Decisions of The Comptroller General of the United States

VOLUME 55 Pages 1337 to 1420

AUGUST 1976

UNITED STATES
GENERAL ACCOUNTING OFFICE

PCN 45300109300

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1976

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

COMPTROLLER GENERAL OF THE UNITED STATES

Elmer B. Staats

DEPUTY COMPTROLLER GENERAL OF THE UNITED STATES

Robert F. Keller

GENERAL COUNSEL

Paul G. Dembling

DEPUTY GENERAL COUNSEL

Milton J. Socolar

ASSOCIATE GENERAL COUNSELS

F. Henry Barclay, Jr.

John J. Higgins

Richard R. Pierson

Paul Shnitzer

TABLE OF DECISION NUMBERS

Cite Decisions as 55 Comp. Gen.—.

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

[B-58380]

Officers and Employees—Transfers—Relocation Expenses—Temporary Quarters—High Cost of Living Area

Civilian employee of U.S. Customs Service was transferred from San Diego, California, to downtown Los Angeles, California, a designated high rate geographical area, and he occupied temporary quarters in Los Angeles. He is entitled to reimbursement at the maximum statutory per diem rate of $35 as prescribed by paragraph 2-5.4c of the Federal Travel Regulations and section 5702(a) of Title 5, U.S. Code. He is not entitled to the daily rate of $37 designated for temporary duty travel in Los Angeles, and the $33 per diem rate established by regulation is not applicable.

In the matter of William E. Addis—temporary quarters allowance, August 3, 1976:

This action is in response to a request dated January 30, 1976, from Mr. Peter F. Gonzalez, Director, Financial Management Division, United States Customs Service, for our advance decision concerning payment of a voucher submitted by Mr. William E. Addis, Jr., Operations Officer, U.S. Customs Service, in which Mr. Addis is claiming a temporary quarters allowance for the period December 14, 1975, through January 12, 1976.

The record discloses that Mr. Addis was transferred from the U.S. Customs District Office in San Diego, California, to the Regional Office of the Customs Service located in downtown Los Angeles, California. The claimant was authorized travel and transportation and relocation allowances including temporary quarters as outlined in the Federal Travel Regulations (FTR) (FPMR 101-7) (May 1, 1973) as amended by Temporary Regulation A-11, effective May 19, 1975. In his letter Mr. Gonzalez points out that the FTR establishes a maximum per diem rate of $33 per day for travel performed within the conterminous United States, except for designated high rate geographical areas where actual expense rates are authorized, whereas a statutory per diem rate of not to exceed $35 per day is established by 5 U.S. Code § 5702, as amended. However, Mr. Addis is making his claim for temporary quarters allowance at $37 a day, the rate established in the FTR for Los Angeles as a designated high rate geographical area.

The following questions are submitted:

1. Is the temporary quarters allowance to be based on the $33.00 or the $35.00 rate?
2. Is the $37.00 Los Angeles designated rate applicable in relocation allowances?

Paragraph 2-5.4c of the FTR provides for payment of a daily per diem rate at various percentage levels of the *maximum statutory per diem rate* for the locality in which the temporary quarters are located.

Section 5702(a) of Public Law 94–22, 89 Stat. 85, May 19, 1975, in revising Title 5, U.S. Code, provides, in pertinent part, that under regulations prescribed under section 5707 of Title 5, a Federal employee is entitled to a per diem allowance at a rate not to exceed $35 for travel inside the continental United States. Therefore, the current maximum statutory per diem rate is $35. Thus, even though paragraph 1–7.2a of the FTR provides that the per diem allowance for official travel within the conterminous United States shall not exceed a maximum daily rate of $33, the applicable rate for the temporary quarters allowance is the $35 maximum rate specified in the statute.

The prescribed maximum daily rate for temporary duty in Los Angeles, California, as a designated high rate geographical area is $37. Paragraph 1–8.1b of the proposed amendments to the FTR contained in the Federal Register, Volume 41, page 20713, May 20, 1976, provides as follows:

b. *Temporary duty within high rate geographical areas.* Actual subsistence expense reimbursement shall be authorized or approved for travel whenever a temporary duty assignment is within a location designated as a high rate geographical area in 1–8.6, except as provided in (1) through (3), below.

Note: The provisions of 1–8.1b pertaining to reimbursement under the high rate geographical area concept are not applicable to travel allowances in connection with a permanent change of station, including travel to seek residence quarters, or to other relocation allowances authorized under chapter 2 of this regulation, including subsistence while occupying temporary quarters.

Thus, Mr. Addis is entitled to the maximum statutory per diem rate of $35 in accordance with paragraph 2–5.4c of the FTR and section 5702(a) of Title 5, United States Code. Since he was involved in a permanent change of station rather than in temporary duty travel, paragraph 1–8.1b of the FTR precludes reimbursement under the high rate geographical area concept at the $37 daily rate for Los Angeles, California.

Hence, the reply to question No. 1 is that the temporary quarters allowance to be paid Mr. Addis is to be based on the maximum statutory per diem rate of $35. The reply to Question No. 2 is in the negative. The voucher submitted by the claimant may be paid in accordance with the foregoing, if otherwise proper.

[B–184653]

Officers and Employees—Transfers—Relocation Expenses—Reemployment After Separation—Two Agencies Involved—Liability for Expenses

The relocation expenses prescribed under 5 U.S.C. 5724a(c) and 5724(e) may be paid by the gaining or losing agency to an employee separated by a reduction in force and reemployed within 1 year at another geographical location, as though the employee had been transferred in the interest of the Government

without a break in service. However, the losing and gaining agency must agree as to which will be responsible for such costs.

In the matter of Ms. Patricia C. Reed—relocation expenses incident to RIF reemployment by different agency at new location, August 3, 1976:

This action concerns a request by Mr. R. F. Wisniewski, the Manpower Administrator of the Selective Service System, as to the propriety of their determination to refuse to pay the relocation expenses of Mrs. Patricia C. Reed by a Reduction in Force action (RIF) where subsequent to her separation she was reemployed within 1 year by another government agency at a different locale.

The record shows that Mrs. Reed was hired by the Selective Service System to work in Oconto, Wisconsin, in May of 1968. In November of 1972, the Oconto office was co-located in Marinette, Wisconsin, approximately 13 miles distance. At that time she drove to Marinette to work until June of 1973, at which time her position was terminated due to a RIF by the Selective Service System. On February 25, 1974, Mrs. Reed obtained employment with the Naval Reserve Center in Green Bay, Wisconsin. By letter of March 3, 1975, she requested information from the Selective Service System whether they would reimburse her for moving expenses if she moved her family to Green Bay.

The Comptroller at the National Headquarters of the Selective Service System advised that it is the policy of the National Headquarters not to approve the payment of relocation expenses of a former employee separated by a RIF when hired by another agency and that no exception should be made in the case presented. Also, the denial of the request of Mrs. Reed was based upon the accepted interpretation of the Federal Travel Regulations (FPMR 101–7) para. 2–1.5d(2) (May 1973), which provides as follows:

(2) *Reemployment after separation.* A former employee separated by reason of reduction in force or transfer of function who within 1 year of the date of separation is reemployed by an agency for a nontemporary appointment effective on or after July 21, 1966, at a different permanent duty station from that where the separation occurred, may be allowed and paid the expenses and other allowances (excluding nontemporary storage when assigned to an isolated permanent duty station within the conterminous United States) in the same manner as though he had been transferred in the interest of the Government to the permanent duty station where re-employed, from the permanent duty station where separated, without a break in service, and subject to the eligibility limitations as prescribed in these regulations.

The National Headquarters of the Selective Service System also cites 53 Comp. Gen. 99 (1973) to support its interpretation of the Federal Personnel Management Regulations. That decision quoting from the syllabus provides that:

The phrase "in the same manner" contained in 5 U.S.C. § 5724a(c), which authorizes payment of travel, transportation, and relocation expenses to a former

employee separated by reduction in force or transfer of function and reemployed within 1 year, as though the employee had been transferred in the interest of the Government without a break in service to the reemployment location from the separation location, when construed in conjunction with 5 U.S.C. § 5724(e), which provides similar expenses for employees transferred from one agency to another because of reduction in force or transfer of function, permits payment of costs in whole or in part by the gaining or losing agency, as agreed upon by agency heads. Therefore, whether relocation benefits are prescribed under § 5724a(c) or § 5724(e), they may be paid by the gaining or losing agency within a 1-year period. 51 Comp. Gen. 14, 52 Comp. Gen. 345, and B-172594, June 8, 1972, overruled.

Section 5724a(c) of Title 5, U.S. Code, provides that a former employee separated by reason of reduction in force or transfer of function who is reemployed within 1 year to a non-temporary appointment at a different geographical location may be allowed travel, transportation and relocation benefits "in the same manner as though he had been transferred in the interest of the Government without a break in service to the location of reemployment from the location where separated." The Selective Service System has concluded that no allowance would be authorized by their agency. Section 5724(a) of Title 5 of the U.S. Code provides that the travel, transportation and relocation expenses of an employee who is transferred from one agency to another because of a reduction in force or transfer of function may be paid in whole or in part by the gaining or losing agency as the heads of the agencies decide. The language of section 5724(e), as well as the Federal Travel Regulations, is permissive and vests broad discretion to the individual agencies involved in determining whether or not a reimbursement of relocation expenses may be made to an employee who is separated by a RIF and reemployed within 1 year at another geographical location.

Mrs. Reed may wish to submit her claim to the Naval Reserve Center for its consideration pursuant to 5 U.S.C. § 5724(e), and § 5724a(c).

[B-186766]

Bids—Late—Telegraphic Modifications—Delay Due to Western Union—Unable to Deliver—Locked Building

Telegraphic bid modification, Government time-stamped as received day after bid opening due to inability of Western Union to timely deliver since building designated in invitation for bids (IFB) for receipt of bids was locked (during noon hour while employees attended retirement luncheon) was properly accepted even though clause in IFB implementing Armed Services Procurement Regulation 7-2002 appears to indicate opposite result since to do so would contravene intent and spirit of late bid regulations, which do not appear to have contemplated instant situation.

In the matter of I&E Construction Company, Inc., August 9, 1976:

This is a protest by I&E Construction Company Incorporated (I&E) against the proposed award of a contract to Conrad Weihnacht Construction, Inc. (Weihnacht), under invitation for bids (IFB)

No. DAHA09-76-B-0023, issued by the United States Property and Fiscal Office, Atlanta, Georgia, for repairs to apron concrete slab sections at the Savannah Municipal Airport, Savannah, Georgia. I&E contends that a telegraphic modification sent by Weihnacht which reduced its bid below that of the protester was improperly accepted by the contracting officer as a timely modification.

The IFB scheduled the bid opening for 2 p.m. on May 27, 1976. I&E was the low bidder of the seven bids received. The telegraphic modification, if proper for consideration, would make Weihnacht's bid the lowest.

The IFB included a clause entitled "Late Bids, Modifications of Bids or Withdrawal of Bids (1974 Sep)," which contained the following:

(a) Any bid received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and either:

* * * * * * *

(ii) it was sent by mail (or telegram if authorized) and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation.

(b) Any modification or withdrawal of bid is subject to the same conditions as in (a) above * * *

(c) The only acceptable evidence to establish:

* * * * * * *

(ii) the time of receipt at the Government installation is the time/date stamp of such installation on the bid wrapper or the documentary evidence of receipt maintained by the installation.

The modification was accepted by Western Union for transmission at approximately 10:11 a.m. on May 27, 1976, and was received by the Western Union office in Atlanta, Georgia, at 12:24 p.m. on the same day. The evidence indicates that Western Union tried to deliver the telegraphic modification at the building designated for receipt of bids in the IFB, but the building was locked due to a retirement luncheon for an employee of the installation. The circumstances surrounding the receipt of the telegraphic modification are explained by the Government in the following manner:

At approximately 7:30 AM on Friday, 28 May 1976, Western Union Form 66 * * * was found on a desk immediately inside the front entrance to this office. This form indicated that an attempt had been made to deliver a telegram at a previous time. Telephone contact was made with Western Union and the message was read and recorded at 8:13 AM, Friday, 28 May 1976. This message indicated a reduction in the original bid of the Conrad Weihnacht Company which, if allowed, would result in a new apparent low bidder. The telegram itself was received on Friday, 28 May 1976, at 11:00 AM. An inquiry was made in an effort to determine when and how the Western Union Form 66 was placed on the desk at the front entrance. It was determined that custodial personnel found the form beneath the left front door of the building while cleaning on the night of Thursday, 27 May 1976. The front entrance to the building has double doors with the left door remaining locked at all times except when necessary to move heavy equipment in or out of the building.

All personnel of this office attended a retirement luncheon for an employee during the noon hour on Thursday, 27 May 1976. The office was locked and secured during this time. Personnel returned to the office at 1:45 PM on Thursday, 27 May 1976, at which time the right front door was opened. It appears that the telegram from Conrad Weihnacht Company was brought to the office by the Western Union messenger during the lunch hour but could not be delivered and the notice was placed under the locked door.

By letter dated June 2, 1976, the customer service manager of Western Union in Atlanta, Georgia, states that a messenger tried to deliver the modification at "approximately between 1:30 PM and 1:45 PM" and found the building locked. There is no indication that the messenger was directed elsewhere to deliver the modification or that there was notification that the building would reopen at a later time. Further, it appears that the telegram remained in Western Union's custody until delivered to the agency.

I&E argues that the modification should not be accepted since it was not delivered prior to the time specified in the IFB as the time/date stamp shows delivery on May 28, 1976, this being the only acceptable evidence to show timely receipt. The protester further argues that this is not a case of mishandling by the Government after timely receipt at the Government installation.

Armed Services Procurement Regulation (ASPR) § 2-303.1 (1975 ed.) states:

Bids received in the office designated in the Invitation for Bids after the exact time set for opening are "late bids." A late bid * * * shall be considered only if the circumstances outlined in the provision in 7-2002.2 are applicable.

ASPR § 7-2002.2 (1975 ed.) prescribes the use of the clause cited above entitled "Late Bids, Modifications of Bids or Withdrawal of Bids (1974 Sep)."

In the past, our Office has construed ASPR § 7-2002.2 as authorizing the consideration of a late bid which arrived at a Government installation in sufficient time prior to bid opening to have been timely delivered to the place designated in the invitation. However, in the cases considered, bids did not reach the designated bid opening office until after bid opening due to mishandling on the part of the installation. See 46 Comp. Gen. 771 (1967); 43 *id.* 317 (1963); B-165474, January 8, 1969; B-163760, May 16, 1968; and B-148264, April 10, 1962. In these cases, the time/date stamp on each bid wrapper was used to establish timely receipt at the Government installation. In the instant situation, the time/date stamp indicates that the modification was received the day after bid opening. Since receipt did not occur until 11 a.m. on May 28, 1976, mishandling after receipt did not contribute to the lateness, and consideration of the modification under the cited regulation would not be appropriate.

We believe, however, that strict and literal application of the regulation should not be utilized to reject a bid where to do so would

contravene the intent and spirit of the late bid regulations. The regulations are intended to insure that late bids will not be considered if there exists any possibility that the late bidder would gain an unfair advantage over other bidders. In *Hydro Fitting Mfg. Corp.*, 54 Comp. Gen. 999 (1975), 75-1 CPD 331, which involved the failure of the Government installation to receive a telegram because of a malfunction in its telex equipment, we stated: "The purpose of the rules governing consideration of late bids is to insure for the Government the benefits of the maximum of legitimate competition, not to give one bidder a wholly unmerited advantage over another by over-technical application of the rules." In the *Hydro* case, *supra*, we concluded that a late telegraphic bid was for consideration, notwithstanding the lack of the requisite acceptable evidence of timely receipt, since the circumstances resulting in the failure of the Government installation to have actual control over the bid or evidence of timely receipt were not contemplated by ASPR § 7-2002.2, and because there was no basis for concluding that consideration of the bid would impugn the integrity of the competitive bid system. We believe that that rationale is applicable here since the closing of the building until just shortly before bid opening, preventing timely receipt, is a circumstance not contemplated by the regulation, and the telegraphic modification was in the custody of Western Union during the period from its transmission until received by the agency.

Based on the foregoing, the bid, as modified, of Weihnacht may be considered and the protest is denied.

[B-178342]

General Services Administration—Insurance on Overseas Automobiles—Regulations

General Services Administration (GSA) may provide by regulation for purchase of annual or trip insurance policies on Government vehicles regularly or intermittently driven into foreign countries where requirements of law that insurance be carried or legal procedures which may result in extreme difficulties to Government employees when involved in an accident require such purchase. To the extent inconsistent, 39 Comp. Gen. 145, 19 *id.* 798, and similar cases are overruled.

Travel Expenses—Miscellaneous—Insurance Premiums—Trip Insurance—Operating Vehicles in Foreign Countries

We are not required to object to reimbursement of Government employees for costs of "trip insurance" purchased while operating Government-owned or privately owned vehicles in foreign countries as "miscellaneous expense" covered by Federal Travel Regulations (FTR) (FPMR 101-7) para. 1-9.1d. However, we believe change in FTR specifically providing for such reimbursement would be desirable because present applicable FTR sections do not provide for payment for any kind of insurance on vehicles operated in foreign countries.

Insurance—Car Rentals—Vehicles Operated in Foreign Countries

We have no legal objection to deletion of restriction in FTR (FPMR 101–7) para. 1–3.2c against reimbursement of Government employees for purchase of additional insurance available on vehicles rented for use in foreign countries if GSA determines this is in best interests of Government. FTR are statutory regulations, and question of whether or not reimbursement for costs of additional insurance on rental vehicles should be permitted, is within discretion of agency authorized to promulgate the particular regulations involved.

Mileage—Travel by Privately Owned Automobile—Rates—Vehicles Operated in Foreign Countries

We have no legal objections, if GSA determines it is in best interests of Government, to amendment of FTR to provide higher mileage allowance rates for operation of privately owned vehicles by Government employees in foreign countries than for operation of such vehicles in United States, within overall statutory limit. FTR are statutory regulations, and such amendments are for determination by agency authorized to promulgate the travel regulations.

In the Matter of General Services Administration—Insurance policies on vehicles operated in foreign countries, August 11, 1976:

This decision is in response to a letter from the Administrator of General Services concerning the purchase of liability insurance for drivers of Government-owned vehicles which are occasionally or regularly used for travel into foreign countries, and the reimbursement by the Government of certain insurance costs incurred by Government employees who may be required or permitted to drive, on official business, Government-owned, rented, or privately owned vehicles, into foreign countries in the regular course of their employment.

The General Services Administration (GSA) states that with the increase in cooperation between the United States Government and the Governments of Canada and Mexico, in particular, more Government employees are required to drive vehicles in these foreign countries.

GSA points out that while driving motor vehicles in these foreign countries, Government employees may be subject to suit or otherwise be called upon to assume personal responsibility for damages or injury resulting from accidents. If there is an accident, the vehicle may be impounded and the driver detained until the question of the liability for the accident is resolved. GSA indicates, however, that the likelihood of the vehicle being impounded or the driver detained is lessened with proof of financial responsibility, which in most instances must be evidenced by possession of an insurance policy valid in, and recognized by, the foreign country.

GSA has asked a series of questions concerning the purchase of insurance on Government-owned, Government-rented, and privately owned vehicles driven in foreign countries, or the reimbursement of employees who purchase such insurance at their own expense, and has set forth the different problems related with each.

As to purchasing insurance on Government-owned vehicles, GSA requests that we reconsider 39 Comp. Gen. 145 (1959), wherein we stated in pertinent part:

> * * * Where the circumstances are such as we would require in the interests of the Government that insurance policies be procured it would appear that justification of such need should be presented to the Congress and authorizing legislation sought. 39 Comp. Gen. 145, 148.

GSA suggests that a change in the rule set forth in 39 Comp. Gen. 145 is desirable so that appropriated funds may properly and lawfully be expended to purchase annual or trip liability insurance policies for drivers of Government-owned vehicles which are occasionally or regularly used for travel into foreign countries, particularly Canada or Mexico.

It is a long-standing policy of the Government to self-insure its own risks of loss. As far back as February 9, 1892, the first Comptroller of the Treasury so advised the Department of State. This policy has been restated and followed in numerous decisions ever since that time. *See, e.g.*, 13 Comp. Dec. 779 (1907); 21 Comp. Gen. 928, 929 (1942); B–59941, October 8, 1946. In this connection, we have stated that:

> It is a settled policy of the United States to assume its own risks and the established rule is that, unless expressly provided by statute, funds for the support of Government activities are not considered applicable generally for the purchase of insurance to cover loss of or damage to Government property. * * * It is not sufficient that there is no law specifically providing that the United States shall not insure its property against loss, but rather that there is some law which specifically authorizes it. * * * The basic principle of fire, tornado, or other similar insurance is the lessening of the burden of individual losses by wider distribution thereof, and it is difficult to conceive of a person, corporation, or legal entity better prepared to carry insurance or sustain a loss than the United States Government. As to this policy of the Government to assume its own risks, no material distinction is apparent between assumption of risk of property damage and assumption of risk of tort liability. 19 Comp. Gen. 798, 800 (1940).

The Government's practice of self-insurance is derived from policy considerations, not positive law. This policy arose because it was felt that the magnitude of the Government's resources and the wide dispersion of the types and geographical location of the risks made a self-insurance policy generally more advantageous to the Government, in that it would save the items of cost and profit which private insurers have to include in their premiums. *See* B–175086, May 16, 1972; 19 Comp. Gen. 211, 214 (1939); 21 *id.* 928, 929 (1942).

When the economy sought to be obtained under this rule would be defeated, when sound business practice indicates that a saving can be effected, or when services or benefits not otherwise available can be obtained by purchasing insurance, exceptions to the general rule have been made. *See* B–151876, April 24, 1964. Most of these exceptions have been provided through congressional action. For example, the Department of State and the Department of Agriculture have been

granted statutory authority by Congress to purchase insurance covering the liability of employees for damage or injury caused while operating Government vehicles in foreign countries. See 22 U.S. Code § 2670(a) (1970) and 7 U.S.C. § 2262 (1970) respectively. In reporting out such legislation creating exceptions, the Congress specifically recognized the general rule as embodied in Comptroller General decisions. In S. Rep. No. 1175, 84th Cong., 1st Sess., the Committee on Foreign Relations reported, with respect to section 3(a) of S. 2569 which ultimately was enacted in amended form as section 3(a) of the Act of August 1, 1956, ch. 841, § 3, 70 Stat. 890, and eventually codified as 22 U.S.C. § 2670(a) (1970) that:

> Laws in some foreign countries require that insurance be carried on all motor vehicles being operated in those countries. The above provision is necessary as the *Comptroller General of the United States has consistently ruled* that funds of a Government agency may not be expended, in the absence of statutory authority to purchase insurance to cover the Government's possible tort liability (19 Comp. Gen. 798). [Italic supplied.]
>
> The above provision is necessary to save this Government from the embarrassment of being unable to comply with local regulations.

The Committee on Foreign Affairs of the House of Representatives in H.R. Rep. No. 2508, 84th Cong., 2d Sess., reported on section 3(a) as it appears in the Act as follows:

> Specific authority is required *under a ruling of the Comptroller General (19 Comp. Gen. 798)* which states that in the absence of statutory authority a Government agency may not use appropriated funds to cover a possible tort liability of the Government. [Italic supplied.]
>
> Under this provision the Secretary [of State] may obtain insurance not only in those countries where required by law of the country but also in those countries where the policy of the foreign office or regulation of local authority make it desirable in the interests of the United States to comply with such policy or regulation.

Moreover, 7 U.S.C. § 2262 (1970), enacted into law as the Act of August 4, 1965, Public Law 89–106, § 3, 79 Stat. 431, granted the entire Department of Agriculture the authority to purchase insurance on Government vehicles operated in foreign countries. This statute was enacted after our ruling in 39 Comp. Gen. 145 (1959) that pursuant to statute, liability insurance could be purchased by the Department of Agriculture only for vehicles of the Foreign Agriculture Service in foreign countries.

In reporting on section 3, the House of Representatives Committee on Agriculture stated in pertinent part:

> Such authority already exists regarding the Foreign Agricultural Service. The bill would extend the same authority to other agencies of the Department with employees overseas. The Department has more than 100 additional vehicles abroad, under programs administered by constituent agencies other than the FAS, most of which are trucks operating in Mexico in connection with research or control measures relating to plant pests. Other countries in which cars or trucks of this Department are located are Brazil, England, France, Italy, Iran, Kenya, Morocco, and the Netherlands.
>
> In many foreign countries situations exist which necessitate carrying insurance on federally owned vehicles. In some cases these result from requirements of

law of a country; in others, from legal procedures which result in extreme difficulty to drivers and passengers even when apparently free of actual responsibility in the circumstances of an accident. Since the provisions of the Federal Tort Claims Act are not applicable to claims arising in foreign countries (28 U.S.C. 2680(k)), employees would be forced to bear the full impact of judgment in accident cases arising out of the performance of official duties. [H. Report No. 206, 89th Cong., 1st Sess. 5 (1965).]

A similar statement was made by the Senate Committee on Agriculture and Forestry in S. Report No. 506, 89th Cong., 1st Sess. 6 (1965).

These reports demonstrate that on at least two occasions when the question was presented to it, the Congress has determined that there should be authority to purchase insurance on Government-owned vehicles operated in foreign countries in situations where requirements of law that insurance be carried or legal procedures which may result in extreme difficulty to Government employees when involved in an accident necessitate the purchase of such insurance. In light of the rule in 39 Comp. Gen. 145, however, it was necessary for the Congress to grant specific statutory authority for the purchase of liability insurance in those situations where it was determined to be necessary.

Although carrying liability insurance is not required on vehicles operated in Mexico, we understand that if there is an accident, the vehicle may be impounded and the driver detained until the question of the liability for the accident is resolved. This could have the effect, in the case of a Government employee, of delaying the employee's mission, causing embarrassment to the United States Government, and increasing the cost of the Government activity being carried out in the foreign country.

Under these circumstances, we are of the view that a change in our rule would be advisable so as to permit GSA to provide by regulation for the purchase of liability insurance on Government-owned vehicles operated in foreign countries in the limited circumstances noted above. To the extent that they are inconsistent with this decision, 39 Comp. Gen. 145 (1959), 19 Comp. Gen. 798 (1940), and similar decisions, are overruled.

GSA also questions whether it may reimburse Government employees who purchase "trip insurance" on Government-owned or privately owned vehicles operated in foreign countries. In its letter of June 16, 1975, GSA states:

* * * it has come to our attention that a common practice of drivers traveling on official business in both Government-owned and privately owned vehicles is to purchase, at relatively modest cost, "trip" insurance at the border to cover potential liability for property damage or personal injury or death to third parties during specific trips into Canada or Mexico. Upon return to their official stations, we believe the travelers could reasonably claim reimbursement for the trip insurance premium on the official travel voucher as a miscellaneous expense permitted by section 1-9.1(d) of the FTR.

* * * * * * *

We believe that "trip" insurance expense is properly considered another minor "Miscellaneous Expense" very similar to those expenses previously cited, and currently reimbursable. Accordingly, we request your approval of reimbursement of "trip" insurance as a miscellaneous expense of travel under section 1-9.1(d).

FTR para. 1-9.1d (May 1973) provides:

d. *Other expenses.* Miscellaneous expenditures not enumerated herein, when necessarily incurred by the traveler in connection with the transaction of official business, shall be allowed when approved.

In light of the discussion above, we are of the view that purchase by a Government employee of "trip insurance" is arguably "* * * necessarily incurred by the traveler in connection with the transaction of official business * * *" in those countries where carrying liability insurance is a legal or practical necessity for use of that country's roads.

Nevertheless, we wish to point out that payments for additional expenditures connected with travel outside the conterminous United States are specifically provided for in FTR para. 1-9.1c (May 1973), which provides:

c. *Fees relating to travel outside the conterminous United States.* The following items of expense may be authorized or approved:

(1) *Conversion of currency.* Commissions for conversion of currency in foreign countries. (See 1-11.5e.)

(2) *Check cashing costs.* Charges covering exchange fees for cashing United States Government checks or drafts issued for the reimbursement of expenses incurred for travel in foreign countries. (See 1-11.5e(1).) Exchange fees incurred in cashing checks or drafts issued in payment of salary shall not be allowed in travel expense accounts.

(3) *Travelers checks.* Costs of travelers checks purchased in connection with travel outside the limits of the conterminous United States. The amount of the checks may not exceed the amount reasonably needed to cover the reimbursable expenses incurred.

(4) *Travel document costs.* Fees in connection with the issuance of passports, visa fees, costs of photographs for passports and visas, costs of certificates of birth, health, and identity, and of affidavits and charges for inoculation which cannot be obtained through a Federal dispensary.

No payment for insurance costs is listed therein.

Moreover, FTR para. 1-4.1c (May 1973) seems to provide for the reimbursement of additional expenses, such as parking fees, ferry fares, and so on, specifically connected with the operation of a motor vehicle by a Government employee. Again, no provision for the payment of insurance costs is included.

Under the circumstances, we are of the view that a change in the regulations specifically providing for reimbursement for the cost of "trip insurance" purchased on Government-owned or privately-owned vehicles for trips into Mexico or other countries where legal requirements or procedures necessitate carrying liability insurance, would be preferable to attempting to pay such costs under FTR para. 1-9.1d (May 1973) as presently written. The amended regulations should provide that reimbursement will only be made for the cost of the minimum

amount of insurance that is required for the use of a foreign country's roads.

As to the purchase of insurance on vehicles rented from commercial sources for Government use, the Federal Travel Regulations (FPMR 101–7) para. 1–3.2c (May 1973) provide:

> c. *Damage waiver or insurance costs.* In connection with the rental of vehicles from commercial sources, the Government will not pay or reimburse employees for the cost of the collision damage waiver or collision damage insurance available in commercial rental contracts for an extra fee. The waiver or insurance referred to is the type offered a renter to release him from liability for damage to the rented vehicle in amounts up to the amount deductible (usually $100) on the insurance included as a part of the rental contract without additional charge. Under decisions of the Comptroller General, the agency in appropriate circumstances is authorized to pay for damage to the rented vehicle up to the deductible amount as contained in the rental contract should the rented vehicle be damaged while being used for official business. The cost of personal accident insurance is a personal expense and is not reimbursable.

GSA requests our views on the issue of whether it may properly delete the restriction in section 1–3.2c against reimbursement of employees of the cost of a collision damage waiver or collision damage insurance available in commercial rental contracts for an extra fee, in connection with the rental of vehicles from commercial sources for use on official trips into foreign countries.

The Federal Travel Regulations are statutory regulations issued by the GSA pursuant to Exec. Order No. 11,609, 36 Fed. Reg. 13747, July 24, 1971, as amended, 3 C.F.R. § 308 (1974). Our decisions involving insurance on rented vehicles have, therefore, revolved around the issue of whether the travel regulations in effect at the time of the rental precluded the purchase of such insurance. In 47 Comp. Gen. 145 (1967) we permitted reimbursement to a Government employee of the $100 deductible amount he was forced to pay after he was involved with a collision in a rental car. We held in that case that in the absence of any administrative instructions requiring the purchase of additional insurance, the employee did not fail to use reasonable discretion because he did not appy for the collision damage waiver. We recognized by implication in that decision that additional insurance could have been purchased.

In B–172721, March 13, 1972, we decided that the Government could not pay for a collision damage waiver, but based our decision on the applicable regulations then in force which precluded such payment. However, in B–172721, July 19, 1971, involving the purchase of additional insurance on a rental car rented prior to the effective date of regulations proscribing reimbursement for such insurance, we permitted reimbursement. *See also* 35 Comp. Gen. 553 (1956); B–180933, October 2, 1974; and B–181193, June 25, 1974.

We have recognized that the decision of whether or not insurance may be purchased on rental automobiles is a matter of economy, and

we have had no objections to changes in the Joint Travel Regulations based on the determination of whether it was more advantageous for the Government to assume the risk of loss covered by a collision damage waiver or to reimburse Federal personnel for the cost of such waiver. B–162186, January 7, 1970.

It would appear, therefore, that GSA has authority to promulgate regulations concerning the purchase of insurance on rental vehicles. Under these circumstances, we perceive no legal objection to the deletion of the restriction in section 1–3.2c of the FTR against reimbursement of employees of the cost of a collision damage waiver or collision damage insurance in connection with the rental of vehicles for use in foreign countries, if the GSA determines, within its delegated authority to prescribe such regulations, that such deletion would be in the best interests of the Government.

GSA next asks whether it may properly amend the FTR to provide for mileage allowances differing from those prescribed for the continental United States, but within the statutory maximum, for Government employees using privately owned vehicles for official business in foreign countries.

In this connection, GSA states in its letter of June 16, 1975, that:

> Travel reimbursed on a mileage basis is a commutation of actual expenses. We recognize that when mileage is paid, Government liability to the traveler begins and ends with the payment and while an employee may profit if travel costs him less, the risk also is his that it may cost him more (21 Comp. Gen. 507); and that the private automobile is maintained not merely at the owner's expense, but in such condition, safe or otherwise, and with such insurance, as he may decide upon. However, the present mileage allowance rates are based on GSA studies of insurance and other costs incurred for travel inside the continental United States, and subject to a statutory maximum. The studies do not embrace added insurance expense for travel in foreign countries.
>
> In an effort to remedy the situation of employee reluctance to utilize their privately owned automobiles, GSA is studying the possibility of prescribing different mileage allowances (subject, of course, to the statutory maximum) for reimbursement of travel in foreign countries than are applicable in the continental United States. These mileage allowances might be based upon operating costs, including insurance costs, that are incurred by drivers using privately owned vehicles in foreign countries.

As stated above, the Federal Travel Regulations are promulgated by the GSA pursuant to statutory authority delegated to it. Within this authority, it appears that GSA has prescribed various mileage allowances based on differing circumstances. It further appears that mileage allowance rates take into account the insurance and other costs incurred for travel inside the continental United States. Thus we perceive no legal objection to GSA fixing different mileage allowance rates for operation of privately owned motor vehicles in foreign countries when its studies of cost indicate that such costs differ from those incurred in operation of a privately owned vehicle in the continental United States.

[B-185405]

Contracts—Awards—Small Business Concerns—Set-Asides—Sole Bid Submitted by Big Business

Award may not be made under Navy total small business set-aside to firm found to be other than small business concern by Small Business Administration (SBA), even though firm's bid was the only one received. Retrospective determination by Navy that there was not sufficient competition to justify set-aside and suggestion that invitation for bids (IFB) size classification may be erroneous do not allow direct award to sole bidder. Requirement must be resolicited so that all potential bidders, including other large business firms, may have opportunity to compete.

Appropriations—Fiscal Year—Availability Beyond—Contracts—Replacement Contract

Fiscal year funds to be used for June 30, 1975, award under small business set-aside, conditioned on SBA determination that awardee is small business concern, can be used in subsequent fiscal year to fund replacement contract where award is withdrawn because of negative SBA size determination since conditional contract (1) was binding agreement obligating 1975 funds; (2) was sufficiently definite; (3) represented *bona fide* 1975 need; and (4) replacement contract to be awarded after resolicitation will cover same continuing need encompassed by conditional contract. 24 Comp. Gen. 555, overruled.

In the matter of Lawrence W. Rosine Company, August 13, 1976:

BACKGROUND

On June 10, 1975, invitation for bids (IFB) N62474-75-C-7024 was issued as a total small business set-aside by the Naval Facilities Engineering Command, Camp Pendleton, California, for floor repair in a family housing project. Only one bid, from the Lawrence W. Rosine Co. (Rosine), was received by the time set for bid opening on June 26, 1975. Rosine certified itself to be a small business.

The National Flooring Company (National), which could not submit a timely bid due to unexpected traffic conditions, protested to the Navy that Rosine exceeds the IFB size standard of a maximum $1,000,000 in average annual receipts for the preceding 3 years. On June 27, 1975, pursuant to Armed Services Procurement Regulation (ASPR) § 1-703(b)(1)(a) (1974 ed.), the Navy referred the size protest to the Small Business Administration (SBA) for its determination. Since the SBA could not determine Rosine's size status before June 30, 1975, when the funds available for the contract would expire, an "award" was made to Rosine on June 30, 1975, containing the following condition:

> The award is conditional upon a determination from the Small Business Administration on the small business size status of your firm. If their determination is that your firm is other than small business, this award will be null and void. * * *

Rosine consented to the conditional award.

The SBA found Rosine not to be a small business concern on July 15, 1975. The SBA Size Appeals Board denied Rosine's appeal on

September 29, 1975. On October 29, 1975, the Navy issued a modification to the contract stating:

> Condition for award for subject project not having been met in accordance with Notice of Award letter of 30 June 1975, the conditional award of subject project is not effective.

The Navy has asked us (1) whether the award to Rosine can be reinstated since Rosine was the only bidder, or, in the alternative, (2) whether the floor repair requirement could be resolicited using the funds set aside for the Rosine contract.

(1) AWARD TO ROSINE

The Rosine contract cannot be reinstated since it was ineligible under the IFB. Although it asserts that no bidder would be prejudiced by such reinstatement, the Navy has not suggested that no other large business firms would have competed had the procurement not been restricted.

The Navy has asserted that the decision to set-aside the procurement for small business was, in retrospect, erroneous because a sufficient number of bids was not received. See ASPR § 1–706.5(a)(1) (1974 ed.). The Navy has also suggested that the size classification standard of $1,000,000 was not appropriate for this procurement.

An award to Rosine would constitute a withdrawal of the small business set-aside under ASPR § 1–706.3 (1975 ed.). The proper procedure, where a total set-aside is withdrawn, is to resolicit so that all eligible bidders may have an opportunity to compete. 46 Comp. Gen. 102 (1966); B–164523, August 28, 1968; *Society Brand, Inc., et al.*, 55 Comp. Gen. 475 (1975), 75–2 CPD 327; *Interad, Limited*, B–184808, November 19, 1975, 75–2 CPD 329.

Moreover, the Navy's contention that since National did not bid it is not an "interested party" entitled to protest Rosine's size is not relevant in the context of the present case, since the Navy referred the size question to the SBA which has specifically found that Rosine is other than a small business concern.

The Navy has also referred to a number of situations where invitation requirements were waived because only one bid was received. See, e.g., 34 Comp. Gen. 364 (1955), which states that delivery requirements may be waived if no bid received is responsive to them; 39 *id.* 796 (1960), which allowed defects in the bid bond of the only bid received to be waived; and 45 *id.* 59, 67 (1965), which allowed an amendment after bid opening to the IFB's change of utility rate provision, where only one bid was received, the contract could have been negotiated under the authority of 10 U.S. Code § 2304(a)(10) (1964), and the deviation from the advertised requirements was found to be

not the type as would affect the legality of the award. However, in each of the referenced cases, which should be limited to their special circumstances, all qualified bidders were eligible to compete in free and open competition for the IFB requirements. There was no free competition open to large business bidders in the present case.

In view of the foregoing, the Navy's first question is answered in the negative, and the requirement must be resolicited rather than awarded directly to Rosine.

(2) USE OF 1975 FISCAL YEAR FUNDS FOR REPLACEMENT CONTRACT

The funds to be used for the Rosine contract were made available through the Family Housing Management Account by the Military Construction and Reserve Forces Facilities Authorization Act, 1975, Public Law 93–552, 88 Stat. 1754, 1759 (Dec. 27, 1974), and the Military Construction Appropriation Act of 1975, Public Law 93–636, 88 Stat. 2179, 2181 (Jan. 3, 1975). The Navy has informed our Office that the money to be used from the account had been appropriated for operation and maintenance of family housing. The amounts available for operation and maintenance could not be obligated after the 1975 fiscal year. *See* 31 U.S.C. § 718 (1970).

Fiscal year funds may be validly obligated only if supported by proper documentary evidence such as a binding agreement. 31 U.S.C. § 200(a) (1970).

Where contract performance has extended beyond the period of availability for obligation of a fiscal year appropriation and the contract has to be terminated because of the contractor's default, we have consistently found that the funds obligated under the original contract are available for the purpose of engaging a replacement contract or to complete the unfinished work, provided that a *bona fide* need for the work, supplies or services existed at the time of the original contract's execution, and the need continues to exist up to the time of the execution of the replacement contract. *See* 2 Comp. Gen. 130 (1922); B–105555, September 26, 1951; 34 Comp. Gen. 239 (1954); 40 Comp. Gen. 590 (1961); B–160834, April 7, 1967. In addition, where contracts have been terminated for reasons other than contractor default, e.g., where contract awards were erroneously made, we have allowed the use of fiscal year funds after the expiration of the fiscal year to fund replacement contracts, if the foregoing conditions have been satisfied. *See* 17 Comp. Gen. 1098 (1938); 34 *id. supra;* B–152033, May 27, 1964; B–158261, March 9, 1966; B–157179, September 30, 1970; B–173244(2), August 10, 1972.

The contracting officer here was faced with a dilemma. The procurement, for the repair of family housing, had been set aside for small business. The only bid received was from a firm which had certified itself as small. The contracting officer has no authority to ignore such a certification. ASPR § 1-703(b) (1974 ed.). He may accept it, if it is not protested by someone else, or he or another party may refer it to the SBA for a size determination. A decision on a referral could not be made by SBA before the obligation period for the funds expired. Therefore, the contracting officer had either to make award to Rosine notwithstanding the protest (which he had a right to do under ASPR § 1-703(b)(5) (1974 ed.) if he determined that the situation was urgent) or lose the funds. In the latter case, it would mean that the work—to make living quarters habitable—could be performed only when and if fiscal year 1976 funds were made available for the project. Also, military families would be dislocated until the work was completed.

Because of his concern for getting the work completed and the size protest, the contracting officer decided to make an immediate award with the condition that the contract would be terminated at no cost if the SBA found Rosine other than small. This allowed the contracting officer to apply the post-award SBA determination to the instant contract without subjecting the Government to possible termination for convenience costs in the event Rosine was found to be other than small. Given the circumstances, the contracting officer's actions appear reasonable.

Even if a large business awardee's certification that it was a small business is in bad faith—and we do not decide that issue here—the Government has the option to cancel or terminate for the convenience of the Government or retain that firm's contract, whichever is appropriate under the circumstances. *See* 41 Comp. Gen. 47 (1961); 53 *id.* 434 (1970); *Bancroft Cap. Co., Inc., et al., 55 id.* 469 (1975), 75-2 CPD 321. This rule is applicable here even though the condition indicated the contract would be null and void if Rosine was found by SBA to be other than a small business, since the condition was for the benefit of the Government rather than Rosine. *See Stewart* v. *Griffith*, 217 U.S. 323 (1910); *Rogers* v. *Dorrance*, 117 A. 564 (Ct. App. Md. 1922); *Murray* v. *Edes Mfg. Co.*, 35 N.E. 2d 203 (Sup. Jud. Ct. Mass. 1941); *Gorman* v. *Gorman*, 128 N.Y.S. 2d 658 (App. Div. 1954); 5 *Williston on Contracts* § 746 (1961).

Therefore, we conclude that the award to Rosine, even with the condition, was sufficient evidence of a binding agreement sufficient to support the obligation of funds under 31 U.S.C. § 200(a) (1970). The record also demonstrates that (1) the initial agreement with Rosine was sufficiently definite to obligate 1975 funds; (2) the Rosine

contract represented a *bona fide* 1975 fiscal year need even though it was executed at the end of the fiscal year; and (3) any replacement contract awarded after resolicitation of the requirement will cover the same continuing need for floor repair, and will not represent a different requirement.

Consequently, the obligated 1975 funds may be used to fund a resolicited replacement contract encompassing the previously advertised flooring requirement. *See* B–152033, *supra;* B–173244(2), *supra.* 24 Comp. Gen. 555 (1945) overruled.

The Navy's second question is answered in the affirmative.

[B–184136]

General Accounting Office—Decisions—Advance—Other Than Heads of Departments, etc.

Questions as to legality of proposed expenditures submitted by an agency official other than the agency head may be decided and transmitted to the agency head as if questions had been submitted by him under 31 U.S.C. 74.

Transportation—Air Carriers—Foreign—American Carrier Availability—Authority to Use Foreign Aircraft—Foreign Currencies Not Accepted

Specific provisions in appropriation statutes that authorize use of foreign currencies for projects involving foreign travel are not viewed as having been impliedly modified by enactment of 49 U.S.C. 1517; hence, Government-sponsored travel that can be financed only with such foreign currencies may be made by noncertificated carrier when otherwise available American–flag carriers will not accept such currencies.

In the matter of the use of noncertificated air carriers for foreign travel when certificated American carriers will not accept foreign currencies made available by specific appropriation acts, August 17, 1976:

The Director, Foreign Currency Staff, Department of State, has requested a clarification of the conditions under which the General Accounting Office will regard as justified the use of foreign flag air carriers for Government-sponsored foreign travel that can be financed only through the use of excess foreign currencies standing to the credit of the United States Government and made available by specific foreign currency provisions in various appropriation acts. Although under 31 U.S. Code 74 and 82d the Comptroller General is required to render advance decisions only to disbursing officers, certifying officers, and to heads of departments and agencies, the Director's inquiry will be regarded as a request by the Secretary of State, and answered accordingly.

The Director indicates that certain programs and activities of the Government, most of which have involved and continue to require ex-

tensive use of commercial air transportation in foreign travel, have for a number of years been financed solely with excess foreign currencies that are not convertible to dollars. Use of these funds for the purposes involved has been specifically authorized in various appropriation acts.

Section 5 of the International Air Transportation Fair Competitive Practices Act of 1974, Public Law 93–623, 88 Stat. 2102, 2104, 49 U.S.C. 1517, requires that Government-financed foreign travel and transportation be performed by American-flag air carrier if available, and also requires that the Comptroller General disallow any expenditure to a noncertificated carrier in the absence of satisfactory proof of the necessity therefor. Regulations issued in implementation of the Act, 4 C.F.R. 52.2, require a certification as to the necessity for the use of noncertificated carriers.

The Director further indicates that American flag carriers have begun a practice of refusing foreign currencies for their services in certain instances. The reason for this apparently stems from unfavorable conditions for conversion and remittance. In many instances the excess foreign currencies are the only funds available for the programs involved; and unless some means can be found for their use for the foreign travel involved the United States Government activities and initiatives planned jointly between this and foreign governments may be forced into default, with consequent embarrassment to our Government and serious disruption of programs of vital public interest.

The Director lists in attachment E to his request a number of programs that would be adversely affected, and the appropriations involved. He correctly points out that these appropriations and the allocations involved do not permit the expenditure of dollars. See Hearings on U.S.-Owned Foreign Currencies Before a Subcommittee of the House Committee on Government Operations, 88th Congress, 1st Session (1964). Although it may be conceded that most of the various activities involved are of secondary importance to programs being carried out through dollar appropriations, and it may be that they are devised mainly to avail of the economic benefits of the excess foreign currency accumulations, there is no question that the programs and the extensive travel required in their execution have specific statutory authorization.

We find in Public Law 93–623 no express amendment of any of such statutory authorizations. The salient question presented, therefore, is whether the language employed in Public Law 93–623 must be accorded the legal effect of having modified or amended such provisions by necessary implication. It is well established that repeals and modifications of law by implication are not favored; on the contrary, there

is a well-recognized presumption against implied repeal or modification. See Sands, Sutherland Statutory Construction, section 23.10, Vol. 1A, pages 230–231, which states the principle as follows:

> The bent of the rules of interpretation and construction is to give harmonious operation and effect to all of the acts upon a subject, where such a construction is reasonably possible, even to the extent of superimposing a construction of consistency upon the apparent legislative intent to repeal, where two acts can, in fact, stand together and both be given consonant operation. Where the repealing effect of a statute is doubtful, the statute is strictly construed to effect its *consistent* operation with previous legislation.

The legislature is presumed to intend to achieve a consistent body of law. *Ibid*, Section 23.09, Vol. 1A, p. 223. Therefore, statutes *in pari materia*, although in apparent conflict, are so far as reasonably possible construed to be in harmony with each other. *Ibid*, Section 51.02, Vol. 2A, p. 290.

Aside from the absence of modifying language in section 5 we find nothing in the legislative history that requires the conclusion that the Congress intended a modification of the authorizations for foreign-currency financed operations in circumstances where the American Flag carriers render themselves unavailable by their own nonacceptance of such currencies. On the contrary, Senate report 93–1257, in explaining section 5 of S–3481, 93rd Congress, 2d Session, the language of which subsequently was enacted as section 5 of Public Law 93–623, indicates at page 9:

> We do not suggest, of course, that U.S. business traffic ought to be reserved exclusively for U.S. flag airlines. But it certainly is in order to require that all government-financed transportation is accomplished on U.S. flag airlines wherever and whenever *possible*. [Italic supplied.]

We therefore conclude that in instances where American flag carriers render themselves unavailable to perform transportation service that can be financed only with excess foreign currencies, by declining to accept payment in such currencies, we are not required to object to the carrying out of the Congressionally-authorized programs when required transportation service is performed by noncertificated carrier. The certification required under 4 C.F.R. 52.2 must, in each such instance, indicate that the service can be financed only by excess foreign currencies and that otherwise available American flag carriers declined to accept payment in such currencies. Such certification, so indicating, will be accepted as satisfactory proof of the necessity for the use of the noncertificated carrier.

This decision should not be viewed as inconsistent with the tenor of paragraph 3(b) of guidelines implementing Section 5, reissued at 41 Fed. Reg. 14946.

We would see no objection to the issuance of a foreign service bulletin to reflect the conclusion stated in this decision.

222-132 O - 76 - 4

[B-184823, B-184818]

Taxes—State—Government Immunity—Gasoline for Government Vehicles

Except for company owned stations, Government's liability for State taxes on gasoline is generally dependent upon whether incidents thereof, by State law, is on service station or on Government as purchaser of gasoline from service station. Although through use of its credit cards Government pays national oil companies for gasoline purchased from independent service stations, oil companies are not vendors but merely participants in credit arrangements.

Taxes—State—Gasoline—California

California service stations are charged with collecting State sales tax from consumers "insofar as it can be done." Incidence of this tax is on the vendee (purchaser), *Diamond National Corp. v. State Board of Equalization*, 44 U.S.L.W. 3591 (U.S. April 20, 1976), and United States is constitutionally immune from payment thereof. To claim its constitutional immunity from California sales taxes on purchase of gasoline, Government must comply with reasonable State requirements.

Taxes—State—Gasoline—Pennsylvania

Pennsylvania's fuel use tax is imposed on dealer-users of fuel; dealer-user is defined to include retailer who delivers fuel into fuel tanks of motor vehicles. Since incidence of tax is on vendor of the fuel, not the vendee, United States is not constitutionally immune from economic burden of this tax on gasoline sales from service stations. However, Pennsylvania statute exempts from payment of tax any fuel used by or sold and delivered to the United States when such sales and deliveries are supported by documentary evidence satisfactory to State that vendee is the United States.

Taxes—State—Gasoline—New Mexico

New Mexico special fuel use tax, applicable to sale of diesel-engine fuel used to propel motor vehicle on highways, attaches at time of delivery of fuel and "shall be collected" by dealer from purchaser of the fuel. Hence, incidence of this tax is on purchaser of the fuel and United States in purchasing diesel-engine fuel is constitutionally immune from payment thereof.

Taxes—State—Gasoline—Hawaii

Hawaii's fuel tax is imposed as a license tax on distributors of motor fuel based on total gallons sold. Incidence of tax is on distributor, not ultimate purchaser of the fuel. Hence, United States is not constitutionally immune from economic burden of this tax. Further, Hawaii's exemption from tax on sales to United States applies only to purchases from distributor and does not affect purchases from independent service stations.

In the matter of State sales taxes—gasoline purchases, August 17, 1976:

We have received several requests for decision concerning the legality of the Federal Government's payment to the national oil companies for the amount of State taxes imposed by certain States on purchases of gasoline. The purchases were made at service stations by employees of the United States on official business, using United States Government National Credit Cards issued by the oil companies. The taxes involved included the California sales tax, the Hawaii motor fuel tax, the New Mexico tax on diesel-engine fuel and

the Pennsylvania fuel use tax. We have consolidated these requests into one decision.

The general rule is that if the incidence of a tax, by State law, is placed on the vendee (ultimate purchaser), then the United States as the vendee is constitutionally immune from payment of the tax. On the other hand, if the incidence of the tax is on the vendor, the United States would not be constitutionally immune from payment thereof; it would be required to bear the economic burden of the tax unless the State statutorily exempted sales to the United States from the tax. *See Alabama* v. *King and Boozer*, 314 U.S. 1 (1941); 24 Comp. Gen. 150 (1944); 32 *id.* 577 (1953); 33 *id.* 453 (1954); and 41 *id.* 719 (1962).

In this regard it should be noted that when the incidence of a tax is on the vendee, the vendee is liable for and actually pays the tax; the seller acts as the State's agent for collection thereof. When the incidence of the tax falls on the seller (vendor), the seller actually pays the tax. However, as with other costs of doing business, the seller may then pass on the amount of the tax to the purchaser; the purchaser is not paying the tax, but merely reimbursing the seller for that cost. That the seller is permitted (or, in many cases, required) by State law to separately state the amount of the tax it must pay on the sale does not change the basic character of the transaction.

Unlike most States, California imposes both a motor vehicle fuel tax based on a charge per gallon sold and a sales tax on the gross amount of the retail sale; it is the latter tax which is of concern here.

The California sales tax is imposed pursuant to Division 2 of the Revenue and Taxation Code, Deering's California Code Annotated (1975). Section 6051 thereof imposes, with certain exceptions, a sales tax calculated as a percentage of the gross receipts from the sale of all tangible personal property sold at retail within the State. Tangible personal property is defined broadly enough to include gasoline. The retailer is charged by section 6052 with collecting the tax from the consumer "insofar as it can be done." Section 6381 specifically exempts from the computation of the amount of the sales tax the sale of any tangible personal property to the United States.

California courts have consistently held in the past that this tax is imposed on the vendor. However, in *Diamond National Corp.* v. *State Board of Equalization*, 44 U.S.L.W. 3591 (U.S. April 20, 1976), the Supreme Court determined that the incidence of a sales tax on bank supplies and equipment fell on the petitioning national bank as purchaser and not upon the vendor. The test, the court said, is whether the vendor is required by State law to collect the tax from the consumer. Applying this test, since the vendor of gasoline must collect

the tax from the consumer at the time of purchase, the previous California decisions on the incidence of sales taxes on tangible personal property may be considered to be overruled. Further, in *United States* v. *State Board of Equalization*, Civil No. 74–3360, (May 7, 1976), the Ninth Circuit Court of Appeals affirmed a district court decision holding that the application of the California sales tax with respect to leases of tangible personal property to the United States in California is unconstitutional. Accordingly, it is clear that the incidence of this tax with respect to the sale of gasoline and other tangible personal property to the United States is on the vendee and that the United States is constitutionally exempt from payment thereof.

To claim its constitutional immunity, the Government must comply with reasonable State requirements that it identify itself as the purchaser. In California, the State Board of Equalization required that except for purchases from company owned stations, the exemption be claimed at the time the fuel is purchased. The operator of the Government vehicle is required to request the service station attendant to fill out a special form prescribed by the Board; the Board refuses to accept the official United States tax exemption certificates in these circumstances. When the employee using the credit card failed to request the exemption or the service station attendant refused to fill out the form, the Government lost its exemption as neither it nor the national oil companies which issued the credit cards have standing under California law to obtain a refund of the tax. (The tax exemption on sales by company owned service stations can effectively be claimed at the time the company pays its otherwise duly owed sales taxes.)

It appears from the information with which we have been provided that in practice the Board's requirements result in the Government's having to pay this tax in a very substantial portion of its gasoline purchases. For example, we have been advised that attendants at service stations are frequently reluctant, and often refuse, to fill out the necessary California form. Thus, the operation of the Board's requirements have effectively prevented the United States from asserting its constitutional immunity from the tax.

Service stations selling gasoline to the United States are paying the taxes on those transactions for which the forms have not been completed. The national oil companies, through their financial arrangements with the independent service stations which market their products, have reimbursed the service stations therefor. Unless the Government pays the amounts of the taxes so paid, the oil companies receive the economic burden of the taxes. This violates the credit card agreements the United States has with these companies.

To avoid this result, we will not object *at this time* to the payment to the national oil companies of amounts designated (or calculated to be) the amount of California sales taxes imposed on the transaction and paid or owed by the oil companies to the independent service stations, since the Defense Supply Agency has advised us that it is exploring potential avenues that would lead to assuring that the Government's purchases of gasoline will be appropriately exempted from the California sales tax. However, if California persists in denying the Government a reasonable means to assert its constitutional immunity from this tax, the matter should be raised by the Defense Supply Agency and other affected agencies with the Department of Justice.

Of course, in some instances the national oil company owns the service stations which sell the gas placed in Government vehicles. In those instances the company is vendor of the gasoline and not merely the issuer of the credit card and a party to a financial arrangement. Since the company in those cases has the clear right under California law to obtain a tax refund from the State, the amount of sales tax incurred in these transactions may not be paid to the national oil companies.

In addition to the California tax, we have been asked about three other States—Pennsylvania, Hawaii and New Mexico. Our views on these States follow.

Pennsylvania's "Fuel Use Tax," 72 P.S. §§ 2614 *et seq.*, imposes a permanent excise tax of $0.08 per gallon "on all dealer-users upon the use of fuel" within Pennsylvania. 72 P.S. § 2614.4 (Supp. 1975–1976). The tax is applicable to all combustible gases or liquids used, among other purposes, to propel vehicles of any kind or character on the public highways. "Dealer-user" is partially defined in terms of one who delivers fuel into the fuel tanks of motor vehicles. The tax is therefore on the vendor, and the United States would not be constitutionally exempt from liability for its payment. However, 72 P.S. § 2614.4 (Supp. 1975–1976) also provides that "No tax is hereby imposed upon * * * any fuel that is used by or sold and delivered to the United States Government, when such sales and deliveries are supported by documentary evidence satisfactory to the department." Thus, although the United States is not constitutionally immune from this tax since it is merely reimbursing the dealer-user for his cost of doing business, steps should be taken by purchasing agencies to assert its State exemption from the tax.

New Mexico Stat. Ann. ch. 64–26–67 (Supp. 1973) includes "diesel-engine fuel" in the definition of "special fuel," and ch. 64–26–68 imposes a "special fuel use tax" of $0.07 per gallon "on the use of special fuel in any motor vehicle as a toll for the use of the highways." The

tax attaches at the time of delivery and "shall be collected" by the dealer from the purchaser or recipient of the special fuel. The tax is paid by the "user" (ch. 64–26–72), defined in ch. 64–26–67 (Supp. 1973) as "any person who used special fuel to propel a motor vehicle on the highways." It is clear that the incidence of the New Mexico diesel engine fuel tax is on the user/vendee who is obligated to pay the tax to the dealer. Therefore, the United States, as vendee, is constitutionally immune from the payment of such tax.

Hawaii imposes a fuel tax in the form of a license tax on distributors of motor fuel based on the total number of gallons of fuel sold. Hawaii Rev. Stat. § 243–4 (Supp. 1974). Since the tax is levied against the distributor rather than the vendee, the United States is not constitutionally immune from the tax. However an exemption located at Hawaii Rev. Stat. § 243–7, provides:

> This chapter requiring the payment of license fees shall not be held or construed to apply to fuel * * * sold to the government of the United States or any department thereof for official use of the government * * *.

However, the concern here is not with purchases from distributors (such as the national oil companies), but rather from independent service stations, termed "retail dealers" and defined and treated separately from distributors under Hawaii tax law. See Hawaii Rev. Stat. § 243–1. Because Hawaii tax law considers distributors and dealers as different entities and because the license tax and its exemption deal only with sales by distributors, the exemption only applies to sales directly to the United States by licensed distributors. That credit arrangements are handled through the national oil companies does not change the fact that the purchases—except when the service stations are owned by the distributors—are actually from the independent retail service stations. Hence, purchases from independent retail dealers, even though at prices inclusive of the tax on distributors, must be considered as being distinct from purchases directly from distributors. Accordingly, the statutory exemption afforded by Hawaii does not apply where the purchase is from other than a distributor. Therefore, purchases of gasoline will be inclusive of the amount of the tax.

[B–186276]

Contracts—Negotiation—Minimum Needs—Selection Process—Not Prejudicial

After side-by-side testing, technical and cost evaluation, and discussions with two sources in preprocurement context, Army selected foreign MAG58 machine gun instead of American-made M60E2. Although protester now complains that selection process was procurement and Army did not comply with applicable laws and regulations, protester entered into process with "eyes wide open" and was not prejudiced. Army's selection process was necessary to determine minimum

machine gun needs, since there was insufficient data for Army to make such determination prior to completion of process.

Contracts—Negotiation—Minimum Needs Requirement—Preprocurement Tests

Agency may legitimately conduct preprocurement tests and discussions with potential suppliers as well as consider cost when formulating minimum needs.

Contracts—Negotiation—Determination and Findings—Not Required—Process to Determine Minimum Needs

Since Army machine gun selection program was not procurement but rather process to determine minimum needs, no written Determinations and Findings (D&F) had to be prepared prior to selection of foreign machine gun as minimum need. In any case, agency's failure to prepare D&F prior to conducting negotiations preparatory to executing sole-source contract is deviation of form rather than substance.

Contracts—Specifications—Minimum Needs Requirement—Factors Other Than Price

Although specifications based on superior characteristics in excess to Government's minimum needs are generally considered overly restrictive, Army, acting within broad discretion, could legitimately specify machine gun, as critical human survival item, to be as reliable and effective as possible. In reasonably determining that MAG58 instead of M60E2 reflected minimum machine gun need primarily because of superior reliability, Army considered MAG58's higher cost, possible lower cost effectiveness, and deficiencies (e.g., broken rivet and cracked receiver problems) and M60E2's strong points (e.g., commonality with other weapons), as well as suggested repair policy which may have significantly improved M60E2's reliability.

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

If agency, in determining minimum needs, does not treat potential suppliers fairly or inform them as fully as possible of what is needed, it may reflect on reasonableness of minimum needs determination. Army machine gun selection process, by which MAG58 was found to be minimum need, was fair and although Army did not specifically set forth bases on which weapons would be evaluated prior to side-by-side tests, all parties realized weapon operational reliability was paramount performance characteristic, and that cost was secondary in importance.

Contracts—Negotiation—Off-The-Shelf Programs

Replacement of "off the shelf" coaxial machine gun program involving limited testing and evaluation does not fall under Department of Defense (DOD) Design to Cost Policy Directive 5000.28. In any case, Directive is matter of DOD policy, and does not establish legal rights and responsibilities.

Buy American Act—Applicability—Use Outside United States

Buy American Act, 41 U.S.C. 10a-d, is not applicable to proposed MAG58 machine gun purchase from foreign firm because Army has sufficient sole-source award justification and can therefore validly determine that MAG58's are not manufactured in United States "in sufficient and reasonably available commercial quantities and of a satisfactory quality." Also, Army discretionary determination that Act's application would not be in public interest cannot be questioned. In addition, Act does not apply to initial quantity of weapons to be purchased for foreign deployment and domestic training for foreign deployment.

Funds—Balance of Payments Program—Applicability

Since MAG58 machine gun manufactured by foreign firm represents the Government's minimum needs, and extended period is needed to develop domestic sup-

plier of MAG58, Army determination that Balance of Payments program (Armed Services Procurement Regulation 6-800-6-807) is not applicable to MAG58's procurement is valid.

Contracts—Specifications—Tests—First Article—Administrative Determinations

Foreign firm manufacturing MAG58 machine guns agreed to ASPR 7-104.93, which generally requires use of American-melted specialty metals. Metallurgical differences between American-melted (if used) and foreign specialty metals now used in MAG58 possibly could have significant impact on performance. However, no significant doubt has been cast on reasonableness of MAG58's selection, since Army technical personnel have found requalification of MAG58, beyond ordinary first article testing, to be unnecessary, and while there may be different technical opinions, Army judgment on this highly technical question has not been shown to lack reasonable basis.

In the matter of the Maremont Corporation, August 20, 1976:

TABLE OF CONTENTS

I. BACKGROUND

By letter dated April 7, 1976, Maremont Corporation (Maremont) of Saco, Maine, protested the award of any contract by the Department of the Army to purchase MAG58 coaxial machine guns from Fabrique Nationale (FN) of Belgium. The Secretary of the Army had announced on March 29, 1976, that the FN-manufactured weapon, instead of the M60E2 machine gun manufactured by Maremont, would be selected to replace the M–219 coaxial machine gun for use on Army tanks and other armored vehicles.

Our Office monitored and conducted a review of the Army's machine gun replacement program at the request of Senator Edmund Muskie on behalf of the State of Maine congressional delegation. Our findings regarding the program were issued in a report entitled *Selection of a Machine Gun for Armored Vehicles*, PSAD 76–112, B–156500(5), March 23, 1976, prior to the announcement of the MAG58 selection.

In evaluating the merits of Maremont's protest, we have utilized the knowledge gained from our audit and technical review of the Army program. This review included monitoring the side-by-side tests between the MAG58 and M60E2 and examining the comparative cost studies performed by the Army.

The M–219 machine gun, which the Army itself manufactured, had been in use on tanks for 16 years, but had never been considered reliable. Therefore, in 1973 and 1974, the Army initiated plans to replace the M–219 with an "off the shelf" 7.62 millimeter (mm) coaxial machine gun. An "off the shelf" weapon was required because the Army needed a replacement machine gun as soon as possible, in view of the M–219's unreliability and the unacceptable time frame incident to the development of a new coaxial machine gun.

Comparative tests of United States and foreign "off the shelf" machine guns were conducted in late 1974 and early 1975. The American candidates in the testing were a modified version of the Maremont M60 machine gun currently in use by Army infantry, the M60(MOD) machine gun, and an improved version of the M–219. In the operational tests conducted (OT II), the M60(MOD) proved to be far superior to both the M–219 and the improved M–219. In addition, selective laboratory tests were conducted on five foreign-made machine guns. The results indicated that FN's MAG58 was far more reliable than the other foreign-made weapons tested.

In early 1975 further modifications were made to the M60(MOD) by Maremont in coordination with the Army, and the weapon was redesignated the M60E2 coaxial machine gun. After further study,

222-132 O - 76 - 5

two cognizant Army commands recommended purchase of the M60E2 to replace the M-219. However, in April 1975, after being informed of the MAG58's exceptional performance in the foreign weapon tests, Army Headquarters' officials decided to introduce the MAG58 as a contender to the M60E2. Therefore, side-by-side tests of the M60E2 and MAG58 were planned to compare the capabilities of the two weapons.

On August 19, 1975, a set of technical and performance characteristics (Required Operational Capability (ROC)) were developed. The planned MAG58-M60E2 side-by-side test results were to be judged against the ROC.

The comparative testing of the MAG58 and M60E2 consisted of an operational test (OT III) and a development test (DT III) conducted by independent Army activities. In view of the "off-the-shelf" requirement, the Army procured coaxial machine guns, which were essentially production line weapons, from FN and Maremont for the tests. The tests were designed to be comparable to the earlier M60 (MOD) OT II tests.

The OT III was essentially a field test designed to simulate the operational environment in which the weapon would be utilized. This test was performed with operational troops using their organic tank equipment. The OT III was intended to provide data concerning the relative operational effectiveness and military utility of the weapons. Weapon reliability was the primary concern of this test.

The primary statistical data to be obtained from the OT III were mean rounds between stoppages (MRBS) and mean rounds between failures (MRBF) based upon the firing of the first 50,000 rounds. (100,000 rounds were scheduled to be fired.) A stoppage includes actual unintentional cessations of firing as well as potential stoppages, e.g., potential weapon failures found during nonfiring activities. A failure is defined as a stoppage lasting more than 1 minute.

As a result of the OT III, the MAG58 proved to be about 3.5 times as reliable as the M60E2, as indicated by the following table:

	MRBS	MRBF
M60E2	846	1699
MAG58	2962	6442
ROC minimum	850	2675
ROC preferred	1750	5500

OT III data indicated other relative strengths and weaknesses in the two weapons. For example, the rivets located alongside the MAG58's receiver broke between 30,000 and 50,000 rounds. Also, the MAG58 receivers developed cracks between 66,000 and 75,000 rounds.

The DT III was an engineering test using standard test procedures and experienced test technicians. One primary purpose of the DT III in this case was diagnostic, e.g., to determine the causes of failures and stoppages. Factors such as endurance, reliability, accuracy, safety, barrel performance, rate of fire (ROF), effect of varying environmental conditions and other engineering subtests were also evaluated under laboratory test range conditions.

The DT III tests indicated that the MAG58 was about 2.5 times as reliable as the M60E2 for the first 50,000 rounds fired. Also, the MAG58 had a higher ROF (in excess of the ROC's stipulated ROF) and was more reliable during sand and dust, and corrosive tests. The M60E2 barrels were considered superior to the MAG58 barrels during high rates of sustained fire.

In addition to the foregoing, at the outset of the competitive test program, the Army began preparing a comparative cost study of the candidate machine guns. The life cycle costs of the two weapons [1] were eventually computed after the tests' completion, and are summarized as follows:

	M60E2	MAG58
Research and development (R&D)[2]	$ 242,200	$ 495,900
Investment	22,838,600	42,691,200
Operation and support (O&S)[3]	18,424,600	17,413,500
	41,505,400	60,600,600
Peacetime ammunition [4]	186,120,000	186,120,000
Wartime ammunition [5]	36,160,000	78,208,000
	$263,785,400	$324,928,600

As we stated in B–156500(5), *supra*, at 27:

> The primary discriminators among these costs are the manufacturing costs, the non-recurring investment costs to establish a mobilization base in the U.S., and the consumption costs of wartime ammunition. The MAG58 gun by itself would be 115 percent more costly than the M60E2—averaging $1,517 compared with $707. This translates into a $14.7 million investment differential. Part of the reason for Maremont's lower cost is probably due to the use of U.S. Government-owned equipment, whereas some of the higher MAG58 costs are probably due to an expensive machining process. The non-recurring costs for a mobilization base are about $4.0 million.

---

[1] This computation was based on the Army purchase of 18,191 weapons having a 15-year useful life. Also it was assumed that the Army would purchase 16,000 of the MAG58's from FN and produce the remaining 2,191 weapons in the United States to create a mobilization base, and that production of the M60E2 would be commenced immediately following the current M60 infantry machine gun production run.

[2] R&D costs are Army in-house costs including development engineering, production engineering planning, machine gun mount prototype, and system testing costs.

[3] O&S costs include the phasing out of the M–219's, which remain in the system for about 6 years. These costs were not reflected in the table on B–156500(5), *supra*, at 26.

[4] Assumes each gun fires 4,260 rounds a year for 15 years.

[5] Assumes a 180-day war at different consumption rates per gun alternative.

The Army also made a Cost Operational Effectiveness Analysis (COEA) of the two machine guns. The end results of the Army's analysis were:

The MAG58 had the highest relative cost efficiency if ammunition costs were included in the analysis.

The M60E2 had the highest cost efficiency if ammunition costs were not considered.

A number of other studies and recommendations were made by various Army officials and commands, which unanimously recommended the selection of the MAG58. On March 29, 1976, the Secretary announced the MAG58's selection, conditioned upon obtaining an acceptable licensing agreement from FN to allow for eventual domestic production.

Both prior and subsequent to the MAG58 selection, Army and FN officials had discussed certain aspects of any potential procurement of the MAG58, e.g., whether FN would accept the general requirement that United States-melted specialty metals be used and whether a licensing agreement for domestic manufacture of the MAG58 could be arranged.

On June 24, 1976, the Under Secretary of the Army concurred with the Determinations and Findings (D&F) of the Assistant Secretary of the Army (R&D) determining that the Buy American Act, 41 U.S. Code §§ 10a–d (1970), would not be applicable to this procurement. In this regard, it was found that approximately 9,600 machine guns were required on a priority basis for mounting on newly manufactured and reconditioned tanks to replace the unsatisfactory M–219 in combat forces. Further production of the M–219 was halted in May 1975 and the M–219 supply would be exhausted in December 1976. Also, it was estimated that approximately 34 months would be needed from the time a technical data package with production rights was obtained from FN before a domestic firm would be able to start delivering MAG58's.

Since the initial quantity of MAG58's to be acquired from FN were to be deployed on tanks in Europe, the Assistant Secretary also executed a D&F determining that the Department of Defense (DOD) Balance of Payments Program (Armed Services Procurement Regulation (ASPR) §§ 6–800 to 6–807 (1975 ed.)), was not applicable to the proposed procurement.

On June 24, 1976, a contracting officer executed a D&F justifying a sole-source negotiated contract with FN to purchase the MAG58 as the only firm capable of fulfilling the Army's needs in the time frame required.

On May 19, 1976, Maremont and members of the Maine congressional delegation had filed suit in the United States District Court for

the District of Columbia (*Maremont Corporation* v. *Rumsfeld*, Civil Action No. 76–0895) seeking to enjoin any award to FN pending our decision in this matter. On July 1, 1976, after oral argument, the United States District Court issued a preliminary injunction enjoining the Army from entering into any contract with FN for production and/or purchase of the MAG58 machine guns until 5 days after our Office issues a decision on the protest. A written memorandum order to this effect was issued by the court on July 2, 1976.

Maremont protested the Army's MAG58 selection to our Office on April 7, 1976. On April 12, 1976, the Army was notified by our Office that a protest had been filed, and that a documented report responsive to the protest would be required. We formally requested the Army's report by letter dated April 13, 1976. On April 21, 1976, Maremont supplied our Office with the details of its protest, which we furnished the Army. On May 17, 1976, Maremont submitted an additional basis for protest that an award to FN would violate the statutory American preference for domestically-melted specialty metals. After several inquiries by representatives of our Office into the status of the report, the Army submitted a report on the protest on June 30, 1976.

On July 16, 1976, Maremont responded to the Army's report on the protest as provided in section 20.3(d) of our Bid Protest Procedures (4 C.F.R. § 20.3(d) (1976)). At the request of Maremont, and pursuant to section 20.7 of our procedures (4 C.F.R. § 20.7 (1976)), a conference on the protest was held in our Office on July 20, 1976, which was attended by representatives of Maremont, FN, and the Army. After the conference, all parties were permitted to submit further comments on the protest, the last of which were received in our Office on July 29, 1976. As provided in section 20.8 of our procedures (4 C.F.R. § 20.8 (1976)), our Office has established a goal of 25 working days for issuing a decision after receipt of all information submitted by all parties.

Although it is the ordinary practice of our Office not to render a decision where the issues involved are likely to be disposed of in litigation before a court of competent jurisdiction, see, e.g., *Nartron Corporation*, 53 Comp. Gen. 730 (1974), 74–1 CPD 154, we will consider Maremont's protest since the court desires and expects our decision on the protest. *See* 4 C.F.R. § 20.10 (1976); *Data Test Corporation*, 54 Comp. Gen. 715 (1975), 75–1 CPD 138. We will also take into our consideration the arguments made by Maremont to the court.

Maremont's two basic contentions are: (1) the Army's selection process violated applicable procurement laws and regulations; and (2) an award to FN would violate various laws and regulations, establishing a preference for American products, e.g., the Buy American Act.

For the reasons stated below, we find that the Army violated neither applicable procurement nor American preference laws or regulations. Therefore Maremont's protest is for denial.

II. COMPLIANCE WITH PROCUREMENT LAWS AND REGULATIONS

A. *Maremont's Contentions*

Maremont has asserted that the replacement machine gun selection program was in reality a source selection or procurement process governed by the applicable procurement rules and regulations, which the Army violated. To support its contentions, Maremont notes that the Army (1) established a need for a replacement machine gun; (2) evaluated existing weapons; (3) established certain minimum technical and performance requirements for the weapon (the ROC); (4) tested weapons for comparison with the requirements; (5) made a cost-technical trade-off study; (6) decided to select a particular weapon manufactured by one firm; and (7) conducted various discussions with that firm. Maremont asserts that the Army necessarily knew at the outset of the program that the selection of a particular weapon meant a single manufacturer was also being selected. Maremont contends that the Army's actions resemble a procurement in all respects except for formal execution of a contract with FN.

Maremont argues that the Army cannot claim that uncertainty as to needs justified a failure to comply with the procurement rules and regulations because ASPR § 3-210.2(xiii) (1975 ed.), quoted below, provides in such situations that competitive negotiation is authorized:

> when it is impossible to draft, for a solicitation of bids, adequate specifications or any other adequately detailed description of the required supplies or services;

One of the procurement requirements which Maremont contends the Army violated is ASPR § 3-306 (1975 ed.) because the D&F justifying the sole-source procurement was not executed prior to selecting FN as the contractor and conducting contract negotiations preparatory to a formal award.

Maremont also contends that the Army did not inform Maremont of the evaluation criteria by which the machine guns would be evaluated, nor of the relative weights of the criteria in violation of ASPR § 3-501(D)(i) (1975 ed.); consequently, the procurement was not competitive as required by ASPR §§ 1-300.1, 1-304.1 and 3-101(d) (1975 ed.). Specifically, Maremont asserts it did not know the Army's priorities regarding design and performance standards, nor that very little weight would be accorded low cost. Had the bases of evaluation been known Maremont contends that it would have modified

the M60E2 so as to be at least equal in performance to the MAG58 at a lower cost. Maremont also asserts that the Army's failure to state evaluation criteria precludes an effective review by our Office of the propriety of the Army's evaluation of the two weapons.

Maremont also contends that the evaluation process was defective and that the MAG58 does not represent the Government's minimum needs for the following reasons, which Maremont asserts were brought to the attention of the Army in B–156500(5), *supra:*

(1) the cost evaluation performed by the Army was invalid;

(2) the Army did not properly consider that the purchase of the M60E2 would be more beneficial to the United States in terms of commonality of weapons, since a significant percentage of the M60E2 parts are interchangeable with the M60 infantry machine gun;

(3) the MAG58 has an overall average cyclic ROF far in excess of the ROC's specified ROF while the M60E2 complied with the ROC requirement;

(4) the Army arbitrarily refused to allow Maremont to replace bolt assemblies in the M60E2's at appropriate times during the OT III as Maremont had recommended prior to the side-by-side tests; if this bolt assembly replacement policy had been followed, the M60E2 would have been rated as reliable as the MAG58 for only in additional $215 per weapon in life cycle costs;

(5) the Army failed to give sufficient consideration to the breakage of the rivets alongside the receiver of the MAG58 between 30,000 and 50,000 rounds of firing; and

(6) the Army gave insufficient consideration to the fact that the life of the MAG58 is significantly shorter than that of the M60E2 since although the M60E2's were fired during OT III to 100,000 rounds, the MAG58 receivers cracked between 66,000 and 75,000 rounds causing them to be removed from further firing.

Maremont contends that if a proper evaluation of the weapons had been made, the M60E2 would have been found at least equal to (if not better than) the MAG58 requiring an award to Maremont as the lowest offeror. In this regard, Maremont contends that the Army violated 10 U.S.C. § 2304(g) (1970) for failing to give sufficient weight to cost and other relevant factors, in particular Maremont's proposed bolt assembly replacement policy; and DOD Directive 5000.28 (1975), *Design to Cost*, which requires that cost be established "as a parameter equal in importance" with technical requirements.

In any case, Maremont contends that, having never found the M60E2 unacceptable, the Army cannot now say the M60E2 does not meet the Government's minimum requirements. Maremont also alleges that there is no evidence that the M60E2 does not meet the Government's minimum needs, noting that the Army procured the M60E2

for the United States Marine Corps (USMC) for use on the latter's tanks. Also, Maremont asserts that the Army has never expressed dissatisfaction with the M60 infantry machine gun.

Maremont further contends that the Army has only found the MAG58 to be "superior" to the M60E2, not that the M60E2 did not meet the Government's minimum needs. In this regard, the Buy American Act D&F justifying negotiating the contract with FN merely states that the MAG58 is "the best weapon possible at this time." Maremont contends that this is inconsistent with decisions of our Office, such as 32 Comp. Gen. 384 (1953), and ASPR § 1-1201(a) (1975 ed.), which require that only the actual minimum needs of the Government be procured and that merely preferred or better items in excess of the Government's needs cannot be specified.

Maremont contends that the Army cannot evade the "minimum needs" requirement merely by defining the MAG58 as its minimum needs. In view of the foregoing, Maremont concludes that the Army's selection of the MAG58 was erroneous.

Maremont has made numerous other contentions in support of its protest which will be discussed below.

B. *Preprocurement Evaluation or Procurement*

As detailed above, a primary basis of Maremont's protest is that the process by which the MAG58 was selected was in fact a procurement, subject to the applicable procurement rules and regulations, which were not complied with. The Army has strongly disagreed with the characterization of this selection process as a procurement and contends that the entire process was necessary to define its minimum needs. The Army maintains that a replacement for the M-219 machine gun could not be procured until an accurate definition of needs was established.

We believe Maremont entered into the machine gun selection process with its "eyes wide open." It was fully aware at the outset of the side-by-side tests of the informal nature of the selection program, as well as the significant factors, on which basis the Army judged the machine guns. Maremont only first complained that the program should have been a formal procurement in its protest to our Office after the MAG58 selection had been announced. Consequently, we have difficulty concluding that Maremont was prejudiced by this informal process. Also see discussion below on Disclosure of Evaluation Factors.

Moreover, we agree with the Army's position that this selection process does not constitute a procurement. Each of the steps enumerated by Maremont (listed above) and taken by the Army in the machine gun selection program are legitimate steps which any agency may take in determining its minimum needs.

We have recognized the appropriateness of an agency conducting preprocurement tests to determine whether existing products constitute the Government's minimum needs, or to develop items to meet those needs. *See* B–168044(1), December 29, 1969; 52 Comp. Gen. 801 (1973); *Bio-Marine Industries*, B–180211, August 5, 1974, 74–2 CPD 78. *Cf. D. Moody and Co., Inc.*, 55 Comp. Gen. 1 (1975), 75–2 CPD 1 and cases cited therein which recognize the propriety of prequalifying products through preprocurement testing to be listed on a qualified products list.

Another legitimate preprocurement agency action is discussing requirements with potential suppliers. *See* B–168044(1), *supra;* B–175721(1), March 19, 1973; 52 Comp. Gen., *supra; Bio-Marine industries*, *supra.* Such discussions are clearly necessary for an agency in the conduct of ordinary business. For example, an agency should be able to survey the market to ascertain what is available or encourage the development of sources to compete with present sole sources. Also, such preprocurement discussions may be appropriate where it appears that a particular firm may be the sole supplier of the item meeting the Government's requirements or where there may be certain special conditions affecting a particular firm, e.g., if the firm is foreign.

It would be unwise and unrealistic to limit such discussions prior to ascertaining what the Government requires. Indeed, discussions with potential suppliers and testing products are often necessary for an agency to rationally determine just what its minimum needs are. An agency cannot intelligently define its needs in a vacuum. In a number of cases, we have criticized the actions of agencies which improperly limited competition because no discussions of requirements were held with potential suppliers, but rather the only firms solicited made products with which agency personnel were familiar. *See* B–173063, December 29, 1971; *Non-Linear Systems, Inc.*, 55 Comp. Gen. 358 (1975), 75–2 CPD 219.

Also, in the preprocurement stage, an agency may legitimately take cost into account in formulating minimum needs. *See* B–168044(1), *supra*; B–175721(1), *supra*; *Winslow Associates*, B–178740, May 8, 1975, 75–1 CPD 283. For example, if a valid improvement in an existing $1,000 system will cost the Government $100,000 to implement, an agency might well decide that, regardless of the validity of the need the improvement would satisfy, the cost would preclude procurement.

Maremont has asserted that the ROC proposed prior to the MAG58–M60E2 tests represented the Government's requirements around which specifications could have been framed.

However, the ROC was based on minimal data and observations. Much of the data seems merely to reflect the Army's impressions of the M60(MOD) OT II tests and hoped-for improved performance characteristics. For example, see discussion on ROF below. Moreover, the ROC clearly indicates the tentative nature of its required characteristics as follows:

> * * * The statement of requirement for the essential characteristics set forth below are to be used as a basis for designing DT/OT tests and as a standard against which to judge the results of both tests.* * * *It should be noted that the values are nominal and could be changed if the tests and operational data and related costs and effectiveness analysis so dictate.* [Italic supplied.]

Based on our review, we are convinced that, at the time the ROC was developed, the Army did not know, with any reasonable degree of definiteness, the extent of its minimum needs, other than to acquire a reliable and durable "off-the-shelf" coaxial 7.62mm machine gun to replace the M–219. We believed the Army did not have sufficient data to make a rational minimum needs determination until the side-by-side tests were completed.

In our opinion the ROC was merely an independent basis to which the results of the side-by-side tests could be compared. Moreover, to the degree the ROC reflected the Army's beliefs at that time regarding its minimum needs, it is clear that the Army was not locked into the ROC's provisions, but could, based upon the demonstrated performance of the machine guns in the tests, legitimately determine that its needs were different from the tentative ROC provisions. See discussion on the Minimum Needs of the Government below.

Also, for the foregoing reasons, we do not believe the Army was required by ASPR § 3–210(xiii) (1975 ed.) to conduct a competitive negotiated procurement in this case. Although this regulation *allows* an agency to negotiate if it cannot draft adequate specifications defining its requirements, the regulation does not require a procurement where the agency has not yet determined its minimum needs.

In view of the foregoing, we do not believe that the Army was required to comply with the rules and regulations generally governing procurements in conducting the machine gun selection program. *See* B–168044(1), *supra;* 52 Comp. Gen. 801, *supra.* In so finding, we are not sanctioning such informal procedures in cases where the agency can rationally state its minimum needs. See discussion on Disclosure of Evaluation Factors below.

The present case has many parallels to 52 Comp. Gen. 801, concerning the selection of an emergency breathing device for use on Navy ships. The selection of a breathing device manufactured by Lear Siegler, Inc. (LSI) was the culmination of over 4 years of testing of various products, discussions, and evaluation not conducted in a procurement context. As the Army intends here, the Navy's original

intent was to find an existing "off the shelf" item with the expectation that, with only slight modification, the item could be made suitable for the Navy's minimum needs. In surveying potential suppliers, the Navy described the characteristics of what was regarded as the optimum breathing device. After extensive testing only Mine Safety Appliance Company (MSAC), the protester, qualified for the side-by-side operational evaluation phase of the program. However, the MSAC device did not meet the optimum requirements and the Navy had reservations concerning safety.

In the meantime, LSI was introduced by the Navy as a contender after a successful demonstration. The Navy and the parties conducted extensive further tests and development on the contender devices. Both the MSAC and LSI devices were found adequate and safe and capable of performing the function for which they were designed prior to the side-by-side tests. However, after the side-by-side tests, LSI's device was selected although neither device had met the optimum performance criteria the Navy had specified for the tests. Eight months then passed during which time many opportunities were given to LSI to modify its device to try to meet the optimum requirements. When an urgent interim requirement for the device arose, the Navy decided to make a sole-source award to LSI, even though the firm's now prototype device did not yet meet the optimum requirements.

We found no violation of law or regulation in making the sole-source award to LSI, even though much of the extensive product selection process was not conducted in procurement context. However, in view of the opportunities and advantages which had been given LSI during the extended period following MSAC's rejection and since we believed the Government's interests would have been better served if MSAC had been given a similar opportunity to meet the Government's interim requirements, we recommended that MSAC and other qualified firms be given a further opportunity to qualify breathing devices. As discussed below, no such unequal treatment is present here.

C. *Determinations and Findings*

Inasmuch as the selection process was not a procurement, the ASPR § 3-306 (1975 ed.) D&F requirement is not for application. Indeed, this regulation only requires the D&F to be prepared "prior to issuance of a request for proposals." No request for proposals or any other formal statement of work had been prepared by the Army when the D&F was executed. In any case, we have found that an agency's failure to prepare a D&F prior to conducting negotiations preparatory to executing a sole-source contract to be a deviation of form rather than substance, and not a basis for sustaining a protest. *See* B-175721(1), *supra.*

D. *Minimum Needs of the Government*

Maremont has contended that the MAG58 is not the Government's actual minimum needs.

The determination of the needs of the Government and the methods of accommodating such needs is primarily the responsibility of the contracting agencies of the Government. 38 Comp. Gen. 190 (1958); B-174140, B-174205, May 16, 1972; *Manufacturing Data Systems, Incorporated*, B-180608, June 28, 1974, 74-2 CPD 348. We recognize that Government procurement officials, who are familiar with the conditions under which supplies, equipment or services have been used in the past, and how they are to be used in the future are generally in the best position to know the Government's actual needs, and, therefore, are best able to draft appropriate specifications. *Particle Data, Inc.*, B-179762, B-178718, May 15, 1974, 74-1 CPD 257; *Manufacturing Data Systems, Inc.*, B-180586, B-180608, January 6, 1975, 75-1 CPD 6. Consequently, we will not question an agency's determination of what its actual minimum needs are unless there is a clear showing that the determination has no reasonable basis. *Particle Data, Inc., supra; Manufacturing Data Systems, Inc.*, B-180608, *supra*. Furthermore, while determinations to make a sole-source award are subject to close scrutiny by our Office, we have recognized that where the legitimate needs of the Government can only be satisfied by a single source, the law does not require that these needs be compromised in order to obtain competition. *Winslow Associates*, 53 Comp. Gen. 478, 74-1 CPD 14, and B-178740, *supra; Manufacturing Data Systems, Incorporated*, B-180608, *supra; Johnson Controls, Inc.*, B-184416, January 2, 1976, 76-1 CPD 4.

On the other hand, we have recognized that procurement agencies are required to state specifications in terms that will permit the broadest field of competition within the minimum needs required and not the maximum desired. 32 Comp. Gen. *supra*. Specifications based only on personal preference or on a finding that a particular item has superior or more desirable characteristics in excess of the Government's actual needs are generally considered overly restrictive. 32 Comp. Gen. *supra; Precision Dynamics Corporation*, 54 Comp. Gen. 1114 (1975), 75-1 CPD 402. *Cf. Leo Kanner Associates*, B-182340, April 4, 1975, 75-1 CPD 205.

With regard to the acquisition of critical human survival items, however, we have recognized that Government agencies may legitimately specify items with superior performance characteristics allowing for as much reliability, effectiveness and safety in performing the function for which they are designed as possible. B-168044(1), *supra;* 52 Comp. Gen., *supra; Bio-Marine Industries, supra*.

It could hardly be termed an illegitimate or unnecessary concern of the Army to require as a valid minimum need a weapon as reliable and effective as technically available. That is to say, we find no unreasonableness in specifying the weapon which has demonstrated that it is the most likely to perform in a "life or death" combat situation.

In this regard, the OT III showed the MAG58 to be 3.5 times as reliable as the M60E2 and in the DT III tests the MAG58 proved 2.5 times as reliable as the M60E2. Also, the M60E2's MRBF on the OT III of 1699 was far less than the albeit tentative ROC minimum reliability requirement of 2675. On the other hand, the MAG58's MRBF of 6442 was far better than even the ROC preferred MRBF of 5500. Although Maremont asserts that had its bolt assembly replacement policy been adopted, the M60E2 would have been rated more reliable, the Army has found that the M60E2 would still be half of the MAG-58's reliability even if the policy were implemented. See discussion on Bolt Assembly Replacement Policy below. Moreover, in DT III the MAG58 proved significantly more reliable during sand and dust, and corrosion tests.

The tests did show that the M60E2 had some superior characteristics (e.g., the barrel), and the MAG58 had some deficiencies. The tests indicated that the MAG58 was apparently less durable than the M60E2 even though the MAG58 exceeded the ROC's specified 50,000 rounds minimum. But see the discussion on Rivets and Cracked Receivers below.

However, we believe the Army, in properly exercising broad discretion in the minimum needs area, could balance the relative merits of each weapon and reasonably decide that the MAG58 constituted its minimum needs because of significantly greater reliability. As discussed below, it was made clear to all parties that reliability was the primary criterion under which the replacement machine gun would be selected. See discussion on Disclosure of Evaluation Criteria below.

Also, the Army was entitled to make the MAG58 selection, notwithstanding that weapon's higher cost in relation to the M60E2. In this regard, we have held that there is no requirement that an agency purchase items merely because they are offered at a lower price without intelligent reference to the particular needs to be served. B–174775, March 29, 1972; *Manufacturing Data Systems, Incorporated*, B–180608, *supra*. That is, an agency's minimum needs can be such that only a particular item can satisfy them notwithstanding the existence of a less expensive item designed to perform the same functions. In the present case, the Army considered the cost differential prior to selecting the MAG58 and reasonably decided that the MAG58 was worth incurring a cost premium. See discussion on Cost below.

Only one coaxial machine gun was to be selected by the Army for reasons of logistics and training. Under the circumstances, we do not believe the Army had to specifically find the M60E2 unacceptable to justify determining the MAG58 to be a minimum need. Although the M60E2 may be acceptable for safe use on tanks, the Army is not required to accept a significantly less reliable machine gun merely because it can be used to perform the function for which it was designed. *See* B–168044(1), *supra; Bio-Marine Industries, Inc., supra.*

Furthermore, contrary to Maremont's contentions, we conclude that the Army's tests were proper and fairly conducted. During our prior audit, we reviewed and monitored the Army's tests and stated:

> GAO monitored the tests and believes they were fairly conducted. * * * B–156500(5), *supra*, at 1.
>
> Both Maremont and Fabrique Nationale technical representatives were allowed to observe the engineering tests [DT III], and they informed us they were satisfied as to its fairness. We observed specific engineering tests conducted on both weapons, monitored the data collection methods, and determined how the data was analyzed. We have no reservations as to the conduct of these tests. B–156500(5), *supra*, at 16.
>
> * * * The field tests [OT III] were adequate for measuring operational reliability. Generally, both tests were adequately designed and conducted to provide critical comparative data between the two guns.
>
> The tests established the MAG58 as the more reliable weapon. Although the most serious malfunctions occurred when the MAG58 rivets broke, the greater number of stoppages on the M60E2 would seem to pose a greater problem on the battlefield. B–156500(5), *supra*, at 23.

In addition, Maremont has made certain specific objections to methodology of the conduct of the tests, e.g., bolt assembly replacement policy, which we have found below did not cast any significant doubt on the reasonableness of the MAG58 selection.

In any case, we have consistently recognized that the responsibility for the establishment of tests and procedures necessary to determine product acceptability is within the ambit of the expertise of the cognizant technical activity. See *D. Moody & Company, Inc.*, 55 Comp. Gen. *supra* at 17, and cases cited therein.

The prior findings of M60(MOD) acceptability by various Army activities, as well as the tentative recommendations that the M60(MOD) be selected, do not compel a determination that the M60E2 meets the Government's present actual needs. At the time, the MAG58–M60E2 side-by-side tests demonstrating the MAG58's significantly superior reliability had not yet been performed. Indeed, until the MAG58 was field tested, the only real basis on which the Army could judge the M60E2's performance was its experience with the unreliable M–219.

Also, assuming *arguendo* that the Army once considered the M60E2 to be a minimum need, we believe the Army is entitled to modify its position as to what constitutes minimum coaxial machine gun needs, upon becoming aware of new information showing significantly supe-

rior effectiveness in another weapon. In this regard, we have recognized that:

> * * * it is axiomatic that the Government may obtain technical equipment which employs operational features upgrading the state-of-the-art by taking advantage of the most advanced developments available where the need exists * * * this [is] so even though similar equipment generally equivalent from a performance standpoint is commercially available. * * *

Particle Data, Inc., supra; see B–174140, B–174205, *supra.*

Moreover, the fact that the Army has never indicated dissatisfaction with the M60 infantry machine gun is not relevant here. The M60E2 is a different weapon used for different purposes and is subject to different stresses.

Furthermore, the Army's procurement of a number of M60E2's for the USMC does not compel a finding that the M60E2 meets the Army's minimum needs. The Army was merely acting as a puchasing agent for the USMC. Also, the USMC purchase came before the OT III and the DT III, which showed the MAG58's superior reliability. (The first 10 M60E2's off the production line which was started to meet the USMC requirement were used in the tests.) The USMC purchase resulted from an immediate need for machine guns for its tanks, and the only field-tested coaxial machine gun at that time, other than the M–219, was the M60(MOD). In any case, we have consistently recognized that one agency's determination of minimum needs is not determinative of the propriety of another agency's minimum needs. *See* B–174140, B–174205, *supra;* B–178584, August 29, 1973; 53 Comp. Gen. 270 (1973); *D. Moody & Co., Inc., supra,* at 21.

Even though the rules and regulations generally governing procurements were not applicable, we believe the Army was under an obligation to treat both contenders fairly. If the Army had not done so, it would have reflected on the reasonableness of its determination that the MAG58 machine gun was its actual need. *See* 52 Comp. Gen. 801. Based on our review of this program, we believe the Army treated both contenders fairly.

In view of the foregoing, and based on the discussion below of Maremont's specific objections against the selection process, we conclude that the Army's selection of the MAG58 as the replacement coaxial machine gun for the M–219 had a reasonable basis.

E. *Disclosure of Evaluation Criteria*

As a corollary to the maxim that potential suppliers should be treated fairly when the Government is ascertaining its requirements, we believe it conducive to a more rational determination of the Government's minimum needs if prospective suppliers are informed as fully as possible of what it is the Government needs. See 52 Comp. Gen. 801.

The Army did not specifically state at the commencement of the side-by-side tests what weight would be accorded the various technical factors and cost because it did not yet know the specific weights the various factors would be accorded in evaluating the machine guns.

It was apparent to all parties involved in this program that the paramount performance characteristic the Army needed in the replacement machine gun was reliability. *See* B–156500(5), *supra*, at 15, 18. Indeed, the M–219's ineffectiveness, caused by its unreliability and lack of durability, was the reason for the replacement program. Therefore, we believe that Maremont was fully aware, prior to the tests' commencement, of the key technical evaluation characteristic to be considered by the Army, i.e., reliability.

Also, we believe it should have been apparent to Maremont that cost, although important, was secondary to reliability. For example, even though the M–219's cost was in excess of $4,000 per weapon, with high operating costs, the Army's dissatisfaction with the weapon was never expressed in terms of cost, but rather in terms of lack of reliability and durability.

Also, the coaxial machine gun is one firepower component on tanks costing from $350,000 to $700,000. Tank effectiveness as a whole should be considered in evaluating cost differences. Inasmuch as one of the major purposes of the coaxial machine gun is to protect the tank against infantry attack, reliability is obviously an essential element. This is not to calculate the number of American troops who will be saved by having a more reliable and effective machine gun on tanks.

If Maremont was uncertain about how the weapon would be evaluated, inquiries should have been made of the Army at the outset of the side-by-side tests. *Cf. BDM Services Company*, B–180245, May 9, 1974, 74–1 CPD 237. There is no indication that Maremont made any such inquiries or that either contender lacked essential knowledge or was less well informed than the other.

Moreover, even if Maremont had been more fully informed of the Army's evaluation criteria, we do not believe it could have made any significant improvements to the M60E2 to increase reliability (even assuming such modifications are possible), in view of the clear Army requirement that the replacement machine gun be an in-production "off-the-shelf" weapon. Also, the time needed to develop and test such modifications would have been unacceptable. In any case, Maremont has not stated just how the M60E2 would have been modified to significantly improve reliability if it had been given the chance. (Maremont merely reasserts its bolt assembly replacement maintenance policy (discussed below).)

Finally, although Maremont contends that evaluation criteria are necessary in order for our Office to ascertain whether the MAG58's

selection was reasonable, it is apparent that weapon reliability was of paramount consideration. Moreover, it is our view that complete evaluation criteria cannot be rationally set forth until an agency actually determines its minimum requirements.

F. *Cost*

As indicated by Maremont, in B–156500(5), *supra*, at 25–32, we raised a number of questions concerning the Army's methodology in computing life cycle costs and the COEA to compare the M60E2 and the MAG58. Maremont asserts that these comments demonstrate that the Army had not properly considered cost, and that if cost and cost effectiveness had been properly evaluated and given sufficient weight the M60E2 would have been rated higher than the MAG58.

As indicated above, an agency may properly consider cost in determining minimum needs. See *Winslow Associates*, *supra*. However, there is no legal requirement that the agency accept lower cost items without intelligent reference to actual minimum needs. See *Manufacturing Data Systems, Incorporated*, B–180608, *supra*. 10 U.S.C. § 2304(g) (1970) is not for application here since the mandate that cost be considered is limited to procurements.

From an audit standpoint, we have frequently stated that proper and impartial cost effectiveness studies are a valuable tool in making a weapon systems selection. See *Life Cycle Cost Estimating—Its Status and Potential Use in Major Weapon Systems Acquisitions*, PSAD 75–23, B–163058, December 30, 1974; *Improvements Needed in Cost Effectiveness Studies for Major Weapons Systems*, PSAD 75–54, B–163058, February 12, 1975. However, as recognized in B–163058, February 12, 1975, *supra*, at 1:

> In many cases the system judged the most cost-effective is the one favored for acquisition. Sometimes other considerations, such as the criticality of achieving unprecedented system performance, has dictated choosing a weapon which was not the most cost-effective due to its high cost.

The most significant audit concern expressed in B–156500(5), *supra*, with regard to the Army's cost studies was the inclusion of ammunition costs in the life cycle costs. This particular disagreement with the Army's methodology is of note because the MAG58 has the highest relative cost efficiency if ammunition is included in the Army's evaluation while the M60E2 has the highest efficiency if ammunition is not considered.

We felt the inclusion of ammunition in the cost effectiveness analysis was questionable because this indirect cost did not represent an incremental cost. Our position in this regard has been more fully explained in B–163058, December 30, 1974, *supra*, at 9 as follows:

> Perhaps a more basic question is the extent to which indirect costs should be considered in preparing the estimate for choosing between alternative sys-

tems. In evaluating a new system the impact on operating and maintenance cost is best measured by determining the incremental (or decremental) cost of adding the new systems to the inventory. Most indirect costs are fixed and, therefore, not affected by the substitution of a new system for another.

Although we may disagree from an audit standpoint with the Army's inclusion of ammunition costs in the cost effectiveness study, we note that the Army did perform a cost study not including ammunition costs, and was aware, when it made the machine gun selection, that the M60E2 was rated the most cost effective under this study.

In any case, as noted above, it is clear that the Army, acting within its reasonable discretion and based on factors other than cost, e.g., reliability, can determine that a "less cost effective" item represents its minimum needs.

G. *Design to Cost Policy*

We do not believe the replacement coaxial machine gun program falls under DOD's *Design to Cost Policy* (DOD Directive 5000.28, May 23, 1975), which is directed at programs involving full scale research and developmental production of major weapon systems. The program here involved a limited testing and evaluation program to find an "off the shelf" substitute for the unsatisfactory M–219.

In any event, DOD Directive 5000.28 is a matter of DOD policy, and as such does not establish legal rights and responsibilities. *See* 43 Comp. Gen. 217, 221 (1963); *Federal Leasing Inc.*, 54 Comp. Gen. 872 (1975), 75–1 CPD 236; *Planning Research Corporation Public Management Services, Inc.*, 55 Comp. Gen. 911 (1976), 76–1 CPD 202.

H. *Commonality*

The M60E2 has many parts in common with the M60 infantry machine gun. That is, 166 of the 263 M60E2 parts (63 percent) are common. These parts are estimated to be 85 percent of M60E2's value.

On the other hand, the only commonality the MAG58 has with other United States weapons is the use of the North Atlantic Treaty Organization (NATO) standard 7.62 millimeter ammunition. Also, it is theoretically possible that parts could be exchanged with those NATO countries which use the MAG58, but, as we concluded in B–156500(5), *supra*, at 11:

> The contribution that either the MAG58 or M60E2 would make to NATO standardization of equipment appears marginal. It would, therefore, appear that this would not be a major factor influencing the selection of either gun.

Maremont has asserted that the Army disregarded or did not properly consider the M60E2's commonality advantage. However, our review of the Army's evaluations shows that the Army did consider the M60E2's advantages.

For example, in computing life cycle costs, the Army took into account that tooling for the M60 and the M60E2 already existed (the

latter because of the USMC purchase), and that an existing inventory of M60 common parts existed. Furthermore, from our review of the record (including classified documents), it is clear that other advantages of M60E2's commonality were considered in the selection.

Maremont also alleges that it has been prejudiced by the Army's lack of regard for commonality in making the selection. In this regard, Maremont states that during the developmental phase of the program it was continuously discouraged by the Army from making any of its numerous suggested modifications to the M60E2 solely because of the Army's repeated expressed desire for M60–M60E2 interchangeability. Maremont believes these modifications would have significantly improved the M60E2's performance and reliability.

The Army readily admits encouraging Maremont to maintain interchangeability between the M60 and the M60E2. However, the Army asserts that this was expressed as a goal and not as a mandatory requirement. Also, the Army states that only one proposed modification by Maremont in the conversion of the M60(MOD) to the M60E2 was rejected. Moreover, the Army states that since 1969 Maremont has repeatedly stressed interchangeability and parts commonality as one of the strongest selling points of the M60(MOD)/M60E2.

From our review of the record, we have found only one instance where the Army rejected a suggested modification by Maremont. That was a proposal to change the M60 standard (right side) cover latch. This proposal was rejected because of commonality. We are satisfied that this change, if approved, would not have improved the M60E2's reliability. On the other hand, the other modifications to the M60 (MOD) suggested by Maremont were approved by the Army and no changes were imposed by the Army on Maremont.

Furthermore, as discussed above (Disclosure of Evaluation Factors), we do not believe Maremont could have disregarded commonality in modifying the M60E2 without straying from the "off-the-shelf" requirement; nor has Maremont made any specific suggestions regarding proposed weapon modifications.

I. *Rate of Fire*

The MAG58's average ROF of 820 rounds per minute far exceeded the ROC's specified ROF of between 400 and 650 rounds per minute with the lower limit preferred. The M60E2 came within the ROC's parameters. Maremont contends that the Army's waiver of this traditional ROF range was indefensible.

The Army has taken the position that good rationale for the ROC ROF requirement was lacking. In this regard, the Army, as a part of the COEA, reviewed the rationale for the ROC ROF. The COEA

acknowledges that no in-depth analysis was made to determine optimal ROF for the ROC due to limited time. The Army found the requirement was historically based on avoiding undue ammunition expenditure. This rationale was found not to be applicable for the coaxial machine gun because it has a large ammunition storage potential.

Further, as indicated above, the ROC values were clearly stated to be nominal and subject to change. Also, the Army knew prior to the side-by-side tests that the MAG58 exceeded the ROC ROF. Also, Maremont was undoubtedly aware that the MAG58 had a much higher ROF than the M60E2. Moreover, the OT III showed that the MAG58's higher ROF did not adversely affect accuracy as compared to the M60E2. Finally, Maremont was not prejudiced by the MAG58's failure to meet the ROC ROF because the MAG58's high ROF was not a factor affecting its selection to any large degree and Maremont could not increase the M60E2's ROF without making the weapon a prototype in view of the complex design factors which would accompany any change in the weapon's ROF.

J. *Bolt Assembly Replacement Policy*

The major complaint which Maremont has raised regarding the conduct of the tests was the Army's failure to allow the M60E2 to be tested using a bolt assembly replacement policy proposed by Maremont. Maremont has asserted that had this policy been adopted for operating the M60E2, as Maremont repeatedly urged prior to the side-by-side tests, the M60E2's tested reliability would have been equivalent to that of the MAG58. Maremont also notes that the total additional life cycle costs for each weapon if this policy were adopted would be only $215 per weapon for a total weapon cost of $922 as compared to the MAG58's $1,517.

Although it certainly was not clear, we believe Maremont's suggested assembly replacement policy was as follows: when a part failure occurred (apparently at any time) during the OT III in the bolt assembly, operating rod assembly or drive spring assembly, the tank crew members would replace the assembly containing the defective part with a new unused assembly, and the used assembly would be discarded. Maremont has limited its protest to only *bolt assembly* replacement probably because this was where the bulk of the part failures occurred in the M60E2's. Also, contrary to some Army statements, Maremont has never, on the record, recommended automatic replacement of bolt assemblies at 15,000 rounds.

There is considerable dispute and confusion surrounding the bolt assembly replacement policy proposed by Maremont. Therefore, we will summarize the facts as we have found them, based on our review of the record.

On August 8, 1975, prior to the side-by-side tests, Maremont was notified by the Army of the tentative ground rules for the OT III, including:

> d. For logistic evaluation, cost of replacement parts will be at the lowest level of assembly for authorized organizational or direct support maintenance.

In other words, parts were to be replaced on a piece rather than an assembly level.

On August 12, 1975, Maremont requested clarification regarding this condition. By letter to the Army dated August 13, 1975, Maremont stated:

> Maremont would like to *suggest* an approach to determining the level assembly at which spare parts will be replaced during the pending tests of the Armor Machine Gun contenders.
>
> A. For the D.T. testing replace parts at the lowest component level. This test would then provide a large data base for part life.
>
> B. For the O.T. testing replace parts at the level at which spares are provided. For example: Bolt Assembly, Feed cover Assembly, Drive Spring, etc.
>
> This would mean that the operational nature of the test would remain and the troop's ability to field the system could be more fairly evaluated. [Italic supplied.]

However, the Army informed Maremont that the maintenance procedure for OT III would be as previously planned.

There is no probative evidence on the record that Maremont "repeatedly urged" the Army to adopt this policy, nor is there any indication that Maremont was displeased with the nonacceptance of its suggestion until after OT III's completion. Notwithstanding various inquiries of Maremont prior to and during the tests, no mention of Maremont's bolt assembly replacement policy was made to our Office's representatives until after OT III's completion. In addition, the Army denies that Maremont ever strongly pursued this suggestion.

Under OT III procedures applicable to the M60E2, we understand that the following maintenance procedures were followed on the M60E2 bolt assembly: when a failure occurred because of a defective part in the bolt assembly, the tank crew replaced the bolt assembly with another one. The deficient bolt assembly was then refurbished at the organizational level by replacing the defective parts only. The assembly was then returned to the tank for use. These actions are consistent with the Army's standard operating procedure (SOP) that piece part rather than assembly repair be performed on small arms, including the weapons in the M60 line.

After OT III's completion, by letter dated December 29, 1975, Maremont informed the Army:

> The operational performance of the M60E2 during these tests would have been vastly improved if the following procedures and recommendations were followed.
>
> 1. Part replacement within the operating group (bolt assembly, operating rod and drive spring) should have been made at the assembly level

instead of at the lowest component level. This was recommended by Maremont prior to the start of testing and if followed would have eliminated many stoppages. (Most of the stoppages and failures encountered were directly related to the operating group). Many of the common M60 component parts failures in this group do not cause stoppages and are discovered only during cleaning.

2. When the weapon is deployed in a combat situation a new operating group (bolt assembly, operating rod and drive spring) should be installed as a unit if replacement of any part within that group is required. These parts are provided in the BII Kit and this procedure would insure 15,000-20,000 rounds of trouble-free performance at a cost of less than $100.

This letter appears to state the same bolt assembly replacement policy set out above, and was the first sign of severe disagreement by Maremont as to the conduct of the tests.

A technical analysis of the failures indicates that 60 percent of the parts replaced on the M60E2 in DT III and OT III were bolt assembly components. Also, once a component of the bolt assembly failed, the likelihood of other bolt assembly parts failing increased. It appears that these accelerating "domino like" bolt assembly component failures may well be curbed to some degree if the entire assembly were replaced.

The Army conducted an analysis of the OT III data, which found that the assembly replacement procedures would reduce stoppages about 30 percent and failures about 45 percent. According to the Army, the bolt assembly replacement policy would add $215 in assembly costs over the life of the weapon. However, the MAG58 (6442 MRBF) is still rated more than twice as reliable as the M60E2 even accepting the bolt assembly replacement policy of Maremont (3054 MRBF).

In its last letter to our Office dated July 28, 1976, Maremont gave a different version of the proposed bolt assembly policy. When an initial failure in the bolt assembly occurred, only the minor parts would be replaced and the assembly would be returned to service. This less costly proposal is inconsistent with all prior Maremont bolt assembly replacement suggestions. Also, we have doubts that this newly proposed policy would significantly increase M60E2 reliability. It is very possible that other factors, e.g., bolt body wear (which was observed during the tests), may be causing the bolt assembly malfunctions. No data of record supports the feasibility of this more limited policy. Therefore, we will not consider it further.

The specific reasons the Army has advanced for refusing to allow the bolt assembly policy to be used in the OT III were (1) inconsistency with Army SOP; (2) the OT II between the M60(MOD) and M-219 could be used as a data base if the same test methods were used, so as to allow the M-219 to be used as a control weapon, on which to base analyses of the MAG58 and M60E2; and (3) part life data could be compared for engineering purposes if piece part repair

was done. In addition, Maremont's August 13 letter proposing the policy, besides being unclear and nonspecific, was framed as merely a suggestion, and the Army treated it as such. Also, as discussed above, Maremont did not pursue this matter with the Army until after the OT III's completion.

In view of the foregoing, we believe the Army had a reasonable basis for declining to use Maremont's suggested policy in OT III. In this regard, as noted above, the Army has considerable discretion as to how to conduct tests to insure product acceptability. *See D. Moody & Company*, *supra*, at 17.

The question remains, however, in view of the OT III data indicating that the M60E2's performance could be significantly improved if the bolt assembly replacement policy were adopted, whether the Army has a reasonable basis for not considering the M60E2 to be substantially equal in performance to the MAG58 or for declining to further test the M60E2.

Even assuming the Army lacks a rational basis for the application of its piece part repair SOP to the M60E2, we believe the Army has a reasonable basis for declining to test the M60E2 further or consider it equal to the MAG58.

As indicated above, the Army's analysis of OT III showed that the M60E2's reliability would improve 45 percent under the assembly replacement policy, i.e., to 3054 MRBF. This MRBF was based on an analysis of the first 50,000 rounds of the OT III with the assumption that the bolt assembly, operating rod and operating rod springs would be replaced at 15,000 rounds intervals. The M60E2 OT III failures were analyzed to ascertain whether the malfunction would have occurred if the assembly policy had been accomplished. The Army then applied a 20-percent adjustment to the number of prevented malfunctions to account for personnel judgmental error and inherent probability of random stoppage occurrences, and computed the MRBF.

The MAG58's MRBF for OT III was 6442, or over 2.1 times as reliable as the M60E2, assuming use of the assembly replacement policy. Consequently, we believe the Army would be justified in deciding the MAG58's significantly greater reliability justified its selection over the M60E2.

Maremount has challenged the validity of this Army study. In particular, Maremont contends that the 20-percent discount figure is unnecessary because the bolt malfunctions are clearly recognizable and traceable from the OT III data. By Maremont's analysis of OT III, the M60E2's MRBF, with the bolt assembly replacement policy, would

be 3821, which Maremont states is within the range of the MAG58's MRBF, and is well within the ROC's minimum MRBF.

From our review, we are not in the position to challenge the 20-percent figure used by the Army in its data analyses. Maremont has not successfully discredited this figure. Moreover, the zero percent figure proposed by Maremont cannot be valid, since personnel errors and random failures as a natural result of mechanism operation would cause some number of bolt assemby component failures.

With regard to the Army's OT III data study's general validity, we note that it was necessarily based upon various assumptions. Actual operational tests would be required to ascertain how much reliability the M60E2 would gain if the bolt assembly replacement policy were adopted. See B–156500(5), *supra*, at 23. Nevertheless, we believe the Army's OT III data study was based on the best data available and has validity.

In any case, by Maremont's own OT III data analysis, the M60E2's MRBF is only 59 percent of the MAG58's MRBF. The Army has stated that, based on Maremont's analysis, it fails to see how the M60E2 with the bolt assembly replacement policy can be considered reasonably equivalent to the MAG58 in reliability. We agree with the Army that, based on the foregoing analyses of the M60E2 bolt assembly replacement policy, the difference in reliability between the two weapons is still very significant.

Maremont performed an analysis of the DT III (not performed by the Army) similar to the Army OT III study. Maremont contends the DT III data is more reliable as a measure of weapon performance because that test was conducted by experienced weapons technicians under controlled conditions. Also, Maremont claims the OT III data was suspect because newly trained troops were used under uncontrolled conditions. Maremont also notes that the troops received 32 hours training (8 hours maintenance) on the MAG58 as compared to 24 hours training (2 hours maintenance) on the M60E2. Maremont's DT III analysis, which also unreasonably assumes that no bolt assembly malfunctions will occur after the policy is adopted, purports to show that the two weapons are essentially equal in reliability.

As indicated by Maremont, there are significant differences in methodology and purpose between the OT III and the DT III. Because of these differences, the Maremont DT III study is not as valid as the Army's OT III study.

The DT III was in this case essentially diagnostic, e.g., to determine causes of stoppages and failures. The DT III was performed in a laboratory environment using a fixed mount and expert weapons technicians. Unlike the OT III, when a stoppage occurred in the

DT III, the weapon was carefully inspected and sometimes disassembled to precisely ascertain the exact cause of the stoppage; the offending component was then replaced. In addition, preventive maintenance procedures, not used in the OT III, were followed. For example, the length of the operating springs was carefully measured after each firing sequence, and if shortness or wear showed, they were replaced even if no malfunctions had occurred. This preventive maintenance policy was applied to other mechanisms as well, including the bolt assembly components. These procedures, which are inconsistent with the operational use of the weapon, significantly limit the DT III's value as an indicator of operational reliability. Consequently, any analysis of DT III parts failure data in an attempt to hypothecate M60E2 operational reliability, if the bolt assembly replacement policy were adopted, must be considered of doubtful validity.

In contrast, the primary purpose of the OT III, which was fairly conducted under test conditions with experienced armor troops, was to measure operational reliability in a simulated combat environment. Also, the MAG58 and M60E2 troop training were regarded as equivalent in scope; the troops' familiarity with the M60 primarily accounting for the training time differences. Also, although Maremont now denigrates the OT III's validity, it was not heard to complain about the OT III or the troop training prior to the test's commencement.

Therefore, the Army study based on the operational test data must be regarded as having much more validity than the Maremont DT III analysis.

Moreover, as previously discussed, Maremont only suggested and did not press the Army on the bolt assembly replacement policy prior to the side-by-side tests. Also, as can be discerned from the foregoing, the details of the M60E2 bolt assembly replacement policy have never been made clear or specific by Maremont. Furthermore, other than the DT III study, Maremont has presented no studies or data of its own weapon, which would cast doubt on the Army OT III analysis or which would tend to indicate that the reliability of the M60E2 would be increased by the bolt assembly replacement policy to be anywhere equivalent to that operationally demonstrated by the MAG58.

Finally, the Army has a current urgent need for a replacement "off the shelf" coaxial machine gun. Several months in time and substantial money would have to be expended for further operational tests on the M60E2. Consequently, the Army could reasonably conclude that further tests would not be warranted, in view of its OT III analysis which assumed the adoption of the bolt assembly replacement policy and indicated the clear maintained superiority in reliability enjoyed by the MAG58 over the M60E2.

K. *MAG58's Broken Rivets*

Maremont also contends that the Army disregarded or did not give adequate consideration to the breakage of the rivets located alongside the MAG58's receiver between 30,000 and 50,000 rounds.

However, as indicated in B–156500(5), *supra*, at 19–20, the Army did consider this malfunction. In the Army's COEA evaluation, the MAG58 was assessed a 9-hour combat unavailability penalty. This assessment was based upon the Army's determination that the rivet repair would be made at a direct support unit level. Maremont takes issue with this time estimate, apparently believing that rivet repair on the MAG58 must be done at a higher maintenance level under Army procedures, i.e., depot level. The probable reason for Maremont's belief is that the M60E2's rivets are much more difficult to repair than the MAG58 rivets. The repair of rivets in a MAG58 is a relatively easy process, which can be performed in about 30 minutes with the tools provided in the MAG58 tool kit.

In addition, FN has indicated that certain improvements have been made to the MAG58, including reinforcing the rivets in question. From our review of the FN data, we are satisfied that this and the other changes proposed by FN are minor modifications, which should not adversely affect the MAG58's reliability. FN tested the modified MAG58's to 100,000 rounds under the supervision of a Belgian Government official. (The Army did not monitor those tests.) The rivets in question broke at 74,000 to 84,000 rounds, which is a significant improvement over the MAG58's OT III performance. The Army has reported that these minor modifications will be incorporated into the MAG58's purchased at no additional cost to the Government.

L. *MAG58's Cracked Receivers*

Maremont also contends that the Army disregarded or did not adequately consider the cracks in the MAG58 receivers suffered between 66,000 and 75,000 rounds in OT III. These cracks caused them to be removed from further firing because of suspected safety hazards. Maremont also refers to our criticisms of the Army's cost evaluation of this problem in B–156500(5), *supra*, at 28:

> During peacetime each gun in the *active forces* is estimated to fire 6,000 rounds of ammunition a year or 90,000 rounds during a 15-year life. This created a problem in assigning costs to the MAG58 because the five test guns only averaged 70,000 rounds when the receivers cracked. The Army assumed the 12,925 guns in the active forces would be rotated with those in the inactive forces. The effect of this assumption is that on the average, each of the 18,191 guns purchased would only fire 63,900 rounds in a 15-year life. If rotation is not accomplished, up to $18 million could be added to the MAG58 alternative to purchase more guns in about 11 years when the receivers would likely crack.

Although we did not conclude the Army's cost analysis was improper, as is contended by Maremont, we note that the Army's analysis

is based on an uncertain assumption regarding how machine guns will be rotated between active and inactive forces.

Nevertheless, the cracked receiver problem was otherwise adequately considered by the Army. After OT III, the Army decided to further fire the MAG58's to see how the hairline cracks in the receivers would react and to ascertain whether a safety hazard really existed. After a Navy weapons expert examined the weapons and concluded that the cracks did not constitute a physical safety hazard, the MAG58's were safely fired to a minimum of 86,000 rounds. From the foregoing, it would appear that the useful life of the MAG58 may extend to about 15 years, even assuming rotation of the weapons is not accomplished, since the MAG58's with cracked receivers could well be suitable for peacetime use.

In addition, we note that the malfunction rate of the M60E2's was accelerating rapidly (well below ROC minimum requirements) as they neared 100,000 rounds. Consequently, the M60E2's usefulness would appear to become more limited with age as well.

Also, the Army conducted stress tests on the MAG58's cracked receivers. These tests indicated that a one millimeter thicker receiver wall would result in the receiver not cracking.

Another modification to the MAG58 which FN made in an attempt to correct the deficiencies discovered during the side-by-side tests was to add the suggested one millimeter of thickness to the receiver wall. The MAG58's were successfully test fired for 100,000 rounds with no receiver cracks occurring. This particular minor modification is reportedly in use on the MAG58's currently installed in Swedish tanks. The Army indicates that this modification will be incorporated into the MAG58's purchased.

It could be argued that the Army in allowing FN to modify the MAG58 after the M60E2 was disqualified falls under our decision in 52 Comp. Gen. 801 (discussed in detail above). However, unlike the situation there, the modifications here are minor and can only improve a weapon that is already clearly superior. As discussed above, Maremont could not and has not proposed to make the significant improvements to the M60E2 necessary to make its reliability equal to the MAG58's.

III. AMERICAN PRODUCT PREFERENTIAL LAWS

A. *Buy American Act.*

1. *Background*

Maremont also contends that any purchase of the MAG58's from FN would violate the Buy American Act, 41 U.S.C. §§ 10a–d (1970), which states in pertinent part:

§ 10a. *American materials required for public use*

Notwithstanding any other provision of law, and unless the head of the department or independent establishment concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, shall be acquired for public use. This section shall not apply with respect to articles, materials, or supplies for use outside the United States, or if articles, materials, or supplies of the class or kind to be used or the articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

* * * * * * *

§ 10d.

In order to clarify the original intent of Congress, hereafter, section 10a of this title and that part of section 10b(a) of this title preceding the words "*Provided, however,*" shall be regarded as requiring the purchase, for public use within the United States, of articles, materials, or supplies manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, unless the head of the department or independent establishment concerned shall determine their purchase to be inconsistent with the public interest or their cost to be unreasonable.

Maremont states that since the M60E2 is acceptable, the Buy American Act's application would require the selection of the M60E2 in view of the price advantage over the Belgian MAG58.

On June 24, 1976, the Assistant Secretary made a determination that the Buy American Act was not applicable to this procurement. This determination reads as follows:

1. That the MAG–58 is not manufactured in the United States in sufficient and reasonable available commercial quantities and of a satisfactory quality.
2. That in view of all of the above and the demonstrated performance advantages of the MAG–58, it is inconsistent with the public interest not to procure this weapon from Fabrique Nationale in sufficient quantity to meet urgent operational requirements of the Army until there is a domestic source available. A technical data package with production rights sufficient for competitive procurement will be obtained from Fabrique Nationale so as to permit U.S. production.

2. *Nonavailability Exception*

With regard to the Assistant Secretary's first determination, we have recognized that where an agency has sufficient justification to make a sole-source award to a foreign firm, it can validly determine that since the items are not manufactured in the United States "in sufficient and reasonably available commercial quantities and of a satisfactory quality," the Buy American Act is not applicable. *See* B–174026, February 8, 1972; B–179007, November 12, 1973; ASPR § 6–103.2(a) (1975 ed.). Since, as found above, the Army has a reasonable basis for finding that the MAG58 represents the Government's minimum needs, and since only FN can deliver the MAG58 in the relatively short time frame necessary, we believe the Army's determination in this regard is valid.

Furthermore, the fact that the M60E2 is in the same "class or kind" as the MAG58 does not require the Act's application, since the M60E2 is not considered to be "of satisfactory quality" to meet the Government's minimum needs.

Also, B–166308, April 23, 1969, cited by Maremont, is not pertinent here, since, although the foreign item may have been superior in that case, the domestic item met the Government's minimum requirements and was offered at a reasonable price. In the present case, the Army found that the M60E2 does not meet the Government's minimum needs.

3. *Public Interest Determination*

Determinations regarding whether it is not in the public interest to purchase the items from domestic sources are matters of discretion vested in the Government departments—and not our Office. 41 Comp. Gen. 70, 73 (1963); B–170026, December 14, 1970; 51 Comp. Gen. 195, 198 (1971). To support this determination, the Assistant Secretary found, among other things, that only FN could supply the MAG58 in time to satisfy the Government's immediate requirements.

We are not persuaded by Maremont's claim that 41 U.S.C. § 10d (1970) requires determinations that the purchase of domestic items will be inconsistent with the public interest, and that therefore the Army's deviant determination that it is not in the public interest not to purchase the MAG58 from FN is invalid. We believe the Assistant Secretary's second determination must necessarily imply a determination that it is not in the public interest to purchase from a domestic firm.

Also, there is nothing that limits the application of the "public interest" exception to international agreements as is implied by Maremont.

Therefore, we do not believe the Army's discretion in determining that application of the Buy American Act would not be in the public interest can be questioned.

4. *Foreign Use*

The Army intends initially to purchase 2,500 MAG58's for installation in armored vehicles deployed in Europe and 300 MAG58's for United States training of Army personnel preparatory for duty in Europe. Therefore, the Army contends that the Buy American Act does not apply to the initial MAG58 purchase in any case.

We agree. In a very similar case, B–168333, May 27, 1970, we found that the Buy American Act should not be applied to procurements of ammunition parts primarily intended for use in Southeast Asia, even though 5 percent of the parts were going to be used for training in the United States. *See also* 49 Comp. Gen. 176 (1969); ASPR § 6–103.1 (1975 ed.).

B. *Balance of Payments Program*

ASPR §§ 6–800 to 6–807 (1975 ed.) implement the DOD policy in furtherance of the Balance of Payments Program. The purpose of this program is the reduction of dollar expenditures outside of the United States. Since the first 2,800 weapons are to be deployed in Europe and for United States training for European duty, consideration must be given to the Balance of Payment provisions. *See* B–168333, *supra*.

ASPR § 6–805.1 (1975 ed.) states:

6–805.1 *Policy.* Except as provided in 6.805.2, proposed procurement of supplies for use outside the United States shall be restricted to United States end products. Proposed procurement of foreign services shall be made only if authorized by 6–805.2.

ASPR § 6–805.2(v) (1975 ed.) states in pertinent part:

(v) *Nonavailability in the United States*—procurements as to which it is determined in advance by the individuals designated in (b) below that (1) the requirements can only be filled by foreign end products or services, because United States end products or services are not available per se, or are not available within the time required to meet urgent military requirements directly related to maintaining combat capability, the health and safey of DoD personnel, or to protect property, and (2) that it is not feasible to forego filling the requirements or to provide a United States substitute for it. * * *

The Assistant Secretary has determined with regard to the Balance of Payments program in a D&F:

1. The Department of the Army requirements for coaxial machine guns for armored vehicles deployed in Europe can only be filled by the MAG–58, a foreign end product, because United States end products are not available within the time required to meet urgent military requirements directly related to maintaining combat capability.
2. It is not feasible to forego filling this requirement or provide a United States substitute for the MAG–58.

Since the MAG58 represents the Government's minimum needs (and the M60E2 does not), and 34 months are needed to develop a domestic supplier of the MAG58, we believe the Assistant Secretary's determination of nonapplicability of the Balance of Payments Program is valid. *See* B–161895, December 29, 1967.

C. *Specialty Metals Preference*

1. *Would Award Violate Provisions?*

On May 17, 1976, Maremont protested that an award to FN, whose MAG58 undoubtedly contained specialty metals, would violate the provisions of section 723 of the DOD Appropriations Act, 1976, 90 Stat. 172, February 9, 1976, which states in pertinent part:

No part of any appropriation contained in this Act shall be available for the procurement of any article of * * * specialty metals * * * produced in the United States or its possessions, except to the extent that the Secretary of the Department concerned shall determine that a satisfactory quality and sufficient quantity of any articles of * * * specialty metals * * * produced in the United States or its possessions cannot be procured as and when needed at United States market prices and except procurements outside the United States in support of combat operations, * * *

However, earlier, on February 4, 1976, FN had agreed, without exception, that ASPR § 7-104.93 (1975 ed.), which implements the foregoing standard Appropriation Act provision, would be acceptable to FN. This clause states in pertinent part:

PREFERENCE FOR DOMESTIC SPECIALTY METALS (MAJOR PROGRAMS) (1974 APR)

(a) The Contractor agrees that any specialty metals (as hereinafter defined) incorporated in articles delivered under this contract will be melted in the United States, its possessions, or Puerto Rico; provided, that this clause shall have no effect to the extent that the Secretary or his designee has determined as to any such articles that a satisfactory quality and sufficient quantity cannot be procured as and when needed at United States market prices * * *.

Compliance with this clause would satisfy the 1976 DOD Appropriation Act's specialty metals requirements.

We note that the Congress currently has under consideration the DOD Appropriations Act—1977, H.R. 14262, in which certain modifications to the standard Appropriation Act provision affecting specialty metals have been made by the United States Senate. There are differences between the House of Representatives and Senate versions of this provision, and the legislation has not yet passed.

2. *Effect of Compliance with Specialty Metals Clause*

Upon learning of FN's acceptance of the clause, Maremont contends that the MAG58, if it contained American-melted specialty metals, would have to be requalified since the MAG58 to be procured is a different weapon and the side-by-side test data would no longer be valid. In this regard, Maremont explains that American-melted specialty metals could well have slightly different metallurgical characteristics, which could have a major impact on the performance of the MAG58.

In its supplementary report in response to these contentions, the Army has implied that specialty metals are nominally used in the MAG58. However, our review, in consultation with a weapons expert, of the FN proprietary data showing the specialty metals contained in the MAG58 indicates that a significant percentage of the MAG58, including many operating parts, is composed of various specialty metals. As indicated by Maremont, metallurgical differences between American-melted and the foreign specialty metals now used by FN in the MAG58 possibly could have a significant impact on the MAG58's performance. On the other hand, it is now uncertain as to what American-melted specialty metals will be required to be employed in the MAG58 by the clause.

With regard to the possible impact the use of American-melted metals may have on the MAG58, the Army has stated:

The metals used by * * * [FN] in the fabrication of the MAG 58 have equivalent U.S. steel classification codes. In general, the technical differences between

U.S. and European steels are of such a nature that in the judgment of [Army] * * * technical personnel, a requalification test beyond the normal first item production test will not be necessary.

Although there could well be different technical judgments on the impact of the possible use of American-melted specialty metals in the MAG58, we are not in the position to say the Army's technical judgment lacks a reasonable basis. In this regard, since determinations regarding the needs of the Government are the responsibility of the procuring agency concerned, the judgment of such agency's specialists and technicians as to whether an item meets the Government's requirements should be accorded considerable deference. This is particularly the case where questions of a highly technical or scientific nature are involved, and the determinations must be made based on expert technical opinion. *See* 52 Comp. Gen. 382, 385 (1972); *METIS Corporation*, 54 Comp. Gen. 612 (1975), 75-1 CPD 44; *Harding Pollution Control Corporation*, B-182899, July 3, 1975, 75-2 CPD 17.

In view of the foregoing, we are unable to find that FN's compliance with the ASPR specialty metals clause casts significant doubt on the reasonableness of the MAG58 selection. However, in view of the specialty metal problem and the minor modifications which have been made by FN to the MAG58 (discussed above), we recommend that the first article testing of the MAG58, which the Army states it will require, be sufficiently thorough to insure that the MAG58 still meets the Government's requirements.

IV. ALLEGED SECRET DEAL

Maremont has alleged to the court that a secret deal may exist between DOD and Belgium, whereby the MAG58 was to be selected as *quid pro quo* for the Belgian selection of the F-16 aircraft. We refer to B-156500 (5), *supra*, at 1, where we summarized the results of our investigation into this particular matter as follows:

* * * GAO found nothing to indicate that a purchase commitment had been made, but the Belgians were assured the MAG58 would be favorably considered if it proved itself in the tests.

Also see B-156500(5), *supra*, at 9, 11. We also refer to the transmittal letter to the Chairman of the Committee on Appropriations, United States Senate, summarizing our *Staff Study on Multinational F-16 Agreements*, ID 76-12, B-152600, September 2, 1975 (Staff Study itself is classified). In that letter we summarized our findings with regard to the relationship of the F-16 purchase and the MAG58 as follows:

The Secretary of Defense had promised to give favorable consideration if the weapon met the U.S. Army's requirements and if it was competitive in price.

We are unaware of any further uncovered documentation which would support Maremont's contentions in this regard.

V. CONCLUSION

Based upon the foregoing review, we conclude that the Army has violated no law or regulation in, and had a reasonable basis for, determining the MAG58 coaxial machine gun to be the Government's minimum need.

Accordingly, Maremont's protest is denied.

[B-181193]

Vehicles—Rental—Long-Term Basis—Temporary Duty—Germany

The General Accounting Office will not object to reimbursement of Government employee for costs of vehicle leased by employee on long-term basis for period of temporary duty in Germany, in light of apparent official determination that long-term use of vehicles was necessary due to extensive travel required and that long-term lease of vehicles was more advantageous to Government than rental arrangement, cost and other factors considered.

Insurance—Car Rentals—Vehicles Operated in Foreign Countries

Government employee may be partially reimbursed for costs of insurance purchased on vehicle commercially leased on long-term basis to extent necessary for hire and operation of motor vehicles on German roads. Excess coverage not required by statute and regulation or by industrial custom to enable commercial hire of vehicle and operation of vehicle on German roads is considered personal to employee and may not be certified for payment.

In the matter of insurance on commercially leased vehicles, August 24, 1976:

This is in response to a request for advance decision from an authorized certifying officer for the National Bureau of Standards, U.S. Department of Commerce, concerning reimbursement to a Government employee for the cost of insurance purchased on a vehicle leased for the purpose of carrying out official business while on temporary duty in the German Federal Republic (Germany).

Pursuant to Travel Order No. OB5826, dated April 10, 1975, Paul L. McQuate was authorized to travel from Boulder, Colorado, to Heidelberg, Germany, to participate in the installation and continued observation of an automated data collection system developed by the Institute for Telecommunication Sciences, U.S. Department of Commerce. Travel was expected to begin on or about June 1, 1975, and to terminate August 31, 1976. It is now anticipated that Mr. McQuate's duties in Germany will not end until December 31, 1976.

Mr. McQuate's duties require him to travel to military installations located in Worms, Karlsruhe, Heidelberg, Koenigstuhl, Stocksberg, Stuttgart, and Vaihingen on a regular basis. We have been informally advised that he visits each of these stations about once every three days. Because extensive travel was required, his travel orders provided for the rental of a vehicle while in Germany for travel between these

points. The total estimated cost for travel for the entire period of temporary duty was $1,000, which was apparently intended to cover the costs of a rental vehicle as well as transportation to and from Heidelberg.

Upon arrival in Germany, it was determined by Mr. McQuate and his superiors that it would be more advantageous to the Government, in terms of cost and convenience to Mr. McQuate, as well as the prompt and efficient carrying out of Mr. McQuate's duties, to lease a vehicle on a long-term basis rather than to enter into the usual short-term rental contract, because of the extensive travel required and because rental companies in Germany, such as Hertz and Avis, do not have special long-term (6 months or more) rental contract rates. The total cost of leasing an automobile on a long-term basis from the Ford Motor Company, Auto-Joncker KG, Heidelberg, including the purchase of insurance, was determined to be 46.3 percent lower than the cheapest rental contract otherwise available.

Accordingly, Mr. McQuate, in his own name, executed a contract with Auto-Joncker KG for a 1-year term beginning August 11, 1975, at a rate of DM 555 per month. (Depending on exchange rates, this amounted to about $212.) This rate included up to 30,000 kilometers (approximately 18,000 miles) for the year term. Each kilometer driven beyond this amount would be charged at the rate of 4 PF.

The auto leasing agreement with Auto-Joncker KG required that insurance be carried on the vehicle. In this regard, section 12 of the agreement (as translated in the submission) provides, in pertinent part, as follows:

Section 12 Insurance

(1) Basically, insurances are contracted for by the lessor on order of and under the name of the lessee.

(2) In the exceptional case that the lessee contracts for the insurance himself, the lessee is obligated to contract for the following insurances under the general conditions for the motor vehicle traffic insurance (AKB) and under the currently applicable tariff irrevocably for the leasing period stated in paragraph 1, item 2:

(a) Liability insurance, inclusive coverage DM 1,000,000, per damage occurrence.

(b) Full "kasko" (Insurance against all damage) insurance, DM 500. –, self participation.

Although referred to elsewhere in the submission as "Comprehensive" coverage, we have been informed by the Embassy of the German Federal Republic that "kasko" actually constitutes an approximate equivalent to a combination of both "Collision" and "Comprehensive" coverage in the United States.

The statutes of the German Federal Republic upon which the foregoing section 12 is based is entitled "Gesetz über die Pflichtversicherung für Kraftfahrzeughalter (Pflichtversicherungagesetz)"

(Law regarding obligatory insurance for motor vehicle holders (obligatory insurance law)). Sections 1 and 6 of this statute have been translated in the submission, in pertinent part, as follows:

Law regarding obligatory insurance for motor vehicle holders (Obligatory Insurance Law)

§ 1

The Holder of a motor vehicle or trailer being regularly based inland is obligated to contract and maintain for himself, the owner, and the driver liability insurance for coverage of personal, material, and other property damage caused by use of the vehicle in accordance with the following requirements if the vehicle is used on public thoroughfares or localities (Paragraph 1 of the law concerning road traffic).

* * * * * * *

§ 6

(1) Who uses by intent or negligence a vehicle on public thoroughfares and localities, or permits its use, although the liability insurance contract for the vehicle in accordance with Paragraph 1 does not, or does not any more exist, will be punished by imprisonment for up to one year and by a monetary fine, or by one of these punishments.

(2) If the action has been committed intentionally, the vehicle may be confiscated if it is property of the violator or the participant at the time of the decision.

It is clear, therefore, that liability coverage is required for the operation of vehicles on German roads. Moreover, failure to carry such coverage may subject the operator of a motor vehicle to criminal sanctions, including imprisonment. We have been informally advised by the Embassy of the German Federal Republic that internal regulations require the following minimum liability coverages:

Property damage	DM 50,000	
Personal injury or death	DM 250,000	(lump-sum)*
Personal incapacity	DM 15,000	(annual payment until death or termination of disability)

There is apparently no legal requirement that "kasko" be acquired.

Pursuant to section 12 of the contract with Auto-Joncker KG, Mr. McQuate obtained motor vehicle insurance through Gerling-Konzern, with liability coverage not to exceed DM 2,000,000, and DM 300 deductible "kasko." This coverage exceeded not only the minimum coverage legally required by German statute and regulation, but also the minimum amount required pursuant to the rental contract with Auto-Joncker KG. The total quarterly cost of the insurance purchased was as follows:

---

*Liability coverage in Germany is apparently different than insurance in the United States, in that both maximum lump-sum and annual payments are provided for. The legally required liability coverage will be referred to in this decision, henceforth, as DM 250,000.

Liability	DM 238.50
Kasko	DM 145.00
Total quarterly cost	DM 383.50

Depending upon exchange rates, the total quarterly cost was approximately equal to $152.

The cost of leasing the vehicle was allowed on Mr. McQuate's travel vouchers, but the cost of insurance was disallowed on Travel Voucher Partial No. 9, and further made retroactive to include two previous claims on Partial Vouchers Nos. 4 and 5, on the basis of the restriction in the Federal Travel Regulations (FPMR 101–7) para. 1–3.2c (May 1973) against the reimbursement for the costs of the collision damage waiver, which is part of the usual rental agreements.

The total amount disallowed was $444.34. An authorized certifying officer of the National Bureau of Standards now asks for an advance decision as to whether the travel vouchers for insurance costs may properly be certified.

We would first point out that individual employees are generally restricted in their recovery for travel expenses to expenses authorized on their Travel Orders, whch we understand do not generally authorize the long-term leasing of vehicles. *Cf.* 31 U.S. Code § 638(a) (1970). Nevertheless, in light of the authorization of the Travel Order for Mr. McQuate to hire a vehicle, and the apparent subsequent determination that a long-term lease arrangement would be more advantageous to the Government than rental based on short-term rates, we will not object to reimbursement to Mr. McQuate of the costs he incurred in leasing the automobile.

As to whether Mr. McQuate may be reimbursed for the costs of insurance purchased on the subject vehicle, FTR para. 1–3.2c (May 1973), cited as the reason for disallowance, provides as follows:

> c. Damage waiver or insurance costs. In connection with the rental of vehicles from commercial sources, the Government will not pay or reimburse employees for the cost of the collision damage waiver or collision damage insurance available in commercial rental contracts for an extra fee. The waiver or insurance referred to is the type offered a renter to release him from liability for damage to the rented vehicle in amounts up to the amount deductible (usually $100) on the insurance included as a part of the rental contract without additional charge. Under decisions of the Comptroller General, the agency in appropriate circumstances is authorized to pay for damage to the rented vehicle up to the deductible amount as contained in the rental contract should the rented vehicle be damaged while being used for official business. The cost of personal accident insurance is a personal expense and is not reimbursable.

This paragraph does not prohibit the reimbursement of a Government employee of the cost of insurance purchased on a rental vehicle, except to the extent that the coverage purchased constitutes a waiver of responsibility for all collison damage costs. This is customarily referred to as a collison damage waiver. Full insurance coverage, except for the

first $100 (or some other amount) of collision damage is customarily included in rental agreements.

However, reimbursement would be normally precluded by the long-standing policy of the Government to self-insure its own risks of loss. *See, e.g.*, 39 Comp. Gen. 145 (1959); 19 *id.* 798 (1940). In B-181193, June 25, 1974, we indicated that at least insofar as the collision damage waiver is concerned, we might waive this policy where foreign statutes or regulations compel purchase of insurance. Moreover, in a decision to the General Services Administration (GSA), dated August 11, 1976, 55 Comp. Gen. 1343, we overruled 39 Comp. Gen. 145 and 19 Comp. 798, to the extent that they would preclude GSA from promulgating regulations to provide for the purchase of insurance by the Government or reimbursement for insurance costs incurred by a Government employee while operating a motor vehicle in foreign countries where legal requirements or procedures make purchase of liability insurance necessary for the use of the country's roads and where purchase is determined to be in the best interests of the Government.

These cases do not completely decide the issue at hand for three reasons. First, GSA has not yet regulated in this area; second, neither of the above cases deals with the issue of purchase of insurance on hired vehicles, except for the collision damage waiver; and third, the cited cases do not involve the purchase of collision and comprehensive coverage.

However, the usual rental contract includes insurance on the vehicle, except for the costs of the first $100 (or some other stated amount) of collision damage. Mr. McQuate could have rented such a vehicle for his use on these terms. If he had done this, the cost of insurance on the vehicle would have been included in the rental rates charged. In this event there would have been no question as to the propriety of reimbursement, at least insofar as the rental was authorized. Mr. McQuate, and his superiors determined, however, that the cost of a rental contract would have far exceeded the cost of a long-term leasing arrangement, even including the costs of securing insurance, and that, therefore, leasing a vehicle would be more advantageous to the Government. As noted above, we have indicated that we would permit reimbursement for the cost of the collision damage waiver where foreign statutes require such purchase for use of the roads. Accordingly, we are of the view that since the leasing arrangement, including insurance, was less costly to the Government than a commercial rental agreement, and since purchase of insurance was necessary for operation of a vehicle on Germany's roads, reimbursement for the costs of necessary insurance may be made.

It remains to consider, however, how much of the costs of insurance incurred by Mr. McQuate may be properly certified for payment. In

this regard, we note that the insurance coverage purchased by Mr. McQuate exceeded not only the legally required minimum but also the minimum amount provided in the rental contract with Auto-Joncker KG.

We indicate in our decision to GSA, 55 Comp. Gen., *supra*, that insurance may be purchased by the Government or the costs thereof may be reimbursed to a Government employee where legal requirements *or procedures* make purchase necessary for the use of a foreign country's roads. While Mr. McQuate was only legally required to purchase liability insurance on the vehicle, and then only with DM 250,000 coverage, he could not have leased a vehicle from Auto-Joncker KG unless he contracted for liabiilty insurance with a maximum amount payable of DM 1,000,000 and "kasko" coverage with a deductible amount of DM 500. Moreover, we have been informally advised that custom in the leasing industry is to require that insurance on vehicles be carried in amounts higher and coverage broader than the legally required minimums. Under the circumstances it is reasonable to conclude that Mr. McQuate could not have leased a vehicle for operation on the German roads without such coverage and therefore the costs of the coverage required in the lease agreement may properly be certified for payment, when Mr. McQuate provides information as to the costs of such insurance from Gerling-Konzern.

Mr. McQuate, however, secured insurance coverage exceeding even the amount required in the lease agreement. The difference between the amount required in the lease agreement and the costs of the coverage actually obtained must be considered personal to Mr. McQuate, and may not properly be certified for payment.

[B-183533]

Compensation—Double—Concurrent Military Retired and Civilian Service Pay—Veterans Benefits in Lieu of Waived Retired Pay—Dual Compensation Act Reduction Formula

A retired Regular commissioned officer who accepts Federal civilian employment, and who immediately executes a waiver of retired pay pursuant to 38 U.S.C. 3105 in order to receive veterans' disability compensation, which award is administratively delayed but when granted by VA is made effective retroactively to date of waiver, has in effect reduced the legally authorized retired pay by the amount of the veterans' compensation; therefore, retired pay payments received by the member during the retroactive period must be adjusted under the dual compensation formula of 5 U.S.C. 5532 from the effective date of the waiver.

In the matter of Lieutenant Colonel Oliver B. Larson, USAF, retired, August 26, 1976:

This action is in response to a letter with enclosures, from the Accounting and Finance Officer, Air Force Accounting and Finance

Center, Denver, Colorado 80205, requesting an advance decision concerning the propriety of making payment on a voucher for $701.48, in favor of Lieutenant Colonel Oliver B. Larson, 517-16-6068, USAF, Retired, for additional retired pay for the period August 8, 1971, through March 31, 1972. The letter was forwarded to our Office by the Chief, Finance Group, Directorate of Accounting and Finance, Headquarters United States Air Force, and has been assigned Air Force Request No. DO-AF-1233 by the Department of Defense Military Pay and Allowance Committee.

Our Office has also received correspondence directly from the member in which he states that his entire claim for additional retired pay is in the total amount of $1,233.09, for the period extending from August 8, 1971, through May 31, 1973. In this connection, we have recently been advised by the Air Force Accounting and Finance Center that their request for decision in this case did not represent the member's entire claim, confirming that the period in question and the amount involved are as claimed by the member. We have been requested to include the issue of the member's entitlement for the subsequent period in this decision.

The submission states that on August 8, 1971, the member, a Regular officer of the Air Force, retired from active military service and accepted Federal civilian employment. Concurrently with his retirement, the member applied to the Veterans Administration (VA) for disability compensation based on a 50 percent disability which arose from his Vietnam service. In view of his pending claim against the VA for disability compensation, the member had submitted VA Form 21-651 to the Air Force on August 1, 1971, whereby he waived that portion of his retired pay which was equal in amount to compensation which he might receive from the VA. Due to an error in the member's record on file with the VA, his claim was denied. However, in response to his subsequent appeal, the VA corrected its records and notified the Air Force Accounting and Finance Center on March 6, 1972, that the retired member was entitled to veterans' disability compensation in the amount of $96 a month, effective retroactively to August 8, 1971. On May 16, 1973, the VA advised the member that as the result on their further correcting his records, he was actually entitled to disability compensation in the amount of $193 a month, retroactive to August 8, 1971.

Because the member received retired pay equal to his VA disability compensation entitlement during the retroactive period, no retroactive payment of disability compensation was required of or made by the VA. Although the member had submitted VA Form 21-651 to the Air Force upon his retirement, whereby he waived that portion of his retired pay which was equal in amount to compensation which

he might receive from the VA, it was apparently determined that his waiver became effective too late to coincide with the effective date of the retroactive VA award. Consequently, the total payments received by the member during the retroactive period were classified as retirement pay, and in view of his Federal employment during the same period, were reduced in accordance with the Dual Compensation Act of 1964, 5 U.S. Code 5532 (1970).

The member bases his claim on the argument that VA disability compensation is not subject to dual compensation reduction and since the retroactive award of VA disability compensation did not operate to reclassify the appropriate amounts of retirement pay received during the retroactive period, the total retired pay was subjected to reduction under the dual compensation formula and he was deprived of the full monetary benefit he would have received had he properly received his full VA disability compensation *ab initio*.

In addition to the resolution of this claim, the Accounting and Finance Officer requests our decision as to whether the determination reached in the present case would vary in those cases where the VA awards disability compensation without administrative delay and error and the member's retired pay is promptly adjusted.

Section 3100 of Title 38, United States Code (1970), prohibits the concurrent payment of retired pay and VA pension or compensation. However, in order to permit retired individuals to receive either their retired pay or their veterans' benefits, or such veterans' benefits plus retired pay equal to the difference between the amount of the VA compensation and the full retired pay entitlement without terminating the status giving rise to the right of retired pay, or to veterans' benefits, 38 U.S.C. 3105 (1970) permits the retiree to waive his retired pay to the extent of veterans' benefits being received. Under the terms of paragraph 3a, Department of Defense and Veterans Administration Memorandum of Understanding, dated July 11, 1969, payment of veterans' benefits must be deferred until reduction of retired pay has been effected by the military service concerned. Therefore, a member's waiver of retired pay does not become effective until after the notifications of the VA award are processed by the service department concerned.

In our decision B–133071, June 28, 1961, we advised the Administrator of Veterans Affairs and the Secretary of Defense concerning cases involving retroactive waivers of retired pay that:

* * * where a record is corrected by the VA to show a retroactive entitlement to compensation or pension payments, and the individual has received military retirement pay during the retroactive period, a retroactive waiver may be filed. If the retirement pay equals or exceeds the amount of the VA compensation or pension, no payment by VA is necessary for the retroactive period. If the amount of the VA compensation or pension is greater than the retirement pay, only the excess of VA compensation or pension is to be paid by VA for the retroactive period. * * *

Thus, where the amount of retired pay received by a member during the retroactive period of a VA disability compensation award equals or exceeds the total VA amount awarded retroactively, the amount due under the award is in effect offset by retirement pay previously received, and no payment of VA disability compensation for the retroactive period is forthcoming.

Section 5532 of Title 5, U.S. Code (1970), provides in pertinent part that:

> (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 receives pay, his retired or retirement pay shall be reduced to an annual rate equal to the first $2,000 of the retired or retirement pay plus one-half of the remainder, if any. * * *

Where a retired military member is in the Federal employ during the period of a retroactive award of VA disability compensation, all amounts classified as retired or retirement pay are subject to reduction under the dual compensation formula. The question presented in the present case is whether a waiver filed pursuant to 38 U.S.C. 3105, *supra*, but which is filed prior to a retroactive award of VA disability compensation, may operate to reclassify as VA compensation, that retired pay received by the member during the retroactive period so as to retroactively exclude it from application of the dual compensation reduction formula to the extent it does not exceed the amount of the VA award.

In our decision 36 Comp. Gen. 799 (1957), we held that a valid waiver of retired pay and the payment of veterans' benefits on the basis of such waiver, operates to reduce the legally authorized retired pay by the amount of the waived retired pay, and that from the effective date of the member's waiver he ceased to be entitled to retired pay equal in amount to the compensation which he is entitled to receive from the VA. *See also*, 48 Comp. Gen. 73 (1968). It follows, then, that disability compensation payable by the VA is not retired pay; and, therefore (as a consequence of the member's execution of the waiver of retired pay on August 1, 1971, in the present case), payments equal in amount to the VA compensation entitlement and which are received subsequent to the effective date of the waiver are classified as disability compensation and are not subject to reduction under the Dual Compensation Act, *supra*.

It will be noted that the statute permitting waiver of retired pay (38 U.S.C. 3105, *supra*) contains no express provision granting administrative discretion as to when the waiver shall be processed and made effective. Although the statute does contain a provision for the purpose of preventing duplicate payments, in that the service department with which the waiver is filed must notify the VA of the receipt of the waiver, the amount waived, and the effective date of the waiver,

there is no requirement for the service department to establish an effective date which is later than the effective date of the disability compensation entitlement if adequate provision can be made to prevent payment of double benefits. *See* 36 Comp. Gen. 799, *supra*. It is our view, therefore, that the service department may not establish an effective date for waiver which would operate to deny the member the full monetary benefit which he would have otherwise received had the award of disability compensation been timely established on or before the date on which he became entitled thereto. This rule must apply in every case where the VA award of disability compensation is delayed administratively even when such delay is not excessive but involves periods of time normally required in the processing of a member's request and agency action thereon.

Accordingly, the total payments received by the member during the period August 8, 1971, through May 31, 1973, must be retroactively adjusted under the dual compensation formula of 5 U.S.C. 5532, *supra*, to allow him the full monetary benefit he would have received had veterans' disability compensation payments been awarded on their effective date of entitlements and the voucher is being returned for recomputation in accordance with this decision.

[B-186461]

Bids—Evaluation—On Basis Other Than Invitation—Intended Bid Price—Mathematically Converted

Bid responsive to reasonable interpretation of invitation for bids which is unclear as to basis for price computation may have price converted mathematically to intended basis and evaluated.

In the matter of Publication Press, Inc., August 26, 1976:

Publication Press, Inc. (Publication Press) protests a determination by the Government Printing Office (GPO) that Port City Press, Inc. (Port City), has submitted the low responsive bid to GPO Jacket No. 202-989.

Jacket No. 202–989 is a solicitation for bids to produce 3,300 copies (sets) of the 1975 annual issue of the National Union Catalog in 18 volumes. When the solicitation was issued GPO knew that each of the first 9 volumes would contain 1,028 pages, but it did not know the exact page content of volumes 10–18.

As it affects the matters at issue, the solicitation called for a single bid price for 3,300 copies of each of volumes 1 through 9 with a single volume to include 1,028 pages. It called for a similar bid for volumes 10 through 18, assuming 960 pages per volume. However, recognizing that the latter 9 volumes might contain either more or less than 960

pages, bids were to include prices to be added or subtracted if the number of pages was either more or less than 960. These prices were expressed in terms of signatures (printed sheets which when folded and trimmed became 4 pages or multiples of 4 in the volume). Signatures of 4, 8, 16 and 32 pages were to be priced.

The solicitation stated that award would be made on the basis of the lowest price for 3,300 copies of each of the first 9 volumes with an individual volume content of 1,028 pages and 3,300 copies of each of the last 9 volumes, assuming a volume content of 1,020 pages. This meant, of course, that to evaluate the bids for the last 9 volumes, the bid for the signatures (totaling 60 pages) would have to be added to the single figure bid for the volumes.

The relevant portions of the Port City and Publication Press bids are as follows:

Item		Port city*	Publication Press
Volumes 1 through 9 (1,028 pages)		$122, 599	$118, 245. 50
Volumes 10 through 18 (960 pages)		$115, 565	$111, 051. 00
Subtotal		$238, 164	$229, 296. 50
Signatures (plus or minus):			
	32 pages	$319	$2, 642. 40
	16 pages	$287	$1, 514. 25
	8 pages	$258	$1, 098. 65
	4 pages	$232	$1, 009. 70
Subtotals	60 pages	$1, 096	$7, 265. 00

*Less 5% prompt payment discount.

It is apparent that the signature prices were not submitted on the same basis.

The GPO interpreted the solicitation to call for signature prices covering the number of copies (3,300) per volume. It assumed Port City bid on this basis. Therefore, the GPO multiplied the sum of Port City's signature of bids by nine. However, the GPO concluded Publication Press' signature bids covered all of the last 9 volumes and did not multiply them.

The protester contends that if Port City offered signature prices on an individual volume basis rather than a per set basis its bid is nonresponsive. It calls attention to the "BASIS OF AWARD" section which provides that award will be made to the bidder complying with the specifications and submitting the lowest total price. According to the protester, "[i]t is perfectly clear from the pricing schedule that the government did not ask for a quotation of 3,300

copies of one volume, but for 3,300 sets (9 volumes)." Moreover, the protester states that after bid opening GPO contacted Port City and the other bidders offering similar prices in order to determine "what they meant by their bids." The protester goes on to state that since Port City was aware of the other bid prices:

> It did not take any imagination for it to conclude that if it accepted G.P.O.'s suggestion that its figure was to be multiplied by nine, it would still be the low bidder by some four hundred dollars. If G.P.O. held it to its price as submitted in the bid, it would have to do the job for $8,000.00 less. It advised that G.P.O. was correct in assuming that its figure was to be multiplied by nine.

In conclusion, the protester states that since the bid is not clear it should be rejected or, at a minimum, GPO should solicit new bids.

Port City, on the other hand, insists that while a GPO representative did question its firm concerning "another specification in the bid * * * at no time was the 'Signature Page' price discussed." In addition, Port City states that this job was bid in the same manner as the one in 1975 with GPO, and "there was no protest."

A nonresponsive bid is not eligible for award. The well-established rule recognizes that maximum practicable competition can be achieved and fraud or favoritism precluded only if bids are submitted on the same basis consistent with the terms of the solicitation. Therefore, a contract for pens cannot be awarded pursuant to a solicitation for pencils even if an attractive bid for pens is received since prospective suppliers who accepted the call for pencils at face value had no opportunity to compete on pens.

We do not believe the general rule is applicable in this case. Initially, we note that the solicitation does not clearly indicate whether signature prices are to cover a single volume or all of the last 9 volumes. We think it is reasonably susceptible to either interpretation. Publication Press appears to have computed the signature prices for volumes 10 through 18 as indicated by the fact that the per page price for signatures is generally consistent with the per page price for the stated volumes. Port City's prices for the signature pages compared with its bid for volumes 10 through 18 make it illogical to draw any conclusion than that the signature prices were per volume.

We assume that GPO intended bidders to price signature sheets covering all of the last nine volumes. This is reasonable since GPO would have to construct such figures to perform a proper evaluation. Nevertheless since reasonably the Port City signature prices can only be per volume and can be converted readily into prices for all 9 volumes, we fail to see any reason for rejecting its bid as nonresponsive. Port City obtained no advantage. It should not—and we believe it would not—have been permitted to argue that its signature prices covered 9 volumes. *Cf.* 51 Comp. Gen. 498 (1972).

We believe the situation is not different from cases in which bids have been found responsive where the bidder failed to furnish data called for but included sufficient information to derive the data by application of generally accepted mathematical formulas. *See* 48 Comp. Gen. 420, 428 (1968). The rule is equally applicable here.

The protest is denied.

[B-184860]

Pay—Retired—Survivor Benefit Plan—Termination or Reduction—Children's Benefits

When member provided Survivor Benefit Plan coverage for widow or widower and dependent children and widow or widower becomes ineligible for annuity, the dependent children are entitled to the full annuity as provided by the member even though the annuity of the widow or widower had been reduced by the amount of Dependency and Indemnity Compensation received.

Pay—Retired—Survivor Benefit Plan—Spouse—Termination or Reduction—Refunds

Widow or widower of member who elected coverage under Survivor Benefit Plan is entitled to refund of deductions made from retired pay if the annuity is reduced based upon receipt of Dependency and Indemnity Compensation. Such refund, however, should be computed on the basis of reductions in retired pay caused by coverage of spouse and no refund may be made based upon the reductions in retired pay caused by member's election of coverage for dependent children.

In the matter of Department of Defense Military Pay and Allowance Committee Action No. 519—Survivor Benefit Plan, August 27, 1976:

This action is in response to a letter from the Assistant Secretary of Defense (Comptroller) requesting a decision concerning the amount of an annuity payable under the Survivor Benefit Plan (SBP) 10 U.S. Code 1447–1455, to dependent children in the circumstances described in Department of Defense Military Pay and Allowance Committee Action No. 519, enclosed with the submission.

The question presented is:

> If an eligible spouse with dependent children is receiving a Survivor Benefit Plan (SBP) annuity which is reduced because of Dependency and Indemnity Compensation (DIC) entitlement and such spouse becomes ineligible to receive such annuity because of remarriage or death, are the dependent children of such spouse entitled to receive in equal shares the full amount of the annuity before DIC reduction or are they entitled to receive the reduced annuity the spouse was receiving prior to his or her becoming ineligible?

The discussion contained in the Committee Action states that the question presented relates to those situations where specific coverage for a spouse and dependent children was elected by the retiree and the additional cost for dependent children was paid by the retiree.

Payments to beneficiaries under the SBP are authorized by 10 U.S.C. 1450(a), clause (1) of which provides for payment to the surviving

widow or widower and clause (2) of which provides that an SBP annuity shall be paid to the surviving dependent children in equal shares if the eligible widow or widower is dead, dies, or otherwise becomes ineligible. It may be noted that the annuity payment provision of 10 U.S.C. 1450 contains no limitation on the amount of the annuity payable to the surviving dependent children. On the other hand, 10 U.S.C. 1450(c) specifically requires that where the spouse is entitled to Dependency and Indemnity Compensation (DIC), such spouse may be paid an annuity, but only in the amount that the annuity otherwise payable would exceed the DIC to which the spouse is entitled.

In connection with restrictions on annuity payments 10 U.S.C. 1450(e) provides that, when the annuity payable is reduced or eliminated because of entitlement to DIC, a computation is made of the amount which should have been deducted from retired or retainer pay to provide the recalculated annuity and the spouse is refunded the difference between the amount deducted prior to the recomputation and the amount that should have been deducted to provide such annuity. In 54 Comp. Gen. 838 (1975) we held that the spouse who receives a refund under 10 U.S.C. 1450(e) permanently loses his or her entitlement to that portion of the annuity which is represented by the amount refunded.

In the discussion which accompanied the submission it is indicated that based on the language of 10 U.S.C. 1450(e) and the interpretation given that section in 54 Comp. Gen. 838, there is a basis for concluding that the surviving dependent children in the situation presented are entitled to share equally in only the reduced annuity as recalculated under section 1450(c).

Section 1452(a) of Title 10, U.S. Code, prescribes the formula by which it is determined how much retired or retainer pay is to be reduced when a member elects to provide an annuity for a spouse. In addition, that section delegates to the Secretary of Defense the authority to issue regulations prescribing the amount to be deducted from retired or retainer pay when a member elects an annuity for a dependent child or children.

The legislative history of section 1452(a) indicates that Congress intended the method of computing the amount to be deducted for dependent children's coverage to be different from that used in the case of coverage for a spouse. The Committee on Armed Services, United States Senate, in a report to accompany S. 3905 on "Establishing a Survivor Benefit Plan for Members of the Armed Forces in Retirement, and for Other Purposes" (Report No. 92–1089) stated (p. 25):

> While the committee agrees that the legislation should provide a benefit to dependent children, it also believes that it should be accomplished on the basis of a self-financing plan. Specifically, the committee recommends that the basic plan

in the bill apply to the spouse. For a slight additional charge (above the charge for spouse coverage), the member could cover the spouse and dependent children. If the spouse were to become ineligible, benefits would then flow to the children. If there were no spouse, the member could cover dependent children. The cost of dependent children's coverage, in both cases, would be based on the actuarial cost for providing benefits and would terminate when the children no longer are eligible for benefits.

In the same report it is stated (p. 28) that only the DIC payable on behalf of the spouse, not DIC payable for dependent children, may be used as an offset.

It thus appears that when a member wishes to provide for an annuity under the SBP for his spouse and dependent children the deduction for such annuity consists of two elements: one portion for the annuity for the spouse and another portion for the annuity for the surviving dependent children. In addition, Congress has provided that the cost of providing coverage for dependent children terminates when the children are no longer eligible for such annuity. However the cost of the annuity for the spouse continues.

We conclude from the above that the annuity for the surviving dependent children is separate and apart from that payable to the widow or widower. Accordingly, the provision in 10 U.S.C. 1450(c) reducing the annuity of a widow or widower on account of DIC entitlement should not be considered as reducing the annuity payable to dependent children. Further annuities paid to dependent children are not reduced on account of their entitlement to DIC since no provision is made for such reduction. As indicated in the cited legislative history, the children's annuity is to be paid for by the member in amounts sufficient to cover the benefit provided.

Thus in the stated circumstances the surviving dependent children are entitled to receive, in equal shares, the full amount of the annuity originally provided for.

In connection with the answers to the question presented it is noted that, in recalculating the amount to be refunded to the spouse under 10 U.S.C. 1450(e) because the annuity is reduced by the amount of DIC entitlement, only that portion of the retired pay deduction applicable to the spouse's annuity is for consideration. No refund should be made based on the additional cost paid in order to provide an annuity for surviving dependent children.

If refunds were made to spouses based upon the amount deducted from retired pay for coverage of dependent children, we do not believe such refunds should be recomputed and recovered at this time since there was some uncertainty with respect to the proper method of computing refunds. However, dependent children who are or who become entitled to annuities are entitled to annuities based upon the coverage selected by the member without regard to DIC payment to themselves or to the member's widow or widower. Accounts not paid on that basis should be adjusted and past or future annuities of dependent children paid on the basis of this decision.

[B-185302]

Contracts—Termination—Feasibility Questioned

In reaching prior decision whether to recommend termination for convenience of improperly awarded contract, General Accounting Office should have considered estimated termination costs in relation to total amount of combined small business/labor surplus area set-aside award. GAO therefore recommends that Defense Supply Agency examine current feasibility of terminating contract, and earlier decision is modified to this extent.

Contracts—Termination—Convenience of Government—"Best Interest of the Government" Basis—Cost *v.* Integrity of Competitive Bidding System

General Accounting Office decisions have recognized propriety of considering estimated costs in deciding whether recommendation that improperly awarded contract be terminted for convenience would be in the Government's best interests. Contention that preserving integrity of competitive bidding system requires termination regardless of costs is not persuasive.

Contracts—Protests—Disclosures of Information, Prices, etc.

In regard to contention that bidder had no opportunity to comment on agency's termination for convenience estimate furnished to GAO, Bid Protest Procedures recognize appropriateness of withholding information which, as here, agency believes is not subject to disclosure.

Contracts—Protests—Persons, etc., Qualified to Protest—Interested Parties—Unions

Even if labor union is assumed to be an "interested party," there is no indication that it submitted written comments during the course of protest proceedings. Therefore, its letter submitted after decision was rendered is not for consideration in connection with pending request for reconsideration of protest decision.

In the matter of Society Brand, Inc.—request for reconsideration, August 30, 1976:

Society Brand, Inc. (SBI), requests reconsideration of our decision in the matter of *Propper International, Inc., et al.*, B-185302, June 23, 1976, 55 Comp. Gen. 1188, 76-1 CPD 400. The decision found that the Defense Supply Agency (DSA) improperly awarded a contract because the awardee, Propper, was not a small business. The decision stated that termination for convenience was not recommended because (1) the estimated cost ($461,244–$527,136 as of June 25, 1976) indicated that such action would not be in the Government's best interests, considering the total amount of the contract ($658,920), and (2) the award was based on a determination of urgency.

SBI contends that (1) the estimated cost of terminating an improperly awarded contract is an irrelevant factor upon which to base a decision not to terminate the contract, (2) SBI and other parties were not given an opportunity to comment on the estimated costs prior to issuance of our decision, and (3) our decision incorrectly stated that the contract amount was $658,920, whereas, actually it is about $1,300,000.

The third issue raised by SBI is the most important. The procurement in question was a combined small business/labor surplus area set-aside. The dollar figure cited in our decision ($658,920) represents only

one-half of the total contract amount ($1,317,840). Moreover, for a bidder to obtain award of any portion of a combined small business/labor surplus area set-aside it must be a small business. See ASPR § 1-706.7 (1975 ed.). Therefore, in deciding whether to recommend termination for convenience of Propper's contract our Office should have considered the estimated costs in relation to the total contract amount of $1,317,840.

We recognize that the costs of termination have probably increased since the date of our decision. Moreover, the record indicates that the award was based on the Defense Supply Agency's (DSA) urgent need for supplies to meet a then-critical inventory situation. However, it is possible that in the current status of the contract the feasibility of termination for convenience is not out of the question. Therefore, by letter of today we are recommending to the Director, Defense Supply Agency, that he examine the current feasibility of terminating Propper's contract for the convenience of the Government and advise our Office of his findings as soon as possible.

If termination is found to be feasible, there is the question of which bidder would be entitled to the award. One of the parties to the protest, Bancroft Cap Company, Inc. (Bancroft), contended that award to the apparent second low bidder (SBI) could not be made. Bancroft argued that (1) SBI's self-certification as a small business was made in bad faith (Bancroft filed a protest to this effect with the contracting officer); (2) SBI is nonresponsible because it lacks the requisite financial capability; and (3) SBI is nonresponsible for lack of integrity, because an earlier decision of our Office on a different procurement (*Bancroft Cap Co., Inc.*, 55 Comp. Gen. 469 (1975), 75-2 CPD 321) found that SBI had failed to certify itself as a small business in good faith.

We note that DSA's February 17, 1976, report to our Office contains the following pertinent reply:

> Bancroft's protest against an award to SBI is based on Bancroft's contention that SBI is a large business concern, that SBI is ineligible for award under the provisions of ASPR 1-703(b), and that SBI is nonresponsible due to a lack of financial capability and integrity. The question of SBI's size status was referred to the Kansas City Regional Office of the SBA which advised that SBI was considered to be a small business concern. The question of SBI's responsibility is a question primarily for the Procuring Agency.

Our Office does not consider protests involving a bidder's size status since SBA is authorized to make such determinations. *Tate Engineering, Inc.*, B-186788, July 23, 1976, 76-2 CPD 76. Also, our Office no longer considers protests against affirmative determinations of responsibility unless there is a showing of bad faith or the solicitation contained definitive responsibility criteria which allegedly were not applied. ENSEC Service Corporation, 55 Comp. Gen. 494 (1975), 75-2 CPD 341.

As for SBI's contention that termination costs are irrelevant, in a number of decisions our Office has indicated that considering the status of contract performance and the estimated termination for convenience costs is appropriate in reaching a decision whether recommending termination would be in the Government's best interests. See, for example, *C3, Inc., et al., Requests for Reconsideration*, B-185592, August 5, 1976; *Dynamic International, Inc.—request for reconsideration*, B-183957, December 29, 1975, 75-2 CPD 412; *Data Test Corporation*, 54 Comp. Gen. 715, 726-727 (1975), 75-1 CPD 138. SBI's contention that preserving the integrity of the competitive bidding system requires termination regardless of the costs is not, in our view, persuasive.

In regard to SBI's contention that it had no opportunity to comment on the estimate of termination costs furnished to our Office by DSA, we note that our Bid Protest Procedures provide for furnishing copies of agency reports to protesters and other interested parties (4 C.F.R. § 20.3(c) (1976)); however, the procedures also recognize that withholding of information submitted by the agency is appropriate when "permitted or required by law or regulation." See 4 C.F.R. § 20.5. In past cases, our Office has withheld procurement sensitive information submitted by the agency when requested to do so; we have indicated that the protester's and the other parties' recourse in such circumstances to attempt to obtain the information is under the Freedom of Information Act, 5 U.S.C. § 552 (1970). See, for example, *Dynalectron Corporation et al.*, 54 Comp. Gen. 1009, 1021 (1975), 75-1 CPD 341; *cf C3, Inc., et al., supra*. Here, DSA has indicated to our Office that there is a question as to the releaseability of its termination for convenience estimate, and we understand that a request for this information under the Freedom of Information Act is now pending before the Agency.

The United Hatters, Cap and Millinery Workers International Union has also submitted a letter concerning our earlier decision. The letter essentially suggests that we investigate the activities of the companies involved in making military caps and hats.

The present matter before our Office does not involve an audit investigation; rather, it is a reconsideration of a protest decision rendered in regard to a particular Government procurement award. In this regard, our Bid Protest Procedures provide as follows (4 C.F.R. § 20.9(a)):

> Reconsideration of a decision of the Comptroller General may be requested by the protester, any interested party who submitted comments during consideration of the protest, and any agency involved in the protest. * * *

Assuming, *arguendo*, that the Union is an "interested party," it nevertheless did not submit written comments during the protest. Therefore, its letter is not for consideration in this matter. See *Republic Electronic Industries Corporation*, B-183816, December 31, 1975, 75-2 CPD 418.

In view of the foregoing, after reconsideration our earlier decision is modified to the extent indicated herein.

[B-171500]

Housing and Urban Development Department—Urban Redevelopment Projects — Rehabilitation Loan Program — Appropriation Availability

Under section 312 of Housing Act of 1964, as amended, and language of 1977 appropriation act, Department of Housing and Urban Development may make new commitments for rehabilitation loans immediately after August 22, 1976, from previous appropriation balances which would otherwise become unavailable after that date. Ambiguous reference to such prior appropriations in 1977 appropriation act could be read as making prior appropriations available only during fiscal year 1977. However, this narrow construction would create hiatus in funding from August 22 to October 1, 1976, which was clearly not intended by Congress.

In the matter of Department of Housing and Urban Development rehabilitation loan program, August 31, 1976:

The Under Secretary of the Department of Housing and Urban Development (HUD) has requested our opinion as to whether the Department can commit balances, including repayments, in the section 312 rehabilitation loan fund, between August 22 and October 1, 1976.

Section 312 of the Housing Act of 1964, as amended, 42 U.S. Code § 1452b, authorizes HUD to make direct loans to finance the rehabilitation of certain classes of real property. Budget authority for the making of loans is obtained through a revolving fund, established by subsection 312(d), which consists of appropriations made from time to time and miscellaneous proceeds derived primarily from loan repayments.

Until the most recent amendment of section 312 by the Housing Authorization Act of 1976, *infra*, appropriations for the rehabilitation loan program were authorized for fiscal year 1976 and into the fiscal year transition quarter beginning on July 1, 1976.* However, subsection 312(h) provided, in effect, that no loan could be made under the authority of section 312 after August 22, 1976, except under a contract, commitment, or other obligation entered into on or before that date.

Pursuant to the authorization in effect at the time, as described above, the Department of Housing and Urban Development-Independent Agencies Appropriation Act, 1976, approved October 17, 1975, Public Law 94-116, 89 Stat. 581, 583, appropriated to the section 312 revolving fund $50 million, to remain available until August 22, 1976.

The Housing Authorization Act of 1976, approved August 3, 1976, Public Law 94-375, § 12, 90 Stat. 1067, 1074, further amended sec-

*The Act approved December 9, 1975, Public Law 94-144, 89 Stat. 800, provided a general authorization for transition quarter appropriations to continue programs for which funding was authorized on June 30, 1976.

tion 312 to its present form. The subsection 312(h) termination date for the making of rehabilitation loans, other than those relating to prior obligations, was extended from August 22, 1976, to September 30, 1977. Subsection 312(d) was amended by including an appropriation authorization for the program of not to exceed $100 million for fiscal year 1977, and by adding the following new sentence to that subsection:

> The amount of commitments to make loans pursuant to this section entered into after August 22, 1976, shall not exceed amounts approved in appropriation Acts.

Finally, the Department of Housing and Urban Development-Independent Agencies Appropriation Act, 1977, approved August 9, 1976, Public Law 94–378, 90 Stat. 1095, 1097, contained the following language with respect to the rehabilitation loan program:

> For the revolving fund established pursuant to section 312 of the Housing Act of 1964, as amended (42 U.S.C. 1452b), $50,000,000, which amount shall be augmented by any previously appropriated funds which would otherwise become unavailable after August 22, 1976: *Provided*, That the aggregate amount of commitments for loans made from the fund for the fiscal year 1977 shall not exceed the total of loan repayments and other income available during such period, less operating costs, plus the aggregate amount provided herein.

In his submission to us, the Under Secretary points out that the effect of the foregoing statutory provisions, particularly the above-quoted language of Public Law 94–378, might appear to create a hiatus in funding for the rehabilitation loan program from August 22 to October 1, 1976:

> The authorization to make new commitments in the § 312 program was provided by § 12(a)(2) of the Housing Authorization Act of 1976. * * * The language of that act limited commitments that could be made in the § 312 program after August 22, 1976 to "amounts approved in appropriation acts."
>
> The 1977 Appropriations Act, which was the first appropriation act enacted subsequent to the Housing Authorization Act of 1976, obviously attempted to provide both authorization to make new 312 loan commitments after August 22, 1976, and appropriations for that purpose. However, the language of the Appropriations Act * * * could be construed to provide authority to commit only in Fiscal Year 1977, which begins on October 1, 1976. If the language of the 1977 appropriations act is so construed, the Department will have no authority to make 312 loan commitments between August 22, 1976 and October 1, 1976. Such a result would have a severely disruptive effect on the Department's Urban Homesteading Program (leaving some families who had counted on being able to move into new homes provided through the program during that period, without quarters during this hiatus) and its Community Development Block Grant Program.

The Under Secretary maintains that the foregoing possible construction is too narrow and that the intent underlying Public Law 94–378 was to continue the program after August 22, 1976, without interruption. Thus he would interpret the language of Public Law 94–378, *supra*, as including an authorization to commit immediately after August 22 "any previously appropriated funds which would otherwise become unavailable after August 22, 1976."

We agree with the Under Secretary's interpretation. As noted above, section 312(d) of the Housing Act of 1964, as amended, provides that

loan commitments made after August 2, 1976, shall not exceed "amounts approved in appropriation Act." The language of Public Law 94–378 satisfies this requirement by approving for commitments after August 22, 1976, new budget authority plus the budget authority provided in the fiscal year 1976 and transition appropriation. We believe it is clear that the $50 million in new budget authority applies only to fiscal year 1977, and therefore does not become available until October 1, 1976. Likewise, the appropriation language contains a limitation upon the aggregate amount of loan commitments which applies by its terms only during fiscal year 1977.

However, it does not necessarily follow that the reference to previously appropriated funds must also be construed as applying only during fiscal year 1977. The statutory language is ambiguous in speaking of funds previously appropriated "which *would otherwise become* unavailable after August 22, 1976." (Italic supplied.) This language is literally consistent with the view that the prior appropriation never actually became unavailable. It could be argued that, if the prior appropriation actually expired on August 22 and was to be renewed on October 1, the language would have referred to previously appropriated funds "which *became* unavailable after August 22, 1976."

More fundamentally, we are convinced that to construe the language as creating such a hiatus in funding would produce an incongruous result, and one contrary to the manifest congressional intent that the rehabilitation loan program continue uninterrupted. First, our review of the legislative histories of the relevant authorization and appropriation statutes discloses absolutely no indication of a congressional intent to create any hiatus in the program after August 22. Rather, it is evident that the issue here presented arises only by virtue of the particular sequence of enactment of these statutes. We have no doubt, for example, that the fiscal year 1976 and transition appropriation for the program was originally made to expire on August 22 merely because the authorization then in effect also expired on this date.

Second, the relevant legislative histories clearly do reflect a general congressional sentiment that the rehabilitation loan program is a highly successful undertaking which merited continuation. *See*, *e.g.*, S. Report No. 94–749, 15 (1976), H. Report No. 94–1091, 17–18 (1976) (concerning the most recent authorization legislation); H. Report No. 94–1220, 11–12 (1976), Cong. Rec., June 22, 1976 (daily ed.) H6447–49, *id.*, July 27, 1976, S12620–21 (remarks of Senator Proxmire) (concerning the 1977 appropriation bill). Of particular relevance here are several statements critical of a "stop and go phenomenon" with respect to the program as a result of prior impoundments and rescissions. H. Report No. 94–1220, *supra*, at 12; Cong. Rec., June 22, 1976, *supra*, at H6448 (remarks of Congressman Boland).

In sum, given the ambiguous language in Public Law 94–378 and the clear congressional intent that the rehabilitation loan program con-

tinue uninterrupted, it is our opinion that HUD may make new loan commitments immediately after August 22, 1976, against funds appropriated for the program prior to that date, including repayments.

[B-183304]

Fees—Attorneys—Grievance Proceedings—Employee Entitlement to Fees

Two State Department employees were named as defendants in grievance brought under Section 1820 of Volume 3, Foreign Affairs Manual, by employee they supervised. State Department refused to provide legal counsel to supervisors at grievance hearing due to personal nature of grievant's allegations and since purpose of hearing was fact finding for ultimate decision by Director of Personnel. Absent express statutory authority, the two supervisors may not be reimbursed fees of private counsel retained to represent them at the hearing.

In the matter of Manzano and Marston—claim for attorney's fees, August 31, 1976:

This action is in response to a request for reconsideration of the settlements issued by our Claims Division on February 6, 1976, of the claims of Mrs. Maria Manzano and Dr. Alice T. Marston, employees of the Department of State (hereinafter referred to as the claimants), for reimbursement of attorney's fees.

The record indicates that in February 1971, two employees under the supervision of the claimants in the Medical Division laboratory filed grievances under the provisions of Department of State regulations contained in Volume 3 of the Foreign Affairs Manual (FAM), Section 1820. On October 20, 1971, these two employees filed suit in United States District Court seeking declaratory and injunctive relief against nine named defendants (including the claimants) and the Department of State. By letter dated October 22, 1971, the Department of State requested that the Department of Justice represent the defendants since the acts alleged in the summons and complaint arose in the performance of official duties. It appears from the record that the Department of Justice did provide representation for the defendants in the United States District Court, where the action was dismissed on November 12, 1971, and in the United States Court of Appeals, where the subsequent appeal was dismissed on November 15, 1974.

While the District Court's decision was on appeal, the Department of State proceeded with a hearing on the grievance of one of the employees, Ms. Cecilia L. P. Thieman. The Office of Legal Adviser of the Department of State denied the requests of the claimants for departmental counsel since this would be "an administrative proceeding where (the) legal liability of (the) employees was not at issue" and since "the purpose of the hearing would be to bring out the facts bearing on the grievance for the benefit of the Director of Personnel, who would make a decision." The Department of State was represented

at the grievance hearing by the Office of Legal Adviser, but the claimants chose to obtain private counsel to represent their interests at the hearing in the belief that their "reputations and careers were at stake." The grievance committee which considered the case found no wrongdoing on the part of the claimants and recommended that the Department of State reimburse the claimants for legal fees and expenses. However, the Director of Personnel denied the claim on the basis of a decision of our Office in 52 Comp. Gen. 859 (1973), holding that the Department of State had no legal authority to reimburse the legal fees incurred by an employee in a grievance hearing.

The claimants were issued Settlement Certificates dated February 6, 1976, holding that, in the absence of express statutory authority providing for reimbursement of attorney's fees in a nonjudicial proceeding such as a grievance hearing, there is no basis for allowing the claims. The settlements distinguished those cases from that involved in 55 Comp. Gen. 408 (1975), where our Office held that a former Government employee could be reimbursed his legal expenses incurred in defending a lawsuit arising out of actions within the scope of his employment where the United States Attorney withdrew from the action for administrative reasons but where the Government's interest in defending the employee continued throughout the proceedings.

On appeal the claimants argue that the settlements turn on a distinction between an administrative proceeding and litigation before a state or Federal court, a distinction which the claimants consider is inappropriate. They state that since the parties are usually bound by administrative findings of fact when a case is later brought before a United States District Court or appellate court, denial of counsel "during these crucial stages of fact finding would not be dissimilar to denial of counsel in a civil proceeding during the pretrial proceedings, but allowing counsel at trial." The claimants argue further that their careers could have been destroyed and their reputations tarnished without assistance of counsel to represent them at the administrative hearing. Finally, they claim that a "reversal of roles" took place in that by attacking the merits of the grievant's case, they were representing the interests of the Department of State, and, thus, reimbursement of legal expenses should lie on a quasi-contractual theory of providing a necessary service to the Government.

Our Office has long held that the hiring of an attorney is a matter between the attorney and the client, and that absent express statutory authority, reimbursement of attorney's fees may not be allowed. 52 Comp. Gen. 859 (1973); B–184200, April 13, 1976; B–178551, January 2, 1976; and B–156482, June 23, 1975. In 52 *id.* 859, *supra*, we held that there was no authority for the reimbursement of legal fees to an employee of the Department of State who brought a grievance under the provisions of 3 FAM 1820, and we are similarly unaware of any authority providing for reimbursement of legal fees to an employee,

supervisor, or management official named as a defendant in the grievance action. In 55 *id.* 408, *supra*, referred to by the claimants as a "*Hadley* case," we allowed reimbursement of legal expenses where a former Small Business Administration (SBA) employee was sued in state court for actions committed while acting within the scope of his employment. In that case SBA requested the Department of Justice to provide legal representation in accordance with the provision of 5 U.S. Code 3106 (1970), and the United States Attorney was directed to represent the employee's interests. However, effective representation was not forthcoming, and, eventually, the United States Attorney withdrew as attorney for the defendant-employee. We noted that the statutes provide and the courts have held that unless authorized by law, only the Attorney General or the United States Attorney can represent the Government's interest in a court action. The Department of Justice stated in that case that its policy was to afford representation to employees sued for acts taken in the performance of their official duties. We held, therefore, that where representation was sought, but was unavailable, and where a determination had not been made that the United States was no longer officially interested in the employee's defense, we would have no objection to SBA reimbursement of reasonable legal fees.

In the present case, when the claimants were named as defendants in the suit in Federal court by the grievants, the Department of State requested that the Department of Justice provide legal representation, and the record indicates that the Department of Justice did so represent the defendants in the District Court and on appeal. However, when the grievance hearing was held, the Office of Legal Adviser decided that, due to the personal character of the allegations in the grievance, agency officials would not represent the individual employees. With regard to the allegations contained in the grievance, the Assistant Legal Adviser for Management, Department of State, writes:

> At that time, no characterization of the acts of Dr. Marston or Mrs. Manzano as official or unofficial was made; nor has that been done since in the absence of reinstitution of a suit in which personal liability would be at issue.

Thus, the present case is clearly distinguishable from our decision in 55 *id.* 408, *supra*, in that the legal liability of the claimants was not an issue in the grievance hearing. Therefore, there was no obligation on the part of the Department of State to supply counsel to represent their interest in a manner adversary to the grievant since the purpose of the hearing was to bring out the facts bearing on the grievance for the benefit of the Director of Personnel who would make a decision. In view of the discussion above, we further find that there is no basis for allowing this claim on a "quasi-contract" theory. Accordingly, the action of our Claims Division is sustained.

U. S. GOVERNMENT PRINTING OFFICE : 1976 O - 222-132