible cost to the Government of acquiring additional IBM equipment for the ALPHA program from a firm other than IBM.

[B-177164]

Appropriations—Availability—Retirement Fund Losses—Agency Liability

Civil Service Commission's Bureau of Retirement, Insurance, and Occupational Health cannot obtain reimbursement from a Federal agency whose certifying officer certified erroneous information on Standard Form 2806 leading to overpayment to a former employee from the Civil Service Retirement Fund, 5 U.S.C. 8348. Reimbursement by agency would violate 31 U.S.C. 628 which prohibits expenditures of appropriated funds except solely for objects for which respectively made.

In the matter of liability of Federal agencies for losses sustained by Civil Service Retirement Fund, September 10, 1974:

This decision to the Chairman, Civil Service Commission, is in response to his request for an opinion regarding the possible reimbursement by a Federal agency for losses sustained by the Civil Service Retirement Fund when such losses are due to that agency's erroneous certification of Standard Form 2806 and not the fault of the Civil Service Commission's Bureau of Retirement, Insurance and Occupational Health (BRIOH) which has the administrative responsibility for the fund. Standard Form 2806 is a record required to be sent to BRIOH by each Federal agency when an employee leaves the Government and becomes eligible for a refund of his accumulated deduction in the Civil Service Retirement Fund. Because of erroneous certifications of the Standard Form 2806 by the agency responsible for its maintenance, BRIOH from time to time makes overpayments which it is not always able to recover from the former employee.

In the administration of the Fund, the Federal Personnel Manual System Supplement 831-1, subchapter 22, sets out the responsibilities of the Federal agencies regarding their maintenance and disposition of the Individual Retirement Record-Standard Form 2806. Standard Form 2806 is used by the Civil Service Commission as the basic record for adjusting the retirement rights of a separated Federal employee or his survivors. In section S22-2g of this subchapter, the Federal agency is required to certify Standard Form 2806 by an officer designated for that purpose. In an illustration in the appendix of the Supplement, the certification is shown as "Deductions and Service Certified Correct, Signature and Title, Date."

In the letter requesting this opinion, it is suggested that the Retirement Fund is a trust fund. As such, a certifying officer, when he erroneously certifies a Standard Form 2806, has failed to meet a standard or measure of care, diligence, and skill required of a trustee. Therefore, the Federal agency for whom the certifying officer has acted should be held liable for the unrecouped losses from the Retirement Fund.

Under the Permanent Appropriations Repeal Act, 1934, 31 U.S. Code 725s(c)(6), the Civil Service Retirement and Disability Fund, among others, is designated as a trust fund. Although not specifically identified as such, it naturally follows that the Civil Service Commission, being given the administrative responsibilities for the Fund, is the trustee of this fund. The statute further provides:

> * * * All moneys accruing to these funds are hereby appropriated and shall be disbursed in compliance with the terms of the trust. * * * (31 U.S.C. 725s(a).)

It is not necessary, however, to explore the trust aspects of this fund or the duties of a trustee, since, in our opinion, the act of March 3, 1809, Ch. 28, 2 Stat. 535, 31 U.S.C. 628, precludes the application of appropriated monies to this purpose. This law provides:

> Except as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others.

We know of no appropriation to an agency under which the Civil Service Retirement Fund could be reimbursed in the proposed manner. Thus, in the absence of specific legislative authority, we cannot concur in this proposal.

[B-181264]

Bids—Unbalanced—Responsiveness of Bid

Fact that low bidder has unbalanced its bid by bidding "No Charge" for over 50 percent of the 505 line items being procured is not sufficient reason to reject bid as nonresponsive where: invitation for bids did not prohibit "No Charge" bids; bidder has verified bid; bid is otherwise acceptable; and, bidder is responsible.

Bids—Prices—Unprofitable

Allegation by second low bidder that acceptance of unbalanced bid will restrict ability of contracting officer to obtain required services because of losses contractor would incur on "No Charge" items is refuted by statement of low bidder that all work orders will be honored and, also, possibility of unprofitable bid is no basis for rejection of otherwise acceptable bid. Moreover, Government has right to default contractor for improper services.

Bids—Competitive System—Unbalanced Bids

Contention by second low bidder that low bidder violated competitive bidding system by relying on past experience in unbalancing bid and ignoring Government estimates included in invitation for bids (IFB) is not sufficient reason to cancel IFB and readvertise when procurring agency believes that estimates are correct and properly reflect work which will be required under contract.

Bids—"Buying in"—Not Basis for Bid Rejection

Where bidder increased its prices for second and third year options 700 to 900 percent over base prices but only first year prices were considered in evaluation, charge by second low bidder of "buying-in" is insufficient reason to reject low bid since there is no guarantee that options will be exercised; also, contracting officer will determine reasonableness of option prices under Armed Services Procurement Regulation 1-1505(d).

Contracts—Awards—Small Business Concerns—Size—Conclusiveness of Determination

General Accounting Office is without jurisdiction to question small business status of bidder since 15 U.S.C. 637(b)(6) makes the determination of the Small Business Administration of such matters conclusive.

In the matter of R & R Inventory Service, Inc., September 12, 1974:

Invitation for bids (IFB) N00600-74-B-0113 was issued on February 8, 1974, by the Naval Supply Systems Command, Washington, D.C., for inventory, validation and supply overhaul assistance services to be performed for active and inactive fleet and shore station customers. The IFB contemplated a one year firm-fixed price indefinite quantity contract with two one-year options. However, only the first year was to be evaluated for the purposes of award. The IFB solicited bids for Lots I, II, III, IV, and V, each lot denoting a geographical area and composed of 169 line items of different types of services of which prices were requested for 101 items. Award by lot was contemplated but the right was reserved to award by item if advantageous to the Government.

On April 30, 1974, five bids were opened. The bid of Manufacturer's Packaging Company, Inc. (Packaging) was low on all lots. Award of all lots was made to Packaging on May 22, 1974, due to the urgency of the procurement.

On May 1, 1974, R & R Inventory Service, Inc. (R & R), the apparent second low bidder, protested to the contracting officer the award of any contracts on the ground that the bid of Packaging was unbalanced and nonresponsive. By letter dated May 13, 1974, the contracting officer denied R & R's protest and by its letter of May 17, 1974, R & R protested to our Office.

The basis for R & R's protest is that of the 505 line items to be priced within the five lots, Packaging bid "No Charge" for over 50 percent of the items. From this failure to bid prices, R & R advances numerous grounds to support its position that the bid of Packaging should have been rejected.

First, R & R contends that the bid of Packaging is nonresponsive because it grossly abuses the criteria for the evaluation of bids established by the contracting officer and by the large number of "No Charge" items, Packaging has rendered the evaluation criteria useless. There was nothing in the IFB concerning the insertion of "No Charge" for items. It appears that the purpose of including so many line items in the solicitation was to facilitate payment to the contractor for each different type of service. Therefore, the only evaluation criteria other than a determination that a bidder was responsible was its total lot prices and individual item prices.

As a general rule, the fact that a bid may be unbalanced does not render it nonresponsive, nor does such factor invalidate an award of a contract to such a bidder. Where a bidder has confirmed a bid which appears to be unbalanced, which Packaging has done, and there is no indication that the bid was not as intended or evidence of irregularity, the bid may be accepted if it is otherwise the lowest bid and the bidder is responsible. 49 Comp. Gen. 335, 343 (1969). It is our view that the asserted unbalancing of the bid did not render it nonresponsive.

R & R's second contention is that the acceptance of Packaging's bid will unduly restrict the contracting officer's ability to obtain the required services. R & R argues that many of the "No Charge" items bid by Packaging are costly and time consuming tasks which Packaging will attempt to avoid performing due to the drastic losses it would incur by such performance. As stated previously, Packaging has confirmed its bid, including the "No Charge" items and also in the telegram in which the bid was verified, further stated that "all work order requests will be honored." When a bidder bids and then verifies its prices, it must be concluded that it knows the costs involved and the risks attendant with performance. Moreover, the possibility of a monetary loss during the performance of a contract is not justification for rejecting an otherwise acceptable bid. 49 Comp. Gen. 311, 315 (1969). In addition, whenever any contract is awarded, there is the possibility of a contractor being unable to perform, either because of financial or technical difficulties and it is precisely for this reason that the Government has devised the default provisions included in its contracts making the defaulted contractor liable for any excess reprocurement costs.

Next, R & R maintains that the bid of Packaging is unfair to competitive concerns and defeats the purpose of competitive bidding. It is alleged that Packaging has over 80 percent of similar contracts issued by the Navy, many of which are overlapping and therefore, Packaging has a competitive advantage which it has abused by relying on past experience rather than the Government estimates in pricing the items being procured under the instant solicitation. R & R cites several past decisions of our Office in support of its position that the bid of Packaging should have been rejected under these circumstances.

In 43 Comp. Gen. 159 (1963), relied on by R & R, we held that all the bids submitted under an invitation should be rejected because of the unbalancing present and the inability to determine if the prices were fair and reasonable. However, in that case no estimated quantities were included in the invitation as there are in the instant case and therefore, the case is inapplicable. For a similar case in which no quantities were given see 54 Comp. Gen. 84 (1974).

In 47 Comp. Gen. 748 (1968), also cited by R & R, we cited the holding in 43 Comp. Gen. 159 *supra*, and concurred with the determination of the contracting officer that the invitation should be canceled because of unbalanced bidding. Here, the contracting officer determined not to cancel the solicitation and readvertise, because the prices and estimates are reasonable and accurate. There has been no showing in the instant case that the contracting officer's decision abused his discretion in arriving at that determination.

Again our Office, in 48 Comp. Gen. 62 (1968), cited with approval the rationale of 43 Comp. Gen. 159 *supra*, in a similar unbalanced bid situation, but we found there was no basis for objecting to an award for that reason since the agency had concluded that the award would provide the required supplies at the lowest prices which were considered reasonable.

Here, the same situation exists. The Navy states that the quantities estimated in the solicitation are correct. While Packaging may have speculated as to which items will be ordered most often, we cannot say that the invitation tended to encourage a serious unbalancing of bids with the result that it would be doubtful whether an award to Packaging would result in the lowest cost to the Government. Consequently, we see no reason to object to the consideration of Packaging's bid.

In addition, R & R makes reference to the Navy's rejection of certain bids under prior solicitations, however, those events are irrelevant to the consideration of the protest now before our Office, especially since it appears that the bids in question were rejected for reasons other than the submission of unbalanced bids.

Next, R & R alleges that the bid of Packaging constitutes "buying-in" since the prices submitted for the two option periods are 700 to 900 percent higher than the first year prices. While it is a fact that there is a significant increase in Packaging's second and third year prices—which were not evaluated for award purposes—the award of the contract does not justify the conclusion that the option will be automatically exercised. Under section 1–1505(c)(iii) of the Armed Services Procurement Regulation (ASPR), the contracting officer must make a determination that the exercise of the option is the most advantageous method of fulfilling the Government's needs, price, and other factors considered. The Navy has advised our Office that these provisions will be complied with and if the option price is unreasonable, the option will not be exercised. *See* ASPR 1–1505(d). Therefore, large increases in the option price is not a sufficient reason to reject the bid of Packaging.

Finally, R & R contests the self-certified status of Packaging as a small business concern because with this contract, Packaging will hold

all Navy contracts in this field and therefore, will be dominant in its field of operation. The Small Business Administration has conclusive authority to determine which concerns are "small businesses" (15 U.S. Code 637(b)(6)) and our Office is without jurisdiction to make any determination in this regard. 51 Comp. Gen. 531 (1972).

Accordingly, for the foregoing reasons, the protest is denied.

[B-157936]

States—Employees—Detail to Federal Government—"Pay" Reimbursement

When a State or local Government employee is detailed to an executive agency of the Federal Government under the Intergovernmental Personnel Act, the reimbursement under 5 U.S.C. 3374(c) for the "pay" of the employee may include fringe benefits, such as retirement, life and health insurance, but not costs for negotiating the assignment agreement required under 5 CFR 334.105 nor for preparing the payroll records and assignment report prescribed under 5 CFR 334.106. The word "pay" as used in the act has reference, according to the legislative history, to the salary of a State or local detailee which term as used in 3374(c), upon reconsideration, does need to be limited to the meaning used in Federal personnel statutes, that is, that the term refers only to wages, salary, overtime and holiday pay, periodic within-grade advancements and other pay granted directly to Federal employees. 53 Comp. Gen. 355, overruled in part.

In the matter of State employees detailed to Federal Government, September 16, 1974:

The Department of the Army has requested that we reconsider the portion of our decision, reported at 53 Comp. Gen. 355 (1973), in which we held that executive agencies could not make reimbursements to State and local governments covering various fringe benefits, i.e., retirement, life and health insurance, for employees of such governments detailed to an executive agency pursuant to 5 U.S. Code 3374(c), part of the Intergovernmental Personnel Act (IPA). A number of similar requests for reconsideration have also been received. 53 Comp. Gen. 355 at 356 stated that the word "pay," now codified in 5 U.S.C. 5101, *et seq.*, and in applicable regulations does not necessarily cover the whole ambit of employment costs. Rather it was held that the term as used in personnel statutes in general refers to wages, salary, overtime and holiday pay, periodic within-grade advancements and other pay granted directly to Federal employees.

The Department of the Army, among others, points out that the decision was based on the premise that no authority was included in the law which would authorize such reimbursements, with referral to 5 U.S.C. 3374(e) which authorizes executive agencies to make contributions to State and local life insurance and health benefit plans, to employees *appointed* to executive agency positions pursuant to 3374(a). Thus it was concluded that there is a distinction between

Federal reimbursement as to State and local Government employees "appointed" and employees "detailed" to Federal positions.

Among the reasons urging reconsideration of that part of the decision are the following:

1. In some State and local jurisdictions, the State Comptroller is not legally permitted to make fringe benefit contributions while the employee is detailed to a Federal agency.

2. For many State employees, such as university teachers, the fringe benefits are in fact a very important part of a teacher's salary or pay. Such benefits are regularly included with salary costs in establishing and authorizing positions.

3. In the absence of any clear indication of a contrary legislative intent as to 3374(c), and in view of the broad overall purpose of the law to provide grants, fellowships, and cross training as a means of facilitating the exchange of Federal, State and local personnel, coupled with the fact that nonreimbursement for fringe benefits will virtually eliminate the details contemplated by the law, the section should be liberally interpreted in order to capture congressional intent in enacting the legislation.

4. The Civil Service Commission in a letter to this Office dated August 13, 1973, and in subsequent informal discussions, takes the position that the statutory scheme of the IPA authorizes the payment of all salary expenses normally associated with an employee's pay and it urges that its conclusion is supported by the use of the term "reimburse," meaning "an equivalent for that taken, lost, or expended." The Commission also notes that the applicable reports on the legislation speak of pay as the "salary of a State or local detailee." Since salary as a term is not defined in Title 5, U.S.C., and pay is a term of art referring to the sums of money an individual receives for his services, the Commission suggests that 5 U.S.C. 5102(c)(15) which excludes the pay fixed under a cooperative agreement from the provisions of Chapter 51 is applicable, as the subject pay is fixed under an assignment agreement, 5 CFR 334.105. Thus the Commission concluded that the fringe benefits an employer pays on behalf of his employee may be included in the reimbursement that a Federal agency makes for a detailee assigned to it.

We understand that an employee *appointed* under the subject program to a position in a Federal agency is for most purposes, such as pay and manpower decisions, considered an employee of that agency. A detailed assignee, however, remains an employee of the State or local Government, and is not counted against the Federal agency's manpower ceiling. For comparable positions, salaries in State and local governments, with some exceptions, have lagged behind those paid by the Federal Government. We have been informed that about

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75 percent of all assignments under this program are on detail and that some State and local Governments use the detail provision rather than the appointment one to protect the tenure and other rights of the employees. Whether the employee is appointed or detailed, however, the arrangement is a temporary one and was designed for the common purpose of the IPA, i.e., to improve the personnel management and training capabilities of State and local Governments.

Upon review of the material set forth in items 1 through 4 above and in particular, taking into account the views and conclusions of the Civil Service Commission which has been delegated the regulatory authority of 3376 (Title 5) by Executive Order 11589, in the light of the stated broad legislative purposes, it is concluded that the limitation imposed in 53 Comp. Gen. 355 on the reimbursement authority provided in 3374(c) with respect to employee fringe benefits—retirement, life and health insurance—is unnecessarily restrictive, and the decision as to those items is overruled. Accordingly, the sums of money paid by an Executive agency to a State or local Government under the authority of 5 U.S.C. 3374(c) may include reimbursement for such items. That part of the decision in 53 *id.* 355, which held that costs of negotiating assignment agreements and preparing payroll records and assignments reports were overhead items rather than salary items and thus such costs were nonreimbursable, is affirmed.

[B-172682]

National Guard—Civilian Employees—Technicians—Severance Pay

National Guard technician prior to fulfilling requirement for immediate civil service annuity, although involuntarily removed from his civilian position due to loss of military membership, is precluded by 5 U.S.C. 5595(a)(2)(iv) from receiving severance pay when he is qualified for military retirement under the provisions of 10 U.S.C. 1331 by having attained age 60 with the requisite years of service.

In the matter of National Guard technician severance pay, September 18, 1974:

This decision is in response to a request by the National Guard Bureau, Departments of the Army and the Air Force, concerning entitlement to severance pay of an individual eligible for an immediate annuity under 10 U.S. Code 1331. The National Guard Technicians Act of 1968—Public Law 90-486, approved August 13, 1968—requires that a technician employed in the Department of the Army or the Air Force, except as otherwise prescribed by the Secretary concerned, must be a member of the National Guard. Under 32 U.S.C. 709, as amended by Public Law 90-486, such a technician must be promptly separated upon loss of this military membership. Under these circumstances a technician may be involuntarily separated from his Fed-

eral position prior to fulfilling the requirement for an immediate civil service annuity, and if otherwise eligible would be normally entitled to severance pay under 5 U.S.C. 5595. *See* 53 Comp. Gen. 493 (1974). However, the technician may have qualified for military retired pay under 10 U.S.C. 1331 if he has attained age 60 and completed the requisite years of service following an initial period of active duty. In view of the explanatory material in the Federal Personnel Manual to the effect that anyone entitled to an immediate annuity, including a retirement from a Reserve component, may not receive severance pay, the agency asks:

> Is an Army or Air Force technician who has been involuntarily separated from his Federal employment precluded from entitlement to severance pay as a result of his immediate qualification for retired pay under provisions of chapter 67, title 10, U.S.C., section 1331, provided he is otherwise eligible?

The severance pay provisions in 5 U.S.C. 5595 provide in pertinent part in subsection (a) (2) (B) (iv) as follows:

> (2) "employee" means—
>
> * * * * * * *
>
> but does not include—
>
> * * * * * * *
>
> (iv) an employee who is subject to subchapter III of chapter 83 of this title or any other retirement statute or retirement system applicable to an employee as defined by section 2105 of this title or a member of a uniformed service and who, at the time of separation from the service, has fulfilled the requirements for immediate annuity under such a statute or system * * *.

The Federal Personnel Manual in setting forth the coverage requirement for severance pay provides in FPM Supplement 990–2, subchapter 7, paragraph b (8) (c) (v) in pertinent part:

> (v) The law excludes from entitlement to severance pay an employee who, at the time of separation, has fulfilled the requirements for an immediate annuity. The statutory exclusion is applicable to any employee who at the time of separasion is receiving or is eligible to receive (he need not actually apply) retirement benefits under any Federal military (including a Reserve component) or civilian retirement program.

In 50 Comp. Gen. 46 (1970) it was held that any retired member of the uniformed service who is eligible to receive military retired pay under any law providing such pay for members or former members of the uniformed services at the time of his separation from civilian Government employment is not entitled to receive severance pay under 5 U.S.C. 5595.

Accordingly, the question set forth above is answered in the affirmative.

[B-180117]

Panama Canal—Panama Canal Company—Quarters—Government

Naval officer occupying Panama Canal Company quarters is not entitled to housing allowance since Panama Canal Company quarters constitute Government quarters and therefore payment of housing allowance is prohibited by paragraph M4301-3c(2), Joint Travel Regulations (JTR) (change 246, August 1, 1973); however, member may be allowed temporary lodging allowance under paragraph M4303-3d, JTR (change 240, February 1, 1973), while occupying vacation quarters provided by the Panama Canal Company, as such quarters appear to be transient in nature and were occupied on a temporary basis.

In the matter of a housing allowance, September 18, 1974:

This action is in response to a request for an advance decision from the disbursing officer, United States Naval Support Activity, FPO New York 09585, dated October 4, 1973, which was forwarded to this Office by endorsement dated November 16, 1973, from the Per Diem, Travel and Transportation Allowance Committee and which was assigned PDTATAC Control No. 73-51, concerning payment of an overseas station housing allowance for the period from August 31 through September 7, 1973, to Lieutenant Commander Mario J. Lamar, USN, 106-30-6600.

The record shows that the member was transferred to the Panama Canal Zone and arrived at his new permanent duty station with his wife and two children on August 13, 1973. From August 14 through September 7, 1973, the member and his family occupied vacation quarters owned by the Panama Canal Company, and from September 8 through 26, 1973, they resided in visiting officers' quarters at Howard Air Force Base, Canal Zone, and he was credited with a reduced temporary lodging allowance while residing there.

It is indicated that the member was informed that his household effects had been shipped to the Canal Zone on July 17, 1973, and were due to arrive on August 20, 1973. The household effects did not arrive, however, until September 26, 1973. On August 28, 1973, Commander Lamar signed a lease for an apartment in Panama City, Republic of Panama. The lease was for a 6-month period with occupancy to commence on August 31, 1973.

While the member rented an apartment for occupancy beginning on August 31, 1973, in view of the fact that he occupied Panama Canal Company vacation quarters for the period from August 14 through September 7, 1973, the disbursing officer is in doubt regarding the legality of payment of a housing allowance for the period from August 31 through September 7, 1973.

Under the provisions of paragraph M4301-3c(2) of the Joint Travel Regulations (change 246, August 1, 1973), a housing allowance is payable to a member with dependents except when Government quarters are assigned to, or occupied jointly by the member and his dependents.

Paragraph M1150–5 of the regulations defines "Government quarters" to include "any sleeping accommodations owned or leased by the U.S. Government, provided they are made available to, or utilized by, the members concerned."

The Panama Canal Company is an agency of the United States Government and, as such, Panama Canal Company quarters are to be regarded as Government quarters. Therefore, Commander Lamar is not entitled to a housing allowance while occupying such quarters. The situation is no different for purposes of these regulations than it was during the period he occupied visiting officers' quarters. During that period he received a temporary lodging allowance and was not eligible for a housing allowance since he occupied Government quarters.

In that connection under the provisions of paragraph M4303–3d of the Joint Travel Regulations (change 240, February 1, 1973), when hotel or hotel-like accommodations or similar transient facilities under the jurisdiction of the Government are occupied, the member may be paid a temporary lodging allowance in accord with that provision.

Since Commander Lamar and his dependents occupied Panama Canal Company vacation quarters which appear to be of a transient nature, and since he occupied those quarters on a temporary basis, he may be authorized temporary lodging allowance under paragraph M4303–3d of the Joint Travel Regulations, for the period from August 14 through September 7, 1973.

[B–180185]

Contracts—Negotiation—Requests for Proposals—Preparation Costs

Claim for recovery of $3,530 in proposal preparation, preaward and cancellation costs based on allegation that issuance of request for proposals (RFP) for air conditioners was arbitrary, since Government knew similar units were available from another agency's inventory, is denied, since no evidence is found showing solicitation was issued in bad faith; and, even if judged by reasonable basis standard, contracting officer's unequivocal statement that he had no indication when RFP was issued that settlement of dispute was in prospect, which would have effect of making available default termination inventory, indicates reasonable basis for soliciting offers.

Contracts—Negotiation—Requests for Proposals—Cancellation

Allegation that cancellation of request for proposals was arbitrary because air conditioners obtained from another agency's inventory were manufactured under different specifications and would not meet Government's needs without modifications does not justify recovery of proposal preparation and related costs, since explicit judicial recognition of right to recover proposal expenses in such circumstances appears to be lacking, and in any event cancellation was not made in bad faith or arbitrarily or capriciously, since contracting officer found that modified inventory units would meet requirements and right to reject all offers on unneeded supplies is well established.

In the matter of Keco Industries, Inc., September 18, 1974:

Keco Industries, Inc. (Keco), seeks recovery of expenses in the amount of $3,530 incurred in connection with its offer submitted under request for proposals (RFP) DAAK02-74-R-0022, issued by the United States Army Mobility Equipment Research & Development Center. Keco's claim, presented to our Office after the solicitation was canceled in January 1974, is composed of the following items:

Microfilm reproduction of drawings	$230.00
Preparation of bill of materials and vendor RFQ's; post costs to bill of materials; and estimate cost of raw materials (80 manhours)	2,000.00
Obtaining sample unit and negotiation with Therm-Air on obsoleted parts	300.00
Bid finalization, including labor and other cost factors (8 manhours)	200.00
Pre-Award Survey (24 manhours)	600.00
Follow-up after Pre-Award Survey and cancellation of procurement (8 manhours)	200.00
Total costs *	$3,530.00

* Each cost element is fully factored with overhead and G & A as appropriate.

The RFP was issued on September 27, 1973, and called for offers on eight compact horizontal air conditioners. Keco and several other concerns submitted offers. A preaward survey of Keco was conducted on November 13, 1973. On November 30, 1973, Keco protested to our Office against award to any other offeror, alleging that it was the low responsive, responsible offeror.

By letters dated January 23, 1974, the contracting officer informed all offerors that the procurement was canceled. The reason given was that an adequate substitute for the items solicited had recently become available from sources within the Government. Keco did not protest against the cancellation. However, it requested additional information from the contracting officer about the nature of the substitute supplies.

In response, the contracting officer, by letter to Keco dated April 4, 1974, explained that in late November 1973, he became aware that the Defense Construction Supply Center (DCSC) was negotiating with Therm-Air Manufacturing Company to settle a default termination claim under a contract between DCSC and Therm-Air. This contract was awarded on February 28, 1969, for a quantity of 30 air conditioners, and was defaulted on November 1, 1972. Upon learning that settlement had been substantially agreed to, with the result that the termination inventory under the defaulted contract would become available to the Army, it was decided to cancel the present solicitation. The contracting officer further stated that some modification to the Therm-Air units might be necessary.

Keco contends it is entitled to recover its proposal preparation and related expenses because the contracting officer acted arbitrarily and

in abuse of his procurement discretion in two respects. First, Keco states that the Army's project engineer knew of the Therm-Air inventory prior to the issuance of the RFP on September 27, 1973; the contention in this regard is apparently based upon the belief that the contracting officer knew or should have known that the Therm-Air units were available before the RFP was issued. Keco alleges that the Army thus put it to the expense of proposal and preaward costs while awaiting the outcome of an interagency requisition. Secondly, Keco has contended that the cancellation itself was arbitrary. The claimant points out that the solicitation called for a 10-month development program, yet it was canceled because a "supply item product" had become available. Moreover, Keco points out that the Therm-Air units have been manufactured in accordance with different specifications and drawings (MIL–A–52605A and No. TA13216E–6310, respectively) than those applicable in the canceled solicitation (MIL–A–52605B and No. TA13216E–6320). Also, since the Therm-Air units are 50–60 hertz, and the solicitation called for 400-hertz units, they will have to be modified in order to meet the Army's requirements.

The contracting officer has considered Keco's contentions and found them to be without merit. In a letter to Keco dated May 7, 1974, the contracting officer stated:

> The air conditioner produced under the Therm–Air contract was substantially the same as the air conditioner described in DAAK02–74–R–0022 except for the type of power to be used. With this modification the Therm-Air product was capable of meeting the same Government requirements that would have been satisfied by a unit produced in accordance with this solicitation. The similarity of these two air conditioners is further born-out by your admitted intention of using certain parts from the Therm-Air inventory in your production effort.
>
> The Project Engineer and several other Government people were aware of the Therm-Air default inventory. However, in no way could this knowledge of the existence of this inventory be equivalent to having the inventory available to this installation. On the contrary, these items did not become available to any installation in the Government from DCSC until the disposal of the litigated appeal from said default action. There was no indication on 27 September 1973 that this inventory would become available to other Government installations. On the contrary, a time consuming trial before the ASBCA was contemplated and further time expected prior to a decision before this inventory would become available.
>
> The above factual statements clearly show that at the time of the RFP, at the time the proposal was submitted, and at the time of the preaward survey the adequate substitute in the form of items from the Therm-Air contract inventory were not available. In fact, the possibility of such availability was not known until late November and the actual availability was some time later. Therefore, I conclude that the cancellation of subject RFP was legitimate because the requirements of the Government changed in that the items became available from sources within the Government several months after the RFP was issued. Therefore, obviously the decision to cancel was in no way arbitrary.

In a series of cases beginning with *Heyer Products Company* v. *United States*, 140 F. Supp. 409; 135 Ct. Cl. 63, the Federal courts have recognized that because bidders and offerors are entitled to have their bids and proposals considered fairly and honestly for award,

the preparation costs of a bid or proposal which was not so considered may be recoverable in certain circumstances. *Heyer* held that recovery could be had only where clear and convincing proof showed a fraudulent inducement of bids, that is, that bids were not invited in good faith, but as a pretense to conceal the purpose to award the contract to some favored bidder or bidders, and with the intent to willfully, capriciously, and arbitrarily disregard the obligation to let the contract to the bidder whose bid was most advantageous to the Government. 140 F. Supp., *supra*, at 414. Our Office has noted that the court in *Heyer* did not extend the principle established there, either expressly or by inference, to situations where all bids are properly rejected in good faith pursuant to the authority vested in the procurement agency by law and regulation. B–169425, June 12, 1970; B–164653, September 10, 1968; B–150159, December 6, 1963.

In its decision in the case of *Robert F. Simmons & Associates* v. *United States*, 360 F. 2d 962; 175 Ct. Cl. 510, the Court of Claims considered a claim for bid preparation costs arising out of a cancellation situation. After passage of a law requiring congressional approval prior to the award of certain construction and lease contracts, the agency received and opened bids, declined to seek the required congressional approval for the contemplated contract, and canceled the solicitation. In holding that the plaintiff had failed to state a cause of action, the court stated:

> There is no allegation in the present pleadings that GSA showed any favoritism toward any bidder, or that GSA harbored any preconceived intention to ignore the merits of the bids submitted and discriminately award the contract to a select bidder. The pleadings lack any showing of arbitrary, capricious, or bad faith actions on the part of GSA. Yet this is what is required to come within the decision in Heyer Products Co v. United States * * *

See 360 F. 2d, *supra*, at 965.

Subsequent decisions which have developed and applied the *Heyer* principle to different factual circumstances do not indicate that its application to a claim arising out of a cancellation situation has been expanded or modified. See *Keco Industries, Inc.* v. *United States*, 428 F. 2d 1233, 1237 (192 Ct. Cl. 773) (Keco I), and *Keco Industries, Inc.* v. *United States*, 492 F. 2d 1200 (Ct. Cl. 1974) (Keco II).

In view of the foregoing, we believe Keco's allegation that the contracting officer improperly issued the RFP with knowledge that the Therm-Air units were available must be considered in light of the *Heyer* rule. Based on the facts of record, we find no indication that the contracting officer acted in bad faith in issuing the solicitation. There is no evidence showing a preconceived intention to willfully, capriciously, and arbitrarily disregard the obligation to award the contract to the offeror whose proposal was most advantageous to the Government. Even if judged by the standard of whether there was

any reasonable basis for the contracting officer's action, we think the claim must fail. We believe there is a reasonable basis to solicit offers for supplies where availability of possible substitute items is contingent upon another agency's settlement of a dispute, especially in view of the contracting officer's unequivocal statement that he had no indication that such settlement was in prospect at the time the solicitation was issued.

In regard to Keco's allegation that the cancellation itself was arbitrary, in view of the authorities discussed *supra* we have some doubt whether explicit judicial recognition has been given to a right to recover proposal preparation expenses arising out of such circumstances. In any event, we do not find that the cancellation was made in bad faith or in an arbitrary or capricious manner. In a number of decisions our Office has observed that contracting officers not only have the right to reject bids on supplies which are no longer needed, but would, indeed, be derrelict in their duty if they did not do so. B–159865, October 6, 1966; *cf.* 49 Comp. Gen. 683 (1970). In the present case, we see no basis to object to the contracting officer's finding that the modified Therm-Air units would fulfill the Government's needs, thus eliminating the need for the solicited supplies.

Lastly, it is noted that $600 of Keco's claim is allocated to preaward survey costs and $200 to "Follow-up after Pre-Award Survey and cancellation of procurement." Whether such costs may be included within the concept of recoverable bid or proposal preparation costs has not been determined to our knowledge. Keco II, *supra*, speaks of "* * * the right to be compensated for the expense of undertaking the bidding process," which suggests that costs of the type described above might be regarded as recoverable bid preparation costs. 492 F. 2d, *supra*, at 1203. In any event, we believe such costs are analogous to bid preparation costs, and that no greater basis exists for reimbursing them. *See*, in this regard, B–174225, November 22, 1971, and B–168917, October 6, 1970.

In view of the foregoing, Keco's claim is denied.

[B–181432]

Small Business Administration—Loans—Guaranteed Loan Programs—Official Approval—Authorization—Subsequently issued

Loan guarantee approved in writing by Small Business Administration (SBA) official properly authorized to approve such loan guarantees constitutes official approval of guarantee despite fact that formal loan authorization was not issued until later time. However, SBA has no authority to reimburse a bank for interim disbursements made to the borrower pursuant to such approval because of bank's failure to comply with conditions, such as payment of guaranty fee, contained in both formal loan authorization which was issued after informal approval and blanket loan guaranty agreement between bank and SBA.

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Small Business Administration—Loans—Guaranteed Loan Programs—Official Approval—Authorization—Not Issued

Loan guarantee approved in writing by Small Business Administration (SBA) official properly authorized to approve loan guarantees constitutes official approval of guarantee despite fact that formal loan authorization was never issued and lending bank having relied on such guarantee is entitled to reimbursement by SBA since SBA's final decision to deny loan application does not vitiate its prior approval and bank was deprived of an opportunity to comply with requirements contained in blanket guaranty agreement.

Small Business Administration—Loans—Guaranteed Loan Programs—Lenders' Entitlement to Reimbursement

Small Business Administration (SBA) possesses authority to reimburse lender for amount of interim loan made on request of authorized SBA official and subsequent to issuance of formal loan authorization regardless of whether direct loan by SBA was not fully disbursed to borrower.

In the matter of the authority of Small Business Administration to reimburse lenders making interim loans, September 20, 1974:

This decision to the Administrator of the Small Business Administration (SBA) is in response to his request for our advice as to whether SBA has the authority to reimburse a lender who, at the request or with the approval of an SBA official, has provided interim financing to a small business concern which has applied to SBA for financial assistance, but to whom SBA financial assistance was not ultimately extended.

The Administrator states in his letter that three banks which regularly participate with SBA in making loans to small business concerns are pressing SBA for reimbursement of funds disbursed by them under interim financing arrangements with three small business concerns. The specific facts surrounding each separate claim are set forth below.

LAURENT LOAN

The District Director of SBA's Richmond District Office represented to the American National Bank of Portsmouth, Virginia, that SBA would guarantee an interim loan made by the bank to Laurent of the South, Inc., (Laurent) and would reimburse the bank from the proceeds of the SBA guaranteed loan for any advances the bank made to Laurent. Accordingly, although SBA did not issue the formal loan authorization until July 25, 1973, prior to that date the bank made three interim disbursements totaling $300,000 on the basis of statements contained in three letters received from the District Director.

The District Director's letter dated May 9, 1973, to the Vice President of American National Bank stated in pertinent part the following:

> Subject to your bank's participation in the $350,000 guaranty loan to Saint Laurent of the South, Inc., and Saint Laurent of Florida, Inc., please be advised that based on my review of this application with you * * * that I have approved the loan request.

Any funds so advanced during the closing stages of disbursement by your bank would, of course, be refunded out of the final disbursement of the loan.

The District Director's letter of June 14, 1973, contained the following statement:

This is to advise you that any advances made by your Bank to Laurent of the South, Inc., pending final closing of the approved loan, will be covered by the guaranty and may be paid back out of the proceeds at the time of final disbursement.

Similarly, the District Director stated in his letter of July 20, 1973, in part, as follows:

This is to advise you that this agency has approved a $350,000 loan in participation with your bank. It is our understanding that Mr. Herbert Zucker is in need of a temporary advance pending the closing of this loan in the amount of $100,000.

It would be appreciated if you would advance this amount on a temporary basis with the understanding that it will be paid back in total upon final disbursement of the loan. Any advances so made by you will, of course, be covered by the guaranty agreement.

By letter dated May 29, 1973, the bank advised Laurent of the terms and conditions upon which it was approving the $350,000 loan, which terms and conditions differed in certain respect from the conditions contained in the formal loan authorization subsequently issued by SBA. Consequently, the bank advised Laurent to resolve all such differences with SBA. By letter dated November 19, 1973, SBA informed American National Bank that it was canceling its loan authorization because the 3-month period for the first disbursement had expired October 25, 1973, without the bank making a disbursement. SBA later reaffirmed cancellation of the loan authorization by letter dated December 10, 1973, for the following reasons:

The SBA Authorization approving your Bank's request for SBA Guaranty of a $350,000.00 loan to Laurent of the South was approved July 25, 1973. This authorization was subject to the terms of the Guaranty Agreement between your bank and SBA dated December 15, 1972 and also subject to first disbursement of the loan being made not later than October 25, 1973. The Guaranty Agreement provides among other things that an approved loan is not covered by the agreement until a guaranty fee is paid. It further provides that within three (3) days after making each disbursement on account of any loan Lender shall advise SBA in writing of the date and amount of disbursement, pay the guarantee fee within five (5) days of date of disbursement, and immediately after disbursement provide SBA with a copy of the executed note and settlement sheet.

Since the date for first disbursement expired on October 25, 1973 and by November 19, 1973, we had received no evidence that you had complied with the above mentioned requirements, we sent you our letter of November 19, 1973 notifying you that we were canceling our loan authorization.

Your bank did not comply with the terms of our Guarantee Agreement and our Authorization has been officially canceled.

American National Bank has requested that SBA either reinstate the permanent loan or purchase the interim notes.

WILLOW STREET LOAN

In this case the Virginia National Bank of Norfolk, Virginia, made an interim advance of $50,000 to Willow Street of Virginia, Inc., (Willow Street) after receiving a letter from the District Director of SBA's Richmond District Office dated October 4, 1973, which stated, in pertinent part as follows:

> This Administration has no objection to Virginia National Bank making an interim disbursement, not to exceed $100,000, to Willow Street Corporation.
> It is my understanding $75,000 will be held in escrow to support a letter of credit and $25,000 will be advanced to purchase raw materials.
> Any such advance will, of course, be covered by our guarantee.

Such letter of October 4, in effect, reaffirmed the following statements which were contained in an earlier letter dated August 16, 1973, from the District Director to the bank.

> Pursuant to our [telephone] conversation this date, please accept this letter as your authority to make an interim disbursement of 90% of the loan proceeds to subject company.
> We are making the necessary arrangements to sell the guaranteed portion of this loan simultaneously with the loan closing.

Although the bank made no advances upon receipt of the first letter from SBA dated August 16, shortly thereafter the bank did transmit the loan application to SBA with certain suggested terms and conditions for the loan.

After Virginia National Bank made the $50,000 advance to Willow Street it was notified by letter of November 12, 1973, that SBA had declined to approve the guaranteed loan to Willow Street. Consequently, no formal loan authorization was ever issued by SBA. The final decision to deny the loan guaranty application was based on SBA's determination that one of Willow Street's officers was also an officer or stockholder in more than one company that had filed an application for SBA assistance, thereby disqualifying Willow Street from further loan consideration as not being an independently owned and operated small business, a basic requirement for loan eligibility under SBA regulations. Virginia National Bank has now demanded that SBA purchase the interim loan that was authorized by the District Director.

JAMES LOAN

A direct loan from SBA to Bill James Auto, Inc. (James) was approved and a formal loan authorization was issued by SBA. However, actual disbursement of the loan by SBA was delayed by disaster loan activities and, consequently, the Deputy Regional Director of the Philadelphia Regional Office requested interim financing from Girard Trust Bank of Philadelphia by letter dated June 23, 1973, which contained the following statement:

This Agency has approved a $100,000 direct loan to William A. James, Jr., d/b/a Bill James Auto Center. Relative to preliminary conversations with your bank, we understand that you will advance $50,000 to the loan applicant for the interim period until we complete the case and establish a settlement date. The check will be drawn to your bank and the $50,000 may be withdrawn with the accrued interest and the balance of the total will be deposited in the account of the borrower for his business account.

Due to our heavy commitment on the disaster operations, at this time, it may be as much as a 60-day period for which this advance may be held.

The bank then made the interim loan, but SBA has not and will not disburse the direct loan to the borrower because he has disappeared and his business has become defunct. Girard Trust Bank has requested that SBA reimburse it for the full amount of its advance.

In relation to the above-stated factual circumstances SBA has specifically requested our advice on "SBA's authority to repay lenders who made interim loans on request or with the approval of SBA employees, and in reliance on promises that they would be reimbursed, in each of the following situations:

1. Where the interim disbursements were made prior to the issuance of the formal loan authorization for a guaranteed loan, as in Laurent.
2. Where the interim disbursement was made but no loan authorization for a guaranteed loan was issued by SBA, as in Willow Street.
3. Where the interim disbursements were made after the issuance of the formal loan authorization for a direct loan, but the direct loan has not and cannot be disbursed, as in James.
4. Where the interim disbursements were made after issuance of the loan authorization, the SBA loan was fully disbursed to the borrower and all SBA loan documents were executed, but the borrower is unable to repay the interim loan.

Relative to these situations the Administrator refers to two prior decisions of the Comptroller General which involve the issue of the legal obligation of SBA to repay interim disbursements by private lending institutions; B–164162 dated September 20, 1968; and B–178250 dated August 6, 1973. The loans involved in each of those two cases were direct loans rather than guaranteed loans.

Our 1968 decision, B–164162, involved an interim loan that was advanced by a bank after SBA had authorized a direct loan to the borrower. Employees of the non-Federal Small Business Development Center in Detroit, who had authority from SBA to process SBA loans, had promised the bank that the interim disbursements would be repaid from the proceeds of the SBA loan. In that decision we said, in pertinent part, the following:

From the record before us we find no basis for concluding that the Small Business Administration is in any way obligated to the Michigan Bank. It appears that the only involvement of SBA in the transaction between the Bank and the borrower was pursuant to request of the Small Business Development Center, a non-Federal entity, to authorize use of a portion of the SBA loan proceeds for repayment of the Michigan Bank's interim loan. We find no evidence which would establish a duty on the part of SBA to assure such repayment through its own independent action.

While the provisions of section 634(b)(7) of title 15, United States Code, cited in the supplemental letter referred to above, grant the Administrator of

Small Business broad authorities with respect to dealing with loans, we do not find such authority related to assuming the obligation of a borrower to third parties under the circumstances here involved.

Our 1973 decision, B–178250, also involved an interim loan made by a lending institution subsequent to SBA approval of a direct loan to the borrower. Although the bank involved in that case claimed that an SBA official had verbally promised its Executive Vice-President that SBA would make the bank copayee on the final SBA check disbursed to the borrower, we based our decision, as is our policy, on the administrative version of the facts wherein it was asserted that no such promise or commitment had been made by any SBA official. In our decision we stated, in pertinent part, the following:

From the record before us we find no basis for concluding that the Small Business Administration is any way obligated to the McLachlen National Bank. Rather, it appears from Mr. Chandler's statement [an SBA official] and from the Director's letter to us that the Bank's Executive Vice President was not informed that the Bank would be made a co-payee on the check. From the facts and circumstances disclosed in the Director's letter and in the statements of the SBA officials concerned, we find no evidence which would establish a legal duty on the part of SBA to assure the repayment of Bank's loan through its own independent action.

As we stated in our decision of September 20, 1968, B–164162, to an SBA authorized certifying officer, while the provisions of section 634(b)(7) of title 15, U.S.C., grant the Administrator of Small Business broad authorities with respect to dealing with loans, we do not find such authority related to assuming the obligation of a borrower to a third party under the circumstances here involved.

The Administrator states that SBA has interpreted these decisions to indicate that—

if a request for the approval of interim financing were in fact made by a duly authorized SBA employee or official, SBA would have the authority to repay the lender for the interim loan even where the SBA loan has been fully disbursed and expended for other purposes.

Accordingly, SBA believes that reimbursement by SBA would be proper as concerning advances made pursuant to direct loans in the following factual situation:

(1) The loan application has been processed and approved;
(2) The loan authorization has been signed and issued by SBA;
(3) A private lender later advises an SBA official that it will make an interim disbursement to the borrower if SBA agrees that the lender will be repaid by disbursement of SBA's direct loan;
(4) The SBA official agrees;
(5) The lender makes its interim loan to the borrower for a purpose which substantially complies with the use of loan proceeds provision in SBA's loan authorization;
(6) Thereafter, the SBA loan is fully disbursed directly to the borrower;
(7) But the interim loan has not been repaid; and
(8) The lender seeks repayment from SBA.

While we believe that SBA's interpretation of our former decisions is a reasonable and proper implication of the language used in those decisions, this conclusion is not sufficient to settle the three cases now presented for consideration since, as recognized in SBA's

letter to us, the factual circumstances of each of the specific cases mentioned varies in some manner from that set forth in SBA's hypothetical situation.

In view of the varying factual circumstances surrounding each of the questions presented by SBA, our response will consider each question separately although comparisons will be drawn and similarities or differences pointed out when appropriate.

With regard to the Laurent case, if the formal loan authorization approving SBA's participation in the loan had not been canceled and SBA financial assistance had ultimately been extended to Laurent, such assistance would have been in the form of a guaranteed loan under the provisions of 13 C.F.R. 122.10. It is clear that the District Director of SBA's Richmond District Office who repeatedly and unambiguously advised the lending institution, American National Bank, that the loan request had been approved and that any advance or interim disbursements made to Laurent would be covered by SBA's guarantee had been delegated the actual authority to approve or decline guaranteed and other business loans to small business concerns. *See* 37 Fed. Reg. 17549, which also authorizes the District Director to execute loan authorizations for loans he had personally approved pursuant to his delegated authority.

The customary procedure that is usually followed by SBA when loan applications are approved was not followed in this instance, however, in that the District Director authorized the lending institution to make interim disbursements prior to the issuance of a formal loan authorization. The only applicable statutory or regulatory provision in this regard can be found at 13 C.F.R. 122.19 which provides as follows:

> If SBA approves a loan application, a formal loan authorization is issued by SBA. This authorization is not a contract to lend or a loan agreement. Instead, it states the conditions which the borrower must meet before financial assistance will be extended. When the borrower is prepared to meet these conditions, SBA or the financial institution will arrange a date, time and place for closing the loan.

In our view the language contained in this regulation, especially the first sentence thereof, is descriptive rather than mandatory and does not require as a matter of law the conclusion that a loan application approved in writing by an SBA official properly authorized to approve such loans is ineffectual and, in fact, invalid unless or until a formal loan authorization is issued. Despite the provision included in the regulation to the effect that a formal loan authorization contain certain conditions the borrower must meet before financial assistance will be extended to him, our view is supported by SBA's practice of allowing disbursements of interim loans prior to the date

of loan closing and presumably before the borrower has satisfied all of the stated conditions.

Our position is further supported by language contained in the Loan Guaranty Agreement between SBA and American National Bank, dated December 15, 1972. Paragraph 2 of the Loan Guaranty Agreement provides as follows:

> SBA shall either authorize the guaranty or decline it, by written notice to the Lender. Any change in the terms or conditions stated in the loan authorization shall be subject to prior written approval by SBA. An approved loan will not be covered by this agreement until Lender shall have paid the guaranty fee for said loan as provided in paragraph 5 of this agreement.

The first sentence of this paragraph merely requires that SBA either approve or disapprove the guaranty by written notice to the lending institution involved. Although this contractual provision also makes reference to loan authorizations and the conditions stated therein, there is no definite requirement that loans can only be properly approved through the issuance of a "formal loan authorization."

Since we cannot conclude as a matter of law that either the relevant regulatory or contractual provisions were sufficient to put the bank on notice that the issuance of a formal loan authorization was an absolute requirement for an effective and binding loan approval, or were even intended to have such a legal effect, we are inclined to the view that the written approval by an SBA official possessing actual legal authority both to make such approvals and to issue loan authorizations does, in fact, constitute official approval of the guaranteed loan in question. *Cf.* B–168300, December 4, 1969, where published regulations precluded Farmers Home Administration employees from guaranteeing repayment of advances made from credit sources. However that may be, in view of events occurring subsequent to both the District Director's approval of the loan and the actual interim disbursements made by the bank, our analysis must continue beyond this preliminary point.

On July 25, 1973, the formal loan authorization was approved containing in pertinent part the following provisions:

> 2. This Authorization is subject to:
> (a) Provisions of the Guaranty Agreement between Lender and SBA, dated *December 15, 1972.*
> (b) First disbursement of the Loan being made not later than *3* months, and no disbursement being made later than *6* months, from the date of this Authorization, unless such time is extended pursuant to prior written consent by SBA.

Despite certain discrepancies between the conditions contained in the July 25 loan authorization and those stated in the bank's letter of approval to the borrower, concerning such matters as the term of the loan, it would appear that American National Bank could have satisfied, had it endeavored to do so, all of the relevant conditions contained in the loan authorization and the guaranty agreement. In addition to the requirement stated in the loan authorization that the

first disbursement of the loan be made within 3 months of the date of the authorization, the loan guaranty also contains the following pertinent conditions:

1. Application for Guaranty. This agreement shall cover only loans duly approved hereafter for guaranty by Lender and SBA subject to SBA's Rules and Regulations. Any loan approved by Lender contingent upon SBA's guaranty under this agreement shall be referred to SBA for authorization upon the separate applications of Lender and the loan applicant.

2. Approval of Guaranty. SBA shall either authorize the guaranty or decline it, by written notice to the Lender. Any change in the terms or conditions stated in the loan authorization shall be subject to prior written approval by SBA. An approved loan will not be covered by this agreement until Lender shall have paid the guaranty fee for said loan as provided in paragraph 5 of this agreement.

3. Closing and Disbursement of Loans. Lender shall close and disburse each loan in accordance with the terms and conditions of the approved loan authorization. Lender shall cause to be executed a note and all additional instruments and take such other actions which shall, consistent with prudent closing practices, be required in order fully to protect or preserve the interests of Lender and SBA in the loan. Immediately after the first disbursement of each loan, Lender shall furnish SBA with a copy of the executed note and settlement sheet. SBA shall be entitled at any time to examine and obtain copies of all notes, security agreements, instruments of hypothecation, all other agreements and documents (herein collectively called "Loan Instruments"), and the loan repayment ledger held by Lender which relate to loans made pursuant to this agreement.

4. Report of Disbursement and Status. Within 3 days after making each disbursement on account of any loan, Lender shall advise SBA in writing of the date and amount of disbursement. Once each year, on a date specified by SBA, Lender shall render a written report which will include the gross principal balance outstanding, gross balance undisbursed, and the current status of each loan.

5. Guaranty Fee. Within 5 days of the first disbursement on account of each loan, Lender shall pay SBA a one-time guaranty fee amounting to one percent of the total amount guaranteed by SBA. However, in those cases where the SBA share is $100,000 or more, the fee may be paid in two installments: one-half within 5 days of the first disbursement, and one-half on the first anniversary thereof or upon Lender's demand for SBA purchase in the intervening period. If the two installment option is elected, an approved loan will be covered by this agreement upon payment of the first installment. Rebates will be made (pro rata based on time elapsed) only in the event SBA is released from its guaranty prior to original maturity of the loan, or upon purchase by SBA in accordance with paragraph 12 of this agreement provided further that the borrower is not in default. No rebate will be made in the event SBA purchases its guaranteed percentage of any loan on demand of Lender or its assignee in accordance with paragraph 7 of this agreement. The guaranty fee shall not directly or indirectly increase the amount which a borrower pays in connection with the loan.

On the basis of the record before us it appears that the bank made no serious attempt to comply with the above-stated conditions, but rather, upon noting the differences that existed between the SBA loan authorization and its own commitment to the borrower, merely advised the borrower to resolve all such differences with SBA. The bank did so despite the provisions included in paragraph 2 to the effect that any changes in the conditions contained in the loan authorization were subject to the prior written approval by SBA. This provision in addition to the others mentioned above should immediately have indicated to the bank the importance of insuring that all such relevant conditions and requirements be satisfied in order for SBA's guarantee to

remain in effect. For example, paragraphs 2 and 5 of the guaranty agreement specifically informed the bank that any previously approved loan was not covered by the agreement and consequently was not guaranteed by SBA unless the bank paid the required 1 percent guaranty fee within 5 days of the first disbursement of the loan. The payment of the guaranty fee is also required by 13 C.F.R. 120.3(b). In view of the fact that all the disbursements the bank made were interim disbursements made prior to the issuance of a formal loan authorization, it appears that the bank could have claimed, with some merit, substantial compliance with this provision if it had paid the guaranty fee within 5 days of the date of each advance disbursement, or perhaps within 5 days of the date the formal loan authorization was issued, or even possibly at any time during the 3-month period provided in the loan authorization for the initial disbursement of the loan. However, the record reveals that American National Bank did none of these. Similarly the bank met none of the other conditions, referred to above, during the 3-month period beginning July 25, 1973, such as furnishing SBA with a copy of the executed notes or advising SBA in writing of the date and amount of each disbursement.

Since the importance of the guaranty agreement is referred to in 13 C.F.R. 120.3(b) as well as in the loan authorization itself and even in the letter from the District Director to American National Bank, especially the letter of July 20, 1973, specifying that any advances the bank made would be covered by the guaranty agreement, the bank cannot validly argue that it was unaware of the significance of satisfying the requirements contained in the loan guaranty agreement. It is clear that if all the advances made by American National Bank had, in fact, been made after the formal loan authorization was issued, such authorization and the accompanying SBA guarantee would have lapsed due to the bank's failure to comply, as described above, with the relevant requirements set forth in the loan authorization and guaranty agreement. Accordingly, in our view it would be unreasonable to conclude that SBA's liability would be greater as a result of the informal, although written approval of an SBA official than would be the case if all the interim disbursements had actually been made pursuant to a formal loan authorization.

In consequence of the foregoing and on the basis of the present record, we conclude that SBA is not obligated in any way to American National Bank and has no authority to purchase the interim notes in question from the bank.

With respect to the Willow Street loan, had it been ultimately approved by SBA, it would also have constituted a guaranteed loan under the provisions of 13 C.F.R. 122.10(b). As before, it is clear that the District Director of SBA's Richmond District Office, who is

properly authorized to approve guaranteed loans and issue formal authorizations, advised Virginia National Bank that any advances the bank made would be covered by SBA's guaranty, thereby implying, of course, that SBA had actually approved the loan application. In view of the District Director's actual authority to approve guaranteed loans and in accordance with the initial preliminary analysis made in relation to the preceding case, Laurent, especially the nonmandatory nature of the regulatory provisions concerning loan authorizations, we conclude that the letters from the District Director to Virginia National Bank constituted official approval of the guaranteed loan to Willow Street. Subsequently, of course, this decision to approve the loan was reversed and no formal loan authorization was ever issued because of SBA's conclusion that Willow Street was not an independently owned and operated small business as is required by 13 C.F.R. 121.3–10. However, we find nothing in the applicable statutory and regulatory provisions which would have put the bank on notice that Willow Street was not, in fact, eligible for SBA assistance and since Virginia National Bank had already received written notice that the guaranteed loan had been approved, SBA's final decision to deny the loan application does not vitiate its prior approval upon which the bank relied. Certainly, if Virginia National Bank had made an interim disbursement after the issuance of a formal loan authorization no serious argument could be raised that a subsequent decision by SBA to revoke the loan authorization, not because of what the bank had done or failed to do but because SBA had erred in issuing such authorization in the first place, should have the effect of terminating SBA's obligation to guarantee the disbursements that were already made.

The fact that SBA never issued a formal loan authorization is highly significant in another regard however. Since no loan authorization was ever issued, Virginia National Bank, unlike the bank involved in the *Laurent* case, never exhausted its legal opportunity to comply either with any of the requirements that might have been contained in such authorization or the provisions included in the Loan Guaranty Agreement between it and SBA, dated January 2, 1973, which is identical to the agreement between SBA and American National Bank referred to previously. The relevant provisions contained in the guaranty agreement, which are set forth in the Laurent analysis, seem to contemplate and refer to disbursements made pursuant to the issuance of a loan authorization and subsequent formal loan closing. Since neither of these events had transpired prior to the date the bank was informed that SBA had ultimately denied its application for a guaranteed loan to Willow Street, we cannot conclude

as a matter of law that the bank failed to comply with the requirements contained in the guaranty agreement between it and SBA. As indicated previously in the Laurent analysis a serious and, in our view, successful argument can be raised that the lending institution involved here was not legally required to satisfy the conditions set forth in the guaranty agreement, including payment of the guaranty fee, until after a formal loan authorization with its accompanying conditions was issued which, in fact, never occurred.

Accordingly, we believe that SBA properly may purchase the $50,000 interim loan made by Virginia National Bank.

Unlike the Laurent and Willow Street cases the loan from SBA to James, if actually consummated, would have been a direct rather than a guaranteed loan. Also, unlike the previous situations, the interim disbursements were not made by the lending institution involved, Girard Trust Bank, until after the direct loan had been formally approved and a formal loan authorization issued. In our view these factors, especially the post-authorization nature of the bank's advance, establish a much stronger case for the existence of a legal obligation on SBA's part to repay the interim disbursements than was true in either of the two other cases. Although it is true that the letter from the Deputy Regional Director of SBA's Philadelphia Regional Office did not specifically state in precise terms that the bank's $50,000 advance disbursement would be guaranteed, the letter did clearly and unambiguously provide for reimbursement of the bank by SBA when the full loan was actually disbursed by that agency. We believe that such a written commitment did in fact constitute SBA's guaranty of any advances made in reasonable and justifiable reliance thereon. The fact that the full SBA loan has not and cannot be disbursed to the borrower because of his disappearance is irrelevant to our determination of whether SBA has a legal duty to Girard Trust Bank.

Our decision in B–178250, *supra*, is helpful in this regard. In that case the lending institution involved claimed that an SBA official had promised it that the bank would be made a copayee on the check issued by SBA to the borrower. As previously stated, however, our decision was based on SBA's statement that no such definite commitment was ever made by any SBA official and strongly implied that if the evidence had supported the bank's claim SBA would have had the authority and possibly the legal obligation to assure repayment of the bank's loan. In the present case it is clear that a properly authorized SBA official did assure Girard Trust Bank in writing that SBA's check would be drawn to the bank and the money the bank had advanced could be withdrawn therefrom. In our view SBA's obligation

to insure the bank's repayment is not terminated merely because the check was, in fact, never issued.

In view of the preceding analysis, especially consideration of SBA's contractual commitment to Girard Trust Bank, the fact, mentioned in SBA's submission to us, that SBA will have to rely upon the assignment of the bank's interim note if the bank is reimbursed rather than the more comprehensive SBA note form is irrelevant in determining SBA's liability. Accordingly, we conclude that SBA is legally required to reimburse Girard Trust Bank for its $50,000 interim loan.

The hypothetical situation described in the fourth matter submitted squares precisely with the eight-step factual outline set forth in SBA's submission to us. The only difference between this hypothetical situation and the James situation is that the hypothetical poses a situation in which the SBA loan was fully disbursed to the borrower by SBA, whereas SBA never actually disbursed any funds to James. In view of the preceding "James" analysis, we see no valid reason why this difference in the facts should affect the lending institution's right to reimbursement from SBA, it being clear that at the time the interim loan was made the facts in each case were similar. The fact that SBA subsequently disbursed directly to the borrower does not, in our view, affect SBA's liability to the lending institution.

The questions presented in SBA's submission are answered in accordance with the foregoing.

[B-180954]

Contracts—Negotiation—Requests for Proposals—Restrictive of Competition

Although protest on basis of sole-sourcing is directed nominally against prime contractor, in actuality it is against restrictive requirement in Government request for proposals and is therefore within class described in section 20.1(a) of Interim Bid Protest Procedures and Standards and for consideration by General Accounting Office.

Contracts—Negotiation—Sole Source Basis—Requests for Proposals Issuance

Contracting agency acted reasonably in restricting component of end item in request for proposals to previous manufacturer where detailed manufacturing drawings were not available and agency determined that it would add undue risk to timely completion of total procurement to allow protester to design product to existing data.

In the matter of California Microwave, Inc., September 24, 1974:

California Microwave, Inc. (CMI), protested the refusal of the Philco-Ford Corporation, Western Development Laboratories Division (Philco), to issue it a request for proposals to quote on a subcontract covering up and down converters for use in AN/MSC-60 satellite communication terminals.

Philco was selected by the Government contracting officer as the sole-source contractor for the AN/MSC–60 satellite communication terminals. Request for proposals DAB07–74–R–0271, soliciting an offer on a 3-year, fixed-price-incentive basis was issued to Philco on December 14, 1973. Shortly thereafter, CMI submitted an informal proposal to Philco for the converters and requested an opportunity to respond to a formal request for proposals. In March 1974, CMI renewed the request. Philco advised CMI by letter of March 28, 1974, that a request for proposals could not be issued to it. The basis for the denial was that the specifications in the Government request for proposals required converters manufactured by Comtech Laboratories, Inc. (Comtech), and permitting a design program for the converters by CMI would introduce a significant risk to a tight delivery schedule for the terminals. CMI protested the Philco refusal to our Office.

The contracting agency was advised of the protest but upon review, determined to proceed with the award to Philco prior to the resolution of the protest. Award was made to Philco on April 19, 1974.

In the report to our Office on the protest, the contracting agency, relying on B–168522, June 2, 1970, and B–170324, April 19, 1971, contends that CMI is protesting against an action by a Government prime contractor and therefore has no standing to have the protest considered by our Office. Section 20.1(a) of our Interim Bid Protest Procedures and Standards provides:

> An interested party wishing to protest the proposed award of a contract, or the award of a contract, by or for an agency of the Federal Government whose accounts are subject to settlement by the General Accounting Office may do so by a telegram or letter to the General Counsel, General Accounting Office, Washington, D.C. 20548.

Although the CMI protest was directed nominally against Philco, it was the Government request for proposals which required Comtech's product and which Philco followed in refusing to receive a proposal from CMI. Thus, in actuality, CMI was protesting against the award by the Government of a contract to Philco which restricted the source of supply of the converters. Therefore, the decisions relied upon by the contracting agency are inapplicable to the immediate situation. The protest is within the class described in section 20.1(a), *supra*, and is for consideration by our Office.

Prior to the issuance of the Government request for proposals, the Government had evaluated an AN/MSC–60 prototype converter developed by Philco and converters procured from Comtech for the AN/MSC–46. Simplicity of design, maintainability and life cycle costs were considered. A decision was made to use the AN/MSC–46 converter in the AN/MSC–60 terminals in order to avoid having two dissimilar types of equipment performing the same function in the

military system. Based on these considerations, the Comtech converter was made a requirement of the Government request for proposals.

Only Comtech possesses complete detailed manufacturing drawings of the converters. These drawings are not due to be delivered to the Government until March 1975. It is contemplated that, after the drawings are received and validated, procurements for the converters will be on a competitive basis utilizing the drawings. There are available source control drawings specifying the mechanical and electrical performance requirements, but the contracting agency does not consider that those drawings are adequate to accomplish the procurement of converters within the existing timeframe. The contracting agency has considered the offer of CMI to supply converters that are electrically and mechanically interchangeable with those drawings. The contracting agency has indicated that without the complete manufacturing drawing package, CMI would have to enter into a development program which the time constraints of the Government request for proposals under which the converters are to be delivered would not allow. The contracting agency has indicated that in order to meet the urgent end item delivery requirement, Philco must have delivery of the converters 8 months after the award of the subcontract. Based on the prior experience of Comtech, the contracting agency has estimated that it would take 12 to 15 months for CMI to design, fabricate, have tested and begin delivery while Comtech will commence deliveries within 8 months. In view of the tight schedule for the converters, it was determined that it would be too risky to permit CMI to enter into a design program for the converters.

The procuring activity has the primary responsibility for drafting specifications which reflect the minimum needs of the agency. While the procurement statutes require that specifications be drawn so as to permit the greatest amount of competition consistent with the needs of the procuring activity, neither the letter nor spirit of the procurement statutes is violated because only one firm is able to supply its needs, provided the specifications are reasonable and necessary to meet the agency's actual needs. We have also held that where the legitimate needs of the Government can be satisfied from only a single source the law does not require that those needs be compromised in order to obtain competition. *See* B–178288, May 24, 1973.

Based on the record, the contracting agency appears to have acted reasonably in restricting the requirement to Comtech converters. B–178179, July 27, 1973.

Accordingly, the protest is denied.

[B-180644]

Subsistence—Per Diem—Delays—Personal Convenience

An employee assigned to temporary duty who departs earlier than necessary in order to take authorized annual leave and consumes traveltime in excess of that which would be allowed for official travel alone on a constructive travel basis, by virtue of special routing and departure times, may not be allowed per diem for the excess traveltime pursuant to Federal Travel Regulations and should be charged annual leave for such excess traveltime consumed for personal convenience.

Subsistence—Per Diem—Rates—Outside United States

Tachikawa and Yokota Air Bases in Japan, although not part of Tokyo City, are part of the Tokyo Metropolitan area and therefore are subject to the per diem rates applicable for Tokyo.

In the matter of a claim for per diem in connection with temporary duty travel, September 25, 1974:

This matter involves a request for an advance decision from the Disbursing Officer, United States Marine Corps Air Station (MCAS), Iwakuni, Japan, forwarded through the Per Diem, Travel, and Transportation Allowance Committee, control number 74–6, on a claim submitted by Mr. Richard A. Wynne, Civilian Personnel Officer, MCAS, Iwakuni, Japan, for additional per diem in connection with travel he performed in late May 1973 to attend a United States Marine Corps Civilian Personnel Conference in Washington, D.C., which convened on June 4, 1973.

Mr. Wynne desired to take 4 days annual leave in the United States prior to the conference, which was duly authorized by his organization. This leave period was scheduled for May 29 through June 1, 1973, inasmuch as June 2 and 3, 1973, were a weekend and May 28, 1973, was a holiday. On this basis the employee's travel orders were issued indicating the mode of travel as Government Air from Japan to the continental United States (CONUS), commercial air within CONUS and category "Z" air from Washington, D.C., to Tokyo and required the employee to proceed on or about May 23, 1973. Mr. Wynne states that in mid-May he was advised that he was booked to depart MCAS, Iwakuni on May 21, 1973. Realizing that this would result in additional time in a travel status, he attempted to obtain a later departure date, but was informed that there were no flights available that would meet the requirements of his orders. He was informed of the possibility of category "Z" air, which would permit him a later departure date, since Government air could not be provided; however, Mr. Wynne declined to accept this change in view of the additional cost involved. Hence, he departed MCAS, Iwakuni, Japan, as scheduled and traveled in accordance with the following itinerary:

Date	Arrival/ departure time	Place	Mode of travel/ quarters
5/21	Dep 1200	Iwakuni, MCAS	Govt Air
5/21	Arr 1400	Yokota, AB	
5/21	Dep 1800	Yokota, AB	Govt Bus
5/21	Arr 2000	Tachikawa, AB	Govt Qtrs
5/22	Dep 1300	Tachikawa, AB	Govt Bus
5/22	Arr 1400	Yokota, AB	
5/22	Dep 1715	Yokota, AB	Govt Air
5/22	Arr 1230	Travis, AB	
5/22	Dep 2000	Travis, AB	Comm Bus
5/22	Arr 2230	San Francisco, Calif.	
5/23	Dep 0040	San Francisco, Calif.	Comm Air
5/23	Arr 0540	Dallas, Tex.	Comm Qtrs
5/27	Dep 2400	Dallas, Tex.	Comm Air
6/1	Arr 1700	New Bern, N.C.	
6/3	Dep 0900	New Bern, N.C.	Pvt. Auto
6/3	Arr 1700	Washington, D.C.	

Mr. Wynne contends that the travel shown above entitles him to per diem from 1200 hours May 21 to 2400 hours May 27, 1973, a period of 7½ days. Also, he maintains that per diem for travel time spent at Yokota and Tachikawa Air Bases should be paid at the special Tokyo rate of $41 instead of the usual rate for other sections of Japan of $31 since these installations are located within the Tokyo Metropolitan area. However, upon submission of a travel voucher, he was only allowed per diem for the period June 1 through 3, 1973, on the basis of constructive travel. Thus, Mr. Wynne has reclaimed the additional per diem.

On the factual situation described above, we have been requested to rule on the following questions:

1. Is the employee entitled to additional per diem as claimed?
2. Should the employee be charged leave for the additional travel time utilized?
3. Is the travel per diem rate for Tokyo applicable to Tachikawa and Yokota Air Bases?

Official travel involving personal convenience travel is governed by the standards set forth in section 1–7.5d, Federal Travel Regulations, FPMR 101–7, May 1973, which provides as follows:

d. *Indirect-route or interrupted travel. Where* for a traveler's personal convenience or *through the taking of leave there is* interruption of travel or *deviation from the direct route, the per diem allowed may not exceed that which would*

have been incurred on uninterrupted travel by a usually traveled route. (See 1-2.5 and 1-11.5a(3).) [Italic supplied.]

A similar standard is set forth in paragraph C6000, Volume 2, Joint Travel Regulations (JTR), which states:

C6000 ROUTING

Travel performed other than by the usually traveled route must be justified as officially necessary. When, for his own convenience, a person travels by an indirect route or interrupts travel by a direct route, the extra expense will be borne by him, with reimbursement based only on such charges as would have been incurred by a usually traveled route (see Chapter 10). * * * Any excess travel time not justified as officially necessary will be charged to the appropriate type of leave.

Applying the standard in the above-quoted regulations, the administrative agency has determined that Mr. Wynne could have departed Iwakuni MCAS on June 1, 1973, and arrived in Washington, D.C., on June 3, 1973, and has allowed per diem on this constructive travel basis. We are of the opinion that this constructive travel established Mr. Wynne's maximum per diem entitlement and the liability of the Government would not be increased by his election to take annual leave in connection with the official travel. 46 Comp. Gen. 425 (1966); 41 *id.* 196 (1961); B-174325, January 7, 1972, and B-160278, December 23, 1966.

Mr. Wynne argues that he should not be penalized for taking leave in connection with his official travel and cites our decision 52 Comp. Gen. 841 (1973) in support of this proposition. That decision held as follows:

We have consistently held that an employee assigned to temporary duty who departs prematurely for an alternate destination on authorized annual leave which he would not have taken but for the temporary duty should not be penalized by reason of a subsequent cancellation of the temporary duty assignment.

We do not find 52 Comp. Gen. 841 apposite to the matter before us in that it sets forth the rule for cancellation of official travel where the employee, relying on the official travel authorization, has already performed certain personal convenience travel in connection with the official travel. The rationale of this rule is to preclude liability of the employee for large travel expenses that were not anticipated, in that they would not have been incurred but for the official travel. However, this rationale is applicable only to canceled official travel.

Therefore, in regard to question 1, we find that the employee is not entitled to additional per diem beyond that which would have been incurred for the official travel, if leave had not been taken.

In connection with the matter of whether the employee should be charged annual leave for traveltime involving personal convenience travel in excess of that required for the official travel alone, we have held that the charging of annual leave in such situations is primarily

a matter of administrative discretion. 46 Comp. Gen. 425, 427, *supra.* Note, however, that paragraph C6000, Volume 2, JTR, requires organizations within the Department of Defense to charge leave for excess traveltime not justified as officially necessary. Question 2, therefore, is answered in the affirmative.

With reference to the issue of whether Yokota and Tachikawa Air Bases are considered as part of the City of Tokyo for purposes of the higher ($41) per diem rate applicable for that city at the time the travel here involved was performed, we note that both these Air Bases are located within "Tokyo-To," defined as the Metropolis of Tokyo. Section 925 of the Standardized Regulations (Government Civilians, Foreign Areas) and Appendix C of Volume 2, JTR, do not distinguish between Tokyo City and the Metropolis of Tokyo, but refer to the area with the broad term of Tokyo. Hence, we are of the opinion that the term Tokyo, which is in fact an unincorporated city, would include the Metropolis of Tokyo and therefore Tachikawa and Yokota Air Bases would be subject to the higher per diem rate. In view of the foregoing, question 3 is answered in the affirmative.

Accordingly, the employee's claim may be allowed only for the difference in per diem rates applicable for Tokyo and other areas of Japan. The employee may not be reimbursed for per diem occasioned by excess personal convenience travel and should be charged leave for such excess travel.

[B–181136]

Bids—Qualified—Prices—Not Firm–Fixed—Bid Nonresponsive

Where two bidders inserted clauses in their bids providing for changes in price of equipment to be furnished if certain circumstances occur, bidders have not offered firm-fixed prices and bids must be rejected as nonresponsive.

Bids—Qualified—Agreement to Comply with Guaranty—Invitation Requirement

Bid, agreeing to comply with guaranty requested by Government on condition equipment is installed and operated in accordance with later instructions of bidder, is not a qualified bid in view of invitation for bids requirement that successful bidder furnish contractor representative to instruct agency as to use of equipment and is, therefore, responsive.

Contracts—Specifications—Conformability of Equipment, etc., Offered—Literal Reading of Specifications

Bid is not nonresponsive where variable rates for contractor's representative are included, solicitation having requested "Per diem rates and full terms" to be submitted with bid, in view of other solicitation instruction that all costs for representative are to be included in bid price and inasmuch as solicitation did not envision other than a single bid price to cover all specification requirements including contractor's representative.

Bids—Discarding All Bids—Compelling Reasons Only

Cancellation of invitation for bids after opening is improper where award under solicitation may be made, provided agency is able to determine from evaluation of low bid, as supplemented by data, that tendered equipment would satisfy actual needs of agency.

In the matter of the Joy Manufacturing Company, September 25, 1974:

The Joy Manufacturing Company (Joy) protests the cancellation and proposed readvertisement of solicitation No. BEP 74–191(A), issued by the Department of the Treasury, Bureau of Engraving and Printing, for the procurement of a heavy duty centrifugal air compressor. The submission of descriptive literature was required to establish the details of the product proposed to be furnished in accordance with paragraph 1.3 of the specification.

Three bids were received in time for the bid opening date. The bid of the Ingersoll-Rand Company (Ingersoll) was low; Joy's bid was second low; the bid of the Elliott Company was high. A late bid was received from, and returned unopened to, the King-Knight Company. Both Joy and Ingersoll noted in their bids optional features to their compressors which could be included with the advertised item should the contracting activity find any of these desirous. The Elliott Company noted only one optional feature in its bid.

Joy believes that award should be made to it as the low, responsive bidder. It is Joy's contention that the Ingersoll bid is nonresponsive for various reasons. First, it is noted that Ingersoll included its own contract provisions with its bid in lieu of the contracting activity's General Conditions for Mechanical and Electrical Equipment (General Conditions), a copy of which Ingersoll advises was not furnished it with its bid copy. The Ingersoll provisions, it is alleged, contained a different standard of liability for damages, loss, and delay in delivery than that contained in the General Conditions. Also, amongst other things, it is asserted that these provisions subjected certain equipment to be furnished by Ingersoll to certain possible price changes. Secondly, Joy questions whether the anodized aluminum impellers offered by Ingersoll meet the requirements of paragraph 2.2.2(2) of the specification requiring any aluminum impellers to be "corrosion and erosion resistant." Thirdly, it is noted that Ingersoll failed to stipulate, as required by paragraph 2.2.2(10) of the specification, how long the design and type of ball gear and pinion gear bearings for the compressor offered had been used in industrial service.

It is the position of the contracting activity that the cancellation of the procurement and the proposed readvertisement of the requirement

are the correct measures to be adopted. This course of action is required, we are advised, because during a review of the bids two errors became apparent. First, it was discovered that the specification erroneously omitted provisions for a required filter which would ensure against foreign matter being permitted to enter the system and for a direct dial read-out indicator to monitor bearing wear and thus to permit frequent maintenance inspections. Secondly, it is noted that the contracting activity apparently neglected to include a copy of the General Conditions in the bid copy sent to Ingersoll. Also, the contracting activity believes that all three bids submitted under the solicitation are nonresponsive.

For the reasons that follow, it is our conclusion that the correct action to be taken would be to reinstate the original solicitation and to make award to Joy if acceptance of its bid would require it to deliver the air compressor equipped with the required filter and the direct dial read-out indicator at Joy's price bid.

First, we believe the Ingersoll bid is nonresponsive to the solicitation requirements. The provisions incorporated by Ingersoll in its bid stated, amongst other things, that the

> Following purchased equipment is subject to the same price change as made effective by our suppliers prior to date of shipment. _____ELECTRICS.

This clearly envisions a possible future change in the price bid on the requirement, and as the solicitation necessitated a firm-fixed price the Ingersoll bid is clearly nonresponsive to that requirement. *See* section 1-2.404-(b)(1) and -(3) of the Federal Procurement Regulations (FPR) requiring bid rejection where the bidder attempts to protect himself against future changes in conditions such as increased costs if the total price cannot be determined for bid evaluation or where the bid offers a price in effect at delivery. We see, consequently, no need to deal with the other alleged aspects of Ingersoll's nonresponsiveness. That Ingersoll corrected this situation after bid opening is, of course, irrelevant to the responsiveness of its bid. 50 Comp. Gen. 8, 11 (1970).

That the General Conditions may not have been included in the Ingersoll bid package is also of no relevance. While the Government should make every effort to see that interested bidders receive timely and complete copies of invitations, specifications, and amendments thereto, the fact that there may have been a failure to do so in a particular case does not warrant acceptance of a bid which is not fully responsive. *See* B-175477, August 3, 1972. This rule is especially applicable where, as here, the missing document is referenced several times

in the invitation and the bidder is advised (attachment cc) that a copy of any relevant document may be obtained at the procurement office.

Concerning the matter of the responsiveness of the bid submitted by the Elliott Company, its bid stated that the

> Prices quoted are firm for thirty (30) days from date of this proposal. Prices quoted are subject to an escalation charge of 0.8% per month from date of order to month of contract shipment. Contract shipment shall be that schedule established after receipt of all final specifications and written notice of release for manufacture by the purchaser.

Consequently, as the price the contracting activity would be obligated to pay under a contract with the Elliott Company might vary with circumstances, that bid would also be nonresponsive under FPR 1–2.404–2(b)(1) and –(3).

The possibility that the Joy bid may not be responsive has also been raised. First, the General Conditions of the solicitation required the following:

> A–21 *GUARANTY:* The Contractor shall guarantee that at the time of delivery and for one year after the date of settlement of the contract, or within a time other than one year if such time is designated in the specifications, the equipment supplied to the Bureau under the contract will be free from any and all defects in material or workmanship and will conform to the contract requirements, notwithstanding the fact that the Bureau may have inspected and/or accepted such equipment.

Joy returned the General Conditions, including this guaranty, with its bid and included also its own standard form pertaining to installation and start-up which provided in pertinent part that:

> All given guarantees and warrantees are contingent upon the Property being installed and operated in accordance with written instructions by JOY, and the initial operation being witnessed by a representative of JOY.

It is felt that this language places limitations on the required guaranty. We do not believe this to be the case.

Any contingencies referenced in Joy's bid are more than met by the requirements of paragraph A–18 of the General Conditions, which in part states:

> A–18 *CONTRACTOR'S REPRESENTATIVE:* Where required by the Invitation, the Contractor shall furnish a qualified representative who shall (1) supervise the installation of the equipment, (2) be responsible for the initial operation of the equipment, (3) demonstrate that the equipment meets specification requirements, and (4) instruct Bureau personnel in operating and maintenance procedures * * *

Since paragraph 2.4.1 of the specification required the successful bidder to furnish a contractor's representative, and Joy took no exception to the requirement (if indeed it would have cause to do so having earlier requested that its representative be present at initial operation), the above-quoted language in Joy's bid does not render its bid nonresponsive.

The second reason raised for questioning the responsiveness of the Joy bid arises from the SERVICE REPRESENTATIVE standard clause inserted in that bid pursuant to paragraph 2.4.1 of the specification. This paragraph states as follows:

2.4 *REQUIREMENTS SUBSEQUENT TO BID*

2.4.1 *CONTRACTOR'S REPRESENTATIVE.* The successful bidder shall furnish a field serviceman, which is referred to herein as Contractor's Representative, in full accordance with paragraph A–18 of the "Bureau's" General Conditions noted in paragraph 1.2 herein. Per diem rates and full terms for such services of a Contractor's Representative shall be stipulated in the bid.

The clause inserted by Joy outlined the wage rate for an 8-hour day, the rate for per diem, and the fact that travel expenses were calculated by the actual cost. It then contained five instances of wage situations arising outside of the regular 8-hour day. Various hourly rates were typed in to cover each of the situations. If such were binding, the Joy bid price might change depending on whether any of these situations were encountered. However, paragraph A–18 of the General Conditions, referred to in paragraph 2.4.1 of the specification, and quoted above, provided in pertinent part:

* * * *All costs associated with the furnishing of this representative shall be included in the bid price.* [Italic supplied.]

While it is not clear why the contracting activity requested "Per diem rates and full terms," we feel that it was intended for general information only. It would be illogical to first inform the bidder (by paragraph 1.2 of the specification) that the General Conditions were to be considered as part of the specification, to then inform him to furnish a representative in full accordance with paragraph A–18 of the General Conditions, and to then put forward the idea that the "Per diem rates and full terms" requested would then be used to evaluate what price he has submitted on the procurement. Paragraph A–18 instructs that a separate bid is not to be submitted for the contractor's representative. The cover page of the solicitation also requires only one price for the compressor in accordance with the specification and the General Conditions. Further, the invitation provided no formula, based on number of days or amount of hours worked, for evaluating any "Per diem rates and full terms" that might be submitted. Finally, in tabulating bid prices the contracting officer treated the lump sum prices submitted as total bid prices without regard to per diem rates or the like. Consequently, and since the Joy bid consisted of one firm fixed-price sum, the Joy bid is not nonresponsive.

The final question, already previously answered, is whether, in view of the need to incorporate additional needs into the specification, the solicitation may be canceled and the procurement readvertised not-

withstanding the responsiveness of the Joy bid. Normally, where the proposed changes constitute a cogent reason for such action our Office will interject no opposition to the agency's wishes. However, two facts present here create a situation atypical of those in which cancellation and readvertisement have been permitted. First, one of the bidders, specifically Joy, has asserted that it has actually offered something above and beyond the requirements of the original specification, and if such is the case, it is possible that the agency may be able to satisfy its additional needs by accepting such bid. Secondly, this fact situation can be clearly dovetailed into the fact that neither of the other two bidders were totally responsive to the original specification thereby creating the possibility of making an award without prejudice to the other bidders. Indeed, where one bidder is responsive and its bid has actually offered all the new or changed needs of the activity, it would be prejudicial to that bidder to cancel and readvertise thereby allowing the remaining nonresponsive bidders a second chance to gain what they could not have had the first time had the specification been correctly stated.

Our Office has sanctioned the reinstatement of a canceled invitation in the past when to do so would work no prejudice on the rights of others and would, in fact, promote the integrity of the public bidding system. 39 Comp. Gen. 834 (1960). The circumstances of this procurement appear to lend themselves to such a reinstatement. Also, it is our view that the cancellation after bids are opened is, as a general proposition, inappropriate when a proper award under a solicitation would serve the actual needs of the Government. 54 Comp. Gen. 145 (1974); 53 *id.* 586 (1974); 49 *id.* 211 (1969); 48 *id.* 731 (1969).

Under the circumstances, reinstatement of solicitation No. BEP 74–191(A) and award to Joy would be proper if the Bureau is able to determine that Joy's original bid, as supplemented by its descriptive literature, will in fact meet the actual needs of the Bureau.

[B–181050]

Contracts—Requirements—Not Established—Option Years

In procurement for rental of relocatable office buildings with 2-year base period and three 1-year options where agency estimates that it may take 2 to 5 years to fund and construct more permanent facilities, "known requirement" for option years was not established nor was there reasonable certainty that funds would be available to permit exercise of options.

Bids—Unbalanced—Proof of Collusion or Fraud—Not Essential Element

Proof of collusion or fraud on part of bidder offering mathematically unbalanced bid is not essential element in determining to reject bid.

Bids—Preparation—Option Bids

Warning in solicitation that materially unbalanced bids may be rejected as nonresponsive is not sufficient to apprise bidders how option bids should be prepared because provision lacks guidelines or standards as to what constitutes "materially unbalanced."

Contracts—Awards—Improper—Corrective Action—Not Recommended—Competition Not Available

No corrective action recommended on contract awarded improperly where due to nature of item procured (lease of relocatable office building) and circumstances presently existing (principally fact that incumbent contractor has already received payment for transporting, setting up and taking down buildings) there appears to be little room for price competition on any reprocurement.

In the matter of the Mobilease Corporation, September 27, 1974:

Invitation for bids (IFB) N62472-74-B-0143, issued by the Naval Facilities Engineering Command, soliciated bids for the rental of relocatable office buildings for the Naval Air Station, Lakehurst, New Jersey. Mobilease Corp. was the sole bidder. However, the IFB was canceled after bid opening because of the "* * * inadvertent inclusion of Davis-Bacon wages rate requirements * * * as well as ambiguities created by an incremental funding provision."

Subsequently, the procurement was readvertised in IFB N62472-74-B-0245, which solicited bids on the following items:

0001—Rental of Relocatable Office Building at the Naval Air Station, Lakehurst, N.J. complete and ready for occupancy in accordance with NAVFAC Spec. No. 04-74-0245 for a period of two (2) years.
0002—Option 1—Same as Item 0001 except the Government has the option to renew the lease for a third year upon expiration of the second year.
0003—Option 2—Same as Item 0001 except the Government has the option to renew the lease for a fourth year upon expiration of the third year.
0004—Option 3—Same as Item 0001 except the Government has the option to renew the lease for a fifth year upon expiration of the fourth year.

The IFB also gave the Navy the option to purchase the item at a price not to exceed the 5-year rental rate (less the cost of dismantling and removing the buildings and the cost for site restoration). Eighty-five percent of the rental paid up to the time the Navy exercises its option would be applied to the purchase price. Bidders were also advised that funds were unavailable for the total amount required for item 0001. Four bids were received as follows:

	Item 0001 (years 1 and 2)	Item 0002 (year 3)	Item 0003 (year 4)	Item 0004 (year 5)	Total
Williams Mobile Offices, Inc.	$1, 575, 000	$145, 000	$100, 000	$75, 000	$1, 895, 000
The Atlantic Mobile Corp.	1, 580, 000	185, 000	135, 000	70, 000	1, 970, 000
Space Rentals	1, 276, 272	256, 310	256, 310	256, 310	2, 045, 000
Mobilease Corp.	1, 160, 000	297, 000	297, 000	297, 000	2, 051, 000

As we understand the procurement, a Navy activity is being relocated at the Lakehurst Air Station and the move will be completed by December 1974. It is the Navy's best estimate that it will take between 2 and 5 years to fund and construct permanent facilities to house the activity. The Navy believes that it would be quite impossible to complete construction within 2 years but that a clear need exists for the relocatable buildings for at least 2 years. However, the Navy feels that events relating to construction might occur which would extend utilization for 5 years.

Mobilease protested to our Office alleging: (1) IFB–0245 contained a funding provision of $800,000 which is insufficient to fund the project; (2) IFB–0143, which also contained an insufficient funding provision of $400,000, was therefore unnecessarily canceled (and Mobilease's bid unnecessarily exposed); (3) the IFB provision relative to purchase option did not provide for a set purchase price while Mobilease alleges that the purchase price should also require an itemized total for dismantling and site restoration; and (4) the two lowest bids on IFB–0245 were materially unbalanced and therefore nonresponsive to the IFB.

The question implicitly raised by the protest is whether the evaluation of the option years was permissible under the facts of this procurement. The evaluation of options in making an award is permitted under certain circumstances if in the best interests of the Government. The procedures implementing this policy are found in Armed Services Procurement Regulation (ASPR) 1–1504(d). These provisions permit the evaluation of option prices when—

> * * * it has been determined at a level higher than the Contracting Officer that:
> (i) there is a known requirement which exceeds the basic quantity to be awarded, but * * * due to the unavailability of funds, the option cannot be exercised at the time of award of the basic quantity *provided* that in this latter case there is reasonable certainty that funds will be available thereafter to permit exercise of the option; and
> (ii) realistic competition for the option quantity is impracticable once the initial contract is awarded and hence it is in the best interests of the Government to evaluate options in order to eliminate the possibility of a "buy-in" (1–311). This determination shall be based on factors such as, but not limited to, substantial startup or phase-in costs * * *.

In consonance with ASPR 1–1504(d)(2), section "D" of the IFB stated:

> * * * Bids will be evaluated for purposes of award by adding the total price for all option Bid Items to the total price for the base bid, Bid Item 0001. Evaluation of options will not obligate the Government to exercise the options. Bidders shall bid on all Bid Items, failure to do so may be cause for rejection of the bid as non-responsive. Any bid which is materially unbalanced as to prices for Bid Item 0001 and the other bid items may be rejected as non-responsive.

From the record before us, we cannot conclude that the ASPR criteria were met. We find nothing to indicate that there was a "known

requirement" for the option years; neither was there evidence of a reasonable certainty that funds would be available to permit exercise of the options. While it may be that the option years do not lend themselves to "realistic competition," ASPR 1–1503(a) limits the evaluation of options to situations wherein continued performance of the requirement is foreseeable, that is, probable or likely, beyond the original contract term.

We recommend that, in the future, procurement actions involving the evaluation of option years should be undertaken in strict accordance with the provisions of ASPR 1–1501, *et seq.*

With regard to Mobilease's contention relating to unbalancing, we note that if the contract period runs for only 2, 3 or 4 years, Mobilease's price is lower than any other bidder's. Specifically, Mobilease's price for a 2-year period is 26.4 percent less than Williams', 15.3 percent less for a 3-year period and 3.7 percent less for 4 years. However, for a 5-year contract period, Williams' price becomes 7.3 percent lower than Mobilease's. Since evaluation, as required by the IFB, was based on the total prices for the 5-year period, award was made to Williams as lowest bidder.

In Matter of Oswald Brothers Enterprises Incorporated, B–180676, May 9, 1974, our Office recognized the two-fold aspects of unbalancing. *See, also,* 49 Comp. Gen. 787, 792 (1970). The first is a mathematical evaluation of the bid to determine whether it is unbalanced. As noted in *Armaniaco* v. *Borough of Cresskill*, 163 A. 2d 379 (1960), and *Frank Stamato & Co.* v. *City of New Brunswick*, 90 A. 2d 34, 36 (1952), the mathematical aspects of identifying an unbalanced bid focus on whether each bid item carries its share of the cost of the work and the contractor's profit or whether the bid is based on nominal prices for some work and enhanced prices for other work. The second aspect involves an assessment of the cost impact of a bid found to be mathematically unbalanced. Unless there is reasonable doubt that by making award to a party submitting a mathematically unbalanced bid, award will not result in the lowest ultimate cost to the Government, the bid should not be considered materially unbalanced. *See* B–180676, *supra;* B–172789, July 19, 1971; 49 Comp. Gen., *supra;* Matter of Global Graphics, Incorporated, 54 Comp. Gen. 84 (1974).

While in *Stamato* and subsequent decisions of our Office (49 Comp. Gen., *supra;* B–180676, *supra*), we suggest that proof of collusion or of fraud on the part of the bidder offering a mathematically unbalanced bid is an element in determining whether to accept an unbalanced bid, a demonstration of fraud or collusion is not essential. Of course, fraud or collusion in and of itself would render a bid un-

acceptable irrespective of the prices submitted by the bidder. However, the more critical test of unbalancing is the quantum of doubt surrounding the price which the Government must ultimately pay as a result of its decision to accept a mathematically unbalanced bid.

In this regard, no criteria were expressed in section "D" to aid in a determination of a "materially unbalanced" bid. Any determination under this section would necessarily be subjective in nature without reference to standards or common guidelines. Certainly, faced with this provision, bidders were unable to prepare their bids with any assurance that their bids would not be rejected because of unbalancing. We recommend that the language of section "D" be critically examined to determine its utility in evaluating bids under an IFB such as involved here. In this kind of situation better guidelines should be provided as to what constitutes an unacceptable unbalanced bid. It might have been preferable here to have advised bidders that option prices should be the same for all option periods. Unlike the usual option case wherein additional work or supplies may be furnished at later dates, the instant matter involves merely the extended use of property already in the possession of the Government under a lease where the cost for one extension should be essentially the same as for other option periods.

We conclude that the evaluation and award were contrary to the provisions of ASPR governing the evaluation of options for purposes of award and the solicitation was otherwise deficient. However, since Williams has essentially been paid for transporting, setting up and taking down the buildings, no purpose would be served by terminating for convenience and reprocuring as there appears little room for competition on any such reprocurement.

With regard to the protester's other contentions, section 20.2(a) of our Bid Protest Procedures and Standards, 4 CFR 20.2, *et seq.*, states that:

> * * * Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening * * * shall be filed prior to bid opening * * *.

Since alleged inadequacies and defects in the IFB's provisions were apparent prior to bid opening, Mobilease's protest in those respects subsequent to that date must be considered untimely. Moreover, our regulations also provide that "In other cases, bid protests shall be filed not later than 5 [working] days after the basis for protest is known or should have been known * * *." Since Mobilease clearly was aware of a basis for protesting the Navy's cancellation of IFB-0143 more than 5 days prior to the date upon which it filed a protest, Mobilease's contentions are also untimely in this regard.

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Bids indicating bidders would not accept orders less than $50, and containing insertions of "$500.00" and "$100.00" in blank calling for specific minimum amount under $50, were properly rejected by contracting officer, since defects pertain to material provision and are not waivable irregularities under FPR 1–2.405 ---- 120

Prices
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Bid nonresponsive

Where two bidders inserted clauses in their bids providing for changes in price of equipment to be furnished if certain circumstances occur, bidders have not offered firm-fixed prices and bids must be rejected as nonresponsive ---- 237

Requests for proposals. (*See* **CONTRACTS, Negotiation, Requests for proposals**)
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Small business concerns. (*See* **CONTRACTS, Awards, Small business concerns**)
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BIDS—Continued
Subcontracts
Bid shopping. (*See* **CONTRACTS, Subcontracts, Bid shopping**)
Two-step procurement
Discontinuance and contract negotiated
Propriety Page
Determination to limit 1974 utility aircraft two-step procurement to turboprop aircraft, based on agencies' determination of minimum needs, guidance from congressional committees, and contracting officer's belief that fuel shortages require procurement of more economical turboprops is not objectionable. Fact that protester's turbofan jets were found most cost effective under 1972 canceled RFP does not demonstrate unreasonableness of 1974 determination and fact that receipt of single acceptable offer results in sole-source procurement does not prove specifications were drafted to cause this result 97
Unbalanced
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Not essential element
Proof of collusion or fraud on part of bidder offering mathematically unbalanced bid is not essential element in determining to reject bid.. 242
Responsiveness of bid
Fact that low bidder has unbalanced its bid by bidding "No Charge" for over 50 percent of the 505 line items being procured is not sufficient reason to reject bid as nonresponsive where: IFB did not prohibit "No Charge" bids; bidder has verified bid; bid is otherwise acceptable; and, bidder is responsible 206
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"Other safe bonds"
Investments
Land-grant funds
For purposes of investing First Morrill Act land-grant funds, bonds rated "A" or better by one of established and leading bond rating services may be considered by District of Columbia as constituting "other safe bonds" within meaning of that phrase as used in such act. 50 Comp. Gen. 712 (1971) modified 37
CHECKS
Endorsements
Powers of attorney
Special
Without time limitation
Special power of attorney in favor of responsible financial institution authorizing that institution to indorse and negotiate Government benefit checks on behalf of payee, may be executed without time limitation as to validity, since recent court cases, applying Treasury regulations which provide that death of grantor revokes power and that presenting bank guarantees all prior indorsements as to both genuineness and capacity, afford adequate protection to Government against risk of loss. Modifies 48 Comp. Gen. 706, 17 *id.* 245 and other similar decisions 75

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Tokyo, Japan
Metropolitan area Page
Tachikawa and Yokota Air Bases in Japan, although not part of Tokyo City, are part of the Tokyo Metropolitan area and therefore are subject to the per diem rates applicable for Tokyo---------- 234

CIVIL SERVICE COMMISSION
Civil Service Retirement and Disability Fund
Refund overpayments
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Civil Service Commission's Bureau of Retirement, Insurance, and Occupational Health cannot obtain reimbursement from a Federal agency whose certifying officer certified erroneous information on Standard Form 2806 leading to overpayment to a former employee from the Civil Service Retirement Fund, 5 U.S.C. 8348. Reimbursement by agency would violate 31 U.S.C. 628 which prohibits expenditures of appropriated funds except solely for objects for which respectively made---------- 205

CLAIMS
Assignments
Contracts
Assignee's right to payment
Without Government set-off
Where assignee bank, acting in its own capacity, makes loan to contractor and in return receives assignment of contractor's claim against Government on specific contract and pledge of future receivables but is not fully repaid the amount of its loan out of funds of contract and/or receivables of contractor, if further funds become due under contract, assignee is entitled to amount of such fund which will cause loan to be fully repaid without set-off by Government---------- 137
Third party rights
Third party dealing with assignee bank under assignment of claim can obtain same but has no greater rights than assignee bank had----- 137
Validity of assignment
Assignee's loan not for contract performance
Bank not assignee of claim under Assignment of Claims Act which loaned money to contractor after subject contract was completed is not entitled to protection of the no-setoff provision of Assignment of Claims Act as beneficiary of trust arrangement with assignee bank which acted in agency and/or trustee capacity since bank did not provide any financial assistance which facilitated performance of this particular contract----- 137
Assignee's right to payment
Fact that third party repaid assignee bank (a principal in loan to contractor) the sum outstanding on loan made by bank to Government contractor, who in turn assigned bank its Government contract and also pledged all future receivables, is not determinative of Government's obligation to pay assignee-principal or that bank's rights to receive additional monies, as Government is stranger to transactions between assignee-principal and third party---------- 137

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Settlement
Review
Procedure
Even though request for reversal of audit action is addressed to Transportation and Claims Division, settlement action, disallowing claims, is ripe for review by Comptroller General where record shows Division adequately responded to all of claimant's grounds for reversal ... 89
COLLECTIONS
Debt. (*See* **DEBT COLLECTIONS**)
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Land grant colleges
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For purposes of investing First Morrill Act land-grant funds, bonds rated "A" or better by one of established and leading bond rating services may be considered by District of Columbia as constituting "other safe bonds" within meaning of that phrase as used in such act. 50 Comp. Gen. 712 (1971) modified 37
COMPENSATION
Administrative errors
Appointment to wrong grade
Retroactive salary adjustment
Employees, placed in lower grade at time of appointment than they would have been placed in had there not been an administrative failure to carry out a nondiscretionary agency policy, may have their appointments retroactively changed to the higher grade and paid appropriate back pay. While general rule is that retroactive changes in salary may not be made in absence of a statute so providing, GAO has permitted retroactive adjustments in cases where errors occurred as the result of a failure to carry out a nondiscretionary administrative policy 69
Jury duty
Inclusion of premium pay in compensation payable
Because it would be a hardship on Federal Aviation Administration (FAA) employees called for weekday jury duty whose tours of duty include work on Saturdays or Sundays, or both, to require them to work their regularly scheduled weekend days in addition to serving on juries on 5 weekdays, the FAA may establish a policy to permit those employees to be absent on weekends without charge to annual leave and with payment of premium pay normally received by them for work on Saturdays and Sundays 147

COMPENSATION—Continued
Military pay (*See* **PAY**)
Overtime
Early reporting and and delayed departure
Guards
Overtime claim
Retroactive period Page

Although decision 53 Comp. Gen. 489, B–158549, January 22, 1974, authorized payment of 15 minutes uniform changing and additional travel time to guards in Region III, General Services Administration, through period up to February 28, 1966, guards assigned to Baltimore area may be paid such overtime to December 23, 1970, inasmuch as the regulation requiring that uniforms be changed at assigned lockers, applicable in Baltimore, was not amended to permit wearing of uniforms to and from work until that date 11

Preliminary and postliminary duties. (*See* **COMPENSATION, Overtime, Early reporting and delayed departure**)
Preliminary and postliminary duties
Overtime. (*See* **COMPENSATION, Overtime, Early reporting and delayed departure**)
Severance pay
Military retired pay entitlement effect

National Guard technician prior to fulfilling requirement for immediate civil service annuity, although involuntarily removed from his civilian position due to loss of military membership, is precluded by 5 U.S.C. 5595(a)(2)(iv) from receiving severance pay when he is qualified for military retirement under the provisions of 10 U.S.C. 1331 by having attained age 60 with the requisite years of service 212

Resignation prior to involuntary separation

Although employee resigned after receipt of general *announcement* by agency of proposed reduction-in-force action and publication of general news items, he is not entitled to severance pay since notice failed to meet requirements for a general reduction-in-force *notice* under 5 CFR 351.804 and 550.706(a)(2), and his separation may not be regarded as involuntary within meaning of sec. 550.706 for purpose of entitlement to severance pay 154

Where employee resigned prior to receipt of specific notice of involuntary separation or general notice of proposed transfer or abolition of all positions in his competitive area, as required in applicable regulations for entitlement to severance pay, neither failure of agency to grant him leave without pay status prior to resignation nor its action in granting such leave to other employees provides basis for his entitlement to severance pay if not otherwise eligible since granting of leave without pay is not matter of right but a matter for agency's discretion 154

What constitutes
Intergovernmental Personnel Act detail reimbursement

When a State or local Govt. employee is detailed to executive agency of Federal Govt. under Intergovernmental Personnel Act, reimbursement under 5 U.S.C. 3374(c) for "pay" of employee may include fringe benefits, such as retirement, life and health insurance, but not costs for negotiating assignment agreement required under 5 CFR 334.105 nor for preparing payroll records and assignment report prescribed under 5 CFR 334.106. The word "pay" as used in act has reference, according to legislative

COMPENSATION—Continued
What constitutes—Continued
Intergovernmental Personnel Act detail reimbursement—Continued Page
history, to salary of State or local detailee which term as used in 3374(c), upon reconsideration, does need to be limited to meaning used in Federal personnel statutes, that is, that term refers only to wages, salary, overtime and holiday pay, periodic within-grade advancements and other pay granted directly to Federal employees. 53 Comp. Gen. 355, overruled in part 210

CONTRACTORS
Defaulted
Reprocurement
Standing
Defaulted contractor, who was furnished reprocurement solicitation because of Freedom of Information Act, has no standing to be considered for award, as award at increased price would be tantamount to modification of defaulted contract without any consideration therefor to Government 161
Responsibility
Contracting officer's affirmative determination accepted
Exceptions
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GAO has discontinued practice of reviewing bid protests of contracting officer's affirmative responsibility determination except for actions by procuring officials which are tantamount to fraud .. 66

CONTRACTS
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Requirement contracts. (*See* **CONTRACTS, Requirements**)
Assignments. (*See* **CLAIMS, Assignments, Contracts**)
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Improper
Corrective action
Not recommended
Competition not available
No corrective action recommended on contract awarded improperly where due to nature of item procured (lease of relocatable office building) and circumstances presently existing (principally fact that incumbent contractor has already received payment for transporting, setting up and taking down buildings) there appears to be little room for price competition on any reprocurement 242
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GAO is without jurisdiction to question small business status of bidder since 15 U.S.C. 637(b)(6) makes the determination of the Small Business Administration of such matters conclusive 206
Bid shopping. (*See* **CONTRACTS, Subcontracts, Bid shopping**)

CONTRACTS—Continued

Buy American Act

Canadian purchases Page

Protest that proposal offering listed Canadian end product should have been evaluated pursuant to Buy American Act restrictions is denied because regulations implementing Act provide for waiver with respect to listed Canadian end products and GAO has previously upheld DOD's discretion in effecting waiver of restrictions and listing products; moreover, action of Canadian Commercial Corporation in submitting offer for Canadian supplier was proper under regulation. In view of Congressional cognizance of Agreements between DOD and Canadian counterpart waiving Act's restrictions, and as Agreement covers matter concerning U.S.-Canadian relations, it is inappropriate for GAO to question regulations' propriety 44

Data, rights, etc.

Disclosure

Timely protest requirement

Protest that Air Force RFP violated protester's proprietary rights is untimely as protester made no attempt to object to alleged disclosure of data until after award of contract approximately five months after protester became aware of RFP's specifications 44

Default

Procurement from another source

Defaulted contractor's bid

Defaulted contractor, who was furnished reprocurement solicitation because of Freedom of Information Act, has no standing to be considered for award, as award at increased price would be tantamount to modification of defaulted contract without any consideration therefor to Government 161

Reprocurement

Government procurement statutes

Not for consideration

When reprocurement is for account of defaulted contractor, statutes governing procurements by Government are not applicable, therefore, questions concerning procurement policy and regulations are not properly for consideration 161

Disputes

Contract Appeals Board decision

Acceptance of fact determinations

Where primary issue before ASBCA was number of hours contractor's employees worked on project and contract contained clause providing for disputes arising out of contract labor standards provisions being resolved under contract, GAO will follow ASBCA decision notwithstanding contrary Department of Labor opinion, since issue involved matter of enforcement of labor standards reserved for established contract settlement procedures of contracting agencies 24

Labor stipulations

Minimum wage determinations

Service Contract Act of 1965

Amendments. (*See* **CONTRACTS, Labor stipulations, Service Contract Act of 1965, Amendments, Minimum wage, etc., determinations**)

CONTRACTS—Continued
Labor stipulations—Continued
Service Contract Act of 1965—Continued
Amendments—Continued
Minimum wage, etc., determinations
Rates under prior contracts Page

Where October 1973 Service Contract Act minimum wage and fringe benefit determination issued for GSA solicitation is based on May 1973 survey data covering manufacturing and nonmanufacturing employees in locality, contention that determination should have specified conformable rates developed under prior contracts between bidder and Air Force in same locality which contained wage determination based on May 1972 survey data is without merit, since act provides that determinations are to be in accordance with prevailing rates in locality..... 120

Withholding unpaid wages, overtime, etc.
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Leases (*See* **LEASES**)
Negotiated. (*See* **CONTRACTS. Negotiation**)
Negotiation
Auction technique prohibition
Disclosure of price, etc.

Contract should not have been awarded to offeror who quoted option price in excess of ceiling in RFP, since it was prejudicial to other offerors and contrary to best interests of Government, and therefore, negotiations should be reopened to either cure deviation in accepted proposal or to issue amendment to RFP deleting option price ceiling, notwithstanding action will amount to auction technique, as GAO does not believe that improper award must be allowed to stand solely to avoid implications of auction situation. Modified by 54 Comp. Gen.— (B-180247, Dec. 26, 1974)..... 16

Negotiation
Awards
Propriety
Evaluation of proposals

GAO finds no evidence in record to support allegation that Air Force aided other offerors in price revisions or that such revisions resulted from other than proper negotiation process. Although protester contends time extension for award was made to benefit awardee, record indicates Air Force needed additional time to evaluate proposal revisions submitted pursuant to negotiations with all offerors..... 44

While protester contends that agency is prejudiced against it because of agency's past actions and alleged conflict of interest on part of agency employees, record indicates no bias on agency's part in evaluation of proposals or selection of awardee. Moreover, claims of similar nature previously have been investigated by Department of Justice and it appears no grounds existed for prosecution..... 44

Competition
Changes in price, specifications, etc.

So long as offerors were advised to base production unit cost estimates on cumulative average costs for 241 production units, there was no unfair advantage in permitting one offeror, by insertion of special clause, to make its proposed cost contingent on accruacy of projected production

CONTRACTS—Continued
Negotiation—Continued
Competition—Continued
Changes in price, specifications, etc.—Continued Page

figure, since clause makes explicit what is already implicit in proposal instructions. Also, model contract provision furnished to offerors specifically states that equitable adjustment will be made in production unit price for any Government change in production quantity affecting production unit cost ---- 169

Discussion with all offerors requirement
Actions not requiring

GAO does not believe agency acted unreasonably in pointing out by letter 24 deficiencies in protester's technical proposal rather than conducting "give and take" oral negotiations, or in failing to negotiate further when revised proposal was also considered deficient, as there is no inflexible rule used in construing the requirement in 10 U.S.C. 2304(g) for written or oral discussions, rather extent and content of discussions is primarily for agency determination. Furthermore, it would be unfair for agency to help one offeror through successive rounds of discussions to bring its proposal up to level of other adequate proposals where offeror's revised proposal contains large number of uncorrected deficiencies resulting from offeror's lack of competence, diligence or inventiveness ---- 60

Technical transfusion or leveling

Air Force not required to notify other offerors of waiver of specification requirements prompted by competing offeror's unique technical approach and to allow offerors opportunity to submit proposal revisions for technical evaluation pursuant to ASPR 3–805.4. As agency indicates offeror's approach was breakthrough in state of art, GAO holds that providing other offerors opportunity to submit revised proposal would have improperly involved technical transfusion ---- 44

Procuring agency did not act improperly in not advising protester of preference for "refinements" design approach of successful offeror since agency's statement, in response to protest concerning lack of meaningful technical negotiations, that it would have "violated ASPR" if it had influenced change in protesting offeror's design approach indicates that "technical transfusion" of competing offeror's superior design approach would have occurred ---- 169

Cost, etc., data
Field pricing support reports
Contracts in excess of $100,000

Requirement in ASPR 3–801.5(b) that field pricing support report be requested prior to negotiation of contract in excess of $100,000 was complied with in production cost area even though procurement contracting officer only requested review of offeror's proposed escalation rate for the period in question, the learning curve to be applied in production, and the make-up of the production unit cost estimate, since ASPR 3–801.5(b)(3) provides that contracting officer has right to stipulate "specific areas for which input (field pricing support) is required" ---- 169

CONTRACTS—Continued
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Cost, etc., data—Continued
Price negotiation techniques Page
Negotiations with unsuccessful offeror as to system weight discrepancy should have, at least, indirectly made it aware that cost estimate was questionable; nevertheless it would have been preferable to have advised offerors that submitted cost proposals were considered generally unrealistic and to convey specifics of cost estimate discrepancies so long as another offeror's unique technical and cost approach would not be disclosed 169
"Realism" of cost
Elimination, without formal advice to offerors, of cost realism standard as applied to preproduction development costs, does not require conclusion that selection of technically superior offeror, whose evaluated unit production cost was within RFP design-to-production-cost limitation but whose development costs were high, was improper under cost evaluation scheme of RFP 169
Cost-plus-incentive-fee contracts
Evaluation
Failure of procuring agency to resolve before award discrepancy between award price on cost-plus-incentive-fee basis of development contract and Government cost estimate for development work was inconsistent with ASPR 3-405.4(b) contemplating negotiation of realistic target cost to provide incentive to contractor to earn maximum fee through ingenuity and effective management 169
Discussion with all offerors. (*See* **CONTRACTS, Negotiation, Competition, Discussion with all offerors requirement**)
Evaluation factors
Administrative determination
Absent clear showing of lack of rational basis for technical judgment reached by procurement activity that proposed design is state-of-art advancement within design-to-production cost limitation of RFP, GAO, on record, as supplemented by comments from interested parties, finds no reason to question judgment exercised by activity 169
Conformability of equipment
Technical deficiencies. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered, Technical deficiencies, Negotiated procurement**)
Criteria
Administrative determination
Lacking independent technical and cost analysis of relative merits of competing proposals in "band 8" approaches and operational effectiveness of system without band 8 requirement, GAO cannot question agency's decision to eliminate band 8 requirement in order to preserve design-to-production cost constraint or subsequent decision, based on possible future importance of requirement to partially restore band 8 coverage via option technique 169
Responsiveness of proposal
GAO examination of technical and price evaluation of awardee's proposal indicates evaluation was reasonable and in accord with stated evaluation criteria. Although selected design has no operational history or actual cost basis, and has yet to undergo testing procedure, RFP

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Criteria—Continued
Responsiveness of proposal—Continued Page

contemplated development contract, including testing thereunder, and did not require item to have been aircraft tested. Furthermore, GAO finds record supports agency's conclusion that successful offeror's low price is reasonable because of unique design, type of materials used, and employment of low cost production processes; also, Canadian Commercial Corporation certified reasonableness of awardee's prices pursuant to ASPR 6–506 44

Factors other than price
Technical acceptability

GAO does not believe agency acted unreasonably in pointing out by letter 24 deficiencies in protester's technical proposal rather than conducting "give and take" oral negotiations, or in failing to negotiate further when revised proposal was also considered deficient, as there is no inflexible rule used in construing the requirement in 10 U.S.C. 2304(g) for written or oral discussions, rather extent and content of discussions is primarily for agency determination. Furthermore, it would be unfair for agency to help one offeror through successive rounds of discussions to bring its proposal up to level of other adequate proposals where offeror's revised proposal contains large number of uncorrected deficiencies resulting from offeror's lack of competence, diligence or inventiveness 60

Although GAO recognizes that cost should be considered in determining most advantageous proposal in negotiated procurement, protester's proposal was properly rejected as technically unacceptable even though proposed cost was low 60

Elimination, without formal advice to offerors, of cost realism standard as applied to preproduction development costs, does not require conclusion that selection of technically superior offeror, whose evaluated unit production cost was within RFP design-to-production-cost limitation but whose development costs were high, was improper under cost evaluation scheme of RFP 169

Options

Procedural validity of option technique in development contract is unquestionable, since ASPR 1–1501 specifically provides for use of appropriate option provision in research and development contracts, and ASPR 1–1504(c), (d), and (e), contrary to contention of protesting concern, provide that options are to be evaluated only if, unlike the subject procurement, the Government intends to exercise option at time of award or if contract is fixed-price 169

Price in excess of RFP ceiling

Contract should not have been awarded to offeror who quoted option price in excess of ceiling in RFP, since it was prejudicial to other offerors and contrary to best interests of Government, and therefore, negotiations should be reopened to either cure deviation in accepted proposal or to issue amendment to RFP deleting option price ceiling, notwithstanding action will amount to auction technique, as GAO does not believe that improper award must be allowed to stand solely to avoid implications of auction situation. Modified by 54 Comp. Gen.—(B-180247, Dec. 26, 1974) 16

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Price elements for consideration
Cost estimates Page

On procurement record showing that protesting offeror's cost proposal, encompassing cost elements that are required to be examined under procedures for cost analysis set forth in ASPR 3-807.2(c), was analyzed by evaluators in arriving at offeror's rating in cost area; that during course of negotiations several inquiries were made of protesting concern about cost proposal; and that consideration was given to reports submitted by field pricing support activities, GAO cannot conclude there was failure to achieve minimum standard of cost analysis under cited regulation 169

Negotiations with unsuccessful offeror as to system weight discrepancy should have, at least, indirectly made it aware that cost estimate was questionable; nevertheless it would have been preferable to have advised offerors that submitted cost proposals were considered generally unrealistic and to convey specifics of cost estimate discrepancies so long as another offeror's unique technical and cost approach would not be disclosed 169

Prior experience

While protester contends that agency is prejudiced against it because of agency's past actions and alleged conflict of interest on part of agency employees, record indicates no bias on agency's part in evaluation of proposals or selection of awardee. Moreover, claims of similar nature previously have been investigated by Department of Justice and it appears no grounds existed for prosecution 44

Propriety of evaluation

GAO examination of technical and price evaluation of awardee's proposal indicates evaluation was reasonable and in accord with stated evaluation criteria. Although selected design has no operational history or actual cost basis, and has yet to undergo testing procedure, RFP contemplated development contract, including testing thereunder, and did not require item to have been aircraft tested. Furthermore, GAO finds record supports agency's conclusion that successful offeror's low price is reasonable because of unique design, type of materials used, and employment of low cost production processes; also, Canadian Commercial Corporation certified reasonableness of awardee's prices pursuant to ASPR 6-506 44

Rejection of revised proposal is not improper since determination as to whether proposal is technically acceptable is primarily matter for administrative discretion and record does not show agency conclusion that protester's proposed approach contains deficiencies which present unacceptable risk that proposed system would not meet desired standards is unreasonable 60

Superior product offered

Absent clear showing of lack of rational basis for technical judgment reached by procurement activity that proposed design is state-of-art advancement within design-to-production cost limitation of RFP, GAO, on record, as supplemented by comments from interested parties, finds no reason to question judgment exercised by activity 169

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Timeliness of consideration Page

GAO finds no evidence in record to support allegation that Air Force aided other offerors in price revisions or that such revisions resulted from other than proper negotiation process. Although protester contends time extension for award was made to benefit awardee, record indicates Air Force needed additional time to evaluate proposal revisions submitted pursuant to negotiations with all offerors ---- 44

Field pricing support reports
Contracts in excess of $100,000

Requirement in ASPR 3-801.5(b) that field pricing support report be requested prior to negotiation of contract in excess of $100,000 was complied with in production cost area even though procurement contracting officer only requested review of offeror's proposed escalation rate for the period in question, the learning curve to be applied in production, and the make-up of the production unit cost estimate, since ASPR 3-801.5(b)(3) provides that contracting officer has right to stipulate "specific areas for which input (field pricing support) is required" ---- 169

Offers or proposals
Deviations
Informal *v.* substantive

Contract should not have been awarded to offeror who quoted option price in excess of ceiling in RFP, since it was prejudicial to other offerors and contrary to best interests of Government, and therefore, negotiations should be reopened to either cure deviation in accepted proposal or to issue amendment to RFP deleting option price ceiling, notwithstanding action will amount to auction technique, as GAO does not believe that improper award must be allowed to stand solely to avoid implications of auction situation. Modified by 54 Comp. Gen.—(B-180247, Dec. 26, 1974) ---- 16

Prices
Unprofitable

No provision of law prevents award of contract to low offeror even though quoted prices may be unrealistically low or result in unprofitable contract ---- 84

Unbalanced
Not automatically precluded

Upon confirmation of apparently unbalanced offer for preparation of technical publication data, acceptance is proper, as fact that offer may be unbalanced does not render it unacceptable nor of itself invalidate award of contract to low offeror in absence of evidence of irregularity or substantial doubt that award will in fact result in lowest cost to Government ---- 84

Prices
"Buy-ins"

GAO examination of technical and price evaluation of awardee's proposal indicates evaluation was reasonable and in accord with stated evaluation criteria. Although selected design has no operational history or actual cost basis, and has yet to undergo testing procedure, RFP contemplated development contract, including testing thereunder, and

CONTRACTS—Continued
Negotiation—Continued
Prices—Continued
"Buy-ins"—Continued Page

did not require item to have been aircraft tested. Furthermore, GAO finds record supports agency's conclusion that successful offeror's low price is reasonable because of unique design, type of materials used, and employment of low cost production processes; also, Canadian Commercial Corporation certified reasonableness of awardee's prices pursuant to ASPR 6-506 ---- 44

Reduction

Low offeror's substantial reduction of original prices following negotiations provides no reasonable basis to conclude that offeror was supplied with additional information by agency, for it is not uncommon for offerors to offer substantial price reductions in final stages of negotiations, even without change in Government's requirements ---- 84

Pricing data. (*See* **CONTRACTS, Negotiation, Cost, etc., data**)

Requests for proposals
Administrative determination
Good faith

Claim for recovery of $3,530 in proposal preparation, preaward and cancellation costs based on allegation that issuance of RFP for air conditioners was arbitrary, since Govt. knew similar units were available from another agency's inventory, is denied, since no evidence is found showing solicitation was issued in bad faith; and, even if judged by reasonable basis standard, contracting officer's unequivocal statement that he had no indication when RFP was issued that settlement of dispute was in prospect, which would have effect of making available default termination inventory, indicates reasonable basis for soliciting offers ---- 215

Amendment
Propriety

Contract should not have been awarded to offeror who quoted option price in excess of ceiling in RFP, since it was prejudicial to other offerors and contrary to best interests of Government, and therefore, negotiations should be reopened to either cure deviation in accepted proposal or to issue amendment to RFP deleting option price ceiling, notwithstanding action will amount to auction technique, as GAO does not believe that improper award must be allowed to stand solely to avoid implications of auction situation. Modified by 54 Comp. Gen.—(B-180247, Dec. 26, 1974 ---- 16

Buy American Act
Restriction not for application
Canadian offeror

Protest that proposal offering listed Canadian end product should have been evaluated pursuant to Buy American Act restrictions is denied because regulations implementing Act provide for waiver with respect to listed Canadian end products and GAO has previously upheld DOD's discretion in effecting waiver of restrictions and listing products; moreover, action of Canadian Commercial Corporation in submitting offer for Canadian supplier was proper under regulation. In view of Congressional cognizance of Agreements between DOD and Canadian counterpart waiving Act's restrictions, and as Agreement covers matter concerning U.S.-Canadian relations, it is inappropriate for GAO to question regulations' propriety ---- 44

CONTRACTS—Continued
Negotiation—Continued
Requests for proposals—Continued
Cancellation Page

Allegation that cancellation of RFP was arbitrary because air conditioners obtained from another agency's inventory were manufactured under different specifications and would not meet Govt.'s needs without modifications does not justify recovery of proposal preparation and related costs, since explicit judicial recognition of right to recover proposal expenses in such circumstances appears to be lacking, and in any event cancellation was not made in bad faith or arbitrarily or capriciously, since contracting officer found that modified inventory units would meet requirements and right to reject all offers on unneeded supplies is well established 215

Evaluation criteria

So long as offerors were advised to base production unit cost estimates on cumulative average costs for 241 production units, there was no unfair advantage in permitting one offeror, by insertion of special clause, to make its proposed cost contingent on accuracy of projected production figure, since clause makes explicit what is already implicit in proposal instructions. Also, model contract provision furnished to offerors specifically states that equitable adjustment will be made in production unit price for any Government change in production quantity affecting production unit cost 169

Preparation costs

Claim for recovery of $3,530 in proposal preparation, preaward and cancellation costs based on allegation that issuance of RFP for air conditioners was arbitrary, since Govt. knew similar units were available from another agency's inventory, is denied, since no evidence is found showing solicitation was issued in bad faith; and, even if judged by reasonable basis standard, contracting officer's unequivocal statement that he had no indication when RFP was issued that settlement of dispute was in prospect, which would have effect of making available default termination inventory, indicates reasonable basis for soliciting offers 215

Proposal deviations
Disqualification of offeror

GAO does not believe agency acted unreasonably in pointing out by letter 24 deficiencies in protester's technical proposal rather than conducting "give and take" oral negotiations, or in failing to negotiate further when revised proposal was also considered deficient, as there is no inflexible rule used in construing the requirement in 10 U.S.C. 2304(g) for written or oral discussions, rather extent and content of discussions is primarily for agency determination. Furthermore, it would be unfair for agency to help one offeror through successive rounds of discussions to bring its proposal up to level of other adequate proposals where offeror's revised proposal contains large number of uncorrected deficiencies resulting from offeror's lack of competence, diligence or inventiveness ... 60

Restrictive of competition

Although protest on basis of sole-sourcing is directed nominally against prime contractor, in actuality it is against restrictive requirement in Government RFP and is therefore within class described in section

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Requests for proposals—Continued
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Waiver
Air Force not required to notify other offerors of waiver of specification requirements prompted by competing offeror's unique technical approach and to allow offerors opportunity to submit proposal revisions for technical evaluation pursuant to ASPR 3-805.4. As agency indicates offeror's approach was breakthrough in state of art, GAO holds that providing other offerors opportunity to submit revised proposal would have improperly involved technical transfusion 44
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Factors used to justify sole-source procurement of public education and information programs such as: nonprofit organization's makeup; fact that organization would utilize volunteers in performance; organization's rapport and understanding of State and local Government, key memberships, respected position, community support and coalition approach do not represent proper justification for noncompetitive procurements irrespective of fact that nonprofit organization could quote lower price since statutes require full and free competition consistent with what is being procured 58
Although protest on basis of sole-sourcing is directed nominally against prime contractor, in actuality it is against restrictive requirement in Government RFP and is therefore within class described in section 20.1(a) of Interim Bid Protest Procedures and Standards and for consideration by GAO 231
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Contracting agency acted reasonably in restricting component of end item in RFP to previous manufacturer where detailed manufacturing drawings were not available and agency determined that it would add undue risk to timely completion of total procurement to allow protester to design product to existing data 231
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Determination to limit 1974 utility aircraft two-step procurement to turboprop aircraft, based on agencies' determination of minimum needs, guidance from congressional committees, and contracting officer's belief that fuel shortages require procurement of more economical turboprops is not objectionable. Fact that protester's turbofan jets were found most cost effective under 1972 canceled RFP does not demonstrate unreasonableness of 1974 determination and fact that receipt of single acceptable offer results in sole-source procurement does not prove specifications were drafted to cause this result 97
Specifications conformability. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered, Technical deficiencies, Negotiated procurement**)

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Technical acceptability of equipment, etc., offered. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered, Technical deficiencies, Negotiated procurement**)
Two-step procurement. (*See* **BIDS, Two-step procurement**)
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In procurement for rental of relocatable office buildings with 2-year base period and three 1-year options where agency estimates that it may take 2 to 5 years to fund and construct more permanent facilities, "known requirement" for option years was not established nor was there reasonable certainty that funds would be available to permit exercise of options. See ASPR 1-1503 242
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Where primary issue before ASBCA was number of hours contractor's employees worked on project and contract contained clause providing for disputes arising out of contract labor standards provisions being resolved under contract, GAO will follow ASBCA decision notwithstanding contrary Department of Labor opinion, since issue involved matter of enforcement of labor standards reserved for established contract settlement procedures of contracting agencies 24
Protests
Contracting officer's affirmative responsibility determination
GAO review discontinued
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Interim Bid Protest Procedures and Standards
Where offeror selected for award under 1972 negotiated utility aircraft procurement makes timely oral protest to agency after Jan. 29, 1973, cancellation of RFP but agency neither sustains nor responds to protest, after reasonable time has elapsed protester is charged with notice of adverse agency action. Subsequent protest to GAO, filed when resolicitation is issued 13 months later, is untimely in regard to portions asserting invalidity of cancellation, resulting invalidity of resolicitation, and protester's demand for award under 1972 canceled RFP. Moreover, GAO consideration of untimely issues is not justified under good cause and significant issue provisions of 4 CFR 20.2(b) 97
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Two-step procurement
Where offeror selected for award under 1972 negotiated utility aircraft procurement makes timely oral protest to agency after Jan. 29, 1973, cancellation of RFP but agency neither sustains nor responds to protest, after reasonable time has elapsed protester is charged with notice of adverse agency action. Subsequent protest to GAO, filed when resolicitation is issued 13 months later, is untimely in regard to portions asserting invalidity of cancellation, resulting invalidity of resolicitation, and protester's demand for award under 1972 canceled RFP. Moreover, GAO consideration of untimely issues is not justified under good cause and significant issue provisions of 4 CFR 20.2(b) ---- 97
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Low bidder found to be nonresponsible to perform full amount of labor hours capacity specified in its bid was properly excluded from award consideration under IFB provision which called for progressive awards to low responsible, responsive bidders until Govt.'s estimated needs were satisfied; however, if some amount of Govt.'s requirements were not contracted for after following award procedure in IFB, agency could reconsider responsibility of low bidder for award of some quantity of hours less than maximum specified in bid, provided bid was not otherwise qualified, since under IFB instructions and conditions, Govt. reserves right to make award for quantity less than quantity offered ---- 120
Not established
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In procurement for rental of relocatable office buildings with 2-year base period and three 1-year options where agency estimates that it may take 2 to 5 years to fund and construct more permanent facilities, "known requirements" for option years was not established nor was

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To insure supply
Low bidder found to be nonresponsible to perform full amount of labor hours capacity specified in its bid was properly excluded from award consideration under IFB provision which called for progessive awards to low responsible, responsive bidders until Govt.'s estimated needs were satisfied; however, if some amount of Govt.'s requirements were not contracted for after following award procedure in IFB, agency could reconsider responsibility of low bidder for award of some quantity of hours less than maximum specified in bid, provided bid was not otherwise qualified, since under IFB instructions and conditions, Govt. reserves right to make award for quantity less than quantity offered ... 120
Research and development
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Primary reliance on independent, "parametric" cost analysis in evaluating projected production unit costs of offerors in determining successful offeror for award of development contract under "design-to-production-unit cost" concept was not unreasonable since: (1) DOD guidelines for award of development contract terms proposed production unit cost estimates of offerors "inconclusive" at development state; (2) each competing offeror's cost proposal was equally and thoroughly analyzed with "parametric" estimate; and (3) substantial cost additions to each offeror's proposal were made 169
Minimum standard
On procurement record showing that protesting offeror's cost proposal, encompassing cost elements that are required to be examined under procedures for cost analysis set forth in ASPR 3-807.2(c), was analyzed by evaluators in arriving at offeror's rating in cost area; that during course of negotiations several inquiries were made of protesting concern about cost proposal; and that consideration was given to reports submitted by field pricing support activities, GAO cannot conclude there was failure to achieve minimum standard of cost analysis under cited regulation 169
Evaluation factors
Design
Superiority, deficiencies, etc.
Procuring agency in source selection process did not disregard procurement guideline directing offerors to design system for protection against certain threats where award was made to offeror receiving excellent rating for protection against threats in question rather than to protesting concern which received rating of "adequate" for same threats 169

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Optional technique Page
Procedural validity of option technique in development contract is unquestionable, since ASPR 1-1501 specifically provides for use of appropriate option provision in research and development contracts, and ASPR 1-1504 (c), (d), and (e), contrary to contention of protesting concern, provide that options are to be evaluated only if, unlike the subject procurement, the Government intends to exercise option at time of award or if contract is fixed-price 169
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Samples. (*See* **CONTRACTS, Specifications, Samples**)
Small business concerns. (*See* **CONTRACTS, Awards, Small business concerns**)
Sole source procurements. (*See* **CONTRACTS, Negotiation, Sole source basis**)
Specifications
Ambiguous
Clarification
Solicitation stating contractor must accept all orders, but that offeror can indicate by checking box whether it will or will not accept orders under $50, and which provides blank where offeror can indicate specific minimum amount below $50, means that bidders are offered three options: to accept all orders less than $50; to refuse all such orders; or to accept orders under $50 but above a specified minimum. However, since provision is somewhat confusing, agency should consider revision to provide clarity 120
Conformability of equipment, etc., offered
Administrative determination
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Allegation that cancellation of RFP was arbitrary because air conditioners obtained from another agency's inventory were manufactured under different specifications and would not meet Govt.'s needs without modifications does not justify recovery of proposal preparation and related costs, since explicit judicial recognition of right to recover proposal expenses in such circumstances appears to be lacking, and in any event cancellation was not made in bad faith or arbitrarily or capriciously since contracting officer found that modified inventory units would meet requirements and right to reject all offers on unneeded supplies is well established 215
Drawings, samples, etc.
Acceptance
Effect
In future, requirements for bid samples should include (FPR 1-2.202-4) warning that bid may be rejected for failure to submit sample timely and should list reasons for sample requirement; however, failure to comply with FPR did not affect validity of instant procurement 157

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Bid is not nonresponsive where variable rates for contractor's representative are included, solicitation having requested "Per diem rates and full terms" to be submitted with bid, in view of other solicitation instruction that all costs for representative are to be included in bid price and inasmuch as solicitation did not envision other than a single bid price to cover all specification requirements including contractor's representative. 237

Technical deficiencies
Negotiated procurement

Rejection of revised proposal is not improper since determination as to whether proposal is technically acceptable is primarily matter for administrative discretion and record does not show agency conclusion that protester's proposed approach contains deficiencies which present unacceptable risk that proposed system would not meet desired standards is unreasonable 60

Lacking independent technical and cost analysis of relative merits of competing proposals in "band 8" approaches and operational effectiveness of system without band 8 requirement, GAO cannot question agency's decision to eliminate band 8 requirement in order to preserve design-to-production cost constraint or subsequent decision, based on possible future importance of requirement to partially restore band 8 coverage via option technique 169

Tests
Specification requirement

Administrative determination that change in specifications required initial production test to be conducted was not shown to be arbitrary, capricious, or without substantial basis in fact 39

Definiteness requirement
Labor stipulations

Listing in IFB of specific equipment types to be repaired is preferable, since bid calculation is difficult where solicitation lists only general equipment types, requiring bids on flat labor hour rate for each type; also, applicable repair standard depends on equipment specified in purchase orders placed under contract. Since solicitation provided common basis for bidding, and submission of 20 bids is indication terms were reasonable, conclusion cannot be drawn that defects were so serious as to contravene requirement for full and free competition 120

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Erroneous
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Not prejudicial Page

Inclusion in IFB of provision that contracting officer "may" waive initial production testing for bidders which had "previously produced an essentially identical item," when in fact no bidder was eligible for waiver, did not invalidate awarded contract in absence of showing that protester was prejudiced by erroneous provision or that bidders were bidding on unequal bases 39

Failure to furnish something required
Information
Subcontractor listing

Where intent of bidder in listing alternate subcontractors is to protect itself in the event the Government exercises its option to select an alternate listed on the bid schedule, such intent must be noted on "List of Subcontractors" attached to bid form prior to bid opening so as to be considered in the agency's determination of bid responsiveness 159

Restrictive
Geographical location

Reasonable expectation that potential contractors located beyond certain distance from installation will not satisfactorily perform laundry contract provides basis for including in solicitation restriction requiring bidders have facilities located within certain radius of miles, and where protester has not presented evidence to overcome contracting officer's finding of marginal historical performance by contractors located beyond 90 miles from Camp Drum, New York, GAO cannot conclude that 90 mile restriction was without reasonable basis 29

Samples
Place of submission

Bid sample requirement that one mockup of item be submitted with bid may not be interpreted so technically as to exclude low bidder from consideration for award because it submitted samples prior to bid opening to contracting activity's technical personnel 157

Time for submission

In future, requirements for bid samples should include (FPR 1-2.202-4) warning that bid may be rejected for failure to submit sample timely and should list reasons for sample requirement; however, failure to comply with FPR did not affect validity of instant procurement 157

Tests
Conformability of equipment offered to specifications. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered, Tests**)
Requirements
Administrative determination

Administrative determination that change in specifications required initial production test to be conducted was not shown to be arbitrary, capricious, or without substantial basis in fact 39

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Invitation provision Page

Inclusion in IFB of provision that contracting officer "may" waive initial production testing for bidders which had "previously produced an essentially identical item", when in fact no bidder was eligible for waiver, did not invalidate awarded contract in absence of showing that protester was prejudiced by erroneous provision or that bidders were bidding on unequal bases 39

Status
Federal grants-in-aid

Illinois Equal Employment Opportunity (EEO) requirements for publicly funded, federally assisted projects do not comply with Federal grant conditions requiring open and competitive bidding because requirements are not in accordance with basic principle of Federal procurement law, which goes to essence of competitive bidding system, that all bidders must be advised in advance as to basis upon which bids will be evaluated, because regulations, which provide for EEO conference after award but prior to performance, contain no definite minimum standards or criteria apprising bidders of basis upon which compliance with EEO requirements would be judged 6

Subcontractors
Listing
Bidder responsibility *v.* bid responsiveness

Where intent of bidder in listing alternate subcontractors is to protect itself in the event the Government exercises its option to select an alternate listed on the bid schedule, such intent must be noted on "List of Subcontractors" attached to bid form prior to bid opening so as to be considered in the agency's determination of bid responsiveness 159

Subcontracts
Bid shopping
Listing of subcontractors
Alternates

Where formally advertised solicitation contained subcontractor listing requirement, low bid which listed alternate subcontractors for several of the categories of work listed on bid form was properly determined nonresponsive in that contractor would have been afforded opportunity to select, after opening of bids, the firm with which it would subcontract work in each category where an alternate was stated, contrary to design and purpose of requirement to preclude "bid shopping" 159

COURTS
Costs
Docket fees

Docket fee may be awarded as cost against Government as set forth in 28 U.S.C. 1923, since after balancing 28 U.S.C. 2412 prohibition against taxing of attorney fees and expenses (docket fee appearing to be attorney's compensation for docketing suit) against allowance of such fees in sections 1920 and 1923, it appears that allowance of such fee accords with congressional intent in 1966 amendment of section 2412, which appears to be remedial in nature, to bring parity to private litigant respecting costs in litigation with U.S 22

DEBT COLLECTIONS
Military personnel
Waiver. (*See* **DEBT COLLECTIONS, Waiver, Military personnel**)
Waiver
Military personnel
Allotment
Class S Page

An erroneous repayment of a Uniformed Services Savings Deposit Program deposit plus interest which arose out of an erroneous allotment of pay resulting in the member's indebtedness may be considered a claim "arising out of an erroneous payment of any pay" within the meaning of 10 U.S.C. 2774(a) and may be considered for waiver---------- 133

Effect of member's fault

Although the Army administrative report recommended against waiver of the member's debt because he stated at the time of his separation from the service he believed he had received an overpayment, the Army does not refute the member's statement that he alerted the Army to a possible overpayment by so indicating on his "out-processing" financial papers, and since there is no evidence of fault on the part of the member, the claim is waived under 10 U.S.C. 2774---------- 133

Statutes of limitation

A "Pay and Allowance Inquiry" form (on which the date was altered) prepared by the Army Finance Center and sent to the member's disbursing officer inquiring as to the erroneous payment but upon which no action was taken by the Army for over three years to notify the member or collect the debt may not be considered evidence that as of the original date of such form it was definitely determined by an appropriate official that an erroneous payment had been made so as to preclude the member's request for waiver from consideration as not being timely filed within the three-year period provided by 10 U.S.C. 2774(b)(2)---------- 133

DECEDENTS' ESTATES
Pay, etc., due military personnel
Beneficiary designations
Six months' death gratuity

When member and wife were separated and agreement was executed by them prior to time member entered Air Force whereby wife waived all rights and other benefits to which she may be entitled as result of member's possible future military service and member designated his mother to receive the 6-months' death gratuity in the event there was no surviving spouse, mother's claim was properly disallowed because 10 U.S.C. 1447(a) provides that surviving spouse shall be paid the gratuity and a simple waiver of an unknown future right does not afford legal basis for payment of gratuity due from the U.S. to someone other than the lawfully designated recipient---------- 152

DEPARTMENTS AND ESTABLISHMENTS
Services between
Procurement of supplies and services
Aircraft services

No impropriety has been demonstrated in GSA's procurement of heavy equipment repair services for use of Air Force since solicitation was issued pursuant to GSA-Air Force agreement executed under Air

DEPARTMENTS AND ESTABLISHMENTS—Continued
Services between—Continued
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Aircraft services—Continued Page

Force authorizing regulations; moreover, provisions of ASPR 5–205 whereunder GSA sources are required to be used for repair services does not prohibit GSA from procuring subject repair services on behalf of Air Force 120

DISTRICT OF COLUMBIA
Federal City College
Investments

For purposes of investing First Morrill Act land-grant funds, bonds rated "A" or better by one of established and leading bond rating services may be considered by District of Columbia as constituting "other safe bonds" within meaning of that phrase as used in such act. 50 Comp. Gen. 712 (1971) modified 37

ENVIRONMENTAL PROTECTION AND IMPROVEMENT
Agency contracts
Sole source procurements
Public education and information programs

Factors used to justify sole-source procurement of public education and information programs such as: nonprofit organization's makeup; fact that organization would utilize volunteers in performance; organization's rapport and understanding of State and local Government, key memberships, respected position, community support and coalition approach do not represent proper justification for noncompetitive procurements irrespective of fact that nonprofit organization could quote lower price since statutes require full and free competition consistent with what is being procured 58

Grants-in-aid
Waste treatment
Recovery of costs

Statutory requirement that grantees under Public Law 92–500 will adopt system of charges assuring that each recipient of waste treatment services shall pay its proportionate share of treatment works' operation and maintenance costs is not met by use of ad valorem tax since potentially large number of users—i.e., tax exempt properties—will not pay for any services; ad valorem tax does not achieve sufficient degree of proportionality according to use and hence does not reward conservation of water; and Congress intended adoption of user charge and not tax to raise needed revenues 44

Water pollution. (*See* **WATER, Pollution prevention**)

EQUAL EMPLOYMENT OPPORTUNITY
Grant programs
Contract awards

Illinois Equal Employment Opportunity (EEO) requirements for publicly funded, federally assisted projects do not comply with Federal grant conditions requiring open and competitive bidding because requirements are not in accordance with basic principle of Federal procurement law, which goes to essence of competitive bidding system, that all bidders must be advised in advance as to basis upon which bids will be evaluated, because regulations, which provide for EEO

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conference after award but prior to performance, contain no definite minimum standards or criteria apprising bidders of basis upon which compliance with EEO requirements would be judged 6
EQUIPMENT
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Lease payments
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Validity
Assignment of lease payments under Government leases for computer equipment to lease financing company which purchases title to equipment should be recognized since purchaser of equipment may be regarded as financing institution under Assignment of Claims Act 80
Selection and purchase
Competitive basis
Protester objecting to alleged sole-source procurement is not without standing to have pro test considered because of failure to participate in earlier, competitive phase of procurement for automatic data processing systems since it is current non-competitive procurement action which is basis of protest 196
Federal Supply Schedule
Army's procurement by renting initially and then purchasing automatic data processing equipment (ADPE) from one vendor pursuant to delivery order issued against Federal Supply Schedule contract 6 years earlier was unauthorized, since delivery order, which Army regarded as long-term contractual arrangement, was effective only with respect to equipment actually ordered for delivery and not with respect to additional equipment listed for possible future acquisition, which could be acquired only through issuance of subsequent delivery orders or contract awards in accordance with then applicable regulations 196
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Government liability
Docket fee may be awarded as cost against Government as set forth in 28 U.S.C. 1923, since after balancing 28 U.S.C. 2412 prohibition against taxing of attorney fees and expenses (docket fee appearing to be attorney's compensation for docketing suit) against allowance of such

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fees in sections 1920 and 1923, it appears that allowance of such fee accords with congressional intent in 1966 amendment of section 2412, which appears to be remedial in nature, to bring parity to private litigant respecting costs in litigation with U.S. ---------- 22

FOREIGN GOVERNMENTS
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Protest that proposal offering listed Canadian end product should have been evaluated pursuant to Buy American Act restrictions is denied because regulations implementing Act provide for waiver with respect to listed Canadian end products and GAO has previously upheld DOD's discretion in effecting waiver of restrictions and listing products; moreover, action of Canadian Commercial Corporation in submitting offer for Canadian supplier was proper under regulation. In view of Congressional cognizance of Agreements between DOD and Canadian counterpart waiving Act's restrictions, and as Agreement covers matter concerning U.S.-Canadian relations, it is inappropriate for GAO to question regulations' propriety ---------- 44

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"Other safe bonds"
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For purposes of investing First Morrill Act land-grant funds, "prudent man rule" is too broad and subjective to be used as test for what constitutes "other safe bonds" within the meaning of that phrase as used in such act, since men may differ as to what is reasonable and prudent ---- 37

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GAO has discontinued practice of reviewing bid protests of contracting officer's affirmative responsibility determination except for actions by procuring officials which are tantamount to fraud ---------- 66
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When member and wife were separated and agreement was executed by them prior to time member entered Air Force whereby wife waived all rights and other benefits to which she may be entitled as result of member's possible future military service and member designated his mother to receive the 6-months' death gratuity in the event there was no surviving spouse, mother's claim was properly disallowed because 10 U.S.C. 1447(a) provides that surviving spouse shall be paid the gratuity and a simple waiver of an unknown future right does not afford legal basis for payment of gratuity due from the U.S. to someone other than the lawfully designated recipient---------- 152

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When a State or local Govt. employee is detailed to executive agency of Federal Govt. under Intergovernmental Personnel Act, reimbursement under 5 U.S.C. 3374(c) for "pay" of employee may include fringe benefits, such as retirement, life and health insurance, but not costs for negotiating assignment agreement required under 5 CFR 334.105 nor for preparing payroll records and assignment report prescribed under 5 CFR 334.106. The word "pay" as used in act has reference, according to legislative history, to salary of State or local detailee which term as used in 3374(c), upon reconsideration, does need to be limited to meaning used in Federal personnel statutes, that is, that term refers only to wages, salary, overtime and holiday pay, periodic within-grade advancements and other pay granted directly to Federal employees. 53 Comp. Gen. 355, overruled in part---------- 210

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A member of the Marine Corps Reserve who while on his initial period of active duty for training sustains an injury determined to be in line of duty may receive pay and allowances in accordance with 37 U.S.C. 204(i), after expiration of the initial tour of duty while hospitalized and until he is fit for military duty but during such period reservist is not considered to be in active military service within the meaning of 10 U.S.C. 701(a) which would entitle the member to leave---------- 33
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National Guard technician prior to fulfilling requirement for immediate civil service annuity, although involuntarily removed from his civilian position due to loss of military membership, is precluded by 5 U.S.C. 5595(a)(2)(iv) from receiving severance pay when he is qualified for military retirement under the provisions of 10 U.S.C. 1331 by having attained age 60 with the requisite years of service 212
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House lease at old duty station
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Employees of the Federal Government selected to enter the business sector under the Executive Interchange Program established pursuant to Executive Order No. 11451, January 19. 1969, are entitled to travel and relocation expenses to the location where they are to enter private employment under the program on the same basis and in the same amount as any employee transferred from one official station to another in the interests of the Government 87

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Civilian employee of Army Corps of Engineers seeks reimbursement of New Mexico Gross Receipts and Compensating Tax levied in connection with his purchase of a newly constructed residence incident to transfer. Reimbursement may not be made since tax is a business privilege tax, and fact that employee may deduct tax on income tax return does not alter nature of tax. Tax is not assessed on casual sale of previously occupied home and, therefore, is not a transfer tax within meaning of sec. 2-6.2d of Federal Travel Regs., FPMR 101-7. Additionally, regulation prohibits reimbursement of expenses that are associated only with construction of a residence. B-174335, Dec. 8, 1971, overruled..... 93

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Where an employee occupied temporary quarters beginning more than 30 days from the date he reported for duty at his new official station, but prior to the date his family vacated the residence at the old official station, he is entitled to temporary quarters subsistence expenses under Section 8.2e of the Office of Management and Budget Circular No. A-56, Revised, August 17, 1971..... 13

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Panama Canal Company
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Naval officer occupying Panama Canal Company quarters is not entitled to housing allowance since Panama Canal Company quarters constitute Government quarters and therefore payment of housing allowance is prohibited by paragraph M4301-3c(2), JTR (change 246, August 1, 1973); however, member may be allowed temporary lodging allowance under paragraph M4303-3d, JTR (change 240, February 1, 1973), while occupying vacation quarters provided by the Panama Canal Company, as such quarters appear to be transient in nature and were occupied on a temporary basis..... 214

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Ability to perform limited duty effect Page

Member of Marine Corps Reserve entitled to receive pay and allowances under 37 U.S.C. 204(i) for period subsequent to the termination of his initial active duty for training, who then returned to his Reserve unit where he performed military duties as a photographer, having agreed to extend his active duty for a period of about 6 months and/or until physically qualified for release from active duty, may be regarded under 10 U.S.C. 683(b) to be on active duty until discharged, and is entitled to active duty pay and allowances, and leave under 10 U.S.C. 701(a)-- 33

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Military member who during attendance at multiple unit training assembly two (MUTA-2) was instructed by his first sergeant to take the most direct route home to obtain his clothing records and return to the Armory, and who was injured on return trip when he lost control of his motorcycle, is entitled to disability pay and allowances since his return home was not due to an omission on his part with respect to the training schedule. 52 Comp. Gen. 28, distinguished---------- 165

Reservists
Active duty
Injured in line of duty
Pay and leave entitlement

A member of the Marine Corps Reserve who while on his initial period of active duty for training sustains an injury determined to be in line of duty may receive pay and allowances in accordance with 37 U.S.C. 204(i), after expiration of the initial tour of duty while hospitalized and until he is fit for military duty but during such period reservist is not considered to be in active military service within the meaning of 10 U.S.C. 701(a) which would entitle the member to leave---------- 33

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Survivor Benefit Plan
Record correction
Entitlement to retired pay prior to SBP
Election status

Members who become retroactively entitled to retired or retainer pay prior to effective date of Survivor Benefit Plan by virtue of record correction occurring after that date and statutory time limit for members entitled to retired or retainer pay on effective date of the act to elect to participate has expired, must be afforded the same opportunity as other prior retirees to elect into the Plan such period in their case being 18 months from the date of notification of records correction---------- 116

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Person whose military record is corrected on date subsequent to September 20, 1972, to show entitlement to retired pay on date prior to September 20, 1972, is not automatically covered under Survivor Benefit Plan, (SBP) since purpose of record correction is to place member as nearly as possible in same position he would have occupied had he been retired at earlier date and in order to be automatically covered under SBP member must become entitled to retired or retainer pay subsequent to effective date of SBP 116

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Persons whose military records are corrected on date subsequent to September 20, 1972, to show entitlement to retired or retainer pay commencing subsequent to that date are automatically covered under Suvivor Benefit Plan and may not be afforded a period of time to decline coverage or elect reduced coverage after award of retired pay, since their positions cannot be distinguished from a member becoming entitled to retired or retainer pay without correction of their record and do not receive opportunity to elect reduced coverage or decline coverage after they become entitled to that pay 116

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Although GAO is aware of no requirement under Federal law, other than Treasury regulations, that special power of attorney be acknowledged, and feels therefore that acknowledgment may be eliminated without prejudice to rights of United States, GAO nevertheless recommends retention of acknowledgment provision in power of attorney form as option due to potential consequences of lack of acknowledgment under local law to private parties in matters not directly involving rights of United States 75

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SMALL BUSINESS ADMINISTRATION

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Not issued

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Loan guarantee approved in writing by SBA official properly authorized to approve such loan guarantees constitutes official approval of guarantee despite fact that formal loan authorization was not issued until later time. However, SBA has no authority to reimburse a bank for interim disbursements made to the borrower pursuant to such approval because of bank's failure to comply with conditions, such as payment of guaranty fee, contained in both formal loan authorization which was issued after informal approval and blanket loan guaranty agreement between bank and SBA 219

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Naval officer occupying Panama Canal Company quarters is not entitled to housing allowance since Panama Canal Company quarters constitute Government quarters and therefore payment of housing allowance is prohibited by paragraph M4301-3c(2), JTR (change 246, August 1, 1973); however, member may be allowed temporary lodging allowance under paragraph M4303-3d, JTR (change 240, February 1, 1973), while occupying vacation quarters provided by the Panama Canal Company, as such quarters appear to be transient in nature and were occupied on a temporary basis ---------- 214
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Statutory requirement that grantees under Public Law 92–500 will adopt system of charges assuring that each recipient of waste treatment services shall pay its proportionate share of treatment works' operation and maintenance costs is not met by use of ad valorem tax since potentially large number of users—i.e., tax exempt properties—will not pay

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User charge system—Continued
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for any services; ad valorem tax does not achieve sufficient degree of proportionality according to use and hence does not reward conservation of water; and Congress intended adoption of user charge and not tax to raise needed revenues 1

WORDS AND PHRASES
"Other safe bonds"

For purposes of investing First Morrill Act land-grant funds, bonds rated "A" or better by one of established and leading bond rating services may be considered by District of Columbia as constituting "other safe bonds" within meaning of that phrase as used in such act. 50 Comp. Gen. 712 (1971) modified 37

For purposes of investing First Morrill Act land-grant funds, "prudent man rule" is too broad and subjective to be used as test for what constitutes "other safe bonds" within the meaning of that phrase as used in such act, since men may differ as to what is reasonable and prudent 37

"Prudent man rule"

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