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[B-179650]

Congress—Committees—Travel Expenses—Overseas—Select Committee on Aging

In the absence of specific authorization in an appropriation act, 22 U.S.C.A. 1754(b) is the sole authority making counterpart funds (foreign currencies) available to members and employees of Congressional committees in connection with overseas travel. Under this provision, such funds are available only to specific committees, not including the House Select Committee on Aging, and to committees performing functions under 2 U.S.C.A. 190(d), which refers to *standing* committees but not *select* committees. Accordingly, members and employees of the House Select Committee on Aging are not authorized to use counterpart funds.

To the Chairman, Select Committee on Aging, House of Representatives, December 3, 1975:

This is in response to your request for our opinion as to whether Members and employees of the permanent Select Committee on Aging are authorized to use foreign currencies (counterpart funds) under the provisions of section 502(b) of the Mutual Security Act of 1954, as amended, 22 U.S.C.A. § 1754(b) (Pam. No. 5, 1975), or under authority contained in the Rules of the House of Representatives, precedents arising under the Rules, or any other legal authority, expressed or implied.

Section 1754(b) of Title 22 of the U.S. Code Annotated provides in pertinent part:

(b) Notwithstanding section 724 of Title 31, or any other provision of law, local currencies owned by the United States, which are in excess of the amounts reserved under section 2362(a) of this title, and of the requirements of the United States Government in payment of its obligations outside the United States, as such requirements may be determined from time to time by the President, (and any other local currencies owned by the United States in amounts not to exceed the equivalent of $75 per day per person exclusive of the actual cost of transportation) shall be made available to Members and employees of appropriate committees of the Congress engaged in carrying out their duties under section 190d of Title 2, and to the Joint Committee on Atomic Energy and the Joint Economic Committee and the Select Committees on Small Business of the Senate and House of Representatives and the Select Committee on Astronautics and Space Exploration of the House of Representatives and the Special Committee on Space and Astronautics of the Senate, for their local currency expenses. * * *

The above provision limits the availability of local (foreign) currencies, absent provision in an appropriation act (as authorized by 31 U.S.C. § 724 (1970)), to certain specified congressional committees (not including the Select Committee on Aging) and to congressional committees engaged in carrying out their duties under 2 U.S.C.A. § 190d. The duties discussed in 2 U.S.C.A. § 190d are those of *standing* committees of the Senate and the House of Representatives, and not select committees. Furthermore, the enumeration of specific select committees authorized to expend such currency under 22 U.S.C.A. § 1754(b) implies that other select committees are not so authorized under this provision. We have reviewed the legisla-

tive history of 22 U.S.C.A. § 1754(b), and are unable to find any indication of a broader congressional intent. It would appear, therefore, that use of foreign currency by Members and employees of the Select Committee on Aging is not authorized by 22 U.S.C.A. § 1754(b).

There is no other general statutory authority of which we are aware which would allow use of such funds by Members and employees of the Select Committee. The legislative history of certain amendments to 2 U.S.C.A. § 190d reveals that 22 U.S.C.A. § 1754(b) represents the sole authority by which local currency is made available for use by Members and employees of congressional committees, in the absence of a specific authorization in an appropriation act.

Section 118(a)(1) of the Legislative Reorganization Act of 1970, Public Law 91–510 (October 26, 1970), 84 Stat. 1156, amended 2 U.S.C.A § 190d to define the legislative review responsibilities of Senate standing committees, rather than standing committees of both Houses of Congress, as was previously the case. As a result, the amendment removed even the standing committees of the House of Representatives from the coverage of 22 U.S.C.A. § 1754(b). Section 1 of Public Law 92–136 (October 11, 1971), 85 Stat. 376, further amended 2 U.S.C.A. § 190d to define the legislative review responsibilities of standing committees of the House of Representatives as well as the Senate. In H.R. Report No. 92–34, 2 (1971) the need for this corrective legislation was explained as follows:

USE OF LOCAL CURRENCIES BY HOUSE COMMITTEES

Section 502(b) of the Mutual Security Act of 1954 (22 U.S.C. 1754) currently authorizes local currencies to be made available—

"(1) to 'appropriate committees of the Congress engaged in carrying out their duties under section 190d of title 2' (section 136 of the Legislative Reorganizaton Act of 1946) ; and

"(2) for the local currency expenses of the Joint Committee on Atomic Energy, the Joint Economic Committee, and the House and Senate Select Commitee on Small Business."

Such section 502 waives section 1415 of the Supplemental Appropriation Act, 1953 (31 U.S.C. 724), which requires an authorization in an appropriation act before such currencies may be made available.

Section 190d of title 2 was amended by section 118 of the Legislative Reorganization Act of 1970 to apply only to Senate commitees; the House committees were covered under a new clause 28, added by such section 118, to rule XI of the rules of the House.

Thus, since section 190d of title 2 no longer applies to House committees, *it is clear that House committees cannot now receive local currencies under the part of section 502(b) of the Mutual Security Act authorizing such currencies for committees carrying out their duties under section 190d of title 2.* New authority must be provided by law to overcome the restriction in section 1415 of the Supplemental Appropriation Act, 1953. The enactment of this bill will provide that authority. [Italic supplied.]

Thus it was recognized that no statutory authority exists for the use of local currencies by committees other than those specified in § 1754(b) or those engaged in duties set forth in 2 U.S.C.A. § 190d.

We have also reviewed the Rules of the House of Representatives and the precedents under the Rules, as you requested, and have found no discussion of the use of local currencies by congressional committees. Moreover, as was noted in H.R. Report No. 92–34, *supra*, a House resolution cannot authorize the use of local currencies since 31 U.S.C. § 724 requires such authority be provided in an act of Congress.

Certain limitations for funding the Select Committee on Aging were discussed in H.R. Report No. 94–89, 2 (1975) accompanying H. Resolution 287, 94th Cong., 1st Sess., agreed to March 21, 1975, which provided operating funds for the Select Committee:

> Another important and significant consideration is that this Select Committee must be funded entirely or completely from funds authorized by a resolution from the House contingent funds. Since this Select Committee does not have the same status as a standing committee of the House, payment of certain salaries from House appropriations is not routinely provided.

Accordingly, we can find no authority for expenditures of counterpart funds by Members and employees of the Select Committee on Aging.

[B–183086]

Compensation—Promotions—Temporary—Detailed Employees

Two Bureau of Mines employees were detailed to higher grade positions in excess of 120 days and no prior approval of extension beyond 120 days was sought from Civil Service Commission (CSC). Employees are entitled to retroactive temporary promotions for period beyond 120 days until details were terminated because Board of Appeals and Review, CSC, has interpreted regulations to require temporary promotions in such circumstances. Amplified by 55 Comp. Gen. as is (B–184990, Feb. 20, 1976).

Compensation—Promotions—Retroactive—Rule—Exceptions to Rule

While employees, who are determined to be entitled to retroactive temporary promotions on basis of mandatory requirement of regulations, must satisfy eligibility criteria for promotions, including 1 year service in grade required by the "Whitten Amendment," 5 U.S.C. 3101 note, CSC may waive service requirement in individual cases of a meritorious nature involving undue hardship or inequity. However, decision of Board of Appeals and Review, CSC, awarding retroactive temporary promotion to employees did not indicate whether waiver was granted and is, therefore, remanded for a determination of this issue.

Details—Compensation—Higher Grade Duties Assignment

Interpretations of regulations by agency charged with their administration are entitled to be given great weight by a reviewing authority. Board of Appeals and Review, CSC, has interpreted Commission's regulations to require temporary promotion of employees detailed to higher grade positions for over 120 days where prior Commission approval has not been sought. We have concurred in the Board's interpretation and therefore 52 Comp. Gen. 920 is overruled. Amplified by 55 Comp. Gen. ———— (B–184990, Feb. 20, 1976).

General Accounting Office—Decisions—Advance—Agency Heads, etc.

Agency heads and authorized certifying officers have statutory rights to an advance decision from the Comptroller General on propriety of paying make-whole remedies ordered by appropriate authorities. Thus, Board of Appeals and Review, CSC, when ordering make-whole remedies should permit agenices an opportunity to exercise their right to an advance decision from the Comptroller General prior to implementation of remedies.

In the matter of retroactive temporary promotions for extended details to higher grades, December 5, 1975:

This matter concerns the claims of Everett Turner and David L. Caldwell, employees of the Bureau of Mines, Department of the Interior, for backpay alleged to be due under a decision rendered by the Board of Appeals and Review, United States Civil Service Commission (CSC), on April 19, 1974, that ordered the agency to give the two employees retroactive temporary promotions. The agency complied with the decision and processed the ordered retroactive temporary promotions. The Board's decision also advised the employees to apply to the Comptroller General for backpay consistent with the decision, and they have filed such claims with our Office.

The record indicates that on April 18, 1971, David L. Caldwell and Everett Turner were appointed by the Bureau of Mines to the positions of Assistant Assessment Officer, GS-301-13, and Deputy Assessment Officer, GS-301-14, respectively. The grade GS-15 position of Assessment Officer was vacant at the time, and Mr. Turner immediately assumed the duties of that position as he was obligated to do under his new position description. Subsequently, on March 16, 1972, the Staff Associate, by a memorandum to the Director, designated Mr. Caldwell as Acting Deputy Assessment Officer. Both Turner and Caldwell served officially in their "acting" positions until July 5, 1973, when the agency designated another employee to be the Acting Chief, Office of Assessment and Compliance Assistance. After that designation, the duties of Turner and Caldwell became those of their official positions.

The two employees filed a grievance and appealed to the CSC's Appeals Examining Office, alleging that they had suffered a reduction in rank. The Appeals Examining Office held that no reduction in rank had occurred in either case and, therefore, that the matter did not come within the purview of the Commission's appellate jurisdiction over adverse actions by agencies under part 752, subpart B, of the civil service regulations.

In reviewing the case the Board of Appeals and Review overruled the Appeals Examining Office's conclusion as to jurisdiction and found

sufficient official action—notwithstanding the absence of any Standard Form 50 or equivalent—to bring the reduction-in-rank proceeding within the jurisdiction of the Civil Service Commission under FPM Supplement 752–1. Then, although the Board agreed that no reduction in rank had occurred, it found that the Bureau of Mines had violated the Commission's regulations requiring that temporary promotions be made for details of more than 120 days and that corrective action was required.

The Board of Appeals and Review's decision first quoted the applicable regulation on details to higher grade positions, located at subparagraph 8–4e, subchapter 8, chapter 300, of the Federal Personnel Manual (FPM), which reads as follows:

> *Details to higher grade positions.* Except for brief periods, an employee should not be detailed to perform work of a higher grade level unless there are compelling reasons for doing so. Normally, an employee *should* be given a temporary promotion instead. If a detail of more than 60 days is made to a higher position, or to a position with known promotion potential, it must be made under competitive promotion procedures. [Italic supplied.]

The Board then observed that in our decision 52 Comp. Gen. 920 (1973), which involved a factual situation similar to the present case, we had held that since the Federal Personnel Manual's provisions on temporary promotions (subchapter 4–4, chapter 335) contained no mandatory provision directing an agency to grant a temporary promotion where an employee temporarily serves in a higher grade position, the employee in that case was not entitled to a retroactive temporary promotion under the exception permitting such action where nondiscretionary administrative regulations or policies have not been carried out. We there distinguished 48 Comp. Gen. 258 (1968) on the ground that the latter had involved a failure to carry out a mandatory regulation.

The Board stated that the rationale of 52 Comp. Gen. 920 correctly recognized the discretionary power of agencies over promotions, but added that the regulation relied on in that decision should not be viewed in a vacuum and that other related FPM regulations changed the effect of the regulation. The Board explained its rationale as follows (slip opinion, p. 7):

> While the above reasoning correctly recognizes the discretionary power of agency officials to grant or not grant promotions, this power does not exist in a vacuum. By considering it in the context in which it is authorized, i.e., in connection with details of employees to higher grade positions, some idea of its parameters or limits may be obtained. At FPM chapter 300, subchapter 8 on "Detail of Employees," such limits are described at 8–3(b)(2) as follows:
>
> > "Since extended details also conflict with the principles of job evaluation, details will be confined to a maximum period of 120 days unless prior approval of the Civil Service Commission is obtained as provided in section 8–4f. All details to higher grade positions will be confined to a maximum initial period of 120 days plus one extension for a maximum of 120 days."

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At 8–4f, in turn, it is said:

> "(1) When it is found that a detail will exceed 120 days, or when there is a question of the propriety of the detail, the agency *must* request prior approval of the Commission on Standard Form 59. (underscoring added.)"

In view of the foregoing, it becomes clear that the discretionary authority of an agency official to grant a temporary promotion to an employee detailed to a higher grade position or to assign him to the position without a temporary promotion lasts, at most, for 120 days. At that point the agency must seek the approval of the Commission for any extension of the detail. By its failure to do so in the case at hand, the agency deprived both appellants of the Commission review concerning the propriety of their details at the end of 120 days as granted by the regulations cited above. Accordingly, corrective action is warranted consistent with what should have occurred at the end of 120 days. What should have occurred is expressed at FPM chapter 300, subchapter 8, section 8–4e:

> "Except for brief periods, an employee should not be detailed to perform work of a higher grade level unless there are compelling reasons for doing so. Normally, an employee should be given a temporary promotion instead.* * *"

Accordingly, the Board ordered the Bureau of Mines to grant temporary retroactive promotions as follows (slip opinion, p. 8):

The corrective action, therefore, is that Messrs. Turner and Caldwell are deemed to have been temporarily promoted to the higher grade levels of the positions to which they were detailed for a period beginning 121 days after they were detailed and ending on the date their details were "officially" terminated, in effect, July 5, 1973. To obtain payment for the period of service under these temporary promotions ordered by the Commission, the appellants should apply to the Comptroller General for backpay consistent with this opinion.

It is a general principle of law that interpretations of regulations by the agency charged with their administration are entitled to be given great weight by a reviewing authority. *Udall* v. *Tallman*, 330 U.S. 1 (1965); *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410 (1945). In this connection, we note that the Board of Appeals and Review (now redesignated as the Appeals Review Board) is located within the Office of the Commissioners, United States Civil Service Commission, and is charged with the responsibility of deciding appeals by Federal employees arising under the laws, rules, and regulations administered by the Commission. Hence, decisions by the Board interpreting Commission regulations are entitled to be accorded the greatest deference. We concur in the Board's interpretation of chapter 300 of the Federal Personnel Manual to the effect that an agency's discretionary authority to retain an employee on detail to a higher grade position continues no longer than 120 days and that the agency must either seek prior approval of the Commission for an extension of the detail or temporarily promote the detailed employee at the end of the specified time period. Therefore, where an agency fails to seek prior approval of the Commission to extend an employee's detail period in a higher grade position past 120 days, the agency has a mandatory duty to award the employee a temporary promotion if he continues to perform the higher grade position.

Moreover, this rule is consistent with and analogous to our "reasonable time rule" set out in 53 Comp. Gen. 216 (1973), which requires

that an incumbent employee of a newly reclassified upgraded position either be removed or promoted not later than the beginning of the fourth pay period after the date of the final position classification decision unless it prescribes a subsequent date. We believe that the 120-day period serves a similar purpose of providing agencies a reasonable time either to obtain prior approval from the Commission for an extension of the detail or to temporarily promote the employee.

As far as we are aware, the Board's decision on April 19, 1974, marks the first time that the Civil Service Commission has held that the FPM provisions on details to higher grade positions are mandatory and not discretionary. We regard the Commission's interpretation of its regulations governing details as a clarification rather than a substantive amendment of such regulations. 49 Comp. Gen. 15 (1969). In light of our concurrence with the Commission's view our decision in 52 Comp. Gen. 920, *supra*, which relied on our interpretation of the relevant regulations as being discretionary in nature, is hereby overruled. Instead, the Commission's interpretation of its regulations governing employee details, as enunciated by the Board of Appeals and Review, will apply.

We note that the agency, in complying with the Board decision, promoted Mr. Turner as of August 17, 1971. In this connection, section 1310 of the Act of November 1, 1951, 65 Stat. 757, as amended, 5 U.S. Code § 3101 note, commonly known as the Whitten Amendment, provides in pertinent part as follows:

> (c) The Civil Service Commission shall make full use of its authority to prevent excessively rapid promotions in the competitive civil service and to require correction of improper allocations to higher grades of positions subject to the Classification Act of 1949, as amended. *No person in any executive department or agency whose position is subject to the Classification Act of 1949, as amended, shall be promoted or transferred to a higher grade subject to such Act without having served at least one year in the next lower grade.* [Italic supplied.]

The above-quoted provision generally requires that an employee serve 1 year in the next lower grade before he is eligible for either a temporary or permanent promotion. Applying this requirement to the case before us, Mr. Turner apparently would not have been eligible for a promotion to GS–15 until April 18, 1972. However, the final proviso of section (c) of the Whitten Amendment states the following:

> Provided further, That, notwithstanding the provisions hereof, and in order to avoid undue hardship or inequity, the Civil Service Commission, when requested by the head of the agency involved, may authorize promotions in individual cases of meritorious nature.

The Board's decision does not mention the Whitten Amendment requirement and, therefore, it is not known whether consideration was given to this matter. In any event, it appears that the Board would have had authority to waive the time-in-grade requirements to avoid hardship or inequity if it chose to exercise its discretion to do so. Inas-

much as we are unable to determine the Board's position on this issue, we are remanding this question to the Board for a determination of whether Mr. Turner's temporary promotion should be effective as of August 17, 1971, under a waiver to the Whitten Amendment, or as of the beginning of the first pay period after April 18, 1972, which would be the earliest possible effective date if no waiver were granted. The Board should notify our Office of its determination in this matter. In either event Mr. Turner's promotion terminated on July 5, 1973.

The situation is different in the case of Mr. Caldwell inasmuch as he satisfied the time-in-grade requirements for promotion within 121 days after March 16, 1972, the date established by the Board as the beginning of his detail to the higher grade position. Hence, Mr. Caldwell's temporary promotion is proper from July 15, 1972, and would also terminate on July 5, 1973.

Inasmuch as the Board has in effect determined that the above employees have undergone an unjustified or unwarranted personnel action as a result of agency officials failing to comply with mandatory regulations, the employees are entitled to backpay under the Back Pay Act of 1966, 5 U.S.C. § 5596 (1970), and the Civil Service Commission's implementing regulations contained in 5 C.F.R., part 550, subpart H. Therefore, we are forwarding the claims of the employees to our Transportation and Claims Division for processing and settlements will be issued in due course.

The Board instructed the agency to implement its decision as follows (slip opinion, p. 9):

> Under section 772.307(c) of the Civil Service regulations, compliance with the Board's decision is mandatory and the administrative officer of the agency shall take the action recommended. The appropriate administrative officer is requested to furnish the Board of Appeals and Review, within 15 days after receipt of this decision, a copy of the official notification of personnel action documenting the accomplishment of the required corrective action. The agency's report should be addressed to the Board of Appeals and Review, U.S. Civil Service Commission, Washington, D.C. 20415, Attention: Compliance Desk.

The Board thereby required immediate agency compliance with its decision but, at the same time, the Board directed the employees to file a claim with the Comptroller General to obtain backpay consistent with the Board's opinion. We believe that the Board's order could be construed as infringing upon the authority of our Office.

With the redesignation of the Board of Appeals and Review as the Appeals Review Board the regulation cited by the Board was reissued as 5 C.F.R. § 772.310(g) (1975), and now provides that "the decision of the Board is final" and that "when corrective action is recommended, the agency shall report promptly to the Board that the corrective action has been taken."

Apparently the Board interprets the above-quoted regulations as granting it authority to direct agencies to immediately comply with its orders to provide make-whole remedies to employees covered by

its decisions. We are of the opinion that there is a potential conflict between the Board's interpretation of these regulations and the Comptroller General's statutory authority under 31 U.S.C. §§ 74 and 82d (1970). In this connection it has been held that a regulation to the extent it is in direct variance with an unambiguous statutory provision is clearly void. *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U.S. 129 (1936); *Mourning* v. *Family Publications Service, Inc.*, 449 F. 2d 235, 241 (1971). The aforementioned statutes grant heads of Executive agencies or authorized certifying officers of agencies the right to request and obtain an advance decision from this Office as to propriety of payments they are ordered to make. Accordingly, an agency or a certifying officer may properly delay the implementation of an order issued by the Board involving the expenditure of funds until it has obtained an advance decision from this Office. 54 Comp. Gen. 760 (1975), and 54 *id.* 921 (1975).

In the present case the Board ordered the agency to grant retroactive temporary promotions to the grievants and directed them to submit claims to our Office for backpay. Under this procedure it could be argued that once the retroactive promotions had been effected, the employees became entitled to the salaries of the positions to which they were appointed. *Dianish et al* v. *United States*, 183 Ct. Cl. 702 (1968). Since the agency is required to process the retroactive temporary promotions within 15 days, the employees could argue that they would be entitled to a *writ of mandamus* to have the agency perform the ministerial act of paying them the money to which such promotion entitled them. *McClendon* v. *Blount*, 452 F. 2d 381 (7th Cir. 1971). However, in deciding the propriety of payment of make-whole remedies, our Office is required to determine whether the awards conform to the requirements of law. Consequently, if we should determine that an award is not in conformity with a statute or regulation, additional personnel actions would be required to correct the employees' personnel records where such make-whole remedies have been implemented prior to a decision from our office.

In view of the above, we suggest that the Board frame its future implementing instructions to agencies in such a manner as to allow agencies or certifying officers, in their discretion, to exercise statutory rights to seek advance decisions from this Office before implementation of the make-whole remedies is required. In the alternative, the Board could submit proposed make-whole remedies to this Office for advance decisions on the propriety of payment where there is any doubt as to their legality. Upon receipt of our decision on a particular make-whole remedy, the Board could then issue its decision, with the decision from this Office attached, and require that the approved make-whole remedy be immediately implemented by the agency.

[B-183842]

Contracts—Protests—Abeyance Pending Court Action—Consideration Nonetheless by General Accounting Office

Where circuit court grants motion to vacate district court's judgement on issues contained in protest and remands cause to district court with direction to dismiss action as moot, district court's opinion is eliminated, is not *res judicata*, and is not bar to consideration of protest, since it cannot be considered to have been decided by district court.

Contracts—Protests—Procedures—Court Action Pending

Fact that issues contained in protest are also contained in protester's suit in district court would ordinarily be bar to consideration of protest absent request or expression of interest by court in General Accounting Office (GAO) decision. However, protest will be considered, since Government has not filed answer, suit is not active and protester has indicated that, if suit will bar consideration of protest, it will have court action dismissed without prejudice under rule 41(a)(1) of Federal Rules of Civil Procedure.

Bids—Acceptance Time Limitation—Waiver—Not Prejudicial to Other Bidders

Low bidder would not be precluded from waiving 10-day bid acceptance period after expiration, since, by offering to keep bid open for 60-day period contemplated by invitation for bids, bidder assumed risk of price increases during period and did not gain advantage over other bidder.

Bids—Mistakes—Correction—Contract Awarded Prior to Correction

Low bidder claiming mistake in bid and seeking correction is not required as condition to proper award to apprise agency prior to decison on correcton of willingness to accept award at original bid price in event correction is disallowed.

Bids—Mistakes—Correction—Denial

Low bidder's reservation of right to contest in appropriate forum contracting agency's denial of request for correction of bid did not render agency's award to bidder improper.

Contracts—Protests—Contract Reformation—Not Subject to Protest Procedures

Contractor's request for equitable relief by way of contract reformation is not subject to bid protest procedures.

Contracts—Modification—Relief Through Courts—Prior to Exhaustion of Remedy in General Accounting Office

Nothing requires contractor seeking contract reformation to exhaust remedy in GAO before bringing action in court for relief.

In the matter of the Guy F. Atkinson Company, The Arundel Corporation, Gordon H. Ball, Inc., and H. D. Zachry Company (a joint venture), December 9, 1975:

Invitation for bids (IFB) No. DACW67-75-B-0020 was issued on October 25, 1974, by the United States Army Corps of Engineers,

Seattle District. The IFB sought bids on a fixed-price basis for the construction of additional units for the powerhouse, Chief Joseph Dam, Columbia River, Washington. Bid opening occurred on March 5, 1975. The following two bids were received: S. J. Groves & Sons Company, Granite Construction Company (A Joint Venture)—$43,888,-716; Atkinson *et al.*—$54,392,305.

Due to the fact that Groves' bid was substantially lower than the other bid received and the Government estimate, which indicated the possibility of an error in bid, the contracting officer, by telephone on March 6, 1975, and by letter of March 10, 1975, sought verification of Groves' bid price.

By letter of March 13, 1975, Groves alleged that its bid was in error in the amount of $986,856. Groves therefore sought an upward adjustment of its bid price by this amount and submitted its original worksheets to the Corps of Engineers in support of its claim. By letter of the General Counsel, Corps of Engineers, dated April 24, 1975, Groves' request for the upward adjustment was denied for the reason that the intended bid price was not proven by clear and convincing evidence.

Thereafter, on May 7, 1975, Groves filed suit against the United States and the Seattle District Corps of Engineers in the United States District Court for the Western District of Washington, Civil Action No. C75–321S, seeking a declaratory judgment and injunctive relief. Groves requested (1) that the court declare that Groves' intended bid was $44,875,572 and that the Corps' rejection of its bid was arbitrary and capricious and without a rational basis or compelling reason; (2) that the court declare that the Corps had a duty to award the contract to Groves while reserving to Groves the right to contend a mistake was made in Groves' bid; and (3) that the Corps be enjoined to make an award under the solicitation. By telegram dated May 8, 1975, Groves also filed a protest in our Office against "the award of the subject solicitation to any other offeror."

On May 13, 1975, the Government and Groves reached an agreement which provided that Groves would withdraw its motion for preliminary injunction and would present the Corps with a written notification that its bid which had expired May 5, 1975, would be extended. In return, the Government would agree to award the subject contract to Groves with the reservation contained in the award document that Groves has the right to appeal the Corps' decision in its mistake in bid claim. Thereafter, Atkinson filed a motion to intervene in the court action. This motion was granted on May 14, 1975, but because the court believed that the matter had been settled by the May 13 agreement and upon the request of Atkinson, the order was not filed and the judge's signature was stricken. Also, on May 14, Groves with-

drew its protest in our Office although it reserved its claim for mistake in bid.

However, on May 16, 1975, Atkinson filed a protest in our Office alleging that:

> The proposed award to Groves-Granite is improper and unlawful because the acceptance period of Groves-Granite's bid expired, and an award on the basis of a purported extension of an acceptance period, in the partcular circumstances present here, would violate the integrity of the competitive bidding system. Moreover, the proposed award assumes and is based upon additional terms beyond those provided in the Invitation For Bids or otherwise.

Thereafter, on May 17, Atkinson filed suit against the Corps in the United States District Court for the Western District of Washington, also seeking injunctive relief on the grounds that:

> (1) Groves' bid has expired and an award cannot legally be made on an expired bid, particulary under the circumstances of this case where such an award would be totally destructive of the integrity of the competitive bidding process; and
> (2) The proposed award will grant additional terms, conditions and rights to Groves not included in the IFB or extended to other bidders * * *.

On May 19, 1975, Groves filed a motion to compel the Corps of Engineers to award a contract to it based in part upon the agreement of the defendant, Corps of Engineers, to award such contract to Groves without prejudice to its rights to contest the Corps' ruling on the mistake claim. Accordingly, on May 20, 1974, the District Court issued the following memorandum and order, which, in pertinent part, states:

> The court therefore finds that an agreement was entered into between the plaintiff and the defendant and that the agreement was stated for the record in open court and became the basis for settlement of the plaintiff's request for a preliminary injunction. The court finds that, according to the terms of the agreement, the defendant agreed to award the disputed contract to the plaintiff and to award it early in the week of May 19, 1975. The court finds that such an award has not yet been made and will not be made during the week of May 19, 1975. Now therefore,
> IT IS HEREBY ORDERED:
> 1. On or before May 30, 1975, the defendant is directed to award the contract in IFB serial number DACW 67-75-B-0020 to the plaintiff.
> 2. *The award shall be made at the original bid price* of forty three million. eight hundred eighty eight thousand, seven hundred and sixteen dollars ($43,888,-716.00); *the award shall be made without prejudice to the plaintiff's right to contest in an appropriate forum the issue of mistake in plaintiff's bid and without prejudice to the defendant's right to defend against such a contest.*
> 3. This order is entered subject to the following condition: This order will be stricken and rendered of no effect should the defendant, with or without the concurrence of the GAO, determine on or before May 30, 1975, to reject all bids and readvertise the project.
> 4. This order constitutes final action by the court in this matter; the court directs the clerk of the court to enter final judgment and determines in accordance with FED. R. CIV. P. 54(b) that there is no just reason for delay in entry of judgment. [Italic supplied.]

Immediately thereafter Atkinson appealed the decision of the District Court to the Ninth Circuit Court of Appeals. Atkinson also

filed motions for a temporary stay and stay pending appeal. On May 22 Judge Sneed of the Ninth Circuit temporarily stayed the District Court's order until June 2, or until disposition by the Ninth Circuit of the motion for a stay pending appeal, whichever occurs last. On the same day, the Department of Justice filed a motion to modify the order of the District Court so as to allow the Corps of Engineers to make an award in the exercise of its sound discretion on or before June 3, 1975 (the expiration date of Groves' renewed $43,888,716 bid to perform the contract). Atkinson also filed for a temporary restraining order and for an emergency stay. By order of the Court of Appeals for the Ninth Circuit of May 30, 1975, Atkinson's arguments were rejected. The Circuit Court held that:

> The order of Judge Joseph Sneed dated May 22, 1975, granting a temporary stay pending appeal is vacated.
> The motions of the intervenor-appellant Atkinson for a temporary restraining order or an emergency stay are denied.
> The Corps of Engineers' motion to modify the temporary stay is now moot in view of the foregoing orders and the Corps of Engineers is free to proceed as indicated in its motion.

Subsequently, the Department of Justice, acting on behalf of the Corps of Engineers and with the consent of Atkinson, filed a motion in the Ninth Circuit to vacate the District Court's judgment and to remand the cause to the District Court with direction to dismiss the action as moot. This motion was granted on July 29, 1975. However, thereafter, Groves filed a petition for rehearing, which, in accordance with rule 41 of the Rules of Appellate Procedure, stayed the issuance of the court's mandate until disposition of the petition by the court. On November 13, 1975, the Ninth Circuit denied Groves' petition for rehearing and affirmed the July 29 order. By the terms of appellate procedures rule 41(a), the mandate of the court issued on November 20, 1975. Therefore, in accordance with *United States* v. *Munsingwear*, 340 U.S. 36 (1950), the District Court's opinion is eliminated, is not *res judicata* and is not a bar to our consideration of the matter, since it cannot be considered to have been decided by the District Court. The Supreme Court in *Munsingwear*, at pages 39–40, stated:

> * * * The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. That was said in *Duke Power Co.* v. *Greenwood County*, 299 U.S. 259, 267, to be "the duty of the appellate court." *That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment*, review of which was prevented through happenstance. * * * [Italic supplied.]

Since the Government has availed itself of the procedure outlined above, the issues here in question are free to be relitigated. Indeed, the issues appear to be in litigation in the Atkinson action against the

Corps in District Court. While the pendency of a suit would ordinarily be a bar to our consideration of a protest on the same grounds in the absence, as here, of any request or expression of interest by the court in our decision, we will consider the Atkinson protest, since the Government has not filed an answer, the suit is not active and the protester has indicated that, if this Office believes that the suit will bar our taking jurisdiction, it will have its action dismissed without prejudice under rule 41(a)(1) of the Federal Rules of Civil Procedure.

The Atkinson protest challenges the validity of the award made to Groves on two bases: (1) that the award, made on a bid which expired and then was extended, is improper and (2) that the award made with a reservation of Groves' right to seek further relief on its mistake claim imposed an additional term beyond that contemplated in the IFB.

With regard to the first contention, this Office has held that, where a bid which contains the bid acceptance period provided in the IFB expires, the bidder may at his option accept award. B–143404, November 25, 1960; *Environmental Tectonics Corporation*, B–183616, October 31, 1975.

Specifically, in 46 Comp. Gen. 371, 372 (1966), it was stated:

> The contracting officer's report states that while the extension was not requested or received prior to expiration of the original 60-day period, it was considered in the best interest of the Government to permit the bidder to waive the time limitation since, in his opinion, such time limitation was solely for the protection of the bidder and may be waived by him if he is still willing to accept the award. While we question whether the time limitation was solely for the protection of the bidder during the period from bid opening until expiration of the acceptance period set out in the bids, it is clear that expiration of the acceptance period operated to deprive the Government of any right to create a contract by acceptance action and to confer upon the bidder a right to refuse to perform any contract awarded to him thereafter. Thus, since *the only right which is conferred by expiration of the acceptance period is conferred upon the bidder, it follows that the bidder may waive such right if, following expiration of the acceptance period, he is still willing to accept an award on the basis of the bid as submitted.* * * * [Italic supplied.]

The decision went on to distinguish situations such as 42 Comp. Gen. 604 (1963) where the low bidder deliberately selected a bid acceptance period shorter than that contemplated by the IFB and then sought to extend the expired bid. There we concluded that award should be made to the second low bidder. However, as stated in 46 Comp. Gen., *supra*, at page 373 (quoted with approval in *Environmental Tectonics Corporation, supra*):

> * * * The issue presented [in 42 Comp. Gen., *supra*] was whether award *should* be made to the low bidder [who was willing to accept] not whether a valid award *could* be made since we recognized that if an award were made to the low bidder, it was probable the courts would hold that the resulting contract would be enforceable. * * *

Atkinson argues that 42 Comp. Gen., *supra*, is applicable to the instant case in that in both situations it was the bidder's deliberate actions

which caused the bid to expire (i.e., the selection of a short bid acceptance period in 42 Comp. Gen., *supra*, and Groves' failure to formally extend its bid after requested to do so by the agency). We do not agree. The cited decision is distinguishable in that there, instead of the 60-day acceptance period contemplated in the IFB, the low bidder deliberately selected a 20-day period and thus did not assume the risk of a price increase during the following 40-day period whereas Groves offered to keep its bid open for the 60 calendar days contemplated by the IFB. Groves could have offered a shorter time period or the IFB could have provided for more than 60 days for the bid acceptance period, since the specific clause of Standard Form 21, Bid Form, states:

> The undersigned agrees that, upon written acceptance of this bid, mailed or otherwise furnished within *calendar days* (*calendar days* unless a different period be inserted by the bidder) after the date of opening of bids, he will within calendar days (unless a longer period is allowed) after receipt of the prescribed forms, execute Standard Form 23, Construction Contract, and give performance and payment bonds on Government standard forms with good and sufficient surety. [Italic supplied.]

(The first blank is for the bidder to indicate the bid acceptance period if other than that specified by the contracting agency in the second blank.) However, Groves, by virtue of the fact that it offered to keep its bid open for the period contemplated in the IFB, did not gain any advantage over the other bidder, since, like the other bidder, it assumed the risk of price increases during the 60-day period contemplated by the IFB.

Further, the principle enunciated in 46 Comp. Gen., *supra*, is applicable. In reaching this conclusion, we do not agree with Atkinson's contention that the decision is distinguishable in that there the low bid was extended prior to expiration of the bid acceptance period. There the bids expired on Saturday, May 28, the first day of a Memorial Day weekend, and the extension was granted on the next working day, Tuesday, May 31. Atkinson contends that, since the bid expired on a weekend, the expiration date was the first working day thereafter, i.e., the date upon which the bid was in fact extended. However, the decision did not follow that approach, but rather was premised on the basis that the expiration date was May 28 and that the extension was granted after the expiration of the bid acceptance period.

In view of the above, Groves would not be precluded from waiving the acceptance time limit after it expired. Therefore, it is immaterial in this case whether the bid did not in fact expire as Groves alleges.

Atkinson also argues that the award to Groves was improper under the rationale in *Teledyne McCormick Selph*, B–182026, March 6, 1975, 75–1 CPD 136, and 52 Comp. Gen. 706 (1973), in that Groves did not apprise the Corps, before the Corps decided its claim for an upward

adjustment in the bid price, that it was willing to accept award at the original bid price if correction was disallowed. It is contended that, unless such timely notification is given, the way is clear for bidders to seek correction after they know their competitive price position and to reserve the unilateral right to withdraw their bids or be bound by them after they know the agency's position on the correction of the claim. Atkinson states that the competitive bidding system should not tolerate giving bidders who claim mistakes such greater rights (i.e., this "option") than accorded bidders who do not claim mistakes and are thus bound by their bids.

Both *Teledyne McCormick Selph* and 52 Comp. Gen., *supra*, involved protests by apparent low bidders who sought correction of their bids prior to award. In both cases, the agencies involved denied correction and made awards to the next low bidder without further consideration of the protesters' uncorrected bids. In each case, the argument was made that the agency had failed to ask the original low bidder if it would accept the contract at the original bid price, thus rendering the award to another bidder improper.

As observed in 52 Comp. Gen., *supra*, at pages 710–711:

> * * * our Office has permitted acceptance of an original bid where the bidder established that an error had been made in the bid, but has not established the intended bid price. The rationale of those decisions has been that where it is clear that the corrected bid would still have been lowest, even though the amount of the intended bid could not be clearly proved for the purpose of bid correction, no prejudice to the other bidders would result by acceptance of the original bid.

In the instant case, there is no question but that Groves would have been low either at its bid price or at the corrected price it sought. This was not the situation in *Teledyne McCormick Selph*, *supra*, or 52 Comp. Gen., *supra*. However, in those decisions, we stated that the procurement regulations, Armed Services Procurement Regulation (ASPR) § 2–406.3 (1974 ed.) and NASA PR § 2.406–3, respectively, did not obligate the agency "* * * to consider the original mistaken bid or query the bidder as to its willingness to accept an award at the original bid price, even where a reasonable review of the evidence showed its intended bid might very well have been clearly lowest." *Teledyne McCormick Selph*, *supra*, commenting on 52 Comp. Gen., *supra*.

Our Office indicated that the first suggestion the agencies had that the protesters in those cases desired to be awarded a contract at their original bid prices came *after* award had been made to another bidder. The decisions then proceeded to distinguish the situation where the bidders' desires were communicated to the agency after award from other cases cited by the protesters which involved the communication of the low bidder's desires not only prior to award, but prior to the agency's determination of the correction issue. However, neither

Teledyne McCormick Selph, *supra*, nor 52 Comp. Gen., *supra*, established that a bidder must, as a condition precedent to award at its original bid price, notify the agency that it would accept such an award *before* its claim for an upward adjustment is decided. Rather, these decisions indicate that, as a precaution, the time to notify a contracting agency of an intention to accept award at the original contract price if correction is not authorized is prior to the agency decision on correction, since agencies have no duty after denying correction to question the low bidder as to its intention to accept award. Thus, the cited cases did not establish a requirement that bidders indicate their intention to the agency prior to resolution of the request for correction, but only recognized that it would be the prudent thing to do for bidders alleging error.

With regard to the propriety of the award made to Groves with a reservation of rights, we note that the reservation incorporated the language stated in paragraph 2 of the District Court's order set forth above. In that aspect, the instant case is analogous to the situation described in *Fortec Constructors*, B–179204, May 24, 1974, 74–1 CPD 285. Fortec sought an upward adjustment in the amount of $35,150. The difference between Fortec's mistaken bid price and the second low bid was $173,059. The agency concluded that there was clear and convincing evidence of a mistake, but sufficient evidence had not been presented as to the bid actually intended.

Upon receipt of the agency's denial of its correction request, Fortec filed a protest with this Office. However, during the pendency of the protest, Fortec agreed to enter into the contract at its mistaken bid price reserving its rights to the upward adjustment as follows:

> The Government and the contractor agree that in the event the Comptroller General favorably considers the contractor's claim for an upward revision of the contract price due to an alleged mistake in bid, the contract price shall be adjusted in the amount recommended by the Comptroller General. The contractor, by accepting award pending determination of his claim by the Comptroller General, expressly waives his rights to withdraw his bid, to disaffirm the contract, or to terminate performance due to denial of his claim by the Comptroller General, and agrees to perform the contract. It is the intent of the parties that the contractor shall not be foreclosed from such legal remedies for monetary relief as may exist following award in connection with mistake in bid claims.

The *Fortec* decision stated that *Chris Berg, Inc.* v. *United States*, 426 F. 2d 314, 192 Ct. Cl. 176 (1970), is not applicable to situations like the instant one where an agency merely denied a requested upward adjustment in bid price after considering the matter in accordance with applicable regulations, since the Court of Claims in *Chris Berg* was concerned solely with a situation where the agency in violation of ASPR § 2–406.3, *supra*, had refused to consider a bidder's claim for correction and the bidder entered into the contract at its original bid price reserving its right to request correction after award. The *Fortec*

decision also indicated that Fortec's acceptance of award at its uncorrected bid price subject only to having its claim for upward revision considered by this Office merely had the effect of preserving Fortec's right to have the agency's determination reviewed and was intended to give Fortec no more rights than it already had. Such reservations have been recognized by this Office as a permissible method of guaranteeing review of the question of upward adjustment. *See* B–161024, July 3, 1967; 49 Comp. Gen. 446 (1970); B–176760, January 22, 1973. Moreover, we have held that in the absence of a protest or some reservation of rights, the bidder by accepting the award at the mistaken bid price may be held to have agreed to absorb the error. B–177281, January 23, 1973; *Sherkade Construction Corp.*, B–180681, October 30, 1974, 74–2 CPD 231.

However, Atkinson contends that Groves' reservation created specific rights which it would not have had absent the reservation. Atkinson states that: (1) the reservation eliminated the rule stated in 4 C.F.R. § 20.2 (1974) " * * * which requires a disgruntled bidder to protest an agency action to the General Accounting Office within five days of learning of that decision" and thus gave Groves a right to a hearing which it might otherwise not have had; (2) the reservation permitted GAO review and Groves would have no right to bring suit in court unless it had exhausted its administrative remedies, i.e., GAO; and (3) since unlike the *Chris Berg* case, *supra*, the agency did not act in violation of the regulations, it is doubtful that any forum other than GAO has reformation jurisdiction; however, the reservation seemingly relinquishes this defense to a court action since it provides for the right to contest the mistake in bid allegations "in any appropriate forum without prejudice."

Groves' request is for equitable relief by way of contract reformation and, therefore, is not subject to the bid protest procedures. B–176760, *supra*. Moreover, we know of nothing that requires a contractor seeking contract reformation to exhaust its remedy in this Office before bringing an action in court for relief. In that connection, Groves nas not sought relief from this Office and has instead filed suit in District Court. For the reasons set forth, Groves' reservation of rights did not render the Corps' award improper.

Accordingly, Atkinson's protest is denied.

[B–183705]

Equipment—Automatic Data Processing Systems—Computer Service—Time/Timesharing

Contract for computer time/timesharing services to prime contractor who has commercial arrangements with potential subcontractors to pay standard per-

centage of invoice fee for finding buyer of computer time and/or services does not violate Anti-Kickback Act (41 U.S.C. 51) because commercial arrangement does not apply and prime contractor receives fee according to sliding matrix from Government only.

Contracts—Construction—Conflicting Provisions

Conflict between two contract provisions concerning who pays prime contractor's fee, subcontractor or Government, is resolved in favor of Government payment since that interpretation upholds validity of contract in accord with presumption of legality. Contrary interpretation might lead to conclusion contract violated Anti-Kickback Act.

Contracts—Negotiation—Competition—Subcontractors

Fact that prime contractor of computer time/timesharing contract may have developed commercial clientele whose abilities it knows does not unduly restrict competition since no potential subcontractor is prohibited from submitting proposal which prime contractor must consider.

Contracts—Payments—Contractor's Fees—Percentage of Fixed-Price Subcontractor Proposal—Cost-Plus-a-Percentage-of-Cost Contracting Prohibition

Contract payment procedure whereby prime contractor's fee is determined as percentage of fixed-price subcontractor proposal does not violate prohibition of 10 U.S.C. 2306(a) against cost-plus-a-percentage-of-cost contracting.

Contractors—Fees—Percentage of Subcontractors Invoice—Cost-Plus-a-Percentage-of-Cost Prohibition

Alternate contract payment procedure, whereby prime contractor's fee is percentage of subcontractor's invoice, and there is no requirement that subcontractor submit fixed-price proposal, violates prohibition of 10 U.S.C. 2306(a) against cost-plus-a-percentage-of-cost since (1) payment is based on predetermined percentage rate; (2) percentage rate is applied to actual performance costs; (3) contractor entitlement is uncertain at time of contracting; and (4) contractor entitlement increases commensurately with increased performance costs.

Contractors — Fees — Sliding Matrix — Cost-Plus-a-Percentage-of-Cost Prohibition

Use of sliding matrix for percentage fee determination that has some points at which fee falls as costs increase does not avoid cost-plus-a-percentage-of-cost prohibition since overall effect of payment procedure is that fee increases and incentive is to raise costs sufficiently to avoid profit depression.

In the matter of Marketing Consultants International Limited, December 10, 1975:

Marketing Consultants International Limited (MCI) protests the award of contract DAHC26–75–D–0008 by the United States Army Computer Systems Support and Evaluation Agency (CSSEA) to RMG Enterprises, Ltd. (RMG), for computer time/timesharing resulting from request for proposals (RFP) DAHC26–75–R–0006. The essential thrust of MCI's protest is two-fold: (1) contract –0008 violates 41 U.S. Code § 51 (1970) (the Anti-Kickback Act), because

it permits a subcontractor to pay a fee or commission to a prime contractor for purposes of obtaining a subcontract; and (2) the contracting arrangement is an undue restriction on competition because only firms that agree to pay a fee or commission to the prime contractor will be allowed to compete.

Section E of contract -0008 contains 9 line items for computer time of a specified computer and equipment and required prices therefor on two bases: (a) sub-clin AA, where the contractor, at the initiation of the contracting officer, solicits subcontractor proposals and submits at least two firm fixed-price offers for evaluation and selection by the CSSEA for a fixed fee of $10; and (b) sub-clin AB, where the contractor directly places an order for computer time, causes the task required by the contracting officer to be accomplished and submits an invoice to the CSSEA for payment. CSSEA included the following clauses in contract -0008:

E.3 The contractor (Time Brokers-South) charges no direct fee for their services under this contract from the customer (The United States of America), but receives compensation in the form of a commission from the seller. Through prior written contracts, sellers of computer time and timesharing have agreed to charge Time Brokers-South customers the same rate as they would charge any other customer buying their services. The seller of the computer time would then absorb the contractor's commission as part of his marketing overhead. The commission or fee received by the contractor shall be in accordance with, and at the rates shown in the "payment clause" located in Section J., paragraph 4 of this contract.

* * * * * * *

J.4 *PAYMENT—*

* * * * * * *

b. The contractor receives compensation for his services as part of the sellers standard rates which he charges any other customer buying his service. Because of this unique situation, the contractor most likely will not receive compensation for all orders placed. However, on any orders in which a fee is received by the contractor, the following parameters shall govern payment of, and invoicing by, the contractor.

1. Since the contractor's standard commission from sellers of computer time is 12½%, regardless of volume, the contractor shall invoice the Government indicating that commission, but receiving compensation from the Government in accordance with the following matrix:

Example of invoice to contractor:	
Sellers invoice for services	$100.00
12½ percent commission to contractor	12.50
Net to seller	$87.50
Examples of invoice to Government:	
Sellers invoice to Government	$87.50
Plus fee 13.5 percent (see below)	11.90
Government pays contractor	$99.40

	Percentage fee—reimbursed
Dollar value of invoice:	
0 to $24,999.99	13.51
$25,000 to $49,999.99	11
$50,000 to $74,999.99	8.5
$75,000 and up	6

2. Under no circumstances shall the contractor receive compensation for more than the seller's standard charges for services.
3. The Government shall have access to the contractor's records, notwithstanding all the terms of this contract, to verify that the contractor is adhering to the above guidelines.
4. Under *NO* circumstances shall the contractor receive any reimbursement, fees, or commissions from anyone other than the Government. (See ASPR 7-103.20 "covenant against contingent fees 1958 JAN."

RMG's proposal as submitted contemplated reimbursement on the same terms and conditions upon which it is reimbursed on its commercial transactions. During the course of negotiations, it became apparent to CSSEA that there were significant problems with that arrangement. Consequently, in order to avoid any possible violation of the Anti-Kickback Act, the method of RMG's invoicing procedure and receiving its fee was changed to that in the above clauses. One of the changes was from a straight 12½-percent commission or fee on volume to the above sliding matrix. In this regard, section 10 of amendment 0001 to the RFP specifically indicated that a proposal using a sliding matrix based on the amount of machine time secured per task order was permissible.

Salient portions of RMG's standard commercial agreement indicate that sellers of computer time who enter into such a brokering arrangement with RMG bind themselves to pay RMG a commission of 12½-percent of the amount billed to buyers of computer time located by RMG. The seller further agrees that it will charge only one uniform rate schedule for all buyers of its time and services, subject to variation for volume, whether or not located by RMG.

The applicable language of the Anti-Kickback Act provides:

> The payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly, by or on behalf of a subcontractor * * * to any officer, partner, employee, or agent of a prime contractor holding a negotiated contract entered into by any department, agency, or establishment of the United States for the furnishing of supplies, materials, equipment or services of any kind whatsoever; or to any such prime contractor * * * either as an inducement for the award of a subcontract or order from the prime contractor or any subcontractor, or as an acknowledgement of a subcontract or order previously awarded is prohibited * * *.

Initially, it appears that sections E.3 and J.4 express conflicting statements as to who pays RMG and the manner in which any fee is determined. This apparent conflict may not be resolved by the Order of Precedence clause of the contract. When construing the various sections of a contract, preference is accorded that interpretation which

upholds the validity and harmony of the contract clauses. It is presumed that the contract as written is legal, and that interpretation which does not ascribe illegality to the contract is preferred. B–163663, May 24, 1968.

Applying the foregoing to the instant case, one must read section J.4 as qualifying E.3. Not only does the text of E.3 itself contemplate resort to section J.4 for determining the method of computing RMG's fee, but the reference to another section in the body of E.3 may be taken as an implication that it was not intended to stand by itself. Further, without considering the impact of J.4, payments contemplated in section E.3 by the subcontractors to RMG standing alone might be construed to be a violation of the Anti-Kickback Act's prohibition against a subcontractor paying a fee to its prime contractor. Thus, in order to uphold the validity of section E.3, the salutory provision of section J.4 must apply. When reading the two provisions together, as intended, it becomes apparent that section E.3 was a statement of recognition of RMG's commercial dealings that necessitated the specified payment procedure which precluded reimbursement to RMG from anyone other than the Government. Further, while section E.3 is a general statement of policy and recognition of an existing situation, section J.4 provides specific guidelines to be followed, as well as a step-by-step example.

CSSEA cites *Howard* v. *United States*, 345 F.2d 126 (1st C.C.A., 1965), to indicate that there are three essential elements that render subcontracting arrangement violative of the Anti-Kickback Act: (1) the parties are within the class covered by the statute; (2) the contract is a type covered by the statute; and (3) the prohibited payment, as defined in the statute, is accepted with knowledge of its nature and purpose, i.e., to induce the award of subcontracts.

We agree with CSSEA that there is no doubt that the first two elements are present here: (a) the parties are the prime contractor and prospective subcontractors of the United States; and (b) the contract was negotiated by the United States for the furnishing of supplies, materials, equipment or services of any kind whatsoever. CSSEA maintains that, under the terms of the contract, the third element is wholly lacking. CSSEA notes that the payment procedure quoted, *supra*, at section J.4, makes payment of the prime contractor's fee flow only from the Government. Thus, it is asserted that no payment is made by the subcontractor to the prime contractor, either directly or indirectly, for the purpose of inducing an award. CSSEA finds further support for this position in the fact that RMG is bound to secure, and present to CSSEA for its selection, at least two fixed-price offers from time sellers (subcontractors). The option of the Government to select either

of the proffered proposals, or reject them both, is seen as a fatal break in any chain of inducement for the prime contractor to award the subcontractor a contract.

At this juncture, it is important to emphasize that the contract calls for two separate tasks for RMG to perform. Under sub-clin AA, RMG, for a stipulated fee of $10, is required to find and present to CSSEA for its selection, at least two firm-fixed price offers from responsible sources. Upon completion of the foregoing, RMG has substantially fulfilled its responsibilities under sub-clin AA. If the Government does not proceed to performance under sub-clin AB, RMG receives only its fee of $10. If the Government accepts one of the proposals and causes a task order to be issued under sub-clin AB, then RMG receives its fee only according to the sliding matrix. Under sub-clin AB, upon receipt of a task order from the contracting officer, RMG is required to (1) place an order with either a subcontractor of its own selection (e.g. where an urgent requirement necessitates bypassing sub-clin AA), or the subcontractor selected by CSSEA under sub-clin AA; (2) cause the order to be performed; (3) submit an invoice directly to the Government for the total services performed in the manner stipulated in section J of the contract; and (4) receive payment from the Government.

In the case of selection of a subcontractor under the sub-clin AA followed by sub-clin AB situation, we agree with CSSEA that the intervention of the Government in the ultimate selection process acts to wrest from the prime contractor a substantial degree of control in being able to cause awards of subcontracts to particular firms. With this lessening of autonomy, the incentive of a subcontractor to attempt to illegally influence also lessens. In any event, since in this situation the Government, not the prime contractor, makes the selection, no violation of the Anti-Kickback Act is evident.

Where an urgent requirement necessitates bypassing sub-clin AA and the Government plays no part in the selection process, the legality of the contracting procedure turns upon another consideration. The absence of a payment by the subcontractor to the prime contractor takes the matter out of the sphere of evil the Anti-Kickback Act was designed to prevent. The evil is the influence on the judgment and corruption of the procurement process, presumptively borne economically by the Government (see *United States* v. *Acme Process Co.*, 385 U.S. 138 (1966)).

The required payment procedure of section J.4 avoids the problem. The example procedure contained in the section shows that the subcontractor's invoice to the prime contractor reflects the total for the service including the 12½ percent commission. RMG and sellers

(subcontractors) of computer time, between whom the commercial arrangement of paying RMG a 12½ percent commission exists, have agreed previously that the sellers would charge RMG buyers and non-RMG buyers one standard charge. Since the one standard charge was arrived at by absorbing RMG's commission as part of sellers' marketing overhead (see section E.3), the 12½ percent commission is deducted from the amount of the invoice. RMG, in turn, factors in its fee according to the sliding matrix by dollar amount of the invoice (after subtracting the 12½ percent), and submits that amount as its invoice to the Government. Only the Government pays RMG. This discussion applies similarly to the above situation where sub-clin AA is followed by sub-clin AB procedures. In view of this, it is our opinion that the contract does not violate either the letter or the spirit of the Anti-Kickback Act because the potential subcontractors pay no fee, either directly or indirectly, to the prime contractor.

MCI's next basis of protest is that the subcontracting procedure in the contract restricts competition. In summary, it is MCI's view that it is "Pollyanna" thinking to believe that RMG will contract with firms other than those that have agreed to execute the 12½ percent commercial commission arrangement. Thus, if a firm does not care to pay the extra 12½ percent to its existing charge for computer time, or absorb that amount in its existing fee structure, it is effectively restricted from competing to provide the computer time. MCI alleges that RMG has no incentive to search for sellers of computer time beyond those firms with whom it has an existing arrangement, even if the 12½ percent commission is factored out of the seller's invoice price, since it will wish to maintain these select firms as continued clients.

CSSEA advances three reasons why the contract procedure does not restrict competition. The first is that section J.11 of the contract requires RMG to verify that the subcontractor prices are the most cost-effective known and available in the marketplace at the particular time. Second, the payments clause, J.4, encourages competition because of the sliding matrix. Third, the contract incorporates by reference Armed Services Procurement Regulation (ASPR) § 7-104.40 (1974 ed.), entitled "Competition in Subcontracting" which requires subcontractor selection on a "* * * competitive basis to the maximum practical extent consistent with the objectives and requirements of the contract."

While RMG's commercial arrangements govern its conduct for sale of computer time to non-Government sources, RMG's responsibilities are measured by its contractual commitment with the Government. As discussed above, the payment procedures and other portions of

section J.4 have eliminated from consideration the provisions of RMG's standard commercial brokerage arrangement. Since RMG is not dependent upon the seller (subcontractor) for its fee, it is encouraged and contractually bound to effectively canvass the marketplace for the best and most effective prices regardless of commercial affiliation or nonaffiliation. To favor holders of a commercial fee arrangement to the economic detriment of the Government might very well be reason to terminate the contract. Furthermore, not only is there no legal impediment to potential subcontractors' (not in the RMG fold) submitting competitive price proposals for potential consideration but, we believe, the RMG contract would require that firm to consider and evaluate those submissions.

In reaching this conclusion, we are not unmindful of the language of clause J.4(b) where it states:

> The contractor receives compensation for his services as part of the seller standard rates which he charges any other customer buying his service. Because of this unique situation, the contractor most likely will not receive compensation for all orders placed.

Based on the above, a contract price analyst, before award, was of the opinion that, when subcontracting with firms other than with whom it had commercial agreements, RMG would buy computer time from other sellers and not obtain a fee for that effort. The charge to the Government would encompass computer processing time only.

We are convinced that this opinion is erroneous. Initially, the opinion was based upon the proposal as submitted which, prior to conversion into the contract, envisioned payment in accordance with a commercial practice. Also, although the quoted language above contained the statement that RMG received its compensation from sellers of computer time, this notion was dispelled earlier in our discussion of section E.3 of the contract. The statement that RMG would not receive compensation for orders placed with firms who did not hold RMG's commercial arrangement is premised on the clause that precedes it, "Because of this unique situation." Since this supposed unique situation involving compensation has been explained away, it follows that the conclusion based upon it is also not for application. Finally, the contract price analyst's interpretation would lead to the conclusion that the contract unduly restricts competition by removing all economic incentive from RMG to subcontract with firms that have not signed RMG's commercial arrangement. We think that any interpretation which envisions the contractor performing a marketplace search and not receiving compensation for that effort is unreasonable. We, therefore, conclude that contract -0008 does not unduly restrict competition.

The applicability of the provisions of 10 U.S.C. § 2306(a) (1970) has been raised by CSSEA.

> The cost-plus-a-percentage-of-cost system of contracting may not be used. Subject to this limitation and subject to subsections (b)–(f), the head of an agency may, in negotiating contracts under section 2304 of this title, make any kind of contract that he considers will promote the best interests of the United States.

CSSEA maintains that its choice of a brokerage-type contract such as the one here is permissible and has been sanctioned by the Supreme Court in *Muschany* v. *United States*, 324 U.S. 49 (1945). Prior to any discussion of the validity of brokerage-type arrangements, as envisioned in *Muschany* v. *United States*, *supra*, the first consideration is whether the contract payment procedure is a prohibited cost-plus-a-percentage-of-cost type. The underlying intent of Congress in prohibiting cost-plus-a-percentage-of-cost contracts was stated by the Supreme Court in *Muschany* v. *United States*, *supra*, at pp. 61–62:

> The purpose of Congress was to protect the Government against the sort of exploitation so easily accomplished under cost-plus-a-percentage-of-cost contracts under which the Government contracts and is bound to pay costs, undetermined at the time the contract is made and to be incurred in the future, plus a commission based on a percentage of these future costs. The evil of such contracts is that the profit of the other party to the contract increases in proportion to that other party's costs expended in the performance. The danger guarded against by the Congressional prohibition was the incentive to a Government contractor who already had a binding contract with the Government for payment of undetermined future costs to pay liberally for reimbursable items because higher costs meant a higher fee to him, his profit being determined by a percentage of cost. * * * Congress * * * indicated it did not care how the contractor computed his fee or profit so long as the fee or profit was finally and conclusively fixed in amount at the time when the Government became bound to pay it by its acceptance of the bid * * *.

We have rendered decisions involving the issue of whether certain types of contractual arrangements constituted prohibited cost-plus-a-percentage-of-costs arrangements. *Cf.* 35 Comp. Gen. 434 (1956); 38 *id.* 38 (1958); and 46 *id.* 612 (1967). The guidelines applicable to this consideration are: (1) payment is on a predetermined percentage rate; (2) the predetermined percentage rate is applied to actual performance costs; (3) contractor's entitlement is uncertain at the time of contracting; and (4) contractor's entitlement increases commensurately with increased performance costs.

Counsel for RMG and CSSEA argue for the validity of the payment procedure on the basis that reimbursement is not on the basis of costs. Both note that section L of the contract incorporates by reference only ASPR clauses applicable to fixed-price service contracts. Further support is cited at sections E.1, E.2, H.2, J.4, J.9, J.10, and J.11 of the contract.

We agree with both counsels, but only to the extent that the sub-clin AA followed by sub-clin AB situation is involved. As regards this

situation, subcontractor proposals are submitted on a fixed-price basis. RMG's commission is computed as a percentage of that fixed price. Therefore, sub-clin AA does not involve a cost-type contract subject to the prohibition of 10 U.S.C. § 2306(a) (1970) since the amount of the contract is known to the Government at the time it selects a proposal. In our view, both RMG and CSSEA incorrectly apply the fixed-price requirements of sub-clin AA to direct sub-clin AB orders.

Direct sub-clin AB orders, on the other hand, permit RMG to select a subcontractor and proceed with the work before an invoice is submitted. In this procedure, there is no requirement that RMG receive a fixed-price proposal. CSSEA does not review any proposals prior to receiving RMG's invoice. The invoice submitted to the Government shows only the subcontractor's total price (minus the aforementioned 12½ percent fee), RMG's sliding matrix fee, and a total. In this light, we conclude that RMG's sliding matrix fee has been calculated as a percentage of the subcontractor's invoice which, of course, includes its costs.

In our opinion, the presence of the first element listed above constituting a cost-plus-a-percentage-of-cost contract for direct sub-clin AB situations is clearly present.

The second element is present in that the predetermined percentage rate is applied to actual performance cost. The invoicing procedure of subsection J.4(b) shows that the sliding matrix fee rate is applied to the subcontractor's invoice including the performance costs presented to the prime contractor prior to submission to the Government.

The third element is that the contractor's entitlement is uncertain at the time of contracting. CSSEA argues the applicability of *Muschany* v. *United States*, *supra*, on this element. In that case, the Government agreed to pay a broker a 5-percent commission of the purchase price for certain lands upon which the broker obtained options for the Government. The Supreme Court found this arrangement outside the scope of a similar cost-plus-a-percentage-of-cost prohibition primarily because the Government had to approve the option price before the contract was consummated. Thus, the contractor's entitlement was ascertainable and certain at the time of contracting. This is the sub-clin AA followed by sub-clin AB situation. However, without the required Government review found in that situation before RMG places an order with a subcontractor in a direct sub-clin AB situation, the Government does not know the amount of the order until it receives the invoice from RMG. Thus, the third element is present.

As to the application of the fourth element, it is conceivable that RMG may receive a smaller fee as the subcontractor's costs rise. This

may occur for tasks that just cross the percentage demarcation lines. For example, if the subcontractor invoice is $24,900, RMG's fee under the sliding matrix would be 13.5 percent of that amount, or $3,361.50. If the subcontractor costs just cross the $25,000 percentage cut-off to which an 11-percent fee applies, RMG would receive $2,750. A similar fee reduction appears at each breaking point in the sliding matrix at $25,000 intervals.

We recognize the foregoing, but do not consider that it cures an otherwise prohibited method of computing payments. The overall thrust of the payment method is that RMG receives a larger fee the greater the subcontractor invoice. The incentive, therefore, is for greater subcontractor costs. While it is true that RMG's fee may decrease as the subcontractor costs cross the $25,000 increments, the incentive, in that situation, is to have the subcontractor costs increased sufficiently to avoid that profit depression. We therefore conclude that the method of payment for orders issued directly pursuant to sub-clin AB is prohibited by 10 U.S.C. § 2306(a) and the contract to the extent that it permits the method of payment is void.

Accordingly, any outstanding obligations which arose pursuant to a direct sub-clin AB order may be paid on *a quantum meruit* basis. *See* 38 Comp. Gen., *supra*. If upon review, CSSEA determines that its needs cannot be fulfilled without resort to direct sub-clin AB tasks, and that portion of the contract is not severable from sub-clin AA followed by sub-clin AB tasks, the latter portion should be terminated for the convenience of the Government and the requirement resolicited.

The foregoing renders it unnecessary to discuss the general validity of this type of brokerage contract.

In view of the above, this decision is being transmitted by letters of today to the congressional committees named in section 232 of the Legislative Reorganization Act of 1970, Public Law 91–510; 31 U.S.C. 1172.

[B–180010]

Arbitration—Award—Punitive Damages

Grievance charged violation of provision in collective bargaining agreement that consultants would not be hired to perform work that could be performed by agency employees. Agency stipulated that it had violated agreement but refused union's demand that consultant repay salary to U.S. Treasury. Prior to arbitration hearing, the consultant resigned. Arbitrator's award of punitive damages to be paid by agency to union may not be implemented since there is no authority to award punitive damages against the United States or one of its agencies.

In the matter of an arbitrator's award of punitive damages, December 11, 1975:

This decision is in response to a request from the Director of the Community Services Administration (hereinafter referred to as the

"agency") as to whether it may disburse appropriated funds to implement an arbitrator's award of punitive damages to be paid by the agency to the union local (FMCS Case #74K07852, J. Lawrence McCarty Grievance). The Federal Labor Relations Council has also requested a decision whether the arbitrator's award (*Office of Economic Opportunity and American Federation of Government Employees, Local 2677* (Doherty, Arbitrator), FLRC No. 75–A–23) violates applicable law.

The facts in this case, which for the most part are not in dispute, are as follows. On July 28, 1973, Mr. J. Lawrence McCarty was employed by the Office of Economic Opportunity (now the Community Services Administration) as a consultant. On December 7, 1973, Local 2677 of the National Council of OEO Locals, American Federation of Government Employees (hereinafter the "union"), filed a grievance with the agency alleging that Mr. McCarty's employment was in violation of section 4 of the September 11, 1973 Amendment to the National Agreement between the agency and AFGE which provides:

SECTION 4. CONSULTANTS AND EXPERTS. Consultants and experts will not be used to perform work that could be performed by OEO employees, and prior to any such employment, the union will be appraised as to the person, his qualifications for the position and the role this person is to perform.

The union sought Mr. McCarty's immediate removal, reimbursement of his salary to the U.S. Treasury, and an assurance that the agency would not hire any other consultants in violation of this provision.

The agency refused the union's request for arbitration and sought a decision from the Labor-Management Services Administration (Department of Labor) as to whether the matter was arbitrable. The parties were advised on February 14, 1974, that the matter was arbitrable, and an arbitration hearing was held on April 10, 1974. The agency stipulated that it had violated section 4 of the National Agreement, but it noted that Mr. McCarty had resigned from the agency on March 15, 1974. The record also indicates that the Civil Service Commission directed the agency on April 11, 1974, to terminate Mr. McCarty's appointment on the ground that he was not performing proper consultant work.

The arbitrator's opinion and award, dated January 22, 1975, stated that neither the union nor any employee in the bargaining unit could show any direct damage as a result of the agency's admitted violation of the collective bargaining agreement. Nevertheless, the arbitrator concluded that the agency had not complied with the letter or the spirit of the agreement, and he, therefore, sought to fashion a remedy to undo any harm done and to ensure speedy and fair resolutions of future grievances of this type. After rejecting several suggested rem-

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edies, he directed the agency to pay the union a penalty payment, as follows (Opinion and Award, p. 7):

> It is my decision that the Agency pay over to the Union an amount equal to five consulting days at the rate paid to McCarty. Such funds may be used by the Union for any purpose which is of direct benefit to all employees in the bargaining unit regardless of their membership in the Union. I further direct that the Agency shall have a report on how these funds are spent so that they may assure compliance with this award.

The arbitrator stated that such an award was "consonant with the guidelines set by arbitrators in the non federal sector" and was not strange to the Federal sector in that:

> The applicable agreement in this case providing as it does for assessment of the Arbitrator's fee is a direct monetary payment on the employee's behalf by the Agency as a form of penalty, and such payment inures directly to the Union for the benefit of all employees.

The Community Services Administration filed a petition for review with the Federal Labor Relation Council which was accepted, and the Council issued a stay of the arbitrator's award on April 16, 1975.

Executive Order 11491, as amended, 3 C.F.R. 254 (1974), governs labor-management relations between agencies of the Executive branch and Federal employees and organizations representing those employees. Section 12 provides, in pertinent part:

> SEC. 12 *Basic provisions of agreements.* Each agreement between an agency and labor organization is subject to the following requirements—
> (a) in the administration of all matters covered by the agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level * * *.

The arbitrator in his opinion and award states that the payment of damages is consonant with the guidelines set by arbitrators in the non-Federal sector. However, there are fundamental differences between the objectives of and the authorities governing collective bargaining in the private and Federal sectors. *See* 54 Comp. Gen. 921 (1975). As noted above, under Executive Order No. 11491 all Federal sector collective bargaining agreements are subject to existing or future laws and regulations. Therefore, where an arbitrator's award is not authorized under such laws or regulations, it may not be implemented.

In the absence of any finding of direct damage to the union or any employee as a result of the agency's violation, we believe the award must be characterized as a penalty or punitive damages. We find no authority for awarding punitive damages against the United States or one of its agencies. *Missouri Pacific Railroad Co. et al.* v. *Ault*, 256 U.S. 554 (1921); *Painter* v. *Tennessee Valley Authority*, 476 F. 2d

943 (5th Cir. 1973); *Littleton* v. *Vitro Corporation of America*, 130 F. Supp. 774 (N.D. Ala. 1955); *Wilscam* v. *United States*, 76 F. Supp. 581 (D.Hi. 1948). In addition, the Federal Tort Claims Act specifically excludes recovery for punitive damages. 28 U.S.C § 2674 (1970). It is, therefore, not legally permissible for the agency to pay to the union a sum amounting to $500 which has been awarded in the nature of punitive damages. Nor can the award be sustained as an assessment of the arbitrator's fee because it is clearly intended as a penalty, entirely separate from the arbitrator's fees and expenses.

Accordingly, it is our decision that the arbitrator in this case exceeded his authority in ordering the agency to pay the union for 5 days of consultant's pay, and the award may not be implemented.

[B–90867]

Experts and Consultants—Compensation—Rates—Dollar Limitation

The maximum pay rate for experts and consultants employed under Public Law 88–633, as amended, may not exceed $100 per day, despite agency for International Development's (AID) administrative determination to the contrary. Public Law 91–231 does not make the specific dollar limitation obsolete, and AID may not rely on 5 U.S.C. 3109 as authority to pay those employees at higher rates. Also, legislative histories of acts increasing the maximum amounts payable to experts and consultants of other agencies with similar dollar limitations indicate necessity of legislation to increase $100 ceiling.

In the matter of pay rates for experts and consultants employed incident to activities of Agency for International Development, December 12, 1975:

The Department of Agriculture has requested reconsideration of our decision B–90867, May 17, 1971, holding that it could not pay experts and consultants in excess of $100 per day when they were employed by the Department in carrying out activities financed by the Agency for International Development (AID).

The Department explains that, in carrying out various activities financed by AID, it operates under the delegated authorities of the Foreign Assistance Act of 1961, Public Law 87–195, 75 Stat. 424, as amended. One of these authorities is section 626(a), as amended, 22 U.S. Code § 2386(a) (1970), which permits the employment of experts and consultants at a rate not in excess of $100 per day. Section 626(a) applies to experts and consultants employed under the authority of 5 U.S.C. § 3109 (1970). The latter, in subsection (b) provides for the rate of compensation payable to experts and consultants as follows:

* * * an agency * * * may pay a rate for services under this section in excess of the daily equivalent of the highest rate payable under section 5332 of

this title only when specifically authorized by the appropriation or other statute authorizing the procurement of the services.

The highest rate payable under 5 U.S.C. § 3109 (1970) has been held to be the rate at the top step prescribed for level 15 of the GS scale. 29 Comp. Gen. 267 (1949); 43 *id.* 509 (1967); 51 *id.* 224 (1971). Our decision was requested since that rate exceeds $100 per day and since AID has taken the position that experts and consultants hired pursuant to the provisions of section 626(a) may be paid at the maximum rate of GS–15, now $138.48 per day.

Our decision B–90867, May 17, 1971, recognized that the purpose of section 626(a), as amended by Public Law 88–633, approved October 7, 1964, was to authorize AID to pay experts and consultants at rates in excess of the top rate of the GS–15 scale at the time of its enactment. Despite the fact that at the time of our 1971 decision the per-day rate for the top step of GS–15 was $121.28, we ruled that the $100 limit still applied. Although the purpose of the statutory provision was to authorize payment to the experts and consultants in question at rates in excess of that for the top of grade GS–15, it also showed an intent to reserve the fixing of the specific rate limitation to the Congress. Moreover, the authority conferred by Public Law 88–633 to permit payment at rates not in excess of $100 per day to experts and consultants was completely independent of the authority in 5 U.S.C. § 3109 to permit payment to experts and consultants generally at rates not in excess of the rate for GS–15. *See* B–147212, October 4, 1961.

On the other hand the General Counsel for AID, in a memorandum dated April 23, 1970, was of the opinion that as a result of the Federal Employees Salary Act of 1970, Public Law 91–231, approved April 15, 1970, 84 Stat. 195 (5 U.S.C. 5332 note), and Executive Order 11524, April 15, 1970, 35 Fed. Reg. 6247, that part of section 626(a) limiting the pay of experts and consultants employed by AID was rendered obsolete. The General Counsel stated that the intent of Congress was that the experts and consultants in question were to be paid in excess of the rate for the top step of GS–15. He also stated that experts and consultants paid in accordance with the provisions of 5 U.S.C. § 3109 (1970) were to be paid at rates not in excess of the GS–15 top rate unless a higher rate was authorized by some other provision of law. Since the top rate of GS–15 was at the time higher than the $100 specified in section 626(a), the General Counsel concluded that AID could rely on the authority of 5 U.S.C. § 3109 (1970) to provide maximum daily rates of compensation not in excess of the highest rate for the top step of GS–15.

However, a review of the pertinent legislative and administrative history of these and relevant other pay provisions does not support the AID General Counsel's viewpoint.

The Foreign Assistance Act of 1961, *supra*, in section 626(a) originally authorized the hiring of consultants at a rate not to exceed $75 per day. This limit was raised in 1964 to $100 per day by section 302 (b), Act of October 7, 1964, Public Law 88–633, 78 Stat. 1009, 1014. In 1969 the House of Representatives proposed to amend the 1964 authorization section to substitute the per-day rate of the top step of GS–18 as the maximum rate for consultants. The purpose of this proposed change was stated in H.R. Report No. 91–611, 91st Cong., 1st Sess. 55 (1969), as follows:

(b)—*Compensation of experts and consutants*

Subsection (b) [of H.R. 14580, section 4] amends section 626(a) of the act to provide that the compensation of experts and consultants employed under this provision shall not exceed the highest per diem equivalent of a grade GS–18 Government employee under the general schedule. This amendment replaces the fixed maximum per diem rate (present $100) with a sliding rate in order to avoid the necessity of amendments each time Government salary levels are changed. At present salary levels, the maximum per diem compensation for such experts and consultants would be $129.

This provision, however, was not included in either the Senate or Conference version of the bill. See S. Report No. 91–603, 91st Cong., 1st Sess. (1969), and Conf. Report No. 91–767, 91st Cong., 1st Sess. (1969). Nor was it contained in the final bill, enacted as the Act of December 30, 1969, Public Law 91–175, 83 Stat. 805 (22 U.S.C. 2162 note). Thus, in 1969, the House of Representatives, at least, felt that the $100 limit still applied to AID consultants, and that periodic amendments were needed if the limit was to be changed. This action, without more, leads us to believe that the stated limit is still effective.

A number of different Executive agencies have had dollar limitations imposed upon their authority to hire experts and consultants. We, of course, have issued a number of decisions upon the subject as well. An examination of this administrative experience will also help to ascertain the continued validity of the dollar amount limitations in question here.

Both the National Aeronautics and Space Administration (NASA) and the Department of Transportation have had dollar limits imposed upon them. They too attempted to amend the laws but, unlike AID, they were successful. They based their proposed amendments on the view that they were bound by the $100 limit applicable to them, despite the existence of the act cited by AID as rendering such limits obsolete. Compare the Act of October 15, 1966, Public Law 89–670, 80 Stat. 931 § 9(b) (49 U.S.C. 1659(b)), with the Act of August 22, 1972, Public Law 92–398, 86 Stat. 580 § 314 (Department of Transpor-

tation Organic Act with Appropriations Act raising the ceiling). With regard to the NASA limitation see Hearings on H.R. 12689 before the Committee on Science and Astronautics, 93d Cong., 2d Sess., Part I, pages 206–207; and S. Report No. 93–818, 93d Cong., 2d Sess. 135 (1974). Also, although AID ruled its dollar limit obsolete, NASA requested the Congress to change the same limit applicable to them. This was done by the Act of June 22, 1974, Public Law 93–316, 88 Stat. 243 § 6, with no Member of Congress objecting to NASA's testimony that the $100 limit still applied. It is unreasonable to assume that Congress would have effected this change without protesting that NASA was misinterpreting the law, or stating that the general authority in 5 U.S.C. § 3109 (1970) was sufficient to permit the agency to pay its experts and consultants rates higher than $100 per diem. This is especially true in light of the following statement in S. Report No. 93–818, *supra*, at page 135:

> *Section 6.* Section 6 amends section 203(b)(9) of the National Aeronautics and Space Act of 1958 (42 U.S.C. 2473(b)(9)) so as to substitute (1) "5 U.S.C. 3109" for "section 15 of the Act of August 2, 1946 (5 U.S.C. 55a)," and (2) "but at rates for individuals not to exceed the per diem rate equivalent to the rate for GS–18;" for "at rates not to exceed $100.00 per diem for individuals:"
>
> The purpose of this amendment is to permit NASA to hire, in accordance with 5 U.S.C. 3109, the temporary or intermittent services of experts or consultants, or organizations thereof, including stenographic reporting services, at rates for individuals not in excess of the daily equivalent of the rate for GS–18 under the General Schedule. Such rate is at present in excess of the $100.00 per diem now authorized by the section 203(b)(9) being amended.

Again, we have an instance where it can be reasonably said that Congress demonstrated its belief that the specific dollar limitations were still in force.

In addition to the above-mentioned authority, we have been informally advised by the Civil Service Commission that its interpretation of the applicable laws coincides with ours.

Since the $100 maximum rate in section 626(a) has not been expressly repealed, the opinion of the General Counsel of AID is tantamount to saying that the limitation was repealed by implication. In view of our foregoing analysis, it is therefore again appropriate to follow the:

> * * * established rule of statutory construction that a later general statute is not to be construed as affecting the operation of an earlier special statute unless the special statute is expressly repealed, or is so wholly inconsistent with the general statute that its repeal must of necessity be implied. 21 Comp. Gen. 273, 278 (1941).

Such repeals by implication are not favored, nor will such repeals be found unless a clear legislative intent to do so can be found. *United States* v. *Georgia-Pacific Company*, 421 F.2d 92, 102 (9th Cir. 1970); *United States* v. *Borden Co.*, 308 U.S. 188, 198–199 (1939); *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). As demonstrated above, no clear

legislative intent to repeal the $100 limit by implication appears in the instant situation. *See also* B–183922, August 5, 1975, applying a similar rule precluding the use of generally appropriated funds for uses covered by specific appropriations acts.

It is our opinion that AID is not legally authorized to pay experts and consultants more than the $100 per day permitted by the statute. This follows for three main reasons. First, the statutes cited by AID were not intended to cover the types of employees in question. Second, continued congressional and administrative interpretations are directly contrary to AID's position. Finally, general legal authority refutes AID's repeal by implication of the specific limitation embodied in section 626(a) of the Foreign Assistance Act of 1961, as amended, *supra.*

In view of the above, and affirming our earlier decision to the Secretary on this matter, we again conclude that the experts and consultants in question may only be paid up to a maximum of $100 per day.

[B–183293]

Bidders—Qualifications—Prior Unsatisfactory Service—Tenacity and Perseverance

Contracting officer's determination that bidder is nonresponsible because of a lack of tenacity and perseverance based on bidder's poor performance on recent contracts is sustained notwithstanding Small Business Administration's (SBA) appeal of that determination which was denied by head of agency. Fact cited by SBA that bidder's performance record recently had shown marked improvewhere record indicates that decrease in number of bidder's delinquent contracts resulted from delivery date extensions granted by Government and completion of already delinquent contracts rather than from bidder's tenacity and perseverance.

In the matter of Consolidated Airborne Systems, Inc., December 16, 1975:

Consolidated Airborne Systems, Inc. (CAS), a small business concern, was the low bidder under invitation for bids (IFB) DAAAJ01–74–B–0473 (PIB), issued by the Army Aviation Systems Command (AVSCOM), for furnishing of 47 test set indicators and related equipment. However, CAS was declared nonresponsible pursuant to Armed Services Procurement Regulation (ASPR) § 1–903 (1974 ed.), because of past unsatisfactory performance due to its failure to apply the necessary tenacity and perseverance to overcome deficiencies in performance and meet delivery schedules on prior contracts.

CAS maintains that it was the low responsive, responsible bidder and, as such, should receive the award. The protester contends that certain deficiencies in performance were not its fault and resulted from

circumstances beyond its control. In support of its position, CAS submitted an analysis of each of its delinquent contracts to establish that delays in performance were not the result of its failure to apply the necessary tenacity and perseverance. CAS also protests AVSCOM's withdrawal of the matter from SBA consideration relative to the possible issuance of a certificate of competency (COC) as to its capacity and credit to perform any resultant contract. Award to the second low bidder, Simmonds Precision, has been withheld pending resolution of CAS' protest.

The administrative record indicates that following the opening of bids, AVSCOM requested that the Defense Contract Administration Services District (DCASD), Garden City, New York, perform a preaward survey of CAS. The report submitted by DCASD on October 24, 1974, recommended that "no award" be made to CAS primarily on the basis that the survey revealed CAS was unsatisfactory in the areas of performance and ability to meet the delivery schedule of the contemplated contract. Specifically, in regard to CAS' past performance record, the survey revealed that of the 101 contracts completed by the bidder during the period January through June 1974, 27 were performed in a delinquent status. While CAS' deteriorating performance record was attributed in part to late vendor deliveries and poor in-house planning, the report emphasized that surveillance during performance on prior contracts indicated that the contractor had not made any effort to improve performance by instituting procedures to overcome its deficiencies. However, on the basis of representations by the protester following the survey that it had sufficient back-up to support an affirmative preaward survey, the contracting officer requested a second survey. The findings of this survey dated December 17, 1974, were also negative in the same areas as in the previous survey with the additional information that CAS was delinquent on 11 of the 23 contracts it had completed during the months of October and November. Furthermore, the report indicated that CAS had 79 active contracts under DCASD's administration of which 21 were due for delivery and were delinquent. The preaward survey team cited the same reasons for CAS' poor performance record and emphasized that due to the bidder's prior history of poor in-house planning and vendor control, it lacked confidence in the bidder's ability to meet the delivery schedule of the proposed contract.

CAS took exception to the negative findings of the above survey and in a letter dated December 30, 1974, forwarded additional supporting documentation to AVSCOM respecting its responsibility for the subject procurement. Consequently, a partial re-survey was requested by the contracting officer in the areas of purchasing and sub-

contracting (Item 5), performance record (Item 12) and ability to meet required schedule (Item 13). This re-survey confirmed the negative findings of the two previous surveys. Specifically, the survey report indicated that the additional information submitted by the bidder did not cover all the subcontracted items. This unsatisfactory rating in the area of purchasing and subcontracting in conjunction with the bidder's poor performance record on both past and present Government contracts and its failure to take positive steps to rectify the situation, led DCASD to conclude once more that CAS would not be able to meet the proposed contract's delivery schedule, and thus it recommended "no award."

On the basis of these negative preaward surveys, the contracting officer made a determination that CAS was nonresponsible because it did not meet the minimum standards for responsibility set forth in ASPR §§ 1–902 and 1–903 (1974 ed.). Pursuant to ASPR § 1–705.4 (c), the contracting officer (on January 31, 1975) referred the matter of CAS' responsibility to SBA for consideration of the issuance of a certificate of competency. However, shortly thereafter, upon the recommendation of DCASD and AVSCOM's Production Technical Services, following CAS' meeting at DCASD at which time new information was introduced, the contracting officer requested that DCASD conduct a second partial re-survey of the bidder in regard to items 5, 12, and 13. Although the survey resulted in CAS being rated satisfactory in the area of purchasing and subcontracting, DCASD, for the fourth time, recommended that no award be made to CAS on the basis of the unsatisfactory findings regarding the bidder's performance record and ability to meet the delivery schedule. The report read in pertinent part:

PERFORMANCE RECORD: Unsatisfactory

Consolidated Airborne Systems has seventy-eight (78) active Government contracts under administration of this office. Thirteen (13) contracts are open due for delivery and are delinquent. * * *

In the 5 Dec 1974 PAS (S3309A4D007) nine of the * * * thirteen contracts were scheduled to get well (according to the proposed contractor's forecast) during the period 12/31/74–1/31/75. Of these nine, none got well and the get well dates depicted are a "best estimate" forecast developed by the Industrial Specialist because of the absence of definitive information.

The past performance record is as follows:

PERIOD	CONTRS. COMPL.	# DELINQ.
Apr–Jun 74	46	10
Jul–Sep 74	0	0
Oct–Dec 74	23	11
Jan 75	18	8

The foregoing reflects an unsatisfactory performance record on the part of Consolidated Airborne Systems. This poor performance record is based on a lack of in-house coordination, poor in-house planning and late vendor deliveries. Continuing production surveillance has revealed the contractor has neglected to develop meaningful corrective measures to improve his present unsatisfactory record. On numerous occasions contractor representatives have failed to provide

the Production Division with up-to-date contract status and accurate Milestone charts. Therefore, because of the foregoing, it is the opinion of the Industrial Specialist that award of this contract will seriously compromise his existing Government contractual backlog.

ABILITY TO MEET REQUIRED SCHEDULE: Unsatisfactory

The proposed bidder produced a phase planning chart showing elements of manufacture that were within the time constraints of the IFB. However, because of the contractor's poor overall performance record, a continuing history of poor in house planning and lack of adequate vendor control there is little confidence that the contractor will meet the delivery schedule of the proposed contract.

RECOMMENDATION:

Based upon the unsatisfactory findings for factors 12 and 13, no award is recommended.

Subsequently, on March 7, 1975, AVSCOM formally withdrew its request for SBA to institute COC procedures. This action was taken because a re-evaluation of the available data supporting the determination of CAS' nonresponsibility indicated that it was not CAS' capacity or credit that was in question, but rather, the bidder's persistent failure to apply the necessary tenacity and perseverance to do an acceptable job. In accordance with ASPR § 1–705.4(c)(vi) (1974 ed.), the contracting officer forwarded the determination of nonresponsibility to the Deputy Chief, Aircraft Systems Procurement Division, for approval, and concurrently, a copy of the documentation was transmitted to the New York Regional Office of the Small Business Administration (SBA) for the submission, if desired, of contrary views to the procuring agency. The contracting officer's "Determination of Nonresponsibility" read in pertinent part as follows:

The presence of lack of tenacity and perseverance is obvious when considering the following facts.

a. Over a period of 5 months, despite the contractor's promise of corrections and efforts to improve performances on past due contracts the following conditions still exist.

b. In Dec 74, contractor promised to improve or correct 9 out of 13 contracts that were delinquent, however in the period of 31 Dec 74 and 31 Jan 75, none showed any change.

c. The in-house planning and coordination, as well as vendor control clearly is deficient as continuous production surveillance indicates the contractor has repeatedly failed to develop any meaningful corrective measures to improve his unsatisfactory record. It is clearly indicated that the contractor did not diligently or aggressively take necessary steps and or action to solve his problems—an evident fact which is obvious because of the many delinquent contracts over the years.

d. Again after a period of months, contractor failed to furnish full requirement of vendor quotes necessary to satisfy a Pre-Award survey.

e. Contractor has consistently displayed an uncooperative attitude regarding furnishing full information desired on contractual status.

Summarizing the above, there is no evidence to indicate the Contractor has made any persistent steps to correct or meet our basic requirements, despite our efforts to cooperate in every way possible. As a result, and in view of the above, I hereby determine that Consolidated Airborne Systems is nonresponsible within the meaning of ASPR 1–705.4 (c) (vi).

On April 10, 1975, SBA formally appealed the contracting officer's determination of nonresponsibility (ASPR § 1–705.4 (c) (vi) (1974 ed.)) on the basis that CAS was a responsible bidder which "had taken reasonable and prudent action to assure prompt deliveries on [its] Government work" and further recommended that the ultimate determination of CAS' responsibility under the subject IFB be referred to SBA for possible issuance of a certificate of competency (COC). In support of its position, SBA submitted an analysis and status report on each of the bidder's allegedly "delinquent" contracts referenced in the aforementioned preaward surveys in an effort to negate the contracting officer's determination that CAS lacked the necessary tenacity and perseverance to do an acceptable job.

SBA offered the explanation that many of CAS' delinquencies were caused by circumstances which existed throughout the industry and were beyond the bidder's control and therefore did not reflect the firm's failure to apply sufficient tenacity and perseverance to insure satisfactory completion of its contracts. More significantly, SBA emphasized the marked improvement in CAS' performance since the last preaward survey. SBA indicated that contrary to AVSCOM's belief, the bidder has exhibited tenacity and perseverance by diligently taking corrective measures to assure the timely performance of its Government contracts. In this regard, SBA noted that as of April 5, 1975, CAS had reduced the number of its delinquent contracts to a total of two as compared to the 13 delinquencies indicated in the final preaward survey leading to the ultimate determination of nonresponsibility. SBA asserted that such findings did not indicate a nonresponsible bidder, but rather, reflected a bidder that has taken reasonable and prudent action to resolve its problems so as to assure prompt deliveries on its Government contracts. Accordingly, SBA maintained that the nonresponsibility determination should be referred to SBA for possible issuance of a COC since it is CAS' capacity as a prospective contractor that was in question.

However, on May 15, 1975, the Commander, AVSCOM, informed SBA that its appeal had been denied and the contracting officer's determination that CAS was nonresponsible for lack of tenacity and perseverance was affirmed.

ASPR § 1–902 (1974 ed.) provides that contracts shall be awarded to responsible contractors only, and that if the information available to the contracting officer "does not indicate clearly that the prospective contractor is responsible," a determination of nonresponsibility is required. ASPR § 1–902 (1974 ed.). In this regard, past unsatisfactory performance, due to failure to apply necessary tenacity and perseverance to do an acceptable job is sufficient to justify a finding of nonresponsibility. ASPR § 1–903.1 (iii) (1974 ed.).

However, ASPR § 1-705.4(c)(vi) (1974 ed.) requires that a determination by a contracting officer that a small business concern is not responsible due to lack of tenacity and perseverance in the performance of previous contracts, "must be supported by substantial evidence documented in the contract files." Recognizing that the determination of a prospective contractor's responsibility is primarily the function of the procuring activity, and is necessarily a matter of judgment involving a considerable degree of discretion, we will not object to a contracting officer's determination of lack of tenacity and perseverance when the substantial evidence of record reasonably provides a basis for such determination. *Kennedy Van and Storage Company, Inc.*, B-180973, June 19, 1974, 74-1 CPD 334. Where a determination is made based upon an alleged lack of tenacity and perseverance and the evidence does not either relate to these factors, or does not adequately establish a basis for the determination, our Office will not uphold such determinations. 49 Comp. Gen. 600 (1970); 39 *id.* 868 (1960).

The evidence in support of the determination must be germane to the inquiry. A mere assumption or an unsupported statement by a contracting officer that a prospective contractor's past unsatisfactory performance resulted from a lack of tenacity and perseverance is insufficient for purposes of meeting the evidentiary test required. 49 Comp. Gen. 600; 43 *id.* 298 (1963). We have also recognized that the cumulative effect of various minor deficiencies which, when taken together, unduly increase the burden of administration from the Government's standpoint, can support a finding of nonresponsibility based, in appropriate circumstances, on lack of tenacity and perseverance. 49 Comp. Gen. 139 (1969). Furthermore, we have recognized that poor business practices go to questions concerning tenacity and perseverance rather than considerations of capacity and credit. *The Transport Tire Company*, B-179098, January 24, 1974, 74-1 CPD 27. What is required to sustain a determination of nonresponsibility for lack of tenacity and perseverance to do an acceptable job is a clear showing that a prospective contractor did not diligently or aggressively take whatever action was reasonably necessary to resolve its problems. B-170224(2), October 8, 1970. We are concerned not with whether a firm has or can acquire the capability to perform, but whether a firm that is deemed to possess adequate capability applies it in sufficient measure to insure satisfactory completion of the contract. 51 Comp. Gen. 288 (1971).

From our review of the record, including SBA's appeal, we are unable to conclude that AVSCOM's determination that CAS lacked tenacity and perseverance was unreasonable. We take this position not-

withstanding SBA's data regarding CAS' "improved" performance record and the fact that certain of the protester's deficiencies in performance may well have been the result of circumstances beyond its control.

In particular, although SBA claims that CAS has applied the necessary tenacity and perseverance to cure its deficiencies in performance as evidenced by the "marked improvement" in its delivery status, the other evidence of record does not support such a conclusion. While AVSCOM does not take issue with SBA's data indicating that CAS had only two delinquent contracts as of April 5, 1975, the activity emphasizes that this seemingly rapid improvement in CAS' performance record should not be attributed to the firm's tenacity and perseverance, but rather to other circumstances not indicative of its responsibility. Although AVSCOM concedes that only 13 out of the some 28 contracts indicated as delinquent at some point during the preaward survey process were proper for consideration in the determination of CAS' nonresponsibility the activity concludes that the record is sufficient to substantiate its nonresponsibility determination.

Specifically, AVSCOM states that the delinquency status of many of CAS' contracts have been improved due to completions in a delinquent status and extension of delivery due dates. Of the 13 contracts noted above, five have been or were being modified with consideration to the Government, one was modified without consideration due to a past delinquency change, and seven were completed late. In essence, it is AVSCOM's position that the modification or completion of already delinquent contracts, while removing them from the status of being delinquent, does not alter or remove the underlying factors which caused the delinquency in the first instance, namely, a lack of tenacity and perseverance. Under the circumstances, we cannot agree with SBA that it was CAS' tenacity and perseverance in the performance of its contracts that resulted in the lower delinquency rate. To the contrary, the record reflects a concerted effort on the part of the Government to assist CAS with its contractual obligations by extending due dates on already existing delinquent contracts. For this reason, we are not convinced solely by the lower number of delinquent contracts that CAS applied the necessary tenacity and perseverance to resolve its problems so as to qualify for the instant procurement.

While reasonable persons might disagree by interpreting identical factual matters relative to tenacity and perseverance differently, our Office will not substitute its judgment for that of contracting officials absent a flagrant or unreasonable abuse of discretion. Thus, the fact that CAS has completed performance on its previous Government contracts and has subsequently been awarded new contracts, is not persua-

sive of its responsibility for the subject procurement. We have held that even on the basis of the same information, contracting officers reasonably may reach different conclusions as to a bidder's responsibility for the same kind of procurement since the determination of responsibility is judgmental. *See* 43 Comp. Gen. 228, 230 (1963).

The protester has furnished an affidavit from the SBA's Industrial Specialist in which he states that members of DCASD-Garden City had expressed to him the opinion that CAS did not lack tenacity and perseverance. The determination of whether a prospective contractor is nonresponsible for failure to apply the necessary tenacity and perseverance to do an acceptable job is reserved solely to the contracting officer. ASPR § 1-904.1 (1974 ed.). Whether or not the preaward survey team members regarded CAS as lacking in tenacity and perseverance, we believe the information contained in the narrative portions of the negative preaward survey reports supports the contracting officer's determination. Accordingly, we find no basis to question the propriety of the contracting officer's determination that CAS was nonresponsible by reason of lack of tenacity and perseverance, or to question the proposed award to Simmonds, who has been determined to be responsible as well as responsive.

Finally, CAS' reference to SBA's favorable report and the existence of new legislation before Congress expanding the role of SBA in all determinations of nonresponsibility for small businesses, including those involving tenacity and perseverance, does not in any way repudiate the contracting officer's decision, since at the present time, ASPR 1-705.4(c)(vi) (1974 ed.) attaches finality to the decision of the Commander, AVSCOM on the SBA appeal from the determination that CAS lacked the requisite tenacity and perseverance.

[B-149372]

Treasury Department—Secretary of Treasury—Protection

Holding in 54 Comp. Gen. 624 that funds appropriated to Secret Service are not available for protection of Secretary of Treasury because authorizing legislation, 18 U.S.C. 3056(a), does not include Secretary among those entitled to protection, is reaffirmed. Administrative transfer to Secret Service of function of protecting Secretary does not, without more, make Secret Service appropriations available for that purpose.

Appropriations—Availability—Secret Service Operations—Protection for Secretary of Treasury—Retroactive Payments

Because intended use of Secret Service appropriation for protection of Secretary of Treasury was disclosed to and apparently acquiesced in by Congress in connection with fiscal year 1976 appropriation request that appropriation is available for such protection.

Treasury Department—Secret Service Agents—Protection for Secretary of Treasury—Reimbursable Basis

Since purpose of 54 Comp. Gen. 624, to stop then unauthorized use of Secret Service funds for protection of Secretary of Treasury, has been achieved, Department apparently acted in good faith, and Congress has acquiesced in use of fiscal year 1976 Secret Service appropriation for protection of Secretary, no useful purpose would be served by requiring reimbursement of Secret Service appropriation from appropriation for Office of Secretary of Treasury for period from decision in 54 Comp. Gen. 624 until fiscal year 1976.

In the matter of Secret Service protection of the Secretary of the Treasury, December 18, 1975:

The General Counsel of the Department of the Treasury has asked, in effect, that we reconsider our decision at 54 Comp. Gen. 624, dated January 28, 1975, in which we held that funds appropriated for the operations of the Secret Service were not available for Secret Service protection of the Secretary of the Treasury, and that protection of the Secretary provided thereafter by the Secret Service should be on a reimbursable basis pursuant to 31 U.S. Code § 686(a) (1970), with reimbursement to be made from funds appropriated for salaries and expenses for the Office of the Secretary of the Treasury. In connection with the request for reconsideration, the General Counsel proposed, and we agreed, that the protection of the Secretary continue to be funded from the Secret Service appropriation, with the understanding that, should our decision in 54 Comp. Gen. 624 not be modified, the Department would then take action to charge the cost of protection of the Secretary after the date of that decision to the appropriation for the Office of the Secretary.

Upon reconsideration, for the reasons set forth below, we find no justification for modifying our conclusion that funds appropriated to the Secret Service, prior to the enactment of the appropriation for fiscal year 1976, were not available for the purpose of providing protection to the Secretary of the Treasury. We have also concluded that funds appropriated to the Secret Service for fiscal year 1976 are available for protection of the Secretary, and we have modified our decision in 54 Comp. Gen. 624, to the extent that we now believe that no useful purpose would be served by requiring the cost of protection provided by the Secret Service to the Secretary after January 28, 1975, the date of that decision, to be reimbursed from the appropriation for the Office of the Secretary.

The General Counsel, in arguing that the appropriation for the Secret Service is available for protection of the Secretary, relies on the provisions of Reorganization Plan No. 26 of 1950, 31 U.S.C. § 1001 note (1970). Reorganization Plan No. 26 transfers all functions of all other officers of the Department and of all agencies and employees of

the Department to the Secretary, with exceptions not here relevant. It goes on to provide that the Secretary may:

> * * * from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of the Treasury of any function of the Secretary, including any function transferred to the Secretary by the provisions of this reorganization plan. Section 2, Reorganization Plan No. 26.

In addition, the Secretary may from time to time:

> * * * effect such transfers within the Department of the Treasury of any of the records, property, personnel, and unexpended balances (available or to be made available) of appropriations, allocations, and other funds of such Department as he may deem necessary in order to carry out the provisions of this reorganization plan. Section 4, Reorganization Plan No. 26.

The General Counsel notes that in 54 Comp. Gen. 624 we found that authority exists for protection of the Secretary, notwithstanding that there is no express statutory authority for it. The General Counsel argues that protecting the Secretary is therefore a "function" of the Department in the sense of that word in Reorganization Plan No. 26; that this function is vested in the Secretary by the Reorganization Plan; that the function may, also by virtue of the Plan, be transferred to the Secret Service as an agency of the Department; and that the Plan allows the concomitant transfer to the Secret Service by the Secretary of balances of funds deemed necessary to carry out the provisions of the Plan. He states that, once such a transfer has been made, the function of protecting the Secretary becomes a continuing function of the Secret Service and, accordingly, appropriations thereafter made to the Secret Service for necessary expenses become available automatically for protection of the Secretary.

The General Counsel concedes that the transfer of function which he contends has taken place was accomplished without the formality of a written Treasury order. His view, however, is that:

> * * * there is no requirement for such formality, particularly where for the safety of the protectee there may be a desire to withhold the very fact of the existence of such protection from those who might wish to harm the protectee. A long continued administrative practice, if not a de jure transfer of functions, is, at least, evidence of such a transfer. In the instant situation, almost every Secretary of the Treasury since 1950 (if not even earlier) has received Secret Service protection, when and as required. Therefore, we believe, as a matter of law, the function of protecting the Secretary has been vested in the Secret Service for many years and pursuant to § 4 of Reorganization Plan No. 26 of 1950 the appropriations of Secret Service are today available for such protection * * *.

It follows, the General Counsel contends, that appropriations for the Office of the Secretary need not be used to reimburse the Secret Service for protective services provided to the Secretary.

With respect to the argument that the function of protecting the Secretary may be transferred to the Secret Service, we have stated, as the General Counsel points out, that protection of the Secretary may be provided by the Department. The Secretary is, by law, the head of

the Department (31 U.S.C. § 1001 (1970)), and is empowered by law to:

> * * * prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business * * *. 5 U.S.C. § 301 (1970).

Accordingly, as the General Counsel suggests, the Secretary can presumably order any office or component of the Department, including the Secret Service, to provide protection for him, pursuant to his general administrative authority, even without reliance on Reorganization Plan No. 26. The question remains, however, whether funds appropriated to the Secret Service are available for the purpose of carrying out the function assigned to it of protecting the Secretary.

The General Counsel argues that appropriations to the Secret Service are available to protect the Secretary pursuant to section 4 of Reorganization Plan No. 26 of 1950. Even assuming that a transfer of function pursuant to section 2 of Reorganization Plan No. 26 was indeed made, we nevertheless cannot accept the General Counsel's contention that funds of the Secret Service became available, and remain so, by virtue of section 4 alone, for the purpose of protecting the Secretary.

Section 4 of Reorganization Plan No. 26 provides for the transfer, in order to carry out the provisions of the Plan, of "unexpended balances (available or to be made available) of appropriations, allocations and other funds * * *." The General Counsel contends that the effect of the parenthetical phrase "available or to be made available" in section 4 is "to transfer all future appropriations even before they are made." We cannot agree.

First, the literal language of section 4 does not support this view. What is authorized thereby to be transferred is not "appropriations" but rather "unexpended balances" of appropriations; the parenthetical phrase "available or to be made available" modifies "unexpended balances." See, in this connection, the Reorganization Act of 1949, June 20, 1949, ch. 226, 63 Stat. 203, which is the legislative authority for the formulation of Reorganization Plan No. 26, and which states that any reorganization plan shall:

> * * * make provision for the transfer of such unexpended balances of appropriations, and of other funds, available for use in connection with any function or agency affected by a reorganization, as he [the President] deems necessary * * * but such unexpended balances so transferred shall be used only for the purposes for which such appropriation was originally made * * *. § 4(4), 63 Stat. 203, 204.

It seems evident that the "unexpected balances" which are authorized to be transferred must be the balances of appropriations which are, at the time of the transfer of funds, available for obligation for pur-

poses of protection of officials, rather than, as the General Counsel contends, the balances of appropriations not yet enacted. Indeed we fail to see, nor does the General Counsel explain, how an appropriation not yet made can be transferred.

Moreover, with respect to the transfer of balances of funds already appropriated, it may be, as the General Counsel argues, that a transfer of functions under section 2 of Reorganization Plan No. 26 could be accomplished without formality, but a transfer to the Secret Service appropriation account of a portion of the unexpended balance of funds from the Office of the Secretary appropriation account, under section 4 of Reorganization Plan No. 26, would presumably be accomplished by some written evidence of the transfer. The General Counsel does not contend that any such transfer of funds actually took place.

The General Counsel argues in the alternative that, even absent section 4 of Reorganization Plan No. 26 of 1950, once the Secretary has exercised the authority to transfer the function of protecting himself, it becomes a continuing function of the Secret Service, and appropriations for necessary expenses for the operation of the Secret Service become available thereafter for the transferred function. However, to say that, as a result of the transfer, the expense of protecting the Secretary becomes a "necessary expense" for the operation of the Secret Service is to beg the question which, fundamentally, is whether the Secretary may, by administrative action, and without disclosure to the Congress, make the Secret Service appropriation available for purposes for which, by virtue of 18 U.S.C. § 3056(a), it would otherwise not be available.

The answer to this question, in our view, must be that he may not, at least where there has been no mention, either in the Secret Service appropriation itself or in the material submitted to the Congress to support it, that it is intended to be used for protection of the Secretary. In that respect, we said in 54 Comp. Gen. 624, at 629, that:

> * * * the Secret Service, although subject to the direction of the Secretary of the Treasury, derives its operating authority with respect to providing protection generally from 18 U.S.C. § 3056(a), and its funds are therefore not available, without specific authorization, to perform protective duties not authorized by that statute.

We find no new or compelling reason to depart from that statement. To hold that Secret Service funds have been available for protection of the Secretary, where neither the appropriation acts, the reports, the budget justifications, nor the testimony gave any indication that such a use was intended, would be inconsistent with the express terms of 18 U.S.C. § 3056(a).

In speaking to this point, the General Counsel argues that the lack of express reference to protection of the Secretary does not negate the

conclusion that the Secret Service appropriation is available for that purpose because:

> * * * Both the Treasury Security Force and the Executive Protection Service are included under this appropriation as part of the Secret Service. There is, however, no specific breakout by Force and Service. The Treasury Security Force guards Government securities and Treasury buildings. This necessarily includes protecting those in the buildings, including the Secretary. Moreover, when the Secretary travels abroad, as he frequently does, he is an official representative of the United States performing special missions abroad. This entities him to protection, at Presidential direction, pursuant to 18 U.S.C. 3056(a) itself. Lastly, the Executive Protection Service provides protection to the Executive residence and any building in which White House offices are located. The Secretary of the Treasury holds a number of positions which may well qualify his office as a "White House office" in the same way that the Office of Management and Budget is such an office. It does not stretch the imagination, therefore, to find that protection of the Secretary is subsumed (although not expressly mentioned) in the functions for the performance of which the Secret Service appropriation is made. Consequently, the budget estimates support rather than detract from the conclusions reached above.
>
> Lasty, having three discrete protective services—i.e., the Secret Service, the Executive Protection Service and the Treasury Security Force—under his jurisdiction, it makes eminent good sense that the Secretary would turn to these for such protection as may be required for his person. Conversely, it would not make sense to create another protective service on his immediate staff for this purpose. Having once turned to these existing services, all funded from the same appropriation and under the supervision of the Director of the Secret Service, and having a continuing need for such protection, it would follow that the funding for such protection should come from, and be the continuing responsibility of, the Secret Service. This is, in fact, what has historically transpired.

We acknowledged in 54 Comp. Gen. 624 that protection of the Secretary by the Treasury Security Force, to the extent its duties as set forth in the Secret Service budget justification involve such protection, is authorized. As we then pointed out, those duties include the responsibility for protecting life and property in Department buildings and for providing security for the Secretary's press conferences. It is likewise clear that, under the explicit authority of 18 U.S.C. § 3056(a), the President may direct protection of the Secretary when the Secretary travels abroad on special missions as an official respresentative of the United States. Assuming, *arguendo*, that the Secretary's duties make his office a "Presidential office" within the meaning of 3 U.S.C. § 202 (1970), setting forth the duties of the Executive Protective Service (referred to in the above quotation as the "Executive Protection Service"), then certainly Secret Service funds would be available to enable the Executive Protective Service to carry out its duty under that law to protect, not the person of the Secretary as such, but the building in which the Presidential office is located.

However, we cannot agree with the General Counsel that the conclusion to be drawn from the foregoing is that "protection of the Secretary is subsumed (although not expressly mentioned) in the functions for the performance of which the Secret Service appropriation is made." Rather, if any significance is to be given to the informa-

tion concerning the Treasury Security Force and the Executive Protective Service, it would seem to be that Secret Service funds are available for protection of the Secretary only in the limited circumstances described. That is, he can be protected by the Treasury Security Force, but only at the Treasury building or at press conferences, and by the Executive Protective Service, again only at his building (assuming that his is a "Presidential" office), but he cannot be protected by the Secret Service, except when on a mission abroad at the direction of the President.

The General Counsel argues further as follows:

> To the extent that any Secretary received Secret Service protection prior to January 28, 1975, the costs thereof were charged to the Secret Service appropriation for Salaries and Expenses. This approach has been consistently followed, at least, since the tenure of Secretary Morgenthau. In fact, the costs thereof have been consistently included in the budget request for the Secret Service Salaries and Expenses appropriation. Admittedly this fact is hard to demonstrate, since the budget estimates submitted each year by the President (see for example the Appendix to the Budget of the United States, 1976, at pp. 747–749) do not make any express mention of it. However, these same estimates make reference to protection of persons only in the narrative portion and, in that connection, essentially restate the substance of 18 U.S.C. 3056 and 3 U.S.C. 202 and 203a. Nowhere in the presentation is there a breakdown of the cost of individual protection. This is deliberate. It is part of the protection afforded such persons to guard closely the identity of the protectees and the number of Secret Service personnel assigned to protect each individual. In view of this, the estimates (i.e., tables) do not provide figures on the cost of protection of persons; such cost is subsumed under the other categories. The narrative does identify the persons protected; i.e., where classes of person are mentioned there is no further identification of those who make up the class. Hence, it is consistent that protection of the Secretary would not be specifically mentioned because, as the Comptroller General stated in his decision, the Secretary of the Treasury is not one of those persons for whom 18 U.S.C. 3056 expressly authorizes protection. Nevertheless, it is a fact that the Secret Service budget estimates, including specifically those for FY 1975, have included the cost of providing protection to the Secretary.
>
> The absence of specific mention of Secretarial protection has, perhaps, misled the Comptroller General. Consequently, we propose to present testimony in support of the Secret Service appropriation for the fiscal year 1976 which fully discloses that such appropriation includes funds for the protection of the Secretary. We also propose to include narrative language in support of any future Secret Service appropriation which will make that fact clear. These two steps should resolve the questions raised by the Comptroller General for the future.

We do not dispute that the Department's budget requests have in fact included amounts sufficient to allow the Secret Service to protect the Secretary. However, we reject the suggestion that the need for secrecy somehow justified the failure of the Department to reveal to the Congress the intended use of those funds. The fundamental issue is not whether the Comptroller General may have been misled, but whether the Congress was misled.

Nothing in this or our earlier decision requires the public disclosure of any information the release of which would, in the judgment of the Secretary, compromise the effectiveness of the protection. However,

neither do we condone the practice of not disclosing to the Congress the intended use of an apropriation where, as in this instance, that use is for a purpose not authorized by the applicable legislation. The Department was not justified in failing to reveal that its requests for funds for the Secret Service have included amounts intended to be used for protection of the Secretary.

Concerning the argument that nondisclosure of the identities of protectees is necessary as part of the protection, in logic it would appear at least as likely that public knowledge of protection would deter attacks. In any event, even assuming that ability to protect an individual is enhanced if the fact of protection is not publicly known, this argument cannot be used to justify nondisclosure to the Congress. Various mechanisms exist for offering confidential information to the Congress if that is thought necessary in a particular case.

Moreover, the identities of protectees whose protection is authorized by 18 U.S.C. § 3056(a) are in effect disclosed by that statute. The law authorizes the protection of the President and his immediate family, the Vice-President and (by virtue of Public Law 93-381, 88 Stat. 613 (August 21, 1974)) his immediate family, and of former Presidents and their wives, as well as their widows and children under certain conditions. In every case, the identity of the protectee is obvious. Visiting heads of State or Government and major Presidential or Vice-Presidential candidates are also entitled to protection; there would ordinarily be no doubt as to the identity of such individuals.

Only in the cases of protection of distinguished foreign visitors to the United States (who are not heads of State or Government) or of official representatives of the United States performing special missions abroad, both of which classes are entitled to protection if the President so directs, is the identity of those entitled to protection not readily apparent. Even in those cases, identification in the statute of the classes entitled to protection makes it possible to speculate with some expectation of accuracy that certain individuals would be likely to be receiving protection.

It thus becomes apparent that the principle that it is necessary "to guard closely the identity of the protectees," which the General Counsel offers as the justification for failure to disclose the protection of the Secretary, finds its primary application in the kind of case now before us, where the law does not authorize such protection to be provided. We cannot agree that nondisclosure is justified in such circumstances. Accordingly, we reaffirm our conclusion in 54 Comp. Gen. 624 that the use of Secret Service funds for the protection of the Secretary of the Treasury was improper.

The Department has now made known to the Congress, in connection with the fiscal year 1976 appropriation request for the Secret

Service, that it intends to use that appropriation for protection of the Secretary. The Congress has apparently acquiesced to that proposal. The Senate Report on the Treasury, Postal Service, and General Government Appropriation Act, 1976, states that one of the functions of the Secret Service is to provide for the protection of the Secretary of the Treasury, as required. S. Report No. 94–294, 19 (1975). Moreover, although it is not reflected in the budget justification or the House Report, representatives of the Department of the Treasury testified in House hearings on the appropriation request for fiscal year 1976 that Secretary Simon is receiving protection, funded from the Secret Service appropriation, and that the request for fiscal year 1976 funding for the Secret Service included amounts intended to be used for that purpose. Hearings on the Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1976, before a Subcommittee of the House Committee on Appropriations, 94th Cong., 1st Sess. 782–83 (1975).

In view of this history, we conclude that funds appropriated to the Secret Service for fiscal year 1976 by the Treasury, Postal Service, and General Government Appropriations Act, 1976, Public Law 94–91, approved August 9, 1975, are available for protection of the Secretary. This conclusion of course cannot be taken to make appropriations to the Secret Service for subsequent fiscal years available for protection of the Secretary. Unless the law is amended to authorize the Secret Service to protect the Secretary of the Treasury, the availability of each annual appropriation for that purpose must be determined by reference to the terms of the appropriation act and its history.

Since funds appropriated to the Secret Service by Public Law 94–91 are available for protection of the Secretary, the only period to which the requirement of 54 Comp. Gen. 624—to charge the protection of the Secretary to the appropriation for the Office of the Secretary—now applies is from the date of that decision, January 28, 1975, until the close of fiscal year 1975, June 30, 1975. With respect to that period, as recognized above, it is not disputed that funds were included in the budget request of the Secret Service, albeit without disclosure, for protection of the Secretary.

While we have not changed our view that that use was not authorized, the Department was apparently acting in the belief, in good faith, that its procedure was proper. Our purpose is not to penalize the Department, but simply to put a stop to the unauthorized practice. That purpose has been achieved, and the Congress has made the Secret Service appropriation for fiscal year 1976 available for the purpose of protecting the Secretary. Accordingly, the cost of protection of the Secretary of the Treasury during the period January 28 to June 30, 1975, will not be required to be reimbursed from the appropriation for

the Office of the Secretary. Our decision in 54 Comp. Gen. 624 is modified accordingly.

[B-184331]

Letter of Credit—Bid Guarantee—Deficiencies—Bid Rejection

Documentary letter of credit furnished as bid guarantee does not constitute "firm commitment" as required by solicitation and Armed Services Procurement Regulation 7-2003.25 (1974 ed.), thereby rendering bid nonresponsive, since letter of credit was not accompanied by bidder's signed withdrawal application which would have to be presented to bank in order for letter of credit to be honored.

In the matter of Juanita H. Burns and George M. Sobley (a joint venture), December 18, 1975:

Juanita H. Burns and George M. Sobley (B & S), bidding as a joint venture, protest the rejection of their bid as nonresponsive under Invitation for Bids (IFB) F22608-09014 issued for refuse collection and disposal services at Columbus Air Force Base, Mississippi.

The protester's bid was rejected on the basis of two alleged deficiencies in the letter of credit furnished as the 20 percent bid guarantee required under solicitation paragraphs 21, 22 and 23. In particular, the contracting officer determined that the protester's letter of credit failed to identify both the bidder and the solicitation as required by paragraph 23 which provides that:

> If the Bid Guarantee is in the form of an irrevocable letter of credit, the letter of credit must (i) be issued by a bona fide financial institution, (ii) *identify the bidder and the solicitation, and* (iii) *be a firm guarantee* in an amount equal to 20 percent of the bid price. [Italic supplied.]

Accordingly, the contracting officer rejected the B & S bid pursuant to paragraph 21 which states in pertinent part that:

> Where a bid guarantee is required by the Invitation for Bids, failure to furnish a bid guarantee in the proper form and amount, by time set for opening of bids, may be cause for rejection of the bid. * * *

Upon additional review of the protester's bid, the Air Force has determined that the letter of credit which expired on August 12, 1975, was not coextensive with the 60 day period expiring on August 16, 1975, during which bids were to remain open. Most importantly, the Air Force also maintains that the bid guarantee did not constitute a "firm commitment" as required by Armed Services Procurement Regulation (ASPR) § 7-2003.25 (1974 ed.). The letter of credit stated that any draft against the letter would have to be accompanied by an approved withdrawal application signed by Mr. Bob Burns or Mrs. Juanita Burns, the depositors whose account was to serve as collateral for the letter of credit. Since the requisite withdrawal application did not accompany the bid guarantee, the Air Force contends that the letter of credit is defective and renders the bid nonresponsive.

Protester's counsel argues that although the letter of credit does not identify the solicitation number, or Juanita H. Burns and George M. Sobley as the bidders, the letter is not deficient since the bid to which it was attached clearly supplied the missing information. Regarding the other bases for objection raised by the Air Force, counsel maintains that they may not properly be considered since the contracting officer initially rejected the bid solely because of the letter's failure to identify the bidders and the solicitation number and not because the letter of credit was not a firm guarantee. However, we believe that once the propriety of a procurement action has been questioned through the filing of a protest with our Office, we are obligated to consider all the relevant circumstances including those which may not have been considered initially by the contracting officer.

This Office has not previously considered a bid guarantee case involving the sufficiency of a commercial letter of credit. Article 5 of the Uniform Commercial Code (UCC) constitutes the basic law in this area. See also Miss. Code Ann. §§ 75–5–101 et. seq. (1972). Ordinarily, at the request of one of its customers, a bank or other financial institution issues directly to a third party a promise to pay a sum of money upon being furnished certain documents, thereby substituting the bank's credit for the buyer's credit, in favor of the beneficiary. Therefore, a commercial letter of credit is essentially a third party beneficiary contract by which a party wishing to transact business induces a bank to issue the letter to a third party.

Section 5–102 of the UCC defines the scope of Article 5 and states, in part, that it applies "to a credit issued by a bank if the credit requires a documentary draft or a documentary demand for payment." UCC § 5–102(1)(a). Section 5–103(1)(a) defines a letter of credit as "an engagement by a bank or other person made at the request of a customer and of a kind within the scope of this Article (Section 5–102) that the issuer will honor drafts or other demands for payment upon compliance with the conditions specified in the credit. * * *" A condition of honoring a documentary letter of credit is that the requisite enumerated documents be presented to the issuing bank, and courts have held that the requirements of a letter must be strictly complied with and that all required documents must be as stated in the letter. See *Courtaulds North America, Inc.* v. *North Carolina Bank*, 387 F. Supp. 92, 99–100 (M.D. N.C. 1975), citing *Fidelity Bank* v. *Lutheran Mutual Life Insurance Co.*, 465 F.2d 211 (10th Cir. 1972); *Sisalcords Do Brazil, Ltd.* v. *Fiacao Brasileira De Sisal, S.A.*, 450 F.2d 419 (5th Cir. 1971); *Venizelos S.A.* v. *Chase Manhattan Bank*, 425 F.2d 461 (2d Cir. 1970); *Banco Espanol de Credito* v. *State Street Bank & T. Co.*, 385 F.2d 230, 234 n.5 (1st Cir. 1967).

In order for a bid to be considered responsive to an IFB, it must comply with all of the IFB's material requirements. 52 Comp. Gen. 265 (1972). It is a fundamental principle of procurement law that whether a bid is responsive to the IFB is for determination upon the basis of the bid as submitted and that it is not proper to consider the reasons for the nonresponsiveness, whether due to mistake or otherwise. 38 Comp. Gen. 819 (1959); 51 *id.* 836 (1972). It is also well-settled that defects which make a bid nonresponsive may not be waived by the contracting officer. 30 Comp. Gen. 179 (1950); 50 *id.* 733 (1971).

Beginning with our decision in 38 Comp. Gen. 532 (1959), we have consistently held that the bid bond requirements must be considered a material part of the IFB and the contracting officer cannot waive the failure to comply with these requirements. *See*, e.g., 39 Comp. Gen. 60 (1959); 44 *id.* 495 (1965); 50 *id.* 530 (1971); 52 *id.* 223 (1972). We summarized the basis for this rule at page 536 of 38 Comp. Gen. *supra*, as follows:

> * * * waiver of a bid bond requirement stated in an invitation for bids would have a tendency to compromise the integrity of the competitive bid system by (1) making it possible for a bidder to decide after opening whether or not to try to have his bid rejected, (2) causing undue delay in effecting procurements, and (3) creating, by the necessary subjective determinations by different contracting officers, inconsistencies in the treatment of bidders. The net effect of the foregoing would be detrimental to fully responsive and responsible bidders, and could tend to drive them out of competition in those areas where the practices described occur. This result could hardly be said to serve the best interests of the United States. * * *

Furthermore, ASPR § 10–102.5 (1974 ed.) recognizes the materiality of the bid bond requirements. This regulation states in pertinent part:

> When a solicitation requires that bids be supported by a bid guarantee, noncompliance with such requirement *will* require rejection of the bid * * *. [Italic supplied.]

Here, B & S asked the Bankers Trust Savings and Loan Association to issue a $25,000 letter of credit in favor of the procurement officer at Columbus Air Force Base. As previously indicated, the letter stated that drafts would have to be accompanied by an approved withdrawal application signed by Mr. Bob Burns or Mrs. Juanita H. Burns. The determination of the sufficiency of a bid guarantee relates to whether the Government will receive the full and complete protection it contemplated in the event the bidder fails to execute the required contract documents and deliver the required performance and payment bonds. We believe that since the requisite withdrawal application was a material part of the bid guarantee and since it did not accompany the letter of credit, the letter did not constitute, at bid opening, a "firm commitment" as required by solicitation paragraph 23 and ASPR § 7–2003.25 (1974 ed.). Accordingly, if the bid had been accepted, but

B & S then failed to undertake its contractual obligations, absent the withdrawal application, the Government would not have been able to receive the protection for which the bid guarantee requirements are designed.

In view thereof, we need not address the other bases for rejection of the B & S bid. Accordingly, the protest is denied.

[B–183174]

Subsistence—Per Diem—Hours of Departure—During Duty Hours

Employee who traveled during working hours on Friday to report for temporary duty the following Tuesday, the day after a Monday holiday, may not be paid per diem for the intervening 3-day weekend. While 5 U.S.C. 6101(b)(2) requires that to the maximum extent practicable agencies schedule travel during regular duty hours, payment of 2 days or more additional per diem to facilitate such scheduling has been held unreasonable. Where 2 days per diem would be required and commencement of assignment cannot be otherwise scheduled, the employee may be required to travel on his own time.

In the matter of certification for payment of per diem, December 24, 1975:

This action is in response to a request for an advance decision by a certifying officer of the Department of the Interior whether the voucher of Mr. Kenneth D. Thomas in the amount of $48 representing 3 days per diem may be certified for payment.

Mr. Thomas, with headquarters in Fresno, California, was given a temporary "Executive Development Mobility Assignment" in Washington, D.C., for the period from February 19, 1974, to April 12, 1974. The assignment was designed to give him management experience at headquarters level and to improve his ability in management techniques and operations at the regional level. As expressed in an undated memorandum, the employee's specific assignment was as follows:

> The first four weeks of the assignment is programmed to be in the Planning Division. The planning assignment is expected to relate input made at the Regional level to problems at the Washington level. This assignment will provide a look at the management style at this level in getting projects approved and into construction.
>
> The last four weeks is to be spent with a Congressional Staff. Congressman Johnson or Sisk would provide an excellent experience as an example. The purpose of this assignment is to gain a better insight into the legislative process and observe the interface between the executive branch, Congress and the public.

The Travel Authorization issued to Mr. Thomas included the statement that the employee was not required to perform travel on weekends or holidays. Because the first day of his temporary duty assignment, February 19, 1974, was the Tuesday following a Monday holiday, Mr. Thomas departed his permanent duty station in Fresno, California, and arrived in Washington, D.C., on February 15, 1974, the preceding Friday. He explains that this early departure was occasioned

by his wish to avoid weekend and holiday travel and the need to make final arrangements for living accommodations for his 2-month stay in Washington, D.C.

That portion of Mr. Thomas' claim for per diem for the 3-day weekend from February 16 to 18, 1974, was disallowed by the administrative office based upon the certifying officer's determination that his early departure was a matter of personal convenience. He has been reimbursed per diem for three-fourths of a day for his travel on Friday, February 15, 1974, and for the entire period of his assignment beginning at 12:01 a.m. on Tuesday, February 19, 1974.

Mr. Thomas feels that he has been wrongly denied per diem for the 3 days in question and requests an opinion regarding his entitlement. He has stated his position as follows:

> I understand that the regulations state that an employee is not required to travel on a weekend and I feel a holiday falls in the same category as a weekend. The regulations are silent on payment of per diem for weekend travel. I feel that if per diem is not to be paid for weekends there would be no need for the regulation.
>
> Amendment No. 2 of subject travel authorization, item (1) states, "Mr. Thomas does not have to perform travel on weekends or holidays."
>
> I feel the wrong decision was made in deducting the per diem, 3 days at $16.00 per day for a total of $48.00. It is wrong to specifically permit an employee to travel on a Friday and then once at the temporary duty station rule that no per diem will be paid for the weekend and holiday or until actual assignment begins on the following Tuesday. I, therefore, request a Comptroller General's decision regarding the payment for the 3 days' per diem in question.

We are not aware of any specific regulation providing that employees are not required to perform weekend travel. Mr. Thomas' reference in this regard is presumably to the following statutory language contained at 5 U.S. Code § 6101(b)(2):

> (2) To the maximum extent practicable, the head of an agency shall schedule the time to be spent in a travel status away from his official duty station within the regularly scheduled workweek of the employee.

We recognize that, insofar as permitted by work requirements, arrival or departure may be delayed to permit an employee to travel during his regular duty hours and that up to 2 days additional per diem may be paid for that purpose. 53 Comp. Gen. 882 (1974); B–160258, January 2, 1970; B–168855, March 24, 1970. However, the payment of additional per diem costs for 2 days or more for the purpose of facilitating an employee's travel during regular duty hours is not considered reasonable. 46 Comp. Gen. 425 (1966), and B–165339, November 18, 1968. Where scheduling to permit travel during regular duty hours would result in payment of 2 days or more per diem, the employee may be required to travel on his own time insofar as the circumstances of his assignment do not meet one of the criteria for payment of overtime compensation for travel set forth at 5 U.S.C. § 5542(b)(2), 51 Comp. Gen. 727 (1972).

Since Mr. Thomas' travel during duty hours on Friday, February 15, 1974, in order to report for work on Tuesday, February 19, 1974, involves more than 2 days additional per diem costs over what would have been incurred if his travel had been performed on Monday, February 18, 1974, those per diem costs may not be paid.

Under the circumstances, however, the Department of the Interior's method of scheduling assignments warrants further mention. The notation contained in the travel orders issued Mr. Thomas to the effect that he was not required to perform travel on weekends or holidays is misleading. For example, depending upon the length and scheduling of his particular travel, there are many circumstances where the above-discussed 2-day per diem rule may require an employee to travel over a weekend in order to place himself at a temporary duty site on a Monday morning. In those circumstances the agency is obliged, by virtue of the policy set forth in 5 U.S.C. § 6101(b)(2), above, to carefully consider the necessity for the employee's reporting on a Monday morning or, as in Mr. Thomas' case, on a Tuesday morning following a Monday holiday.

In Mr. Thomas' particular case, we question the necessity for the Department of the Interior's having scheduled his "Executive Development Mobility Assignment" to commence on the morning of Tuesday, February 19, 1974. The first 4 weeks of his assignment were with a division of the Department of the Interior in Washington, D.C., and thus, it would appear that the scheduled start of his assignment was a matter entirely within the control of that Department. To the extent that it was within its control the Department should more properly have scheduled the start of Mr. Thomas' assignment for Wednesday morning, permitting him to travel from Fresno to Washington on Tuesday.

When the scheduling of an employee's travel requires him to perform noncompensable travel outside his regularly scheduled workweek the provision of section 610.123 of title 5 of the Code of Federal Regulations should be complied with. That section provides:

> Insofar as practicable travel during nonduty hours shall not be required of an employee. When it is essential that this be required and the employee may not be paid overtime under § 550.112(e) of this chapter the official concerned shall record his reasons for ordering travel at those hours and shall, upon request, furnish a copy of his statement to the employee concerned.

[B-184759]

Contracts—Specifications—Descriptive Data—"Subject to Change" Qualification

Printed legend on descriptive data sheets submitted with bid that product specifications set forth in data sheets are subject to change without notice may be ignored in evaluating bid under brand name or equal clause since bid, read as a whole, indicates bidder's intention to furnish from stock product conforming to

specifications. Effect of legend by manufacturer of equipment is to reserve right to make changes as to its items produced in future.

In the matter of Burley Machinery, Inc., December 24, 1975:

Invitation for bids (IFB) DAAA22-75-B-0011 was issued on May 28, 1975, by the Watervliet Arsenal, Watervliet, New York, to procure a snow removal unit on the basis of a "Caterpiller Loader, Model 920 or equal" with specified attachments. Two bids were received in response to the IFB including the bid submitted by Burley Machinery, Incorporated (Burley), a regular dealer, who offered the Clark Equipment Company (Clark) Model 45B, and related attachments of other manufacture, as equal to the brand name model. However, it is reported that all bids were rejected as nonresponsive because of qualifying language contained in the accompanying descriptive literature.

The IFB contained the standard Brand Name or Equal clause prescribed by Armed Services Procurement Regulation 1-1206.3(b) (1974 ed.), which requires bidders proposing to furnish an "equal" product to furnish with the bid descriptive material to enable the purchasing activity to determine whether the product offered meets the salient characteristics of the IFB and to establish exactly what the bidder proposes to furnish. The Clark data sheets, submitted as part of the descriptive literature with Burley's bid, contained the statement: "Materials and Specifications Subject to Change Without Notice or Obligation." However, Burley contends that the cover letter transmitting its bid, in effect, negates the legend contained in the descriptive literature. Specifically, the protester relies on the statement contained in its cover letter that its bid met the specifications in every respect, that delivery of the "equal" unit would be from stock in its inventory and that the loader and snowblower were in inventory and available for inspection. The protester contends that the overall offer to comply with the specifications and to furnish equipment in stock and ready for delivery supersedes the qualification in the descriptive literature. Burley also questions whether the cancellation of the solicitation was in fact in the best interests of the Government and made in good faith.

The responsiveness of a bid submitted under a brand name or equal purchase description depends not on whether the bidder believes, or even knows, that his proposed product is equal to the brand name but whether the procuring activity can determine that fact from the information submitted with the bid. Since the IFB's brand name or equal clause clearly warned bidders that the "equality" of the product would be determined on the basis of information furnished by the bidder, the issue in the instant protest is whether the descriptive literature, specifically the Clark data sheets containing the above-

quoted pre-printed reservation, precluded the contracting agency from determining that Burley will furnish a product meeting the needs of the Government.

For the reasons that follow, it is our conclusion that the original solicitation should be reinstated and the award made to Burley, if its bid is otherwise responsive.

In reporting on the rejection of Burley's bid, the procuring activity cites our ruling in *Big Joe Manufacturing Company*, B–182063, November 14, 1974, 74–2 CPD 263, which held that inclusion of statements in descriptive literature to the effect that the production specifications are subject to change without notice provide a bidder with an option to deviate from the advertised specifications after award and is a material deviation requiring bid rejection. We have reviewed the case and believe that it should be distinguished from the facts and circumstances of the instant protest. In *Big Joe*, *supra*, the solicitation similarly required that bidders offering "equal products" submit descriptive literature for evaluation purposes. The bidder offered its *own* product, and its descriptive literature contained virtually an identical preprinted legend accompanied by a statement in the bid form that "We are quoting in full compliance with the specifications." In denying Big Joe's protest, we stated in pertinent part:

> We do not believe that the blanket offer to comply with the specifications cures this deviation since the descriptive literature was required for the purpose of determining what the Government was binding itself to purchase. See B–158808, May 12, 1966. The legend on the descriptive literature, at the very least, makes the protester's bid ambiguous since it can be argued that either (1) the legend gives the protester an option to deviate from the specifications, or (2) that the protester is bound by its statement on the form. Consequently, the Government cannot be sure what it is binding itself to purchase. *Cf. Arista Company*, 53 Comp. Gen. 499 (1974). Looking at the bid, which includes the descriptive literature, there is no way of being certain that the protester didn't mean that it reserved the right to change specifications regardless of any other statements in the bid and it cannot clarify this ambiguity subsequent to bid opening.

In addition, we stated in the *Arista* case, *supra*, that generally a qualifying legend is a material deviation requiring bid rejection where descriptive data is necessary to establish exactly what the bidder proposes to furnish. However, we think that the pertinent language of the bid should be read as a whole. In that light, we believe the reasonable interpretation of Burley's bid to be that it offered to furnish from stock items which fully comply with the specifications but that the manufacturer of the equipment reserved the right to make changes without notice in such items which it might produce in the future.

Therefore, we believe that Burley's bid should not have been rejected for the reason stated by the agency. Since the IFB was canceled as a result of an erroneous determination of nonresponsiveness,

no "cogent or compelling reason" presently exists to allow the cancellation to stand. *See* 52 Comp. Gen. 285 (1972). Our Office has sanctioned the reinstatement of a canceled invitation in the past when to do so would work no prejudice on the rights of others and would, in fact, promote the integrity of the public bidding system. 39 Comp. Gen. 834 (1960); 54 *id.* 237 (1974), 74–2 CPD 183; 54 *id.* 145 (1974), 74–2 CPD 121.

Under the circumstances, we recommend reinstatement of the invitation and award to Burley, if otherwise responsive.

[B–148044]

Property—Private—Acquisition—Relocation Expenses to "Displaced Persons"—Effective Date of Entitlement

Tenant who vacated premises subsequent to written purchase offer by Architect of the Capitol qualifies as "displaced person" and is entitled to benefits applicable to displaced tenants under Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, since Government made firm offer to purchase property from owner, the tenant moved after this offer, and Government actually acquired property.

In the matter of relocation assistance, December 29, 1975:

This decision is in response to the request by the Architect of the Capitol for our decision as to whether a tenant who vacated certain premises after the Government made a firm written offer to purchase the property but before the contract of sale was executed is eligible for relocation benefits under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Relocation Act), Public Law 91–646, January 2, 1971, 84 Stat. 1894, 42 U.S. Code § 4601 (1970).

The payment request was received from a tenant, Helen C. Hampson, who vacated premises which were the object of acquisition by the Architect of the Capitol. Congress, by Act of October 31, 1972, Public Law 92–607, 86 Stat. 1498, 1510, the Supplemental Appropriation Act, 1973, appropriated funds to enable the Architect of the Capitol to obtain by purchase, condemnation, transfer or otherwise real property located in certain lots contained in Square 724 in the District of Columbia, including lot 838 containing the premises occupied by the claimant tenant. On March 6, 1974, the Architect of the Capitol made a written purchase offer to the owner of the premises. Ms. Hampson vacated the premises on August 15, 1974. Thereafter, a contract with the owner of the property was entered into on September 6, 1974, and title to the property was vested in the United States by a general warranty deed executed on November 6, 1974. On March 31, 1975, the Architect

of the Capitol issued a formal notice to the tenants to vacate the premises.

The tenant states that although she vacated her apartment prior to either actual acquisition of the property by the Government or an order to vacate from the Government, she moved solely because of her knowledge of the Government's impending acquisition of the property. She knew negotiations to acquire this property, pursuant to the Supplemental Appropriations Act, 1973, were underway and that a firm offer to purchase had been made to the property's owner.

The benefits of the Relocation Act extend only to a "displaced person," a term defined in pertinent part by the act to include:

> * * * any person who * * * moves from real property * * * as a result of the acquisition of such real property * * * or as the result of the written order of the acquiring agency to vacate real property for a program or project undertaken by a Federal agency * * *. Relocation Act § 101(6), 42 U.S.C. 4601(6).

Inasmuch as the tenant in this case vacated the premises prior to the acquisition or to the issuance of a formal notice to the tenants from the Architect of the Capitol, in order for us to find that the present claimant is entitled to the benefits of the Act, we must determine that she moved as a result of the acquisition of the property.

In a recent decision of this Office, 54 Comp. Gen. 819 (1975), we stated that Relocation Act benefits are not available to persons who vacate property in the "mere anticipation or expectation that there may be an acquisition by the United States." This decision concerned tenants who had vacated leased premises after General Services Administration had made a solicitation for offers from all property owners in the general geographic vicinity. We held that these tenants were not eligible for Relocation Act benefits since the vacating of the premises by the tenant could be characterized as having been made in mere "expectation of acquisition." The decision emphasized the fact that by making a public solicitation for offers, "GSA had not legally committed itself" to acquiring the premises occupied by the claimants. The lack of a "commitment" to acquire by the Government indicated that the movement of the tenants was not a result of the acquisition but merely in expectation of the possibility of such an acquisition.

In the present case, the United States had taken two actions prior to the time that the claimant vacated: (1) Congress had authorized the Architect of the Capitol to condemn or purchase the specific property in question, and (2) the Architect of the Capitol had made a written purchase offer to the owner of the premises.

The authorization and appropriation of funds to condemn or purchase this property is not, in itself, such a "commitment" by the United States to acquire the land as to entitle tenants vacating thereafter to

the benefits of the Relocation Act on the basis that they moved "as a result of the acquisition" of the property. The legislation could have been repealed or modified or the actual acquisition might not have taken place for many years. *Cf. Danforth* v. *United States*, 308 U.S. 271, 286 (1939).

However, the additional action of the making of a firm offer can constitute such a commitment by the United States so as to characterize Ms. Hampson and other tenants vacating thereafter as "displaced persons" who moved "as a result of the acquisition" of their property. While it is true that such an offer may be revoked, it creates a legal obligation on the part of the United States to comply with the contract which will be formed if and when the owner-offeree accepts the offer. Thus, some of the Relocation Act's major benefits, as provided by sections 203 and 204 thereof (42 U.S.C. 4623, 4624), are available only to those occupying the premises for specified periods prior to the "initiation of negotiations," a phrase widely interpreted by various Government agencies to be the first time a firm offer to acquire is made.

Of course, in order for a claimant to be entitled to the Relocation Act benefits, the acquisition must be completed by purchase or condemnation. A claimant who moves before the acquisition is completed will not be entitled to benefits unless the acquisition is, in fact, completed. Only then can the claimant be said to have "moved as a result of the acquisition" of the property.

In summary, where the United States makes an authorized offer to acquire property, tenants of that property who move after the date of the offer may be said to have moved "as a result of the acquisition of such real property" if the acquisition is subsequently completed. Accordingly, if otherwise eligible, Ms. Hampson may be considered a "displaced person" entitled to the applicable benefits of the Relocation Act.

[B-184439]

Bidders—Qualifications—State, etc., Licensing Requirements

Invitation for bids provision that successful bidder meet all requirements of Federal, State or City codes does not justify rejection of bid for failure to have city license to operate ambulance service since need for license under such general requirement is matter between local governmental unit and contractor. However, where bidder conditions bid upon possession of license, such qualification renders bid nonresponsive.

Agents—Government—Government Liability for Negligent or Erroneous Acts

Fact that bidder alleges it was told by procuring agency personnel to include cover letter with bid which conditioned bid upon possession of local license,

resulting in rejection of bid, does not alter nonresponsiveness of bid as Government is not responsible for negligence of employee absent specific statutory provision.

In the matter of National Ambulance Company, Inc., December 29, 1975:

On June 6, 1975, the Veterans Administration Hospital, Vancouver, Washington (VA), issued invitation for bids (IFB) No. 683–1–76 for ambulance services.

The IFB required that the "successful bidder shall meet all requirements of Federal, State or City codes regarding operations of this type of service." Bids were opened on June 18, 1975, and the low bid was submitted by National Ambulance Co., Inc. (National). National submitted with its bid a cover letter which stated:

> This bid is contingent upon receiving approval from the proper authorities to pick up Veteran's Administration authorized patients within the Vancouver City Limits.

At the time National submitted its bid, it did not possess a city license to operate an ambulance in the city limits. On June 23, 1975, National applied for a license from the city council but the application was denied.

Accordingly, on June 30, 1975, award was made to American Ambulance Company, Inc. (American), as the low responsive, responsible bidder.

National has protested the rejection of its bid to our Office contending that possession of the Vancouver city license was unnecessary to show its qualifications as a responsible bidder.

Our Office has considered numerous cases in the past involving license requirements under VA ambulance service solicitations. The general rule enunciated in these cases is that where the IFB requires a bidder to possess a specific license, the failure of the bidder to have such a license at the time of award is a bar to an affirmative finding of responsibility by the contracting officer. However, where the IFB employs only general language, as here, the failure of a bidder to possess a certain permit or license is not a bar to an award to that bidder. This is so because whether a bidder needs a license or permit to perform a Federal contract is a matter between the bidder and the local governmental unit and not for resolution by the contracting officer. 51 Comp. Gen. 377 (1971) and 53 *id.* 51 (1973). Therefore, based on the foregoing precedents, the failure of National to have the Vancouver city license would not have been sufficient, standing alone, to require rejection of its bid.

However, the act of attaching to its bid the aforementioned cover letter making its bid contingent upon receiving the city license had

the effect of qualifying National's bid and thereby rendered the bid nonresponsive. By qualifying its bid on the basis that it would accept the award only if it obtained the license, National obtained the ability to accept or reject an award after bid opening, depending upon which action would be to its advantage. A bid must be rejected where the bidder imposes conditions which would modify requirements of the IFB or limit rights of the Government so as to give such bidder an advantage over other bidders. *S. Livingston & Son, Inc.*, B–183820, September 24, 1975, 75–2 CPD 179.

National argues that it was advised to furnish the cover letter by a VA employee and that such action on the part of the Government was misleading, resulting in the rejection of its bid.

It is well settled that in the absence of a specific statutory provision, the Government is not responsible for the malfeasance, misfeasance, negligence or omissions of duty of its agents or employees. *Durable Metal Products Company*, B–182864, November 21, 1975.

For the foregoing reasons, we find the rejection of National's bid to have been proper and the protest is denied.

[B–184308]

Bids—Nonresponsive to Invitation—Information After Bid Opening Unauthorized

Low bidder, after bid opening, cannot "cure" its failure to acknowledge receipt of an invitation for bids (IFB) amendment because to do so would be tantamount to permitting the submission of a second bid. Bidder's alleged non-receipt of amendment does not appear to have been the result of a deliberate effort to exclude bidder from competition.

Contracts—Specifications—Failure To Furnish Something Required—Addenda Acknowledgment—Waiver—Refused

Bidder's contention that amendment to IFB only repeated obligation required under original IFB's "Site Visit" clause, and therefore, its failure to formally acknowledge receipt thereof should be waived as a minor informality is without merit for while clause required bidders to inspect site so as to acquaint themselves with general and local conditions affecting cost of performance, clause did not impose legally enforceable obligation under IFB for bidder to provide bus transportation for employees as required by amendment and thus did not give Government same rights against bidder as it would possess under amendment.

Contracts—Specifications—Failure To Furnish Something Required—Addenda Acknowledgment—"Trivial" and "Negligible" Effect of Amendment

Where only estimate as to value of invitation amendment is bidder's unsupported, self-serving statement, rejection of its bid for failure to acknowledge such amend-

ment was proper, for in determining whether amendment has only "trivial" or "negligible" effect on bid price to permit waiver, it would be inappropriate to permit bidder seeking waiver to determine value as it would give him option to become eligible for award by citing costs that would bring him within *de minimis* rule or to avoid award by placing larger cost value on effects of amendment.

In the matter of Ira Gelber Food Services, Inc., December 30, 1975:

Ira Gelber Food Services, Incorporated (Ira Gelber), protests the rejection of its bid and the subsequent award of a contract to another bidder under invitation for bids (IFB) No. N00612–75–B–0069, issued by the Naval Supply Center, Charleston, South Carolina. The invitation solicited bids for the furnishing of mess attendant services at the Naval Air Station, Key West, Florida. Amendment 0001 to the IFB added the following "Employee Transportation (NAS Boca Chica only) (Item 0002)" clause to Section F.2 of the invitation:

> Since NAS (Boca Chica) is considered in inconvenient, inaccessible and outlying area to the labor market, *the Contractor shall furnish transportation for his employees to NAS (Boca Chica), on a no-cost-to-the-empoyee basis. Such cost shall in no way be transferred to the employee or affect his take-home pay in any manner. The Contractor shall provide for transportation to pick-up each employee at a specified point not more than two city blocks from the employee's place of residence and return the employee to the same place upon completion of his work shift.* The transportation provided must be for the sole purpose of transporting employees to Building 515 at NAS (Boca Chica) and return. Since satisfactory public transit service is not available, the Contractor shall not attempt to require the employee to obtain public transportation on a reimburseable basis. The Contractor may arrange to reimburse an employee who drives his own car and transports fellow employees to the NAS (Boca Chica) galley or provide other suitable transportation in kind at his discretion. Suitable transportation is defined as pick-up within two blocks of place of residence not more than one hour before working hours and transport to and from NAS (Boca Chica) with return to pick-up point not more than one hour after end of working hours in a closed passenger carrying vehicle such as a bus or automobile. [Italic supplied.]

The bids of Ira Gelber (the low bidder) and of T & S Service Associates (the next low bidder) were rejected as nonresponsive for failure to acknowledge receipt of the above amendment. Ira Gelber protests the rejection of its bid contending that it did not receive the amendment, and, therefore, it did not have the opportunity to acknowledge it. Moreover, the protester emphasizes that even had it received the amendment, the failure to acknowledge receipt thereof did not constitute a basis to reject its bid because the original IFB, specifically its "Site Visit" clause, required the furnishing of transportation for employees and therefore the amendment only repeated an obligation required under the original solicitation. Alternatively, Gelber contends that the amendment was trivial or negligible in nature and therefore the failure to acknowledge it could have been waived under the provisions of Armed Services Procurement Regulation (ASPR) § 2–405(iv)(B) (1974 ed.).

Addressing first the failure of Ira Gelber to receive the amendment, generally, if a bidder does not receive and acknowledge a material amendment to an IFB and such failure is not the result of a conscious and deliberate effort to exclude the bidder from participating in the competition, the bid must be rejected as nonresponsive. *Hyde & Norris/ t/a Traveler's Inn Motor Lodge*, B–180360, May 20, 1974, 74–1 CPD 272; 40 Comp. Gen. 126, 128 (1960). In his report upon the protest, the contracting officer states that the amendment was mailed on the date of issuance to all firms that had received copies of the invitation. There were 17 bids received in response to the IFB and 13 bidders acknowledged receipt of the amendment. Therefore, we have no reason to believe that the failure of Ira Gelber or any other bidders to receive the amendment was the result of a deliberate attempt on the part of the Navy to exclude them from competition. *Torotron Corporation*, B–182418, January 30, 1975, 75–1 CPD 69.

The protester has further alleged that the T & S representative present at bid opening has stated that contrary to usual practice, nothing was said about any amendment or anyone's failure to acknowledge it. We think it is clear that even if the bid opening officer had mentioned the amendment at bid opening and had informed those bidders present of their failure to acknowledge receipt thereof, the results of the bid evaluation would not have been altered since neither Ira Gelber nor any other bidder would have been permitted a post-bid opening opportunity to acknowledge the amendment. Even though Ira Gelber may have intended to be bound by all the terms and conditions of the solicitation, the determining factor is not whether the bidder intends to be bound, but whether this intention is apparent from the bid as submitted. It has been the consistent position of this Office that the responsiveness of a bid must be determined from the face of the bid itself, for to allow a bidder to alter or clarify his bid in order to make it responsive would be tantamount to permitting the submission of a second bid. *Sheffield Building Co., Inc.*, B–181242, August 19, 1974, 74–2 CPD 108. To permit a post bid-opening acknowledgement would be precisely the "two bites at the apple" situation that the bid responsiveness rules are intended to preclude. *Veterans Administration re Welch Construction Inc.*, B–183173, March 11, 1975, 75–1 CPD 146.

Ira Gelber next asserts that there was no need for it to acknowledge the amendment since it had bid on the basis of the original invitation's "Site Visit" clause, which the protester contends required the furnish-

ing of a bus to transport its employees to and from the work site. The "Site Visit" clause reads in pertinent part as follows:

> Bidders are urged and expected to inspect the site where services are to be performed and to satisfy themselves as to all general and local conditions that may affect the cost of performance of the contract, to the extent such information is reasonably obtainable. * * *

In this regard, Ira Gelber states that as a former contractor fully acquainted with the local conditions at the Key West site it knew that local public transportation was almost nonexistent and that personnel would not work at NAS Boca Chica without being furnished transportation. Therefore, Ira Gelber contemplated the use of a bus in performance of the work the cost of which was fully included in its bid and accordingly, its bid as submitted, obligated the firm to comply with the requirements of the amendment without a formal acknowledgement thereof.

In support of its position, the protester cites our ruling in *Genest Baking, Inc.*, B–180999, July 12, 1974, 74–2 CPD 25, which held that where an amendment to an IFB does not impose on the bidder any additional obligations from those required under the original solicitation, the failure to acknowledge such an amendment may be waived. We have reviewed the case and we do not agree with Ira Gelber's analogy of that case to the facts and circumstances of the instant protest. In *Genest*, *supra*, the amendment was issued to apprise bidders of the inadvertent omission of the unit of issue (pounds) for four of the items being procured and to instruct them that these items must also be offered on a pound basis as were all the other items. In effect, the amendment merely reiterated the original IFB instructions regarding the unit of issue on which bid prices were to be based. However, in the instant case, we believe the amendment in question imposed an additional obligation on the bidder, not legally enforceable under the original solicitation; namely, that the contractor supply bus transportation for its employees at no cost to them.

While the IFB's "Site Visit" clause required that bidders inspect the site and acquaint themselves with the general and local conditions that could affect their cost of performance, nowhere does the clause either directly or indirectly obligate a potential contractor to furnish bus transportation for its employees. Admittedly, the lack of public transportation may well in fact be a local condition that could adversely affect the cost of performance and may well have been taken into consideration in formulating a bid price, but, the clause itself does not specifically impose any legally enforceable obligation under the original solicitation for a bidder to furnish bus transportation.

Although Ira Gelber may have intended to comply with the terms of amendment 0001, and formulated its bid price accordingly, such an intention was not apparent from the face of its bid. The IFB's "Site Visit" clause did not give the Government the same enforceable rights against the bidder as it would possess under the amendment. Any resultant contract with Ira Gelber would not bind it to assume the costs agreed to by those bidders acknowledging the amendment and acceptance of its bid would therefore be prejudicial to them. Accordingly, since we do not believe, as the protester contends, that the amendment only repeated an obligation already required under the IFB's "Site Visit" clause, Ira Gelber's failure to acknowledge the receipt thereof was fatal to the responsiveness of its bid.

Alternatively, Ira Gelber takes the position that the amendment had a "trivial" or "negligible" effect on the total price of the contract. The protester therefore contends that its failure to acknowledge the amendment did not affect price, quality or quantity, or delivery, or the relative standing of the bidders, and that such a deviation constituted a minor informality which could be waived in accordance with ASPR § 2–405(iv)(B) (1974 ed.). In this regard, the general rule as to the effect of a bidder's failure to acknowledge an amendment to an invitation for bids is that when the amendment affects, in other than a "trivial or negligible" manner, the price, quantity, or quality of the procurement, the bidder's failure to acknowledge the amendment in compliance with the terms of the invitation or amendment cannot be waived. *See* ASPR § 2–405 (1974 ed.). The basis for this rule is the principle that the acceptance of a bid which disregards a material provision of an invitation, as amended, would be prejudicial to other bidders. Clarification of the bid after opening may not be permitted because the bidder in such circumstances would have the option to decide to become eligible by furnishing extraneous evidence that the amendment had been considered, or to avoid award by remaining silent. 41 Comp. Gen. 550 (1962).

In support of its position, Ira Gelber states that its bid included an allowance of $170 per month ($2,040 per year) for all travel, including the cost of a bus, and therefore the value of the amendment when compared with the difference between Ira Gelber's bid and that of the successful contractor was "trival or negligible" and did not alter their respective standing for award. In further support of its position, Gelber refers to our previous decisions, *Algernon Blair, Inc.*, B–182626, February 4, 1975, 75–1 CPD 76, and *Flippo Construction Co., Inc.*, B–182730, March 7, 1975, 75–1 CPD 139, which cite 52 Comp. Gen. 544 (1973), wherein we stated that the failure to acknowledge receipt of an

amendment may be waived in circumstances where the monetary change effected by the amendment is trivial or negligible in relation to the scope of the overall work and the difference between the two low bid prices. In 52 Comp. Gen. 544, *supra*, we agreed with the procuring activity that the failure to acknowledge reciept of an amendment could be waived as a minor informality since the value of the amendment was *estimated by the Government* as $966 or 0.138 percent of the overall $702,000 bid for the work (as compared with the protester's estimated value of the amendment in the present case of $2,040 per year or .635 percent of the overall $304,900 bid for the work), and 5.682 percent of the $117,000 difference between the two lowest bids (as compared with the protester's estimate of 7.432 percent of the $27,446.40 difference between its bid and that of the contractor).

However, all the above cited cases are clearly distinguishable from the present case since in each of those referenced decisions there was a Government estimate of the value of the amendment in question providing a basis from which our Office could apply the rule (standard) enunciated in 52 Comp. Gen. 544, *supra*, so as to determine whether the change affected by the amendment was trivial or negligible. Here, the contracting officer reports that the activity was unable to estimate the value of the amendment in view of the number of variables present. In the present case, the only estimate as to the value of the amendment are the protester's unsupported self-serving statements. In this regard, we believe that in determining whether the value of an invitation amendment is such as to allow waiver of the failure to acknowledge receipt thereof, it would be inappropriate to accept the value placed upon it by the bidder seeking the waiver. 53 Comp. Gen. 64, 66 (1973). To allow that would be to revert to the situation wherein a bidder after publication of bid prices could have the option to decide to become eligible for award by citing costs which would bring him within the *de minimis* doctrine, or to avoid award by placing a larger cost value on the effects of the amendment.

Since there is no Government estimate of the value of the amendment, we have no basis to conclude that the award was improper, and since the award was made 6 months ago, we do not believe any useful purpose would be served in now obtaining an independent estimate of the cost of complying with the amendment. However, we are requesting of the Secretary of the Navy that in future procurements where the application of the *de minimis* rule is in question, our Office be furnished the procuring activity's best estimate of the value of the unacknowledged amendment. While we recognize that the formulation of an estimate may in certain instances be extremely difficult, it is

nevertheless imperative that we have the benefit of such information in order to determine whether the aforementioned rule is to be applied so as to permit or deny waiver of the bidder's failure to acknowledge an amendment.

Accordingly, the protest is denied.

[B-184904]

Bids—Evaluation—Delivery Provisions—After Date of Contract *v.* After Receipt of Contract

Where invitation for bids required delivery within 280 days "after date of award," telegraphic bid offering delivery "280 days after receipt of award" was properly rejected as nonresponsive, where solicitation contained provision for evaluation of bids offering delivery based upon date of receipt of contract or notice of award (rather than contract date) by adding the maximum number of days normally required for delivery of the award through the mails. Thus evaluated, protester's bid exceeded the required delivery schedule.

In the matter of the Imperial Eastman Corporation, December 30, 1975:

Imperial Eastman Corporation (Imperial) has protested the rejection of its low telegraphic bid as nonresponsive, and the subsequent award of a contract to Container Service, Inc. (CSI), the second low bidder, under invitation for bids No. DSA700-75-B-2685, issued by the Defense Supply Agency, Defense Construction Supply Center (DCSC), Columbus, Ohio.

The subject IFB, which called for the supply of tube-pipe fitting kits, required delivery within 280 days "after date of award." Upon the opening of bids on July 30, 1975, it was discovered that Imperial's low telegraphic bid stated, in part, delivery terms of "280 days after *receipt* of award." [Italic supplied.] However, a signed bid form, which was received as a confirming bid after the time set for bid opening, took no exception to the IFB's delivery requirements. The agency advised Imperial that the confirming bid could not be considered in determining the responsiveness of the timely telegraphic bid due to its untimely receipt. The timely telegraphic bid was rejected as nonresponsive pursuant to Armed Services Procurement Regulation (ASPR) § 2-404.2(c) (1974 ed.) which requires rejection of any bid which fails to conform to the delivery schedule.

Counsel for Imperial has contended that the bid was improperly rejected and that the contracting officer failed to follow the procurement regulations applicable to an apparent minor informality, irregularity, or mistake in bid.

Counsel maintains that notwithstanding the use of the terminology "after receipt of award," it was unmistakably clear from the telegraphic bid that no exceptions were being taken to the terms of the IFB. Reference is made to the telegraphic bid's opening sentence which began:

> Subject to all terms, conditions, and provisions of Solicitation No. DSA700-75-B-2685 * * *

and the subsequent statement in the telegram:

> * * * delivery as required by the solicitation, with the shipping point being Chicago, Illinois.

Counsel therefore urges that the responsiveness of the bid is clear from a reading of its entirety, citing 51 Comp. Gen. 831, 833 (1972); 49 *id.* 517, 520 (1970); and 48 *id.* 593, 601 (1969).

Counsel further argues that weight must be given to the late confirming bid documents in which no exceptions were taken to the delivery provision specifying 280 days after "date of award." It is urged that this should constitute strong evidence as to the content of Imperial's telegraphic bid since the confirming document was sent by certified mail, return receipt requested, on the same date as transmission of the telegraphic bid, so that Imperial had no opportunity to modify that document after the bid opening date.

Counsel's final contention is that the semantical terms "date of award" and "receipt of award" must be considered synonymous in the Government contracting milieu, where in "receipt" is to be arguably construed to connote that the contractor becomes a recipient of a contract upon its execution, as distinguished from physical receipt of the contract or physical receipt of notice of the fact that the contract has been awarded.

The subject IFB has addressed the matter with considerable specificity. At page 7, with regard to the time of delivery, the IFB expressly made applicable, with the deletion of subparagraph c, the provisions of paragraph H07 of the DSCS Master Solicitation, and stated:

> *IMPORTANT:* Bidders not meeting Government's *REQUIRED* delivery schedule set forth above WILL BE CONSIDERED NONRESPONSIVE. Attention is directed to Para (b) Prov. H07 set forth in DCSC Master Solicitation. [Italic in original.]

Paragraph H07, which expressly controls situations such as herein presented, states:

> H07—TIME OF DELIVERY (IFB's) (1974 APR—DCSC:
>
> a. Delivery is *Required* to be made in accordance with the schedule set forth below. *Bids failing to meet the required delivery schedule will be rejected as nonresponsive.*

CLIN(S) QUANTITY TIME

(Days after date of award)

(*Government will insert information in Solicitation*)

b. Attention is directed to paragraph 10d of the Solicitation Instructions and Conditions (SF 33A) which provides that a written award mailed or otherwise furnished to the successful bidder results in a binding contract. Any award hereunder, or a preliminary notice thereof, will be mailed or otherwise furnished to the bidder the day the award is dated. Therefore, in computing the time available for performance, the bidder should take into consideration the time required for the notice of award to arrive through the ordinary mails. However, *a bid offering delivery based on date of receipt by the Contractor of the contract or notice of award (rather than the contract date) will be evaluated by adding the maximum number of days normally required for delivery of the award through the ordinary mails. If, as so computed, the delivery date offered is later than the delivery date required in the invitation, the bid will be considered nonresponsive and rejected.* [Italic in original.]

This Office has previously considered contract clauses virtually identical to the foregoing, and has rejected the argument that "date of contract" [or award] and "receipt of contract" [or award] are synonymous. To the contrary, we have regarded them as separate and distinct dates, holding that the latter is to be construed as the date upon which the award, or notice thereof, is actually received by the successful bidder, and that date is therefore to be determined by the distance between the parties involved and the manner by which either the contract documents or notice of award are transmitted from the Government to the successful bidder. *See* B–158670, April 14, 1966; B–162138, August 18, 1967; and citations therein. Accordingly, where the maximum number of days required for delivery of the award through the ordinary mails is added to such a proposed delivery schedule, and a delivery schedule so computed exceeds the number of days from date of award as set forth in the solicitation, the bid must be rejected as nonresponsive. B–162138, August 18, 1967. In view of Imperial's location in a State external to that of the procuring activity, it is obvious that the maximum number of days required for receipt of the contract for normal delivery through the ordinary mails would be at least one, and we therefore consider Imperial's bid to have been properly rejected under the provisions of the cited clause.

Although the telegraphic bid contained blanket statements indicating that the protester intended to conform to all of the terms and provisions of the subject IFB, the choice of the words "after receipt of award" was most unfortunate since such phraseology, under the provisions of H07 as interpreted by our Office, required the addition to Imperial's offered delivery schedule of the maximum number of days required for interstate transmission of contract award, thereby rendering the bid nonresponsive.

Moreover, and notwithstanding Imperial's stated intent to comply with all terms and provisions of the IFB, the inexplicable deviation from the specific delivery terms of the IFB, construing the matter most favorably to Imperial, may be considered as creating a material ambiguity as to whether or not delivery would be made within 280 days from date of award. In this regard, we have held that where either of two possible meanings can be reached from the terms of a bid, the bidder should not be allowed to explain his meaning when he is in a position thereby to prejudice other bidders or to affect the responsiveness of his bid. *See* B–154821, September 15, 1964, and citation therein.

In so considering this type of provision, and such deviations therefrom, we have concluded that the latter are not informalities or minor irregularities which may be waived since they go to the substance of the bid by affecting delivery. B–154821, September 15, 1964. Nor may they be eligible for correction under the rules governing mistakes in bids since errors in bids which may be corrected after opening are those which do not affect the responsiveness of a bid. 38 Comp. Gen. 876, 878 (1959).

In 48 Comp. Gen. 593, 601 (1969), cited by counsel for the proposition that bid responsiveness must be determined by a reading in the entirety within the "four-corners" of the bid documents, we noted that a determination of responsiveness on the basis of independent knowledge outside of the bid itself would not create a valid and binding contract. *id.* 601. In view thereof, we must reject the argument that the responsiveness of the timely telegraphic bid may be determined by the content of Imperial's late confirming bid. Inasmuch as the contracting agency had only the telegraphic bid available from Imperial upon which an award could legally be made, its responsiveness must be determined from the content thereof.

Having reviewed the cases cited by Imperial's counsel in support of his contention of bid responsiveness, we find that none involve either the type of deviation or the delivery clause with which we are herein confronted. Therefore, the matter must be governed by the precedents of this Office, set forth above, which specifically address, and therefore control, the instant circumstances.

Accordingly, the protest must be denied.

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FPR, unlike ASPR, imposes no duty on contracting officer to record amount of funds available prior to bid opening for base bids and alternates when amount of funding is in doubt. Therefore, determination of actual available funding, and the consequential determination whether alternates, if any, will be applied, may properly be made after bid opening in case of civilian agency. However, adoption of uniform Govt-wide policy is recommended 443

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Advertised procurement is open and public to protect interests of both Govt. and bidders. Agency's position that no regulation obliged it to notify apparently successful bidder of fact that undisclosed late bid was being considered for award is not persuasive justification for declining to provide information where apparently successful bidder makes several preaward inquiries attempting to ascertain procurement status. Record does not show whether there was actual failure to furnish advice, or merely poor communication. But procurement officials should be sensititive to position of bidder and make reasonable efforts to respond to inquiries---------- 494

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FPR, unlike ASPR, imposes no duty on contracting officer to record amount of funds available prior to bid opening for base bids and alternates when amount of funding is in doubt. Therefore, determination of actual available funding, and the consequential determination whether alternates, if any, will be applied, may properly be made after bid opening in case of civilian agency. However, adoption of uniform Govt-wide policy is recommended---------- 443

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Where solicitation provided for insertion of bid price for entire work (basic bid) and insertion of bid prices for deductive items (alternates), and stated that evaluation of bids would be made on bases of basic bid and all alternates, it was proper to evaluate basic bid without deductive items since award was made for entire work. However, agency is advised to clarify its evaluation provision for future use---------- 443

BIDS—Continued Page

Bidders' qualifications (*See* **BIDDERS, Qualifications**)

Bond (*See* **BONDS, Bid**)

Brand name or equal (*See* **CONTRACTS, Specifications, Restrictive, Particular make**)

Collusive bidding

Referral to Justice Department

Questions of alleged collusive pattern of bidding by small business firms should be referred to Attorney General by procuring agency for resolution pursuant to ASPR 1–111.2, since interpretation and enforcement of criminal laws are functions of Attorney General and Federal courts, not GAO 372

Competive system

Federal aid, grants, etc.

Basic principles

Basic principles of Federal norm of competitive bidding are intended to produce rational decisions by those who purchase for Federal Govt.; to extent, therefore, that grantee's procurement decision (and concurrence in decision by grantor agency) is not rationally founded, it may be in conflict with fundamental Federal norm. Procurement under "rational basis" test does not require detailed knowledge of GAO decisions.. 390

Negotiated contracts. (*See* **CONTRACTS, Negotiation, Competition**)

Preservation of system's integrity

Invitation canceled and resolicited

While fact that specifications are inadequate, ambiguous or otherwise deficient is not compelling reason to cancel invitation, absent showing of prejudice, where specification is restrictive of competition and record indicates that additional firms would bid on revised specifications included in a resolicitation, cancellation is proper course of action..... 464

Unfair practices allegation

Contention raising allegedly "questionable" pattern of bidding by certain small business firms is not for consideration, since ASPR 1–111.2, "*Noncompetitive Practices*," provides that such matters should be referred by procuring agency to Attorney General for prosecution..... 475

Delivery provisions

Evaluation (*See* **BIDS, Evaluation, Delivery provisions**)

Discarding all bids

Invitation defects

D.C.'s cancellation of invitation after bid opening was proper upon determination that specifications for one particular item being procured overstated user's actual needs and had detrimental effect of restricting competition..... 464

Reinstatement

General Accounting Office direction

Printed legend on descriptive data sheets submitted with bid that product specifications set forth in data sheets are subject to change without notice may be ignored in evaluating bid under brand name

BIDS—Continued Page

Reinstatement—Continued

General Accounting Office direction—Continued

or equal clause since bid, read as a whole, indicates bidder's intention to furnish from stock product conforming to specifications. Effect of legend by manufacturer of equipment is to reserve right to make changes as to its items produced in future 592

Discount provisions

Bid bond amount calculated on discount price

Since ASPR 2-407.3(b) provides that any prompt payment discount offered shall be deducted from bid price on assumption that discount will be taken and offered discount of successful bidder shall form part of award, where prompt payment discount is offered in bid where bid bond is required amount of bid bond may be properly calculated on discounted price 352

Evaluation

Aggregate *v.* separable items, prices, etc.

Base bid low

Where solicitation provided for insertion of bid price for entire work (basic bid) and insertion of bid prices for deductive items (alternates), and stated that evaluation of bids would be made on bases of basic bid and all alternates, it was proper to evaluate basic bid without deductive items since award was made for entire work. However, agency is advised to clarify its evaluation provision for future use 443

Total *v.* extension differences

While IFB clause, stating that aggregate total of lump-sum and unit price items, based on estimated quantities, shall be basis for comparison of bids, assumes that extended price for each item will equal product of unit price times estimated quantity, it does not indicate that where there is inconsistency one shall prevail over other 413

Conformability of equipment, etc. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered**)

Criteria

Federal aid, grants, etc.

Grantee's decision to give greater weight to long-range operating cost, rather than initial capital cost, in selecting successful bidder can be rationally supported so long as evaluation criteria for award makes clear basis upon which bids will be evaluated 390

Delivery provisions

After date of contract *v.* after receipt of contract

Where IFB required delivery within 280 days "after date of award," telegraphic bid offering delivery "280 days after receipt of award" was properly rejected as nonresponsive, where solicitation contained provision for evaluation of bids offering delivery based upon date of receipt of contract or notice of award (rather than contract date) by adding maximum number of days normally required for delivery of award through mails. Thus evaluated, protester's bid exceeded required delivery schedule 605

Guarantee

Letter of credit. (*See* **LETTER OF CREDIT, Bid guarantee**)

BIDS—Continued Page
Guarantees
Checks
Insufficient amount
Bid which contained $3,000 certified check, instead of 20-percent bid guaranty of $106,092 bid, was properly rejected, since failure to submit sufficient bid bond renders bid nonresponsive ---- 439
Invitation for bids
Cancellation
Erroneous
Cancellation of a subsequent IFB on basis that services were no longer required was erroneous where there was in fact a continuing need for the services which was being met through a noncompetitive, informal agreement with a contractor to a Federal agency—an arrangement unauthorized by statute. Recommendation is made that D.C. discontinue present method of procurement and that services be procured through formal advertising or an intergovernmental agreement authorized by statute ---- 464
Line item
Omission
Omission of one line item, which may have substantial cost impact in relation to other 53 items in IFB for acoustical ceiling work, does not constitute compelling reason to reject all bids and readvertise since other items are valid representation of Govt.'s needs and alternate methods exist to satisfy need of omitted item ---- 488
Mistakes
Correction
Contract awarded prior to correction
Low bidder claiming mistake in bid and seeking correction is not required as condition to proper award to apprise agency prior to decision on correction of willingness to accept award at original bid price in event correction is disallowed ---- 546
Denial
Low bidder's reservation of right to contest in appropriate forum contracting agency's denial of request for correction of bid did not render agency's award to bidder improper ---- 546
Discrepancy between words and figures
IFB provision stating, if discrepancy occurs between written and figure prices, price most favorable to municipality will be taken as bidder's intention applies where discrepancy exists between price stated in words and same price stated in figures and not where there is mistake between unit and extended price ---- 413
Unit price *v.* extension differences
Grants-in-aid procurement
While IFB clause, stating that aggregate total of lump-sum and unit price items, based on estimated quantities, shall be basis for comparison of bids, assumes that extended price for each item will equal product of unit price times estimated quantity, it does not indicate that where there is inconsistency one shall prevail over other ---- 413
Contract awarded under Iowa law pursuant to EPA grant to City of Davenport, Iowa, appears to be improper. City's construction of bid, which contained discrepancy between unit price and extended price for one item which resulted in displacement of another bid, was not proper because intended bid price for item was subject to more than

BIDS—Continued
Mistakes—Continued
Unit price *v.* extension differences—Continued
Grants-in-aid procurement—Continued Page

one reasonable interpretation. Valid and binding contract comes into being under Iowa law only if essence of contract awarded is contained within four corners of bid submitted ---- 413

Negotiated procurements (*See* **CONTRACTS, Negotiation**)

Nonresponsive to invitation
Bid guarantee
Deficiencies

Documentary letter of credit furnished as bid guarantee does not constitute "firm commitment" as required by solicitation and ASPR 7–2003.25, thereby rendering bid nonresponsive, since letter of credit was not accompanied by bidder's signed withdrawal application which would have to be presented to bank in order for letter of credit to be honored ---- 487

Information after bid opening unauthorized

Low bidder, after bid opening, cannot "cure" its failure to acknowledge receipt of IFB amendment because to do so would be tantamount to permitting submission of second bid. Bidder's alleged nonreceipt of amendment does not appear to have been result of deliberate effort to exclude bidder from competition ---- 499

Opening
Public
Late bids

Advertised procurement is open and public to protect interests of both Govt. and bidders. Agency's position that no regulation obliged it to notify apparently successful bidder of fact that undisclosed late bid was being considered for award is not persuasive justification for declining to provide information where apparently successful bidder makes several preaward inquiries attempting to ascertain procurement status. Record does not show whether there was actual failure to furnish advice, or merely poor communication. But procurement officials should be sensitive to position of bidder and make reasonable efforts to respond to inquiries ---- 494

Qualified
All or none
Evaluation (*See* **BIDS, Evaluation, Aggregate *v.* separable items, prices, etc.**)
Bid nonresponsive
Stamped "confidential"

Low bid to provide computer services which is stamped "CONFIDENTIAL" is nonresponsive since stamp restricted public disclosure of information concerning essential nature of services and product offered, as well as price, quantity and delivery terms and affords that bidder opportunity, after bid opening, of accepting or refusing award, which is contrary to requirements of competitive bid system ---- 445

Cover letter (*See* **BIDS, Qualified, Letter, etc.**)
Descriptive literature
Notations

Printed legend on descriptive data sheets submitted with bid that product specifications set forth in data sheets are subject to change without notice may be ignored in evaluating bid under brand name

BIDS—Continued
Qualified—Continued
Descriptive literature—Continued
Notations—Continued Page

or equal clause since bid, read as a whole, indicates bidder's intention to furnish from stock product conforming to specifications. Effect of legend by manufacturer of equipment is to reserve right to make changes as to its items produced in future ---- 592

Letter, etc.

Receipt of city license

Fact that bidder alleges it was told by procuring agency personnel to include cover letter with bid which conditioned bid upon possession of local license, resulting in rejection of bid, does not alter nonresponsiveness of bid as Govt. is not responsible for negligence of employee absent specific statutory provision ---- 597

Rejection

Discarding all bids (*See* **BIDS, Discarding all bids**)

Requests for proposals (*See* **CONTRACTS, Negotiation, Requests for proposals**)

Specifications (*See* **CONTRACTS, Specifications**)

Unbalanced

Not automatically precluded

Where agency receives mathematically unbalanced bids and determines that quantity estimates in IFB are valid representation of actual needs, award may be made to low bidder notwithstanding its bid is unbalanced ---- 488

BONDS

Bid

Amount of bond

Calculated on discounted price of bid

Since ASPR 2-407.3(b) provides that any prompt payment discount offered shall be deducted from bid price on assumption that discount will be taken and offered discount of successful bidder shall form part of award, where prompt payment discount is offered in bid where bid bond is required amount of bid bond may be properly calculated on discounted price ---- 352

Deficiencies

Amount

Bid which contained $3,000 certified check, instead of 20-percent bid guaranty of $106,092 bid, was properly rejected, since failure to submit sufficient bid bond renders bid nonresponsive ---- 439

Bid rejection

While ASPR 10-102.5(ii) gives discretionary authority to contracting officer to decide whether bid bond deficiencies should be waived, such discretion must have been intended for application within definite rules. Consequently, absent specific finding that waiver of requirement was not in best interest of Govt., which was not made in instant case, bid should not have been rejected since it fell into stated exception; protest is therefore sustained and ASPR Committee requested to revise provision to make exception mandatory ---- 352

Waiver

To permit unbridled discretion under ASPR 10-102.5(ii) in determining when bid bond deficiency may be waived would totally defeat purpose of exception and allow its employment as substitute for rejecting bids for unrelated reasons such as nonresponsibility determinations ---- 352

BONDS—Continued Page

Bid—Continued

Signatures

Corporate agent

Where bid bond, submitted with properly executed bid, is signed by corporate agent whose authority to sign bond on behalf of corporation is questioned, accompanying bid may be considered for award since surety's obligation to Govt. would not be affected by absence of authorized signature on bond ---- 422

Sufficiency

Evidence required to establish authority of particular person to bind corporation is for determination of contracting officer, and record provides no basis for concluding that contracting officer incorrectly determined that agent was authorized to sign bid bond ---- 422

CERTIFYING OFFICERS

Responsibility

Interagency services

GSA certifying officers who perform administrative functions relating to final processing of expenditure vouchers under interagency service and support agreement will not be regarded as certifying officers for purposes of 31 U.S.C. 82c liability to the extent that serviced Commission retains certification responsibility with respect to basic vouchers -- 388

CIVIL SERVICE COMMISSION

Adverse personnel actions

Appeals

Agency heads and authorized certifying officers have statutory rights to an advance decision from the Comptroller General on propriety of paying make-whole remedies ordered by appropriate authorities. Thus, Board of Appeals and Review, CSC, when ordering make-whole remedies should permit agencies opportunity to exercise their right to an advance decision from the Comptroller General prior to implementation of remedies. Amplified by 55 Comp. Gen. —— (B–184990, Feb. 20, 1976) -- 539

CLAIMS

Evidence

Administrative determination acceptability

Foreign country

Where, due to unusual circumstances, presentation of best evidence to support claim will be impossible, impracticable, or will place undue burden on agency or individual concerned, this Office in exercise of its discretion will accept such other pertinent data from which the necessary information may be reconstructed, and on this basis, authorize payment. 402

Evidence to support

General Accounting Office discretionary authority

31 U.S.C. 71, which provides that all claims by and against the Govt. shall be settled by the GAO, leaves to the discretion of this Office what evidence is required in support of such claims ---- 402

Transportation

Evidence requirement

Arrival of shipping documents in advance of actual unloading is irrelevant to issue whether U.S. is liable for vehicle detention charges for unloading performed in excess of 2 hours where motor carrier, with knowledge of fact that vehicles are scheduled for unloading at ocean terminal by Military Traffic Management Command, offers to perform transportation services which include use of its vehicles at no extra charge for 2 hours for unloading ---- 301

CLASSIFICATION Page
Reclassification
Effective date
Date of action by administrative officer
Employee's GS–12 position was reclassified administratively to GS–13, effective June 2, 1975, incident to employee's grievance related to co-workers' promotions which had become effective October 11, 1974. Reclassification of position with concomitant pay increase may not be made retroactive other than as provided in 5 CFR 511.703 515

COMPENSATION
Back pay (*See* COMPENSATION, Removals, suspensions, etc., Back pay)
Experts and consultants (*See* EXPERTS AND CONSULTANTS, Compensation)
Increases
Promotions (*See* COMPENSATION, Promotions)
Military pay (*See* PAY)
Overtime
Actual work requirement
Exception
Backpay arbitration award
Fed. Labor Relations Council questions propriety of sustaining arbitration award of 1 hour backpay to employee deprived of overtime work in violation of negotiated labor-management agreement. Agency violations of such agreements which directly result in loss of pay, allowances or differentials, are unjustified and unwarranted personnel actions as contemplated by Back Pay Act, 5 U.S.C. 5596. Therefore, where agency obligated itself in a labor-management agreement to provide 2 hours of productive work when employee is held on duty beyond his regular shift and, in violation of such agreement, provided him only 1 hour, arbitration award providing backpay to employee for the additional hour may be sustained 405
Defense Attache Office personnel in Saigon
Evacuation of South Vietnam
Overtime performed by Defense Attache Office (DAO) personnel in Saigon during the period of Mar. 30, 1975, through Apr. 30, 1975, immediately prior to the evacuation of American personnel from South Vietnam, was approved by the Defense Attache on June 6, 1975, after the normal procedures for approval and payment of overtime had been modified. The compensation for overtime is mandatory where the work actually performed is officially ordered or approved 402
The retroactive modification of a regulation requiring that overtime performed by DAO civilian personnel be specifically approved by DAO division chiefs or their designated representatives is permissible since the regulation modified was primarily designed to govern internal agency procedures rather than designed to benefit party by entitling him to either substantive benefit or procedural safeguard. Accordingly, if Major General Smith is authorized official to approve payment of overtime, his approval of June 6, 1975, is sufficient to allow payment of overtime as reported on time and attendance reports of DAO civilian personnel 402

COMPENSATION—Continued Page

Promotions

Failure to promote employee to reclassified position

Employee's GS–12 position was reclassified administratively to GS–13, effective June 2, 1975, incident to employee's grievance related to co-workers' promotions which had become effective October 11, 1974. Reclassification of position with concomitant pay increase may not be made retroactive other than as provided in 5 CFR 511.703 ..... 51 5

Retroactive

Rule

Exceptions to rule

While employees, who are determined to be entitled to retroactive temporary promotions on basis of mandatory requirement of regulations, must satisfy eligibility criteria for promotions, including 1 year service in grade required by "Whitten Amendment," 5 U.S.C. 3101 note, may waive service requirement in individual cases of a meritorious nature involving undue hardship or inequity. However, decision of Board of Appeals and Review, CSC, awarding retroactive temporary promotion to employees did not indicate whether waiver was granted and is, therefore, remanded for a determination of this issue. Amplified by 55 Comp. Gen. —— (B–184990, Feb. 20, 1976) 539

Interpretations of regulations by agency charged with their administration are entitled to be given great weight by reviewing authority. Board of Appeals and Review, CSC, has interpreted Commission's regulations to require temporary promotion of employees detailed to higher grade positions for over 120 days where prior Commission approval has not been sought. We have concurred in the Board's interpretation and therefore 52 Comp. Gen. 920 is overruled. Amplified by 55 Comp. Gen. —— (B–184990, Feb. 20, 1976) 539

Temporary

Detailed employees

Two Bureau of Mines employees were detailed to higher grade positions in excess of 120 days and no prior approval of extension beyond 120 days was sought from CSC. Employees are entitled to retroactive temporary promotions for period beyond 120 days until details were terminated because Board of Appeals and Review, CSC, has interpreted regulations to require temporary promotions in such circumstances. Amplified by 55 Comp. Gen.—— (B–184990, Feb. 20, 1976) 539

Rates

Limitations

Experts and consultants, etc.

Maximum pay rate for experts and consultants employed under Pub. L. 88–633, as amended, may not exceed $100 per day, despite AID's administrative determination to the contrary. Pub. L. 91–231 does not make the specific dollar limitation obsolete, and AID may not rely on 5 U.S.C. 3109 as authority to pay those employees at higher rates. Also, legislative histories of acts increasing the maximum amounts payable to experts and consultants of other agencies with similar dollar limitations indicate necessity of legislation to increase $100 ceiling 567

Removals, suspensions, etc.

Back pay

Arbitration award

Federal Labor Relations Council questions propriety of implementing arbitration award that sustains grievance of two Community Services

COMPENSATION—Continued
Removals, suspensions, etc—Continued
Back pay—Continued
Arbitration award—Continued Page

Admin. employees for retroactive promotions and backpay. Because record contains substantial evidence that grievants would probably have been demoted shortly after they should have been promoted—evidence which arbitrator apparently did not consider—award is indefinite. Matter should be remanded to arbitrator for additional proceedings with instructions that he hear evidence on whether demotions would have occurred and, if so, on what date 427

Unfair labor practices

Fed. Labor Relations Council questions propriety of sustaining arbitration award of 1 hour backpay to employee deprived of overtime work in violation of negotiated labor-management agreement. Agency violations of such agreements which directly result in loss of pay, allowances or differentials, are unjustified and unwarranted personnel actions as contemplated by Back Pay Act, 5 U.S.C. 5596. Therefore, where agency obligated itself in a labor-management agreement to provide 2 hours of productive work when employee is held on duty beyond his regular shift and, in violation of such agreement, provided him only 1 hour, arbitration award providing backpay to employee for the addi- additional hour may be sustained 405

Withholding
Debt liquidation
Alimony and child support

State of Washington sought to garnish pay of Air Force civilian employee to collect child support under authority of sec. 459 of P.L. 93-647 by means of administrative garnishment order served on Air Force Finance Officer. Air Force refused to effect garnishment on ground that administrative order was not "legal process" within meaning of statute. In light of purpose of statute and lack of any limiting language, we believe "legal process" is sufficiently broad to permit garnishment by administrative order under Washington procedure. GAO would not object to Air Force payments under State administrative order 517

CONGRESS
Committees
Travel expenses
Overseas
Select Committee on Aging

In absence of specific authorization in an appropriation act, 22 U.S.C.A. 1754(b) is the sole authority making counterpart funds (foreign currencies) available to members and employees of Congressional committees in connection with overseas travel. Under this provision, such funds are available only to specific committees, not including the House Select Committee on Aging, and to committees performing functions under 2 U.S.C.A. 190(d), which refers to *standing* Committees but not *select* committees. Accordingly, members and employees of the House Select Committee on Aging are not authorized to use counterpart funds 537

CONTRACTING OFFICERS Page

Determinations

Deficiencies in contract performance

Whether guard services contractor is, as protester claims, in default of contract is matter of contract administration, which is function of contracting agency, not GAO. In any event, contracting officer states that contractor beginning performance using personnel with Confidential security clearances adequately meets initial needs under contract; that necessary administrative processing to transfer Secret clearances from old to new contractor is being accomplished; and that in event Secret tests or equipment are utilized at site, contractor has capability to furnish Secret-cleared personnel 494

Nonresponsibility

Reasonable

Supported by grand jury findings

Where validity of contracting officer's nonresponsibility determination is challenged on basis it was erroneously predicated primarily upon criminal indictment which had been dismissed, such determination is nevertheless reasonable since findings of grand jury underlying indictment adequately support findings of lack of integrity, indictment was dismissed because of procedural deficiencies rather than for insufficiency of evidence, and dismissal has been appealed. Contracting officer's failure to contact prospective contractor regarding responsibility did not affect validity of determination 343

CONTRACTORS

Contract reformation

Court relief

Nothing requires contractor seeking contract reformation to exhaust remedy in GAO before bringing action in court for relief 546

Not subject to protest procedures

Contractor's request for equitable relief by way of contract reformation is not subject to bid protest procedures 546

Fees

Percentage of fixed-price subcontractor proposal

Contract payment procedure whereby prime contractor's fee is determined as percentage of fixed-price subcontractor proposal does not violate prohibition of 10 U.S.C. 2306(a) against cost-plus-a-percentage-of-cost contracting 554

Percentage of subcontractors invoice

Cost-plus-a-percentage-of-cost prohibition

Alternate contract payment procedure, whereby prime contractor's fee is percentage of subcontractor's invoice, and there is no requirement that subcontractor submit fixed-price proposal, violates prohibition of 10 U.S.C. 2306(a) against cost-plus-a-percentage-of-cost since (1) payment is based on predetermined percentage rate; (2) percentage rate is applied to actual performance costs; (3) contractor entitlement is uncertain at time of contracting; and (4) contractor entitlement increases commensurately with increased performance costs 554

Sliding matrix

Conflict between two contract provisions concerning who pays prime contractor's fee, subcontractor or Govt., is resolved in favor of Govt. payment since that interpretation upholds validity of contract in accord with presumption of legality. Contrary interpretation might lead to conclusion contract violated Anti-Kickback Act 554

CONTRACTORS—Continued Page
Fees—Continued
Sliding matrix—Continued
Cost-plus-a-percentage-of-cost prohibition
Use of sliding matrix for percentage fee determination that has some points at which fee falls as costs increase does not avoid cost-plus-a-percentage-of-cost prohibition since overall effect of payment procedure is that fee increases and incentive is to raise costs sufficiently to avoid profit depression 554
Joint ventures (*See* **JOINT VENTURES**)
Responsibility
Contracting officer's affirmative determination accepted
Exceptions
Security clearance requirement waived
Where it is alleged that definitive responsibility criterion—IFB security clearance requirement—was waived, contracting officer's affirmative determination of responsibility is for review on merits. Determination was supported by objective evidence before contracting officer, who had received information from bidder that adequate personnel working at nearby facilities could be used to perform contract, and that predecessor contractor's qualified personnel might also be hired. GAO has no objection to determination in view of facts of record and absence of evidence from protester demonstrating that determination lacked reasonable basis 494

CONTRACTS
Appropriations
Availability (*See* **APPROPRIATIONS, Availability, Contracts**)
Automatic Data Processing Systems (*See* **EQUIPMENT, Automatic Data Processing Systems**)
Awards
Discount considered
Since ASPR 2-407.3(b) provides that any prompt payment discount offered shall be deducted from bid price on assumption that discount will be taken and offered discount of successful bidder shall form part of award, where prompt payment discount is offered in bid where bid bond is required amount of bid bond may be properly calculated on discounted price 352
Federal aid, grants, etc.
By or for grantees
Review
GAO will consider requests for review of contracts awarded "by or for" grantees. Where record shows that grantee's engineering consultant drafted specifications, evaluated subcontractors' bids, recommended that grantee award subcontract to specific proposed subcontractor, and grantee instructed prime contractor to award questioned subcontract to company proposed by consultant, award is considered to be "for" grantee because grantee's participation had net effect of causing subcontractor's selection 390
Negotiated contracts (*See* **CONTRACTS, Negotiation, Awards**)
Procedures leading to award
General Accounting Office review
While termination of contract for convenience of Govt. is matter of administrative discretion not reviewable by GAO, review of procedures leading to award of contract is within GAO jurisdiction 502

CONTRACTS—Continued Page

Awards—Continued

Propriety

Grantees under Federal grants-in-aid

Review

GAO will undertake reviews concerning propriety of contract awards under Federal grants made by grantees in furtherance of grant purposes upon request of prospective contractors where Federal funds in a project are significant 390

Reversal of administrative determination

Low bidder's reservation of right to contest in appropriate forum contracting agency's denial of request for correction of bid did not render agency's award to bidder improper 546

Separable or aggregate

Lowest overall cost to Government

Combination by procuring activity of two items in one solicitation (formerly two solicitations had been utilized) is proper exercise of procurement discretion since preparation and establishment of specifications to reflect needs of Govt. are matters primarily within jursidiction of procurement agency and record substantiates fact that combination of items results in lower overall cost. Moreover, award can still be on item basis if doing so is in best interests of DC 366

Small business concerns

Adequate competition

Where four responsive bids were received from small businesses under totally set-aside IFB, and where low small business bid was less than 5 spercent above low, big business bid submitted, adequate competition har been achieved 372

Certifications

Effective date

Where firm purchases assets of concern previously found by SBA to be large business, suggestion is made that SBA consider adopting rule requiring such firm to request small business certificate prior to self-certifying status as small 469

Disadvantage test

Examination of "social disadvantage" determination made of owner of firm proposed for 8(a) award shows that SBA did consider factors regarding disadvantage other than racial identity of owner or owner's alleged inability to obtain bonding. Determination is considered rationally supported, given broad guidelines conveyed in SBA policy and regulation concerning what constitutes "disadvantage." 397

Erroneous award

***Ab initio v.* voidable**

Contract awarded on basis of offeror's good faith certification that it is small, which status is determined erroneous by SBA, is voidable and may be terminated for convenience in discretion of agency where, as here, it is determined contracting officer should have questioned size status prior to award 502

Fair proportion criteria

It is policy of Congress that fair proportion of purchases and contracts be placed with small business concerns if adequate prices and reasonable competition can be expected and determination of these facts is made by contracting officer and small business representative prior to issuance of solicitation 475

CONTRACTS—Continued Page
Awards—Continued
Small business concerns—Continued
Fair proportion to small business concerns
Administration of program
Since it is Dept. of Army's policy to enter into contracts with SBA to foster small business (including 8(a) growth), it is not considered improper for Dept. to have advised SBA of availability of proposed procurement of KP services for 8(a) program or fact that proposed 8(a) concern was currently providing similar services at one of facilities involved in proposed procurement 397
Price reasonableness
Mere fact that lower bid price is submitted by big business does not *per se* make award to small business, at slightly higher price, against public interest purusant to ASPR 1–706.3, since 15 U.S.C. 631 states policy of Congress to award fair proportion of Govt. procurements to small business firms, and therefore, Govt. may pay reasonable premium price to small business firms on restricted procurement to implement above-mentioned policy of Congress 372
While provisions of Small Business Act authorize award of contracts to small business concerns at prices which may be higher than those obtainable by unrestricted competition, no basis exists upon which it may be concluded that Act was intended to *require* award of contracts to small business concerns at prices considered unreasonable by contracting agency, or that contracting agency would be prohibited from withdrawing set-aside determination where bids submitted by small business concerns were considered unreasonable 475
Determination of unreasonableness of price of small business bid, based upon comparison with prior procurement and with Govt. estimates, involves no impropriety on part of contracting officer and, therefore, no legal basis exists to object to cancellation and resolicitation of procurement on unrestricted basis 475
Procurement under 8(a) program
Non-8(a), non-small business concern is considered interested party so long as it contends that concern proposed for 8(a) award does not belong in 8(a) category whose application prevents protester from competing; test of interested party for 8(a) protests clarifies prior discussion in *Kleen-Rite Janitorial Services, Inc.*, B–178752, March 21, 1974, 74–1 CPD 139; *City Moving and Storage Company, Inc.*, B–181167, August 16, 1974, 74–2 CPD 104; and *Kings Point Manufacturing Company, Inc.*, 54 Comp. Gen. 913, 75–1 CPD 264 397
Because other issues raised by non-small business, non-8(a) concern in protest against 8(a) award are indirectly related to basic eligibility determination of firm proposed for 8(a) award, it is considered that concern is interested party as to other issues 397
Excess costs
Because Dept. of Army states it is aware of requirement that SBA must fund any costs of 8(a) services in excess of what Dept. considers current fair market price for services, it appears that Dept. will charge SBA any excess costs involved in subject 8(a) procurement contrary to protester's suggestion that Dept. will not 397

CONTRACTS—Continued Page
Awards—Continued
Small business concerns—Continued
Qualifications (*See* BIDDERS, Qualifications, Small business concerns)
Self-certification
"Good faith" certification
Where record indicates that contractor was or should have been aware of its affiliation with large business firm, GAO agrees with protester's contention that firm awarded total small business set-aside contract failed to self-certify its small business status in good faith pursuant to ASPR 1–703(b), and award was therefore improper. However, since contract has been fully performed no remedial action is possible 469
Set-asides
Competition sufficiency
Where four responsive bids were received from small businesses under totally set-aside IFB, and where low small business bid was less than 5 percent above low, big business bid submitted, adequate competition has been achieved 372
Withdrawal
Bid price excessive
While provisions of Small Business Act authorize award of contracts to small business concerns at prices which may be higher than those obtainable by unrestricted competition, no basis exists upon which it may be concluded that Act was intended to *require* award of contracts to small business concerns at prices considered unreasonable by contracting agency, or that contracting agency would be prohibited from withdrawing set-aside determination where bids submitted by small business concerns were considered unreasonable 475
Determination of unreasonableness of price of small business bid, based upon comparison with prior procurement and with Govt. estimates, involves no impropriety on part of contracting officer and, therefore, no legal basis exists to object to cancellation and resolicitation of procurement on unrestricted basis 475
Size
Affiliates of large business concerns
Where firm purchases assets of concern previously found by SBA to be large business, suggestion is made that SBA consider adopting rule requiring such firm to request small business certificate prior to self-certifying status as small 469
Eligibility to protest size
Where small business size status protest was timely filed with contracting officer within 5 days after notification of successful offeror, but after award, SBA determination that protested offeror was not small at time of award does not result in contract awarded being void *ab initio*, but merely void at option of Govt., thereby precluding effective size protest. To remedy this anomaly, it is recommended that FPR be revised to require that identity of successful offeror be revealed prior to award 502
Obvious error
Contracting Officer's duty to question
Contract awarded on basis of offeror's good faith certification that it is small, which status is determined erroneous by SBA, is voidable and may be terminated for convenience in discretion of agency where, as here, it is determined contracting officer should have questioned size status prior to award 502

CONTRACTS—Continued Page
Awards—Continued
Small business concerns—Continued
Size—Continued
Status protest by unsuccessful bidder, etc.
Where small business size protest is received 1½ hours after award made on bid opening date, last day of fiscal year, termination of contract is recommended, since SBA subsequently sustained protest; contracting officer has indicated that procurement would have been referred to SBA under standard operating procedure if received before award; and contracting officer exceeded authority in that ASPR 1-703(b)(5) precludes small business set-aside award prior to expiration of 5 working days after bid opening in absence of urgency determination 439
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Combination by procuring activity of two items in one solicitation (formerly two solicitations had been utilized) is proper exercise of procurement discretion since preparation and establishment of specifications to reflect needs of Govt. are matters primarily within jurisdiction of procurement agency and record substantiates fact that combination of items results in lower overall cost. Moreover, award can still be on item basis if doing so is in best interests of DC 366
To other than lowest bidder
Small business set-asides
Mere fact that lower bid is submitted by large business on small business set-aside solicitation does not *per se* make award to small business, at slightly higher percentage differential, against public interest under ASPR 1-706.3 since 15 U.S.C. 631 has been interpreted to mean that Govt. may pay premium price to small business firms on restricted procurements to implement intent of Congress 475
Construction
Conflicting provisions
Conflict between two contract provisions concerning who pays prime contractor's fee, subcontractor or Govt., is resolved in favor of Govt. payment since that interpretation upholds validity of contract in accord with presumption of legality. Contrary interpretation might lead to conclusion contract violated Anti-Kickback Act 554
Default
Performance deficiencies
Determination
Function of contracting agency
Whether guard services contractor is, as protester claims, in default of contract is matter of contract administration, which is function of contracting agency, not GAO. In any event, contracting officer states that contractor beginning performance using personnel with Confidential security clearances adequately meets initial needs under contract; that necessary administrative processing to transfer Secret clearances from old to new contractor is being accomplished; and that in event Secret tests or equipment are utilized at site, contractor has capability to furnish Secret-cleared personnel 494

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Discounts

Interpretation of discount clause

Since ASPR 2-407.3(b) provides that any prompt payment discount offered shall be deducted from bid price on assumption that discount will be taken and offered discount of successful bidder shall form part of award, where prompt payment discount is offered in bid where bid bond is required amount of bid bond may be properly calculated on discounted price---- 352

Equal employment opportunity requirements (*See* **CONTRACTS, Labor stipulations, Nondiscrimination**)

Labor stipulations

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"Affirmative action programs"

Washington, D.C. plan

Allegation that DC's policy of affirmatively promoting minority-owned business is thwarted by award under instant IFB is unsubstantiated in record presented---- 366

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Nothing requires contractor seeking contract reformation to exhaust remedy in GAO before bringing action in court for relief---- 546

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Negotiation

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Advertising *v.* negotiation

Although procurement assigned priority designation 02 is sufficient authority for contracting officer to negotiate under public exigency exception rather than formally advertise, such authority does not give contracting officer authority to negotiate with only one source where other sources can meet agency's needs as applicable statute and regulations require solicitation of proposals, including price, from maximum number of qualified sources consistent with nature and requirements of supplies to be procured and time limitations involved---- 358

Anti-Kickback Act violations

Contract for computer time/timesharing services to prime contractor who has commercial arrangements with potential subcontractors to pay standard percentage of invoice fee for finding buyer of computer time and/or services does not violate Anti-Kickback Act (41 U.S.C. 51) because commercial arrangement does not apply and prime contractor receives fee according to sliding matrix from Govt. only---- 554

Awards

Contrary to public policy

No basis for allegation

While protester argues contract award by Navy should be regarded as void since it is not in accordance with public policy as expressed in congressional Conference Report, award is not contrary to statute, contract does not require any actions contrary to law, and does not represent a violation of moral or ethical standards. Therefore no basis exists to conclude that award is contrary to public policy---- 307

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Legality
Provision in appropriation act which prohibits use of funds for presenting certain reprogramming requests cannot operate to invalidate contract awards even if awards resulted from reprogramming action since violation of such provision cannot serve to invalidate an otherwise legal contract award ---- 307
Multiple
Since determinations of technical acceptability are within discretion of procuring agency, in absence of clear evidence that agency acted arbitrarily, and record in this case is devoid of any evidence which would justify our Office concluding that technical evaluations were without reasonable basis, there is no basis to take exception to awards-- 432
Number
Where under terms of RFP Govt. reserved right to make any number of awards, such reservation can only be regarded as also reserving to Govt. its right to make more than three awards even though it later indicated that its contemplation was to make maximum of three awards. While offerors were led to believe, because of confusing and misleading language in RFP, that three awards would be made, harm to competitive system generated by agency's action does not necessitate recommending that corrective action be taken ---- 529
Small business concerns
Erroneous award
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Where small business size status protest was timely filed with contracting officer within 5 days after notification of successful offeror, but after award, SBA determination that protested offeror was not small at time of award does not result in contract awarded being void *ab initio*, but merely void at option of Govt., thereby precluding effective size protest. To remedy this anomaly, it is recommended that FPR be revised to require that identity of successful offeror be revealed prior to award ---- 502
Bidder qualifications (*See* **BIDDERS, Qualifications**)
Changes, etc.
Procurement no longer needed
Govt. need not make award initially contemplated under solicitation where it is determined reduction in available funds requires commensurate reduction in scope of work ---- 432
Competition
Changes in price, specifications, etc.
Relative price position not affected
Although offerors selected for award were afforded opportunity to revise total price to receive award for reduced scope of work, failure of agency to conduct discussions with other offerors within competitive range does not provide basis for GAO to take exception to awards as unit prices for reduced work were not revised and, therefore, relative price position of offerors would not have been affected by revision of total price. 49 Comp. Gen. 402, overruled ---- 432

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Competitive range formula
Selection basis
Determination of competitive range on basis of three highest technically evaluated proposals without consideration of price and relative weight *vis-a-vis* technical is improper since competitive range should be determined from array of scores of all proposals submitted and with regard to price. Although award will not be disturbed, agency is advised to preclude recurrence of such deficiency in future procurements. 49 Comp. Gen. 402, overruled ---- 432
Limitation on negotiation
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Fact that prime contractor of computer time/timesharing contract may have developed commercial clientele whose abilities it knows does not unduly restrict competition since no potential subcontractor is prohibited from submitting proposal which prime contractor must consider ---- 554
Evaluation factors
Commonality of design
Protester's assertion that Navy properly could select only derivative of model selected by Air Force is incorrect, since reasonable interpretation of RFQ, read in context of applicable documents, indicates that Navy sought aircraft with optimum performance (within cost parameters) and with due consideration of design commonality with prior Air Force prototype program and with selected Air Force fighter ---- 307
Conformability of equipment, etc.
Technical deficiencies (*See* CONTRACTS, Specifications, Conformability of equipment, etc., offered, Technical deficiencies, Negotiated procurement)
Cost credibility
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Criteria
Protester's claim that Navy did not treat offerors on equal basis is not supported by record, which indicates that overall evaluation was conducted in accordance with established criteria and that both offerors were treated fairly ---- 307

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Responding to prior GAO decision, agency furnishes rational support for bare conclusions reached by third evaluator (whose views prompted source selection) in conflict with technical evaluation committee's views. Committee evaluated and scored only original proposals but not additional information resulting from negotiations considered by third evaluator which reduced technical evaluation difference of technical committee in favor of protester. Additional information from lower cost awardee responded satisfactorily to technical problem raised by agency which, in large measure, accounted for technical evaluation difference between proposals. 54 Comp. Gen. 896, modified 499
Point rating
Competitive range formula
Determination of competitive range on basis of three highest technically evaluated proposals without consideration of price and relative weight *vis-a-vis* technical is improper since competitive range should be determined from array of scores of all proposals submitted and with regard to price. Although award will not be disturbed, agency is advised to preclude recurrence of such deficiency in future procurements. 49 Comp. Gen. 402, overruled 432
Price elements for consideration
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Propriety of evaluation
Since determinations of technical acceptability are within discretion of procuring agency, in absence of clear evidence that agency acted arbitrarily, and record in this case is devoid of any evidence which would justify our Office concluding that technical evaluations were without reasonable basis, there is no basis to take exception to awards 432
Offers or proposals
Qualifications of offerors
In any negotiated procurement, burden is on offerors to affirmatively demonstrate merits of their proposals. Where RFP contemplated fixed-price contract for supply of calibration system, not developmental effort, and instructed offerors to make such demonstration on paragraph-by-paragraph basis, offeror which proposed alternative approach to meeting requirements arguably bore even heavier burden of showing how its system would satisfy Army's needs 374
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Acceptance time limitation
Contracting officer may allow offeror to waive expiration of proposal acceptance period and make valid award thereunder 432

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Cancellation
Off-the-shelf items procurement
While public exigency justification for negotiation imbues contracting officer with considerable range of discretion in determining extent of negotiation consistent with exigency of situation, and D & F reasonably supported sole-source negotiation, RFP should nevertheless be canceled and resolicited on unrestricted basis where protests prior to award indicate multimeter being procured is off-the-shelf item which other manufacturers can furnish within time required---------- 358
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In interpreting seemingly inconsistent provisions of RFP it is incumbent upon GAO to attempt to read provisions together---------- 529
Copy requested
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Allegations of Army officials' persistent unfairness towards protester from time of initial proposal submission through conduct of negotiations, ultimate rejection of basic and alternate proposals, and participation in protest proceedings before GAO cannot be substantiated, since written record fails to demonstrate alleged unfairness, and in fact suggests reasonable explanations for Army's actions. Also, fact that agency officials declined for most part to join in oral discussion of issues at GAO bid protest conference is not objectionable, since agency responded to protester's allegations in several written reports, and conference is not intended to be formal hearing---------- 374
Timeliness
Where solicitation clearly provided for only one award in particular region, while multiple awards were provided for in other regions, protest against provision for only one award filed after closing date for receipt of proposals was untimely---------- 432
Restrictive of competition
Where under terms of RFP Govt. reserved right to make any number of awards, such reservation can only be regarded as also reserving to Govt. its right to make more than three awards even though it later indicated that its contemplation was to make maximum of three awards. While offerors were led to believe, because of confusing and misleading language in RFP, that three awards would be made, harm to competitive system generated by agency's action does not necessitate recommending that corrective action be taken---------- 529

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Sole source basis
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Although procurement assigned priority designation 02 is sufficient authority for contracting officer to negotiate under public exigency exception rather than formally advertise, such authority does not give contracting officer authority to negotiate with only one source where other sources can meet agency's needs as applicable statute and regulations require solicitation of proposals, including price, from maximum number of qualified sources consistent with nature and requirements of supplies to be procured and time limitations involved ... 358
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Specifications (*See* **CONTRACTS, Specifications**)
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Determination of fees of prime contractors
Alternate contract payment procedure, whereby prime contractor's fee is percentage of subcontractor's invoice, and there is no requirement that subcontractor submit fixed-price proposal, violates prohibition of 10 U.S.C. 2306(a) against cost-plus-a-percentage-of-cost since (1) payment is based on predetermined percentage rate; (2) percentage rate is applied to actual performance costs; (3) contractor entitlement is uncertain at time of contracting; and (4) contractor entitlement increases commensurately with increased performance costs ... 554
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Protests
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Consideration nonetheless by GAO
Where small business size protest is received 1½ hours after award made on bid opening date, last day of fiscal year, termination of contract is recommended, since SBA subsequently sustained protest; contracting officer has indicated that procurement would have been referred to SBA under standard operating procedure if received before award; and contracting officer exceeded authority in that ASPR 1-703(b)(5) precludes small business set-aside award prior to expiration of 5 working days after bid opening in absence of urgency determination ---- 439
Where circuit court grants motion to vacate district court's judgment on issues contained in protest and remands cause to district court with direction to dismiss action as moot, district court's opinion is eliminated, is not *res judicata*, and is not bar to consideration of protest, since it cannot be considered to have been decided by district court ---- 546
Authority to consider
Grant procurements
GAO will undertake reviews concerning propriety of contract awards under Federal grants made by grantees in furtherance of grant purposes upon request of prospective contractors where Federal funds in a project are significant ---- 390
Reprocurement due to nonresponsive bid
Receipt of no responsive bids to IFB requires resolicitation and, although protest that specifications were restrictive would ordinarily not be decided in that event, since it seems apparent that resolicitation will be essentially on same specifications and protester has indicated it will therefore protest and record has been completely developed, protest will be considered now ---- 445
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Not subject to protest procedures
Contractor's request for equitable relief by way of contract reformation is not subject to bid protest procedures ---- 546
Contracting officer's affirmative responsibility determination
General Accounting Office review discontinued
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Where it is alleged that definitive responsibility criterion—IFB security clearance requirement—was waived, contracting officer's affirmative determination of responsibility is for review on merits. Determination was supported by objective evidence before contracting officer, who had received information from bidder that adequate personnel working at nearby facilities could be used to perform contract, and that predecessor contractor's qualified personnel might also be hired. GAO has no objection to determination in view of facts of record and absence of evidence from protester demonstrating that determination lacked reasonable basis ---- 494

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Evidence lacking
Allegations of Army officials' persistent unfairness towards protester from time of initial proposal submission through conduct of negotiations, ultimate rejection of basic and alternate proposals, and participation in protest proceedings before GAO cannot be substantiated, since written record fails to demonstrate alleged unfairness, and in fact suggests reasonable explanations for Army's actions. Also, fact that agency officials declined for most part to join in oral discussion of issues at GAO bid protest conference is not objectionable, since agency responded to protester's allegations in several written reports, and conference is not intended to be formal hearing 374
Interested party requirement
Generally, in determining whether protester satisfies "interested party" requirement, consideration should be given to nature of issues raised by protest and direct or indirect benefit or relief sought by protester 397
Persons, etc., qualified to protest
Grantees under Federal grants-in-aid
Prior reviews of contracts awarded under Federal grants are considered consistent, in the main, with principles enunciated here. However, to extent any prior precedent may be inconsistent it should not be followed. B–178960, September 14, 1973, overruled 390
Interested parties
Requirement that party be "interested" in order to lodge formal protest serves to ensure party's diligent participation in protest process so as to sharpen issues and provide complete record on which correctness of challenged procurement may be decided 397
Because other issues raised by non-small business, non-8(a) concern in protest against 8(a) award are indirectly related to basic eligibility determination of firm proposed for 8(a) award, it is considered that concern is interested party as to other issues 397
Small business subcontracting
Non-8(a), non-small business concern is considered interested party so long as it contends that concern proposed for 8(a) award does not belong in 8(a) category whose application prevents protester from competing; test of interested party for 8(a) protests clarifies prior discussion in *Kleen-Rite Janitorial Services, Inc.*, B–178752, March 21, 1974, 74–1 CPD 139; *City Moving and Storage Company, Inc.*, B–181167, August 16, 1974, 74–2 CPD 104; and *Kings Point Manufacturing Company, Inc.*, 54 Comp. Gen. 913, 75–1 CPD 264 397
Procedures
Bid Protest Procedures
Improprieties and timeliness
Allegation that contracting officer's original determination to advertise solicitation on unrestricted basis should not have been reversed by DSA, first raised almost 10 weeks after issuance of amendment which reversed contracting officer's determination, is untimely and not for consideration under 4 CFR 20.2(a) of then applicable Interim Bid Protest Procedures and Standards, which requires that such protests be filed prior to bid opening 475

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Protests—Continued
Procedures—Continued
Court action pending
Fact that issues contained in protest are also contained in protester's suit in district court would ordinarily be bar to consideration of protest absent request or expression of interest by court in GAO decision. However, protest will be considered, since Govt. has not filed answer, suit is not active and protester has indicated that, if suit will bar consideration of protest, it will have court action dismissed without prejudice under rule 41(a)(1) of Federal Rules of Civil Procedure 546
Significant issues requirement
Public policy, etc.
Protest raising issues concerning interpretation of appropriation act and "congressional intent" as public policy will be considered in this case involving selection of a Navy Air Combat Fighter (NACF), whether or not timely filed, since protest raises significant issues concerning relationship of Congress and Executive on procurement matters. Issues regarding evaluation and competition will also be considered since they are substantially intertwined with first issue and since GAO has continuing audit interest in NACF program 307
Timeliness
Solicitation improprieties
Apparent prior to bid opening
Omission of one line item, which may have substantial cost impact in relation to other 53 items in IFB for acoustical ceiling work, does not constitute compelling reason to reject all bids and readvertise since other items are valid representation of Govt.'s needs and alternate methods exist to satisfy need of omitted item 488
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Requests for quotations
Negotiated procurement (*See* **CONTRACTS, Negotiation, Requests for quotations**)
Research and development
Costs
Analysis
Evaluation factors
Responding to prior GAO decision, agency furnishes rational support for bare conclusions reached by third evaluator (whose views prompted source selection) in conflict with technical evaluation committee's views. Committee evaluated and scored only original proposals but not additional information resulting from negotiations considered by third evaluator which reduced technical evaluation difference of technical committee in favor of protester. Additional information from lower cost awardee responded satisfactorily to technical problem raised by agency which, in large measure, accounted for technical evaluation difference between proposals. 54 Comp. Gen. 896, modified 499

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Review

Federal aid, grants, etc.

Administrative reports

Multiple layers of Federal, State and local Govt. involved in typical grant review situation will not impose enormous burden on Federal grantor in producing report responsive to request for review of contract under Federal grant---------- 390

Rational basis

To extent grant reviews will be concerned with application and interpretation of local procurement law, with which grantees should be familiar, they will not be disadvantaged. In other cases, since review will only be concerned with application of "basic principles," rather than all intricacies of Federal norm, it will not result in mechanistic application of Federal procurement law---------- 390

Small business concerns (*See* **CONTRACTS, Awards, Small business concerns**)

Sole source procurements (*See* **CONTRACTS, Negotiation, Sole source basis**)

Specifications

Adequacy

Scope of work

Sufficiency of detail

In any negotiated procurement, burden is on offerors to affirmatively demonstrate merits of their proposals. Where RFP contemplated fixed-price contract for supply of calibration system, not developmental effort, and instructed offerors to make such demonstration on paragraph-by-paragraph basis, offeror which proposed alternative approach to meeting requirements arguably bore even heavier burden of showing how its system would satisfy Army's needs---------- 374

Blanket offer to comply (*See* **CONTRACTS, Specifications, Failure to furnish something required, Blanket offer to conform to specifications**)

Brand name or equal (*See* **CONTRACTS, Specifications, Restrictive, Particular make**)

Changes, revisions, etc.

Amendment requirement

Acknowledgment failure (*See* **CONTRACTS, Specifications, Failure to furnish something required, Addenda acknowledgment**)

"De minimus" rule

Where only estimate as to value of invitation amendment is bidder's unsupported, self-serving statement, rejection of its bid for failure to acknowledge such amendment was proper, for in determining whether amendment has only "trivial" or "negligible" effect on bid price to permit waiver, it would be inappropriate to permit bidder seeking waiver to determine value as it would give him option to become eligible for award by citing costs that would bring him within *de minimis* rule or to avoid award by placing larger cost value on effects of amendment---------- 599

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General *v.* specific statement
General statement by bidder that item offered would be fully color coded rather than a statement of compliance with one of precise color coding methods specified by agency did not require rejection of bid since in absence of express exception to methods specified by agency bidder's general statement must be construed as consistent with solicitation requirements 340
Conformability of equipment, etc., offered
Comparability with existing equipment
Protester's assertion that Navy properly could select only derivative of model selected by Air Force is incorrect, since reasonable interpretation of RFQ, read in context of applicable documents, indicates that Navy sought aircraft with optimum performance (within cost parameters) and with due consideration of design commonality with prior Air Force prototype program and with selected Air Force fighter 307
Information deviating from specifications
Requirement for submission of manufacturer's specifications with bid to show that product offered conforms to specification is not justified since solicitation did not advise bidders with particularity both as to extent of detail required and purpose to be served by such requirement. 340
Negotiated procurement
Assertion that engine selected by Navy was not authorized for use with lightweight fighter is without merit, since record indicates selected engine is modified version of baseline engine listed in solicitation. Also, record indicates Navy did not improperly estimate offerors' engine modification costs 307
Technical deficiencies
Negotiated procurement
Claims that alternative system can meet all present and future Army calibration needs at lower cost do not clearly show that RFP requirement for expandable read/write computer memory is without any reasonable basis, since Army, which must make determination of minimum needs and bear risk of inadquate performance resulting from improper determination, believes greater memory capacity will be needed in future to calibrate more complex equipment, that operator-configurable software will provide desireable flexibility and longterm cost savings and that despite protester's performance claims, its approach may involve unacceptable technical and cost risks 874
Where offeror proposing alternative approach to meeting RFP requirements submitted voluminous technical literature, documents, manuals and articles but was proceeding on misconception that Army bore burden of demonstrating how its approach was not feasible, GAO cannot conclude that Army's rejection of basic and alternate proposals as technically unacceptable is shown to be without any reasonable basis. Basic proposal's failure to meet expandable memory requirement and alternate proposal's lack of information on software interface indicate reasonable basis for rejection, notwithstanding protester's allegations of numerous technical errors by Army in failing to understand approach proposed 374

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Specifications—Continued

Conformability of equipment, etc., offered comparability with existing equipment—Continued

Technical deficiencies—Continued

Negotiated procurement—Continued

Since determinations of technical acceptability are within discretion of procuring agency, in absence of clear evidence that agency acted arbitrarily, and record in this case is devoid of any evidence which would justify our Office concluding that technical evaluations were without reasonable basis, there is no basis to take exception to awards..... 432

Consolidation

Combination by procuring activity of two items in one solicitation (formerly two solicitations had been utilized) is proper exercise of procurement discretion since preparation and establishment of specifications to reflect needs of Govt. are matters primarily within jurisdiction of procurement agency and record substantiates fact that combination of items results in lower overall cost. Moreover, award can still be on item basis if doing so is in best interests of DC..... 366

Descriptive data

"Subject to change" qualification

Printed legend on descriptive data sheets submitted with bid that product specifications set forth in data sheets are subject to change without notice may be ignored in evaluating bid under brand name or equal clause since bid, read as a whole, indicates bidder's intention to furnish from stock product conforming to specifications. Effect of legend by manufacturer of equipment is to reserve right to make changes as to its items produced in future..... 592

Deviations

Amendment acknowledgment

Low bidder, after bid opening, cannot "cure" its failure to acknowledge receipt of IFB amendment because to do so would be tantamount to permitting submission of second bid. Bidder's alleged nonreceipt of amendment does not appear to have been result of deliberate effort to exclude bidder from competition..... 599

Delivery provisions

Where IFB required delivery within 280 days "after date of award," telegraphic bid offering delivery "280 days after receipt of award" was properly rejected as nonresponsive, where solicitation contained provision for evaluation of bids offering delivery based upon date of receipt of contract or notice of award (rather than contract date) by adding maximum number of days normally required for delivery of award through mails. Thus evaluated, protester's bid exceeded required delivery schedule..... 605

Failure to furnish something required

Addenda acknowledgment

"Trivial" and "negligible" effect of amendment

Where only estimate as to value of invitation amendment is bidder's unsupported, self-serving statement, rejection of its bid for failure to acknowledge such amendment was proper, for in determining whether amendment has only "trivial" or "negligible" effect on bid price to permit waiver, it would be inappropriate to permit bidder seeking waiver to determine value as it would give him option to become eligible for award by citing costs that would bring him within *de minimis* rule or to avoid award by placing larger cost value on effects of amendment..... 59

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Specifications—Continued

Failure to furnish something required—Continued

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Waiver

Refused

Bidder's contention that amendment to IFB only repeated obligation required under original IFB's "Site Visit" clause, and therefore, its failure to formally acknowledge receipt thereof should be waived as minor informality is without merit for while clause required bidders to inspect site so as to acquaint themselves with general and local conditions affecting cost of performance, clause did not impose legally enforceable obligation under IFB for bidder to provide bus transportation for employees as required by amendment and thus did not give Govt. same rights against bidder as it would possess under amendment.. 599

Bid guarantee

Letter of credit deficiencies

Documentary letter of credit furnished as bid guarantee does not constitute "firm commitment" as required by solicitation and ASPR 7-2003.25, thereby rendering bid nonresponsive, since letter of credit was not accompanied by bidder's signed withdrawal application which would have to be presented to bank in order for letter of credit to be honored..... 587

Blanket offer to conform to specifications

General statement by bidder that item offered would be fully color coded rather than a statement of compliance with one of precise color coding methods specified by agency did not require rejection of bid since in absence of express exception to methods specified by agency bidder's general statement must be construed as consistent with solicitation requirements..... 340

Information

Catalog number and manufacturer

Requirement that bidders submit manufacturer's specifications and indicate on bid manufacturer and catalog number of item offered is informational in nature and failure to comply should not have required rejection of bid since procured item was not unusually complex, was adequately described in solicitation and record did not provide adequate justification for such requirement..... 340

License approval

IFB provision that successful bidder meet all requirements of Federal, State or City codes does not justify rejection of bid for failure to have city license to operate ambulance service since need for license under such general requirement is matter between local governmental unit and contractor. However, where bidder conditions bid upon possession of license, such qualification renders bid nonresponsive..... 597

Manufacturers

Justification

Lacking

Requirement for submission of manufacturer's specifications with bid to show that product offered conforms to specification is not justified since solicitation did not advise bidders with particularity both as to extent of detail required and purpose to be served by such requirement. 340

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Specifications—Continued
Minimum needs requirement
Administrative determination
Combination by procuring activity of two items in one solicitation (formerly two solicitations had been utilized) is proper exercise of procurement discretion since preparation and establishment of specifications to reflect needs of Govt. are matters primarily within jurisdiction of procurement agency and record substantiates fact that combination of items results in lower overall cost. Moreover, award can still be on item basis if doing so is in best interests of DC 366
Claims that alternative system can meet all present and future Army calibration needs at lower cost do not clearly show that RFP requirement for expandable read/write computer memory is without any reasonable basis, since Army, which must make determination of minimum needs and bear risk of inadequate performance resulting from improper determination, believes greater memory capacity will be needed in future to calibrate more complex equipment, that operator-configurable software will provide desirable flexibility and long-term cost savings, and that despite protester's performance claims, its approach may involve unacceptable technical and cost risks 374
Restrictive
Cancellation of invitation
Resolicitation of procurement
Receipt of no responsive bids to IFB requires resolicitation and, although protest that specifications were restrictive would ordinarily not be decided in that event, since it seems apparent that resolicitation will be essentially on same specifications and protester has indicated it will therefore protest and record has been completely developed, protest will be considered now 445
Geographical location
Delivery provisions
Use of geographic restriction for procurement of "furnish" asphalt (that asphalt which is picked up, transported, and applied by DC) which limits procurement to those suppliers having facilities located within DC is not subject to objection, as geographic restriction serves useful purpose of eliminating those suppliers who appear unable to render acceptable "furnish" service to DC due to their decentralized location outside DC 366
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Geographic restrictions constitute legitimate restriction on competition where contracting agency properly determines that particular restriction is required. Determination of proper scope of restriction is matter of judgment and discretion involving consideration of services being procured, past experience, market conditions, etc. Moreover, use of geographic limitation creates possibility that one or more potential bidders beyond limit could meet Govt.'s needs; therefore, procurement officials should consider extending geographic limit to broadest scope consistent with Govt.'s needs 366

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Alternate contract payment procedure, whereby prime contractor's fee is percentage of subcontractor's invoice, and there is no requirement that subcontractor submit fixed-price proposal, violates prohibition of 10 U.S.C. 2306(a) against cost-plus-a-percentage-of-cost since (1) payment is based on predetermined percentage rate; (2) percentage rate is applied to actual performance costs; (3) contractor entitlement is uncertain at time of contracting; and (4) contractor entitlement increases commensurately with increased performance costs 554

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Contract for computer time/timesharing services to prime contractor who has commercial arrangements with potential subcontractors to pay standard percentage of invoice fee for finding buyer of computer time and/or services does not violate Anti-Kickback Act (41 U.S.C. 51) because commercial arrangement does not apply and prime contractor receives fee according to sliding matrix from Govt. only 554

Conflict between two contract provisions concerning who pays prime contractor's fee, subcontractor or Govt., is resolved in favor of Govt. payment since that interpretation upholds validity of contract in accord with presumption of legality. Contrary interpretation might lead to conclusion contract violated Anti-Kickback Act 554

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Corrective action is not recommended concerning questioned subcontract awarded under Federal grant since it cannot be concluded that questioned temperature specification for incinerator project was ambiguous or that company receiving award submitted bid which was nonresponsive to specification 390

Termination

Convenience of Government

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While termination of contract for convenience of Govt. is matter of administrative discretion not reviewable by GAO, review of procedures leading to award of contract is within GAO jurisdiction 502

Valid

Absent bad faith or abuse of discretion

Although determination to terminate contract for convenience of Govt. rests with agency concerned and not with GAO, it is noted that court has held that in absence of bad faith or clear abuse of discretion such termination is valid and no such showing is made here 502

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Since contractor awarded 5,000 units was reasonably led to believe that three awards, each of 10,000 units, would be made, contractor should be afforded opportunity to have contract terminated for convenience if contractor so desires 529

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While ASPR 10-102.5(ii) gives discretionary authority to contracting officer to decide whether bid bond deficiencies should be waived, such discretion must have been intended for application within definite rules. Consequently, absent specific finding that waiver of requirement was not in best interest of Govt., which was not made in instant case, bid should not have been rejected since it fell into stated exception; protect is therefore sustained and ASPR Committee requested to revise provision to make exception mandatory 352

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Although determination to terminate contract for convenience of Govt. rests with agency concerned and not with GAO, it is noted that court had held that in absence of bad faith or clear abuse of discretion such termination is valid and no such showing is made here 502

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Small business concerns

Where small business size protest is received 1½ hours after award made on bid opening date, last day of fiscal year, termination of contract is recommended, since SBA subsequently sustained protest; contracting officer has indicated that procurement would have been referred to SBA under standard operating procedure if received before award; and contracting officer exceeded authority in that ASPR 1-703(b)(5) precludes small business set-aside award prior to expiration of 5 working days after bid opening in absence of urgency determination 439

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Where U.S. Attorney undertook defense of former SBA employee who was sued as result of actions committed while acting within scope of his employment and during course of proceedings U.S. Attorney withdrew for administrative reasons, necessitating former employee's retaining services of private counsel although Govt.'s interest in defending employee continued throughout proceedings, we would not object to SBA's reimbursing former employee amount for reasonable legal fees incurred. 28 U.S.C. 516–519, 547, and 5 U.S.C. 3106 are not a bar in such circumstances since to hold otherwise would be contrary to rule that cost of defending such cases should be borne by Govt 408

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State of Washington sought to garnish pay of Air Force civilian employee to collect child support under authority of sec. 459 of P.L. 93–647 by means of administrative garnishment order served on Air Force Finance Officer. Air Force refused to effect garnishment on ground that administrative order was not "legal process" within meaning of statute. In light of purpose of statute and lack of any limiting language, we believe "legal process" is sufficiently broad to permit garnishment by administrative order under Washington procedure. GAO would not object to Air Force payments under State administrative order 517

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Customs Service has authority under User Charges Statute, 31 U.S.C. 483a, to implement recommendation in GAO report that administrative overhead costs be collected from parties-in-interest who benefit by special reimbursable and overtime services of Customs officers. Various statutes which provide for reimbursement by parties-in-interest of compensation and/or expenses of Customs officers for such services generally do not preempt imposition of additional user charges under 31 U.S.C. 483a 456

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Contract for computer time/timesharing services to prime contractor who has commercial arrangements with potential subcontractors to pay standard percentage of invoice fee for finding buyer of computer time and/or services does not violate Anti-Kickback Act (41 U.S.C. 51) because commercial arrangement does not apply and prime contractor receives fee according to sliding matrix from Govt. only ---- 554

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Alternate proposals requirement

In any negotiated procurement, burden is on offerors to affirmatively demonstrate merits of their proposals. Where RFP contemplated fixed-price contract for supply of calibration system, not developmental effort, and instructed offerors to make such demonstration on paragraph-by-paragraph basis, offeror which proposed alternative approach to meeting requirements arguably bore even heavier burden of showing how its system would satisfy Army's needs 374

Minimum needs requirement

Claims that alternative system can meet all present and future Army calibration needs at lower cost do not clearly show that RFP requirement for expandable read/write computer memory is without any reasonable basis, since Army, which must make determination of minimum needs and bear risk of inadequate performance resulting from improper determination, believes greater memory capacity will be needed in future to calibrate more complex equipment, that operator-configurable software will provide desirable flexibility and long-term cost savings, and that despite protester's performance claims, its ap-approach may involve unacceptable technical and cost risks 374

User acceptability

Where offeror proposing alternative approach to meeting RFP requirements submitted voluminous technical literature, documents, manuals and articles but was proceeding on misconception that Army bore burden of demonstrating how its approach was not feasible, GAO cannot conclude that Army's rejection of basic and alternate proposals as technically unacceptable is shown to be without any reasonable basis. Basic proposal's failure to meet expandable memory requirement and alternate proposal's lack of information on software interface indicate reasonable basis for rejection, notwithstanding protester's allegations of numerous technical errors by Army in failing to understand approach proposed 374

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Maximum pay rate for experts and consultants employed under Pub. L. 88–633, as amended, may not exceed $100 per day, despite AID's administrative determination to the contrary. Pub. L. 91–231 does not make the specific dollar limitation obsolete, and AID may not rely on 5 U.S.C. 3109 as authority to pay those employees at higher rates. Also, legislative histories of acts increasing the maximum amounts payable to experts and consultants of other agencies with similar dollar limitations indicate necessity of legislation to increase $100 ceiling ---------- 567

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FPR does not apply to award made under EPA grant for municipal sewer construction, since FPR pertains to direct Federal procurements and reference in EPA grant regulations to "Federal law" does not incorporate FPR by reference ---------- 413

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Identity of successful offeror

Revision of FPR recommended

Where small business size status protest was timely filed with contracting officer within 5 days after notification of successful offeror, but after award, SBA determination that protested offeror was not small at time of award does not result in contract awarded being void *ab initio*, but merely void at option of Govt., thereby precluding effective size protest. To remedy this anomaly, it is recommended that FPR be revised to require that identity of successful offeror be revealed prior to award ---------- 502

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FPR, unlike ASPR, imposes no duty on contracting officer to record amount of funds available prior to bid opening for base bids and alternates when amount of funding is in doubt. Therefore, determination of actual available funding, and the consequential determination whether alternates, if any, will be applied, may properly be made after bid opening in case of civilian agency. However, adoption of uniform Govt-wide policy is recommended ---------- 443

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Customs Service has authority under User Charges Statute, 31 U.S.C. 483a, to implement recommendation in GAO report that administrative overhead costs be collected from parties-in-interest who benefit by special reimbursable and overtime services of Customs officers. Various statutes which provide for reimbursement by parties-in-interest of compensation and/or expenses of Customs officers for such services generally do not preempt imposition of additional user charges under 31 U.S.C. 483a 456

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Use by Congressional committees

In absence of specific authorization in an appropriation act, 22 U.S.C.A. 1754(b) is the sole authority making counterpart funds (foreign currencies) available to members and employees of Congressional committees in connection with overseas travel. Under this provision, such funds are available only to specific committees, not including the House Select Committee on Aging, and to committees performing functions under 2 U.S.C.A. 190(d), which refers to *standing* Committees but not *select* committees. Accordingly, members and employees of the House Select Committee on Aging are not authorized to use counterpart funds 537

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GAO will undertake reviews concerning propriety of contract awards under Federal grants made by grantees in furtherance of grant purposes upon request of prospective contractors where Federal funds in a project are significant 390

Prior reviews of contracts awarded under Federal grants are considered consistent, in the main, with principles enunciated here. However, to extent any prior precedent may be inconsistent it should not be followed. B–178960, September 14, 1973, overruled 390

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State of Washington sought to garnish pay of Air Force civilian employee to collect child support under authority of sec. 459 of P.L. 93-647 by means of administrative garnishment order served on Air Force Finance Officer. Air Force refused to effect garnishment on ground that administrative order was not "legal process" within meaning of statute. In light of purpose of statute and lack of any limiting language, we believe "legal process" is sufficiently broad to permit garnishment by administrative order under Washington procedure. GAO would not object to Air Force payments under State administrative order..... 517

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Agency heads and authorized certifying officers have statutory rights to an advance decision from the Comptroller General on propriety of paying make-whole remedies ordered by appropriate authorities. Thus, Board of Appeals and Review, CSC, when ordering make-whole remedies should permit agencies opportunity to exercise their right to an advance decision from the Comptroller General prior to implementation of remedies. Amplified by 55 Comp. Gen. —— (B-184990, Feb. 20, 1976).. 539

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Cancellation of a subsequent IFB on basis that services were no longer required was erroneous where there was in fact a continuing need for the services which was being met through a noncompetitive, informal agreement with a contractor to a Federal agency—an arrangement unauthorized by statute. Recommendation is made that D.C. discontinue present method of procurement and that services be procured through formal advertising or an intergovernmental agreement authorized by statute.... 464

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Where claimant obtained Mexican divorce from prior spouse and subsequently married deceased member, fact that Coast Guard paid her member's unpaid pay and allowances as designated beneficiary under clause (1) of 10 U.S.C. 2771(a) does not estop Govt. from challenging validity of marriage since such payment was neither determinative of question of her marital status nor was such question even in issue..... 533

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Documentary letter of credit furnished as bid guarantee does not constitute "firm commitment" as required by solicitation and ASPR 7–2003.25, thereby rendering bid nonresponsive, since letter of credit was not accompanied by bidder's signed withdrawal application which would have to be presented to bank in order for letter of credit to be honored..... 587

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Documentary letter of credit furnished as bid guarantee does not constitute "firm commitment" as required by solicitation and ASPR 7-2003.25, thereby rendering bid nonresponsive, since letter of credit was not accompanied by bidder's signed withdrawal application which would have to be presented to bank in order for letter of credit to be honored---------- 587

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Granting of administrative leave to employee for acclimatization rest after he completed a full day of duty and traveled over 7 hours by air on return from Guam after crossing international date line is proper exercise of administrative authority. This is so since the CSC has not issued general regulations covering the granting of administrative leave and, therefore, each agency, under general guidance of decisions of Comptroller General, which are discussed in applicable FPM Supplement, has responsibility for determining situations in which excusing employees from work without charge to leave is appropriate 510

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Expense of suit against officer in his official capacity

Where U.S. Attorney undertook defense of former SBA employee who was sued as result of actions committed while acting within scope of his employment and during course of procedings U.S. Attorney withdrew for administrative reasons, necessitating former employee's retaining services of private counsel although Govt.'s interest in defending employee continued throughout proceedings, we would not object to SBA's reimbursing former employee amount for reasonable legal fees incurred. 28 U.S.C. 516–519, 547, and 5 U.S.C. 3106 are not a bar in such circumstances since to hold otherwise would be contrary to rule that cost of defending such cases should be borne by Govt---------- 408

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Temporary

Retroactive

Two Bureau of Mines employees were detailed to higher grade positions in excess of 120 days and no prior approval of extension beyond 120 days was sought from CSC. Employees are entitled to retroactive temporary promotions for period beyond 120 days until details were terminated because Board of Appeals and Review, CSC, has interpreted regulations to require temporary promotions in such circumstances. Amplified by 55 Comp. Gen. —— (B–184990, Feb. 20, 1976)--------- 539

Relocation expenses (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)

Removals, suspensions, etc.

Compensation (*See* **COMPENSATION, Removals, suspensions, etc.**)

Transfers

Relocation expenses

Dependents

Mother

Mother of Govt. employee who is member of employee's household is dependent parent within meaning of para. 2–1.4d, Federal Travel Regs., for purposes of relocation allowances as she receives only social security payments, which are largely required for medical expenses, and is dependent upon daughter to maintain reasonable standard of living. IRS standards for dependency do not determine entitlement under FTR---- 462

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Relocation expenses—Continued
House trailers, mobile homes, etc.
Separate shipment of household effects for part of distance
Reimbursement limitation

Incident to transfer to Alaska, employee transported mobile home from Keyser, W. Va., to Seattle, Wash., where it was determined that it did not meet Alaskan specifications. Employee stored trailer in Seattle and completed shipment of household goods to Alaska on GBL. Regarding reimbursement for transportation of mobile home, rule in 39 Comp. Gen. 40 is applicable. Credit should be allowed under FTR para. 2–7.3a for shipment of mobile home from Keyser to Seattle. Employee is not entitled to further allowance under authorization for shipment of household goods on GBL. Total payment under both authorizations may not exceed cost which would have been incurred by Govt. had either method been used for entire distance---------- 526

Travel expenses (*See* **TRAVEL EXPENSES**)
Traveltime
Hours of departure
"Reasonable" and/or "practical" hour

Employee who traveled during working hours on Friday to report for temporary duty the following Tuesday, day after Monday holiday, may not be paid per diem for intervening 3-day weekend. While 5 U.S.C 6101(b)(2) requires that to maximum extent practicable agencies schedule travel during regular duty hours, payment of 2 days or more additional per diem to facilitate such scheduling has been held unreasonable. Where 2 days per diem would be required and commencement of assignment cannot be otherwise scheduled, employee may be required to travel on own time---------- 590

PAY
Active duty
Reservists
Period of litigation
Pay subject to deduction for civilian earnings

Enlisted member of the U.S. Naval Reserve who after being ordered to active duty filed petition for habeas corpus on grounds that he was not a member and was determined by Federal court order to have been lawfully enlisted and in military status is entitled to pay and allowances during litigation, regardless of whether he performs military duties. However, settlement of member's claim for such pay and allowances is subject to deduction of gross civilian earnings when he performed no meaningful or useful services for U.S. Govt. during the period--------- 507

Civilian employees (*See* **COMPENSATION**)

PERSONAL SERVICES Page

Private contract *v.* Government personnel

Collective bargaining agreement

Violation

Grievance charged violation of provision in collective bargaining agreement that consultants would not be hired to perform work that could be performed by agency employees. Agency stipulated that it had violated agreement but refused union's demand that consultant repay salary to U.S. Treasury. Prior to arbitration hearing, the consultant resigned. Arbitrator's award of punitive damages to be paid by agency to union may not be implemented since there is no authority to award punitive damages against U.S. or one of its agencies---------- 564

PROPERTY

Private

Acquisition

Relocation expenses to "displaced persons"

Effective date of entitlement

Tenant who vacated premises subsequent to written purchase offer by Architect of the Capitol qualifies as "displaced person" and is entitled to benefits applicable to displaced tenants under Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, since Govt. made firm offer to purchase property from owner, tenant moved after this offer, and Govt. actually acquired property---------- 595

Damage, loss, etc.

Government liability

Rented equipment destroyed by fire

Bailee, in case of bailment for mutual benefit, is held to standard of due care and ordinary prudence. While presumption of negligence ordinarily arises from destruction of bailed property, rule does not apply where property is destroyed by fire---------- 356

Public

Excess

Utilization

Acquisition by agencies of aircraft and passenger motor vehicles by purchase or transfer is prohibited by 31 U.S.C. 638a, unless specifically authorized by appropriation act or other law, and this prohibition applies to acquisition by transfer by Law Enforcement Assistance Admin. of aircraft or passenger motor vehicles for use by grantees in their regular law enforcement functions because agency obtains custody and accountability and exception would reduce congressional control over aircraft and vehicles. See 44 Comp. Gen. 117. 43 Comp. Gen. 697, 49 *id.* 202, and B–162525, Dec. 21, 1967, distinguished---------- 348

PROTESTS

Contracts (*See* CONTRACTS, Protests)

REGULATIONS

Incorporated by reference in negotiated agreement

Agency interpretation *v.* plain language of regulations

When agency regulations are incorporated by reference in negotiated agreement, arbitrator should accord great deference to agency interpretation of regulations it has promulgated. However, where regulations are plain on their face, no interpretation is required and arbitrator was correct in rejecting agency interpretation at variance with plain language of regulations---------- 427

REGULATIONS—Continued Page

Overtime policies

Collective bargaining agreement

Fed. Labor Relations Council questions propriety of sustaining arbitration award of 1 hour backpay to employee deprived of overtime work in violation of negotiated labor-management agreement. Agency violations of such agreements which directly result in loss of pay, allowances or differentials, are unjustified and unwarranted personnel actions as contemplated by Back Pay Act, 5 U.S.C. 5596. Therefore, where agency obligated itself in a labor-management agreement to provide 2 hours of productive work when employee is held on duty beyond his regular shift and, in violation of such agreement, provided him only 1 hour, arbitration award providing backpay to employee for the additional hour may be sustained 405

Promotion procedures

After details

Two Bureau of Mines employees were detailed to higher grade positions in excess of 120 days and no prior approval of extension beyond 120 days was sought from CSC. Employees are entitled to retroactive temporary promotions for period beyond 120 days until details were terminated because Board of Appeals and Review, CSC, has interpreted regulations to require temporary promotions in such circumstances. Amplified by 55 Comp. Gen. —— (B–184990, Feb. 20, 1976) 539

Collective bargaining agreement

Federal Labor Relations Council questions propriety of implementing arbitration award that sustains grievance of two Community Services Admin. employees for retroactive promotions and backpay. Because record contains substantial evidence that grievants would probably have been demoted shortly after they should have been promoted—evidence which arbitrator apparently did not consider—award is indefinite. Matter should be remanded to arbitrator for additional proceedings with instructions that he hear evidence on whether demotions would have occurred and, if so, on what date 427

RENT (*See* **LEASES, Rent**)

REPORTS

Administrative

Contract protest

Reports substantiate administrative determination

Allegations of Army officials' persistent unfairness towards protester from time of initial proposal submission through conduct of negotiations, ultimate rejection of basic and alternate proposals, and participation in protest proceedings before GAO cannot be substantiated, since written record fails to demonstrate alleged unfairness, and in fact suggests reasonable explanations for Army's actions. Also, fact that agency officials declined for most part to join in oral discussion of issues at GAO bid protest conference is not objectionable, since agency responded to protester's allegations in several written reports, and conference is not intended to be formal hearing 374

Contract reviews

Multiple layers of Federal, State and local Govt. involved in typical grant review situation will not impose enormous burden on Federal grantor in producing report responsive to request for review of contract under Federal grant 390

SMALL BUSINESS ADMINISTRATION Page

Authority

Small business concerns

Allocation of 8(a) subcontracts

Review does not suggest that SBA has arbitrarily decided that proposed 8(a) concern is still in need of further assistance through proposed 8(a) award ---- 397

Certifications

Effective date

Where firm purchases assets of concern previously found by SBA to be large business, suggestion is made that SBA consider adopting rule requiring such firm to request small business certificate prior to self-certifying status as small ---- 469

Contracts

Awards to small business concerns (*See* **CONTRACTS, Awards, Small business concerns**)

STATES

Federal aid, grants, etc.

Contract status

GAO will undertake reviews concerning propriety of contract awards under Federal grants made by grantees in furtherance of grant purposes upon request of prospective contractors where Federal funds in a project are significant ---- 390

Prior reviews of contracts awarded under Federal grants are considered consistent, in the main, with principles enunciated here. However, to extent any prior precedent may be inconsistent it should not be followed. B-178960, September 14, 1973, overruled ---- 390

FPR does not apply to award made under EPA grant for municipal sewer construction, since FPR pertains to direct Federal procurements and reference in EPA grant regulations to "Federal law" does not incorporate FPR by reference ---- 413

Municipalities

Contracts

Awarded under State law

Contract awarded under Iowa law pursuant to EPA grant to City of Davenport, Iowa, appears to be improper. City's construction of bid, which contained discrepancy between unit price and extended price for one item which resulted in displacement of another bid, was not proper because intended bid price for item was subject to more than one reasonable interpretation. Valid and binding contract comes into being under Iowa law only if essence of contract awarded is contained within four corners of bid submitted ---- 413

Federal Procurement Regulations *v.* OMB Circular A-87

Regulations incorporating FPR cost principles in situations involving allocation and allowability of cost on grants to other than educational institutions or State and local Govts. does not make FPR generally applicable to procurements by EPA grantees. In fact, where State or local Govt. is grantee, OMB Cir. A-87 regarding allowability of costs applies and not FPR ---- 413

SUBSISTENCE Page

Per diem

Hours of departure

During duty hours

Employee who traveled during working hours on Friday to report for temporary duty the following Tuesday, day after Monday holiday, may not be paid per diem for intervening 3-day weekend. While 5 U.S.C. 6101(b)(2) requires that to maximum extent practicable agencies schedule travel during regular duty hours, payment of 2 days or more additional per diem to facilitate such scheduling has been held unreasonable. Where 2 days per diem would be required and commencement of assignment cannot be otherwise scheduled, employee may be required to travel on own time 590

Military personnel

Temporary duty

Rest stopover

Navy member returning from Teheran, Iran, to Washington, D.C., on temporary duty, who departs from Teheran at 5:35 a.m. and completes 7 hours of travel to Rome, Italy, on trip requiring at least 24 hours' total travel if he is to continue on same plane or flight, may be allowed recredit of leave and paid per diem for period of rest stopover since officer's action in utilizing stop for rest appears reasonable under circumstances 513

Temporary duty

Military personnel (*See* **SUBSISTENCE, Per diem, Military personnel, Temporary duty**)

TRAILER ALLOWANCES

Civilian personnel

Separate shipments of household effects, etc., and house trailer

Reimbursement limitation

Incident to transfer to Alaska, employee transported mobile home from Keyser, W. Va., to Seattle, Wash., where it was determined that it did not meet Alaskan specifications. Employee stored trailer in Seattle and completed shipment of household goods to Alaska on GBL. Regarding reimbursement for transportation of mobile home, rule in 39 Comp. Gen. 40 is applicable. Credit should be allowed under FTR para. 2–7.3a for shipment of mobile home from Keyser to Seattle. Employee is not entitled to further allowance under authorization for shipment of household goods on GBL. Total payment under both authorizations may not exceed cost which would have been incurred by Govt. had either method been used for entire distance 526

TRANSPORTATION

Additional costs

Detention charges

Government liability

Arrival of shipping documents in advance of actual unloading is irrelevant to issue whether U.S. is liable for vehicle detention charges for unloading performed in excess of 2 hours where motor carrier, with knowledge of fact that vehicles are scheduled for unloading at ocean terminal by Military Traffic Management Command, offers to perform transportation services which include use of its vehicles at no extra charge for 2 hours for unloading 301

TRANSPORTATION—Continued Page

Dependents

Mother

Entitlement to relocation expenses incident to transfer

Mother of Govt. employee who is member of employee's household is dependent parent within meaning of para. 2–1.4d, Federal Travel Regs., for purposes of relocation allowances as she receives only social security payments, which are largely required for medical expenses, and is dependent upon daughter to maintain reasonable standard of living. IRS standards for dependency do not determine entitlement under FTR ---- 462

TRAVEL ALLOWANCE

Military personnel

Subsistence

Per diem (*See* **SUBSISTENCE, Per diem, Military personnel**)

Travel expenses (*See* **TRAVEL EXPENSES, Military personnel**)

TRAVEL EXPENSES

Customs employees overtime inspection duty

Party-in-interest liability

Customs Service has authority under User Charges Statute, 31 U.S.C. 483a, to implement recommendation in GAO report that administrative overhead costs be collected from parties-in-interest who benefit by special reimbursable and overtime services of Customs officers. Various statutes which provide for reimbursement by parties-in-interest of compensation and/or expenses of Customs officers for such services generally do not preempt imposition of additional user charges under 31 U.S.C. 483a ---- 456

Dependents (*See* **TRANSPORTATION, Dependents**)

Escorts

Contract

Reimbursement

Expenses incurred by international visitors and paid for by contract escort are not reimbursable on voucher form SF 1012 since each traveler is required to sign voucher to claim reimbursement for authorized travel expenses which he personally incurred in performance of his official travel. However, assuming that travel authorizations have been obtained, travel expenses may be claimed and paid on SF 1164 ("Claim for Reimbursement for Expenditures on Official Business") or SF 1034 ("Public Voucher for Purchases and Services other than Personal") ---- 437

Military personnel

Leaves of absence

Return to duty station

Rest stopover

Navy member returning from Teheran, Iran, to Washington, D.C., on temporary duty, who departs from Teheran at 5:35 a.m. and completes 7 hours of travel to Rome, Italy, on trip requiring at least 24 hours' total travel if he is to continue on same plane or flight, may be allowed recredit of leave and paid per diem for period of rest stopover since officer's action in utilizing stop for rest appears reasonable under circumstances ---- 513

TRAVEL EXPENSES—Continued Page
Military Personnel—Continued
Per diem (*See* **SUBSISTENCE, Per diem, Military personnel**)
Subsistence (*See* **SUBSISTENCE, Per diem, Military personnel**)
Overseas
Congressional committees (*See* **CONGRESS, Committees, Travel expenses, Overseas**)
Permanent change of station
Relocation expenses (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)
Private parties
Foreign delegations
If multiple-person travel voucher would serve purpose of paying travel expenses incurred for foreign journalists touring U.S. under arrangements with U.S. Travel Service, Dept. of Commerce should seek approval by Administrator of GSA in accordance with para. 1–11.3a of Federal Travel Regs 437
Transfers
Relocation expenses (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)
Vouchers (*See* **VOUCHERS AND INVOICES, Travel**)

TREASURY DEPARTMENT
Secret Service agents
Protection for Secretary of Treasury
Reimbursable basis
Since purpose of 54 Comp. Gen. 624, to stop then unauthorized use of Secret Service funds for protection of Secretary of Treasury, has been achieved, Dept. apparently acted in good faith, and Congress has acquiesced in use of fiscal year 1976 Secret Service appropriation for protection of Secretary, no useful purpose would be served by requiring reimbursement of Secret Service appropriation from appropriation for Office of Secretary of Treasury for period from decision in 54 Comp. Gen. 624 until fiscal year 1976 578
Secretary of Treasury
Protection
Holding in 54 Comp. Gen. 624 that funds appropriated to Secret Service are not available for protection of Secretary of Treasury because authorizing legislation, 18 U.S.C. 3056(a), does not include Secretary among those entitled to protection, is reaffirmed. Administrative transfer to Secret Service of function of protecting Secretary does not, without more, make Secret Service appropriations available for that purpose ... 578

VEHICLES
Acquisition by purchase or transfer
For use by grantees
Acquisition by agencies of aircraft and passenger motor vehicles by purchase or transfer is prohibited by 31 U.S.C. 638a, unless specifically authorized by appropriation act or other law, and this prohibition applies to acquisition by transfer by Law Enforcement Assistance Admin. of aircraft or passenger motor vehicles for use by grantees in their regular law enforcement functions because agency obtains custody and accountability and exception would reduce congressional control over aircraft and vehicles. See 44 Comp. Gen. 117. 43 Comp. Gen. 697, 49 *id.* 202, and B–162525, Dec. 21, 1967, distinguished 348

VIETNAM Page
Evacuation
Overtime claims by Defense Attache Office personnel in Saigon
Retroactive approval
Overtime performed by Defense Attache Office (DAO) personnel in Saigon during the period of Mar. 30, 1975, through Apr. 30, 1975, immediately prior to the evacuation of American personnel from South Vietnam, was approved by the Defense Attache on June 6, 1975, after the normal procedures for approval and payment of overtime had been modified. The compensation for overtime is mandatory where the work actually performed is officially ordered or approved 402
The retroactive modification of a regulation requiring that overtime performed by DAO civilian personnel be specifically approved by DAO division chiefs or their designated representatives is permissible since the regulation modified was primarily designed to govern internal agency procedures rather than designed to benefit party by entitling him to either substantive benefit or procedural safeguard. Accordingly, if Major General Smith is authorized official to approve payment of overtime, his approval of June 6, 1975, is sufficient to allow payment of overtime as reported on time and attendance reports of DAO civilian personnel 402

VOUCHERS AND INVOICES
Travel
Expenses of international visitors
Paid by contract escort
Expenses incurred by international visitors and paid for by contract escort are not reimbursable on voucher form SF 1012 since each traveler is required to sign voucher to claim reimbursement for authorized travel expenses which he personally incurred in performance of his official travel. However, assuming that travel authorizations have been obtained, travel expenses may be claimed and paid on SF 1164 ("Claim for Reimbursement for Expenditures on Official Business") or SF 1034 ("Public Voucher for Purchases and Services other than Personal") 437
Multiple-person travel expenses
Use of authorized form
Waived or modified
If multiple-person travel voucher would serve purpose of paying travel expenses incurred for foreign journalists touring U.S. under arrangements with U.S. Travel Service, Dept. of Commerce should seek approval by Administrator of GSA in accordance with para. 1–11.3a of Federal Travel Regs 437

WORDS AND PHRASES
Acclimatization rest
Granting of administrative leave to employee for acclimatization rest after he completed a full day of duty and traveled over 7 hours by air on return from Guam after crossing international date line is proper exercise of administrative authority. This is so since the CSC has not issued general regulations covering the granting of administrative leave and, therefore, each agency, under general guidance of decisions of Comptroller General, which are discussed in applicable FPM Supplement, has responsibility for determining situations in which excusing employees from work without charge to leave is appropriate 510

WORDS AND PHRASES—Continued Page

Counterpart funds

In absence of specific authorization in an appropriation act, 22 U.S.C.A. 1754(b) is the sole authority making counterpart funds (foreign currencies) available to members and employees of Congressional committees in connection with overseas travel. Under this provision, such funds are available only to specific committees, not including the House Select Committee on Aging, and to committees performing functions under 2 U.S.C.A. 190(d), which refers to *standing* Committees but not *select* committees. Accordingly, members and employees of the House Select Committee on Aging are not authorized to use counterpart funds 537

Legal process

State of Washington sought to garnish pay of Air Force civilian employee to collect child support under authority of sec. 459 of P.L. 93-647 by means of administrative garnishment order served on Air Force Finance Officer. Air Force refused to effect garnishment on ground that administrative order was not "legal process" within meaning of statute. In light of purpose of statute and lack of any limiting language, we believe "legal process" is sufficiently broad to permit garnishment by administrative order under Washington procedure. GAO would not object to Air Force payments under State administrative order 517

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