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[B–185157]

Contracts—Subcontractors—Listing—Invitation Requirement—Listing Inadvertently Included

Although solicitation requirement for listing of pipe suppliers is not fully met by low bidder who lists two possible suppliers for certain categories of pipe, award may be made to low bidder. Facts show that listing requirement was inadvertently included in solicitation by agency and that second low bidder who complied fully with listing requirement was not prejudiced thereby. Moreover, listing requirement serves no valid purpose for Government where item being procured is commercially available as in instant case.

In the matter of Frank Coluccio Construction Company, Inc., April 1, 1976:

Frank Coluccio Construction Company, Inc. (Coluccio) has protested the proposed award of a contract to the Perini Corporation (Perini) by the Bureau of Reclamation, Department of the Interior (Interior), under Specifications No. DC–7155 for the construction of the Spring Hill Distribution System, Tualatin Project, Oregon. Coluccio, the second low bidder, contends that the low bid submitted by Perini should be rejected as nonresponsive for failure to comply with the pipe supplier listing requirement specified in the solicitation.

The invitation, insofar as is pertinent to this protest, called for the furnishing and laying of approximately 41 miles of pipe of 6 through 60 inch diameter. The contractor was allowed (with certain exceptions) the option of furnishing different classes of pipe, including reinforced concrete pressure pipe, pretensioned concrete cylinder pipe, asbestos-cement pressure pipe, steel line pipe, or ductile iron pipe for line pipe. Classes of pipe were denoted by symbols representing engineering requirements at a particular location in the pipeline, including the diameter of pipe, earth loading and hydrostatic head. Bidders were required to list the pipe option and "symbol" or class of pipe to be furnished by each pipe and pipe fittings supplier, along with the supplier's name and address. The solicitation required that the successful bidder agree not to have any of the listed categories of pipe and pipe fittings supplied by any supplier other than the one named as the supplier of such pipe and pipe fittings. Thus, the listing was intended to preclude bid shopping, and the solicitation warned bidders that failure to submit this list by bid opening time would make the bid nonresponsive.

Perini listed Ameron as its supplier for pretensioned concrete cylinder pipe and Certain-Teed as its supplier of asbestos-cement pressure pipe, with R. H. Baker as the supplier of the asbestos-cement pipe fittings. However, the bid did not indicate which class or symbol of pipe each supplier would furnish for the option indicated.

Coluccio contends that the Perini bid is nonresponsive because it only listed the names and addresses of suppliers of pipe options but failed to specify the range of sizes and symbol of pipe to be furnished by each option supplier. Coluccio asserts that Perini's failure to comply fully with the listing requirement allows it to purchase the symbol pipe required from whichever of the listed suppliers that offers the lowest price at the time of purchase. Specifically, Coluccio equates the requirement for the listing of suppliers in the instant case with the construction subcontractor listing requirements of previous solicitations which our Office has determined to be a material requirement. Since the requirements and conditions of both clauses are virtually identical (the only difference being that the latter refers to subcontractors performing construction tasks while the former refers to suppliers of pipe), and both were designed to eliminate post award "bid shopping," Coluccio contends Perini's failure to comply with the requirement rendered its bid nonresponsive.

At the outset, Interior concedes that the purpose of requiring bidders to list their suppliers of symbol pipe and pipe fittings was to prevent "bid shopping" and that Perini's manner of complying with the requirement may have allowed the bidder to bid shop among its listed suppliers by changing the pipe option for the symbol pipe to be furnished. Nevertheless, Interior asserts that Perini's bid conformed to the substance, if not the form, of the requirement, in that Perini's ability to bid shop would be restricted to the two pipe options for which it listed suppliers. Furthermore, while there is an overlap in the pipe sizes which could be supplied by either of the two suppliers listed in Perini's bid, Interior states that it has been the experience of the Bureau that Certain-Teed will furnish the option of pipe for which it is listed in sizes up to and including 24 inches in diameter and that Ameron will furnish only its pipe option in sizes larger than 24 inches. Coluccio contests the accuracy of this statement by referring to its own bid which lists Ameron as the supplier of pipe of 18 inches in diameter and above and Certain-Teed as the supplier of pipe with a diameter of less than 15 inches.

In our opinion, Perini's bid does not meet the solicitation requirement for listing the portion that each of the listed suppliers would furnish where more than one supplier is named for the same category of pipe and pipe fittings. Since the Government's solicitation sought the right to require the successful bidder to furnish pipe only from *the* supplier named for the particular category of pipe, we must conclude that Perini's bid does not satisfy the listing requirement.

Interior also argues, however, that although the language of the solicitation indicates otherwise, full compliance with the listing re-

quirement is not considered essential. It reports that the Bureau of Reclamation had been including the pipe supplier listing requirement on an experimental basis, since a similar requirement for listing of construction subcontractors had been authorized by regulation, 41 CFR 14–7.602–50(1) (1975). Interior points out that while in construction contracts the prevention of bid shopping may be in the Government's interest because substitution of a construction subcontractor after award may result in inferior workmanship or other cost-cutting measures, it believes that the Government need not be concerned about bid shopping where the subcontractor is merely a supplier of standard materials. Although Coluccio contends that neither Certain-Teed nor Ameron is a middleman or wholesaler providing "off-the-shelf" items, Interior points out that the solicitation's requirements will be furnished by suppliers of standard pipe. It reports that Ameron and Certain-Teed are regularly engaged in the manufacture of various categories of pipe and that the instant pipe is commercially available even though requests would be met either from stock or by special manufacturing runs.

We have held that the requirement for listing subcontractors does not encompass suppliers of standard electrical equipment to be furnished in connection with an electrical modernization contract with the Government. 49 Comp. Gen. 120 (1969). We interpreted the listing requirement in that case as extending only to manufacturers and fabricators whose products were specially made to conform to the Government's specifications rather to firms which merely furnish combinations of standard items. Implicit in the cited decision is the recognition that no valid purpose exists for requiring the listing of suppliers of essentially standard items. We therefore agree with Interior's position that the listing requirement is unnecessary in this case since the evils of bid shopping are insignificant in the context of items generally supplied to the public.

Moreover, we think similar considerations are pertinent to the question whether a bidder complying with the pipe listing requirement would be significantly prejudiced if a noncomplying bid is accepted. In this connection, we also note that both Perini and Coluccio listed identical suppliers of pipe and that the Government would merely waive its right to require the bidder to commit itself to one of the two listed suppliers for only a portion of the pipe. There has been no evidence brought forth indicating unfair competitive practices by either of the listed pipe suppliers. Furthermore, we note that while Coluccio's total bid was more than $300,000 higher than Perini's, Coluccio's price for the furnishing and laying of pipe was approximately $446,000 *lower* than Perini's bid for that portion of the contract. In view of the

protester's significantly lower bid for the furnishing and laying of pipe it does not appear to be prejudicial to the protester if Perini were allowed the flexibility of choosing between the two identical pipe suppliers intended to be used by Coluccio for the limited portion of pipe which both suppliers are capable of furnishing.

Finally, we recognize that an award which negates a requirement considered to be material under the terms of the solicitation tends to undermine the integrity of the bidding system. However, we are convinced that the listing requirement was inadvertently included in the solicitation. Prior to issuance of this solicitation, Interior had revoked 41 CFR 14–7.602–50(1), which authorized the listing of subcontractors. 40 Fed. Reg. 29722 (1975). Interior has pointed out that the reasons for this change in policy were published in 40 Fed. Reg. 17848 (1975) and included many of the problems that have surfaced here. The publication cited the fact that bidders had difficulty understanding and complying with the requirement, which resulted in the submission of nonresponsive low bids, numerous protests against award and delays in programs. It is significant from the point of view of the integrity of the bidding system that the Department had changed its overall policy with respect to the need to prevent bid shopping prior to issuance of the solicitation. We trust this change of policy will be consistently adhered to in its future procurements and we are recommending that the agency take appropriate corrective action.

In all of the circumstances, we agree with Interior that Perini's bid may be accepted as submitted.

[B–185038]

Transportation—Rates—Tariffs—Filed With Civil Aeronautics Board—Validity

Provisions of tariffs filed with Civil Aeronautics Board are valid unless and until rejected by the Board.

Contracts—Transportation Services—Terms—Bills of Lading and Tariffs

Terms of contract of carriage under which carrier transports goods include both bill of lading and the published applicable tariff.

Transportation—Rates—Tariffs—Construction—Against Carrier

Claim against air carrier for damage to a shipment moved on Government bill of lading is not subject to notice requirements of governing air tariff because use of Government bill of lading—which in Condition 7 contains waiver of usual notice requirements—is required by air tariff and creates ambiguity over applicability of notice requirements which is resolved in favor of shipper.

In the matter of Eastern Airlines, Inc., April 5, 1976:

The Department of the Air Force sent here for collection a disputed claim for $601.58 against Eastern Airlines, Inc. (Eastern).

The claim arose from a shipment of five containers of electrical instruments, weighing a total of 1,122 pounds, which was transported under Government bill of lading No. H–1476322, dated July 31, 1972, from the Bendix Corporation, Davenport, Iowa, to the Naval Air Station, Pensacola, Florida, by United Airlines, Inc., and Eastern.

The shipment was delivered to a building at the Naval Air Station on Friday, August 4, 1972, when it was offloaded and received in apparent good order. When the containers were opened on Monday, August 7, damage was discovered and Eastern was notified of the damage. On August 9, representatives of the Naval Air Station and of Eastern inspected the damage; among other things, the inspection report indicates that the property would be repaired.

The claim for $601.58 represents the maximum limit on Eastern's liability for costs of $6,059.78 incurred by the Government to repair the damage. Under the tariff governing the shipment and unless a higher value is declared, Eastern's maximum liability on the shipment is based on 50 cents per pound, or $561; to this was added $40.58, the cost of transportation to the repair facility.

On July 23, 1974, a claim for $601.58 was filed with Eastern. The carrier denied the claim because it was not submitted to it in writing within the time limited specified in the governing tariff. After an exchange of correspondence, the claim was submitted here.

Eastern's denial is based on Rule No. 60(B)(1) of Official Air Freight Rules Tariff No. 1–B, C.A.B. No. 96 (Tariff 1–B); the rule provides in part that "All claims * * * must be made in writing to the originating or delivering carrier within a period of nine months and nine days after the date of acceptance of the shipment by the originating carrier." The Air Force's claim accrued July 31, 1972, but was not filed within the time period specified in Rule No. 60(B)(1).

It seems to be true, as contended by Eastern, that provisions of tariffs filed with the Civil Aeronautics Board are valid unless and until they are rejected by the Board. *Vogelsang* v. *Delta Air Lines, Inc.*, 302 F. 2d 709 (2nd Cir. 1962), cert. den. 371 U.S. 826 (1962); *Herman* v. *Northwest Airlines*, 222 F. 2d 326 (2nd Cir. 1955), cert. den. 350 U.S. 843 (1955); *Lichten* v. *Eastern Airlines*, 189 F. 2d 939 (2nd Cir. 1951).

The Air Force relies on Rule No. 26 of Tariff 1–B. Paragraph (A)(2) of the rule reads:

> The shipper shall prepare and present a non-negotiable Airbill * * * or other non-negotiable shipping document with each shipment tendered for transporta-

tion subject to this tariff and tariffs governed hereby, and such Airbill *or other shipping document* shall contain all particulars necessary for transport of the shipment. If the shipper fails to present such Airbill, the carrier will prepare a non-negotiable Airbill for transportation, subject to tariffs in effect on the date of acceptance of such shipment by the carrier, and the shipper shall be bound by such Airbill and shall be deemed to have received such notice(s) as is contained therein. [Italic supplied.]

Paragraph (E) of the rule reads:

Any shipment transported for the United States Government must be accompanied, in addition to the Airbill, by a Government Bill of Lading with the proper number of copies properly executed.

It is established in transportation law that the terms of the contract of carriage under which the carrier transports goods include both the bill of lading and the published applicable tariffs. *Union Pacific R.R.* v. *Higgins*, 223 F. Supp. 396 (D. N.D. 1963); see also, *Eastern Motor Express* v. *A. Maschmeijer, Jr., Inc.*, 247 F. 2d 826 (2nd Cir. 1957); *Pacific S.S. Co.* v. *Cackette*, 8 F. 2d 259 (9th Cir. 1925); *Railway Exp. Agency* v. *Ferguson*, 242 S.W. 2d 462 (Civ. App. Tex. 1951). And here Tariff 1–B, the published applicable tariff, requires the use of a Government bill of lading.

The back of Government bill of lading No. H–1476322 under the heading "CONDITIONS" provides:

It is mutually agreed and understood between the United States and the carriers who are parties to this bill of lading that—

* * * * * * *

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

The conflict between Rule No. 60(B)(1) and Rule No. 26 is apparent and its source is the ambiguity created by the terms of the tariff. It is settled that ambiguities and uncertainties in the terms of a tariff are to be resolved against the carrier, as the author of the document, and in favor of the shipper. *C & H Transportation Co.* v. *United States*, 436 F. 2d 480, 193 Ct. Cl. 872 (1971); *United States* v. *Strickland Transportation Co.*, 204 F. 2d 325 (5th Cir. 1953) cert. denied 346 U.S. 856 (1953); *Great Northern Ry.* v. *United States*, 178 Ct. Cl. 226 (1967).

Resolving the tariff ambiguity against the carrier and in favor of the shipper means that claims for loss or damage on shipments governed by Tariff 1–B which are transported for the United States Government on Government bills of lading are not subject to the notice requirements of Rule No. 60(B)(1).

We today have instructed our Claims Division to collect the claim for $601.58 against Eastern by setoff from amounts otherwise due Eastern.

[B-172318]

Compensation—Double—Concurrent Military Retired and Civilian Service Pay—Exemptions—Disability Incurred in Line of Duty

For purposes of establishing employment retention preference (5 U.S.C. 3501 (a)(3), and 3502), exemption from reduction in retired pay under the Dual Compensation Act (5 U.S.C. 5532(c)), and full credit for years of military service for annual leave accrual (5 U.S.C. 6303(a)) as a civilian employee of the Federal Government, determinations as to whether a service member's disability retirement from a uniformed service resulted from injury or disease incurred as a direct result of armed conflict or caused by an instrumentality of war during a period of war can only be made by the uniformed service from which he is retired and neither the employing agency nor this Office has the authority to change that determination.

Military Personnel—Record Correction—Retirement Status

Where a retired service member has sought correction of military records under 10 U.S.C. 1552 and the Correction Board has denied the relief sought, such action is final and conclusive on all officers of the United States and not subject to review by the General Accounting Office.

In the matter of Lieutenant Commander George K. Huff, USN, Retired, April 6, 1976:

This action is in response to a letter, with enclosures, from Lieutenant Commander George K. Huff, USN, Retired, in which he requests review of the administrative action taken in his case by the Naval Weapons Station, Seal Island, California, which resulted in his military retired pay being reduced, loss of certain leave credits from his civilian employment and the establishment of an indebtedness to the United States in the amount of $5,451.81 arising out of the overpayment of military retired pay during the period 1967 to 1972.

The file in the case shows that the member, who was serving on active duty in the United States Navy during World War II, appeared before a Navy Retiring Board on September 24, 1943, apparently convened for the purpose of determining his physical fitness to continue on active duty in the Navy. The Board in his case concluded that he was incapacitated for active service by reason of physical disability; that his incapacity was permanent; and that it was contracted in line of duty. By action dated February 29, 1944, the President of the United States approved the proceedings and findings of the Board and the member was placed on the retired list effective March 1, 1944, under the provisions of section 417 of Title 34, U.S. Code (1940 ed.), in the grade of lieutenant commander in conformity with the provisions of subsection 404(h) of the same title.

On May 29, 1967, the member was initially employed at the Naval Weapons Station, Seal Beach, California, under a 700-hour Tempo-

rary Appointment as a General Engineer (GS–12). It is indicated that the application for employment (SF–57) which he filed showed that he had performed military service in the Navy from 1923 to 1944. However, it was further indicated that that document showed that he only claimed a 5-point veterans preference but did not claim a 10-point disability preference and while he responded "yes" to the questions on the form concerning disability, he apparently qualified that affirmative response by noting that he had pilot fatigue in World War II and that he failed a physical examination to the rank of full commander and was subsequently retired. In this connection, it was administratively admitted that since the member had not claimed the 10-point disability preference, no follow-up action was taken to verify the basis for his reitrement.

In early 1971, incident to a reduction-in-force (RIF) action involving several engineering positions at that Naval Weapons Station—apparently not the position held by the member—a review of RIF retention registers was conducted. As a result, irregularities were discovered in the member's service computation date and in the crediting of his military service for leave accrual, and RIF purposes under the Dual Compensation Act.

Because of these irregularities, it was apparent that some adjustments had to be made in the member's employment records; however, before doing so, the Naval Weapons Station, by letter dated March 1, 1971, orginated a routine request to the National Personnel Records Center (Military Personnel Records), St. Louis, Missouri, to verify whether the member was retired from the Navy, and if so, the basis for such retirement. That request was forwarded by the Chief of Naval Personnel, via the Navy Bureau of Medicine and Surgery, to the Navy Judge Advocate General (JAG) for action.

In response to that request, the Navy JAG, by letter dated May 19, 1971, advised the Naval Weapons Station that a review of the member's service records indicated that the disability for which he was retired was service connected, but that his service medical records showed that it was not incurred as a direct result of armed conflict, nor was it caused by an instrumentality of war during a period of war. As a result, the member's employment records were adjusted on June 9, 1971, to reflect that he was a noncombat disability retired Navy officer not exempt from reduction in retired pay under the provisions of 5 U.S.C. 5532 (Supp. II, 1965–66). In addition, the member's service computation date was revised from August 25, 1950, to March 6, 1965, and his leave account adjusted since the change of dates eliminated credit for all military service performed by him other than wartime service.

The file reflects that as a result of that corrective action, the member by letter dated August 10, 1971, petitioned the Navy JAG to reconsider his retirement status and restore his disability rights and benefits. Following another review of his medical records by the Bureau of Medicine and Surgery, the Navy JAG, by letter dated October 12, 1971, advised the member that the prior determination made in his case that the disability for which he was retired was not as a direct result of armed conflict nor caused by an instrumentality of war during a period of war, was adhered to.

By letter dated March 2, 1972, addressed to the Board for Correction of Naval Records, the member requested their determination of his physical disability status. In response, the Navy JAG, by letter dated March 29, 1972, again affirmed the prior determination of status made in his case.

On May 23, 1972, the Commanding Officer, Naval Weapons Station, transmitted to Navy JAG, a copy of a form letter from the Veterans Administration to the member, dated March 29, 1972, which contained the statement "His disability is combat incurred," and requested that the member's status be further evaluated. On review by the Bureau of Medicine and Surgery, it was concluded that the criteria utilized by the Veterans Administration were not known and that there was no new medical information available which would require modification of the prior determination.

By letter dated May 24, 1972, from the Navy Finance Center, Cleveland, Ohio, the member was advised that he was subject to a Federal Civil Employment (FCE) deduction—required by the provisions of the Dual Compensation Act—for the periods June 28, through July 29, 1967, and August 30, 1967, through April 30, 1972, and that total overpayment of retired pay during that period was $5,451.81.

In his letter, the member questions the propriety of such action, contending in effect that his disability retirement in 1944 was based on combat incurred incapacity and that the decision by the Navy JAG took away the benefits which flowed from such retirement status.

The right of a retired member of an armed force to receive his full military retired pay while employed by the Federal Government in a civilian capacity and receive other positive civilian employment benefits which accrue only by virtue of his military service are matters strictly governed by law and the regulations promulgated pursuant thereto.

With regard to entitlement of a member to receive full retired pay while employed by the Federal Government, section 5532 of Title 5, U.S. Code, provides in pertinent part:

(b) A retired officer of a regular component of a uniformed service who holds a position is entitled to receive the full pay of the position, but during the period for which he received pay, his retired or retirement pay shall be reduced * * *.

(c) The reduction of retired or retirement pay required by subsection (b) of this section does not apply to a retired officer of a regular component of a uniformed service—
(1) whose retirement was based on disability—
(A) resulting from injury or disease received in line of duty as a direct result of armed conflict; or
(B) caused by an instrumentality of war and incurred in line of duty during a period of war * * * or
(2) employed on a temporary (full-time or part-time) basis * * * for the first 30-day period for which he receives pay.

In determining years of service for purposes of annual leave accrual as a civilian employee, 5 U.S.C. 6303(a) provides in part that an employee, who is a retired member of a uniformed service, is entitled to credit for his entire active military service only if his retirement is based on disability resulting from injury or disease received in line of duty as a direct result of armed conflict, or caused by an instrumentality of war during a period of war, or for such service as was performed in the Armed Forces during a period of war.

A Federal Government employee's preference eligibility for retention purposes incident to a RIF action is governed by 5 U.S.C. 3502, which provides in pertinent part:

(a) The Civil Service Commission shall prescribe regulations for the release of competing employees in a reduction in force which give due effect to—
(1) tenure of employment.
(2) military preference, subject to section 3501(a)(3) of this title * * *

Section 3501(a)(3) defines a preference eligible employee for the purposes of employment retention, to mean a retired member of a uniformed service, but (so far as pertinent here) only if:

(A) his retirement was based on disability—
(i) resulting from injury or disease received in line of duty as a direct result of armed conflict; or
(ii) caused by an instrumentality of war and incurred in line of duty during a period of war * * *

The Secretary of the military service concerned, and as delegated by him, has all powers, functions and duties incident to the determination of fitness of any member of the Armed Forces under his jurisdiction. This includes authority to determine the nature and cause of a disability, if any, of a member at the time his active military service is terminated.

In connection with the foregoing, in order for a member retired for physical disability to receive the maximum benefits while employed by the Federal Government in a civilian position, such disability must be medically determined by the service concerned to be as a direct result of armed conflict or caused by an instrumentality of war during a period of war. Neither this Office nor the employing agency has the authority to change such determination.

However, under the provisions of 10 U.S.C. 1552, the Secretary of such service under procedures established by him and approved

by the Secretary of Defense, and acting through boards of civilians of the executive portion of that military department, may correct any military record of that department when it is considered necessary to correct an error or remove an injustice. Any correction action taken under those provisions "is final and conclusive on all officers of the United States." In this regard, we have been informally advised by the Board for Correction of Naval Records that the member in the present case filed a petition with the Board on July 30, 1973, in an effort to have his records corrected to clearly show that the disability for which he was retired was incurred as a direct result of combat with an armed enemy of the United States. We understand that by action dated October 21, 1974, that petition was denied for the reason that no error or injustice was found to exist in his case.

Thus, in the present case, our authority only extends to the consideration of whether the actions by the Naval Weapons Station adjusting the member's leave credits and employment status and that of the Navy Finance Center to reduce his retired pay entitlement because of the application of the restrictions contained in the Dual Compensation Act and establish his indebtedness because of the overpayment of retired pay, are consistent with that service determination.

Since the record shows that the member's disability was medically determined by the Department of the Navy not to be as a direct result of armed conflict or caused by instrumentality of war, the member's employment does not come within the exemption provisions of the Dual Compensation Act or the other before-quoted provisions of Title 5, U.S. Code.

Accordingly, it is our view, based on the material contained in the file as supplied by the member, that the actions taken by the Naval Weapons Station with regard to his employment records and the Navy Finance Center with regard to his military retired pay, were required and proper.

[B–156550]

District of Columbia—Firemen and Policemen—Compensation—Increases—Applicable to U.S. Park Police and Executive Protective Service

Under section 501 of the District of Columbia Police and Firemen's Salary Act of 1958, as amended, officers and members of the United States Park Police and the Executive Protective Service (formerly White House Police) are entitled to the same rates of compensation as those granted under that Act to the Metropolitan Police Force of the District of Columbia. By virtue of section 501, enactment of legislation by the Council of the District of Columbia increasing the salaries of the Metropolitan Police under the 1958 Act will have the effect of granting like increases to the United States Park Police and the Executive Protective Service until Congress otherwise provides.

In the matter of United States Park Police and Executive Protective Service—salary increase, April 7, 1976:

I

By letter of February 13, 1976, the Director, National Capital Parks, United States Department of the Interior, has requested a decision concerning the salary increase entitlement of officers and members of the United States Park Police. He specifically asks whether the proposed action of the Council of the District of Columbia granting salary increases to the Metropolitan Police Force, if approved, would have the effect of granting like increases to the United States Park Police.

The question arises in view of the following provision contained at section 501 of the District of Columbia Police and Firemen's Salary Act of 1958, Public Law 85–584, 72 Stat. 485, August 1, 1958, as amended by section 111 of the Act of August 29, 1972, Public Law 92–410, 86 Stat. 639 (hereinafter "the 1958 Salary Act"):

> Sec. 501. The rates of basic compensation of officers and members of the United States Park Police and the Executive Protective Service shall be the same as the rates of compensation, including longevity increases, provided in this Act, for officers and members of the Metropolitan Police force in corresponding or similar classes.

The above provision is included as section 833 of title 4 of the District of Columbia Code (1973 ed.), except that the words "provided in this Act" are deleted from the text and replaced by the words "provided in sections 4–823 to 4–837 * * *." The Executive Protective Service (formerly the White House Police) was brought under this provision by the Act of August 29, 1972.

Prior to 1974, all salary increases for the District of Columbia Metropolitan Police Force were granted by Congress, and, pursuant to section 501 of the 1958 Salary Act, such increases were paid to the United States Park Police and Executive Protective Service. Two recent statutes have changed the procedures. The first is the District of Columbia Self-Government and Governmental Reorganization Act, Public Law 93–198, 87 Stat. 774, December 24, 1973 (hereinafter the "Self-Government Act"), which granted general legislative powers to the elected Council of the District of Columbia. The second is the 1974 Amendment to the District of Columbia Police and Firemen's Salary Act of 1958, Public Law 93–407, 88 Stat. 1036, September 3, 1974 (hereinafter the "1974 Amendment"), which made significant changes in the procedures for providing pay increases to the police and firemen of the District of Columbia. Under the 1974 Amendment, the salaries of police and firemen are negotiated between the unions and the Mayor and are approved by the Council. No specific mention is made of the

effect of those procedures on the salaries of officers and members of the United States Park Police or Executive Protective Service, all of whom are Federal employees.

Together with the Director's request for a decision, he has enclosed a letter from the Director of the Office of Management and Budget dated November 14, 1974, stating the opinion that under the 1974 Amendment future pay increases for the United States Park Police and Executive Protective Service will be determined on the basis of action by the Council of the District of Columbia until further legislative action is taken by Congress.

On the other hand, the Director also forwarded a memorandum of January 30, 1976, to the Director, National Capital Parks, from the Assistant Solicitor, National Capital Parks, concluding that the anticipated action of the Council granting pay increases to the Metropolitan Police would not, without further congressional action, have the effect of granting those increases to the United States Park Police under the 1958 Salary Act. Support for this view is mustered in part from subsection 602(a) of the Self-Government Act prohibiting the Council from legislating with respect to matters not restricted in application exclusively to the District and, in part, from statements in the legislative history of the 1974 Amendment, both of which are hereinafter discussed. However, the Assistant Solicitor's memorandum further states that his opinion "is based upon our view of a complex interrelationship and interpretation of statutory provisions which do not address the problem directly." He expressly recognizes "that it is possible to draw different conclusions from these authorities * * *" and he recommends that an opinion be requested from the Comptroller General.

The Acting Corporation Counsel for the District of Columbia, in a letter to this Office dated March 9, 1976, with enclosures, states his view that the Council of the District of Columbia has the statutory authority to amend the 1958 Salary Act (title 4, section 823(a), D.C. Code) to provide salary increases for District of Columbia police and firemen by virtue of the legislative powers granted it in the 1974 Amendment.

II

The Self-Government Act grants the Council of the District of Columbia general legislative powers, including authority to amend laws and regulations in effect at the effective date of the District's Charter. Sections 302 and 717(b) of that Act provide, respectively, as follows:

SEC. 302. Except as provided in section 601, 602, and 603, the legislative power of the District shall extend to all rightful subjects of legislation within the

District consistent with the Constituion of the United States and the provisions of this Act subject to all the restrictions and limitations imposed upon the States by the tenth section of the first article of the Constitution of the United States.

* * * * * * *

SEC. 717. (b) No law or regulation which is in force on the effective date of title IV of this Act shall be deemed amended or repealed by this Act except to the extent specifically provided herein or to the extent that such law or regulation is inconsistent with this Act, but any such law or regulation may be amended or repealed by act or resolution as authorized in this Act, or by Act of Congress * * *.

Insofar as pertinent, the Council's legislative authority is restricted by the general limitation on its powers contained in the following language of section 602(a) (3) of the Self-Government Act:

SEC. 602. (a) The Council shall have no authority to pass any act contrary to the provsiions of this Act except as specifically provided in this Act, or to—

* * * * * * *

(3) enact any act, or enact any act to amend or repeal any Act of Congress, which concerns the functions or property of the United States or which is not restricted in its application exclusively in or to the District * * *.

With respect to the specific matter of laws and regulations pertaining to personnel, the Council's legislative authority is constrained, pending implementation of a District government merit system, by the following language of section 422(3) of the Self-Government Act:

(3) * * * Personnel legislation enacted by Congress prior to or after the effective date of this section, including without limitation, legislation relating to * * * pay * * * applicable to employees of the District government as set forth in section 714(c), shall continue to be applicable until such time as the Council shall, pursuant to this section, provide for coverage under a District government merit system. * * * The District government merit system shall take effect not earlier than one year nor later than five years after the effective date of this section.

The 1974 Amendment to the District of Columbia Police and Firemen's Salary Act of 1958, however, in addition to providing specific salary increases for officers and members of the Metropolitan Police Force, the United States Park Police and the Executive Protective Service, makes significant changes in the procedures for considering future pay increases for District police and firemen. Section 111 requires the Mayor to provide for the annual conduct of a comparative study of the rates of compensation paid officers and members of the police and fire departments in the Washington metropolitan area and other cities of comparable size and to provide the results of that study to parties involved in negotiations between the District and labor organizations representing officers and members of the police force and fire department. Section 112(a) requires the Mayor to present the negotiated solution with respect to changes in compensation to the Council of the District of Columbia as follows:

SEC. 112. (a) If after January 2, 1975, as a result of collective bargaining the parties have reached a negotiated solution with respect to changes in compensation for officers and members of the Police and Fire Departments, the Mayor

shall recommend to the Council of the District of Columbia that said changes should be authorized and that the Congress shall be requested to appropriate sufficient funds for that purpose. The first recommendation made by the Mayor under this subsection shall be made no later than October 1, 1975.

The Corporation Counsel is of the opinion that section 112(a) has the effect of removing the limitation on Council action affecting pay imposed by section 422(3) of the Self-GovernmentAct, *supra*, insofar as it applies to the compensation of District of Columbia police and firemen.

III

Bill No. 1–235 to "amend the District of Columbia Police and Firemen's Salary Act of 1958 to increase salaries, and for other purposes" was adopted by the Council of the District of Columbia on March 23, 1976. The bill as adopted will become effective, if approved by the Mayor or otherwise in accordance with section 404(e) of the Self-Government Act, in the absence of disapproving congressional action within the 30-day period provided for by section 602(c) of that Act. While it provides for pay increases for officers and members of the Metropolitan Police Force and Fire Department, the bill does not address itself to pay increases for officers and members of the United States Park Police or Executive Protective Service. As approved by the District of Columbia Council, section 2 of that bill authorizes pay increases effective October 1, 1975, and provides, in part, as follows:

SEC. 2. The District of Columbia Police and Firemen's Salary Act of 1958 (D.C. Code, sec. 4–823(a) et seq.) is amended as follows:

(1) Effective on the first day of the first pay period beginning on or after October 1, 1975, the salary schedule contained in subsection (a) of section 101 of that Act (D.C. Code sec. 4–823(a)) is amended to read as follows * * *.

Regarding the effect of favorable action on the bill as approved by the Council of the District of Columbia, the language of section 501 of the 1958 Salary Act is precise in its statement that officers and members of the United States Park Police Force and the Executive Protective Service are entitled to the same rates of compensation, including longevity increases, provided officers and members of the Metropolitan Police Force under that Act. Since the language of section 2 of the bill would grant District of Columbia police a salary increase retroactively effective October 1, 1975, by amending the 1958 Salary Act, the consequent entitlement of United States Park Police and the Executive Protective Service to like increases as of that date seems clear.

We do not believe that section 602(a)(3) of the Self-Government Act prohibiting the Council from enacting legislation not restricted in its application exclusively in or to the District of Columbia precludes a finding that United States Park Police and the Executive

Protective Service are entitled to the same rates of pay granted District police by Council action. The bill passed by the Council is restricted in its application solely to District police and firemen. The United States Park Police and Executive Protective Service would be affected only as a result of earlier congressional action in enacting and amending section 501 of the 1958 Salary Act to bring their salaries into conformance with those of the Metropolitan police. There is no evidence that Congress intended the 1974 Amendment to repeal section 501 or to restrict its effect to compensation changes made by Act of Congress.

The legislative history of the 1974 Amendment does suggest that the Congress did intend to later consider recommendations which may alter salary adjustment provisions for officers and members of the United States Park Police and Executive Protective Service. The following statement appears at S. Report No. 1203, 93d Cong., 2d Sess., 13:

> The bill increases the salaries of the Park Police and the Executive Protective Service. But it does not specifically outline a procedure for considering future pay increases for members of these law enforcement agencies, whose pay levels are now linked to the D.C. Metropolitan Police Departments (D.C. Code Title 4, Section 833). The Committee has been informed by the Office of Management and Budget that the matter of procedures for handling compensation for members of these two Federal agencies is being considered, and that as soon as possible appropriate recommendations will be made to the Congress.

This statement is apparently derived from the following language contained in the Office of Management and Budget's report published in the record of the Hearings on H.R. 14212, *et seq.*, before the Subcommittee on Revenue and Financial Affairs and the Committee on the District of Columbia, 93d Cong., 1st and 2d Sess., 259:

> The issue of the future status of U.S. Park Police and Executive Protective Service employees with respect to future salary legislation and pension funding is a complex one. These problems are currently under review by the Executive Branch. There are a number of questions relating to appropriate administrative arrangements, pay-setting mechanisms, and relationships to other Federal employees which must be resolved. While we do have these issues under active consideration, the Office of Management and Budget cannot present views on these matters at this time. Therefore, it would be premature to include any provisions relating to these police forces in legislation dealing with the District's police and firemen's pension program. As soon as these issues relating to the Park Police and Executive Protective Service are resolved, we will present appropriate recommendations to the Congress.

As stated above, the Office of Management and Budget is of the opinion that United States Park Police and Executive Protective Service salary increases are tied to increases for the Metropolitan Police Force granted by the Council of the District of Columbia until Congress enacts new legislation on this subject.

Consistent with the above references to contemplated legislative action involving the pay of officers and members of the United States

Park Police Force and the Executive Protective Service, we note that H.R. 11131, 94th Cong., 1st Sess., a bill "[T]o amend the District of Columbia Police and Firemen's Salary Act of 1958 and other Acts to adjust the salary and other benefits received by the United States Park Police and others under those Acts, and to establish a United States Park Police Retirement and Relief Board" is currently before the House Committee on the District of Columbia. That bill would amend section 501 of the 1958 Salary Act to expressly provide that any adjustments in the annual rates of basic compensation of officers and members of the Metropolitan Police Force shall not be applicable to officers and members of the United States Park Police Force and to provide instead that the Secretary of the Interior shall make adjustments in the annual rates of basic compensation of officers and members of the United States Park Police Force in accordance with comparability pay principles.

Thus, it appears from the legislative history of the 1974 Amendment and from the bill introduced in the 94th Congress that the method of adjusting salaries of officers and members of the United States Park Police Force and the Executive Protective Service may be changed by future action of the Congress. It is equally clear, however, that the 1974 Amendment was not itself intended to alter the pay adjustment mechanism then in being under section 501 of the 1958 Salary Act. Until legislation in the nature of that proposed by H.R. 11131 is enacted, we believe that officers and members of the United States Park Police Force and the Executive Protective Service are entitled to like pay increases to those afforded District police by appropriate action of the Council of the District of Columbia amending the District of Columbia Police and Firemen's Salary Act of 1958. We, therefore, conclude that, if bill No. 1–235 as approved by the Council of the District of Columbia is enacted, officers and members of the United States Park Police and the Executive Protective Service will be entitled to the same rates of pay granted officers and members of the Metropolitan Police Force under section 2 of that bill.

IV

Section 4 of the bill No. 1–235 provides a mechanism for granting additional pay increases effective October 1, 1976, to District of Columbia police and firemen based on the percentage rate of increase used by the President in adjusting the pay rates of Federal employees under 5 U.S. Code § 5305(a)(2). Specifically, section 4 provides that effective October 1, 1976, the Mayor shall, by applying the percentage increase used by the President in adjusting Federal salaries, "adjust the rates of pay in each class and service step on the salary schedule in section 101(a) of the District of Columbia Police and Firemen's Salary of

1958" and that those rates of pay shall "be the rates of pay for each position and class concerned as if those rates had been set by statute and such rates of pay shall supersede and render inapplicable those corresponding rates of pay set prior to the effective date of the rates of pay set under this section."

As discussed above, section 422(3) of the Self-Government Act restricts the authority of the District of Columbia Council to enact pay legislation for its employees pending adoption of a District government merit system. As yet a merit system has not been adopted. However, with respect to the pay of officers and members of its police and fire departments, the District of Columbia considers the restriction of section 422(3) lifted by the pay negotiation procedures contained in the 1974 Amendment. While it predicates its authority to enact pay legislation for District police and firemen on the 1974 Amendment, section 4 of the bill is clearly inconsistent with the pay negotiation procedures of that Act. However, it is not necessary to consider the issues raised by section 4 of the bill. For this reason, our decision is restricted in its application to pay increases granted under section 2 of bill No. 1–235 as approved by the Council of the District of Columbia.

[B-182979]

General Accounting Office—Decisions—Reconsideration—Prior Recommendation—Withdrawn

On reconsideration, General Accounting Office (GAO) decision 55 Comp. Gen. 201—which sustained protest against award of negotiated turnkey housing procurement and recommended remedy involving renewal of competition among offerors and possible termination for convenience of existing contract—is modified in part. After considering points raised in requests for reconsideration by contracting agency, contractor and protester, recommendation in prior decision is withdrawn, and in all other respects decision is affirmed.

General Accounting Office—Decisions—Reconsideration—New Contentions *v.* Errors in Law or Fact

Contentions made by contracting agency—to effect that turnkey housing request for proposals (RFP) did not require specific responses in proposals, that deviations from requirements in successful proposal were minor, that blanket offer covered all requirements, that price of successful proposal was "reasonable" within provisions of Armed Services Procurement Regulation (ASPR) 3–805 and, generally, that all offerors were fairly treated—do not convincingly demonstrate errors of fact or law in prior GAO decision. Decision is affirmed that award to proposal which substantially varied from RFP requirements was improper in light of provisions of 10 U.S.C. 2304(g) and ASPR 3–805.

Contracts—Negotiation—Late Proposals and Quotations—Modification of Proposal—Price Increase

Contracting agency's position that late price increase submitted by successful offeror upon extending its proposal did not involve late modification to proposal or

any unequal treatment to other offerors is without merit. Decision is affirmed that late price increase was late modification within meaning of RFP late proposals clause, and that agency's acceptance amounted to conduct of irregular discussions with successful offeror, since no discussions were held with other offerors within competitive range.

General Accounting Office—Recommendations—Contracts—Prior Recommendation—Not Feasible—Withdrawn

GAO recommendation made to Navy in prior decision sustaining protest—which contemplated renewal of competition among offerors, with possible result that existing turnkey housing contract be terminated for convenience—is withdrawn upon reconsideration. Information presented by agency and contractor concerning value of work in place at time of decision, plus extent of subcontracting for materials, indicates implementation of such recommendation is not feasible. Protester's only possible remedy rests with its claim for proposal preparation costs, which will be considered in future GAO decision of protester wishes to pursue claim.

Contracts—Performance—Ability To Perform—Administrative Responsibility To Determine

GAO will not consider protester's request that termination for default of turnkey housing contract be recommended as appropriate remedy in connection with prior decision upholding protest. Questions involved in protest as to adequacy of contract performance are matters of contract administration—which is function of contracting agency, not GAO. Also, performance defects alleged by protestor do not neceessarily establish grounds for termination for default, and contracting agency states it has no cause to take such action.

General Accounting Office—Recommendations—Contracts—Agency Review of Protest Reports—Prior to Submission to GAO

Through recommendation for corrective action in prior decision sustaining protest is withdrawn, decision on reconsideration makes further recommendations to Secretary of Navy. Naval Facilities Engineering Command's (NAVFAC) procedures for furnishing protest reports should be reviewed to ensure that all relevant documents—including individual technical evaluators' numerical scoring of proposals—are furnished to GAO. Also, since award was improper, Secretary should cause review of NAVFAC's actions in procurement to be undertaken to ensure compliance with law in future negotiated turnkey housing procurements.

In the matter of Corbetta Construction Company of Illinois, Inc., April 9, 1976:

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The Naval Facilities Engineering Command (NAVFAC), Towne Realty, Inc., Woerfel Corporation and Miller, Waltz, Diedrich, Archi-

tect & Associates, Inc., a joint venture (Towne), and Corbetta Construction Company of Illinois, Inc., and Joseph Legat Architects (Corbetta) have each requested reconsideration of our decision in the matter of *Corbetta Construction Company of Illinois, Inc.*, 55 Comp. Gen. 201 (1975), 75-2 CPD 144.

The September 12, 1975, decision sustained Corbetta's protest against NAVFAC's award of a contract to Towne for the design and construction of 210 family housing units at the Naval Training Center, Great Lakes, Illinois. The decision recommended certain corrective actions to the Navy involving reinstatement and amendment of the request for proposals; renewed competition with the offerors through written or oral discussions; and the award of a new contract under this procedure with termination for convenience of Towne's contract (or modification of Towne's contract pursuant to its final proposal in the event that it remained the successful offeror).

Upon reconsideration, it is our conclusion that the September 12, 1975, decision must be modified in part. The "Recommendation" contained in that decision is now withdrawn. In all other respects that decision is affirmed. Also, today's decision makes further recommendations to the Secretary of the Navy, which are described *infra*.

Towne's request for reconsideration is directed essentially at the recommendation in our prior decision. Towne's October 8, 1975, submission to our Office contends that the extent of construction already accomplished, plus the additional construction work which would be ongoing while our decision's recommendation is being implemented, renders the recommended remedy impracticable—because it would not be economically feasible for the Navy to terminate the Towne contract should this be necessary at the close of the recompetition. Towne supports its request with extensive evidence documenting the progress of construction. Towne requests, in short, that we withdraw the recommendation in our prior decision.

NAVFAC's request for reconsideration takes the same position as Towne in regard to our recommendation. NAVFAC has stated that construction work already in place as of September 16, 1975, amounted to at least $1.5 million, and that termination for convenience of the Towne contract, if required, would likely cost $4 million. Like Towne, NAVFAC has submitted a substantial amount of documentary evidence detailing the progress of the construction.

In addition, NAVFAC's request goes beyond our decision's recommendation and challenges the correctness of our decision on the merits. The principal points raised are that the offerors were in fact properly treated in the procurement, and that our decision's holding concerning a late modification to Towne's proposal was incorrect.

In contrast to Towne's and NAVFAC's requests, which essentially allege that our decision was in error on various points, Corbetta's request departs to some extent from issues strictly related to a request for reconsideration, and instead attempts to relitigate issues which were presented and resolved in our earlier decision. This observation is also true, to some extent, as to NAVFAC's submission responding to Corbetta's allegations.

The objective of our Office in considering requests that one of our decisions be reconsidered is not to conduct a *de novo* review of the issues which were involved in the original controversy. Rather, it is to determine whether and to what extent our decision was erroneous. *See* B–168673, October 26, 1970, where we stated:

> While this Office will reconsider its decisions when it is alleged that they are based upon error of fact or law, such allegations must be supported by evidence, in the form of documentation or citations to controlling administrative or judicial precedent, which will convincingly illustrate how and why our conclusions are wrong.

This is the standard to be applied in this matter, and we will consider the parties' contentions accordingly. Also, as in our prior decision, we intend to concentrate upon those issues which we believe to be dispositive of the matter.

RECONSIDERATION OF TECHNICAL EVALUATION OF TOWNE PROPOSAL—REQUIREMENT TO CONDUCT DISCUSSIONS

Our earlier decision held essentially that NAVFAC's acceptance of Towne's proposal was improper because NAVFAC failed to meet the obligation to conduct written or oral discussions with all of the offerors within the competitive range. Because Towne's proposal varied substantially from certain specific request for proposals (RFP) requirements, NAVFAC's acceptance of it waived those requirements for the purposes of the competition among Towne, Corbetta, and the other offerors. This action violated Armed Services Procurement Regulation (ASPR) § 3–805.4 (1974 ed.). Also, we held that the existence of substantial technical uncertainties in initial proposals precluded any award on the basis of the initial proposals under 10 U.S. Code § 2304(g) (1970).

NAVFAC's request for reconsideration raises several points which bear upon these issues. One of the principal contentions is that the deficiencies in the Towne proposal which were discussed in our decision, as well as additional deficiencies cited by the protester, were in fact corrected after award of the contract during the process of final design review.

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This, we believe, is not in point. As our earlier decision explained, the pertinent issue is not whether Towne conforms to the requirements during contract performance, but whether the requirements of competitive negotiation procedures were complied with in the procurement prior to award. Conformance with the requirements after award—whether fortuitous, or the result of efficient contract administration by NAVFAC—is irrelevant to the issue raised in Corbetta's protest and decided in our decision.

NAVFAC's request also raises additional points involving the nature of requirements stated in the RFP specifications, the responses to these requirements made in the proposals, and the effect in terms of evaluation of the proposals and the requirement to conduct written or oral discussions. For example, NAVFAC maintains that matters such as off-street parking, ponding, water system sectional control valves, absences of lights and hose bibs, etc., are considered by expert technical evaluators to be minor, insignificant details. NAVFAC contends that Towne's blanket offer of compliance with the RFP requirements should cover such items.

In this regard, the difficulty with a blanket offer of compliance is that there is no certainty what it is intended to cover. A blanket offer might be submitted by an offeror which has carefully examined all of the RFP requirements and fully intends to comply with them, but a blanket offer could also be submitted by an offeror which has misunderstood, overlooked or ignored RFP requirements and thus has no intent to comply with them. The effect, in terms of the statutory and regulatory requirements, on competition among the offerors, as well as the deleterious consequences to the Government which may ensue from improvident acceptance of a blanket offer without discussions, is adequately described in our earlier decision. We see nothing in NAVFAC's contentions to cause us to modify our holding on this point.

As for NAVFAC's assertion that some of the omissions in the Towne proposal are merely minor details, we believe our earlier decision sufficiently explained why the cumulative effect of a large number of relatively minor items could amount to a substantial impact on the proposal. NAVFAC's contentions do not demonstrate errors of fact or law on this point.

NAVFAC again points out that turnkey proposals are not expected to contain complete plans and specifications, and that to insist on proposals showing satisfaction of every detailed requirement would discourage offerors from submitting proposals due to the cost and time involved in proposal preparation. NAVFAC also invites our attention to the RFP clause which cautions offerors not to submit unnecessarily

elaborate proposals. NAVFAC has indicated, generally, its belief that our decision will vitiate the effectiveness and feasibility of negotiated turnkey housing procurement.

We believe these allegations indicate that NAVFAC has misinterpreted our earlier decision. The thrust of our decision was not that in all future turnkey procurements, initial proposals must respond to every detail of the requirements or else be rejected as unacceptable. Rather, it was that when initial proposals fail to so respond, to a "substantial" degree, an award on the basis of the initial proposals is legally precluded; and that when the RFP establishes detailed requirements, but the contracting agency accepts an initial proposal which does not meet a substantial number of the requirements, these requirements are waived, with the result that other offerors have been deprived of an equal opportunity to compete. Our earlier decision did not hold, nor do we hold now, that the cure for this problem is to insist that offerors' initial proposals respond to every detailed requirement. Instead, the solution is to undertake the legally required written or oral discussions with offerors within the competitive range to the extent necessary.

Negotiated turnkey housing procurement is no different in this regard than many other negotiated procurements for supplies or services where offerors are expected to propose their own individual "approach" to meeting the Government's needs and at the same time to satisfy many specific, detailed requirements set forth in the RFP. In such situations, we have not countenanced the idea that a substantial number of the "details," which were not addressed in the most favorable initial proposal, can properly be left for resolution after award in a process of "final design review." We do not see a legal basis under the statute and ASPR to support this concept, and NAVFAC called none to our attention in its reports on the protest.

In its request for reconsideration, NAVFAC cites a recent court decision—*Lincoln Services, Ltd.* v. *Middendorf*, Civil Action No. 75–90–N (U.S.D.C., E.D. Va.), October 24, 1975. NAVFAC contends that this decision, which involved a Navy turnkey housing procurement, recognized that the RFP did not require or expect elaborate detailed proposals, that details could be resolved after award during the final design review, and that omission of some details did not render the successful proposal nonconforming.

A review of this decision indicates that the court specifically found the omissions in the succesful proposal to be "minor" and not of such character as to make the proposal nonconforming. The decision mentions only two omissions—relating to fire ratings of exterior walls and tie-ins for hurricane resistance. *Lincoln Services*, then, is clearly dis-

tinguishable on its facts from *Corbetta* and affords no basis for our Office to modify our earlier decision in this matter.

NAVFAC's November 4, 1975, submission asserts that Towne's proposal met the requirements of RFP section 1C.13 (this provision, discussed in our earlier decision, required offerors to submit detailed information covering specifications, drawings, and an equipment schedule. The provision cautioned that failure to submit all data might be cause for determining a proposal "nonresponsive"). NAVFAC suggests that detailed requirements set forth elsewhere in the RFP—for example, those relating to streets and sidewalks—did not have to be addressed under section 1C.13. As a specific example, NAVFAC points to the requirement of RFP section 2A.4B(4) that "Sidewalks on both sides of the street shall be included in basic scope of proposals." The protester cited, and our decision discussed, the failure to provide for sidewalks on both sides of the street in a number of locations as one of the omissions in Towne's proposal.

NAVFAC states that the clear intention of this RFP provision was that proposals were to be "* * * submitted on the basis that both sidewalks must be provided. Nowhere does it state that the proposals as submitted must show sidewalks on both sides of the streets."

We believe that the distinction which NAVFAC attempts to draw is without merit. We note that RFP section 1C.13(b)(2) specifically called for offerors to furnish with their proposals site plan drawings showing, among other things, "sidewalks." Reading RFP sections 2A.4B(4) and 1C.13(b)(2) together, the most reasonable interpretation is that offerors were required to submit drawings showing sidewalks on both sides of the street. The drawings submitted with Towne's proposal fail to show sidewalks on both sides of the street in a number of locations.

NAVFAC's request also raises the suggestion that discussions were not needed because the contracting officer believed a reasonable price within the provisions of ASPR § 3-805 (1974 ed.) was obtained in making an award to Towne without discussions. NAVFAC's September 25, 1975, submission states:

> Under this ASPR 3-805 requirement, it is disretionary with the contracting officer whether, in his professional opinion, the offered prices are reasonable or whether conducting complete discussions of the details of each offer could be expected to result in significant reductions. Note that the longer discussions are prolonged, the greater the risk that offerors will learn the details of other offers. While the GAO may disagree with the Contracting Officer's decision on this, ASPR clearly states it is his decision to make. We submit that in the absence of gross error, the decision of a contracting officer should not be overruled. In this case, gross error was not present, and therefore GAO should not direct the setting aside of the awarded contract on the basis of a supposition that if further discussions had been held with Corbetta, a lower price would have been received.

We believe that NAVFAC's analysis reflects, at best, an incomplete assessment of the applicable law. As explained in our prior decision, 10 U.S.C. § 2304(g) (1970), as implemented by ASPR § 3-805.1 (1974 ed.), establishes a general requirement to conduct written or oral discussions with all offerors within the competitive range, price and other factors considered, in a negotiated procurement. The statute and regulations provide only five specifically delimited exceptions to this requirement. The only one of these exceptions which conceivably could be applicable in the present case is set forth in ASPR § 3-805.1(a)(v), i.e., a situation where it can be clearly demonstrated from the existence of adequate competition that acceptance of the most favorable initial proposal without discussions would result in a "fair and reasonable" price. ASPR § 3-807.1(b)(1)a (1974 ed.) further provides that "offers responsive to the expressed requirements of the solicitation" is one of the several criteria necessary to have "adequate price competition."

We note that there is no indication in the voluminous record developed in the protest and requests for reconsideration that the contracting officer made any determination that the criteria necessary to have adequate price competition were satisfied in this case. Moreover, as we stated in our earlier decision, the facts concerning omissions, deficiencies and uncertainties in Towne's and the other proposals were sufficient to create doubt whether there were at least two proposals responsive to the expressed requirements of the solicitation. We found that, in any event, a reasonable application of 10 U.S.C. § 2304(g) (1970) requires that where the most favorable initial proposal is substantially at variance with the RFP requirements, no award on the basis of the initial proposals is legally permissible. The requirement to conduct discussions in this situation does not relate primarily, as NAVFAC suggests, to supposition whether a lower price might be received from another offeror. It relates primarily to the need to clarify what the offerors' "firm fixed prices" actually are. If the most favorable initial proposal's price relates to a technical proposal which substantially varies from the solicitation's requirements, there can be no reasonable assurance that acceptance of this proposal will actually be most advantageous to the Government. To use NAVFAC's terminology, acceptance of such a proposal without discussions is "gross error."

Also, NAVFAC's observation that prolongation of discussions creates auction risks seems inapposite in view of the fact that no technical or price discussions were conducted with the offerors in the present procurement, with the exception of NAVFAC's improper acceptance of a late modification to the Towne proposal, discussed *infra*. Further,

such risks cannot stand in the way of a legal requirement to conduct written or oral discussions. We believe that efficient conduct of negotiations in accordance with ASPR will minimize auction risks. Even where such risks are high, we have expressed the view that accepting them is less detrimental to the Government than the alternative of making an improper award. *Cf. Bristol Electronics, Inc., et al.*, 54 Comp. Gen. 16, 21–22 (1974), 74–2 CPD 23.

In its November 4, 1975, submission to our Office which comments on Corbetta's request for reconsideration, NAVFAC furnished additional information covering the individual technical evaluators' point-by-point numerical scoring of the various proposals, and at the same time released this information to Corbetta.

We note for the record that along with its reports submitted during the course of the protest (dated April 18 and May 30, 1975), NAVFAC had furnished certain information relating to the technical evaluation of proposals, such as the evaluators' narrative assessments of the proposals and the overall numerical point totals. Corbetta was furnished with pertinent portions of these materials during the protest proceedings and commented upon them. However, at no time during the protest proceedings did NAVFAC furnish the detailed record of point-by-point numerical scoring of the technical proposals. NAVFAC's November 4, 1975, submission to our Office was the first time this material was furnished either to our Office or to Corbetta. See, in this regard, further discussion of this point *infra*.

NAVFAC's November 4, 1975, submission uses the detailed record of the numerical point scoring to construct an assessment of the impact on the actual technical scoring of what it now terms the "alleged" discrepancies in the Towne proposal which were cited by Corbetta during the protest. The gist of this argument is that even accepting the existence of the 26 omissions in the Towne proposal which were discussed in our prior decision, their impact on the overall point scoring of the Towne proposal would be no more than 57 points. (Towne received 647 total points in the technical evaluation out of a maximum of 1,000.) NAVFAC also points out that the Corbetta proposal also evidenced discrepancies in a number of the same areas as to which Corbetta contended the Towne proposal was deficient.

NAVFAC has also remarked in connection with the technical point scoring that our Office "* * * has consistently refused to substitute its determination on technical matters for the determinations of experienced persons charged with responsibility for making such determinations * * *" and submits that we should not now depart from that practice.

We note, initially, that the above statement is not entirely accurate. It is true that in protest cases we do not conduct *de novo* technical

evaluations of proposals simply because a protest against the agency's evaluation has been filed (*Julie Research Laboratories, Inc.*, 55 Comp. Gen. 374 (1975), 75–2 CPD 232), nor do we ordinarily become involved in substituting our judgment as to the precise numerical scores which should have been assigned to the proposals. (*PRC Computer Center, Inc., et al.*, 55 Comp. Gen. 60 (1975), 75–2 CPD 35.) However, our Office does review the record of the technical evaluation, including the details of the numerical point scoring, in order to determine whether the agency's actions are shown to be without any reasonable basis (*Julie Research Laboratories, Inc., supra*). The detailed record of the numerical point scoring is clearly relevant evidence which must be considered in protests which challenge the technical evaluation. For our Office to substitute its judgment for the agency's on a purely technical matter is relatively rare, but in appropriate cases we have done so (see, for example, *Globe Air Inc.*, B–180969, June 4, 1974, 74–1 CPD 301).

In addition, we fail to see the point of NAVFAC's contention concerning substitution of technical judgment. Our September 12, 1975, decision was not premised upon the substitution of our technical judgment for the technical judgments of NAVFAC's evaluators. We did not conclude in our decision that one or another of the proposals should have received a greater or lesser number of technical points than was accorded to it by NAVFAC. Rather, our decision was premised upon the existence of various omissions, uncertainties, deficiencies, and ambiguities both in Towne's proposal and in the other competing proposals, as documented both in the protester's submissions and in NAVFAC's own report documents. These facts and the applicable law led to the conclusion that the award to Towne was improper.

In addition, NAVFAC's remark that the protester failed in any of its protest correspondence to "* * * *set forth any specific instance of misevaluation* * * *" (apparently with reference to the point-by-point numerical scoring) seems to overlook the fact that NAVFAC failed to provide Corbetta with the detailed technical evaluation documents upon which Corbetta would base any showing of misevaluation. As for the 57-point effect on the Towne proposal cited by NAVFAC, we have no difficulty in regarding this as involving a "substantial" impact. Concerning the deficiencies in the Corbetta proposal alleged by NAVFAC, this merely provides another reason why written or oral discussions should have been conducted with all offerors in the competitive range. See the discussion of this point in our earlier decision. In short, we do not believe that NAVFAC's contentions in regard to the additional technical evidence which has been presented furnish any cause for our Office to modify our prior decision in this matter.

Lastly, NAVFAC contends that our Office should not have sustained Corbetta's protest because the applicable statutory cost limi-

tation precluded an award to the protester. NAVFAC's November 4, 1975, submission states:

> The statutory limit for family housing is not an absolute dollar amount, but rather an average cost per unit. This permits the armed forces to construct housing in geographic areas where construction is expensive, by offsetting the savings possible in other geographic areas. There is always the possibility that during a program year, earlier projects may be awarded at prices below the statutory average, and DOD *may* allocate the additional amounts thereby made available to the Navy for use on a particular project. However, it is DOD policy that the statutory average cost must be honored on each housing award and particularly true in a situation such as this, where we have the first award under a newly raised legislative limit where no average cost other than the statutory limit has been established. In law, the statutory average does constitute an absolute bar to an award greater than a particular allocated share of such average. Accordingly, because of the limit on available funds, *at no time during the period at issue in this case, could award ever have been legally made to Corbetta.*
>
> The Corbetta proposal was within a competitive range, as defined by ASPR 3-805.2. If for some reason an award could not be made to Towne, and if as stated above a more liberal average cost had been made possible (through other housing awards being made below the average), then an award to Corbetta might have been possible. Therefore, it would have been premature, at any time prior to actually make an award to Towne, to have rejected the Corbetta proposal. * * * [Italic in original.]

It is unnecessary at this time to become involved in consideration of the nature of the statutory cost limitation, nor need we consider the question of the appropriate point in time in a negotiated procurement at which proposals which exceed the limitation should be rejected pursuant to ASPR § 18-110(c) (1974 ed.). Our earlier decision held that if discussions had been held with Corbetta as required by law, Corbetta may have been able to reduce its price so as to come within the applicable statutory limitation. We see nothing in NAVFAC's contentions which shows this conclusion to be erroneous.

In view of the foregoing, the holding of our prior decision on these issues is affirmed.

RECONSIDERATION OF LATE MODIFICATION TO TOWNE PROPOSAL

Our earlier decision concluded that NAVFAC erred in accepting a late price increase which was submitted by Towne upon extending its initial proposal. We held that this action constituted discussions with Towne, and that NAVFAC failed to meet the obligation to conduct discussions with the other offerors in the competitive range. NAVFAC disagrees with this holding.

NAVFAC contends that a bid or proposal remains legally open for acceptance until its expiration date, that it may not be revoked unilaterally by the offeror prior to such date, and that it may not be unilaterally extended by the offeree beyond such date, citing Corbin on Contracts § 273 (1963) and *Waterman* v. *Banks*, 144 U.S. 394 (1892).

NAVFAC argues that because an offeror is not legally obligated to extend its offer, it follows that it may condition any extension on such terms as it desires, as, for example, an increase in price. *Basler* v. *Warren*, 159 F. 2d 41 (10th Cir., 1947).

NAVFAC concludes that Towne clearly had the right to increase its price as a condition of extending its offer, and that Corbetta and other offerors could have done likewise. NAVFAC points out that while its message to the offerors asked for extensions of their original proposals (so as not to encourage offerors to raise their prices), the offerors as experienced contractors were capable of knowing their legal rights in this situation and exercising them.

NAVFAC also disagrees with our decision's holding that Towne's price increase was a late modification to its proposal. NAVFAC states that the late proposals and modifications clause included in the RFP ("*LATE PROPOSALS, MODIFICATION OF PROPOSALS OR WITHDRAWAL OF PROPROSALS (1973 SEP)*") had no application to the price increase. The reason given is that under the terms of the RFP, all offers were to expire on October 20, 1974, and that the request for extensions was an admission that the Government had no legal right to demand that the offers be extended. NAVFAC states: "Since in response Towne extended the period of the offer, only upon acceptance by the Government of an increase in price, it seems clear that there can be no application of the 'Late Modifications' clause since along with all other terms of the RFP, its effectiveness concluded as of 20 October 1974."

Concerning the question of discussions with the offerors, NAVFAC believes that a request to extend the offers does not constitute an opening of discussions and points out that no discussions as to the technical aspects of the proposals were sought or engaged in. NAVFAC believes that to the extent that the request to extend the offers constituted holding discussions, then discussions were in fact held with all offerors, since each offeror had the same opportunity to adjust its price in connection with extending its offer. Thus, all offerors were treated equally. NAVFAC refers, in this regard, to ASPR § 3-507.2 (b) (1974 ed.).

NAVFAC also considers it noteworthy that the *Lincoln Services* decision, discussed *supra*, "recognized" a price increase which was submitted when the time for acceptance of a proposal was extended by one of the offerors.

NAVFAC's observation that offerors had the legal right to condition extensions of their proposals on whatever terms they deemed desirable is correct, but only in a limited sense. Towne and the other offerors had the right to revise their proposals upon extending them

in that they could legally attempt to do so. This, however, is not the issue. The issue is the legal effect of the offerors' attempts, and the Navy's response to those attempts, within the framework of the statutory requirement to conduct written or oral discussions with all offerors within the competitive range and the requirements of the late proposals clause included in the RFP. If an offeror attempts to make material revisions in its proposal upon extending it, and the revised proposal is accepted by the contracting agency in contravention of the requirement to conduct discussions or the requirements of the late proposal clause, there can be no question that such action is improper, notwithstanding the fact that the offeror had a "legal right" to attempt to make the revisions. Since these considerations did not apply in the circumstances involved in the *Basler* decision, *supra*, it is not in point.

NAVFAC's assertion that the late proposals clause, along with all other terms of the RFP, "effectively concluded" on October 20, 1974--the date proposals expired—is wholly without merit. There is no provision in the RFP whereby its effectiveness terminates as of a certain date. Rather, it is the proposals which expire at the end of a stated time, unless withdrawn earlier. Any extensions or modifications of the proposals are made with reference to the terms of the RFP and are either in material conformance with those terms or a departure from them. The RFP continues in existence even after a contract is awarded, as recognized by decisions of our Office which have held that the solicitation can be reinstated under appropriate circumstances. See our decision of September 12, 1975, in this matter; *Cf. Federal Leasing, Inc., et al.*, 54 Comp. Gen. 872, 883 (1975), 75-1 CPD 236.

As our earlier decision held, the RFP late proposals clause cannot justify the NAVFAC's acceptance of the revised Towne proposal. The clause provides in pertinent part:

> (b) Any modification of a proposal, except a modification resulting from the Contracting Officer's request for "best and final" offer, is subject to the * * * [provisions calling for rejection of late proposals].
>
> (c) A modification resulting from the Contracting Officer's request for "best and final" offer received after the time and date specified in the request will not be considered unless received before award and the late receipt is due solely to mishandling by the Government after receipt at the Government installation.
>
> * * * * * * *
>
> (e) Notwithstanding the above, a later modification of an otherwise successful proposal which makes its terms more favorable to the Government will be considered at any time it is received and may be accepted.

Towne's revision to its proposal was clearly a "modification"; it did not result from a request for "best and final" offers; it was not a late modification which made the terms of the proposal more favorable to the Government; and there is no other provision in the clause which would allow acceptance of the late modification.

We note that ASPR § 3–506(d) (1974 ed.) provides that the normal revisions of proposals by offerors selected for discussion during the usual conduct of negotiations with such offerors are not to be considered as late modifications to proposals. This provision cannot justify acceptance of the revised Towne proposal because the revision was not a normal one made during the usual conduct of negotiations, i.e., discussions with all offerors within the competitive range. Compare the circumstances discussed in *Data General Corporation*, B–182965, May 20, 1975, 75–1 CPD 304.

The question of whether "written or oral discussion" have been conducted turns upon whether an offeror has been afforded an opportunity to revise or modify its proposal, regardless of whether such opportunity resulted from action initiated by the Government or the offeror. 51 Comp. Gen. 479, 481 (1972). We agree with NAVFAC that its request to offerors to extend their original proposals did not in itself constitute the opening of "discussions." In some instances, a mere request from the contracting agency to the offerors can in itself constitute discussions—for example, a request for best and final offers. *Dyneteria, Inc.*, B–181707, February 7, 1975, 75–1 CPD 86. The situation here is different. It was not NAVFAC's request for extensions of the original proposals which constituted the opportunity to revise proposals, but the offeror's submission of a material revision to its proposal and NAVFAC's acceptance of the same. These actions constituted the holding of discussions with Towne alone and not with the other offerors in the competitive range. NAVFAC's citation of ASPR § 3–507.2(b), *supra*, in this connection does not appear to be in point, since this provision deals with disclosure of information to prospective contractors concerning a potential procurement.

Finally, NAVFAC's reliance on the *Lincoln Services* decision is misplaced. In that case it was the plaintiff which conditioned the extension of its proposal on a late price increase. The court found the plaintiff's contentions of unfair treatment in the procurement to be without merit under the circumstances of the case. It is apparent that the court was never faced with the issue of a late price modification submitted by a successful offeror which operated to the detriment of other offerors in the competitive range.

In view of the foregoing, the holding of our earlier decision on the late modifications issue is affirmed.

RECONSIDERATION OF RECOMMENDATION

The recommendation in our prior decision, as noted *supra*, contemplated a renewal of competition among the offerors, with the possible result that Towne's contract be terminated for the convenience of the

Government. A number of reasons have been advanced why the recommendation is not in the Government's best interests, as, for example, NAVFAC's allegations that construction had advanced to the point by September 1975 that a new contractor would not be able to build over the work already in place without removal of that work, and that the renewal of competition would result in an auction due to the amount of information concerning the offerors' proposals which was disclosed to the parties during the protest proceedings. It is unnecessary to discuss these in detail. For the reasons which follow, the recommendation is now withdrawn.

Our recommendation was made with the knowledge that construction had been underway for some time, and that the Government would obviously incur costs in carrying out the renewal of competition. Information received by this Office in early September 1975 indicated that the value of preconstruction mobilization costs, actual work in place and materials on the jobsite was between $300,000–$400,000.

Several pertinent points have been brought out by NAVFAC and Town. NAVFAC's figures estimate that the actual value of work in place as of September 11, 1975—the day before our decision was issued—was about $1.1 million. Moreover, Towne was in the process of awarding numerous subcontracts for materials, the cost of which would impact on any termination for convenience settlement. NAVFAC's documents indicate that the contracting agency itself was not fully aware of the extent of the subcontracts being awarded at that time, presumably because the subcontract process is a continuing one and the contractor merely advises the agency from time to time of the status of the subcontracting and progress of the work.

In this light, it appears that even if the contract had been terminated for convenience immediately after issuance of our decision—which we did not recommend—the costs may well have been so great that such action would not be in the Government's best interests. (We did not recommend immediate termination because of the possibility that competition might not be effectively renewed among the parties. For example, all of the offerors in the competitive range might have declined to participate in the recompetition. NAVFAC would have been left with no contract for housing and would have had to conduct an entirely new procurement.) It follows that any termination subsequent to the renewal of competition—a process which would take at least several weeks—would result in even greater costs to the Government. We are inclined to agree with Towne's observation that it is probably impracticable to recommend any termination remedy after construction has begun in a contract of this type. It may well be that a remedy such as the one recommended could be practicable and effective

only if made during the design stage, prior to the beginning of actual construction.

This leaves the question of what other action our Office could take in these circumstances. We could have recommended to the Secretary of the Navy that he investigate the feasibility of a renewal of competition and possible termination for convenience of the Towne contract. For the reasons already discussed, this would not have resulted in any effective remedy for Corbetta. We are unaware of any other recommendation in connection with this protest which would have been legally appropriate. See, in this regard, the discussion of Corbetta's request for reconsideration *infra*. Any possible relief for Corbetta, therefore, would result from its claim for proposal preparation costs, discussed *infra*, either in this Office or the Court of Claims.

Corbetta's request for reconsideration contends that the manner of Towne's performance of the contract requires a termination for default, and that this would be the preferred remedy for protection of the Government's interests. In support of this, Corbetta has submitted affidavits prepared by several of its employees who have inspected the worksite subsequent to September 12, 1975. It is alleged that these affidavits demonstrate in detail numerous failures by Towne to comply with the contract requirements, local building codes, professional society requirements and good construction practice.

Towne denies the existence of the performance defects cited by Corbetta. Moreover, Towne and NAVFAC have pointed out that under the applicable termination for default provisions (*see* ASPR § 7-602.5 (1974 ed.)), a contractor may be terminated for default for refusing or failing to diligently prosecute the contract work. Also, even if it were assumed that there are defects in Towne's performance, they would not necessarily be the basis for a default termination, since the contractor may be given an opportunity to explain the causes of delay and the time for performance may under appropriate circumstances be extended by the contracting officer. NAVFAC states that the contracting officer has caused the work to be examined, and that he has no cause to believe that Towne is refusing or failing to prosecute the work with such diligence as will insure its completion. NAVFAC states that, accordingly, no termination for default will be directed.

We do not believe that this Office should become involved in considering whether to recommend terminations for default in situations of this kind. As pointed out in our September 12, 1975, decision in this matter, and in many other decisions of our Office, questions raised in a protest as to the adequacy of a contractor's performance are matters of contract administration, which is the function of the contracting agency, not this Office. The only relevance of a termination for

default to this matter is, as we stated in our earlier decision, that recommendations for corrective action such as those in the decision should not preclude the contracting agency from terminating the contract for default if the circumstances warrant. In view of NAVFAC's statements, *supra*, we take it that no termination for default is in the offing and, therefore, it is unnecessary to give further consideration to this point.

Corbetta has also suggested a number of remedies contingent upon Towne's contract being terminated for default, such as "assignment" of the contract to it with Towne performing as its subcontractor. In view of the discussion *supra*, it is unnecessary to consider these in detail. Another possibility raised by Corbetta is that it be reimbursed for certain costs in accordance with section 1B.14 of the RFP. This provision, however, is by its terms applicable only to recovery of costs pursuant to termination of the contract awarded under the RFP.

Corbetta's submission in regard to the reconsideration further contends that it should recover damages—principally proposal preparation costs—because of the Navy's "wanton and capricious action." In our earlier decision we noted that Corbetta had made a similar claim in connection with its protest. Our decision stated that in view of the recommended remedy, it was unnecessary to give further consideration to Corbetta's claim at that time.

Prior to issuance of today's decision, we advised the parties that any consideration of Corbetta's claim which might be necessary would be undertaken not in this decision but at a future time, because while protests and request for reconsideration of protest decisions should be decided in a reasonably speedy manner, the need for a rapid decision is not as pressing in the case of claims. Since today's decision withdraws the remedy recommended in our September 12, 1974, decision, Corbetta may now renew its claim for whatever costs to which it believes it is entitled.

Corbetta's request brings up several factors which it believed created delay in the protest proceedings or otherwise adversely affected its opportunity to obtain a remedy. Corbetta, specifically, contends that it was prejudiced by NAVFAC's delay in furnishing the agency reports responding to the protest, because our Office's decision on the protest was thereby delayed. NAVFAC has replied that Corbetta itself was responsible for the delay in the protest proceedings, because it spent about 2 months after filing its protest in deciding whether it wanted to withdraw the protest and an additional month in clarifying its grounds for protest. We think this factor is basically irrelevant to the recommendation contained in our earlier decision. The only pertinent questions are whether Corbetta filed a timely protest (it did) and

whether NAVFAC took an unreasonable amount of time to furnish its reports (we cannot say that it did, in view of the reasons cited by NAVFAC, *supra*).

Corbetta also contends that it filed its protest (January 7, 1975) prior to the time an award to Towne was actually consummated. Corbetta believes that the notice of award issued to Towne, January 6, 1975, did not consummate the contract, because the certain formal contractual documents were not executed until later. It is argued that section 20.4 of our Interim Bid Protest Procedures and Standards (4 C.F.R. § 20.4 (1974)) and ASPR § 2–407.8 (1974 ed.) required NAVFAC to withhold the actual award until the protest was decided.

We find it unnecessary to decide when the award to Towne was consummated. The preamble to our Interim Bid Protest Procedures and Standards (*see* 36 Fed. Reg. 24791 (1971)) specifically notes that our Office has no authority to regulate the withholding of awards by contracting agencies. Where a before-award protest has been filed, the ASPR provisions do require the agency to make a determination, before proceeding with an award, that the items to be procured are urgently required; that performance will be unduly delayed by failure to make a prompt award; or that a prompt award will otherwise be advantageous to the Government. In the present case, even if it were assumed, *arguendo*, that Corbetta's protest was filed before award, we believe that NAVFAC's failure to make an appropriate determination under ASPR § 2–407.8, *supra*, would, at most, render the award to Towne voidable and not plainly or palpably illegal under the standards of 52 Comp. Gen. 215 (1972). Towne's contract was found to be voidable in our earlier decision, and at this late stage in the proceedings Corbetta's allegation that its protest was before award has become academic.

Another point to be considered is Corbetta's allegation that NAVFAC should have suspended performance under the contract while its protest was under consideration. NAVFAC has replied that, in its view, there was "no valid reason" to suspend performance and points out that such action could have given rise to disputes between itself and the contractor.

Our Office has taken the position that while suspension of performance during a protest is a desirable step, the question of whether this action should be taken is for the contracting agency to decide. The agency bears the responsibility of assuring that satisfaction of the Government's needs is not unreasonably delayed by suspension of work and must judge any risks inherent in such action. Legal authority to compel the agency to suspend the work rests with the Federal courts,

and it is up to the protester to pursue this course of action if it so desires. In the present case, Corbetta did not do so.

CONCLUSION

In view of the foregoing, the recommendation made in our prior decision is withdrawn and the decision is otherwise affirmed.

Two final points must be discussed. The first concerns NAVFAC's recent disclosure, as noted *supra*, of documents containing its evaluators' detailed point-by-point scoring breakdown of the technical proposals. At the conference on the requests for reconsideration, October 10, 1975, Corbetta's representatives raised the question as to why they had been unable to obtain this information during the protest. NAVFAC's November 4, 1975, letter to our Office responded as follows:

> At our meeting of 10 October 1975 we indicated to your representatives that the individual evaluations by the members of the evaluation team are in the Northern Division files and that in keeping with our policy these had not been made available to the protestor, the contractor, or anyone else. Indeed, the Navy policy remains firmly against release of these documents, for any other position would be to invite protest from unsuccessful proposers who would then seek to have the GAO or the courts, or both, review the subjective evaluations by each member of the evaluation team. Nevertheless, because the decision of your office dated September 12th tends to infer that the Navy has not acted in accordance with the governing regulations in effecting this procurement, we are attaching to this report * * * copies of the individual ratings prepared by the members of the evaluation team. * * *

This statement leaves unanswered the question of why the record of the individual technical evaluations was not routinely furnished to our Office with NAVFAC's reports on the protest in April and May 1975. As noted *supra*, our Office received this information for the first time with NAVFAC's November 4, 1975, submission—10 months after the protest was filed.

In this regard, we note that where, as here, records which the contracting agency believes should not be disclosed are relevant to the issues raised in a protest, the proper course of action is to furnish these records to our Office with the report on the protest, along with an indication that they are believed to be exempt from disclosure under the Freedom of Information Act (5 U.S.C. § 552 (1970)) and should not be disclosed to the parties. Our Office will not disclose the records to the protester and interested parties under these circumstances. Rather, it is up to the protester and interested parties to pursue their disclosure remedies under the Freedom of Information Act if they choose to do so. See *Unicare Health Services, Inc.*, B–180262, B–180305, April 5, 1974, 74–1 CPD 175; *Dynalectron Corporation et al.*, 54 Comp. Gen. 1009 (1975), 75–1 CPD 341.

NAVFAC did not follow this procedure in the present case, but rather withheld these records from both the parties involved in the

protest and our Office. We view this action as a departure from the protest procedures contained in ASPR § 2-407.8(a) (1974 ed.), which provide that agency protest reports should include, in addition to various other items, any agency documents which are relevant to the protest. Also, our Office has stated that it is imperative that agency reports responding to protests contain a full accounting of the relevant facts and circumstances. 45 Comp. Gen. 417, 418 (1966). By letter of today, we are calling this matter to the attention of the Secretary of the Navy with a recommendation that the procedure followed by NAVFAC in this case be fully reviewed and revised so as to prevent a recurrence of these circumstances in the future.

The second concluding point concerns our recommendations to the Secretary of the Navy for corrective action in our prior decision, made pursuant to the Legislative Reorganization Act of 1970, Public Law 91-510, 2 U.S.C. 72a note, and furnished to the congressional committees named in 31 U.S.C. § 1172 (1970). Pursuant to such recommendations, the Secretary is obligated to respond to the congressional committees named in the statute within a stated time as to the actions which are taken in response to the recommendations. *See* 31 U.S.C. § 1176 (1970). As noted *supra*, the recommended remedy in this case has now been withdrawn. However, since the actions taken by NAVFAC in this procurement led to an improper award, it is necessary that the Secretary cause a review of NAVFAC's actions in this procurement to be undertaken to ensure conformance with the requirements of applicable law and regulations in future negotiated turnkey housing procurements. Accordingly, in today's letter to the Secretary we are recommending this action.

[B-131836]

Family Allowances—Separation—Type 2—Ship Duty—Residence Location

Following the decision 52 Comp. Gen. 912, if a ship moves from its home port to another port within 50 miles (or 1½ hours traveltime as provided in paragraph 30313, Department of Defense Military Pay and Allowances Entitlements Manual) of the home port, those members attached to the ship whose dependents do not reside in the area of the home port do not become entitled to family separation allowance (FSA), Type II.

Family Allowances—Separation—Type 2—Ship Duty—Home Port Changes

Family separation allowance, Type II, if otherwise allowable may not be paid to naval personnel assigned to ships merely because the ship has moved from its home port but eligibility depends upon where the dependents actually reside. If they reside within 50 miles (or 1½ hours traveltime) of the ship while at some other port, FSA may not be paid.

In the matter of Family Separation Allowance, Type II, April 12, 1976:

This action is in response to a request for decision from the Acting Secretary of the Navy, dated May 2, 1974. The request has been approved by the Department of Defense Military Pay and Allowance Committee and assigned Control Number SS–N–1220.

The Acting Secretary states that in view of our decision of June 5, 1973, 52 Comp. Gen. 912, which was applicable to certain Navy members in the Norfolk, Virginia area, it is requested that this Office provide a rule of entitlement to family separation allowance (FSA), Type II, which would apply in all situations when a ship is away from its home port, and which includes consideration of traveltime and distance to the residence of the dependents.

In our decision of June 5, 1973, we held that Navy members assigned in excess of 30 days to ship overhaul at the Norfolk Shipyard, Portsmouth, Virginia, located 3 miles from the home port, Norfolk, Virginia, who had had the option to move their families at Government expense to the Norfolk area but chose not to do so, were not entitled to the payment of the family separation allowance provided by 37 U.S. Code, 427(b)(2) (1970). We stated in that decision (p. 916):

> * * * [T]he allowances authorized in all three clauses under subsection 427(b) are predicated on a separation of the member from his dependents by reason of his military assignment. When the vessels involved were moved from Norfolk to Portsmouth there was not such a separation of the members and their dependents residing at Norfolk as would entitle them to the allowance. Likewise, no such separation resulted in the case of dependents who reside away from the home port.

With regard to payments of FSA, Type II, when the actual residence of the dependents is for consideration, paragraph 30313 of the Department of Defense Military Pay and Allowances Entitlements Manual (DODPM) provides that dependents reside "at or near" a duty station if they live within a reasonable commuting distance. A reasonable commuting distance is defined as a distance of 50 miles, unless a member actually commutes a greater distance. However, if actual traveltime exceeds 1½ hours by the commonly used route and method of transportation, the dependents shall not be considered as residing near the member's duty station, even though the distance is less than 50 miles, if the member does not actually commute.

In accordance with the rationale of 52 Comp. Gen. 912, and in view of the provisions of paragraph 30313, DODPM, it would appear that the following rule would establish a reasonable test for nonentitlement to FSA, Type II, when a ship moves from its home port to another port:

> If a ship moves from its home port to another port within 50 miles (or 1½ hours travel time as prescribed in para. 30313, DODPM) of the home port, those members attached to the ship whose dependents do not reside at or near

such home port under the criteria of para. 30313, DODPM, do not become entitled to FSA, Type II.

Generally, we view the regulations as providing that where a member's dependents reside at or near the home port (within 50 miles or 1½ hours traveltime) and the ship moves from the home port to another port, the member may become eligible for FSA, Type II, if he does not commute to the ship, provided the distance from his dependents' residence to the current location of the ship is not within 50 miles (or 1½ hours traveltime). Further, a member whose dependents do not reside at or near the home port (more than 50 miles or 1½ hours traveltime of the home port) but who commutes, may be considered as being in the area of the home port for FSA, Type II, entitlement purposes. Such a member may become entitled to FSA, Type II, if the ship moves from the home port provided the dependents' residence is more than 50 miles (or 1½ hours traveltime) from the new location of the ship and he does not then commute.

The four situations set forth by the Acting Secretary are considered as presented:

Situation 1—A member of eligible grade, upon reassignment to a ship, moves his family to a location any great distance from the home port of the ship, the movement of the ship from the home port not resulting in the member residing any closer to his dependents.

In regard to situation 1, if the movement of the ship is less than 50 miles (or 1½ hours traveltime) from the home port FSA, Type II, would not be payable to those members whose dependents do not live at or near the home port. However, if the ship moves more than 50 miles (or 1½ hours traveltime) from the home port FSA, Type II, would be payable if other requirements are met.

Situation 1—A member of eligible grade, upon reassignment to a ship, moves his family to a location outside the current 50 mile/1½ hour limit of the home port of the ship. Subsequently, the ship moves from the home port and on the 29th day docks at a port inside the 50 mile/1½ hour limit for 5 days. The ship then remains deployed for an additional 60 days, after which time it returns to the home port.

For situation 2, the docking of the ship within the 50-mile limit would, for purposes of the member here in question, have the same consequence as if the ship had returned to its home port since the member's dependents do not reside at or near the home port and since the ship did not move to a location more than 50 miles (or 1½ hours traveltime) from the home port.

Situation 3—A member of eligible grade, upon reassignment to a ship, moves his family to a location outside the current 50 mile/1½ hour limit of the home port of the ship, but actually commutes, the movement of the ship from the home port resulting in the member being unable to commute.

As stated above, the member's dependents would be considered as being in the area of the home port inasmuch as he commuted while the ship was in the home port. Therefore, in situation 3, since after move-

ment of the ship to the new location the member is unable to commute, he would meet this requirement for FSA, Type II, if his dependents resided 50 miles (or 1½ hours traveltime) from the new location.

Situation 4—A member of eligible grade, upon reassignment to a ship, moves his family to a location within the 50 mile/1½ hour limit, the movement of the ship resulting in the residence being located outside the 50 mile/1½ hour limit for some of the members, but not all.

As to situation 4, those members whose dependents reside more than 50 miles (1½ hours traveltime) from the new location of the ship and who do not commute, would fulfill the vicinity requirement for entitlement to FSA, Type II. Those members whose dependents reside within 50 miles (1½ hours traveltime) of the new location of the ship would not become entitled to FSA, Type II, by virtue of the movement of the ship.

The questions are answered accordingly.

[B–179186]

Officers and Employees—Hours of Work—Forty-Hour Week—First Forty-Hour Basis—Overtime and Traveltime

Mine inspectors who work first-40-hour workweeks may be compensated for time spent in travel on official business during their first 40 hours. Any time spent in nontravel work after first 40 hours is compensable overtime. B–179186, October 24, 1973, modified.

Interior Department—Bureau of Mines—Mine Inspectors—Overtime and Traveltime

Mine inspectors' travel, which due to nature of the mine inspection work is found to be an inherent part of and inseparable from their work, is compensable as regular or overtime work. However, mine inspectors are prohibited from receiving overtime compensation for any time they spend in training under the Government Employees Training Act. 5 U.S.C. 4109. B–179186, October 24, 1973, modified.

In the matter of Department of Interior—reconsideration of mine inspectors' compensable traveltime, April 13, 1976:

This decision involves a request from James T. Clarke, Assistant Secretary of the Interior, for reconsideration of our decision B–179186, October 24, 1973. That decision concerned the payment of overtime compensation to inspectional employees of the Bureau of Mines, Department of the Interior, who performed a substantial amount of travel away from their official duty stations.

BACKGROUND

In decision B–179186, *supra*, we stated that with regard to those employees whose workweek was the first 40 hours of duty, hours of

duty or hours worked included "* * * all time during which an employee is required to be on duty at his headquarters or to be at a prescribed work place and time spent in travel to and from a prescribed place of duty will not be considered hours of duty unless such travel qualifies under one of the four considerations specified in 5 U.S. Code § 5542(b) (2) (B)." Therefore, we held that Bureau of Mine inspectors who worked a first-40-hour workweek were improperly paid overtime compensation for time spent in traveling to and from their work. We held further that the overpayments made were subject to waiver under 5 U.S.C. § 5584 and the implementing regulation in 4 C.F.R. § 91, *et seq.*

The Assistant Secretary of the Interior, by letter of April 17, 1975, states that we were not provided with certain pertinent information which he believes would have altered our decision. The attachments to his letter contain that information for our review.

The basic submission attached to the Assistant Secretary's letter states that the validity of the Bureau of Mines regulations [1] with regard to compensating the traveltime of inspectional employees has been placed in doubt by our decision, even though we did not find the regulations to be invalid.

To assist our review, the submission describes the statutory requirements for a vigorous mine safety inspectional system. It states that, in order for the mine safety inspectional system to work properly, mines must be subject to inspection at all hours, even if they are located in remote areas. Moreover, so that a thorough inspection may take place, it may be necessary for the mine to be under constant inspection for several days in a row. The submission states further:

> In those areas where mining activities are heavily concentrated, the inspection workforce usually engages in travel of relatively short distances within one workday. Overnight accommodations are not involved. Upon completion of their inspection activities, they usually return to their headquarters office to turn in their automobiles and equipment and prepare reports associated with the inspection activities.
>
> In areas where mining operations are widely dispersed, inspectors usually report to their headquarters office for their assignments, autos and equipment at the beginning of their workweek.
>
> They drive, sometimes for a whole day, to a location close to the first inspection site. After completing the inspection they drive to the next mining site selected for inspection. Under these circumstances, they may remain in the field for a full workweek and sometimes longer without returning to their headquarters office. Reports are usually prepared at their motel accommodations after the inspection has been completed. In addition, the inspectors may be required to report at any hour on short notice to their headquarters office to pick up vehicles and equipment to participate in mine rescue operations or other emergency or disaster operations.
>
> Travel by automobile is a necessity in performing these tasks due to the locations of the mines, the travelling required upon a mine site, the mobility required of the inspectors, and the equipment which must be used. For example, an inspector must take with him for use during a typical safety inspection: per-

[1] Bureau of Mines is now supplanted by the Mining Enforcement and Safety Administration which is in the process of issuing its own regulations.

missible methane detector, permissible flame safety lamp, roof-testing device, roof-bolt finishing bit gage, anemometer (to measure wind velocity), measuring tape and rule, smoke tubes and aspirating bulb, feeler gages, self-rescuer device, rock dust collecting equipment, containers for mine dust samples, bottles for air samples and miscellaneous items such as cards, notices of violation, copies of the law and other information data as well as personal paraphernalia. When the same inspector is also examining health conditions at the same time he would carry with him enough air and dust samplers for each miner to carry with him while performing his job (plus spares) as well as sampler head assemblies and filter cassettes to go with them, a personal sampler field calibrator and a noise level meter and calibrator.

The submission also states that the statute requires education and training of mine operators and miners in accident prevention and demonstrations of heavy mine rescue apparatus.

DISCUSSION AND OPINION

Section 5542(b)(2) of Title 5 of the U.S. Code (1970), as amended, states the following with respect to compensating an employee for time spent in travel:

> (2) time spent in a travel status away from the official-duty station of an employee is not hours of employment unless—
>
> (A) the time spent is within the days and hours of the regularly scheduled administrative workweek of the employee, including regularly scheduled overtime hours; or
>
> (B) the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling, (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively.

There is no doubt that under subsection 5542(b)(2)(A), an employee having a regularly scheduled workweek must be compensated for any time spent in travel on official business which is within his regularly scheduled work hours. Moreover, any overtime work performed by such an employee is compensable even though the work became overtime solely because travel was performed during regular work hours.

We have reconsidered our previous decision in light of the additional information presented and find that it was unnecessarily restrictive. It is now our opinion that there is no need to differentiate between an employee with a fixed tour of duty who must travel from one site to another after reporting for work at one location and an employee who must of necessity have a work schedule consisting of the first 40 hours of work and who must perform similar travel after working at his first work site. Accordingly, if after commuting to headquarters or another work site from his home a first-40-hour employee is ordered to perform travel, such traveltime is compensable within the first 40 hours and any time spent in nontravel work after the first 40 hours is compensable overtime. However, travel performed after the first

40 hours of work is not compensable unless it meets the conditions described in 5 U.S.C. § 5542(b) (2) (B).

The Civil Service Commission has explained the limited conditions in section 5542(b) (2) (B), under which traveltime is considered hours of work, in section 3b(2) of subchapter S1, Federal Personnel Manual (FPM) Supplement 990–2, Book 550. However, subparagraph (c) (v) of said section 3b(2) states that those conditions are not applicable in certain circumstances, as follows:

(v) The above conditions do not apply to work situations involving travel which is an inherent part of, and inseparable from, the work itself. In such events when an agency determines that the travel represents an additional incidental duty directly connected with the performance of a given job, and is therefore considered to be an assigned duty, the time spent in travel is work time and will be payable at regular or overtime rates, as appropriate. (See Comptroller General decisions B–146389, February 1, 1966, and B–163042, May 22, 1968.)

Our decisions B–146389, February 1, 1966, and B–163042, May 22, 1968, which relied on B–143074, September 29, 1960, sanctioned the agency practice of treating as compensable traveltime, travel which is an inherent part of and inseparable from the work itself. In B–143074, *supra*, we held it was proper for the Army to prescribe by regulation that the traveltime of a survey party between assembly point and survey site was inherent to the work at the survey site and was thus compensable as work. In B–146389, *supra*, we approved regulations of the Federal Aviation Administration (FAA) which stated that employees who reported to headquarters, received assignments, picked up vehicles, tools, and supplies and then traveled to one or more facilities for maintenance work, may be paid compensation for such traveltime since the FAA found that the traveltime was a part of the established tour of duty.

The pertinent Bureau of Mines regulation concerning the compensation of inspectional employees for time spent in travel is found at Part 370, Bureau of Mines Manual, chapter 610, subchapter 1.11.B, July 16, 1970:

B. *Travel which is an inherent part of, and inseparable from the work itself.* In those work situations where a determination can be made that the travel represents an additional incidental duty directly connected with the performance of a given job, and is therefore considered to be an assigned duty, the time spent in travel is work time, compensable at regular or overtime rates, as appropriate. It has been administratively determined that travel is an incidental part of the officially assigned duties of employees in the following situations:

(1) Employees performing mine inspection work. Employees in this group report to a headquarters office or other official duty station at the beginning of the workday or workweek to pick up Government vehicles. They then drive these vehicles, transporting mine inspection equipment, to one or more worksites where they perform mine inspection work. During or at the end of the workday or workweek, they return to their official duty station to turn in Government vehicles and prepare reports on inspections. The time spent in traveling from the official duty station to the mine or other worksite and back, and between worksites, is worktime for pay purposes.

> (2) If, after an employee completes his duties at a temporary worksite, he is required to return to his post of duty to perform additional tasks, such as cleaning or recharging equipment that must be ready for his use the next day, or obtaining necessary supplies, his tour of duty for that day does not end until he has performed the required additional tasks. In such cases the travel time between his temporary post of duty and his regular post of duty constitutes a part of the hours of duty of the employee for that day.

The Bureau of Mines has thus administratively determined that the travel performed by mine inspectors is travel which is an inherent part of and is inseparable from the work mine inspectors perform. We see no basis to differ with this administrative determination since the inspectional employees must constantly be traveling to perform their job. We conclude, therefore, that the travel performed by the mine inspectors comes within the rule stated in our previous decisions, B–143074 and B–146389, *supra.*

We recognize that those decisions involved employees who were not in a travel status and who returned to their official duty station after performing the travel at the end of the day. There is a remaining question, therefore, as to whether an inspectional employee who is away from his official duty station for a period of time longer than 1 day, may also be compensated for such traveltime.

It is not reasonable that the determination of whether the traveltime is compensable or not should rest on whether the mine inspector is able to complete his assignment and return to his official station within 1 day or whether he must take more than 1 day from his official duty station to complete his assignment. Rather, the basic reason here for treating traveltime as compensable is that the travel is found to be an inherent or inseparable part of the work. Once the travel is determined to be an inherent and inseparable part of a mine inspector's work, it must follow that this travel is an inherent and inseparable part of his work whether the inspector's assignment is performed within 1 day or whether it is performed over a longer period of time during which the mine inspector is away from his official duty station.

Accordingly, we would approve the payment of compensation for traveltime performed by a Bureau of Mines inspector, if otherwise found proper, under the above Bureau of Mines regulations, whether such traveltime was performed when the inspector departed from and returned to his official duty station within 1 day or whether he took more than 1 day away from his official duty station to accomplish his assignment.

Considering the above, we find that the payments made to mine inspectors (other than those who are in training) whose jobs are covered by the Bureau of Mines regulations for time spent in travel either within or after their first 40 hours are proper. Therefore, no waiver action in connection with such payments is necessary.

However, we also found in B–179186, October 24, 1973:

* * * that one of the employees, Mr. Gary R. Milton, was a trainee and was paid a total of $466.60 overtime compensation while engaged in training. The authority for training of civilian employees is provided by 5 U.S.C. 4101–4118 and such training may be either through the use of Government or non-Government facilities. Under the regulations of the Civil Service Commission issued pursuant thereto, overtime compensation is precluded except under specified circumstances which do not appear applicable here. 5 CFR 410.602.

We are presented with no legal justification to change the above-quoted part of our prior decision. Accordingly, mine inspectors who may otherwise be covered by the rules set out above, but who are in training, may not properly receive overtime compensation while in training and any overpayments paid to them in violation of this rule are for recovery unless waived under 5 U.S.C. § 5584 and the implementing regulations in 4 C.F.R. § 91, *et seq.*

Decision B–179186, October 24, 1973, is modified accordingly.

[B–184970]

Contracts—Protests—Timeliness—Considered on Merits

Untimely protest is considered on merits because it reflects serious misunderstanding by agency of concepts of responsibility and responsiveness as applied in prior General Accounting Office (GAO) decisions.

Contracts—Specifications—Descriptive Data—Failure To Insert Specific Information—Bid Nonresponsive

Inclusion in invitation for bids of six pages of "Descriptive Schedules" containing over 200 blanks in which bidders were to insert specific information concerning equipment being supplied; which were expressly made part of specifications; which were to be furnished with bid; and as to which bidders were advised to fill in all blanks or be found nonresponsive, was a descriptive literature requirement even though agency failed to use descriptive literature clauses prescribed by regulations.

Contracts—Specifications—Descriptive Data—Failure To Complete Descriptive Schedules—Bid Nonresponsive

Bidder's failure to complete blanks in "Descriptive Schedules" made bid nonresponsive and was not matter of bidder's responsibility as claimed by agency.

Bids—Qualified—Letter, etc.—Containing Conditions Not in Invitation

Statement in cover letter accompanying bid that bidder would supply equipment specified in "Descriptive Schedules" "or equal" was reservation by bidder of right to substitute unidentified components for those described in bid, thereby rendering bid nonresponsive.

Contracts—Specifications—Descriptive Data—Failure To Submit Horsepower Data

Bidder's failure to submit with bid manufacturer's horsepower curves substantiating engine horsepower claimed in bidder's entry upon "Descriptive Schedules" also resulted in nonresponsive bid.

Contracts—Specifications—Conformability of Equipment, etc., Offered—Ability To Meet Requirements

No basis exists for rejection of bid as nonresponsive under argument that generator offered would not meet specifications where bidder inserted acceptable information in "Descriptive Schedules" and furnished with bid letter from generator manufacturer certifying that generator would comply with specifications.

Contracts—Termination—Not in Government's Best Interest—Urgency of Procurement, Lack of Bad Faith, etc.

GAO does not recommend that contract awarded to nonresponsive bidder be terminated for convenience of the Government, after considering urgency of procurement, good faith (albeit erroneous) reliance by agency on prior GAO decisions and untimeliness of protest.

In the matter of Cummins Diesel Engines, Inc., April 13, 1976:

Cummins Diesel Engines, Inc. (Cummins), the third low bidder under Coast Guard invitation for bids (IFB) No. CG-60, 500-A, contends that the first and second low bids submitted by Essex Electro Engineers, Inc. and King-Knight Co. respectively should have been rejected as nonresponsive. The agency has proceeded with an award to Essex, despite the pendency of the protest, pursuant to a determination that a prompt award would be most advantageous to the Government.

In its report to our Office, the agency observes that Cummins' initial protest to it was untimely filed under the standards set forth in section 20.2 of our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975). We agree. Our review of the record shows that Cummins' protest to the agency was filed one day late; its subsequent protest to this Office was timely. However, we have considered this protest on its merits because the file reflects a misunderstanding by the agency of the concepts of responsibility and responsiveness as applied in prior decisions of this Office.

FACTUAL BACKGROUND

The instant IFB for diesel engine-driven power systems utilizes a mixture of design and performance specifications. Components of the systems were described in terms of certain required physical and dimensional characteristics as well as in terms of the level of performance to be achieved. The designation of system components, such as diesel engines, generators, switches, meters and cabinets was generally

left to each bidder, whose task was to select from the products of several manufacturers a combination of components meeting the design and performance requirements of the specifications.

Each bidder was required to describe his selection of components by filling in approximately 225 blanks in two three-page "Descriptive Schedules" attached to both specifications used in the IFB. (The precise number of blanks varied with the type of radiator used.) At the beginning of each "Descriptive Schedule" was the legend "(To be furnished as part of bid)" and the relationship of the "Descriptive Schedule" to the specifications was explained as follows in the IFB's listing of the items being procured:

1. [4] Power systems consisting of two (2) each 400KW Diesel Engine Generator Sets (Prime Power Rated) with automatic transfer switch system and 400KW Load Bank *in accordance with* Specification No. 953 dated 19 May 1975 *consisting of* 35 pages and *3 pages of descriptive schedule;*
2. [1] Power system consisting of three (3) 400KW Diesel Engine Generator Sets (Prime Power Rated) with automatic transfer switch system and 400KW load bank *in accordance with* Specification No. 956 dated 25 June 1975 *consisting of* 44 pages *and 3 pages of descriptive schedule* [Italic supplied.]

The solicitation further provided:

BIDDER SHALL SUBMIT THE FOLLOWING INFORMATION WITH THEIR BID OR THE BID SHALL BE CONSIDERED NON-RESPONSIVE

1. Completion of "Descriptive Schedule" attached to the specifications. *ALL* items must be completed.

* * * * * * *

[Italic in original.]

Essex's Failure to Complete the "Descriptive Schedule"

The agency has conceded the accuracy of Cummins' contention that Essex failed to provide the following information requested by the "Descriptive Schedule":

(1) the precise model Westinghouse generator circuit breaker;
(2) the manufacturer of the generator control cabinet; and
(3) the catalog numbers of the ASCO monitors to be furnished.

However, the agency obtained that information from Essex after bid opening, and found it to be satisfactory, under the following rationale advanced by the contracting officer in his report to our Office:

The statement that required data was not submitted with the bid is correct. Here, in spite of the fact that the solicitation states that the bidder shall submit all completed items of the Descriptive Schedule or be considered nonresponsive, nevertheless, it is apparent that the purpose of the requirement is to permit the Coast Guard to determine whether the product offered would meet the specifications and to generally establish what the bidder proposed to furnish.

In connection with the failure of a bidder to comply with the requirements of a Descriptive Schedule, the Comptroller General held in 48 Comp. Gen. 659 (1969) that a similar requirement for furnishing information with the bid was directed toward determining the responsibility of the bidder rather than the responsiveness of the bid. Therefore, there was no valid basis for rejecting the low bid solely for failure to submit the requirement data at the time of bid. (See also [B–177245, May 7, 1973]). Therefore, in keeping with the ruling of the

Comptroller General, I find that the Descriptive Schedule requirement relates to the responsibility, and I have determined that the bid submitted by Essex is responsive. * * *

We believe the agency's reliance on the decisions cited is misplaced. Our decision which is reported at 48 Comp. Gen. 659 (1969) concerned the proposed rejection of a bid which failed to include certain "preliminary drawings" required by the IFB. The agency advised our Office that the "preliminary drawings" were required to determine prior to award "whether the product offered will *conceivably* meet the specification requirements and to *generally establish* what the bidder proposes to furnish." [Italic supplied.] We observed, with specific reference to the underscored language, that the requirement for "preliminary drawings":

* * * would appear to be directed to determining the responsibility of the bidder, rather than the responsiveness of the bid to the specification requirements. Additionally, we note that [the IFB specifications] would appear to require that *the successful bidder must comply with the specification requirements, rather than the preliminary drawings submitted with his bid,* as indicated by the requirement in Section C for postaward submission of detailed drawings, and the requirement in section G for submission and approval of a preproduction sample which conforms to every requirement of the specification. In view thereof, it is our opinion the record presents no valid basis for rejecting bids solely for failure to submit preliminary drawings with the bid. 48 Comp. Gen. at 662. [Italic supplied.]

The "preliminary drawings" with which our prior decision was concerned served only to indicate whether bidders sufficiently grasped the specifications to offer products which would conceivably meet the Government's needs, and did not establish exactly what the bidders would ultimately furnish. Moreover, the solicitation did not state that the failure to furnish the preliminary drawings would render the bid nonresponsive.

The function of the "Descriptive Schedule" in the instant procurement was very different. The IFB's Schedule of Supplies/Services requested bidders to submit firm fixed prices for the supply of power systems which were to be "in accordance with" specifications which expressly included "3 pages of descriptive schedule." "Specifications" is defined in the Federal Procurement Regulations (FPR) as a "clear and accurate description of the technical requirements for a material, product or service * * *." FPR § 1–1.305 (1964 ed. amend. 95).

We think it is clear that the information entered by the bidders in the "Descriptive Schedule" was meant to describe *exactly* what was to be furnished under any resulting contract. Any doubt in this regard can be resolved by an examination of the quality assurance provisions in both specifications contained in the IFB. Among the tests to be conducted on each engine-generator unit offered for acceptance is one for "Fuel Consumption-Diesel Engine." The "Requirement Paragraph of the *specification*" against which the test results are to be measured

is given as "Manufacturer's Ratings *as given in the Descriptive Schedules.*" [Italic supplied.] The fact that at least in one respect the "Descriptive Schedule" established a specification requirement against which the supplies were to be tested conclusively demonstrates, in our opinion, that the information sought related to the suitability of the equipment rather than to a bidder's capacity to produce it. In addition, the invitation stated that information should be submitted or the bid would be considered nonresponsive.

In B–177245, May 7, 1973, also cited by the Coast Guard, we found as relating to responsibility data requirements which admittedly were not necessary to determine whether the product met specifications. In contrast, the data required in the instant case specifically formed a part of the product specifications. We note that the data omitted from Essex's bid was obtained by the Coast Guard prior to award.

We must therefore conclude that the Coast Guard erred in regarding the "Descriptive Schedule" as relating to Essex's responsibility rather than to the responsiveness of its bid. Essex's admitted failure to complete all of the "Descriptive Schedule" items rendered its bid nonresponsive and it should have been rejected as such. See *Western Waterproofing Co., Inc.*, B–183155, May 20, 1975, 75–1 CPD 306.

Our review of the record has revealed another deficiency in Essex's bid which has not been discussed by Cummins or the agency. Attached to Essex's bid was a cover letter signed by the same corporate official who signed Essex's bid form and which was clearly meant to be part of the bid. The letter states in part: "Included is a copy of the Descriptive Schedule specifying *proposed* sources of supply. The sources will be *as specified or equal.*" [Italic supplied.]

Essex clearly was reserving to itself the right to substitute components for those listed in the "Descriptive Schedule" and therefore the Coast Guard had no assurance that the items delivered would conform exactly to those listed in the "Descriptive Schedule." Since the "Descriptive Schedule" formed part of the specifications, we believe this reservation by Essex also rendered its bid nonresponsive.

Essex's Failure to Submit Horsepower Curves with Bid

Cummins next observes that Essex failed to include with its bid published horsepower curves for the engine upon which it bid, as required by paragraph 3.4.2.1 of the specifications. As we noted above, it was the bidder's responsibility to select a diesel engine sufficient in size to drive the generator under the altitude and temperature conditions set forth in the IFB. Stating this requirement in a precise and unambiguous manner and assuring that the equipment offered met this re-

quirement has been a particularly vexatious problem. In fact, a prior Coast Guard solicitation was canceled pursuant to a decision of this Office holding that the specifications concerned with the horsepower rating of the engines was subject to conflicting interpretations. *Essex Electro Engineers, Inc., Cummins Diesel Engines, Inc.*, 54 Comp. Gen. 1068 (1975), 75-1 CPD 372.

The terms "maximum (peak) horsepower rating," and "continuous (prime power) horsepower rating" appear sufficiently defined in the instant IFB to eliminate any confusion which may have existed previously. Bidders were required to enter in the "Descriptive Schedule" the "Continuous (Prime Power) Horsepower Rating" of the diesel engine they proposed to supply. In addition, paragraph 3.4.2.1 of the specifications stated in part:

> * * * The engine shall have a *continuous horsepower* (prime power) rating (as shown by the engine manufacturer's published performance curves) (*bidder shall furnish published h.p. curves indicating the horsepower for the continuous-prime power-rating of the engine being furnished*) of at least ten percent and not more than 25 percent in excess of that required to drive the generator and all engine and generator and auxiliaries at rated generator speed, where the generator is delivering its full output at rated power factor, all at the altitude and ambient temperatures specified. * * * [Latter italic supplied.]

Essex represented in its "Descriptive Schedule" that it would utilize a Detroit Diesel Allison Model No. 9123-7005 engine with a Continuous (Prime Power) Horsepower rating of 700. However, Essex failed to enclose with its bid manufacturer's horsepower curves which would confirm the horsepower figure entered in the bid.

Using data primarily from the 1975 "Diesel and Gas Turbine Catalog," Cummins has submitted calculations in support of its contention that the engine offered by Essex cannot satisfy the requirements of specification paragraph 3.4.2.1. However, the agency has concluded that the engine will meet the intent of the specifications, based upon examination of manufacturer's horsepower curves obtained after bid opening.

The Coast Guard used the manufacturer's horsepower curves to verify whether Essex's product would meet the specification requirements: a matter of responsiveness, not responsibility. Essex's failure to submit the required horsepower curves, which were a form of descriptive literature, rendered its bid nonresponsive. In this connection, we note that in the past the Coast Guard has considered the failure of manufacturer's horsepower curves to support the horsepower claimed for the engine as rendering bids nonresponsive. Cummins' earlier protest mentioned in 54 Comp. Gen. 1068 (1975), 75-1 CPD 372, was precipitated in part by such a determination. (Other circumstances which rendered moot Cummins' protest resulted in our not ruling on the propriety of that determination.)

Conformance to the Specifications of Generators Bid by Essex

Cummins' final argument is that the Marathon 680–FDF generator listed in Essex's "Descriptive Schedule" will not meet the requirement of specification paragraph 3.4.1 that: "The temperature rise at rated load shall not exceed 40 degrees Centigrade." Cummins contends that National Electrical Manufacturers Association "MG–1–Standards for Motors and Generators" which was expressly made part of the specifications, requires temperature rise to be measured by the "resistance" method and that the temperature rise of the Marathon 680 generator exceeds the permissible limits when measured by that method.

The report furnished our Office by the Coast Guard does not directly respond to Cummins' argument, stating only that Military Standard MIL–HDBK–705B allows the use of either the "resistance" or the "contact" method for measuring generator heat rise. The protester concedes that when the "contact" method is used the generator meets specifications.

The agency also notes that in compliance with the IFB, Essex furnished with its bid a letter from Marathon certifying that its Model 680–FDF generator would meet the specifications. In view of this certification and the use of the "contact" method permitted by MIL–HDBK–705B, the agency has found the Marathon generator acceptable.

Cummins has furnished our Office with copies of pre-bid correspondence from Marathon to Cummins in which the former stated that its generators would meet the Coast Guard specifications "as indicated on our quote." The Marathon quotation, however, took four specific exceptions to the specifications. Cummins states that it did not use Marathon's product for this reason and suggests that Essex will furnish a nonconforming generator.

In contrast to its failure to complete certain entries in the "Descriptive Schedule" or to submit manufacturer's horsepower curves Essex fully complied with what was in effect the IFB's descriptive literature requirements with regard to the generator. It completed all blanks in the "Descriptive Schedule" concerning the generator with apparently acceptable data and submitted a certification from the generator manufacturer stating that the generator would meet the specifications. Nothing more was required of Essex by the IFB and we believe that Essex is committed to furnishing a generator which complies with the specifications in every respect.

CONCLUSIONS AND RECOMMENDATION

The Coast Guard failed to include in the instant IFB the "Requirement for Descriptive Literature" clause prescribed by Federal Pro-

curement Regulations (FPR) § 1–2.202–5 (1964 ed. amend. 13). However, we think the IFB did in fact require the submission of descriptive literature in the forms of entries upon the "Descriptive Schedules" and manufacturer's horsepower curves. The "Descriptive Schedules," which were made a part of the specifications, which were "to be furnished as part of Bid," and "*ALL*" whose blanks were to be filled in (bidders were advised) in order to avoid a nonresponsive bid, requested over 200 items of information descriptive of the equipment being purchased. Essex's failure to complete the "Descriptive Schedules," and moreover, the express reservation in its bid of the right to substitute unidentified "equal components, rendered its bid nonresponsive. *See* B–183155, *supra.* We believe the same conclusion is applicable to Essex's failure to submit with its bid manufacturer's horsepower curves substantiating the horsepower claimed for the engines in the "Descriptive Schedules" attached to Essex's bid.

Normally, we would recommend that a contract awarded to a nonresponsive bidder be terminated for the convenience of the Government. See, e.g., *Hartwick Construction Corporation*, B–182841, February 27, 1975, 75–1 CPD 118. However, we are advised that these power systems are to be Government furnished equipment for other contracts for the construction of Loran-C chains which are part of the National Plan for navigation, and that it was necessary to proceed with award of this contract in October, 1975, in order that the completion of the navigation system would not be unduly delayed. It also appears to us that the Coast Guard's acceptance of Essex's bid was undertaken in good faith (albeit erroneous) reliance upon prior decisions of this Office. Finally, we believe some weight should be given to the fact that Cummins' protest was not made as timely as it should have been.

After consideration of these factors, especially the urgency of the procurement and the apparent lack of bad faith, we have concluded that it would not be in the best interests of the Government to disturb Essex's contract. However, we are advising the Secretary of Transportation of the deficiencies which existed in this procurement in order to prevent their reoccurrence.

[B–180010]

Arbitration—Award—Implemented by Agency—Effective Date

Arbitrator's award setting effective date for increase in wage rates at Yakima Project Office, Bureau of Reclamation, may be fully implemented where governing collective-bargaining agreement calls for arbitration of unresolved negotiation issues involving wage rates, and record is clear that impasse existed on date collective-bargaining agreement became effective, and that, on same date, it was clear that there would be substantial increase in wage rates. Agencies and unions

may negotiate preliminary agreement setting effective date for wage increases before exact amount of increase is known; therefore, arbitrator may resolve same issue.

In the matter of Bureau of Reclamation Yakima Project—implementation of arbitrator's award, April 14, 1976:

This matter involves a request for an advance decision submitted by Ms. Jo Manzanares, an authorized certifying officer of the Engineering and Research Center, Bureau of Reclamation, Department of the Interior, concerning the authority for implementing an arbitrator's award which set the new wage rate and the effective date for that rate for nonsupervisory hourly employees of the agency's Yakima Project Office. The issues were submitted to arbitration, in accordance with the existing collective-bargaining agreement, following an impasse in negotiations between the agency and the union representing the employees.

The nonsupervisory hourly employees involved are represented by the International Brotherhood of Electrical Workers, Local Union No. 77, under a collective-bargaining agreement first signed in 1967 under the terms of Executive Order 10988, January 17, 1962, 27 F.R. 551. That Basic Agreement remained in effect until 1973 when the agency and the union began negotiations to revise the agreement to conform to the requirements of Executive Order 11491, October 29, 1969, 34 F.R. 17605, as amended. Work on the revision was completed at the local level in February 1974 and the revised Basic Agreement was forwarded to the Department of the Interior for review and approval. Wage rates in 1974 were resolved without regard to the proposed revision. Subsequently the revised Basic Agreement was approved on March 17, 1975.

In addition to the Basic Agreement, Supplementary Agreements setting wage rates were negotiated on approximately an annual basis, but no uniform date served as the effective date for each change in wage rates. The effective dates for changes in the wage rates, as set out in the arbitrator's decision were: April 15, 1971; May 25, 1972; March 20, 1973 (approved by Regional Director on March 30, 1973); and May 30, 1974. Although these wage rate changes were negotiated, they were supposed to be substantially equal to the prevailing wages for comparable positions in the private sector in the area.

Negotiations for the 1975 wage rate adjustments began on January 29, 1975. By March 11, 1975, four negotiating sessions had been held, and, on that date, the parties reached an impasse with the agency offering $8 per hour and the union seeking $8.48 per hour for what was known as the "100 percent wage rate." The comparable rate then in effect was $7.36 per hour. Therefore, when the parties reached an

impasse on March 11, 1975, there was no real doubt that there would be a substantial increase in the wage rate; the only question was the exact amount of that increase.

The new Basic Agreement which was approved on March 17, 1975, contained the following provision, paragraph 5.2, relating to settlement of wage rate issues:

> Unresolved negotiation impasses involving wage rates will be referred to an arbitrator to be selected as provided under article 6.6. The decision of the arbitrator shall be binding on the parties subject to federal pay regulations and applicable decisions of the Comptroller General * * *.

In accordance with that provision the union, on April 7, 1975, requested that the wage rate issue be taken to arbitration. The arbitrator was selected, a hearing was held July 16, 1975, and a decision was issued September 30, 1975. In that decision the arbitrator held that the new "100 percent wage rate" should be $8.43 per hour, and that the effective date of the increase should be March 17, 1975, the effective date for the new Basic Agreement which contained the arbitration provision. There is nothing in the record to indicate that either party petitioned the Federal Labor Relations Council for a review of the arbitrator's award.

During the arbitration, the agency did not argue that the arbitrator was not authorized to set the effective date for the change in the wage rates, instead they argued that the arbitrator could not make an award of retroactive pay, and, therefore, that the new rates could go into effect only after the rendition of the award. In answer to this argument, the arbitrator, in his decision, stated that:

> * * * The parties had reached impasse on the wage rate issue on March 11, 1975, and the existence of this impasse was known to the Employer's representatives when the Employer's approval was given to the agreement on March 17, 1975. Thus they both knew that the wage rates to be put in effect for their new agreement had not been fixed by them. Indeed, as indicated by the statements of the Employer's negotiators at the March 10, 1975, meeting, the Employer suggested that if the agreement were approved the decision as to what was the appropriate wage rate would be made by an arbitrator. It therefore is appropriate to conclude that when the agreement was approved by the Employer's representatives, the parties had agreed that employees were to be paid for work performed thereafter at the rate of pay which would subsequently be fixed by an arbitrator's award. This construction of the agreement does leave it to subsequent events to fix the level of pay, but it does not make that payment retroactive any more than would, for example, an agreement that wage rates be adjusted for subsequent changes in the cost of living as reflected in the consumers' price index. Or, as another example, it may be impossible to predict in advance what supplement to pay an employee will receive under a profit sharing plan, but the subsequent payment of such amounts to an employee does not amount to a retroactive adjustment of pay if the formula for the later determination had previously been agreed upon. This construction of the agreement has the desirable effect of according employees in the public sector the treatment a similar controversy would receive in the private sector.

In B-183083, November 28, 1975, we were presented with the question of whether or not an agency and a union could negotiate, in a

preliminary agreement, an effective date for a wage increase, even though the exact amount of the increase was not known at that time. We held that such an agreement was permissible as long as the date set was no earlier than the date of the preliminary agreement setting that date. If the parties can set an effective date through negotiations, they can agree that the date may be set by the arbitrator in accordance with the collective-bargaining agreement. The rationale used by the arbitrator is essentially the same as that found in our decision, B–183083, *supra.* In this case it was clear on March 11, 1975, when an impasse was reached, that there would be an increase in the wage rates, the only question was the exact amount. On March 17, 1975, when the Basic Agreement was approved by the Department of the Interior, and went into effect, the method of resolving wage rate impasses became arbitration. The agreement to arbitrate wage rate issues is the functional equivalent to the preliminary agreement setting the effective date in B–183083, *supra.*

Accordingly, we have no objection to full implementation of the arbitrator's decision of September 30, 1975. With regard to negotiations leading to wage adjustments in the future, if there is no preliminary agreement setting an effective date, and the matter is submitted to arbitration, the effective date may be no earlier than the date impasse is reached, if that date can be precisely determined, or the date arbitration is requested. In either case, it must be clear on that date that there will be an increase in the wage rates, with only the exact amount still undecided.

[B–181317]

Compensation—Overtime—Traveltime—Commuting Time

Employee was allowed to commute in Government vehicle from Fort Sam Houston to Camp Bullis, his duty station. Employee's workday started at 7:30 a.m., at which time he picked up the vehicle at Fort Sam Houston. He returned from Camp Bullis after 4 p.m., the end of his regular workday. His claim for overtime compensation for the return travel is denied since such traveltime was a part of his normal travel from work to home and commuting time is noncompensable under 5 U.S.C. 5544(a).

Compensation—Overtime—Fair Labor Standards Amendments of 1974, Pub. L. 93–259—Traveltime—Commuting Time

Government vehicle in which employee commuted carried essential equipment and supplies for his employer. Commuting time is generally not compensable under the Fair Labor Standards Act (FLSA); however, where the commuting employee also transports equipment and supplies for the employer, the traveltime is compensable overtime even though commuting in the Government vehicle is of a benefit to the employee, since the activity is employment under the FLSA as it is done in part for the benefit of the employer.

In the matter of Porter C. Murphy—overtime compensation for traveltime, April 20, 1976:

This action is in response to Mr. Porter C. Murphy's appeal of our Claims Division's denial of his claim for overtime compensation believed due incident to his employment with the Department of the Army.

Mr. Murphy is employed at Camp Bullis, Texas, as a wage board employee. From May 18, 1964, through May 31, 1974, the period during which Mr. Murphy claims overtime compensation, Mr. Murphy's tour of duty was from 7:30 a.m. to 4 p.m. daily, Monday through Friday. During this period of time Mr. Murphy was allowed to report for duty at Fort Sam Houston at 7:30 a.m. whereupon he would drive a Government vehicle to Camp Bullis, his official duty station. Mr. Murphy worked at Camp Bullis until 4 p.m., at which time he departed in a Government vehicle for Fort Sam Houston where he dropped off the vehicle and then continued home by private means. It is apparently this return trip to Fort Sam Houston, which occurred outside of regular duty hours, for which Mr. Murphy claims overtime compensation.

In its report to us on the matter, the Department of the Army states that the use of a Government vehicle between Fort Sam Houston and Camp Bullis was not a requirement of Mr. Murphy's position. Rather, this arrangement was one of mutual convenience. Mr. Murphy's use of a Government vehicle was advantageous to him in that he did not have to pay for the long commute from Fort Sam Houston to Camp Bullis, Fort Sam Houston being much closer to his home than Camp Bullis. In addition, Mr. Murphy did not have to leave for work as early as he would have had to had he reported directly to Camp Bullis since he was traveling from Fort Sam Houston to Camp Bullis during his regular duty time.

On the other hand the vehicle used by Mr. Murphy to travel between Camp Bullis and Fort Sam Houston carried various equipment and supplies. This cargo was loaded prior to departure from Camp Bullis at 4 p.m. and was not unloaded at Fort Sam Houston until the following morning at 7:30 a.m., the start of Mr. Murphy's regular duty hours. The Department of the Army states that had Mr. Murphy not driven the vehicle during the times described above, the vehicle would have to have been driven at some other time during the day in order to transport the equipment and supplies. The practice of allowing Mr. Murphy to drive to and from Camp Bullis was discontinued after May 31, 1974, because of the then current fuel shortage.

The Department of the Army's report stated further that Mr. Murphy was not ordered to perform any overtime by an official authorized to order or approve overtime. On this basis our Claims Divi-

sion denied Mr. Murphy's claim. The Claims Division also noted that such portion of Mr. Murphy's claim which occurred prior to November 4, 1964, is barred by the Act of October 9, 1940, 54 Stat. 1061, 31 U.S. Code 71a; 31 U.S.C. 237, since his claim was first received by the General Accounting Office on November 4, 1974.

It is not necessary to reach a determination as to whether Mr. Murphys' traveltime was ordered or approved. The compensation of wage board employees for overtime is provided for at 5 U.S.C. § 5544 (a) (1970), in pertinent part, as follows:

* * * Time spent in a travel status away from the official duty station of an employee subject to this subsection is not hours of work unless * * *.

A similar provision concerning General Schedule employees, 5 U.S.C. § 5542(b)(2) (1970), has been construed by this Office to mean that normal commuting time between an employee's residence and his duty station is not "time spent in a travel status away from the official duty station" and is thus not compensable traveltime. 41 Comp. Gen. 82 (1961); B–169178, May 12, 1970.

The above-construed portion of section 5544(a) was in effect for the last 7 years of Mr. Murphy's claim. Prior to that time no such provision was applicable to wage board employees although such a provision, 5 U.S.C. § 912b (1964), now 5 U.S.C. § 5542(b)(2) (1970), was applicable to General Schedule employees. In decision B–151950, December 17, 1964, we stated that although wage board employees were not covered by 5 U.S.C. § 912b the same criteria in decisions of our Office were to be applied to wage board employees for such travel outside their hours of duty on a regularly scheduled workday. Therefore, we held that wage board employees were not entitled to overtime compensation for traveltime similar to that performed here by Mr. Murphy.

Even though Mr. Murphy did drive a Government vehicle after work hours from Camp Bullis to Fort Sam Houston, and this travel did benefit the Government, Mr. Murphy was in essence performing the major part of his work-to-home commute at Government expense. He performed no work on arriving at Fort Sam Houston but rather continued home by private means. Accordingly, in light of the above-cited decisions we find that since Mr. Murphy was actually commuting to and from work he is not entitled to overtime compensation for the travel in question.

We note that the application of the Fair Labor Stanadards Act (FLSA) to Federal employees became effective on May 1, 1974, (29 U.S.C. § 202, see note (1974 Supp.)), and the last month of Mr. Murhpy's claim, May 1 to May 31, 1974, would therefore be covered by the overtime provisions of the said Act if Mr. Murphy is nonexempt from the FLSA. There is no statement in the record concerning Mr. Murphy's exemption status under the FLSA. The Department of

the Army, therefore, should determine Mr. Murphy's status and if he is nonexempt, the following statement of entitlement under the FLSA is for application.

In the ordinary situation normal home-to-work and return travel is not compensable under the Fair Labor Standards Act, 29 C.F.R. § 785.35. However, it has been held that when an employee drives an employer's vehicle to or from a job site and he carries in the vehicle essential tools and equipment, such traveltime is work performed for the benefit of the employer and is compensable under the FLSA. 29 C.F.R. § 785.38. In *Secretary of Labor* v. *Field*, 495 F. 2d 749 (1974) the court held at p. 751:

[1,2] Field argues, and there is evidence bearing him out, that use of the truck was of importance to Audet as a means of getting to the jobs. Audet testified, not unreasonably, that had he been forced to supply his own transportation to the various out of town sites, he would have quit. However, consistent with the above-quoted finding that the truck's essential purpose was to convey tools and equipment, the court also found that the trucks "were primarily utilized as an integral and indispensable function of the defendant business." We cannot say that these findings are clearly erroneous, F.R. Civ. P. 52(a), nor are they inconsistent with a benefit also having been bestowed upon Audet. It is irrelevant that Audet and the other employees might have reached the jobsite by personal transportation or that the employer might have stocked the jobsite without the use of the trucks. The activity is employment under the Act if it is done at least in part for the benefit of the employer, even though it may also be beneficial to the employee. "[T]he crucial question is not whether the work was voluntary but rather whether the [employee] was in fact performing services for the benefit of the employer with the knowledge and approval of the employer. "Republican Publishing Co. v. American Newspaper Guild, 172 F. 2d 943, 945 (1st Cir. 1949). Cf. United States. v. Rosenwasser, 323 U.S. 360, 362, 65 S. Ct. 295, 89 L. Ed. 301 (1945)."

See also *DA & S Oil Well Servicing Inc.* v. *Mitchell*, 262 F. 2d 552 (1958). Accordingly, since it is admitted that Mr. Murphy drove a vehicle which carried various equipment and supplies between Camp Bullis and Fort Sam Houston for the benefit of his employer, he is entitled under the FLSA to overtime compensation for the period May 1, 1974, to May 31, 1974, for such work if he is determined to be nonexempt. Since Mr. Murphy was on duty and has been paid for the Fort Sam Houston to Camp Bullis portion of the travel, he would only be entitled to overtime compensation for the return portion of travel which took one-half hour and which was performed outside of regular duty hours.

Action should be taken by the Department of the Army consistent with the above.

[B–115369]

Equipment—Automatic Data Processing Systems—Leaseback—Third Party—Trial Basis

Various General Services Administration (GSA) proposals for third party leaseback of installed and uninstalled ADPE are tentatively approved by General

Accounting Office (GAO) provided that equipment manufacturer's consent to leaseback arrangement be obtained where necessary. However, recommendation is made that leaseback proposals be instituted on a trial basis because of problems which may arise.

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

Direct assignment by Government of purchase option under ADPE lease to third party lessee for purpose of accomplishing leaseback of equipment to Government under more favorable terms constitutes procurement transaction rather than a disposal of property and therefore laws governing disposal of Government property are not for application.

Equipment—Automatic Data Processing Systems—Selection and Purchase—Procurement With ADP Fund—General Services Administration Control

While GSA proposed leaseback arrangements tentatively are approved, GAO recommends that GSA should continue to seek adequate ADP Fund capitalization to finance ADPE purchases. Furthermore, each proposed leaseback should be approved by GSA (no blanket delegation to agencies) and lease or purchase determinations should be made and documented before leasebacks are used.

In the matter of third party leaseback of ADPE, April 23, 1976:

By letter of August 7, 1975, the Acting Administrator of the General Services Administration (GSA) submitted for our approval a number of plans involving the lease of Automatic Data Processing Equipment (ADPE).

As background, GSA notes that it has consistently sought to improve the ADPE procurement process to take advantage of changes in the market place. As examples of this process, it points out that our decision 45 Comp. Gen. 527 (1966), relating to third party leaseback arrangements, and our decision 48 Comp. Gen. 497 (1969), regarding long-term lease plans, resulted from GSA requests to this Office.

With regard to the instant requests, it is reported that various members of the financial market have approached GSA and other Federal agencies with various multi-year and/or leaseback proposals that could result in substantial savings to the Government in the leasing of ADPE. GSA believes that it may accept these various proposals, since each of them constitutes a proper method of procurement under section 201 of the Federal Property and Administrative Services Act of 1949, 40 U.S. Code 481 (which gives GSA authority to prescribe policies and methods of procurement for supplies and services), as amended by Public Law 89-306 of October 30, 1965, 40 U.S.C. 759 (The Brooks Act), and under related Office of Management and Budget (OMB) Directives. In particular, subsection 111(b) (1) of the

Brooks Act specifically authorizes GSA to provide ADPE for use by Federal agencies "through purchase, lease, transfer of equipment from other Federal agencies, *or otherwise* * * *." [Italic supplied.] GSA believes that now "with the added broader authority and responsibilities placed in GSA under the Brooks Act (specifically subsection 111 (b)(1) thereof), we have more flexibility and greater discretion in determining economic and efficient methods of providing ADPE to Federal agencies than we previously had solely under section 201 of the Property Act."

GSA further reports that financial institutions are interested in placing long-term leases (with or without renewable features) upon installed or uninstalled ADPE. These institutions feel that this special function of theirs has come into being because of two basic reasons: (1) financial institutions are suited to managing long-term rates as well as other long-term fiscal aspects; and (2) financial institutions are willing to assume certain types of risks, particularly long-term risks, which vendors or other suppliers of ADPE are unable or unwilling to assume. Hence such practices are now widely utilized in the commercial market place.

The leasing arrangements are described under the following plans:

Plan A

(a) Pertains solely to the placement of an institutional lease on installed equipment covered by an existing OEM lease;
(b) Involves a special policy of the OEM (primarily, if not solely that of IBM) precluding the assignment by the Government of an option to purchase but allowing the exercise of the option by an agent;
(c) Covers the use of several simultaneous documentary procedures for the placement of a new institutional lease with a financial institution (leasing firm) on more favorable terms;
(d) Excludes the use of any Government funds for the initial purchase; and
(e) Covers a lease involving either a long-term arrangement (requiring obligation of entire amount) or a one-year renewable lease.

Plan A is described by GSA as that covered in our prior decision of 45 Comp. Gen. 527, *supra*, where we considered the propriety of entering into a leaseback arrangement (also called "institutional lease" by GSA) on already installed ADPE. GSA had reported to us that several Federal agencies were leasing certain ADPE equipment from IBM (the original equipment manufacturer or OEM) under leases which contained a nonassignable purchase option clause. However, GSA proposed an arrangement whereby a third party leasing firm acting as the Government's agent, but using its own funds, would exercise the purchase option in the Government's name. At the same time the Government would transfer its title interest in the equipment to the third party leasing firm. In return, the leasing firm would lease back the equipment to the Government at more favorable rental rates and with an option to purchase.

We approved the proposed leaseback arrangement, provided that the OEM had no objection to the procedure. In approving the arrangement, we viewed the proposed leaseback as a single procurement transaction not accomplished for the purpose of vesting title to the equipment in the Government and therefore not subject to the laws concerning the disposal of Government property.

We note that under Plan A the OEM precludes assignment by the Government of its purchase option but allows exercise of the option by the Government's agent. As indicated in our prior decision, our approval of an institutional lease under the circumstances described in Plan A is conditioned upon the Goverment obtaining the OEM's consent to the placing of the lease, so as not to circumvent the lease provision against assignment of the purchase option.

Plan B

(a) Pertains solely to the placement of an institutional lease upon installed equipment where the vendor-lessor has no policy precluding the assignment of the option to purchase contained in the lease;

(b) Covers the use of several simultaneous documentary actions, including:

(1) assignment to the financial institution of the option to purchase with the purchase price being paid to the original vendor directly by the financial institution;

(2) placement by the Government of an institutional lease on more favorable terms, including option to purchase; and

(3) the lease being either a long-term lease (requiring obligation of entire amount if legislation has not been enacted) or a one year renewable lease.

Thus, Plan B, unlike Plan A, calls for direct assignment of the purchase option. GSA recognizes, however, that while direct assignment does not involve even a momentary transfer of title to and from the Government, assignment of the option does involve a transfer to and from the financial institution of certain rights. These include any accrued credits toward the purchase price which the Government may have previously acquired as lessee of the installed equipment under the original lease. Since property disposal requirements were not deemed applicable under the situation covered in our 1966 decision (such as described in Plan A), GSA believes these requirements would not be applicable under Plan B as well.

We agree. Under both plans the Government essentially would be obtaining (procuring) more favorable lease terms (including purchase options) for its installed equipment rather than disposing of its property rights. We recommend, however, that where a long-term lease is contemplated, requiring obligation of the entire amount of the lease payment, consideration should be given to the desirability or feasibility of out-right purchase of the equipment by the Government.

The remaining plans described below apply to uninstalled equipment, since it is reported that financial institutions have offered to issue institutional leases upon uninstalled equipment. For such equipment,

GSA contemplates a two-step procedure using the following types of plans:

Plan C

Under this plan the method of procurement would involve two steps using successive solicitations, or using a single solicitation containing two parts, and would be accomplished as follows:

I. Under step one (part one):

(a) GSA would proceed in a regular manner to issue an RFP for the acquisition of ADPE;

(b) GSA would request proposals to meet Government-wide requirements from all possible suppliers (not only from OEM vendors or from third party market vendors but also from "plug-to-plug" suppliers as well as other sources);

(c) Interested suppliers of uninstalled equipment would be requested to submit offers for purchase, lease, lease with option to purchase, or any other special lease plan;

(d) Offerors would be notified that in the event an offer involving a purchase privilege is evaluated as reflecting the lowest overall cost alternative (including the costs of obtaining financial resources to finance the purchase), then the Government reserves the right to designate a financial institution to accept and pay for any or all of the ADPE listed on the proposal on behalf of the Government. Such notice would be issued to enable the accomplishment of a lease-back to the Government, subject to its implementation under step two; and

(e) Accordingly, when finally purchase is determined to be the method of award, and purchase money is not available in the Government, GSA would activate step two if original RFP is under a single solicitation. However, if the procedure involved successive solicitations, GSA would solicit financial institutions for financial proposals offering the most favorable terms based on purchase offers received in step one.

II. Under step two (part two):

(a) Financial institutions (leasing firms) would be requested to submit offers setting forth the terms of an institutional lease to become applicable to a respective type (or types) of equipment which had been tendered for purchase under step one;

(b) Evaluation and selection of the best financial institutional proposal would be based on the purchase price established under step one plus the financial institution charges. Accordingly, if such overall amount is still lower than the amounts of a straight lease or a lease with option to purchase, or any other special lease plan, then implementation of the successful tender submitted under step one would be undertaken by the Government with the financial institution (leasing firm) submitting the most advantageous proposal;

(c) The financial institution would enter into a separate agreement with the supplier, which would contain all agreed upon terms and conditions between the supplier and the Government as previously established in step one;

(d) The financial institution would pay directly to the supplier the purchase price of the selected equipment;

(e) The financial institution would assign to the Government all of its rights with the ADPE supplier, which could include the supplier being obligated to the Government for transportation costs and any costs for support services such as training, etc.;

(f) The Government's contract with the financial institution, although it could be for one year (renewable), almost always would establish a multiyear leasing arrangement with GSA;

(g) The ADP Fund would be used to finance the arrangement between the Government and the financial institution;

(h) Title to the equipment would pass from the ADP supplier directly to the financial institution only; and

(i) ADPE acquired under this plan, if financed through the ADP Fund, would then be assigned to the user agency under an interagency reimbursable lease agreement, and would require (prior to enactment of pending legislation) obligation of the entire amount.

As described above, Plan C involves a two-step procedure whereby proposals would be solicited for acquisition of ADPE (including purchase) under step one. Evaluation and selection of the best financial institutional proposal under step two would be based on the purchase price established under step one, plus the financial institution charges. The financial institution would directly purchase the ADPE from the supplier in accordance with the terms and conditions of step one and would assign to the Government all of its rights under the ADPE supplier, which could include costs for support services. The ADP arrangement between the Government and the financial institution, and the ADPE acquired under this plan, would then be assigned to the user agency under an interagency reimbursable lease agreement.

We assume that the user agency would not be obligating fiscal year funds to reimburse the ADP Fund under this type of multiyear agreement. See 48 Comp. Gen. 497, *supra*. Otherwise, we have no legal objection to the method of procurement described in Plan C at this time. However, it should be recognized that the proposed procedure is novel, and that unforseen problems could arise once the plan is implemented. Therefore, we recommend that if the proposed method of procurement described above is to be undertaken, it should be instituted initially on a trial basis.

Plan D

Same as Plan C except the financial institution would not be responsible for the maintenance and service of the equipment. The Government would have to enter into a separate agreement to obtain such services from the supplier or some other source. The financial institution would merely be a "financial intermediary". (See your decision "Atlanthus Peripherals, Incorporated"—B–178674 of August 1, 1974, describing such a financial intermediary.)

This plan is the same as Plan C except that the financial institution would not be responsible for the maintenance and service of the equipment. The Government would have to obtain such services from the supplier or some other source. The financial institution would be merely a "financial intermediary."

In this connection, GSA calls attention to our decision *Atlanthus Peripherals, Incorporated*, published at 54 Comp. Gen. 80 (1974). There, we recognized that in the ADPE industry there have been springing up a number of institutions (leasing firms) which have undertaken to provide their financial resources for leasing purposes, or otherwise under a variety of marketing methods. We concluded that such firms may be regarded as "financial institutions" under the Assignment of Claims Act (31 U.S.C. 203, as amended).

In that case, the original supplier rather than the financial institution proposed to be responsible for maintenance and service of the ADPE. However, GSA states that as an incident to placement of the institutional lease, maintenance and other specialized service func-

tions pursuant to the arrangements between the parties could be performed by the leasing firm, could remain in the OEM, or could be established with a newly designated service furnishing concern.

As in the case of Plan C, we assume that fiscal year funds will not be obligated by the user agency under this plan for multiyear contracting, and we recommend that the plan initially be instituted on a trial basis. This recommendation is applicable as well to Plans E and F set forth below.

Plan E

A variation of Plans A and C in that the Government would set forth a further alternative.

(a) Under step one, the Government would indicate that where a supplier has a policy of not permitting the financial institution to accept the purchase offer, but where the supplier would accept the payment from the financial institution after the Government had placed the order, then the Government's purchase privilege would be exercised immediately by the Government, but not using or citing any Government funds for effecting the purchase;

(b) Payment for the ADPE would be provided by the financial institution furnishing a certified check to the Government made out to the supplier;

(c) The certified check would be given to the supplier simultaneously with the signing of the purchase order by the Government;

(d) All Government rights would be assigned to the finacial institution;

(e) Title would pass through the Government to the financial institution; and

(f) As in Plan C, the Government's lease with the financial institution could involve either a one year or a firm long-term lease requiring obligation of the entire amount.

Plan F

(a) This plan would be utilized where the Government has previously determined that one kind (or several specific kind brand names) of equipment would satisfy the Government's needs, but where such equipment is not currently available on the open market except from the OEM;

(b) Because delivery is a significant aspect, the Government would have obtained advance agreements from the OEM's stating that they would permit the Government to assign to any designated offeror (the lowest overall offeror), the right to purchase a specific piece (or pieces) of equipment from the OEM at the earliest delivery date available to the OEM for the specific requirement, (provided the designated offeror is not otherwise entitled to a better delivery schedule). This would eliminate any unfair delivery advantage that the OEM might have because of its advance planning under its marketing practices;

(c) Under a one step proceeding (where both vendors and financial institutions would be solicited), offerors would be requested to submit proposals for the required equipment for purchase or for long-term or short-term leases (with or without the option to purchase). The solicitation would contain a notice as to the Government's right to a specific advantageous delivery designation for the required equipment;

(d) Award would be made to the lowest overall offeror (the award covering the OEM's delivery designation if required); and

(e) Under this plan, no accrued Government rights would be involved in the delivery designation, nor would any Government title or funds be involved.

We find no reason to disagree with GSA that each of the methods of procurement described above, whether undertaken in respect to installed or uninstalled ADPE or undertaken by means of a one-step or a two-step proceeding, constitutes a permissible method of procure-

ment under applicable authorities. Nevertheless, we believe that unqualified endorsement of these unique proposals would be premature. At this point, therefore, we can only offer our tentative approval of these proposals. As indicated above, we recommend that each of these plans be instituted on a trial basis for a period of time. At the end of the trial period a determination could be made whether each of the plans is feasible and advantageous to the Government. In this regard, we would appreciate being advised by GSA of any determinations and proposed actions in the matter.

Finally, as indicated in our Report to the Congress, B–115369, October 1, 1975, LCD 74–115, we believe that GSA should continue to seek adequate ADP Fund capitalization so that financing through the Fund should be the prime consideration. Therefore, we recommend that (1) each proposed leaseback arrangement be approved by GSA (no blanket delegations to agencies to enter into such arrangements), and (2) lease or purchase determinations based on the present value of money be made and documented before any decision is made to use the proposed financing mechanism as suggested in our 1966 decision.

[B–184927]

Contracts—Protests—Merits—Court Interest

When court expresses interest in GAO decision, merits of protest will be considered even though protest might have been untimely filed.

Contracts—Negotiation—Sole Source Basis—Propriety

Agency's decision to procure design and development of improved system from sole-source supplier without breaking out one component of system for competitive procurement is not subject to objection where record shows agency had reasonable basis for decision.

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

Agency's refusal to break out key component of improved sonar system for separate procurement is justified in view of agency's judgment that such breakout would involve unacceptable technical (due in part to increased concurrency of development and production efforts) and delivery risks as well as increased costs.

Contracts—Research and Development—Production and Development Combination Propriety

Protester's fear that militarized disk being developed under contract for development of improved sonar system will become standard disk for use throughout agency without meaningful competition is without merit since agency indicates that it will finance development of "second source" contractor and conduct competitive procurement for standard disk.

Contractors—Conflicts of Interest—Organizational—Development or Prototype Items

No organizational conflict of interest is shown where contractor who performed both contract definition including development of specifications, and actual system development is awarded contract for initial production that only it can provide.

Contractors—Development—Selection

Fact that contractor engaged in development tasks prior to award of development and that agency intends to pay for costs incurred in those efforts does not indicate illegal action. Payment under such circumstances appears to be authorized by regulatory provision.

In the matter of Control Data Corporation, April 23, 1976:

Introduction

This case involves the property of the Navy's award of sole-source contracts to International Business Machines Corporation (IBM) for an improved AN/BOQ–5 sonar system without breaking out for competitive development and procurement a key component of the improved system. The improved sonar system is to be installed in three classes of nuclear submarines, including several submarines which are currently under construction.

The AN/BOQ–5 sonar system was developed and produced by IBM under a contract awarded by the Navy in 1970 pursuant to competitive negotiation procedures. In 1974 the Department of Defense approved a proposed Increased Computer Capacity and Towed Array Broadband Processing (ICC/TABP) improvement to the sonar system. After conducting a system definition effort, the Navy, through the Naval Sea Systems Command (NAVSEA), awarded a sole-source contract (No. N00024–75–C–6223) to IBM on June 30, 1975, for the contract definition of the ICC/TABP improvement. This contract was synopsized in the July 11, 1975 issue of the Commerce Business Daily (CBD).

On September 15, 1975, Control Data Corporation (CDC) protested the award. The protest, as supplemented and refined, essentially is directed against (1) the award of that contract and against any subsequent award to IBM for development or production of the complete ICC/TABP improvement. Notwithstanding this protest, NAVSEA on March 31, 1976, awarded a sole-source contract to IBM for the development of the sonar system improvement.

CDC's position is based on NAVSEA's failure to break out and procure competitively a key component of the ICC/TABP improvement, a militarized computer disk system known as an Advanced Disk

File (ADF). CDC claims that it has the capacity to timely furnish the required ADP and that NAVSEA's refusal to permit competition for this militarized disk system is contrary to procurement statutes and regulations requiring competition in the award of Government contracts and permitting the breakout of components from end items. CDC also asserts that the inclusion of the ADF in the ICC/TABP improvement development contract awarded to IBM is inconsistent with the efforts of the Navy Electronic Systems Command (NAVELEX) to competitively develop the Navy Standard Disk and would give IBM an insurmountable advantage in the Standard Disk competition. In addition, CDC suggests that since IBM prepared the specifications for the ICC/TABP improvement, any award of a development and/or production contract to IBM would violate the rules for the Avoidance of Organizational Conflicts of Interest found in Appendix G of the Armed Services Procurement Regulation (ASPR).

Subsequent to filing its protest here, CDC, on March 1, 1976, brought an action in the United States District Court for the District of Columbia for declaratory relief and a preliminary injunction pending resolution of the protest. On March 22, 1976, CDC's motion for preliminary injunction was denied. Ordinarily this Office will not decide any protest where the matter involved is the subject of litigation before a court of competent jurisdiction unless the court "requests, expects, or otherwise expresses interest in the Comptroller General's decision." Section 20.10 of our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975); *Nartron Corp. et al.*, 53 Comp. Gen. 730 (1974), 74–1 CPD 154. Although the court's order denying the preliminary injunction is silent on this point, we understand that the court is interested in and does expect a decision in this case. We will therefore consider this matter on the merits. *Descomp, Inc.*, 53 Comp. Gen. 522 (1974), 74–1 CPD 44.

Timeliness

At the outset, we are faced with the Navy's claim that CDC's protest against the contract definition award is untimely. Section 20.2(b)(2) of our Bid Protest Procedures requires protests to be filed not later than 10 days after the basis for protest is known or should have been known. The Navy asserts that CDC was placed on notice of the award by the synopsis published in the CBD on July 11, 1975, and was again informed of the award at a meeting with NAVSEA personnel on July 21, 1975. CDC's position is that it was not made aware of the inclusion of the ADF in the ITT/TABP improvement by the CBD synopsis, that it first learned of the sole-source selection of IBM at the July 21, 1975 meeting, and that, in accordance with section 20.2(a)

of our Bid Protest Procedures urging "resolution of * * * complaints initially with the contracting agency," it then sought to resolve the matter directly with the Navy.

We need not resolve this question. We have often indicated that when there is judicial interest in our decision, we would deem it appropriate to consider the matter on the merits notwithstanding the fact that the protest was not timely filed. See, *Dynalectron Corporation et al.*, 54 Comp. Gen. 1009 (1975), 75-1 CPD 341; 52 Comp. Gen. 161 (1972). Accordingly, since the District Court is interested in our decision in this case, we will consider the merits of the protest regardless of whether it was filed timely.

Propriety of Awards

The contract definition and development awards followed the Navy's determination that the ICC/TABP improvement required a new disk system and that only IBM could provide it. This is explained by NAVSEA as follows:

> The SSN 594, 637 and 688 class submarines include a Fire Control System (FCS) designated the MK 117 FCS which is used to program and launch weapons, i.e. torpedoes. The MK 117 FCS presently includes a militarized IBM computer disk file designated the RD-281. The initial ICC/TABP definition studies indicated that it would be necessary to modify and add a second RD-281 disk file specifically for the ICC/TABP. However, this approach to achieving the desired improvement was not feasible since it would have required substantial modifications and combinations of other equipment cabinets to meet the space constraints in the submarine. Following a survey of the commercial disk market (described below), a decision was reached to militarize the IBM 3340 commercial disk which was designated the Advanced Disk File (ADF). Accordingly, the disk designated for use in the ICC/TABP was changed from the initially planned modified RD-281 to AN/BQQ-5 [improved] Sonar systems in lieu of the RD-281 which served only the FCS. The ADF would occupy the space of a single RD-281.
>
> The system definition effort was completed in March 1975 and plans were initiated to proceed to the contract definition phase of the ICC/TABP. Generally it had been determined that the ICC/TABP could be effected by replacing the IBM built Classification Post Processor with a second Univac AN/UYK-7 Computer. In addition, other equipment in the AN/BQQ-5 would be modified to permit incorporation of the second Univac AN/UYK-7 computer, additional hardware modifications would be required to accomplish the broadband processing of towed array signals, and the ADF would be added to provide memory for the AN/UYK-7 computer performing the data storage and retrieval. * * *
>
> During the first quarter of 1975 a survey of the commercial disk market by NAVSEA and the Naval Electronic Systems Command (NAVELEX) did not reveal a disk that could met the Navy's schedule requirements without unreasonable technical risk and excessive cost. * * * Generally, the survey indicated that no contractor had a commercial disk equivalent to the IBM 3340 type of disk. Further, no contractor other than IBM had ever militarized a disk of comparable size and capacity as the RD-281, or the 3340. The ADF is a militarization of the IBM commercial 3340 disk. Militarization requires modification of the disk to meet submarine environmental constraints in such areas as shock, vibration, temperature, humidity, electromagnetic interference, salt spray and electric power variations. In 1974 IBM at private expense started militarization of its commercial 3340 disk. IBM has had three years of commercial experience in perfecting its commercial 3340 disk. For all these reasons and the fact that IBM is the developer and sole producer of the AN/BQQ-5 Sonar, IBM was uniquely qualified to develop the ICC/TABP improvement to the Sonar including the ADF. * * *

CDC, while not disputing that an improved AN/BQQ–5 sonar system would require an ADF, claims that the items are not "inseparable for design and procurement purposes" and that the ADF should be "competitively procured and furnished as GFP [Government Furnished Property] to the BQQ–5 program." CDC states that there are no technical difficulties associated with breaking out the ADF from the ICC/TABP improvement effort because the nature of the required interface is well described in an existing MIL STD and in the specification developed by IBM. CDC also challenges the adequacy of the Navy's 1975 market survey as a basis for concluding that only IBM could meet the Navy's needs, particularly in view of the fact that the Navy never contacted CDC about what it had in the way of computer disk systems. Had it been contacted, CDC asserts, it would have informed the Navy of CDC's planned imminent announcement of the availability of a disk system which could have been militarized.

On the other hand, NAVSEA states that breaking out the ADF "is not feasible in the contract definition phase or in the development phase * * * because of the interface between the computer/computer program of the ICC/TABP and the ADF." According to NAVSEA:

> Operation of the computer and the ADF is one integrated function. The computer program software must be developed to function with the ADF. The ADF design must be completed early in the ICC/TABP Program to minimize the impact on the program software. Accordingly, the configuration of the ADF must be defined at an early stage of the ICC/TABP design or a program impact resulting in delays and significantly increased costs will result.

Furthermore, says NAVSEA, its 1975 market survey cannot be regarded as inadequate because it was used only to determine if the required ADF technology existed and not to determine what companies might be able to develop that technology.

Initially, we point out that while CDC has couched many of its submissions in language which suggests that the protest is against allegedly improper sole-source awards, in essence the protest is actually directed against the Navy's refusal to break out one component of the system being developed for separate, competitive procurement. In other words, CDC's concern is not that it should have been given an opportunity to compete for the design and development of the entire ICC/TABP improvement, but that the Navy should have provided it with an opportunity to compete for the ADF component of the improved sonar system. Thus, what is at issue here is not the sole-source nature of the awards to IBM, but rather the Navy's decision to procure the entire ICC/TABP improvement from IBM instead of breaking out the ADF for a separate competitive procurement.

The issue of component breakout is directly related to the statutory requirement of 10 U.S. Code 2304(g) (1970) that proposals shall be solicited "from the maximum number of qualified sources consistent

with the nature and requirements of the supplies or services to be procured." See also ASPR § 3–101(b). Although this requirement for maximum competition has been recognized as the "cornerstone of the competitive system," 53 Comp. Gen. 209, 211 (1973); *Hoffman Electronics Corporation*, 54 *id.* 1107 (1975), 75–1 CPD 395, procuring activities may place sole-source or other restrictions on competition when the legitimate needs of agencies so require. See cases and examples cited in *Hoffman Electronics Corporation*, *supra*, at 1112–13. Sole-source awards are generally justified in situations where time is of the essence and award to other than the sole-source contractor would introduce the possibility of unacceptable technical risk, *North Electric Company*, B–182248, March 12, 1975, 75–1 CPD 150; *Hughes Aircraft Company*, 53 Comp. Gen. 670 (1974), 74–1 CPD 137, and where only a single source can meet compatability and interchangeability requirements. B–174968, December 7, 1972.

However, because sole-source awards are exceptions to the general rule requiring maximum competition, contracting officers are charged with the responsibility for assuring that a proposed noncompetitive award is necessary and for taking steps to "avoid the need for subsequent noncompetitive procurements. This action should include * * * possible breakout of components for competitive procurement." ASPR § 3–101(d). Guidelines for determining whether components should be broken out are provided in ASPR § 1–326. Essentially, these guidelines involve considerations of technical risk, delayed delivery, and net cost savings if breakout were to occur.

Decisions based on those guidelines, of course, are primarily matters within the sound discretion of the procuring activities, which are in the best position to assess the technical risk and potential cost savings involved in component breakout, and will be upheld so long as some reasonable basis for the decisions exist. They will be subject to question only where it appears that a failure to break out one or more components from an end-item procurement unnecessarily restricted competition in contravention of 10 U.S.C. 2304(g). For example, in B–169924, November 24, 1970, and B–170426, February 10, 1971, we objected to the Air Force's inclusion of one particular item in a procurement of modification kits when that would result in a noncompetitive procurement even though "there was competition available with respect to the great majority of the items being procured." We pointed out that "[c]ompetition could have been assured if the [item not competitively available] had been procured on a separate solicitation." On the other hand, where the Navy decided, primarily for reasons relating to integration and other technical risk problems, to procure strobe lights for the P–3 aircraft then being manufactured directly

from the airframe manufacturer through issuance of a contract change order instead of obtaining competitive proposals, we held that the decision "involves a matter of contract administration" and was not subject to objection since the change order was within the scope of the original contract. *Symbolic Displays Incorporated*, B–182847, May 6, 1975, 75–1 CPD 278.

Here we think the record clearly establishes that the Navy had a reasonable basis for including the ADF in the overall ICC/TABP improvement contract. Unlike the situation in B–169924 and B–170426, *supra*, most of what is being procured is not, insofar as the record indicates, competitively available, and the Navy has presented substantial reasons why it would not be feasible to break out the one component for which CDC desires to compete. These reasons involve both technical risk and time of delivery, as well as likelihood of increased costs. Although CDC does not agree with those reasons, CDC has not established on this record that the Navy's position is unreasonable.

First of all, with regard to the market survey conducted in early 1975, it appears that the Navy was not at that time looking for potential developers of the militarized computer disk system. Rather, the purpose of the survey was to uncover existing militarized disk technology which would meet program needs and thus be suitable for use as Government Furnished Equipment in the improved sonar system. In other words the Navy wanted to separately acquire the ADF if it existed (and apparently have the rest of the ICC/TABP improvement designed around that ADF), but was not looking for possible competitors for designing or developing the ADF if it did not exist since, as explained below, the Navy believed that it was not feasible to have an ADF designed separately from the design effort needed for the rest of the improved system. For this reason, NAVSEA limited the survey to a review of the literature of militarized disk sources and to a review of earlier (involving responses to a CBD notice) conducted by NAVELEX. According to the Navy, CDC did not have any literature at that time indicating that it had developed a militarized disk technology. The Navy further states that even a direct contact with CDC would not have indicated anything to the contrary since CDC, although it apparently had developed and was about to announce a new disk capability, did not have a developed militarized disk technology. Thus, the Navy's failure to contact CDC directly had no bearing on the sole-source awards to IBM.

Secondly, the contract definition award was predicated primarily on the Navy's belief that it is important, in the design phase, to have the configuration of the ADF component defined in the early stages of the overall design effort for the ICC/TABP improvement and that

breakout would not be feasible for this reason. There is nothing in the record which would warrant our disagreeing with that belief. We think it is obvious that a separately designed ADP would necessarily involve some degree of noncompatability of the ADF design with the design of the ICC/TABP improvement. Although CDC asserts that breakout was feasible because of the availability of both a military standard (MIL STD) and a specification, the specification referred to by CDC is the very one developed by IBM under the design contract. Obviously, the specification could not support ADF breakout for the design contract itself. Furthermore, the most that can be said with respect to the feasibility of ADF breakout for the design contract is that CDC's technical experts and the Navy's technical experts disagree. In such situations, where the technical judgment of the agency has a reasonable basis, "we do not believe it is appropriate for this Office to question the [agency's] judgment * * * merely because there may be divergent technical opinions * * *." *Honeywell, Inc.*, B–181170, August 8, 1974, 74–2 CPD 87; *METIS Corporation*, 54 Comp. Gen. 612 (1975), 75–1 CPD 44. Here we think the record reflects a reasonable basis for the Navy's judgment that it was not technically feasible to break out the ADF, and we therefore cannot conclude that the failure to break out the ADF for the contract definition procurement was improper.

With respect to the development contract, the Navy does not rely solely on the lack of technical feasibility for ADF breakout, since it admits that, if certain changes were made to the IBM-developed specification, the ADF could be developed separately from the ICC/TABP improvement and that CDC is capable of developing it. Instead the Navy asserts that while there are still technical risk problems associated with separate development of the ADF, it is the time constraints imposed on the AN/BQQ–5 sonar system improvement program by the delivery schedule of submarines now under construction which preclude breaking out the ADF for separate development and production. According to the Navy, separate ADF development would result in either (1) an unacceptable delivery date of 14 production units, thereby costing the Navy some $4.2 million to purchase the existing RD–281 disk and later retrofitting the affected submarines with the ADF (plus an additional $3.9 million in integration and support maintenance costs if the ADF is developed separately), or (2) an unacceptable technical risk stemming from a significant overlapping of development and production efforts.

The delivery problem is explained by the Navy as follows:

> Using the parallel development plan required by the CDC approach, it would be necessary for IBM to develop the ICC/TABP without an ADF in order to meet the first required ICC/TABP delivery date of January 1978 for the SSN 700. In

parallel with this effort it would be necessary to award a separate contract for the ADF development. Assuming a separate ADF development contract, the earliest award date for such a contract would have been 1 April 1976 (this date was constrained by a 1 October 1975 availability of the ADF specification) and the first delivery of the ADF would not be made until July 1978 (15 month development effort followed by a 12 month production lead time). Six additional months would be required to integrate the ADF into the ICC/TABP production systems thereby resulting in a January 1979 initial total system delivery. This would result in apparently 14 ICC/TABP systems being delivered and installed in submarines without the ADF.

CDC points out, and the record establishes, that in fact the Navy envisions some overlap of the development and production phases in lieu of consecutive phases assumed in the above quoted statement. In this connection, however, the Navy states:

Ideally, in any program to develop, produce and deploy a major new military system, development should be completed prior to the initiation of production. The obvious reason is that changes which become necessary as a result of development program are most expeditiously, and economically incorporated into production before materials are ordered and before production begins. Otherwise, expensive rework retrofit and waste occur as a result of incorporating changes *during* the production cycle which are required by the development program. Further, even where development is 'completed' prior to production in a complex defense system, unforeseen problems and delays generally arise in getting systems integrated and working properly.

In the ICC/TABP program, because of the need to deliver a working production system to the SSN 700 by 1 March 1978, development and production must exist concurrently to a great extent. This fact significantly increases the technical risk. The greater the concurrency of development with production, the greater the technical risk. Breaking out the ADF for separate development will delay the program and thereby increase the technical risk. Further, it will dilute the total systems responsibility for the Sonar system which IBM presently has.

NAVSEA's position essentially is that while development and production overlapping would occur regardless of whether the ADF were broken out for separate development, separate ADF development by a company other than IBM would involve significantly greater overlap with the attendant greater technical risks. IBM can meet the Navy's time schedule with less overlapping because that company, prior to award of the development contract, had engaged in ADF development efforts on its own and was the only firm in a position to meet the initial delivery requirements of the development phase. The time schedule, as reported by the Navy, is as follows:

(1) delivery of a Functional Development Model of the ADF in April 1976 for support of the ICC/TABP software development;

(2) delivery of an Engineering Model ICC/TABP system (including an ADF) in July 1976, to support system development testing;

(3) delivery of a fully militarized pre-production model of the ADF in October 1976, for the start environmental and reliability testing;

(4) delivery of a production unit of the ADF in July 1977 for the start of the system integration of the production AN/BQQ–5 ICC/TABP for delivery of a total system in January 1978.

The January 1978 date is based on the stated requirement of the Navy's submarine shipbuilder, the Electric Boat Division of General Dynamics, for receipt of the first ICC/TABP improvement by March 1, 1978, for installation into the SSN–700, the first of several submarines under construction which have been designated to receive the improved sonar system.

CDC asserts that although it could not have met some of the intermediate delivery requirements, it could have met the Navy's "early 1978" requirement, had an award to it been made expeditiously, by overlapping development, production, and integration. CDC also states that there would be no serious technical risk involved in the separate development of the ADF, and that the 6 months established by the Navy for integration of the ADF into the ICC/TABP is much too long. Furthermore, CDC claims that the early 1978 delivery date for the ICC/TABP improvement is no longer realistic because of scheduled slippages at Electric Boat.

The record does not support CDC's position. Although there is an overlap of development and production in the Navy–IBM contract, the Navy reports that production cannot begin until a functional development model of the ADF is delivered and tested. The ICC/TABP improvement delivery schedule calls for 1 year of production plus 6 months of integration. Since the total system delivery date is January 1978, production would have to start in July 1976, thereby necessitating delivery of the functional development model in April 1976 to allow time for testing. CDC has indicated that it could reasonably expect to furnish a functional development model 7 months after contract award. Thus even if the Navy was prepared to award a contract to CDC at the same time it awarded the development contract to IBM, CDC would have had to make up at least 7 months in order to meet the Navy's delivery requirements. Although CDC apparently believes it could have made up some of that delay with a short integration period, we note that in the Navy's technical judgment a 6-month integration period, including an 8 to 10-week acceptance period, is necessary. The record indicates that this 6-month period, which is being required for IBM, "is based on experience on programs of very similar complexity and design." Thus it would appear that CDC either could not reasonably be expected to meet the Navy's delivery requirements, or could possibly do so only through significantly great-

er overlapping of development and production effort than will be required under the IBM contracts.

In this regard, despite CDC's assertion to the contrary, we think the Navy has reasonably established the likelihood of substantially increased technical risk under a CDC contract because of that more extensive overlapping. It has long been recognized that "concurrency" of development and production necessarily entails certain risks which, if realized, can lead to significant delay and increased costs. See, e.g., *Hoffman Electronics Corporation, supra;* 51 Comp. Gen. 743, 748 (1972); 2 Report of the Commission on Government Procurement 85, 158; GAO Report to the Congress, "Adverse Effects of Large-Scale Production of Major Weapons Before Completion of Development and Testing," B–163058, November 19, 1970. We think it is obvious that "[t]he greater the concurrency of development with production, the greater the technical risk." Here, the record contains an affidavit from a NAVSEA senior engineer which sets forth some indication of why and how those risks would arise and why the schedule which only IBM can meet would minimize those risks:

> The prevalent method of developing Navy software programs is from the top down with many incremental deliveries which are tested as a complete system. Both DOD and commercial developments have been plagued with bottom up developments and delivery of large amounts of software for purposes of integration and test. These types of development require perfect specifications, perfect two way interpretation and perfect implementation. This has not been shown to be a real world probability and has led to many disastrous development programs. As previously stated the heart of the system is the software and hardware elements dealing with total system processing and control. For software these elements are the executive services, bulk memory management, display/system concurrency management, and man/machine interface. For the hardware these elements are the computer, mass memory, and man/machine interface. In top down approach these elements will be first delivered and debugged. A July 1976 delivery date of these elements is required in order to assure a reasonable chance of delivering a successful production system by January 1978. To proceed into production prior to the accomplishment of these events would result in significantly increased technical risk, i.e. a likelihood that production systems would require extensive rework and retrofit prior to delivery thereby delaying delivery and increasing costs. The schedule from July 1976 until January 1978 is derived from some of the most successful development schedules for similar efforts. Some of the factors used in determining the schedule were code generation rates, debug and test rates, available hardware assets, size of program, complexity, and the experience of programmers.

We find no basis in the record to disagree with the Navy's technical judgment.

CDC's contention that the January—March 1978 delivery date for the improved sonar system is not realistic is based on schedule slippages for delivery of the SSN–700. CDC argues that the January—March 1978 date for delivery of the improvement was established on the basis of a scheduled delivery of the SSN–700 in August 1978. Because of labor and other difficulties, the SSN–700 is now scheduled for completion in June 1979. CDC therefore asserts that the required delivery

date for the improved sonar should have slipped a corresponding number of months, thereby providing CDC with significant time to develop and produce the ADF.

The record shows that the January—March 1978 delivery date for the improved sonar system was established at a time when the Navy's official expected delivery date for the SSN–700 was August 1978. However, the technical director of NAVSEA's Sonar Division has stated that:

> The schedule for the ICC/TABP was developed utilizing the best estimates available within NAVSEA of the actual delivery for the SSN 700, recognizing that schedule slippage was anticipated. The SSN 700 was assumed to be May 1979 for the purpose of the ICC/TABP development schedule.

Although CDC questions that statement, the record does indicate that in fact the current SSN–700 delivery date of July 1979 necessitates delivery of the ICC/TABP improvement in the January–March 1978 period. The record shows that Electric Boat, on February 20, 1976, notified the Navy that it would require a March 1, 1978 delivery of the improved sonar system to be installed in the SSN–700. It is our understanding that this 15-month lead time is needed because installation of the sonar system takes place prior to launch, which in turn is approximately 1 year prior to delivery of the vessel to the Navy.

In light of this record, we find no basis for questioning the propriety of either the sole source nature of the awards to IBM or the Navy's decision not to breakout the ADF from those awards. The Navy has shown compliance with all applicable statutory and regulatory requirements for awarding sole source contracts, has justified the noncompetitive basis of the awards and the inclusion of the ADF in the awards, and has executed the necessary Determination and Findings (signed by the Assistant Secretary of the Navy) required by 10 U.S.C. 2310. Furthermore, we find no substantial evidence on the record indicating that the award of either contract was the result, as CDC alleges, of illegal "favoritism" toward IBM on the part of the Navy. Rather, the awards appear to be the logical result of IBM's winning a competition for a sonar system in 1970 and the Navy's current needs for delivery of an acceptable improved version of that sonar system within rigidly prescribed time frames.

Other Issues

There remains for consideration certain other issues raised by CDC in connection with these procurements. These issues involve (1) future award of a production contract to IBM; (2) the Navy Standard Disk program; (3) organizational conflict of interest; and (4) reimburse-

ment of IBM for costs incurred while not under contract. Each is considered below.

1. *Future production award to IBM*

The Navy has stated its intention to award a contract to IBM in July 1976 for a production quantity of 14 ADF units. CDC's protest, while aimed primarily at the award of the development contract, also encompasses any future award to IBM. It is not clear, however, in light of our conclusion that the development contract was awarded properly, to what extent, if any, CDC is interested in pursuing a protest solely against the intended limited production award since it would appear that CDC would not be in a position to compete for a production quantity when it has not developed a militarized disk. In any event, the record provides no basis for our objecting, at this point, to an ADF production award to IBM.

2. *The Standard Disk program*

NAVELEX has for some time been seeking to obtain a standard computer disk system for the Navy. In this regard, it was planned to have qualified companies interested in competing for the standard computer disk system bear the cost associated with militarizing their existing commercial hardware. CDC complains that the ICC/TABP development contract award to IBM without breakout of the ADF has resulted in NAVSEA's funding of IBM's militarization efforts, thereby giving IBM an advantage in any subsequent competitive procurement. CDC is also concerned that the ADF itself might become the Standard Disk for use throughout the Navy and that IBM would be the sole source for the item.

We do not believe that the existence of the Standard Disk program in any way precluded NAVSEA from funding IBM's development of the ADF. It is clear that NAVSEA was interested only in its immediate needs, which required development of the ADF as an essential part of the ICC/TABP improvement, and not the overall Navy Standard Disk program. Furthermore, the Navy has reported that the Standard Disk itself will be procured competitively, and that if the ADF is selected as the Navy Standard Disk, the Navy will fund development of a second source prior to conducting a competitive procurement. Accordingly, this aspect of the protest is without merit.

3. *Organizational conflict of interest*

CDC argues that organizational conflict of interest questions arise if IBM is permitted to compete for production quantities of the ADF after it prepared the specification for the development of the ADF. ASPR Appendix G sets forth various rules for avoidance of conflicts

of interest that would give rise to biased contractor judgment of unfair competitive advantage. These rules provide that where a contractor furnishes specifications for nondevelopmental items to be used in a competitive procurement, the contractor should be eliminated for a reasonable period of time for competing for the production award. However, when development work is required, Appendix G states:

> In development work it is normal to select firms which have done the most advanced work in the field. It is to be expected that these firms will design and develop around their own prior knowledge. Development contractors can frequently start production earlier and more knowledgeably than firms which did not participate in the development, and this affects the time and quality of production, both of which are important to the Department of Defense. In many instances the Government may have financed such development. Thus, the development contractor may have an unavoidable, competitive advantage which is not considered unfair and no prohibition should be imposed.

We think the quoted provision is clearly applicable to this situation. Furthermore, as indicated above, it appears that the Navy is planning to award a production contract for only a limited number of ADFs and that only IBM will be able to provide those items. Thus, we see nothing in the Appendix G rules which would preclude award of the limited production contract to IBM.

4. *Reimbursement of IBM*

The record indicates that IBM engaged in development work on the ADF for several months prior to the March 31, 1976 award of the development contract, and that the Navy intends to reimburse IBM for the allowable costs it incurred during that period. CDC suggests that this situation indicates that the Navy may have "promised, illegally" to reimburse IBM prior to execution of the authorizations, required for award of a contract.

The record does not support this contention. The affidavit of the technical director of the Sonar Division indicates that the contracting officer advised IBM that the Navy was not encouraging that firm to work on the ICC/TABP development and that IBM was doing so at its own risk. The affidavit further states that at no time did the Navy authorize IBM to engage in development activities beyond the scope of contract N0024–75–C–6223 for contract definition. There is nothing else in the record to indicate that the Navy in any way did encourage or authorize IBM to continue its development work.

Furthermore, with regard to the intended reimbursement, the Navy reports that it desires to obtain unlimited rights in data developed by IBM for the ICC/TABP improvement for possible future competitive procurements and that "it must recognize and pay for the allowable cost incurred" in order to do so. Such reimbursement would appear to be authorized by ASPR § 15–205.30, which states:

> Precontract costs are those incurred prior to the effective date of the contract directly pursuant to the negotiation and in anticipation of the award of

the contract where such incurrence is necessary to comply with the proposed contract delivery schedule. Such costs are allowable to the extent that they would have been allowable if incurred after the date of the contract.

We find no merit to this aspect of CDC's protest.

Conclusion

We have carefully considered the various contentions advanced by CDC both in papers filed directly with this Office and in documents filed directly with the District Court. As indicated, we believe the Navy's actions are consistent with applicable statutory and regulatory provisions, and have not been shown by CDC to have been otherwise improper. Accordingly, the protest is denied.

[B-180915]

Decedents' Estates—Persons Causing Death of Decedent—Evidence of Intent

Claim of widow of deceased service member for entitlement to both six months' death gratuity (10 U.S.C. 1477) and unpaid pay and allowances (10 U.S.C. 2771) where she admitted killing him and was indicted for murder, is denied, even though she claimed self-defense and *nolle prosequi* was entered on indictment, since due to certain information of record, the lack of felonious intent cannot be established.

Decedents' Estates—Pay, etc., Due Military Personnel—Persons Implicated in Death of Decedent—Claim Determined on Basis of Award of Life Insurance Proceeds

Civil action in case of widow versus decedent's mother for proceeds of life insurance policy which ruled in favor of mother on specific jury finding that widow unlawfully and intentionally killed member and which conclusion was upheld by United States Court of Appeals, while not binding on General Accounting Office, is to be given considerable weight in our consideration of survivor claims where parties and issues before such court involve, in part, matters before this Office.

In the matter of a deceased staff sergeant, USAF, April 26, 1976:

This action is in response to a letter dated October 30, 1974, from a claimant in which she requests further consideration of a settlement dated October 15, 1974, by our Transportation and Claims Division (now Claims Division) which disallowed her claim for the six months' death gratuity and unpaid pay and allowances due in the case of her late husband who died September 28, 1973.

The file shows that the disallowance was based in part on the fact that while a *nolle prosequi* was entered in the case against the widow after she was indicted for murder, there remained an element of doubt as to the lack of felonious intent due to certain evidence of record.

In addition, the file indicates that it was learned that in April 1974, the decedent's mother and a secondary beneficiary in the case before this Office had initiated a civil action in the United States District Court for the District of South Carolina, against the deceased member's wife and the Prudential Insurance Company, to recover the proceeds of a life insurance policy issued on the life of the member.

While the decision of the Court in that case is not binding on this Office in the matter of payment of a death gratuity or distribution of unpaid pay and allowances, since the parties and issues before that court involve in part matters before this Office, the findings of that Court are to be given considerable weight in our consideration of these survivor claims.

Payment of the six months' death gratuity is governed by the provisions of 10 U.S. Code 1477 (1970), which provides in part:

> (a) A death gratuity * * * shall be paid to or for the living survivor highest on the following list:
> (1) His surviving spouse
> * * * * * * *
> (3) If designated by him, any one or more of the following persons:
> (A) His parents * * *.

In connection with the distribution of the unpaid pay and allowances due in a deceased member's case, 10 U.S.C. 2771 (1970), provides in part:

> (a) In the settlement of the accounts of a deceased member of the armed forces * * * an amount due * * * shall be paid to the person highest on the following list living on the date of death:
> (1) Beneficiary designated by him in writing * * *.
> * * * * * * *
> (2) Surviving spouse
> * * * * * * *
> (4) Father and mother in equal parts or, if either is deceased, the survivor.

The file shows that on May 31, 1972 the member executed a Record of Emergency Data form, on which he designated his mother to receive the death gratuity if he had no spouse or child and designated his wife to receive his unpaid pay and allowances due at his death.

There appears to be no question as to the claimant's status as surviving spouse, or as designated beneficiary. However, it has uniformly been held that it is against public policy to permit the payment by the Government of arrears of pay, compensation or other benefits to an heir or beneficiary who feloniously kills the person upon whose death such payments become due. This is so even though such heir or beneficiary may be found not guilty by a jury tried in criminal proceedings growing out of the homicide, or where a *nolle prosequi* was entered. *See* 34 Comp. Gen. 103 (1954).

The record in the case indicates that the member and his wife, who were married in 1971, apparently ceased living together as husband and wife in July 1973. In August 1973, the member was placed under court order by the Family Court of Charleston County, South Carolina, not to interfere with, molest or in any way harm his spouse. On

September 28, 1973, apparently in violation of that court order and while in an intoxicated condition, the member forceably entered his wife's residence. At some point after so entering, he was shot to death by his wife.

The wife claimed that she acted in self-defense. The record, however, indicated that the member had no weapon. Further, there was nothing to show that he threatened her life or that she was in danger of immediate bodily harm. In this connection, the report of autopsy revealed that two of the three bullets which struck the deceased, struck him in the back. This, we believe, tends to evidence a retreat by the member at the time of the shooting, or at the very minimum, a recession of any threat of bodily harm to the wife which might have previously been present.

With regard to the civil action initiated by the decedent's mother, in September 1974, following a jury trial, she was awarded the insurance proceeds based on the specific finding that the widow did intentionally and unlawfully kill the member. On November 17, 1974, that ruling was appealed by the widow and on December 19, 1975, the United States Court of Appeals for the Fourth Circuit, affirmed the lower court's ruling.

On the basis of the record before us, it is our view that the wife did not act without felonious intent in the death of the member. Accordingly, the action taken by our Transportation and Claims Division disallowing her claim is sustained.

As to the claim of the deceased member's mother, since the record shows that she is the next higher survivor, the member having no children, and the file indicating that his mother is a widow, she is entitled to receive both the six months' death gratuity and the unpaid pay and allowances due in the case.

[B-183691]

Transportation—Vessels—Foreign—American Vessel Availability

While on vacation leave, employee traveled from Victoria, British Columbia, to Prince Rupert, British Columbia, by foreign bottom carrier. Although such travel was not authorized, reimbursement may be made if otherwise proper since route was reasonable and no American vessel was available for travel.

Compensation—Overtime—Traveltime—Vacation Leave Travel—Fair Labor Standards Act Inapplicable

Claim for compensation and premium (overtime) pay for period of time during which employee is traveling on vacation leave may not be paid because such time is not compensable official duty time. Further, since Fair Labor Standards Act (FLSA) applies only where employee has in fact worked during period for which compensation and premium pay is claimed, FLSA is inapplicable to vacation leave travel.

Alaska—Employees—Vacation Leave—Leave-Free Travel Time

Employee, whose duty station is at Juneau, Alaska, must be charged annual leave for each day he would otherwise work and receive pay while on vacation leave, irrespective of when he commenced or completed travel, because 5 U.S.C. 6303(d), which provides leave-free travel time for employees whose duty station is outside the United States, does not apply to travel from Alaska, which is a State.

Travel Expenses—Vacation Leave—Renewal Agreement Travel

Notwithstanding Federal Travel Regulation (FPMR 101–7) para. 1–7.5, round-trip travel expenses of employee incident to vacation leave may be paid pursuant to FTR para. 2–1.5h(2)(b) because leave provisions of former paragraph, dealing with interruptions of official travel, are inapplicable to overseas tour renewal agreement travel which is governed by latter section.

Leaves of Absence—Vacation Leave—Outside Continental United States—Accrual—Beginning Date

Where administrative agency establishes tour of duty of 2 years, less time spent by the employee on the immediately preceding vacation leave trip, employee begins to earn vacation leave rights for each successive tour of duty on the biennial date for the commencement of such leaves of absence.

General Accounting Office—Decisions—Advance—Disbursing and Certifying Officers—Questions Not on Voucher

Where certifying officer seeks General Accounting Office (GAO) advance decision on matters of travel incident to change of permanent duty station or attendance of meetings or training but submits voucher relating only to propriety of payment of items incident to vacation leave travel, GAO will not render decision on matters unrelated to accompanying voucher.

In the matter of R. Elizabeth Rew—vacation leave entitlement, April 27, 1976:

This matter is before us on a request of April 14, 1975, from an authorized certifying officer of the Department of Agriculture, Forest Service, Juneau, Alaska, as to the propriety of certifying for payment the travel voucher of Mrs. R. Elizabeth Rew for expenses and compensation relative to vacation leave taken.

Having satisfactorily completed a prescribed tour of duty in Alaska, Mrs. Rew executed a new employment agreement with the Forest Service. Pursuant to Federal Travel Regulations (FPMR 101–7) para. 2–1.5h(1) (May 1973), travel was authorized for the purpose of taking vacation leave between tours of duty.

The travel authorization dated March 27, 1974, approved travel by mixed modes including use of privately owned vehicle, Alaska State Ferry, and air transportation limited to the lowest cost jet fare, family plan, or excursion rates generally offered by airlines for travel which apply using most direct routes. It also approved the trip to an alternate location (Spokane, Washington) not to exceed the lowest air fare to Mrs. Rew's actual residence which was Portland, Oregon.

The Forest Service issued a GTR for transportation on the Alaska State Ferry with auto from Juneau, Alaska, to Seattle, Washington. Mrs. Rew and her husband (dependent) then traveled via Amtrak from Seattle to Spokane and returned to Seattle. From Seattle they then boarded the B. C. Ferry System at Victoria, British Columbia, Canada, and proceeded to Prince Rupert, British Columbia. From Prince Rupert they changed to the Alaska State Ferry under a GTR and traveled with automobile back to her official station at Juneau, Alaska.

During the period from the date of issuance of travel authorization, March 27, 1974, until Mrs. Rew actually commenced travel on May 14, 1974, the Fair Labor Standards Act (FLSA), 29 U.S. Code § 201 *et seq.*, was amended effective May 1, 1974, to extend coverage of the minimum wage and overtime provisions to most Federal employees. Having been designated by the Service as a nonexempt employee for FLSA purposes, Mrs. Rew has submitted a claim against the Government for salary and overtime for the period of time she traveled on vacation leave.

With respect to the claim of Mrs. Rew the certifying officer has submitted certain questions to this Office. The questions will be considered in the order presented, except that question 5 will be considered after question 6.

1. Because the travel from Victoria, to Prince Rupert, British Columbia, was by foreign bottom carrier the B. C. Ferry System the certifying officer expresses doubt as to the propriety of payment of this item. We have concluded that even though this travel was not authorized this item is reimbursable if otherwise proper since this route was reasonable and no American vessel was available for travel. B–171748, May 27, 1971.

The travel order shows that Mrs. Rew may use mixed modes of transportation with costs limited to the lowest cost jet fare offered for travel direct from Juneau to Portland and return. The official Airline Guide in our Office, Airline Tariff Publishers, Inc., C.T.C. (A) No. 107, CAB No. 214, shows that the following travel schedule by jet coach could have been used by Mrs. Rew and her husband at a total cost of $340.88 for a round trip.

Depart Juneau	10:00 a.m.	Alaska Airlines flt. 60	5/14/74
Arrive Seattle	1:00 p.m.		5/14/74
Depart Seattle	1:50 p.m.	Hughes Air West flt. 935	5/14/74
Arrive Portland	2:25 p.m.		5/14/74
Depart Portland	12:20 p.m.	N.W. Airlines flt. 108	5/24/74
Arrive Seattle	12:56 p.m.		5/24/74
Depart Seattle	2:30 p.m.	Alaska Airlines flt. 67	5/24/74
Arrive Juneau	6:40 p.m.		5/24/74

While the voucher shows a claim for $468 as actual transportation expenses reimbursement should be limited to $340.88 as set forth above. Also, the employee would be entitled to reimbursement of constructive per diem for air travel.

2. Is the time the employee spends in route considered compensable duty time for salary and/or overtime under provisions of the FLSA in lieu of annual leave status?

The statutory authority for overseas tour renewal agreement travel is found at 5 U.S.C. § 5728(a) (1970) and reads as follows:

§ 5728. *Travel and transportation expenses; vacation leave*

(a) Under such regulations as the President may prescribe, an agency shall pay from its appropriations the expenses of round-trip travel of an employee, and the transportation of his immediate family, but not household goods from his post of duty *outside the continental United States* to the place of his actual residence at the time of appointment or transfer to the post of duty, after he has satisfactorily completed an agreed period of service outside the continental United States and is returning to his actual place of residence to take leave before serving another tour of duty at the same or another post of duty outside the continental United States under a new written agreement made before departing from the post of duty. [Italic supplied.]

This statute merely authorizes the payment, under the conditions specified, of certain expenses of an employee and his immediate family incident to his return to the continental United States for the purpose of taking leave. It does not liberalize existing or create new leave rights or benefits in any employee. 34 Comp. Gen. 328, 330 (1955). Although expenses of travel are authorized, no provision is made to make such time official duty. B–171947.62, November 27, 1974. Accordingly, since the traveltime is properly chargeable to the annual leave of the employee, no portion of the time during which the employee is on vacation leave is compensable duty time.

3. For vacation leave purposes, does the employee's annual leave begin prior to travel or after arrival at designated location?
4. Same as above only for persons designated as "exempt" from FLSA.

Annual leave of civilian personnel is controlled by Annual and Sick Leave Act of 1951, now codified in 5 U.S.C. §§6301–11. The implementing regulations are in Federal Personnel Manual (FPM) Supplement 990–2, Book 630. Under the provisions of 5 U.S.C. § 6303(d) and FPM Supplement 990–2, Book 630, subchapter S2–7, no annual leave is charged for the time actually and necessarily occupied in going to or from the post of duty and time necessarily occupied awaiting transfer in the case of an employee whose post of duty is outside the United States and who returns to the United States. "United States" is defined in 5 U.S.C. § 6301(1) and FPM Supplement 990–2, Book 630, subchapter S2–2a(1), as "the several States and the District of Co-

lumbia." Therefore, since Alaska is a State, it is not outside the United States, and section 6303(d) does not provide leave-free traveltime from and to Alaska. Except for section 6303(d) or any other statutory exception, the general rule in 5 U.S.C. § 6302(a) applies and leave is required to be charged for days on which the employee would otherwise work and receive pay exclusive of holidays and nonworkdays established by Federal statute, Executive order, or administrative order.

Accordingly, annual leave should be charged for each day the employee would otherwise work and receive pay irrespective of when the employee commenced or completed his travel. Because the FLSA has no application in these circumstances, the question is answered similarly irrespective of whether the employee is exempt or not exempt from the provisions of the FLSA.

6. If the above questions 2, 3, and 4 are answered in the negative, is there a legal basis for payment of per diem if the employee begins her vacation leave travel while on annual leave? (See FTR, section 1–7–5 a, d, and 3).

As noted above, statutory authority for the payment of the round-trip travel expenses of an employee pursuant to vacation leave is found at 5 U.S.C. § 5728(a). Implementing this provision, FTR para. 2–1.5h(2)(b) (May 1973) provides that reimbursement of such expenses shall be limited to per diem in lieu of subsistence and transportation for the employee. This paragraph provides the legal basis for payment of a per diem allowance to the employee for vacation leave travel.

The FTR paras. 1–7.5a and 1–7.5d (May 1973), referred to in the question, provide generalized guidance where official travel is interrupted. Travel incident to vacation leave is not, however, official travel. As specified by FTR para. 2–1.5h, it is "overseas tour renewal agreement travel." Because such travel is for the purpose of taking leave and is accomplished while on leave, the provisions of paragraph 1–7.5, insofar as they relate to matters of leave, are inapplicable in the circumstances of the instant case.

5. If the time spent between official station and designated residence or an approved alternate location is considered duty time, when does employee begin to earn right for new two year waiting period?

This Office has previously indicated that it will not object to the establishment by an administrative agency of a tour of duty of 2 years, less the time spent by the employee on the immediately preceding vacation leave trip, so as to permit the scheduling of vacation leave at regular 2-year intervals. 37 Comp. Gen. 62, 63 (1957). As set forth in Forest Service Manual para. 6543.51h1b (August 1973), the Forest

Service permits, in accordance with said decision, the employee to earn vacation leave rights within successive 2-year periods. Accordingly, if otherwise proper, an employee of the Forest Service would begin to earn vacation leave rights for each successive tour of duty on the biennial date for the commencement of such leaves of absence.

7. If it is determined that exempt and/or non-exempt employees under the FLSA are entitled to compensation for travel time spent on vacation leave, would this also be applicable to time spent on Saturdays, and Sundays in excess of eight hours per day while in route between official stations under Transfer of Station?

8. If travel in connection with transfer of official station is considered duty time under the FLSA, must we forbid travel on Saturdays and Sundays?

9. If travel time is considered duty hours, would it be applicable to travel time in connection with attendance at meetings and training which are officially ordered and approved?

10. If allowable, how would duty hours and travel costs be reconstructed where alternate destination or routing is involved, and where vacation leave is approved at a different location than where dependents take leave?

The Comptroller General is required to render advance decisions at the request of disbursing officers, certifying officers, and the head of any department or establishment of the Government for their guidance in advance of payment. *See* 31 U.S.C. §§ 74 and 82d. In the case of disbursing officers and certifying officers, decisions are rendered only on specific vouchers before them for action. 1 GAO Manual For Guidance of Federal Agencies § 11.1 (December 17, 1970). The voucher before this Office is limited to the propriety of payment of certain items incident to the taking of vacation leave by a Forest Service employee. Inasmuch as no travel voucher is submitted with respect to questions 7 through 10 which concern travel in connection with transfer of official station or attendance at meetings and training, these questions may not properly be considered by this Office at this time.

The travel voucher should be processed in accordance with this decision.

[B–185897]

Contracts—Data, Rights, etc.—Disclosure—Solicitation

General Accounting Office (GAO) has provided some protection against unauthorized disclosure of proprietary data in solicitation which includes data without owner's consent. If protest against solicitation disclosing data is lodged after award, policy has been not to hear protest.

Contracts—Protests—Data, Rights, etc., Disclosure

Because of policy not to hear post-award proprietary data protests and since relief being sought by post-award protester is injunctive in nature—relief not available through GAO—aspect of protest will not be considered.

Contracts—Protests—Contracting Officer's Affirmative Responsibility Determination—General Accounting Office Review Discontinued—Exceptions—Fraud

Since question whether protester's data is proprietary will not be considered, capability of prime contractor to successfully complete contract without data will not be questioned.

Contracts—Protests—Timeliness—Solicitation Improprieties

Protester's post-award assertion that solicitation was defective for failing to include as evaluation factor cost of possible damages arising from release of alleged proprietary data is untimely filed under Bid Protest Procedures.

In the matter of the Data General Corporation, April 28, 1976:

On February 12, 1976, a protest was received from Data General Corporation against the January 30, 1976, award of prime contract No. 6–35124 for computer equipment and related services to Aeronutronic Ford Corporation (AFC) by the Department of Commerce. The contract was awarded under solicitation No. 5–35243.

Data General, an unsuccessful competitor for certain work under the prime contract, insists that item 26 of the contract ("CONVERSION SOFTWARE, to convert 100,000 NOVA 840 Instructions") requires AFC, or its subcontractor, Keronix, Inc., to have the NOVA 840 Instructions. The protester argues that it has previously furnished the Instructions to the Department "under specific license agreements" incident to National Oceanic and Atmospheric Administration Purchase Order No. 5–19402, General Services Administration contract No. G5–00C–00430, and Department of Commerce contract No. 3–35323. Because the Instructions were furnished under license agreements, Data General insists that the Instructions are its proprietary data; further, Data General says that it has not given license rights to AFC or Keronix to use the Instructions. The company therefore requests that we bar the Department from giving AFC or Keronix access to Data General's proprietary data, the NOVA 840 Instructions."

Our Office has provided some protection against the unauthorized disclosure of proprietary data in a solicitation which includes the data without the owner's consent. In several prior decisions. we have directed the cancellation of solicitations which improperly disclosed proprietary data. 49 Comp. Gen. 28, 32 (1969); 43 *id.* 193, 203 (1963); 41 *id.* 148, 160 (1961). Data rights have been protected in order not to give any semblance of approval to improper disclosures of data and so as

not to expose the Government to liability for damages resulting from the disclosures. *See* 52 Comp. Gen. 312, 313 (1972); 42 *id.* 346, 354 (1963).

If a protest is lodged with our Office after the award of a contract under a solicitation which allegedly discloses proprietary data, it has been our policy, however, not to hear the protest. *Cf.* B–167803, December 12, 1969. We have taken this view because the courts have held that a party must take reasonable action to prevent unauthorized use of its proprietary data. See, for example, *Ferroline Corporation* v. *General Aniline and Film Corporation*, 207 F. 2d 912 (7th Cir. 1953); *Globe Ticket Company* v. *International Ticket Company*, 104 A. 92 (1918). Because of this view, and recognizing that proprietary data cases often involve disputed facts—including technical issues of the greatest complexity—we have never directed the cancellation, or recommended the termination, of a contract which has been the subject of a proprietary data protest. *See* 49 Comp. Gen. 124, 128 (1969).

The post-award protest filed by Data General here, of course, does not involve a solicitation which contained the concern's alleged proprietary data. Further, the relief being sought by the protester—that we order the Department to refrain from releasing the data in question—is injunctive in nature and not within our authority to grant. The courts, of course, have the general power to issue injunctive relief. Notwithstanding the courts' general authority to fashion injunctive relief, the U.S. Court of Appeals has held that injunctive relief, enjoining the United States from distributing reports containing a company's alleged proprietary data, is improper. *International Engineering Co.* v. *Richardson*, 512 F. 2d 573 (D.C. Cir., 1975), cert. denied, January 12, 1976.

Although in footnote eleven of the Court of Appeal's decision, cited by the protester, the court states that our Office has the "power to cancel * * * procurements made to competitors who wrongfully have acquired [proprietary data]," we interpret the court's statement as a reference to our Office's role in sometimes directing the cancellation of solicitations which have improperly disclosed proprietary data and not as an indication that we have or will entertain post-award protests of the type lodged by Data General here.

Consequently, we will not further consider this aspect of Data General's protest.

Arguing in the alternative, Data General also asserts that if the Department does not intend to give the Instructions to AFC, AFC

should not now be considered a responsible contractor. The company acknowledges that we generally do not review affirmative responsibility determinations made by contracting officers save for a showing of fraud or where the solicitation contains definitive responsibility criteria which allegedly have not been met. See, for example, *Randall Manufacturing Company, Inc.*, B-185363, January 26, 1976, 76-1 CPD 44. The company argues, however, that we should review AFC's responsibility here since it "go[es] to the right to use proprietary data."

This ground of protest is predicated on the assumption that the Department would not release data considered to be proprietary. The argument obviously involves the question whether the Instructions are, in fact, proprietary—a question we will not consider. Because of this position, we cannot question AFC's capability to perform the contract.

Finally, Data General argues that the Department failed to consider, for proposal evaluation purposes, the cost of breach of contract damages arising out of the release of Data General's alleged proprietary data.

Since Data General is asserting that the solicitation was defective for failing to specifically include the cost of these possible damages as an evaluation factor, the company's post-award protest is untimely filed under our Bid Protest Procedures (40 Fed. Reg. 17979 (1975)).

Protest denied.

[B-185403]

Contractors—Responsibility—Contracting Officer's Affirmative Determination Accepted—Exceptions—Specific and Objective Responsibility Criteria

Pilot patent production demonstration contained in invitation for bids (IFB) and administered to bidder to ascertain technical capability constitutes specific and objective responsibility criterion and, therefore, General Accounting Office (GAO) will review contracting officer's affirmative responsibility determination to see if criterion has been met.

Bidders—Responsibility *v.* Bid Responsiveness—Bidder Ability To Perform

Where bidder never successfully passes demonstration required by IFB to establish technical ability to perform in responsible manner—a specific and objective responsibility criterion contained in solicitation—GAO finds there was no reasonable basis upon which contracting officer could find bidder responsible.

Bids—Discarding All Bids—Resolicitation—Revised Specifications

Solicitation should be canceled and requirement resolicited where (1) low bidder found to be responsible by agency is ineligible for award because bidder failed to comply with specific and objective responsibility criterion in IFB; and (2) only other bidder's price is almost $8 million higher than that of low bidder. Also, determination that low bidder was responsible shows that specific and objective criterion was unnecessary.

In the matter of the International Computaprint Corporation, April 29, 1976:

On May 1, 1975, the Department of Commerce (Commerce) issued invitation for bids (IFB) No. 6–36976 for the preparation of patent data for patent full text data bases.

Under the resulting contract, the contractor will be furnished approximately 1,540 approved patents per week which are to be converted into machine language on magnetic computer tape. Several different types of tapes are to be produced for various uses. Master tapes are to be prepared containing the full text of the approved patents which will be available for distribution to industry desiring to store current patent information on computers. A second type of tape required will be used by the Government Printing Office on its Linatron machine to print the Official Gazette of the United States Patent and Trademark Office. Other types of tapes required are for reissues, defensive publications, designs and plants. An index to the Official Gazette is to be prepared also by the contractor.

Bids were received in response to the IFB from International Computaprint Corporation (ICC), the incumbent contractor, and Informatics, Inc. (Informatics). The low bid of $9,947,224 for the 2-year contract period (1 year plus a 1-year option) was submitted by Informatics. ICC's bid was $17,829,317.

Since the low bid of Informatics was considered to be responsive to the IFB, the contracting officer proceeded to determine the responsibility of Informatics. The contracting officer subsequently has made an affirmative determination of Informatics' responsibility. That determination has been protested to our Office by ICC.

Regarding protests against a contracting officer's affirmative determination of a bidder's responsibility, our Office has held that we will not review such matters except where there are allegations that the contracting officer's actions in finding a bidder responsible are tanta-

mount to fraud or the solicitation contains specific and objective responsibility criteria which allegedly have not been met. *Yardney Electric Corporation*, 54 Comp. Gen. 509 (1974), 74-2 CPD 376; and *Data Test Corporation*, 54 Comp. Gen. 499 (1974), 74-2 CPD 365, reconsidered at 54 Comp. Gen. 715 (1975), 75-1 CPD 138. This policy was adopted by our Office because normally responsibility determinations are based in large measure on the general business judgment of the contracting officer, and being subjective are not readily susceptible to reasoned review. *Central Metal Products, Incorporated*, 54 Comp. Gen. 66 (1974), 74-2 CPD 64; and *Keco Industries* v. *United States*, 428 F. 2d 1233, 1240 (192 Ct. Cl. 773). However, in situations where the question of responsibility revolves around a bidder's meeting or failing to meet certain specific and objective responsibility criteria expressed in the solicitation, our Office will review, to the extent possible, the determinations of the contracting officer to see if the specified responsibility criteria have been met. See *Yardney*, *supra*.

A principal ground of ICC's protest is that Informatics failed to pass the pilot patent production demonstration (PPPD) contained in the IFB and, therefore, there was no basis on which the contracting officer could make the determination that Informatics was a responsible bidder.

ICC contends that the PPPD constitutes a specific and objective responsibility criterion and, under the *Yardney* and *Data Test* cases, our Office can and should review the results of the PPPD to ascertain if the criterion has been applied as required and met by Informatics. Commerce, the contracting officer, and Informatics take the opposite position, arguing that the PPPD was not a specific and objective responsibility criterion and that passage of the PPPD was not a requirement for an affirmative responsibility determination by the contracting officer. Accordingly, our Office should not review the contracting officer's determination because the exceptions to our general policy enunciated in *Yardney* and *Data Test* are not applicable to the instant IFB.

Therefore, the threshold question presented by the protest is whether the PPPD constituted a specific and objective responsibility criterion.

In the IFB, section "E" of part II—Additional Solicitation Instructions and Conditions, entitled "Determination of a Prospective Contractor's Responsibility," contained the procedures and standards which would be employed by the contracting officer to determine a

prospective contractor's responsibility. Section E(2)(d), which explained the PPPD, reads as follows:

(d) *A pilot patent production demonstration shall be accomplished by the prospective contractor* (as defined under b, above) *to establish his technical ability to perform the work in a responsible manner.* The procedure for the demonstration is as follows:

Not less than 700 patented files have been identified for the purpose of selecting files to be used for this pilot patent production demonstration. These 700 patent numbers have been listed with the appropriate letter (M, E, C. or O) added to the patent number. None of these 700 patents is among the 100+ patents used for the preparation of Exhibit 1.

The list of not less than 700 patent numbers is deposited with the contracting officer (Department of Commerce's Procurement Division), assigned to and responsible for this procurement. He will be furnished with a list of patented files signed out for study by all bidders (or anyone else) and will eliminate from the 700+ list any patented file(s) studied by any bidder.

From the remaining patented files on the list, the contracting officer will have 100 "M" files, 50 "E" files, 25 "C" files, and 25 "O" files randomly selected for the pilot patent production demonstration. No P & TM Office employee will participate in the final selection of these 200 patented files.

The prospective contractor shall be notified three weeks in advance of actual file availability. He shall be given 200 patent application files (actually patented files) and shall produce magnetic tape items 1, 2, 3, 4, 5, and 53. *These patent files will be produced, delivered, and inspected in accordance with Contract Article 2 and Article 8 provisions set forth under Part I—Special Provisions Contract, except that all samples for inspection may be 100 percent of the pilot.* The prospective contractor must include complex work units encountered in the demonstration patented files. (See Reference 5 in Part III—Additional Technical Specifications and References.)

The prospective contractor's attention is especially drawn to the rejection/reinspection procedures of Contract Article 8, wherein, for example, for any rejected portion of item 1, the contractor is given the "error rate" and must "rework" the entire rejected portion for resubmission of the replacement item 1. He is *not* given a copy of the original inspection list with errors marked thereon.

In addition, the contracting officer may grant up to an additional seven calendar days for a second resubmission if the first submission and then the first resubmission gave substantial evidence to the government of technical understanding and capability.

Up to two 25 patent Linotron test tapes and up to two 25 patent item 1 test tapes will be permitted during the pilot demonstration or related resubmission period(s).

Failure to meet acceptance requirements upon initial inspection (or with only one resubmission in seven calendar days) may be deemed cause for a determination that the respective contractor is non-responsible for not demonstrating adequate technical capability to process and make timely deliveries of acceptable work for all products required at 1540 patent files per contract week (every other week).

All costs associated with the pilot patent production demonstration of the prospective bidder's capability will be at the expense of the bidder, except those costs incurred for the GPO Linotron processing and the P & TM Office quality assurance inspection. [Italic supplied where underscored.]

The contracting officer, in support of his position that the PPPD did not constitute a specific and objective responsibility criterion, made

the following comments in the report of the Commerce Department in response to the protest:

> We do not concur that under this solicitation, the "question of responsibility revolves around the bidder's meeting or failing to meet certain specific and objective responsibility criteria expressed in the solicitation." The intent of the PPPD was to simulate to the most practical extent processing conditions which would be applicable to actual contract performance, in recognition that the PPPD was a pilot operation intended to be accomplished by the prospective contractor "to establish his technical ability to perform the work in a responsible manner." * * * Furthermore, the prospective contractor's failure to meet acceptance requirements, * * * "*may* be deemed cause for a determination that the (prospective) contractor is non-responsible . . ." [Italic supplied.] Under the expressed language, such determination by the Contracting Officer is permissive, not obligatory, and intends that the Contracting Officer take into account all relevant considerations.

ICC disputes the contracting officer's interpretation of the penultimate paragraph of the above-quoted portion of the IFB. ICC acknowledges that the paragraph is discretionary, but that the only discretion permitted the contracting officer is that he *may* determine a bidder nonresponsible on the basis of the initial submission or after only one resubmission without allowing the second resubmission. ICC states that it does not allow the contracting officer the discretion to find a bidder responsible, if it fails to successfully perform the PPPD.

We must agree with ICC's interpretation of the paragraph. We believe the contracting officer had discretion to find a bidder nonresponsible based on the results of the initial submission, and first resubmission without having to allow the bidder to perform a second resubmission. If the interpretation advocated by the contracting officer was the most reasonable, we fail to see the need to discuss in the paragraph the initial submission or first resubmission. If the contracting officer were to retain broad discretion regarding a bidder's responsibility, it seems logical that the paragraph would have simply said, "Failure to meet the acceptance requirements of the PPPD may be deemed cause for a determination that the contractor is nonresponsible * * *." Of particular importance, the IFB clearly required accomplishment of the PPPD, including a specified error rate, to establish the prospective contractor's "technical ability to perform in a responsible manner." Therefore, we do not believe the above-discussed paragraph is sufficient to make the PPPD merely a guideline in the determination of a bidder's responsibility, as opposed to a specific and objective criterion which must be met.

In addition to the above, Informatics contends that the following statement contained in amendment 2 to the IFB shows that the

contracting officer retained discretion in determining a bidder's responsibility:

> Attention is directed to Page 74, Section C, "Contract Award or Awards," Page 75, Section D, "Criteria for Evaluating Price and Other Factors," and Pages 77–85, Section E, "Determination of a Prospective Contractor's Responsibility." A high level of confidence that the prospective contractor can achieve the program objectives *must be evident*. Responsiveness and responsibility of a prospective Contractor or Contractors *will be considered as set forth in the above Sections* in addition to the mathematical calculations. Therefore, the Government must necessarily exercise some discretion in the determination of responsibility *in accordance with the procedures stated above*. [Italic supplied.]

Informatics argues that the final sentence of the above paragraph clearly shows that the passage of the PPPD, within the acceptable error rate, was not a prerequisite to an affirmative determination of responsibility, but that the contracting officer had the discretion to find a bidder responsible notwithstanding a failure of the PPPD as long as the contracting officer was convinced of a particular firm's ability to perform.

We note that section "E," "Determination of a Prospective Contractor's Responsibility," in addition to describing the PPPD, also contained a list of other factors which would be considered in determining responsibility. These were the more classic types of responsibility criteria such as financial resources, satisfactory past performance, necessary experience, and satisfactory record of integrity. These are the types of criteria which involve the business judgment of the contracting officer, and under *Central Metal Products*, *supra*, our Office no longer reviews affirmative determinations based on these criteria.

We believe it is with respect to these types of responsibility factors where "the Government must necessarily exercise some discretion in the determination of responsibility." However, this discretion in no way detracts from the requirement that the PPPD must be accomplished as a measure of the prospective contractor's responsibility. Further, the underscored portions of the paragraph show that responsibility will be determined "as set forth in the above Sections" and "in accordance with the procedures stated above." These procedures included the PPPD and the error rate to be obtained. Accordingly, the paragraph in amendment 2 does not alter our position that the PPPD was a specific and objective responsibility criterion.

Accordingly, we find that accomplishment of the PPPD within the stated parameters did constitute a specific and objective responsibility criterion meeting the standards of the *Yardney* and *Data Test* cases.

We reach this decision taking into consideration the entire tone of the IFB which stressed the need of Commerce for a responsible contractor able to meet the rigid specifications for the timely and accurate production of tapes containing the approved patents. The concern of Commerce for satisfactory performance under the contract is exemplified by the fact that the IFB contemplated the possibility of two separate awards to different contractors for alternate week production to assure a responsible contractor would be available, if one contractor experienced difficulty in performance. This alternative method of award, when read in conjunction with the detailed statement of the PPPD, would or should have led resasonable prospective bidders to expect that compliance with the PPPD was a prerequisite to award.

Therefore, as we find that the PPPD is a specific and objective criterion in determining a bidder's responsibility , we will review the record to ascertain if the criterion was applied and met.

ICC's protest alleges that the PPPD was neither applied—because deviations were granted to Informatics during the conduct of the demonstration by the contracting officer—nor met because Informatics failed to perform the PPPD within the acceptable error rate. Because of our discussion below, we find it unnecessary to discuss the allegation that the contracting officer did not apply the PPPD.

With regard to whether the criterion was met by Informatics, the record before our Office, including the technical evaluation committee's report, shows that while Informatics' performance on the PPPD continued to improve from the initial submission through the two resubmissions, the firm never successfully accomplished the minimum error rate contained in the IFB.

The contracting officer argues that he and the technical evaluation committee were convinced by the efforts of Informatics under the PPPD that the firm possesses the technical capability to perform the contract notwithstanding the failure to pass the PPPD. In this regard, we observe again that the contracting officer determined Informatics to be a responsible prospective contractor. While demonstrating the requisite technical capability to perform would be a proper basis for an affirmative determination of responsibilty in the normal situation, this is not so here, where there has been no compliance with a specific and objective responsibility criterion stated in the IFB. Therefore, there was no reasonable basis for the contracting officer to find Informatics responsible. *See Data Test Corporation*, *supra* (1974).

In reaching the above conclusion, we recognize that the IFB did not explicitly provide that failure to pass the PPPD was fatal to any finding that Informatics was responsible. We believe this lack of explicitness, however, does not overcome the reasonable construction of the IFB provisions discussed above.

With this in mind, the affirmative determination of Informatics' responsibility by the contracting officer and the position of the procuring activity has the effect of waiving the requirement for passage of the PPPD, and convinces us that passage was an unnecessary requirement of the Government. We do not believe it is fair to have an IFB which, upon examination, at the very least, gives the impression that passage of the PPPD was a specific responsibility criterion if such result was not intended by the procuring activity. For the procuring activity to construe, after the bid opening, that the PPPD was not a specific responsibility criterion was prejudicial to any bidder who bid under the IFB as issued or to any prospective bidders who failed to bid because of doubts as to their ability to comply with the literal requirements of the PPPD.

Further, the Government is now presented with the situation of having a low bidder, which it deems capable of complying with the performance requirements of the solicitation, ineligible for award because the responsibility determination was not made in accordance with the IFB. Therefore, the Government is faced with the possibility of making an award to a bidder whose bid price is almost $8 million over the low bid of a bidder who has been determined to be responsible absent literal compliance with an unnecessary requirement. We believe such an award would be prejudicial to the Government from a cost standpoint.

Accordingly, we believe the IFB as drawn was unduly restrictive of competition and did not permit the full and free competition contemplated by the procurement statute, 41 U.S. Code § 253 (1970) and implementing regulations. Therefore, the IFB should be canceled and a resolicitation issued which accurately expresses the minimum needs of the Government. *Data Test Corporation*, *supra*, (1975). However, taking into consideration the urgent need for continuing services of a responsible contractor by the Patent and Trademark Office, our Office would have no objection to the Commerce Department entering into negotiations with ICC and Informatics and any other firm which can timely demonstrate the requisite technical capability.

Because of the above holding, there is no need to consider the other contentions advanced by ICC which allegedly preclude an award to Informatics.

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