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[B-183419]

Officers and Employees—Transfers—Relocation Expenses—House Purchase—Interim Financing Loan

Transferred employee who obtains "interim financing loan" to be used as down payment on residence at new duty station, because residence at old duty station has not yet been sold, may not be reimbursed for any expenses relating to "interim" financing loan." Prohibition in 5 U.S.C. 5724a, Federal Travel Regulations and Joint Travel Regulations, against reimbursement of any losses on sale of residence due to market conditions is sufficiently broad to preclude reimbursement here, since need for "interim financing loan" arises because of market conditions.

In the matter of real estate expenses—interim financing loan, February 2, 1976:

This matter is a request dated March 2, 1975, for an advance decision submitted by the Finance and Accounting Officer, North Central Division, Corps of Engineers, Department of the Army, Chicago, Illinois, concerning the authority for reimbursing a transferred employee for the cost of an "interim financing loan" that was used as a down payment for the purchase of a residence at the employee's new duty station. For the reasons set forth below, the voucher may not be certified for payment.

Under the authority of travel order number 74-949, dated April 5, 1974, Mr. James P. Beirs was transferred from the Corps of Engineers, Detroit District, to the North Central Division in Chicago, Illinois. He reported to his new duty station on April 29, 1974. On April 15, 1974, settlement was held on the residence Mr. Beirs purchased at his new duty station. Because the settlement for the sale of Mr. Beirs' residence at his old duty station did not occur until July 31, 1974, he found it necessary to obtain an "interim financing loan" to be used as the down payment on his new residence. That loan was obtained on April 15, 1974, in the principal amount of $9,500. Interest in the amount of $263.26 was charged and various fees, for preparation and recording of documents, were incurred in the amount of $55. Mr. Beirs is seeking reimbursement for these items in the total amount of $318.26.

The authority for reimbursement of real estate expenses related to transfers is 5 U.S. Code § 5724a (1970), which is implemented by the Federal Travel Regulations (FTR), FPMR 101-7 (May 1973).

The provisions of the FTR are further implemented in volume 2 of the Joint Travel Regulations (2 JTR). Reimbursement of interest is specifically covered in 2 JTR para. C8352-1d (Change 91, May 1, 1973), which provides, in pertinent part, that:

* * * Interest on loans, points, and mortgage discounts are not reimbursable. Notwithstanding the foregoing, no fee, cost, charge, or expense is reimbursable which is determined to be a part of the finance charge under Truth in Lending

Act, Title I, Public Law 90–321, and Regulation Z issued pursuant thereto by the Board of Governors of the Federal Reserve System. * * *

It should also be noted that 2 JTR para. C8352–1e (Change 91, May 1, 1973) provides that:

Losses Due to Prices or Market Conditions at the Old and New Duty Stations. Losses due to failure to sell a residence at the old duty station at the price asked, or at its current appraised value, or at its original cost, or losses due to failure to buy a dwelling at the new duty station at a price comparable to the selling price of the residence at the old duty station, and any similar losses, are not reimbursable.

There is no authority in the JTR or FTR that deals more specifically with "interim financing loans."

Mr. Beirs contends that the prohibition against reimbursement of interest should not be extended beyond interest on mortgage loans. He contends that a person must pay interest on a mortgage either directly, if he owns a home, or indirectly if he rents, because everyone must live somewhere, but the interest on the "interim financing loan" must be paid only because of the transfer. He states that the interim loan is "substitute money" that is used only until the settlement for the sale of the former residence occurs.

It is true that the need to purchase a new residence arises only because of the transfer, but Mr. Beirs' argument seems to assume that all transfer-related expenses are reimbursable. That is not the case. Reimbursement is allowed only where it is specifically authorized. There is nothing in the regulations that authorizes payment of any expenses relating to "interim financing loans." On the contrary, there is a specific prohibition against the reimbursement of interest. We do not agree with Mr. Beirs' contention that this prohibition should be limited to interest on mortgage loans. The regulations contain no such limitation, and the prohibition against reimbursement of any "fee, cost or charge" that is found to be part of a finance charge under Federal Reserve Board Regulation Z, supports a broad interpretation of this provision. *See* B–176362, August 7, 1972.

We believe that the need to obtain an "interim financing loan" arises because of market conditions, in that the former residence could not be sold prior to the purchase of the new residence. The provisions of 2 JTR para. C8352–1e are simply an extension of 5 U.S.C. § 5724a(a)(4) (1970), which provides in pertinent part that "reimbursement may not be made for losses on the sale of the residence." The cost of the "interim financing loan," while not an actual loss on the sale of the residence, is an added expense that arises only because of market conditions. We believe that the prohibition against reimbursement of losses resulting from market conditions is sufficiently broad to exclude reimbursement of any expenses relating to an "interim financing loan."

[B–184716]

Officers and Employees—Contracting With Government—Public Policy Objectionability—Exception

Expenses of renting boat and equipment from Government employee for the purpose of performing acoustical measurements are not reimbursable as travel expenses. Equipment should have been obtained by procurement means with due regard to section 1–1.302–3 of the Federal Procurement Regulations and public policy prohibiting the Government from contracting with its employees except for the most cogent of reasons as where the Government's needs cannot otherwise reasonably be met. Payment may, however, be made on a *quantum meruit* basis insofar as receipt of goods and services has been ratified by an authorized official.

In the matter of the rental of boat and other equipment, February 2, 1976:

This action is in response to a request from a certifying officer of the National Bureau of Standards, United States Department of Commerce, for an opinion concerning the authority to pay its employee, Mr. Robert E. Stoltenberg, certain of the items of expense claimed on the travel voucher which he submitted in connection with a temporary duty assignment during the period May 9 through May 18, 1975.

The travel order pursuant to which Mr. Stoltenberg's temporary duty was performed authorized, among other expenses, "boat rental and miscellaneous purchases of equipment." In addition to transportation and per diem expenses Mr. Stoltenberg has claimed the following expenses:

Boat rental for 7 days	$140.00
Gasoline for boat	7.15
Gasoline for motor generator	6.68
Outboard oil for boat	2.38
Waders, 3 pair for project personnel	57.21
Life vest	27.99
Boarding ladder for boat and barge	14.90
Redwood, 2″ x 4″	2.71
Oak sounding rod	.71
	$259.73

The National Bureau of Standards expressed doubt as to whether the above-listed items of expense are payable as travel expenses.

In explaining the rationale for its authorization of boat rental and miscellaneous expenses, the Bureau states that the purpose of the temporary duty assignment was to perform acoustical measurements for the United States Navy and that the performance of such

measurements required the use of costly equipment which it did not own. While certain of the necessary items of equipment were loaned to the Bureau by the Navy, we are told that "timing and logistics prevented the loan of scuba and boat equipment." The Bureau's actions authorizing boat rental and purchase of equipment are explained as follows:

> Due to the limited time requirements for this equipment and the small yearly funding, each of which is contingent upon the preceding work, purchase of these items was not reasonable and rental was chosen. Due to the remoteness of the areas (Blythe and Needles, California vicinity on the Colorado River as well as some lakes in Colorado) rentals were not available locally. As a result, the equipment would have had to be rented in Denver or Phoenix requiring rental costs to include all travel time as well as the loss of personnel time required to pick up and return this equipment. In the case of the boat, no rental could be found which included the trailer. To acquire a trailer would have required additional arrangements and costs.
>
> Since project personnel owned this type of equipment, they were compensated at a rate less than commercial rental (nominally 80%) on a per day basis and were paid only for the time actually in use. The equipment was brought to NBS for the trips on their own personal time thus saving the salary money which would have been necessary to pick up and return the boat and scuba gear. The action was investigated with the travel unit prior to its inception two years ago to determine if any regulations specifically prohibited it. We were advised of none; however, our procurement people suggested the rental be accomplished via the travel order rather than a purchase request.

The laws and regulations governing reimbursement for travel expenses make no provision for payment of items of expense in the nature of those claimed by Mr. Stoltenberg inasmuch as they bear no relation to the travel of the employee involved. More correctly characterized, they are expenses for the acquisition or use of equipment or supplies necessary to accomplishment of the Bureau's mission. Their lease or acquisition should have been secured by proper procurement methods involving the execution of a lease contract or purchase order as appropriate.

There is, however, some question as to the propriety of the Government's execution of a contract or purchase order under the particular circumstances presented. With regard to the specific matter of a Government agency contracting with one of its employees, section 1–1.302–3 of the Federal Procurement Regulations (FPR) provides:

> (a) Contracts shall not knowingly be entered into between the Government and employees of the Government or business concerns or organizations which are substantially owned or controlled by Government employees, except for the most compelling reasons, such as cases where the needs of the Government cannot reasonably be otherwise supplied.
>
> (b) When a contracting officer has reason to believe that an exception as described in paragraph (a) of this section should be made, approval of the decision to make such an exception shall be handled in accordance with agency procedures and shall be obtained prior to entering into any such contract.

The above-quoted provision is the regulatory implementation of well-established policy. While contracts between the Government

and its employees are not expressly prohibited by statute, they are undesirable and should be authorized only in the exceptional case where the needs of the Government cannot reasonably be otherwise supplied. We have recognized that such contractual arrangements are open to criticism as to alleged favoritism. Particularly is this so in cases where the contract is between the employee and the particular service for which he works. *See* 4 Comp. Gen. 116 (1924), 5 *id.* 93 (1925), 13 *id.* 281 (1934), 14 *id.* 403 (1934), 27 *id.* 735 (1948), 41 *id.* 569 (1962).

An exception to this policy in the instance where the Government's needs cannot otherwise be met has been found to exist in a case somewhat similar to that under consideration. In B–146259, July 13, 1961, we considered the question of the propriety of the Army's award of a contract to one of its employees for the lease of equipment and horses for the Government's use in patrolling and inspecting the White Sands Missile Range. Copies of the Army's invitation for bids to furnish the required horses and equipment had been publicly posted and, in addition, copies had been sent to four individuals who were employed by the Army as range inspectors. Only one bid—that of the supervisory inspector—was received. Payment under the contract was authorized by this Office inasmuch as the services in question were essential to the operation of the Missile Range and were not otherwise available. We found the contract in that case to fall within the exception to the general policy prohibiting the Government from contracting with its own employees.

It is unclear from the record presented in this case whether the situation justifies the National Bureau of Standards' securing equipment from its own employees. The record indicates merely that it would have been more costly to have leased a boat from a commercial concern. We do not believe the fact that commercial arrangements would be somewhat more costly is sufficient to establish that the necessary equipment would not reasonably have been otherwise provided in view of the strong public policy against the Government's contracting with its employees. However, the agency is responsible for the determination required by section 1–1.302–3 of the FPR that compelling reasons exist for contracting with a Government employee.

In the future equipment needs of the Bureau should be met by proper procurement methods, with due regard to the Federal policy expressed in section 1–1.302–3 of the FPR. Although that portion of Mr. Stoltenberg's claim for lease or purchase expenses of equipment may not be certified for payment as travel expenses, we have recognized an obligation on the part of the Government to pay for the value of goods or services received without benefit of a valid contract.

See 37 Comp. Gen. 330 (1957), 38 *id.* 368 (1958), 40 *id.* 447 (1961), 46 *id.* 348 (1966). In such cases payment may be made on a *quantum meruit* or *quantum valebat* basis where it is shown that the Government has received a benefit and that acceptance of the unauthorized goods or services was expressly or impliedly ratified by the authorized contracting officials. *See* B–173765, November 18, 1971; B–180630, May 2, 1974; B–182584, December 4, 1974. It has been recognized that the acceptance of benefits by authorized representatives of the Government with knowledge of the circumstances may, in a proper case, result in a ratification of the unauthorized act by implication. B–164087, July 1, 1968; B–182854, *supra;* B–183878, June 20, 1975. We are told that in this case National Bureau of Standards procurement officials advised that rental of the equipment in question should be secured by travel order rather than by purchase order. Insofar as those officials may be authorized to procure the equipment by contractual means, their advice as to the use of a travel order may be regarded as sufficient indication of the required ratification. In the event that those officials are not so authorized, appropriate officials may, within their discretion, hereafter ratify the otherwise improper rental arrangements.

Action on the voucher should be taken in accordance with the foregoing.

[B–185134]

Retirement—Civilian—Service Credits—Military Service—Waiver of Retired Pay

Where retired member waived his retired pay to receive Veterans Administration compensation but informed Civil Service Commission that purpose of such waiver was to have his Civil Service annuity computed on basis of his total Federal service, we must conclude that member waived his retired pay for purposes of increasing his Civil Service annuity (pursuant to subchapter III of chapter 83 of Title 5, U.S. Code) even though Navy was not so advised until after member's death. Accordingly, his widow is not eligible for Survivor Benefit Plan annuity; however, she is entitled to all such costs remitted by member.

In the matter of Department of Defense Military Pay and Allowance Committee Submission No. DO–N–1242, February 2, 1976:

This action is in response to a letter dated September 5, 1975, with enclosures (file reference XO:AAF:blf 722 07 5737), from Mr. A. B. Emde, Disbursing Officer, Retired Pay Department, Navy Finance Center, Cleveland, Ohio, requesting an advance decision concerning the propriety of making payment of a survivor annuity under the Survivor Benefit Plan (SBP), 10 U.S. Code 1447–1455 (Supp. II, 1972), to Mrs. Mary H. Whaley as widow of Chief Boilerman Leslie H. Whaley, USN, Retired, SSAN 722 07 5737, in the circumstances described. That letter was forwarded to our Office

by endorsement dated October 7, 1975 (file reference NCF–411 7220/6–5), from the Navy Accounting and Finance Center and assigned submission number DO–N–1242 by the Department of Defense Military Pay and Allowance Committee.

In the submission it is stated that effective October 1, 1959, after having completed more than 30 years' active service, the member was placed on the Temporary Disability Retired List with a disability rated at 60 percent and that on June 1, 1964, he was permanently retired with a disability rating of 60 percent. In order to receive greater disability compensation payments from the Veterans Administration, the member waived his retired pay in its entirety on March 1, 1970, under the provisions of 38 U.S.C. 3105 (1970), and such waiver remained in effect until his death on December 4, 1973. The submission further states that on February 9, 1970, the United States Civil Service Commission requested verification of the member's retired pay status because he had applied for Civil Service retirement benefits and on March 12, 1970, the Navy Finance Center certified that for disability reasons the member had been awarded retired pay effective October 1, 1959, but such pay had been totally waived effective March 1, 1970.

The record shows that on October 3, 1972, the member made an SBP election pursuant to the provisions of section 3(b) of Public Law 92–425, approved September 21, 1972, 86 Stat. 706, 711 (10 U.S.C. 1448 note (Supp. II, 1972)), to provide an annuity for his surviving spouse. Since the member was not in receipt of retired pay due to the before–mentioned waiver, as required by 10 U.S.C. 1452(d) he submitted personal remittances to the Navy Finance Center for the cost of the SBP annuity for the period November 1, 1972, through December 31, 1973.

The submission states that following the member's death on December 4, 1973, appropriate claim forms were forwarded to his widow for completion in order that she could receive the annuity payable under the SBP as well as the arrears of retired pay due from December 1 through December 4, 1973. In response, the Navy Finance Center was informed by the member's daughter that he had been in receipt of Civil Service annuity payments prior to his death and his widow had chosen to receive the Civil Service survivor annuity based on the member's total years of Federal service in lieu of the SBP annuity. In view of that response, officials at the Navy Finance Center contacted officials at the Civil Service Commission by telephone and were advised that: (1) the member's military service was included in the computation of his Civil Service annuity which was effective March 1, 1970; (2) upon his death, the Civil Service survivor annuity payable to his widow also included such service in its computation; (3) according

to the records of the Bureau of Medicine and Surgery, Navy Department, Washington, D.C., the disability for which the member was militarily retired was not combat-incurred nor caused by an instrumentality of war; and (4) the member did not require the use of his military service in order to qualify for Civil Service retirement. Written confirmation of this information was furnished the Navy Finance Center by letter dated August 18, 1975, which also advised that it previously had been the policy of the Civil Service Commission to automatically include a member's military service in the computation of the Civil Service annuity if his military retired pay had been waived, regardless of the reason for the waiver.

The submission also states that a request that the purpose of his waiver be changed to show that his retired pay was waived for Civil Service benefits, rather than for Veterans Administration compensation, was never submitted to the Navy Finance Center by the member. Therefore, insofar as the Navy's records were concerned, a waiver for Veterans Administration compensation was in effect at the time of his death. In addition, had such compensation been discontinued or reduced to an amount less than his retired pay entitlement prior to his death, his retired pay would have been reinstated accordingly.

The submission further states that 10 U.S.C. 1450(d) provides that an SBP annuity is not payable if, at the time of a member's death, a waiver is in effect for the purpose of including military service in the computation of Civil Service annuity benefits and, in addition, he had elected to participate in the Civil Service survivor annuity program. In this regard, it is pointed out that our decision, 53 Comp. Gen. 857 (1974), held that SBP costs in such cases need not be deposited during the period such waiver is in effect. It is also stated that because of the absence of a request that his retired pay be waived for Civil Service purposes, it is questionable as to whether section 1450(d) is applicable in the present case, since our decision 41 Comp. Gen. 460 (1962) held that a member who was unable to gain title to Civil Service benefits without the inclusion of his military service must be regarded as having actually or constructively waived or relinquished his right to receive retired pay in order to receive the increased Civil Service annuity. However, it is noted that the circumstances of that case differ from those in the present case in that the inclusion of the member's military service was not necessary in order to establish his eligibility for Civil Service retirement benefits.

Finally, the submission states that if it is determined that a waiver for Civil Service annuity benefits was in effect at the time of the member's death, then it would appear that Mrs. Whaley would be entitled to a refund of SBP costs remitted by her husband since No-

vember 1, 1972. Conversely, if it is held that no such waiver existed, Mrs. Whaley would be entitled to retired pay due and payable for the month of her husband's death as well as to SBP annuity payments commencing December 5, 1973, less offsets for Dependency and Indemnity Compensation and Social Security benefits, if applicable. In turn, however, not only would Mrs. Whaley's Civil Service survivor annuity require a recomputation to exclude credit for her husband's military service but it appears that a portion of the Civil Service survivor annuity already paid to her based on his military service would constitute an overpayment by the Civil Service Commission. In such circumstances, it would also appear that the Civil Service annuity received by the member from March 1, 1970, until December 4, 1973, was excessive in that the basic computation of the annuity should not have included credit for his military service.

Subsection 1450(d) of Title 10, U.S. Code (Supp. II, 1972), provides as follows:

(d) If, upon the death of a person to whom section 1448 of this title applies, that person had in effect a waiver of his retired or retainer pay for the purposes of subchapter III of chapter 83 of title 5, an annuity under this section shall not be payable unless, in accordance with section 8339(i) of title 5, he notified the Civil Service Commission that he did not desire any spouse surviving him to receive an annuity under section 8341(b) of that title.

Subsection 1452(e) of Title 10, U.S. Code (Supp. II, 1972), provides as follows:

(e) When a person who has elected to participate in the Plan waives his retired or retainer pay for the purposes of subchapter III of chapter 83 of title 5, he shall not be required to make the deposit otherwise required by subsection (d) as long as that waiver is in effect unless, in accordance with section 8339(i) of title 5, he has notified the Civil Service Commission that he does not desire any spouse surviving him to receive an annuity under section 8341(b) of title 5.

As it is indicated in the submission, subsection 1450(d) precludes the payment of an annuity under the SBP when a retired member has in effect a waiver of retired pay for the purpose of including his military service in the computation of his Civil Service annuity, unless he specifically notifies the Civil Service Commission that he does not desire a survivor annuity under that retirement system. Also, under the provisions of 10 U.S.C. 1452(e), while a retired member has a waiver of retired pay in effect for Civil Service retirement purposes and has not notified the Civil Service Commission that he does not desire coverage under the Civil Service survivor annuity plan, premium deposits are not necessary under the SBP. This in effect provides coverage for his survivor under the Civil Service program.

We have consistently taken the position that what constitutes creditable service for purposes of the Civil Service Retirement Act is a matter primarily for determination by the Civil Service Commission.

See, e.g., 41 Comp. Gen. 460, *supra*. Civil Service Regulations provide that credit is not allowed for military service if the employee is receiving retired pay awarded for a nonservice-connected disability. 5 C.F.R. 831.301 (1969) through (1975). The Civil Service Commission interprets this regulation as providing for crediting military service if the employee is not receiving military retired pay. No specific statement is required as to the purpose of a waiver of retired pay if such waiver is in effect. If the member has a waiver in effect which under Civil Service Commission procedures permits payment of a Civil Service annuity based upon his military service and no declaration of survivor coverage under that system was executed we do not believe that he can also be covered under the SBP. However, it is to be noted that in this case the record shows that by letter dated December 19, 1969, addressed to the Civil Service Commission, the member stated that it was his intention to waive his military retired pay for the purpose of having his Civil Service annuity computed on the basis of his total Federal employment.

In these circumstances, we must conclude that since on the date of his death, the member had in effect a waiver of retired pay which permitted increasing his Civil Service annuity based on his military service, he was not entitled to coverage under the SBP. Accordingly, Mrs. Whaley is not eligible for an SBP annuity. However, she is entitled to a refund of the personal remittances made by the member to cover the costs of the SBP annuity for the period November 1, 1972, to December 31, 1973. *See* 53 Comp. Gen. 857, *supra*.

[B-180221]

Licenses—Use of Sewage System—Revocable License for Limited Use

Perryville, Maryland, recreational park may be permitted to discharge sewage into Veterans Administration (VA) sewage system if VA determines administratively that arrangement is in interest of Government, and agreement constitutes only revocable license for limited use.

Water—Sale—Excess or Surplus

VA hospital which has water filtration plant currently running at half its rated capacity may sell water to town of Perryville, Maryland recreational park, if VA administratively determines plant in ordinary course of business produces excess water and sale is in Government's interest.

In the matter of Perryville, Maryland—sale of surplus water and use of Veterans Administration sewage system, February 3, 1976:

The Veterans Administration (VA) has requested our opinion as to whether its VA Hospital in Perry Point, Maryland, may sell to the

town of Perryville, Maryland, approximately 10,000 gallons of fresh water per day, which are excess to its needs, and may offer the use of sewer lines to discharge approximately 2,500 gallons of sewage per day. The VA advises us that on November 14, 1972, the Department of the Interior deeded to the town of Perryville, Maryland, 44 acres of surplus land adjacent to the Perry Point, Maryland, VA Hospital. The land is to be used as a recreational area for area residents and hospital patients. There are, however, no utilities available on the site, although a rest room has been built on the site, which the town hopes can be made operational through a hook-up with the VA Hospital water and sewage system. The hospital is located between the park and the town, and the park is almost 1 mile from the town limits. The hospital grounds cover all of the access routes between the park and the town, making it both difficult and expensive for the town to develop its own sewer and water system. The town proposes to install a meter on the water and sewage lines to measure the amount used by park visitors and to reimburse the VA for such usage.

The VA Administrator states:

> * * * We see no objection to the matter of discharge, since the hospital sewage system discharges into the town system, and the hospital system has adequate capacity; discharge would be in the nature of an easement across the hospital property. With respect to water capacity, the hospital has a filtration plant which utilizes river water. This plant is presently running at about half of its rated capacity (capacity 400–500,000 gallons daily). The cost of processing water is around 28 cents per thousand gallons. The addition of processing 10,000 gallons per day would increase the costs of production by about 1 or 2 cents per thousand gallons.

We agree that the town may be permitted to discharge sewage from the park into the hospital sewage system. Such discharge would constitute a limited use of Government property for moving park sewage across the hospital property, since the hospital system, under agreement with the town, presently discharges into the town system. We see no reason to prohibit such use of the Government property in question provided it does not injure the property, if the VA determines administratively that such use would be in the interest of the Government, and the agreement or contract therefor is so drawn as to constitute only a revocable license or permit for such limited use of the property. *See* 22 Comp. Gen. 563 (1942), 44 *id.* 824 (1965), and decisions cited therein.

The sale of water from the hospital filtration plant would generally be contrary to the opinion expressed in several of our earlier cases that appropriated funds may not be used to manufacture products or materials for or otherwise supply services to private or non-Federal parties, in the absence of specific statutory authorities. 15 Comp. Dec. 178; B–69238, July 13, 1948. At 34 Comp. Gen. 599 (1955), we discussed the question whether the Bureau of Reclamation

might execute a contract for the construction of a sewage system in excess of the capacity required by the Government to be used jointly by a Reclamation project camp and the general public. We held there that, even though the cost of the larger sewage system would be about the same as a smaller system built only for the use of the Government, in the absence of specific statutory authority the Bureau of Reclamation could not expend funds to construct the larger system.

In 28 Comp. Gen. 38 (1948), however, the question was whether the Bureau of Mines could sell *excess* electric energy to a private activity. The Bureau of Mines operated a steam generating plant which was owned by the Government and which had the capacity to produce electric energy in excess of the Bureau's needs. After stating the general rule, we said:

> * * * However, it has long been held that, where a Government agency in the course of its operations produces electric current in excess of its needs, disposition of the surplus by sale to a non-Government activity is not legally objectionable. 5 Comp. Gen. 389; 11 *id.* 144. Therefore, if it be administratively determined to be in the interest of the Government to operate the generating plant involved at its capacity, no objection will be interposed to the disposition of the excess electric power by sale to the Northeast Missouri Power Coop in the manner contemplated by the terms of the proposed agreement.

Also, in A–34549, December 19, 1930, involving the sale of steam by the Capitol power plant to the Pennsylvania Railroad, we stated:

> * * * A Government service may not, ordinarily, make use of appropriated funds to manufacture for or otherwise supply services to a non-Government activity. 15 Comp. Dec. 178. However, where a Government service necessarily produces in the ordinary course of its business, a surplus of any particular commodity, such surplus may be sold or otherwise disposed of. 5 Comp. Gen. 389. * * *

There appears to be no reason why the exception for sales of surplus services or commodities should not apply as well to the sale of excess water.

Hence, if the VA determines that in the ordinary course of its business the hospital's water filtration plant produces an excess of water, and that the sale of such excess water to the town of Perryville for use in the park is in the Government's interest, there is no legal objection to such sale.

[B–183978]

Subsistence—Per Diem—Actual Expenses—Lodgings at More Than One Temporary Duty Station

Where employee of Federal Mediation and Conciliation Service incurred dual lodging expenses on the same nights, and travel order authorized reimbursement of actual subsistence expenses not to exceed $40 per day and his subsistence expenses exceeded $40 each day, reimbursement of actual subsistence expenses up to $40 each day may be made, provided appropriate agency official determines employee had no alternative but to retain lodgings at regular temporary duty post while occupying lodgings at other temporary posts.

In the matter of actual subsistence expenses, February 3, 1976:

This action is in response to a request by an authorized certifying officer of the Federal Mediation and Conciliation Service for our decision as to whether Mr. Robert H. Johnston, a mediator with the agency, is entitled to reimbursement for lodging expenses incurred on the same night at two different temporary duty points and if so, what limitations, if any, are placed upon such reimbursement.

The certifying officer has submitted the claimant's expense voucher and states, in pertinent part, as follows:

> While in Tucson, Mr. Johnston rents an apartment on a monthly basis. His job sometimes requires overnight trips away from Tucson, in which case he incurs the additional expense of paying for two lodging accommodations for the same night. In April of this year, Mr. Johnston traveled on official business to Window Rock and Second Mesa, Arizona, and stayed overnight in each place, which resulted in paying for lodging accommodations in both Tucson and the above-mentioned places.
>
> Please advise if Mr. Johnston is entitled to both lodgings for this period of time, and if so, can he claim the entire amount even though it is over $40.00? Can he claim a flat $40.00 for each of these days? Federal Mediation and Conciliation Service Travel Regulations state that its employees who are "authorized (or approved) to claim actual subsistence, may be reimbursed such expenses in an amount not to exceed the actual cost of hotel sleeping room, plus tax, and the actual cost (not to exceed $12.00) of meals, tips, and other items of personal expense, total not to exceed $40.00 per day." Mr. Johnston's Travel Authorization allows him actual expenses, which are as follows:

Dates	Lodging	Lodging	Meals	Total per day
4/20-21/75	$18.88	$16.00	$12.00	$46.88
4/22-24/75	$18.88	$14.42	$12.00	$45.30

Travel Authorization No. 075-163 dated March 5, 1975, states that the purpose of the travel by Mr. Johnston was in connection with mediation of the Navajo-Hopi Land Dispute. Travel was to begin approximately on March 7, 1975, and terminate approximately on March 31, 1975. The subsistence allowance specified was "Hotel plus tax plus up to $12.00 for miscellaneous expense not to exceed $40.00 per day." An amendment dated April 1, 1975, to the original travel authorization extended the travel period from April 1 to June 30, 1975.

In a statement dated April 25, 1975, the claimant reported that lodging on various dates was claimed for apartment 24, Catalina Foothills Lodge, Tucson, Arizona, where the mediation office for the land dispute was set up. He states that it was necessary for him to obtain an apartment in order to be available on a full-time basis in the Tucson area for mediation meetings. He explains that lodging expenses were also claimed at Window Rock and Second Mesa, Arizona, where travel away from Tucson was necessary to conduct official business in connection with the land dispute. Mr. Johnston limited his claim to $40 per day.

The primary question is whether Mr. Johnston is entitled to reimbursement for lodging expenses incurred on the same night at two

different duty points and is he entitled to the total amount of subsistence expenses expended on each of the 2 days in question. Federal Travel Regulations (FTR) (FPMR 101–7, May 1973) effective during the period the travel in question occurred provides in paragraph 1–8.1b as follows:

> *Duty of heads of agencies.* Heads of agencies, as defined in 5 U.S.C. 5701, shall in accordance with the provisions of this part prescribe conditions under which reimbursement may be authorized or approved for the actual and necessary subsistence expenses of a traveler. Such conditions shall restrict travel on an actual subsistence expense basis to those travel assignments where necessary subsistence costs are unusually high. They shall not permit the use of the actual subsistence expense basis where necessary subsistence expenses may exceed the statutory maximum per diem allowance by a small amount. Because hotel accommodations constitute the major part of necessary subsistence expenses, travel on an actual subsistence expense basis might appropriately be authorized or approved for travel assignments which otherwise meet conditions prescribed by the head of the agency where the traveler *has no alternative* but to incur hotel costs which would absorb all or practically all of the statutory maximum per diem allowance. [Italic supplied.]

In construing the aforecited regulation, the decisions of this Office have held that if it is determined by an appropriate official (see para. 1–8.1c) of an agency that an employee had no alternative but to retain his lodgings at his regular temporary duty post while occupying lodgings at other temporary posts where lodgings were also required, to insure the availability of lodgings upon return to his original temporary duty post, we would interpose no objection to the allowance of expense items for the dual lodgings, subject to the actual expense limitation stated in the travel order. B–164228, October 9, 1975; B–182600, August 13, 1975; B–164228, June 17, 1968; B–158882, April 27, 1966; and B–155141, October 20, 1964.

Since, by statute (5 U.S. Code § 5702(c) (1970)), actual and necessary subsistence expenses incurred inside the continental United States could not exceed $40 each day during the period in question, an actual expense limitation in the same amount was contained in the claimant's travel order, and as Mr. Johnston's subsistence expenses exceeded $40 per day for each of the days in question, he would be entitled to reimbursement of his subsistence expenses at the rate of $40 for each day, provided the aforementioned administrative determination of necessity is made by an appropriate official of the Federal Mediation and Conciliation Service.

The certifying officer also states that this decision will affect the payment of the voucher under consideration and any future vouchers submitted by Mr. Johnston for similar claims. In this connection, it is to be noted that paragraph 1–8.1 of FTR (May 1973) has been revised by Attachment A of FPMR Temporary Regulation A–11, effective May 19, 1975. However, paragraph 1–8.1c(1)(b), as did its predecessor paragraph, allows the authorization or approval of actual subsistence expense reimbursement where "the traveler has no alternative but to

incur hotel costs which absorb all or nearly all of the maximum per diem allowance (see 1–7.2), since hotel accommodations constitute the major portion of necessary subsistence expenses." Hence, the aforestated rule governing reimbursement where dual lodgings are required would still be applicable.

Subject to the requirements previously set forth, the instant voucher may be certified for payment, if otherwise proper.

[B–184186]

Contracts—Negotiation—Offers or Proposals—Revisions—Cost

Authority in Federal Procurement Regulations 1–3.805–1(a)(5) to make award on "initial proposal" basis operates only to permit acceptance of proposal exactly as initially received. Consequently, award, incorporating revised cost proposal submitted by successful offeror in response to call for "best and final" offers (which constituted negotiation), was not made under initial proposal authority.

Contracts—Negotiation—Competition—Discussion With All Offerors Requirement—What Constitutes Discussion

General Services Administration (GSA) did not conduct meaningful negotiation with unsuccessful, albeit competitive-range, offeror, since it did not explore purported deficiency in phase-in costs.

Contracts—Termination—Negotiation Procedures Propriety

Although defects in negotiation procedures would ordinarily prompt recommendation that contract be terminated, if contractor was not successful after further round of negotiations, recommendation is not made considering unusual circumstances of case.

Contracts—Janitorial Services—Advertising *v.* Negotiation

Since question of whether negotiated award method is proper for GSA's awards of janitorial services is of widespread interest, given number of janitorial services' awards made by GSA and number of protests pending involving negotiated janitorial services' awards, protest will be considered even though untimely raised under Bid Protest Procedures.

Contracts—Negotiation—Justification—Requirement

Notwithstanding desired use of negotiated award method for given procurement or range of procurements, negotiation must be objectively justified in view of statutory preference (41 U.S.C. 252(c)) for formal advertising.

Contracts—Negotiation—Level of Quality

None of the exceptions to formal advertising (as set forth in 41 U.S.C. 252(c)(1)–(15)) expressly authorizes use of negotiations only to secure desired level of quality of janitorial services or to obtain incentive-type contract. Moreover, analysis of legislative history of Federal Property and Administrative Services Act (40 U.S.C. 471), under which questioned negotiated award of services was made, shows that Congress specifically rejected proposal to permit negotiation to secure desired level of quality of supplies or services.

Contracts—Cancellation—Negotiation Procedures Propriety

Finding that janitorial services contract was improperly negotiated does not lead to conclusion that contract must be canceled, since cancellation is reserved for contracts illegally awarded, and under rationale of Court of Claims decisions illegal award results only if it was made contrary to statutory or regulatory requirements because of some action or statement by contractor or if contractor was on direct notice that procedures being followed were violative of requirements.

Bids—Prices—Below Cost

Because of GSA's widespread difficulties with deficient performance on formally advertised janitorial services contracts, GSA's possible misunderstanding of the decisions of General Accounting Office (GAO) as applied to "below cost" bidding, and GAO opinion that GSA should be given time to study alternative solutions to difficulties, termination of protested award is not recommended.

Contracts—Options—Not to Be Exercised—Janitorial Services

Recommendation is made that options in questioned negotiated janitorial services contract, and similar outstanding janitorial services contracts, not be exercised and that GSA immediately commence study of appropriate methods and clauses for improving formal advertising procurement method for future needs of janitorial services.

In the matter of Nationwide Building Maintenance, Inc., February 3, 1976:

On June 13, 1975, a protest was received from Nationwide Building Maintenance, Inc. (Nationwide), against the June 3, 1975 award of a cost-plus-award-fee contract under request for proposals (RFP) No. 03C5080101, issued by the General Services Administration (GSA). GSA issued the RFP on January 6, 1975, for janitorial services at the Internal Revenue Service Center, Philadelphia, Pennsylvania, for a 1-year period from date of award with an option reserved for 2 additional years of services. The questioned award was made to Ensec Service Corporation (Ensec) after GSA considered proposals from nine offerors.

Nationwide contended that GSA failed to conduct meaningful negotiations with it concerning the award in question in contravention of Federal Procurement Regulations (FPR) § 1-3.805-1(a) (1964 ed. amend. 118) which requires that "After receipt of initial proposals, written or oral discussions shall be conducted with all responsible offerors who submitted proposals within a competitive range, price and other factors considered * * *." Specifically, Nationwide points out that although its offer was considered deficient for failing to include a phase-in cost factor, GSA did not discuss this alleged deficiency with it. Nationwide further insists that it properly omitted phase-in costs for the requirement because, as the incumbent contractor, it would not incur phase-in costs.

GSA is of the opinion that it did not conduct discussions with competitive-range offerors (including Ensec and Nationwide) and, moreover, that it did not have to conduct discussions because, after obtaining "best and final" offers, it properly made award on an "initial proposal" basis under FPR § 1-3.805-1(a)(5) (1964 ed. circ. 1). The regulation provides, in effect, that award may be made on an initial proposal basis to the concern submitting the most favorable initial proposal if this would result in a fair and reasonable price and if there is no uncertainty as to the pricing or technical aspects of any proposals.

The authority to make an "initial proposal" award operates only to permit acceptance of a proposal exactly as it was initially submitted. 48 Comp. Gen. 663, 667 (1969). Although GSA maintains that it did not conduct negotiations with offerors so as to give offerors opportunities to change their initial proposals, the request for "best and final" offers, and offerors' replies, must be considered "negotiation" since offerors were thereby afforded opportunities to revise their proposals. *Dyneteria, Inc.*, B-181707, February 7, 1975, 75-1 CPD 86.

Further, GSA's record of proposal evaluation shows that Ensec submitted "revised data" (involving proposed lower costs in G&A amount, award fee, equipment and materials) in response to the "best and final" call and that the revised cost data were incorporated in the award. Since the Ensec award was made on the basis of a revised cost proposal, pursuant to negotiation, GSA could not properly cite FPR § 1-3.805-1(a)(5) as authority for the award.

Since GSA entered into negotiations with offerors, it was obliged to make those discussions meaningful. *Raytheon Company*, 54 Comp Gen. 169 (1974), 74-2 CPD 137; 51 Comp. Gen. 431 (1972); 50 *id.* 117 (1970). As we stated in 50 Comp. Gen., *supra*, at page 123:

> FPR 1-3.805-1 requires that discussions be conducted with all offerors within a competitive range, price and other factors considered. It is a well-established principle in Federal procurements that such discussions must be meaningful and furnish information to all offerors within the competitive range as to the areas in which their proposals are believed to be deficient so that competitive offerors are given an opportunity to fully satisfy the Government's requirements. 47 Comp. Gen. 336 (1967). When negotiations are conducted the fact that initial proposals may be rated as acceptable does not invalidate the necessity for discussions of their weaknesses, excesses or deficiencies in order that the contracting officer may obtain that contract which is most advantageous to the Government. * * *

Because Nationwide's offer (which was $4,000 less than Ensec's offer in estimated cost) was within the competitive range for the award, we are of the opinion that meaningful negoatiations, under the above-stated principles, should have been conducted with Nationwide to explore its purported deficiency in the phase-in cost area, expecially since "phase-in-cost" was not specifically listed as a proposal evaluation factor. *Cf.* 50 Comp Gen. 637 (1971).

Although the above-determined departures from well-established principles governing negotiated procurements would ordinarily prompt us to recommend termination for convenience of Ensec's contract, if it was not successful after a further round of negotiations, it is our conclusion, as explained below, that this remedy, under the particular circumstances of this case, should not be applied.

Nationwide's protest, as supplemented, also questioned GSA's authority to negotiate the award of the janitorial services. The legal propriety of the cost-type award was also questioned. Nationwide recognized that these questions related to the "form of the RFP" and therefore should have been raised, under our Bid Protest Procedures, prior to the date set for receipt of proposals. It argues, however, that we should consider these issues to be "significant to procurement practices or procedures" under section 20.2(c) of our Procedures, and, therefore, eligible for our review.

Since the question of the proper method of procuring these services is one of widespread interest, given the number of janitorial awards made by GSA and the number of protests currently pending in our Office involving GSA negotiated janitorial services' awards, these issues will be considered. Cf. *Ira Gelber Food Services, Inc.; T and S Service Associates, Inc.*, 54 Comp. Gen. 809 (1975), 75-1 CPD 186.

The RFP contains information that the subject solicitation was negotiated under authority of 41 U.S. Code § 252(c)(10) (1970) which provides that contracts may be negotiated by the agency head (in this case the Administrator of GSA) "for property or services for which it is impracticable to secure competition." The Administrator's power, in this particular case, was redelegated, under authority of 41 U.S.C. § 257(a) (1970), to the Regional Commissioner of the Public Buildings Service, GSA.

According to the mandate in FPR § 1-3.210(b) (1964 ed. circ. 1) (concerning limitations on the authority described in 41 U.S.C. § 252(c)(10)), a determination and findings (D&F) justifying use of the authority was prepared. The D&F provides:

FINDINGS

The use of formally advertised, low bid, fixed price contracting procedures by the General Services Administration has not resulted in the desired level of quality for services procured. The quality of work has shown a general declining trend apparently without regard to the size and experience of the contracting firm. There are strong indications that the present system of assessing penalty deductions for control of quality in service contracts is at fault. The penalty deduction system increases the susceptibility and probability of protests and appeals on the part of the contractors, which results in a general undesirable increase in administrative time and expense on the part of GSA in administering the contracts, while doing nothing to foster good relations with the contractors, or to improve performance.

The requirement to award contracts to the low bidder has often resulted in receipt of irresponsible bids from firms which lack the professional capability, experience, and the required resources to satisfactorily perform the required services. In a few cases, contractors have submitted bids considerably below the Government's estimate of the minimum reasonable cost to accomplish the services being solicited. It is factural that a contractor will not maintain an acceptable level of performance with a "below cost" contract. Even so the Comptroller General ruled (B-171419) that because a bid is below reasonable cost expectations is not sufficient reason for rejection of the bid.

GSA experience has shown that the use of an incentive type contract has produced the desired results in obtaining a very high quality performance for service contracts. An incentive type contract allows reimbursement of audited costs, and provides incentive for excellence in the form of a performance award fee which is awarded in whole or in part as determined by an Award Fee Determination Board, based upon a graded level of performance. The fee schedule is designed to provide motivation for excellence in contract performance in areas of quality, cost effectiveness, and ingenuity, while at the same time holding the fee well below the maximum of 10% of cost for service contracts.

The incentive contracting program has truly upgraded the level of quality for services in Government buildings. Incentive contracts have been eminently successful in procuring quality service at costs below the GSA Force Account estimate.

Budgetary and manning restrictions require increased procurement of services from commercial sources. The record shows that the incentive contracting program of competitive selection and negotiation with qualified offerors provides the desired level of quality service at a most reasonable cost.

As required by Section 302(c)(10) of the Federal Property and Administrative Services Act, and for the reasons set forth above, it is determined that it is impracticable to secure services of the kind and quality required without the use of an incentive type contract, and it is recommended that authorization be given to negotiate an incentive contract to provide the required services.

DETERMINATION

Based upon the foregoing findings, it is hereby determined, in accordance with Section 302(c)(10) of the Federal Property and Administrative Services Act of 1949, (63 Stat. 377), as amended, and FPR 1-3.210(a)(13), that this requirement is "for property or services for which it is impracticable to secure competition" because it is impossible to set out adequate detailed specifications which will describe the performance objectives by definite milestones, targets or goals susceptible of measuring actual performance to provide satisfactory services for the Government, and the negotiation of an incentive contract is hereby authorized to provide janitorial services at the IRS Service Center, 11601 Roosevelt Boulevard, Philadelphia, PA.

The Findings reveal GSA's opinion that the formal advertising method has not achieved the level of service thought desirable for janitorial services. Thus, the phrases "desired level of quality," "quality of work," "quality in service contracts," "quality services," "level of quality," "very high quality performance" and "quality required," are found in the paragraphs of the Findings. Moreover, in a report on a similar protest, GSA has advised:

> The circumstances justifying negotiation in this instance are not related to quantities, however, but to the Government's inability in general to specify and obtain the level or quality of service required to meet the Government's needs.

This inability to obtain the desired level of quality for the required janitorial service, coupled with the belief that only a negotiated, incentive-type contracting method would improve service, prompted

the Determination that adequate specifications, suitable for formal advertising, could not be drafted.

We note, however, that Section C, Part 4, Custodial Specifications, of the RFP, contains 19 pages of detailed specifications for the janitorial services. Further, it is implicit from the narrative in the Findings that GSA has used specifications similar to those in the RFP to previously procure janitorial services under formal advertising. It is also our understanding that the military services, which also are involved in a significant number of procurements of janitorial services, invariably use formal advertising (although restricted to competition among small business concerns) to procure janitorial services.

Notwithstanding the desired use of the negotiated method for a given procurement or range of procurements, negotiation must be objectively justified in view of the statutory preference (41 U.S.C. § 252(c) (1970)) for formal advertising. None of the exceptions to formal advertising (as set forth in 41 U.S.C. § 252(c)(1)–(15) (1970)) expressly authorizes the use of negotiation only to secure a desired level of quality of services or to obtain an incentive-type contract. Moreover, our analysis of the legislative history of the Federal Property and Administrative Services Act (40 U.S.C. § 471 (1970)), under which the purchase was made, reveals that the Congress specifically rejected the proposal to permit negotiation to secure a desired level of quality of supplies or services. As we stated in 43 Comp. Gen. 353, 370 (1963):

> In this connection it would appear to be especially pertinent to note that H.R. 1366, 80th Congress, which subsequently was enacted as the Armed Services Procurement Act of 1947, originally included, as Section 1(xii), a request for authority to negotiate under the following circumstances:
>
> "(xii) for supplies or services as to which the agency head determines that advertising and competitive bidding would not secure supplies or services of a quality shown to be necessary in the interest of the Government."
>
> As passed by the House of Representatives, H.R. 1366 included this authority, and the necessity and justification for its enactment by the Senate was presented to the Senate Committee on Armed Services by the Assistant Secretary of the Navy during hearings on June 24, 1947, with the following concluding statement:
>
> "Where quality is a matter of critical—in many cases life-and-death—importance, discretion must reside in the services to select sources where experience, expertness, know-how, facilities and capacities are believed to assure products of the requisite quality. Where national security or the safety and health of personnel of the services are involved, any compromise of quality dictated by mandatory considerations of price would be indefensible." (See page 15, Hearings before the Committee on Armed Services, United States Senate, on H.R. 1366, 80th Congress.)
>
> Notwithstanding the above, the Senate Armed Services Committee deleted this provision from the bill and explained its action at page 3, Senate Report No. 571, 80th Congress, as follows:
>
> "The bill was amended by deleting the authority to negotiate contracts for the purpose of securing a particular quality of materials. Your Committee is of the opinion that this section is open to considerable administrative abuse and would be extremely difficult to control. For this reason it has been eliminated."

As indicated by the legislative history of the Federal Property and Administrative Services Act, that act was intended to extend the same procurement principles to civilian agencies of the Government as had previously been conferred upon the military departments by the Armed Services Procurement Act of 1947. See page 6, House Report No. 670, and page 5, Senate Report No. 475, 81st Congress. [Italic supplied.]

The Court of Claims made a similar analysis of the legislative history involved in *Schoenbrod* v. *United States*, 410 F. 2d 400, 402–403 (1969).

When agencies have failed to obtain priced proposals in negotiated procurements or having obtained price proposals have neglected to secure appropriate price competition, we have concluded that negotiation was actually being employed solely to obtain services and products of the highest quality in contravention of the expressed congressional intent. *See* B–175094, May 9, 1972; 50 Comp. Gen. 679 (1971); 50 *id.* 117, *supra*; 43 *id.*, *supra*; 41 *id.* 484 (1962). Cost proposals from nine offerors were obtained here—although GSA erroneously believed that it did not conduct cost discussions (other than a request for "best and final" offers) with offerors because adequate cost experience existed from prior procurements of services. Notwithstanding the solicitation of cost proposals, it is our view that using negotiation solely to secure a desired quality of services was contrary to the statutory authority for negotiation. We consider GSA's preference for an incentive-type contract as part of its desire for quality services and do not view the preference as constituting a separate reason for the negotiation. We must therefore conclude that the determination to negotiate the service requirement is not rationally founded within the limits of existing law.

Our finding that the contract was improperly negotiated does not lead us to the further conclusion, as urged by Nationwide, that the contract must be canceled. Cancellation is reserved for contracts illegally awarded. An illegal award, under the rationale of several Court of Claims decisions, results only if it was made contrary to statutory or regulatory requirements because of some action or statement by the contractor or if the contractor was on direct notice that the procedures being followed were violative of the requirements. 52 Comp. Gen. 215, 218 (1972). Since Ensec was not aware of GSA's rationale for negotiating the janitorial services or that the rationale was not legally sound, the award must be considered improper rather than illegal. Consequently, the only theoretically available remedy is termination for convenience rather than cancellation.

We appreciate the administrative difficulties GSA has had in administering janitorial services contracts. These difficulties are similar to those that the Department of the Navy had recited in the past as justification for negotiating mess attendant (KP) services

contracts. However, the Department of the Navy has since advised our Office that the use of the negotiated format generated numerous protests because offerors were "unable to reasonably predict the application of the [RFP's] evaluation factors" and that procurement of mess attendant services by formal advertising would result in a "more uniform treatment of bidders, in addition to encouraging more realistic competition." *Ira Gelber Food Services, Inc., supra.* The five protests that we have received this year involving GSA's negotiated awards of janitorial services are some evidence, in our view, that the Navy's cited experience may be repeated in GSA's negotiation of janitorial services contracts.

GSA's problems in janitorial services contracts involve contract administration and contractor motivation. We question that suitable administrative/motivation solutions to these problems cannot be found within the context of the statutory preference for formal advertising. For example, the Findings cite B–171419, March 12, 1971, for the proposition that "below cost" bidding is not a sufficient reason for rejecting a bid. The Findings fail to acknowledge, however, that we have recognized that "below cost" bidding may affect the responsibility of the bidder. See *Columbia Loose-Leaf Corporation,* B–184645, September 12, 1975, 75–2 CPD 147; B–173276, August 19, 1971. In that regard, FPR § 1–2.407–2 (1964 ed. amend. 139) requires that the contracting officer determine that a prospective contractor is responsible before awarding a contract. See FPR Subpart 1–1.12 (1964 ed. amend. 95).

Because of GSA's widespread difficulties with deficient performance on formally advertised janitorial services contracts, GSA's possible misunderstandings of the decisions of our Office as applied to "below cost" bidding, and our opinion that GSA should be given time to study alternative solutions to its difficulties, we are not recommending termination of the protested award. We are recommending, however, that the options in Ensec's contract and options for requirements subsequent to June 1976 in similar outstanding negotiated janitorial services contracts not be exercised and that GSA immediately commence a study of appropriate methods and clauses for improving the formal advertising procurement method for future needs of janitorial services.

As this decision contains recommendations for corrective action to be taken, it 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-162852]

Pay—Retired—Disability—Computation—Method—Most Favorable Formula

An enlisted member of the Army who is eligible for voluntary retirement for over 20 years of service, and who would be entitled to a 10 percent increase for an act of extraordinary heroism in the computation of his retired pay, is entitled to such increase if he is retired for disability, since the retired pay computation statute applicable to disability retirements authorizes the computation of retired pay on the basis of the formula most favorable to the member if he is otherwise entitled to compute his retired pay under another provision of law.

Pay—Retired—Disability—Extraordinary Heroism

Although 10 U.S.C. 3914, which authorizes voluntary retirement with more than 20 and less than 30 years' service, provides that members so retired will be members of the Army Reserve and perform involuntary active duty as prescribed by law, retirement and receipt of retired pay under that section are separate and distinct from the Reserve obligations and members retired for disability after having 20 years' service may receive retired pay computed under the applicable formula even though not in the Reserve.

In the matter of John E. Reinburg, III, February 5, 1976:

This action is in response to a letter dated March 3, 1975, from Lieutenant Colonel R. J. Withington, Finance and Accounting Officer, requesting an advance decision as to the propriety of making payment on a voucher in the amount of $767.29 in favor of Sergeant First Class John E. Reinburg, III, USA, 229-36-4570 (Retired), in the described circumstances. The request has been assigned Control No. DO-A-1234 by the Department of Defense Military Pay and Allowance Committee.

It is reported in the submission that Sergeant Reinburg was retired for disability on July 14, 1973, under the provisions of 10 U.S. Code 1201. At that time he had 20 years, 2 months, and 17 days' active service (20 years, 4 months, and 29 days' creditable service for basic pay purposes) with a permanent disability rating of 40 percent. His retired pay was computed in accordance with Formula 1 of 10 U.S.C. 1401 at $386.79 monthly, increased by applicable cost-of-living adjustments to $465.45. It appears that the computation was based on the years of service option of Formula 1, rather than on the basis of percentage of disability.

It is also indicated in the submission that at the time of his retirement, Sergeant Reinburg was also eligible for retirement under the provisions of 10 U.S.C. 3914. That section provides that an enlisted member of the Army may retire for length of service after at least 20 but less than 30 years' service. Such a member then becomes a member of the Army Reserve and performs such active duty as may be

prescribed by law, until his service under 10 U.S.C. 3925, plus inactive service in the Army Reserve equals 30 years.

It is pointed out that members who retire under the provisions of 10 U.S.C. 3914 are entitled to compute their retired pay in accordance with provisions of 10 U.S.C. 3991, Formula C. Under that formula, the monthly retired pay is computed by taking the member's monthly basic pay to which he was entitled on the date of retirement and multiplying by 2½ percent of the years of service credited to him under 10 U.S.C. 3925. Column 3 of that formula provides for a 10 percent increase in that product for the certified performance of an act of extraordinary heroism in the line of duty prior to retirement. It is indicated that Sergeant Reinburg had been awarded the Distinguished Service Cross and would be entitled to the additional 10 percent if his retired pay could be computed under Formula C of 10 U.S.C. 3991.

In this connection, it is pointed out that the third sentence of 10 U.S.C. 1401 provides as follows:

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

It is indicated in the submission that in view of this language it would appear that Sergeant Reinburg would be entitled to a computation of his retired pay on the basis of 10 U.S.C. 3991, Formula C. Doubt exists, however, as to whether he qualifies under the "would otherwise be entitled" clause of 10 U.S.C. 1401 to compute his retired pay under 10 U.S.C. 3991, since 10 U.S.C. 3914 requires membership in the Army Reserve. The submission cites our decisions 43 Comp. Gen. 805 (1964), 52 *id.* 599 (1973), B–162852, August 8, 1974, as giving rise to the doubt concerning the correct interpretation of this situation.

A member of the uniformed services who is retired for disability under the provisions of 10 U.S.C. 1201 is entitled to compute his retired pay under the provisions of 10 U.S.C. 1401, Formula 1. That formula authorizes the computation of retired pay on the basis of years of service computed under the provisions of 10 U.S.C. 1208 or the percentage of disability as the member elects. However, no provision is contained in 10 U.S.C. 1401 which provides for the inclusion of a 10 percent increase in retired pay computed under that section for the certified performance of an act of extraordinary heroism.

In connection with the requirement of 10 U.S.C. 3914 relating to membership in the Army Reserve, attention is invited to 46 Comp. Gen. 245 (1966). At page 247 of that decision it was pointed out that while enlisted members of the Army and the Air Force retired under the provisions of 10 U.S.C. 3914 and 8914 concurrently become members

of the Army or Air Force Reserve, it is only as Reserve members that they are subject to periodic involuntary active duty prior to the completion of the 30 years' service. It was further held in that decision that retirement and receipt of retired pay are separate and distinct from their status and obligations as members of the Reserve. On the other hand, 43 Comp. Gen. 805 (1964) involved an enlisted member of the Navy who was eligible for transfer to the Fleet Reserve and entitled to retainer pay. The significant point in that case being the construction that retainer pay was incident to service in the Fleet Reserve and could not be considered retired pay as that term is used in 10 U.S.C. 1401. That decision provides a full explanation of the rationale applied in reaching that conclusion.

The other cases cited in the submission, B–162852, August 8, 1974, and 52 Comp. Gen. 599 (1973), involve the provisions of 10 U.S.C. 1402, which relate only to the recomputation of retired and retainer pay when periods of active duty are performed following retirement or transfer to the Fleet Reserve. Since 10 U.S.C. 1402 makes no provision for an increase in retired or retainer pay on account of an act of extraordinary heroism, nor does that section have a provision similar to the third sentence of 10 U.S.C. 1401, there was no alternative but to conclude that the increase for extraordinary heroism is not authorized.

Thus, it appears on the basis of the facts presented that at the time Sergeant Reinburg was retired for disability under 10 U.S.C. 1201, he was also eligible for retirement under the provisions of 10 U.S.C. 3914 and would otherwise be entitled to compute his retired pay under the provisions of 10 U.S.C. 3991. Since Formula C of that section is applicable to retirements under 10 U.S.C. 3914 and provides for a 10 percent increase in retired pay for certified acts of extraordinary heroism, such formula should be construed as a qualifying formula within the meaning of the third sentence of 10 U.S.C. 1401. *See* 47 Comp. Gen. 74 (1967), 38 *id.* 715 (1959) and 37 *id.* 794 (1958).

Therefore, if in fact Sergeant Reinburg's years of service as computed under 10 U.S.C. 3925 are sufficient to authorize retirement under 10 U.S.C. 3914, payment on the voucher returned herewith is authorized, if otherwise correct.

[B–184543]

Defense Department—Emergency Preparedness Mobilization Planning Program—Production Planning Schedule

Pursuant to Armed Services Procurement Regulation (ASPR) 1–2201(d), industrial firm becomes "planned producer" of "planned" item under Department of Defense (DOD) emergency preparedness mobilization planning program when it completes and executes DD Form 1519, "Production Planning Schedule."

Contracts—Awards—Small Business Concerns—Set-Asides—Limitation—Planned Producer

ASPR 1-706.1(e)(ii), which prohibits total small business set-asides where large business "planned producer" of "planned" item under DOD emergency preparedness mobilization planning program desires to participate in procurement, is valid limitation on making total set-asides necessary to protect legitimate DOD concern, and is not in contravention of Small Business Act and implementing regulations.

Contracts—Awards—Small Business Concerns—Set-Asides—Withdrawal—Planned Emergency Producer

Although ASPR 1-706.3(a), which permits withdrawal of small business set-aside prior to award if found detrimental to public interest, is largely discretionary with contracting officer and SBA, contracting officer must withdraw total set-aside on procurement for "planned" item under DOD emergency preparedness mobilization planning program where solicitation containing set-aside was issued in violation of ASPR 1-706.1(e)(ii), which prohibits total set-aside where large business "planned producer" of item desires to participate in procurement, and bid opening has not occurred when contracting officer became aware of error.

Contracts—Awards—Small Business Concerns—Set-Asides—Planned Item Procurements

Total small business set-aside on procurement of "planned" item under DOD emergency preparedness mobilization planning program becomes so established as to preclude applicability of ASPR 1-706.1(e)(ii), which prohibits total set-asides where large business "planned producer" desires to participate in procurement of item, on date that invitation is issued. 42 Comp. Gen. 108, modified.

Contracts—Awards—Small Business Concerns—Set-Asides—Procedures

Total small business set-aside is not required to be withdrawn, pursuant to ASPR 1-706.1(e)(ii), prior to bid opening, where "planned producer" firm of "planned" item under DOD emergency preparedness planning program only achieved that status on same date that solicitation for item was issued, since firm was not "planned producer" prior to issuance date, notwithstanding that firm had expressed interest in procurement prior to becoming "planned producer" and procuring activity solicited firm to be "planned producer" after making total set-aside determination.

Contracts—Awards—Small Business Concerns—Set-Asides—Department of Defense Procurements—Emergency Preparedness Planning Program

Although withdrawal of total small business set-aside pursuant to ASPR 1-706.1(e)(ii) prior to bid opening, where large business "planned producer" achieved status on same date solicitation containing set-aside was issued, is not required, contracting officer, exercising reasonable discretion, can find sufficient detriment to public interest to justify withdrawing set-aside solely for reason that "planned producer" wants to bid, in view of specificity of ASPR 1-706.1(e)(ii) proscription and criticalness of DOD emergency preparedness planning program. Therefore, recommendation is made that contracting officer consider exercising discretion in view of various special factors.

In the matter of the American Air Filter Company, Inc., February 5, 1976:

The American Air Filter Company, Inc. (AAF), has protested invitation for bids (IFB) DAAKO1–75–B–2112, issued by the United States Army Troop Support Command (TROSCOM), St. Louis, Missouri, as a total small business set-aside, for a quantity of mobile field kitchens. AAF's basic contention is that since it is a large business "planned producer" of the mobile field kitchens under the Department of the Army Industrial Preparedness Program (AIPP), it was improper for the IFB to be made a 100-percent small business set-aside. AAF relies upon Armed Services Procurement Regulation (ASPR) §§ 1–706.1(e)(ii), 1–2201(d) and 1–2206(a) (1974 ed.). ASPR § 1–706.1(e)(ii) (1974 ed.) states:

> None of the following is, in itself, sufficient cause for not making a set-aside:
> * * * * * * *
> (ii) the item is on an established planning list under the Industrial Preparedness Program, except that a total set-aside shall not be authorized when one or more large business Planned Emergency Producers of the item desire to participate in the procurement (but see 1–706.6 as to partial set-asides);

ASPR § 1–2201(d) (1974 ed.) defines a "planned producer" to be:

> * * * An industrial firm which has indicated its willingness to produce specified military items in a national emergency by completing an Industrial Preparedness Program Production Planning Schedule (DD Form 1519).

Also, see ASPR § 1–302.5 (1974 ed.) to the same effect. ASPR § 1–2206(a) (1974 ed.) requires:

> solicitation of Planned Producers in all procurements over $2,500—of items for which they have signed industrial preparedness agreements (but see 1–706 and 1–804.1 as pertain to partial set-asides for small business and labor surplus);

On January 28, 1975, the contracting officer at TROSCOM agreed with the Small Business Administration (SBA) that the procurement of TROSCOM's 1975 fiscal year requirement of 200 mobile field kitchens should be a total small business set-aside. At that time, there were no "planned producers" for this item. During February 1975, AAF representatives had conversations with the Director of Production and Procurement of TROSCOM, whose responsibilities apparently include procurement and solicitation of "planned producers" for the AIPP. AAF expressed interest in participating in this procurement and in possibly becoming a "planned producer" for the item.

Subsequently, TROSCOM officials decided that this item was appropriate for planning under the AIPP. The AIPP encompasses planning done by Army Materiel Command subordinate activities, such as TROSCOM, with possible producers of critical items the Army needs for mobilization in preparing for war or other national emer-

gencies. Planning with industry is to assure capability for sustained production of essential military items to meet the needs of the United States and Allied Forces during an emergency. See ASPR § 1–2203(a) (1974 ed.). The planning is accomplished via the DD Form 1519, "Production Planning Schedule," signed by the Government and the "planned producer" of the item being "planned." This agreement essentially sets forth the capability of a "planned producer" to produce the required "planned" item in a certain timeframe. The agreement is not binding on either the "planned producer" or the Government as is expressly recognized in the DD Form 1519. However, the agreement does form a basis for industrial preparedness plans, current procurement plans, planning programming and budgeting. Execution of the agreement by a "planned producer" does not obligate it to accept any contract offered by the Government, nor does the Government's execution obligate it to contract with the "planned producer." As discussed below, the Government is ordinarily obligated to solicit the "planned producer" when it purchases the "planned" item.

On March 7, 1975, AAF and two other firms (both small businesses) were solicited by TROSCOM to be "planned producers" for the mobile field kitchen. AAF completed and executed the DD Form 1519 on March 28, 1975. The form indicates that the effective period covered by the planning schedule was July 1, 1975, to June 30, 1976. The form was apparently given to AAF by the Defense Contract Administration Services Region (DCASR) plant representative at AAF in St. Louis, Missouri. AAF apparently immediately executed the form and returned it to the DCASR representative. The DCASR representative then apparently delivered the DD Form 1519 to the Armed Services Procurement Planning Office (ASPPO) of this item at DCASR, St. Louis, Missouri. When the ASPPO executed the form on April 1, 1975, the planning agreement was completed. On April 2, 1975, the ASPPO returned the form to TROSCOM.

On March 28, 1975 (the same date that AAF executed the DD Form 1519), TROSCOM issued the IFB as a total small business set-aside for a firm quantity of 136 mobile field kitchens with an option of up to 64 additional units to be exercised on the date of award. This option was dependent on the availability of funds. In addition, a separate option for 300 units (a 1976 fiscal year requirement) could have been exercised within 120 days of award. Bid opening was initially designated for May 4, 1975. The Army asserts that the contracting officer has no record of any request by AAF for a copy of the IFB prior to its issuance.

Although the date of issuance indicated on the IFB was April 4, 1975, it was actually distributed on March 28, 1975. The Army has explained:

> * * * The issue date is a target based on an estimate of how long reviewing and print-shop personnel will require to perform all necessary tasks prior to formal issue of the IFB. If this process can be expedited and the IFB be issued so as to allow bidders a few extra days in which to bid, the IFB will be issued prior to the posted date. In this case, the IFB was ready for issue on 28 March 1975.

As indicated above, TROSCOM was supplied the completed AAF DD Form 1519 on April 2, 1975. Notice of this procurement was published in the Commerce Business Daily issue of April 7, 1975.

On April 8, 1975, AAF protested the total small business set-aside to TROSCOM on the grounds that it violated ASPR § 1–706(e)(ii) (1974 ed.) (quoted above), inasmuch as AAF was a large business "planned producer" which desired to participate in the procurement. AAF also protested that this procurement would not be a suitable partial set-aside because the quantity being procured was not susceptible to being severed into two or more economic production runs as required by ASPR § 1–706.6(a)(i) (1974 ed.). AAF contended that this procurement should therefore be amended so as to remove all set-asides for small business.

In response to the protest, TROSCOM extended bid opening to May 20, 1975, and later initiated withdrawal of the total set-aside, since it considered AAF's claim, as a large business "planned producer," to be a valid one. When additional funds were made available, TROSCOM found that the entire 1975 fiscal year quantity of 200 units could be purchased, and that this quantity was susceptible to being separated into two economic production runs of 100 units apiece. Consequently, on May 5, 1975, TROSCOM proposed to amend the procurement to be a 50-percent small business set-aside.

On May 6, 1975, the SBA representative at TROSCOM protested the proposed withdrawal of the total set-aside to TROSCOM, which denied the protest. On May 9, 1975, SBA requested TROSCOM to suspend the procurement pending an appeal by SBA to the Assistant Secretary of the Army (Installations and Logistics). On May 12, 1975, bid opening was indefinitely suspended. (Bid opening has not yet been rescheduled.) By letter of May 14, 1975, SBA appealed TROSCOM's proposed action to the Assistant Secretary. By letter of June 19, 1975, the Deputy Assistant Secretary sustained SBA's appeal since he found that "* * * there was no large planned producer desiring to participate in this procurement at the time of the set-aside."

Consequently, the total set-aside was reinstated, and AAF was advised of the denial of its protest on July 7, 1975. By letter dated

July 16, 1975, AAF protested the total small business set-aside to our Office.

ASPR § 1–706.1(e)(ii) (1974 ed.) (quoted above) clearly provides that a total small business set-aside "shall not be authorized" when one or more large business "planned producers" of the procured item desire to participate in the procurement. In addition, ASPR § 1–2206(a) (1974 ed.) clearly requires the solicitation of "planned producers" for procurements in excess of $2,500 of the "planned" item. In order to resolve the protest, all parties agree that two critical dates have to be established: (1) when did AAF become a "planned producer," and (2) when was the small business set-aside for this procurement so effectively established as to preclude the applicability of ASPR §§ 1–706.1(e)(ii) and 1–2206(a) (1974 ed.)?

AAF contends that ASPR § 1–2201(d) (1974 ed.) (quoted above) provides that a firm becomes a "planned producer" when it completes and executes the DD Form 1519, in this case, March 28, 1975.

However, various parties to the protest have contended, alternatively, that AAF did not become a "planned producer" until the ASPPO executed the DD Form 1519 on April 1, 1975; that AAF did not become a "planned producer" until TROSCOM (the initiating activity) was appraised of the agreement on April 2, 1975; and that AAF did not become a "planned producer" until July 1, 1975, the effective date of the agreement indicated on the DD Form 1519 executed by AAF. In support of the latter date, paragraph 2–2(c) of Army Regulation (AR) 700–90, C2, May 2, 1973 (revised September 15, 1975), is also referenced. This paragraph states in pertinent part:

> To accommodate the problems associated with varied lead times pertaining to planned items and for DOD-wide consistency in planning, production planning with industry will be based on a 3-year time frame (36-month delivery schedule). In addition, due to the need for both short-range and long-range planning data, two separate planning periods are authorized for each planned item. The first planning period will cover M–Day through M+36 months and will begin on 1 July following the date on which the planning agreement (DD From 1519) is signed by the contractor. * * *

Also see section V.B.8 of Department of Defense (DOD) Directive No. 4005.1, July 28, 1972.

We believe the clear and unequivocal language of ASPR § 1–2201(d) (1974 ed.) (quoted above) establishes AAF's execution date as the date on which AAF became a "planned producer" and refutes the arguments made in support of the other "effective" dates. Also, see ASPR § 1–302.5 (1974 ed.). Although we believe it is implicit that the Government be promptly apprised of the DD Form 1519's execution (which was done here) and although the DD Form 1519 clearly contemplates the ASPPO's signature in order to be completed,

the applicable regulations do not reference these dates as the "planned producer's" effective date. Rather, ASPR § 1–2201(d) (1974 ed.) specifies the effective date to be when a firm indicates its willingness to become a "planned producer" "by completing [a DD Form 1519]."

Also, we note that the delivery dates under the IFB, as initially issued, did not commence until after July 1, 1975, i.e., during AAF's planning period when it was to have the production capabilities indicated on the DD Form 1519. The planning schedule period dates referenced in the DD Form 1519 and paragraph 2–2(c) of AR 700–90 are distinct from the date of the primary decision to "plan" an item and make a firm a "planned producer." Indeed, paragraph 2.2(c) of AR 700–90 indicates that the date a "planned producer" achieves that status is the date the DD Form 1519 "is signed by the contractor."

With regard to the second question of when a set-aside becomes so effectively established as to preclude the applicability of ASPR § 1–706.1(e)(ii) (1974 ed.), AAF contends that either the IFB issuance date of March 28, 1975, or the bid opening date (which has not yet occurred) is the critical date. AAF notes that it had previously expressed a desire to TROSCOM officials to participate in the procurement (albeit prior to achieving its "planned producer" status). Also, TROSCOM, with knowledge of AAF's interest, solicited AAF to be a "planned producer" after it decided to make this procurement a total set-aside but prior to the IFB's issuance. AAF concludes that it would therefore be improper for TROSCOM to bar AAF from competition on this procurement.

The Army contends that January 28, 1975, the date TROSCOM agreed with SBA to make this procurement a 100-percent small business set-aside, was the critical date, and that since AAF became a "planned producer" after that date, the total set-aside is proper. The Army has stated that significant administrative inconvenience and disruption of the procurement process could result if a later date were found to be the critical date in view of the considerable work that has to be done once a decision to make a set-aside is made. In addition, the Army contends that a determination to withdraw a set-aside, once it has been properly established, is within the discretion of the Army and SBA, taking into consideration such factors as detriment to the public interest due to inadequate competition or unreasonable prices.

SBA also submitted a report to our Office on this matter essentially agreeing with the Army's position. SBA also suggests that ASPR § 1–706.1(e)(ii) (1974 ed.) may be invalid since it could be considered an additional limitation on small business set-asides not

sanctioned or recognized by, and imposed in contravention of, section 15 of the Small Business Act (SBA Act), Public Law 85–536, July 18, 1958, 72 Stat. 395, 15 U.S. Code § 644 (1970), and SBA's implementing regulations, 13 C.F.R. Part 127 (1975). In support of this position, SBA analogizes the present situation to that existing in *Atkinson Dredging Company*, 53 Comp. Gen. 904 (1974), 74–1 CPD 299, wherein we held a certain ASPR provision regarding the extent of subcontracting in total small business set-asides to be invalid because it was an impermissible infringement on SBA's exclusive statutory authority in small business size matters.

We will discuss SBA's latter suggestion here since, if correct, it would render moot the question regarding when a total set-aside is so effectively established as to preclude the applicability of ASPR § 1–706.1(e)(ii) (1974 ed.).

15 U.S.C. § 644 (1970) states:

> To effectuate the purposes of this chapter, small-business concerns within the meaning of this chapter shall receive any award or contract or any part thereof, and be awarded any contract for the sale of Government property, as to which it is determined by the Administration and the contracting procurement or disposal agency (1) to be in the interest of maintaining or mobilizing the Nation's full productive capacity, (2) to be in the interest of war or national defense programs, (3) to be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government are placed with small-business concerns, or (4) to be in the interest of assuring that a fair proportion of the total sales of Government property be made to small-business concerns; but nothing contained in this chapter shall be construed to change any preferences or priorities established by law with respect to the sale of electrical power or other property by the Government or any agency thereof. These determinations may be made for individual awards or contracts or for classes of awards or contracts. Whenever the Administration and the contracting procurement agency fail to agree, the matter shall be submitted for determination to the Secretary or the head of the appropriate department or agency by the Administrator.

This statute clearly recognizes that the ultimate determination of whether to make a set-aside for small business concerns is discretionary with the agency, since the contracting officer is not required to accept an SBA recommendation that a set-aside be made for a particular procurement or class of procurements, and SBA may only appeal the matter to the head of the agency. In addition, the SBA Act's primary purpose is only to insure that small business concerns receive a "fair proportion" of the total purchases and contracts of property and services made by the Federal Government. *See* 15 U.S.C. § 631 (1970).

Consequently, we believe DOD may impose reasonable limitations on when a total small business set-aside can be made, if such limitations are necessary to protect legitimate DOD concerns. In this regard, SBA's own regulations at 13 C.F.R. § 127.15–2(a)(1) (1975) implicitly recognize the applicability of such ASPR provisions in stating in pertinent part:

> * * * set-asides are made in accordance with provisions in [ASPR] * * *

The AIPP is the Army's implementation of the presidentially mandated DOD emergency preparedness mobilization planning responsibility. By section 401(7) of Executive Order 11490, 34 Fed. Reg. 17567, 17570 (1969), the President directed DOD to:

> Develop with industry, plans for the procurement and production of selected military equipment and supplies needed to fulfill emergency requirements, making maximum use of plants in dispersed locations, and, where essential and appropriate, providing for alternative sources of supply in order to minimize the effects of enemy attack.

Consequently, we believe DOD issued ASPR § 1-706.1(e)(ii) (1974 ed.) as a valid limitation on making total small business set asides necessary to protect a legitimate national defense concern of allowing large business "planned producers" an "equitable" opportunity to compete on procurements for mobilization planning items.

Also, DOD has attempted to balance its emergency preparedness mobilization planning responsibilities with its SBA Act responsibilities. Even where a large business "planned producer" desires to participate, the applicable regulations recognize the viability of partial small business set asides in procurements for "planned" items. ASPR § 1-2208 (1974 ed.) specifically recognizes that the policy of placing a "fair proportion" of contracts with small business concerns applies to mobilization planning.

In view of the foregoing, and since we have found nothing in either the SBA Act or its legislative history which evidences an intent to limit DOD's emergency preparedness mobilization planning responsibilities with regard to the making of small business set-asides, we believe ASPR § 1-706.1(e)(ii) (1974 ed.) is valid and not in contravention of 15 U.S.C. § 644 (1970) or applicable implementing regulations. The ASPR § 1-2208 (1974 ed.) "policy" statement regarding the use of small business concerns in mobilization planning does not supersede the clear language of ASPR § 1-706.1(e)(ii) (1974 ed.). Moreover, ASPR § 1-706.1(e)(ii) (1974 ed.) has the force and effect of law since it implements Executive Order 11490, the SBA Act and the Armed Services Procurement Act of 1949, as amended, 10 U.S.C. § 2301 *et seq.* (1970).

Our decision in *Atkinson Dredging Company*, *supra*, held invalid the provision in ASPR § 1-701.1(a)(2)a (1973 ed.) requiring that eligibility for award under small business set-aside dredging procurements be dependent upon the use of dredges owned or obtained from small business concerns for at least 40 percent of the contract work. This decision is not applicable to ASPR § 1-706.1(e)(ii) (1974 ed.). The ASPR provision in *Atkinson Dredging Company*, *supra*, violated 15 U.S.C. § 637(b)(6) (1970), a specific provision of the SBA Act which gave SBA exclusive and conclusive authority and responsibility to

determine, for procurement purposes, matters concerning small business size. ASPR § 1–706.1(e)(ii) (1974 ed.) is not such an improper attempt to regulate small business size, but rather is a legitimate limitation on when total set-asides can be made, a matter which, as indicated above, is within DOD's authority.

With regard to the Army and SBA contentions that the decision to withdraw a small business set-aside is discretionary with the contracting officer and SBA, we agree that in the ordinary case ASPR § 1–706.3(a) (1974 ed.), which permits withdrawal of set-asides prior to award if the contracting officer finds the set-asides detrimental to the public interest, is largely discretionary. Also, it is clear that the DD Form 1519 is not a binding agreement on either the "planned producer" or the Government. Notwithstanding the foregoing, ASPR § 1–706.1(e)(ii) (1974 ed.), which has the force and effect of law, clearly provides that total small business set-asides "shall not be authorized" if a large business "planned producer" desires to bid. There is no provision in this requirement allowing for discretion on the part of the procuring activity. Therefore, if bid opening has not occurred when the contracting officer is made aware of the erroneously established total set-aside, the procuring activity is required to withdraw a total set-aside contained in a procurement in violation of this requirement.

As to the question of when a total small business set-aside becomes so established as to preclude the applicability of ASPR § 1–706.1(e)(ii) (1974 ed.), it is our view that the critical date is the date of the issuance of the IFB, i.e., in the present case, March 28, 1975. *See* B–154172, July 14, 1964. *Cf.* B–143426, October 6, 1960. We believe that in order to clearly ascertain the critical date, ASPR § 1–706.1(e)(ii) (1974 ed.) should be read together with ASPR § 1–2206(a) (1974 ed.) (quoted above). ASPR § 1–2206(a) (1974 ed.) requires the "*solicitation* of Planned Producers" [Italic supplied]. Obviously, soliciting a "planned producer" necessitates the issuance of a solicitation or some other positive communication between the contracting officer and the "planned producer." It follows that the IFB issuance date is the critical date since a large business "planned producer" can only express a desire to participate in a procurement if it has been solicited or otherwise notified of the procurement's existence.

Moreover, ASPR § 1–2206(a) (1974 ed.) does not limit its application to procurements where a "planned producer" achieved that status prior to the agreement of the contracting officer and SBA that a total set-aside be initiated. Consequently, the date of the SBA-TROSCOM interagency agreement in this case, which was not a matter of public knowledge, cannot be regarded as the critical date, since a procure-

ment does not become a reality until a solicitation is issued or interested firms are otherwise invited to participate.

We recognize that some language in 42 Comp. Gen. 108, 111 (1962) (cited by the Army), which also involved a large business "planned producer's" exclusion from competition, implies that ASPR § 1–706.1(e)(ii) (1974 ed.) is not applicable once the contracting officer agrees with SBA that a total set-aside should be made. However, the relied upon language was not necessary to the outcome of that case. The large business "planned producer" excluded there did not become a "planned producer" until after the IFB's issuance and was not designated a large business until after bid opening. We held that although the contracting officer had the *discretion* to withdraw the total set-aside under the circumstances of the case, he was not *required* to do so under the applicable ASPR provision then in force (the predecessor of ASPR § 1–706.1(e)(ii) (1974 ed.)). 42 Comp. Gen. 108, *supra*, is modified insofar as it may be inconsistent with this decision.

In addition, in B–154172, *supra*, issued subsequent to 42 Comp. Gen., *supra*, the IFB issuance date was clearly regarded as the critical date. We concurred with the Navy that cancellation of an IFB was *required* by the applicable ASPR provision because the procurement was issued as a total small business set-aside although there was a large business "planned producer" existing prior to the date of the IFB's issuance, the existence of which the contracting officer was unaware when the IFB was issued.

Also, in B–143426, *supra*, which concerned the applicability of the very similar ASPR provision (the predecessor of ASPR § 1–706.1(e)(iii) (1975 ed.)) prohibiting total small-business set-asides on procurements of items on qualified products lists (QPL) where a large business listed on the QPL desires to participate, we held that an IFB calling for a QPL product was improperly issued as a total small business set-aside, since a large business on the QPL had expressed a desire to participate in the procurement prior to the issuance date. In view of this violation of an ASPR requirement and since the bids submitted by the small business firms were considered unreasonably high, the procurement was properly canceled after bids had been opened and the requirement resolicited.

Considering the nonpublic nature of a "procurement" prior to the issuance of a solicitation, we do not regard the possible administrative inconvenience, which may occur in the relatively few cases where a large business firm becomes a "planned producer" or a "planned producer" becomes a large business during the period extending from the contracting officer's decision that a total set-aside be instituted to

the IFB's issuance date, to be sufficient reason to justify barring a firm or class of firms from competing on a procurement.

Also, we do not believe the bid opening date should be regarded as the critical date. As indicated above, this TROSCOM requirement actually became a procurement when the IFB was issued. Also, ASPR § 1–2206(a) implies a "cut off point" at the time bids are solicited, after which there would be no compulsion on the procuring activity to solicit large business "planned producers" which achieve that status after issuance. We do not believe an otherwise authorized procurement, once issued, becomes an unauthorized procurement because of the subsequent creation of a large business "planned producer." Moreover, there is a considerably greater possibility of disruption to the procurement process if actions which occur subsequent to an IFB's issuance could *compel* the withdrawal of a set-aside. Under such circumstances, especially prior to bid opening, where a large business becomes a "planned producer" or a "planned producer" becomes a large business after the issuance of an IFB containing a total set-aside, we believe it should be *discretionary* with the contracting officer as to whether he should withdraw the set-aside so that he may consider other factors, such as detriment to the public interest, in deciding whether such a withdrawal would be merited. *See* 42 Comp. Gen., *supra*. *Cf.* 37 Comp. Gen. 147 (1957); B–144080, October 26, 1960.

Since the IFB issuance date, i.e., March 28, 1975, is the critical date and since AAF was not a "planned producer" prior to that date, we cannot conclude that the total set-aside was not authorized. Although AAF had expressed interest in participating in this procurement to TROSCOM officials some months prior to the IFB's issuance (after TROSCOM had decided to make the procurement a total set-aside), AAF was not a "planned producer" (nor had it even been solicited to be a "planned producer") at that time. These conversations and the subsequent solicitation of AAF to be a "planned producer" do not legally compel TROSCOM to withdraw the total set-aside since AAF did not become a "planned producer" prior to the IFB's issuance. In this regard, we note that AAF was in no way required to execute the DD Form 1519. Moreover, the contracting officer denies having any knowledge (and there is no probative evidence to the contrary) of AAF's desire to participate in this procurement prior to the IFB's issuance or of AAF's impending "planned producer" status. Therefore, TROSCOM is not legally compelled to withdraw the total set-aside.

However, as indicated above, in view of the specificity of the ASPR § 1–706.1(e)(ii) (1975 ed.) proscription against total set-asides and

the criticalness of the DOD emergency preparedness planning program, it would ordinarily be within the reasonable exercise of the contracting officer's discretion to find the total set-aside detrimental to the public interest and have it withdrawn solely for the reason that a large business "planned producer" desires to participate in the procurement, especially where bid opening has not occurred. This would be true even if that firm had not achieved that status prior to the IFB's issuance.

Consequently, we recommend that the contracting officer again consider whether the circumstances are such that withdrawal of the total set-aside would be justified under ASPR § 1–706.3(a) (1975 ed.), and, if the answer is affirmative, whether a partial set-aside would be justified under ASPR § 1–706.6 (1975 ed.). In this regard, we note that the decision of the Deputy Assistant Secretary was apparently based solely on his "legal" determination that AAF was not a "planned producer" when the set-aside was established so that withdrawal of the set-aside would be improper. In addition to our contrary finding that withdrawal of the total set-aside could be reasonably within the contracting officer's discretion, there are several other special factors extent which were apparently not considered in reversing TROSCOM's decision to withdraw the total set-aside. These factors include the length of time which has passed since the IFB's issuance, the extremely close timeframe between AAF's achieving its "planned producer" status and the IFB's issuance, TROSCOM's prior knowledge of AAF's interest in participating in this procurement, TROSCOM's solicitation of AAF to be a "planned producer" during the formulation of this procurement, and the effect of excluding AAF from this procurement on the viability of its "planned producer" status. Obviously, SBA has the right to disagree with any such determination by the contracting officer to withdraw the total set-aside, in which case this matter could again be referred to the Assistant Secretary for his decision pursuant to ASPR § 1–706.3(e) (1975 ed.).

In any case, we do not believe the 1976 fiscal year quantity (an option for 300 mobile field kitchens under the IFB as initially issued) may be procured on a total set-aside basis in view of the ASPR § 1–706.1(e)(ii) (1975 ed.) prohibition.

[B–184606]

Contracts—Negotiation—Requests For Proposals—Protests Under—Timeliness—Solicitation Improprieties

Allegations were filed after receipt of best and final offers that request for proposals was deficient for failure to disclose (1) numerical values assigned to mission suitability factors, and (2) relative importance of cost or "other factors" to mission suitability; and failure to include incumbent contractor closeout costs are untimely since they relate to deficiencies apparent before date set for receipt of initial proposals. Argument that protester did not read request for proposals as

making cost an independent evaluation factor is rejected since evaluation section clearly indicates three distinct major areas of evaluation—mission suitability, cost, and other factors.

Contracts—Protests—Significant Issues Requirement

Since on many occasions questions raised by protester regarding deficiencies in negotiated solicitation have been discussed, there is no basis to conclude that issues untimely raised are of the required level for consideration as significant issues.

Contracts—Negotiation—Evaluation Factors—Point Rating—Differences Significance

Since question of whether given point spread between two competing proposals as a result of technical evaluation indicates significant superiority of one proposal over another is primarily within discretion of procuring agency and where point spread is 18 points out of 1,000, no basis exists to object to agency's determination that proposals were essentially equal.

Contracts—Negotiation—Evaluation Factors—Escalation—Wage Rates

Even if offeror's score for mission suitability should have been adjusted downward for its improper escalation of Davis-Bacon Act wage rates, impact on scoring would not be sufficient to make situation one where given point spread between competing proposals indicates significant superiority of one proposal over another.

Contractors—Successors—Service Contract Act of 1965

Selected offeror would be successor contractor under Service Contract Act and proposes to hire substantial number of incumbent union workers but also to replace percentage of senior union workers with apprentices. In view of indication of labor unrest resulting therefrom, source selection official should ascertain if risk of possible labor unrest was properly assessed by evaluation board.

Contracts—Negotiation—Competition—Propriety—Method of Conducting Negotiations

In negotiated procurement accomplished under NASA Procurement Directive 70-15 which limits agency in discussing deficiencies in offeror's propcsals during written or oral discussions, no harm to protester's competitive position is found even though other offeror was advised of deficiency during multiple "final negotiations," since NASA could properly have made necessary Davis-Bacon Act wage cost adjustments to offeror's proposal. Comment is made that this practice seems inconsistent with limitations imposed by procurement directive.

Contracts—Negotiation—Offers or Proposals—Discussions—Not Prejudicial—Relate to Responsibility

Agency's improper release to one offeror of transfer agreement between protester, another offeror, and its predecessor, which contained basis of transfer but did not contain financial or business data so as to give insight into protester's proposal, was not prejudicial since, unlike situation where either unique technical approach or price is improperly disclosed to other offerors during negotiations, matter relates to protester's responsibility.

Contracts—Subcontractors—Minority—Firm Commitment For Use Requirement

Agency erred in merely accepting, without more, offeror's proposed use of specific minority subcontractor then using this fact as significant basis for award decision.

Evaluation of resources which offeror merely proposes without contractual control or commitment is "patently irrational." Agency must be reasonably assured that resources are firmly committed to offeror, especially where consideration of factor in evaluation may be determinative of award.

Freedom of Information Act—Disclosure Requests—Contract Protester

Where protester files suit under Freedom of Information Act to obtain documents submitted by agency to General Accounting Office (GAO) for *in camera* review, and requests delay of GAO decision on protest pending outcome of suit, delay of decision would be unreasonable because of indefinite delay of procurement process, severe impact on proposed awardee, and fact that delay would permit protester (incumbent contractor) to continue as holdover contractor long after new contractor (only possibly protester) should have been awarded contract.

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

Where cost realism analysis of competing proposals was based, in part, on collective bargaining agreement in effect at time of evaluation escalated over proposed contract period, but thereafter new collective bargaining agreement is negotiated and becomes effective, more appropriate and precise analysis is now both possible and in order in light of definitization of new applicable wages.

In the matter of Management Services, Inc., February 5, 1976:

Request for proposals (RFP) No. 8–3–5–12–30505 was issued on December 18, 1974, by the Marshall Space Flight Center (MSFC), National Aeronautics and Space Administration (NASA), Huntsville, Alabama. The RFP requested proposals for base maintenance services on a cost-plus-award-fee basis for 1 year, plus two 1-year options.

The RFP advised the offerors that proposals would be evaluated in accordance with the NASA Procurement Regulations, the NASA Source Evaluation Board Manual (NASA handbook) 5103.6, August 1973 edition, and NASA Procurement Directive 70–15 (Revised September 1972). The RFP states at page 47 that: "Proposals will be evaluated in three areas: Mission Suitability Factors, Cost Factors, and Other Factors."

During the initial evaluation, the Source Evaluation Board (SEB) found that the proposals of two of the offerors contained major weaknesses and were so deficient that they could not be made acceptable without major revision. These proposals were considered to be outside the competitive range and the respective offerors were so notified. However, two firms, Management Services Incorporated (MSI), the incumbent contractor, and Metro Contract Services, Inc. (Metro), were considered within the competitive range and each firm was invited to give an oral presentation of its proposal and answer specific questions raised by the SEB. Both presentations took place on April 3, 1975, and best and final offers were received on April 10, 1975. Thereafter, the SEB presented its initial report on the best and final offers to the source selection official (SSO) on June 16, 1975.

In view of the closeness of the scoring of the two proposals in the area of mission suitability and probable cost, the SSO selected both firms for "final negotiations." See NASA Procurement Directive 70–15. The negotiations were conducted between June 23 and July 7, 1975. After the negotiations, and without rescoring the merits of the technical proposals, the SEB compiled an addendum to its initial report comparing each offeror's strengths, weaknesses and costs prior to "final negotiations" with those after "final negotiations."

On August 6, 1975, the SSO issued a source selection statement, the last paragraph of which states in pertinent part:

> I find that the two proposers are essentially equal in Mission Suitability potential. Nevertheless, I have determined that the critical distinctions between them make it advantageous for the Government to award the contract to Metro, because, in light of the foregoing, of its lower costs and because of its firm commitment to utilize a Minority-owned Enterprise in its subcontracting program. Further distinctions between these two competitors are important in their own right and also because they reinforce the credibility of the costs negotiated with Metro: I have determined that Metro's organizational structure is superior; its management information system is superior; and its system for the processing and control of work is superior. For these reasons I have selected Metro for award of the base maintenance services contract.

Prior to the issuance of this source selection statement, MSI had on July 28, 1975, protested to our Office "a determination of the contracting officer for the National Aeronautics and Space Administration, Marshall Space Flight Center, Huntsville, Alabama, to award subject contract to Metro Contract Services, Inc., on the grounds that Metro Contract Services, Inc., was not the lowest responsible bidder."

Thereafter, MSI supplemented its protest and made the following specific allegations: (1) the RFP was deficient in the following areas: (a) the numerical values assigned to each of the mission suitability factors are nowhere stated in the RFP; (b) the RFP failed to state the relative importance of costs or other factors to mission suitability; (c) the RFP should have included as an evaluation factor the costs of incumbent contractor close out; (2) Metro's proposal contained unrealistically low proposed labor costs creating the possibility of and consequences resulting from labor unrest; (3) MSI was clearly superior in mission suitability; (4) NASA released proprietary information which was prejudicial to MSI; and (5) Metro did not have a firm commitment to utilize a minority-owned enterprise in its subcontracting program.

With regard to the alleged deficiencies of the RFP, section 20.2(b)(1) of our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975), states:

> Protests based upon alleged improprieties in any type of solicitation which are apparent prior to * * * the closing date for receipt of initial proposals shall be filed prior to * * * the closing date for receipt of initial proposals.

In this regard, allegations (1)(a), (b) and (c) relate to RFP deficiencies which were apparent long before the date for receipt of initial proposals, February 3, 1975, and a protest based on these deficiencies filed on July 28, 1975, would clearly appear to be untimely.

MSI, however, argues that it reasonably interpreted the RFP to mean that cost was to be considered not as an independent factor but only as part of mission suitability and that, if the true intent of RFP was to treat costs as an independent factor having equal weight with mission suitability, then the RFP was fatally ambiguous. This ambiguity, MSI alleges, was not apparent on the face of the RFP. Rather, it argues that the ambiguity was latent because a reasonable interpretation of the RFP is that cost was not to be an independent factor.

We disagree. As noted above, the RFP at page 47 clearly states that proposals will be evaluated in three distinct areas: mission suitability factors, cost factors and other factors. The section dealing with source evaluation describes evaluation factors and subfactors, as follows:

(A) Mission suitability factors
  (1) management plan
  (2) key personnel
  (3) staffing plan
(B) Cost factors
(C) Other factors
  (1) phase-in
  (2) policies, procedures and practices
  (3) financial capabilities
  (4) corporate experience and past performance
  (5) make or buy plan
  (6) small and minority business utilization plan
  (7) consultants
  (8) schedule and general provisions

While the RFP statement outlining the method of evaluation of mission suitability factors did indicate that innovation, cost effectiveness and low-cost planning would be considered, we think that an entire reading of the source evaluation section of the RFP clearly indicates that there were three separate and distinct major areas of evaluation.

The protester states that the RFP was "clearly deficient." We submit that, if this is the case, it was incumbent upon MSI to file its protest before the date set for receipt of initial proposals, and not 5½ months thereafter.

MSI also indicates that the matter should be considered on its merits for it raises issues significant to procurement practices or procedures and, as such, may be considered by the Comptroller General, even though untimely in accordance with section 20.2(c) of our Bid Protest Procedures, *supra*. In 52 Comp. Gen. 20 (1972), we defined the phrase "issues significant to the procurement practices or procedures" as referring to "the presence of a principle of widespread interest." Moreover, as we held in *A.C.E.S., Inc.*, B–181926, January 2, 1975, 75–1 CPD 1, a matter does not present a significant issue for consideration if that matter has been treated on its merits previously. See *Hayes International Corporation et al.*, B–179842, March 22, 1974, 74–1 CPD 141. This Office has on many occasions discussed the questions raised by allegations (1)(a), (b) and (c). Accordingly, we see no basis for us to conclude that the issues raised in the instant case rise to the required level for consideration as significant issues. Therefore, these issues will not be discussed on the merits.

MISSION SUITABILITY EVALUATION

MSI initially argues that the determination that Metro and MSI were approximately equal in mission suitability was inaccurate and arbitrary in light of (1) MSI's past excellent performance at MSFC; (2) its lengthy experience compared to Metro's; and (3) MSI's carefully designed manual system for scheduling and controlling the work as opposed to Metro's proposed use of a computerized system.

However, in reaching the determination that the proposals were essentially equal, the SSO noted that MSI was 18 points (out of a possible 1,000) higher than Metro. MSI was rated higher in the areas of key personnel (program manager, subordinate management) and staffing plan (plan adequacy and staffing rationale, and ability to implement the plan), while Metro was higher in management plan (organization, processing and control of work, and management information systems). Moreover, MSI's past performance and experience (primarily obtained when the firm was known as Management Services, Inc. of Tennessee) was also noted by the SEB in the "Corporate Experience and Past Performance" subcategory of "Other Factors."

As we have held in other cases, the question of whether a given point spread between two competing proposals indicates significant superiority of one proposal over another is a matter primarily within

the discretion of the procuring agency. *Lockheed Propulsion Company et al.*, 53 Comp. Gen. 977 (1974), 74–1 CPD 339; 52 Comp. Gen. 686 (1973). In 52 Comp. Gen., *supra*, we stated that even an 81-point spread out of 1,000 does not automatically establish that the higher-rated proposal was materially superior. Thus, in the absence of more, we perceive of no basis in the instant case to object to the agency's determination that the proposals, which were merely 18 points apart (out of a possible 1,000), were essentially equal in mission suitability.

MSI also argues that Metro should have been penalized in the mission suitability area for improperly handling Davis-Bacon Act wage costs in its proposal. (See discussion, *infra*, on realism of Metro's costs and the Davis-Bacon Act.) A similar argument could be made for its overly optimistic view of what would be paid to rehired MSI Service Contract Act employees. (See discussion, *infra*.)

As noted above, the RFP stated that "*Innovation, cost effectiveness and low cost* planning will be considerations in the evaluation of Mission Suitability." The RFP also indicated more specifically that in evaluating the staffing plan subfactor of mission suitability "[A]n assessment will be made of the adequacy of the staffing plan and the proposer's ability to implement the plan as proposed." The SEB stated in reaching its conclusions as to mission suitability:

> [t]he cost proposal was used extensively in the evaluation and scoring of Mission Suitability Factors to determine realism and understanding of the requirements by the proposers.

That is, in reaching the conclusion as to Metro's staff planning, NASA considered the impact of Metro's overly optimistic proposed wages for MSI rehires. Thus, while both MSI and Metro were considered as "competent" after the initial evaluation, the SEB's final evaluation found MSI to have a nine-point superiority for this subfactor alone. However, since the SEB's "Results of Final Negotiations" did not indicate any change with regard to Metro's ability to implement its staffing plan, we are unable to say that its difficulties with Davis-Bacon wage costs were assessed in mission suitability. However, even if this should have occurred we are unable to quantify the impact, if any, of this deficiency on the mission suitability scoring. Even if mission suitability should have been adjusted on the basis of the SEB omission we do not believe that the impact would be sufficient to make this situation one where the given point spread between two competing proposals under the circumstances presented indicates the significant superiority of one proposal over another. *Lockheed Propulsion Company, supra;* 52 Comp. Gen., *supra.*

REALISM OF METRO'S COSTS

Service Contract Act

The proposed contract's scope of work is broken down into six distinct areas of effort (by appendix):

Appendix	Employee Wages Rate Determined In Accordance With
A. Vehicle Support	Service Contract Act
B. Repair and Minor Construction Services	Davis-Bacon Act
C. Material Handling Support Services	Service Contract Act
D. Operation and Maintenance of Special Equipment	Service Contract Act
E. Engineering Design Services	Service Contract Act
F. Grounds Maintenance Services	Service Contract Act

For all appendices other than "B," the Service Contract Act Wage Determination of January 20, 1975, which was included in the RFP was employed by offerors in submitting proposals. The wage determination reflected the collective bargaining agreements then in effect between NASA's incumbent contractor (MSI) and various trade unions. In accordance with 29 C.F.R. § 4.165, *et seq.* (1974), the contractor would be required to pay the employees covered by the act in accordance with the wage determination.

The collective bargaining agreements (incorporated into the wage determination) set forth a number of wage steps to be paid based on the respective seniority of the employees. Since MSI is the incumbent contractor, more than 95 percent of its employees have sufficient seniority to be at the top step of the wage schedule (step No. 5). Consequently, MSI's Service Contract Act labor cost was relatively high.

Metro, on the other hand, proposed to hire a substantial percentage of MSI's employees if awarded the contract (substantially in excess of 50 percent) and pay them at a rate established in the collective bargaining agreement, which covers the largest number of employees presently being employed by MSI. Metro also proposed to hire a large number of new hires who would not have any seniority and could be paid at the entry level wage step, step No. 1. It should also be noted

that while Metro's proposal indicated that its hiring of incumbent MSI personnel would be at the step No. 2 level of the collective bargaining agreement, since, as noted above, 95 percent of the incumbent contractor's personnel had sufficient seniority to be at step No. 5 of the wage scale, the SEB upwardly adjusted Metro's direct labor costs to reflect Metro's obligation under the law to pay incumbent employees in a manner consistent with the collective bargaining agreement. This adjustment would vitiate MSI's argument concerning possible labor unrest if Metro were to hire incumbent senior employees at a rate less than the incumbent contractor was paying under the collective bargaining agreement.

However, MSI has included as an attachment to its protest a letter from the president of Local No. 783 of the International Union of Electrical, Radio and Machine Workers, AFL–CIO, which according to the RFP represents incumbent contractor employees with regard to the work covered by appendices "A," "C," "F" and part of "D." That letter states in pertinent part:

> * * * We have learned that it is the intent of Metro to hire a "substantial number" of the incumbent personnel represented by our union and to hire new people for the remaining positions at base rates as set forth in the RFP. As you know, most of these employees have from 10 to 15 years seniority on this job. Metro's plan to replace them with new employees would be extremely unfair.
>
> It is our belief that any attempt by a successor contractor to replace the trained, experienced personnel of long seniority with new personnel will result in serious labor problems. While we as a union will make every effort to maintain labor peace and to assure the continuance of the work, you will understand the feeling of the employees who would be displaced under such a plan.

The above-quoted letter clearly raises the possibility of labor unrest should Metro follow its proposed labor policy. Thus, we will now discuss the issue presented as to the possible cost and/or performance consequences of Metro's plan to replace a percentage of the incumbent's senior union employees with apprentices—that is, the consequences emanating from the possibility of labor unrest.

As stated on page 49 of the RFP:

> * * * The evaluation of cost factors will include Government assessment of the probable cost of doing business with each proposer and *the possible growth in proposed costs* during the course of the contract. * * * [Italic supplied.]

This Office has recognized the importance of analyzing proposed costs in terms of their realism since, regardless of the costs proposed, the Government in a cost-reimbursement contract is bound to pay the contractor's actual and allowable costs. See *Bell Aerospace Company*, 54 Comp. Gen. 352 (1974), 74–2 CPD 248; 50 Comp. Gen. 390 (1970); B–178445, October 4, 1973; B–152039, January 20, 1964. It is incumbent upon the agency to exercise judgment as to whether the costs submitted are realistic. *Bell Aerospace, supra; Raytheon*

Company, 54 Comp. Gen. 169 (1974), 74-2 CPD 137. 50 Comp. Gen., *supra;* B-178445, *supra;* B-174003, February 10, 1972. Moreover, GAO will not second-guess a cost realism determination unless it is not supported by a reasonable basis. See *Dynalectron Corporation*, 54 Comp. Gen. 562 (1975), 75-1 CPD 17, affirmed 54 Comp. Gen. 1009 (1975), 75-1 CPD 341.

A conclusion that a cost proposal is realistic cannot appropriately be made unless all nonspeculative cost risks are analyzed. In this regard, the court in *Kentron-Hawaii Limited*, 480 F.2d 1166 (D.C. Cir. 1973), in somewhat similar circumstances involving a cost-plus-award-fee contract, viewed as speculative the incumbent contractor's assertion that the awardee's offer, which included low wage rates,* would foment labor strife under the existing labor conditions and result in higher ultimate costs to the Government. The question there was the impact of ongoing attempts at unionization upon the awardee's ultimate costs. The court held that:

> Presumably, newly unionized employees would be quite likely to press for higher wages. *Labor strife might result* if those demands were not met; but then again it might not. Indeed, if the labor relations at [the] P[acific] M[issile] R[ange] [Facility] had turned as sour as Kentron suggests, the contracting officer might reasonably have concluded that a confrontation and work stoppage was inevitable, *no matter who obtained the contract award.* [Italic supplied.]

We believe that the *Kentron* decision is distinguishable. Here, only Metro, the proposed successor contractor, indicated an intention to dismiss a percentage of MSI's senior employees, all of whom are members of a union which the successor would have to recognize as the employees' bargaining agent. See *NLRB* v. *Burns Security Services*, 406 U.S. 272 (1972).

Moreover, unlike the RFP in the *Kentron* situation, the instant RFP did not set a limit on Government reimbursement of the awardee's direct labor costs. In *Kentron*, the agency specifically stated in the RFP that "maximum labor rates should contain *any cost contingency you consider necessary* with due regard to unionization activities in progress and/or pending * * *." The court construed this provision to mean that if unionization did force the awardee's labor rates above the proposed maximums, any resulting "* * * 'cost overrun' would still *not* be *reimbursable.*"

The court seemed to approve the award mechanism used there which allows competitors to receive award, on the basis of not unrealistic maximum labor rate reimbursement levels, while taking reasonable risks of cutting into their own profits should their estimate of actual

*Dynalectron, the awardee, proposed maximum wage rates averaging $0.13 less than that being paid by Kentron-Hawaii at the time its contract was terminated.

labor rates prove overly optimistic. Thus, while in *Kentron*, true competition, which would achieve the lowest actual costs to the Government, was fostered in that the RFP was structured so that any miscalculation in the maximum labor rates to be paid under the contract would be borne by the contractor, such is not the situation here. In the instant situation it would be to the benefit of a competitor to speculate optimistically vis-a-vis the maximum percentage of incumbent senior employees it would hire, for in limiting rehires from this group and supplementing additional hires at apprentice levels, direct labor costs would be minimized. However, should the situation arise that to insure labor peace a larger percentage of rehires would be required, with a concomitant increase in direct labor cost, the Government and *not the contractor* would have to bear the burden of this increase. Such an increase could result in a decrease in award fee. However, the decrease in award fee paid the contractor need not be so great so as to negate the increased costs to the Government from reimbursing the contractor for direct labor cost increases.

We note that, in other cost-reimbursement situations, NASA has examined the impact of possible labor unrest generated by an offeror's proposed labor policies. *See* 50 Comp. Gen. 592 (1971); B–171391(2), February 26, 1971. In B–171391(2), *supra*, NASA decided not to make award to the offeror (Pan American World Airways, Inc.) whose proposal was ranked first technically (tie) and was lowest in cost (at least for the base period of the contract), in large measure, since it was the opinion of NASA's labor relations consultants and its evaluation board that a severe labor impact and a serious disruption of the then present harmonious labor relations at the facility could be foreseen in Pan Am's proposed approach. Pan Am proposed to transfer the incumbent contractor's personnel, who were represented by the International Association of Machinists (IAM), to its bargaining units with the Transport Workers Union of America and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The wage rates that Pan Am proposed to pay were also lower than those then being paid by the incumbent contractor as well as being lower than those then paid by Pan Am on a similar contract at a nearby Air Force facility.

In denying Pan Am's protest against NASA's actions, we held that NASA properly considered the factor of possible labor strife generated by Pan Am's labor policy including the effect on Pan Am's costs of work stoppages, work slowdowns, picketing and other problems which are costly in and of themselves.

In another protest regarding the same procurement, 50 Comp. Gen., *supra*, we noted that the NASA's industrial relations officer

felt that the successful offeror's (Boeing) alternate plan to subcontract one segment of the operation, then being performed by the incumbent with direct hires, might have created a problem of convincing the union that a smaller number of employees was needed. This again illustrates a NASA preselection analysis of the labor strife risk incumbent in proposals.

Again with reference to the procurement noted in 50 Comp. Gen., *supra*, Boeing planned to bring the incumbent contractor's IAM employees under its own company-wide agreement with the IAM and thus pay them a "considerably lower" wage than those paid by the incumbent for similar work. However, the Acting Administrator of NASA, while directing that "final negotiations" be conducted with Boeing, expressly conditioned award on Boeing's presentation of firm agreements from appropriate unions providing coverage for the work to be performed under the proposed contract. In doing so, we believe that he made a determination that the risk of labor strife had not properly been taken into account up to that point, but that before award to Boeing could properly be made, the risk would have to be minimized. While it may have been more appropriate to have assessed the risk of labor unrest and to take necessary action prior to conducting "final negotiations," clearly the risk must be properly assessed at some point in time.

We have examined closely the SEB report and addendum thereto, as well as the source selection statement and subsequent letter of October 7, 1975, relating to the cost realism of the proposals, prepared by the Director of the Procurement Office at MSFC. Nowhere in that material did we find a specific discussion regarding the direct labor cost risk outlined above.

One possible explanation for this seeming omission is that the SEB in discussing Metro's staffing plan, a mission suitability subfactor, indicated that Metro had contacted the local labor unions, surveyed the local labor market and determined the availability of the percentage of workers other than rehires necessary to fulfill the contract requirement. Moreover, the SEB believed that Metro's staffing plan was feasible and attainable and that consideration of personnel sources combined with source contacts, backup capability of local hire for personnel, and contact with local unions added to Metro's otherwise well-designed plan. This area of Metro's proposal was rated as competent as was the analogous section of MSI's proposal. This meant that the SEB considered that the staffing plan of both MSI and Metro reflected overall competence and had strengths which clearly predominated over weaknesses particularly in the most important areas.

However, the record is devoid of any information to show that the possibility of labor unrest vis-a-vis the Metro proposal was specifically

considered by the SEB either in mission suitability or in assessing cost realism. Therefore, we recommend that the SSO ascertain whether and/or to what degree that risk of labor unrest inherent in the Metro proposal was assessed. If the risk was not assessed or assessed insufficiently, the SSO should direct the SEB to consider the risk and make appropriate recommendations to the SSO. The SSO should take whatever action relative to the selection of an awardee that is required by the risk assessment. See generally, *Tracor Jitco, Inc.*, 54 Comp. Gen. 896 (1975), 75–1 CPD 253; 55 Comp. Gen. 499 (1975), 75–2 CPD 344.

Moreover, an analysis of the risk of labor strife may also have been warranted with regard to "Other Factors." The RFP indicated that the eight subfactors of "Other Factors" listed above did not constitute an all-inclusive listing of Other Factors which may be used in the selection decision. The NASA SEB Manual, NHB 5103.6 (August 1973 ed.), cited in the RFP as one of the bases upon which proposals were evaluated, states that:

OTHER FACTORS

1. Within this category fall factors other than Mission Suitability and Cost Factors that the Source Selection Official considers in making a final selection. *Other Factors may become pertinent any time in the acquisition process up to the moment of source selection.*
2. Other Factors *include:*
   a. Financial condition and capability.
   b. Corporate experience and past performance.
   c. Priority placed by the corporate level of the offeror on the work being proposed, or importance of the business to corporate management.
   d. *Stability of labor-management relations.*
   e. Extent of proposed small business and minority enterprise participation in subcontract arrangements.
   f. Geographic distribution of subcontract arrangements.
   g. Any others pertinent to the particular procurement.
3. *Other Factors will generally be known at the time the RFP is issued. When this is the case, they are to be referenced specifically in the RFP, evaluated by the SEB, and reported on to the Source Selection Official. Certain factors* in the Other Factors category, such as financial condition and capability and past performance, *may undergo change up to the moment of source selection.* Although the SEB has made its formal report to the Source Selection Official, *the Board shall have continuing responsibility to report to the Source Selection Official, until its discharge, any changes in its evaluation of Other Factors due to circumstances affecting an offeror different from those pertinent at the time of the Board's formal report.* In this connection it is not intended that after its report the Board actively pursue continuing evaluation. *What is expected is that matters in Other Factors category which come to the attention of the Board and which might be expected to be pertinent to the selection decision will be communicated to the Source Selection Official.* [Italic supplied.]

Thus, the stability of the proposers' labor management relations was from the outset (even though not set forth in the RFP), to be considered under Other Factors. Even if this were not the case, by the terms of paragraph 3, noted above, upon the submission by Metro of its outlined labor policy, we believe that the SEB was under a duty to examine and investigate the circumstances surrounding this proposed labor practice. This does not appear to have been done. Therefore,

the SSO should direct the SEB to consider this aspect of the evaluation as well as those previously noted.

Davis-Bacon Act

NASA's report on the protest to our Office states with regard to appendix "B" (Repair and Minor Construction) that MSI properly utilized the December 1974 Davis-Bacon Act Wage Determination in the RFP. NASA states that Metro, on the other hand, found it necessary, during "final negotiations," to make extensive proposal revisions in this regard.

These revisions were accomplished by using the Davis-Bacon wage rates published in the Federal Register on June 20, 1975. However, NASA indicates that MSI was not asked to, nor did it offer to, revise its proposed labor costs for appendix "B," so as to conform to the June 20 wage determination. The SEB and MSI felt that the labor costs already proposed along with the proposed cost escalation were a reasonable and accurate measure of direct labor costs for the appendix.

MSI contends that the deficiency in Metro's proposal relative to the Davis-Bacon Act rendered the proposal nonresponsive and that Metro should not have been considered within the competitive range. Moreover, it argues that Metro should not have been advised of its deficiencies and given the opportunity to correct them.

The competitive negotiation process has inherent flexibility, wherein an offeror is permitted to remedy defects which if present in a bid under formal advertising would require the rejection of the bid. Therefore, the rigid concept of responsiveness as used in formally advertised procurements has no place in negotiated procurements. *Linolex Systems, Inc.*, 53 Comp. Gen. 895, 897 (1974), 74–1 CPD 296; *Ballantine Laboratories, Inc.*, B–183122, August 21, 1975, 75–2 CPD 121; *Teledyne Ryan Aeronautical*, B–180448, April 29, 1974, 74–1 CPD 219. For this reason, the specific cases cited by MSI dealing with a bidder's failure to acknowledge an amendment to a formally advertised procurement (*Kuckenberg-Arenz*, B–184169, July 30, 1975, 75–2 CPD 67; *Hartwick Construction Corporation*, B–182841, February 27, 1975, 75–1 CPD 118) are wholly inapplicable to the instant case. Therefore, the protester has presented no viable argument as to why Metro should have been excluded from the competitive range.

With reference to Metro's deficiency regarding the use of the Davis-Bacon Wage Determination, it should be noted that the Government estimate for appendix "B" was prepared utilizing the Department of Labor's Wage Determination of December 20, 1974, escalated by a fixed percentage over the 3-year contract period in recognition

of the fact that new wage determinations are issued approximately every 120 days. MSI which had based its appendix "B" direct labor costs on the December 20, 1974, wage determination recognized that increased wages would result from revised wage determinations and so provided in its cost proposal. MSI also included in its proposal an anticipated salary increase for Service Contract Act employees whose union contract expired on May 31, 1975. Metro, on the other hand, did not escalate its first year direct labor costs for this group of employees. However, the SEB made an upward adjustment of Metro's direct labor costs, insofar as the Service Contract Act is concerned, in an amount approximating the NASA estimated rate of escalation.

But, by NASA's own admission, Metro found it necessary during "final negotiations" to make extensive revisions to its proposal with respect to appendix "B," which NASA reviewed and accepted. Metro had apparently also omitted appropriate Davis-Bacon Act wage rate escalation. Therefore, rather than using the December wage determination and escalate therefrom for the entire contract year plus the period from December to July 1, 1975, Metro based its final proposed appendix "B" direct labor costs on the June 20 wage determination escalated only over the contract period itself.

MSI contends that Metro should not have been advised of its Davis-Bacon wage deficiency during final negotiations. In this regard, the NASA SEB Manual states in paragraph 601.3 that:

> 3. The final contract negotiation process differs from the written and oral discussions previously held with offerors in the competitive range. The latter discussions have the specific function of obtaining information for *evaluation and selection* purposes, while the final contract negotiations have the additional function of presenting that information in *contractually binding form.* For this reason it is essential that each offeror be brought to the most favorable terms that the negotiation process can produce, including technical and scientific approaches, management arrangements, and estimated costs (or fixed prices where applicable), and cost element ceilings as appropriate. The prohibition against auction techniques applies, of course, to these negotiations.

This Office has held that if negotiations are to be meaningful, the agency should conduct either written or oral discussions to the extent necessary to resolve uncertainties. See *Corbetta Construction Company of Illinois, Inc.*, 55 Comp. Gen. 201 (1975), 75-2 CPD 144; *Signatron, Inc.*, 54 Comp. Gen. 530 (1974), 74-2 CPD 386.

We believe that the instant situation is somewhat complicated by the fact the proposals were evaluated in accordance with NASA Procurement Directive (PRD) 70-15. That Directive states, in pertinent part:

> However, where the meaning of a proposal is clear, and where the Board has enough information to assess its validity, and *the proposal contains a weakness which is inherent in a proposer's management, engineering, or scientific judgment, or is the result of its own lack of competence or inventiveness in preparing its proposal, the contracting officer shall not point out the weaknesses.* Discussions are useful in

ascertaining the presence or absence of strengths and weaknesses. The possibility that such discussions may lead an offeror to discover that it has a weakness is not a reason for failing to inquire into a matter where the meaning is not clear or where insufficient information is available, since understanding of the meaning and validity of the proposed approaches, solutions, and cost estimates is essential to a sound selection. Proposers should not be informed of the relative strengths or weaknesses of their proposals in relation to those of other proposers. To do so would be contrary to other regulations which prohibit the use of "auction techniques." In the course of discussions, Government participants should be careful not to transmit information which could give leads to one proposer as to how its proposal may be improved or which could reveal a competitor's ideas.

The foregoing guidelines are not all-inclusive; careful judgment must be exercised in the light of all the circumstances of each procurement to promote the most advantageous selection from the standpoint of the Government while at the same time maintaining the fairness of the competitive process. [Italic supplied.]

As we have previously indicated (51 Comp. Gen. 621, 622 (1972) and *Dynalectron Corporation*, *supra*), while 10 U.S. Code § 2304(g) (1970) calls for the conduct of "written or oral" discussion with all offerors in the competitive range, valid exceptions to this rule under NASA procedures have been recognized in subject areas where, for example—

* * * it would be unfair to help an offeror through successive rounds of discussions to bring its original inadequate proposal up to the level of other adequate proposals *by pointing out weaknesses* which were the *result* of the *offeror's* lack of *diligence, competence, or inventiveness*, in preparing its proposal. [Italic supplied.]

In *Dynalectron*, *supra*, also involving NASA, the offeror's (incumbent contractor's) proposed low level of effort was not found to have made the proposal ambiguous or uncertain. Similarly, Metro's deficiency with respect to the application and escalation of Davis-Bacon wage rates would not appear to be of such a nature as to allow NASA to apprise an offeror of its existence during written or oral discussions (prior to what NASA calls "final negotiations"). We believe that NASA could properly have made the necessary cost adjustments to reflect cost realism as it had done with regard to Metro's proposed attempt to pay holdover MSI union employees less than they were presently receiving under the MSI union collective bargaining agreement. See discussion, *supra*.

In essence, the adjustment by NASA during evaluation and the correction of the deficiency by Metro subject to the review and approval of NASA we view as two different actions which reach the same result. Therefore, since NASA could have made the necessary adjustments to Metro's proposal in the evaluation process, its review and approval of Metro's correction of this deficiency in "final negotiations" did no harm to the MSI competitive position from a cost standpoint.

In cost-plus contract cases not involving NASA's PRD 70–15, this process of pointing out such deficiencies and allowing the offeror to make its own proposal modifications is used with the ultimate

determination of the offeror's most probable cost still left to the agency. See *Bell Aerospace, supra,* at 359–360. However, in the context of a NASA PRD 70–15 procurement where multiple "final negotiations" take place, it seems inconsistent to on the one hand limit the discussion process as it related to disclosing deficiencies only to disclose deficiencies to one offeror in the "final negotiations" phase.

RELEASE OF PROPRIETARY INFORMATION

MSI also argues that NASA's release to Metro of material proprietary to it gave Metro an unfair advantage by affording that firm the opportunity to obtain knowledge of MSI's financial and organization status to which it had no right. NASA indicates that, following the submission of proposals, Metro protested MSI's size status to the Small Business Administration (SBA). In support of this size protest, Metro requested certain documents from NASA. Personnel at MSFC who were not associated with the SEB, in response to this request on March 3, 1975, inadvertently released a copy of the transfer agreement effective September 1, 1974, between MSI and its predecessor, MSI of Tennessee, which related to a novation agreement with NASA. According to the NASA report, the document "contained the basis for the transfer between the two companies but did not contain financial or business data which would have given Metro insight into MSI's proposal."

It is agreed by NASA that Metro did not have a right to the material but NASA argues that MSI was not prejudiced in this procurement by the inappropriate disclosure. We agree. Unlike a situation where either a proposer's unique technical approach or its price is improperly disclosed to other offerors during negotiations and other offerors could modify their proposals to take the new information into account (see, e.g., *Swedlow, Inc.*, 53 Comp. Gen. 139 (1973), affirmed 53 Comp. Gen. 564 (1974), 74–1 CPD 55) here, the materials divulged the financial aspects of the transfer which relate to MSI's responsibility rather than to its price or technical approach in the instant procurement. While it is conceivable that such information may be of value to a party protesting MSI's size status to the SBA, the information in question was already in the Government's hands and we therefore fail to perceive the degree of harm asserted by MSI.

METRO'S COMMITMENT TO MINORITY SUBCONTRACTING

Lastly, MSI argues that, while the SSO indicated that one factor in deciding in favor of Metro was its firm subcontract with a minority-

owned company, information received by MSI on July 29, 1975, indicated that as of that date Metro did not have such a subcontract. (Note—As mentioned above, minority subcontracting was a subfactor in the "Other Factors" portion of the RFP evaluation factors.)

The source selection statement states in this regard:

> * * * While MSI is committed to procure certain designated supplies and materials from local Minority-owned or Small Business firms, Metro has agreed not only to consider the same procurement arrangement for like materials and supplies, but *Metro is also firmly committed to procure data processing from a local Minority-owned concern, D. P. Associates, Inc.* [Italic supplied.]

NASA's report states that:

> * * * A proposal for the use of a particular subcontractor is accepted by the SEB in the same manner as a proposal to use a named individual as a Key Personnel. Absent any contrary information, the contractor's proposal is accepted on its face.
>
> Additionally, on August 27, 1975, Metro reaffirmed its intent to subcontract with the firm and will resume negotiations upon resolution of this protest.

It is clear from the above-noted statements that Metro did not have any sort of contractual arrangement with D. P. Associates. Moreover, the record is devoid of information as to any commitment at all between D. P. Associates and Metro other than the fact that Metro "proposed" to use that firm.

As noted above, NASA accepted this proposed use in the same manner as a proposal to use a named individual as a key personnel and evaluated Metro as if it had entered into a contractual arrangement with D. P. Associates. We do not believe this was proper, especially where the use of this minority firm was proposed by Metro only during NASA's "final negotiations" with two offerors whose proposals were extremely close on a mission suitability basis and the proposed use of this minority subcontractor was a significant discriminator between the two proposals. *Cf. Serv-Air, Inc.*, B–179065, April 22, 1974, 74–1 CPD 206. As set forth by the court in *Rudolph F. Matzer & Associates, Inc.* v. *Warner*, 348 F. Supp. 991 (M.D. Fla. 1972), where in the course of a negotiated procurement, an agency evaluates a proposal based on an offeror's proposed use of certain resources (key employees) which the offeror neither contractually controls nor has an informal commitment regarding its use, the evaluation is "patently irrational."

We do not believe that an offeror must in every instance have contractual relationships with key employees, subcontractors, etc. However, for those employees, subcontractors, etc., to be considered in the evaluation of the offeror's proposal absent such a contractual relationship, the agency must reasonably be assured that the employee, subcontractor, etc., is firmly committed to the offeror. See *Programming Methods, GTE Information Systems, Inc.*, B–181845, December 12, 1974, 74–2 CDP 331. This is especially true where the consideration

of the factor in question may be determinative of award. *Serv-Air, supra.* We do not believe that an offeror's mere proposed use of a certain person or subcontractor constitutes such a commitment. Indeed, if this was all that was required, there would be no way to preclude an offeror from proposing an impressive array of employees and/or subcontractors, to be evaluated on that basis, and perhaps receive award, even where the persons or companies proposed had never committed themselves to the offeror and had no intention of doing so. See rationale for RFP clause precluding this situation set forth in *Hew Es Co., Incorporated,* B–183040, April 18, 1975, 75–1 CPD 239.

Accordingly, we believe that NASA erred in merely accepting, without more, Metro's proposed use of D. P. Associates and then using this fact as a significant basis for the award decision. See *Serv-Air, supra.* In view of this fact, it is now incumbent upon NASA to reopen its evaluation in this regard and assess the respective proposals based on the resources actually "committed" to the project. As can be clearly seen, the concept of commitment of resources can equally apply to the area of key personnel. We therefore feel that NASA should reexamine this aspect of its evaluation.

RESOLUTION OF PROTEST PENDING FREEDOM OF INFORMATION ACT SUIT

MSI, in pursuing its protest, requested certain documents such as the SEB report from NASA. Some of the information requested was released. Most of it was not. Therefore, MSI filed an appeal in accordance with the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (Supp. IV, 1974), and NASA's implementing regulations, 14 C.F.R. § 1206 (1975). On October 15, 1975, NASA denied MSI's appeal and on November 10, 1975, MSI filed an FOIA action in the United States District Court for the Northern District of Alabama.

At the conference on this protest, MSI specifically requested that we withhold our decision pending the court's disposition of the FOIA action. On November 17, 1975, MSI was informally advised that GAO would not withhold the processing of its protest.

MSI, thereafter, complained that GAO acted improperly in denying MSI's request to withhold the decision arguing that "This is not an instance where further delay could harm the NASA procurement process since the services which were the subject to the Request for Proposals (RFP) are presently being performed [by MSI] in a manner satisfactory to NASA. In the *matter of Riggins and Williamson Machine Company, Inc., et al.,* 75–1 CPD 168 (1975)."

In *Riggins & Williamson* the protester claimed that it was at a disadvantage being without access to portions of the agency report on the protest submitted to our Office. We do not disagree that any time material is submitted for our *in camera* review, one or more parties may feel disadvantaged. However, in deciding to issue a decision in *Riggins & Williamson*, we indicated that we had carefully balanced the disadvantages to the protester against a further delay in the procurement plan. However, this balancing test is not the sole consideration to be applied to these situations. Each circumstance must be viewed separately and the magnitude of the disadvantages of respective parties including the Government must be weighed.

Here, as MSI asserts, NASA has not claimed that a delay in our issuance of a decision would be critical. Nevertheless, any further delay would postpone the procurement process indefinitely, impact severely on the proposed awardee who has been *in limbo* since the filing of this protest in July 1975 and further permit MSI to continue as the holdover contractor long after a new contractor (only possibly MSI) should have been awarded a contract for NASA's current needs. Examining these factors, we are of the opinion that delay of the decision would be unreasonable.

CONCLUSION

Summarizing our discussion above with respect to the merits of the protest, we believe that the evaluation should be reopened so that the assessment of possible cost risk relating to potential labor unrest can be assessed. This cost risk should be properly determined and the impact of any such cost risk on realistic costs, other factors and/or mission suitability should be adjudged with appropriate action taken after this review. Also examined should be the commitment of resources.

In the course of the NASA review of cost, we think that an analysis of the cost impact of the new Service Contract Act wage rates (new collective bargaining agreement) which became effective on June 1, 1975, should be assessed. As noted in *Dyneteria, Inc.*, 55 Comp. Gen. 97 (1975), 75–2 CPD 36, affirmed in *Tombs & Sons, Inc.*, B–178701, November 20, 1975, 75–2 CPD 332, it is insufficient for an agency to simply assume after prices are received but before award that a new Service Contract Act Wage Determination will affect all offerors equally. Thus, even though both proposals were based on the prior collective bargaining agreement with projected escalations, and since NASA has indicated that all evaluation labor costs governed by the Service Contract Act were assessed on this basis, we feel that a more

appropriate and precise analysis is now both possible and in order, in light of the definitization of the new applicable wages.

[B-185248]

Contracting Officers—Responsibility—Bid Opening Time—Error Detection Duty

Contracting officer acted unreasonably and in contravention of Armed Services Procurement Regulation 2-208 in failing to at least telephonically notify five firms on bidders' list of correct bid opening time when he was made aware of patent error in invitation for bids (IFB), which designated bid opening time as either ".30 PM" or "30 PM," even though DD Form 1707 included in solicitation package but not incorporated in IFB indicated correct bid opening time of 1:30 p.m. Contracting officer should not merely presume that reasonable bidders would inquire as to correct bid opening time under such circumstances.

Bidders—Inquiries—Duty to Inquire—Existence of Patent Discrepancy in Invitation

Late bidder acted unreasonably in assuming that bid opening under IFB, which designated bid opening time as either ".30 PM" or "30 PM," would occur at 3 p.m. (actual bid opening was at 1:30 p.m.), and had duty to inquire of agency regarding patent discrepancy, even though agency improperly failed to notify bidder of bid opening time discrepancy when agency was made aware of it. Rule under which IFB's terms would be interpreted against Government as IFB drafter has no application where such a patent discrepancy exists.

Contracts—Protests—Timeliness

Although protest, insofar as it concerns IFB discrepancy in designating correct bid opening time, is untimely under Bid Protest Procedures, since it was not filed prior to bid opening, balance of protest, i.e., contention that protester's bid should not have been rejected as late, is timely because protester filed within 10 working days after it became aware of basis for protest.

Bids—Late—Acceptance—Prejudicial to Other Bidders

Bidder, who submitted bid 30 minutes after 1:30 p.m. bid opening because it unreasonably interpreted IFB bid opening time designation of either ".30" or "30 PM" as 3 p.m., and did not inquire as to correct bid opening time, may not have its late bid considered, despite substantial contribution to bid lateness of defective IFB and Government's improper failure to notify bidders of correct bid opening time, because bidder caused own lateness and integrity of competitive bid system may be jeopardized if late bid is considered since other bids had been publicly opened.

Bids—Invitation for Bids—Cancellation—After Bid Opening

Although IFB was patently defective in indicating bid opening time and contracting officer improperly failed to inform bidders of correct bid opening time when he was made aware of IFB discrepancy prior to bid opening, no compelling reason exists to cancel IFB after bid opening and resolicit requirement since late bidder contributed to own lateness by failing to inquire regarding patent deficiency and there is adequate competition, a reasonable price and absence of any indication of prejudice to other bidders.

In the matter of Avantek, Inc., February 5, 1976:

This decision concerns the bid protest filed in our Office by Avantek, Inc. (Avantek), against the rejection of its bid as late by the Naval Supply Center, Norfolk, Virginia, under invitation for bids (IFB) N00189–76–B–0012. The IFB was issued on September 30, 1975, for the supply of six transistor microwave amplifiers.

In block nine of Standard Form 33 (SF 33), which was the first page of the IFB, the time indicated for bid opening reads either "* * * until *.30 PM 75 October 30*" or "* * * until *30 PM 75 October 30.*" (There is a dispute regarding the "time" designated in the IFB.) The Navy reports that apparently, in reproduction, some particle had blocked out a portion of block nine of the SF 33, and that the intended printing was "* * * until *1:30 PM 75 October 30.*" The Navy states that this misprint occurred in all of the IFB's issued to potential bidders.

All of the solicitation packages supplied the bidders (including Avantek) for this IFB contained a Department of Defense Form 1707 (DD Form 1707) titled "Information to Offerors." On the front side of this form, certain salient facts concerning this procurement are outlined. The back of the DD Form 1707 is essentially a "no bid form" to be completed by solicited potential bidders who decide not to bid on the procurement. On the bottom of the back of the DD Form 1707, the intended bid opening time of 1:30 p.m., October 30, 1975, is set out.

The Navy reports that the contracting officer became aware of the misprint on the SF 33 at approximately 4 p.m., October 29, 1975. However, because the intended time was indicated on the DD Form 1707 and because no queries had been received from any of the potential bidders solicited, it was determined that there was no need to extend bid opening. Moreover, it was decided not to notify any of the five firms on the bidders' list of the correct bid opening time. However, the contracting officer advised the bid opening officer to notify him if problems concerning the opening time developed.

Bids were opened at 1:30 p.m., October 30, 1975, and three bids were submitted by the scheduled bid opening time. The low bid was submitted by the Watkins-Johnson Company (W–J). The Navy states that it received an inquiry from only one of the timely bidders on the morning of October 30, 1975, regarding the correct bid opening time. The Navy reports that the bids timely received were opened, read aloud and recorded. After the bids were recorded, all Government representatives vacated the bid opening room, and a copy of the bid abstract was left in the room and made available to the public. The bid opening apparently took no more than 15 minutes. At ap-

proximately 2 p.m., a representative of Avantek attempted to submit a bid. The contracting officer determined that Avantek's bid was late. The Navy has withheld award and retained Avantek's bid unopened pending our decision in this matter.

Avantek has asserted that it reasonably interpreted the bid opening time to be at 3 p.m., October 30, 1975. Avantek has stated that since it intended to bid on this procurement it did not look at the "no bid form" on the back of the DD Form 1707. Avantek delivered its sealed bid to its representative in Maryland with the bid opening time of 3 p.m., clearly marked on the outside of the envelope. Avantek's representative transported the bid by motor vehicle to Norfolk in order to deliver it in time for the presumed 3 p.m. bid opening. The representative states that at no time on October 30, 1975, prior to submitting the unopened bid to Navy personnel, did he communicate with anyone regarding this procurement. He also asserts that he did not open the bid and was unaware of its contents. The Avantek representative has also stated in his affidavit:

17. I arrived at the Naval Supply Center, Norfolk, Virginia shortly before 2:00 p.m., and was logged in by a security guard at the gate.

18. I drove to [building where bid opening was scheduled], was requested to and did sign a security register at 2:00 p.m., and took an elevator to the eighth floor.

19. I initially approached a woman * * * who normally receives responses to Invitation for Bids. She refused to accept Avantek's sealed bid envelope, and directed me to [another woman], who looked at Avantek's sealed bid envelope, commented that she would have to get someone, and disappeared.

20. [She] * * * returned in two or three minutes with * * *, the Contracting Officer, and advised me that bid opening had occurred at 1:30 p.m. rather than the 3:00 p.m. indicated on Avantek's sealed bid envelope. She took possession of Avantek's sealed bid envelope, stamped it with a 2:00 p.m. time of receipt, signed it, and requested that I also sign, which I did.

* * * * * * *

22. After processing and taking possession of Avantek's sealed bid envelope [she] * * * showed me a synopsis of bids which had already been opened. This was my first indication from any source whatsoever of the amount of the bids which had been opened.

It is Avantek's position that its bid should be accepted as timely, inasmuch as the first page of the IFB (SF 33) indicated that bid opening was at 3 p.m. Avantek asserts that it had no obligation to read the DD Form 1707 because it had every intention of bidding. Consequently, it does not believe it can be said to be on notice of the 1:30 p.m., bid opening time indicated therein. Avantek also asserts that the rule whereby ambiguities are construed against the draftsman should be applied against the Government in interpreting the IFB in this case, and the validity of the 3 p.m., bid time, as interpreted by Avantek, recognized.

Avantek contends that "late" hand-carried bids may be considered, under appropriate circumstances, if the lateness is caused by Government fault and there is corroborating evidence showing that the

"late" bidder had no opportunity after the other bids were opened to alter its bid. Avantek cites *Le Chase Construction Corporation*, B–183609, July 1, 1975, 75–2 CPD 5, and *Hyster Company*, 55 Comp. Gen. 267 (1975), 75–2 CPD 176, to support its position in this regard. Avantek contends that the evidence and affidavits it has submitted demonstrate Avantek's lack of any opportunity to alter its bid after the other bids were opened. Avantek also points out that the Government was at fault not only for the defective IFB but also for failing to amend the solicitation to correct this defect prior to bid opening when it became aware of this discrepancy. Avantek contends that this violated Armed Services Procurement Regulation (ASPR) § 2–208 (1975 ed.) which provides for amendment of a solicitation to correct such a defect or ambiguity.

In addition to the Navy's actions in issuing an IFB which did not clearly set forth the exact time of bid opening, we believe the contracting officer acted unreasonably and in contravention of ASPR § 2–208 (1975 ed.) in failing to notify the five firms on the bidders' list, at least by phone, of the correct bid opening time when he became aware of the IFB discrepancy prior to bid opening. The Government should not merely presume, from the absence of queries concerning what it regards as a patent deficiency in the IFB, that all bidders, in the exercise of their reasonable judgment, will ascertain for themselves, either by questioning the appropriate Government officials or by perusing the entire solicitation package, the Government's intended meaning. Indeed, it seems clear that the contracting officer seemingly anticipated that problems could well occur from the failure to notify potential bidders of the correct bid opening time in view of the specific instructions given to the bid opening officer that the contracting officer be notified if problems arose regarding the bid opening time.

In addition, the Navy readily admits that although the DD Form 1707 indicating the correct bid opening time was in the solicitation package, it was not considered part of the IFB. Although ASPR § 2–201 (1975 ed.) indicates that the DD Form 1707 may be made part of the IFB as the "cover sheet," it is clear (contrary to W–J's contentions) that the Navy regarded the SF 33 as the "cover sheet" of the IFB, and that the DD Form 1707 was not part of the IFB. Even if the DD Form 1707 was considered part of the IFB, we believe the contracting officer still should have notified the bidders of the correct bid opening time, so as to ensure that no bidder would be prejudiced by the error in the IFB.

Notwithstanding the foregoing, we believe that Avantek also acted unreasonably in assuming that the correct bid opening time was 3 p.m., whether the IFB indicated ".30 PM" or "30 PM." We

agree with the Navy that both ".30 PM" and "30 PM" have no meaning in the context used in the IFB. Where such a patent discrepancy exists in an IFB, we believe it is the duty of the bidder to ask for an explanation prior to submitting its bid, and a reasonable bidder may not blindly make its own assumptions regarding a clearly defective requirement. See *Beacon Construction Company of Massachusetts* v. *United States*, 314 F.2d 501, 161 Ct. Cl. 1 (1963); *Space Corporation* v. *United States*, 470 F.2d 536, 200 Ct. Cl. 1 (1972); *Merando, Inc.* v. *United States*, 475 F.2d 601, 201 Ct. Cl. 19 (1973). *See also* B–135933, June 26, 1958, where we found that patent inconsistencies in an IFB regarding the correct bid opening time should be brought to the agency's attention prior to bid opening. Under such circumstances, where the bidder knew or should have known of the patent IFB deficiency, the rule under which the IFB's terms would be interpreted against the Government as the IFB's drafter can have no application. See *Jefferson Construction Company* v. *United States*, 151 Ct. Cl. 75 (1960); *Space Corporation* v. *United States, supra*, at 539; *Merando, Inc.* v. *United States, supra*. Moreover, although the DD Form 1707 was admittedly not part of the IFB, it was in the solicitation package supplied to Avantek. Therefore, we believe Avantek acted unreasonably in failing to inquire as to the correct bid opening time and in assuming that 3 p.m. was the intended time.

In view of the foregoing, Avantek's protest insofar as it is against the IFB's deficient indication of the bid opening time must be regarded as a protest of an impropriety in the solicitation apparent prior to bid opening. Since Avantek did not file its protest prior to bid opening, the protest of the IFB deficiency is untimely under section 20.2(b)(1) of our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975). See *Associated Refuse and Compaction Services*, B–180484, April 17, 1974, 74–1 CPD 201; *E. Sprague, Batavia, Inc.*, B–183082, April 2, 1975, 75–1 CPD 194. However, Avantek did not find out until it attempted to deliver its bid that the contracting officer had acted in contravention of ASPR § 2–208 (1975 ed.) in failing to notify the bidders of the proper bid opening time when he realized the IFB deficiency existed. Therefore, since Avantek's protest was received in this Office on November 3, 1975, within 10 working days of when it became aware of this procurement deficiency and since Avantek's protest is essentially against the rejection of its bid as late, the balance of Avantek's protest is timely filed under our Bid Protest Procedures, and will be considered on the merits.

A bid submitted after the scheduled bid opening time is late and generally may not be considered for award. ASPR §§ 2–301(a), 2–302, and 2–303.1 (1975 ed.); 34 Comp. Gen. 150 (1954); 47 *id.* 784 (1968). However, a hand-carried bid which is received late may be accepted

where the bid lateness was due to improper Government action and consideration of the bid would not compromise the integrity of the competitive bid system. See *Le Chase, supra; Hyster, supra*, and cases cited therein.

On the other hand, a late bid should not be considered if the late bidder significantly contributed to the bid lateness by not acting reasonably and diligently in fulfilling its own responsibility of delivering its hand-carried bid to the proper place by the proper time, even where the lateness is substantially caused by erroneous Government actions or advice. 47 Comp. Gen., *supra;* B–169845, June 23, 1970; *James L. Ferry and Sons, Inc.*, B–181612, November 7, 1974, 74–2 CPD 245; *Associate Control, Research and Analysis, Inc.*, B–184071, September 25, 1975, 75–2 CPD 186. Notwithstanding the Government's improper actions in this case, we believe Avantek acted unreasonably in interpreting "30 PM" or ".30 PM" (as the case may be) to be 3 p.m., and in failing to inquire regarding this patently obvious IFB deficiency.

In contrast, the "late" bidders in *Le Chase, supra*, and *Hyster, supra*, cited by the protester, acted reasonably and diligently in attempting to deliver their hand-delivered bids. In *Le Chase, supra*, the "late" bidder, unaware that the two bid opening rooms had been incorrectly designated in the IFB, unsuccessfully sought clarification as to the bid opening place upon arrival at the bid opening building. Thereafter, the bidder proceeded to one of the IFB's designated rooms, which was locked and unoccupied. The bidder finally arrived in the room to which the bid opening had been transferred, one minute after the scheduled bid opening but prior to the actual opening of any bid. In *Hyster, supra*, the "late" bidder actually tendered, albeit unsuccessfully, its bid to a proper agency official in the bid opening room, prior to the opening of any bids and prior to the bid opening time indicated on the bid opening room clock.

Moreover, it is our belief that acceptance of Avantek's late bid would tend to compromise the integrity of the competitive bid system. The bids were publicly opened, read, recorded and left unattended for public inspection in the bid opening room for a period of approximately 15 minutes. In addition, information regarding the results of the opening was apparently freely made available shortly after bid opening to any who inquired by telephone. In view of the foregoing, the integrity of the competitive bid system could be jeopardized by the consideration of the Avantek bid tendered after the other bids were exposed. *See* 38 Comp. Gen. 234 (1958); B–143288, June 30, 1960; 47 Comp. Gen., *supra. Cf. Commercial Envelope Manufacturing Co., Inc.*, B–183010, July 17, 1975, 75–2 CPD 44.

The situation is readily distinguishable from the circumstances in the cases referenced by Avantek. In *Le Chase, supra,* no bids had been opened when the "late" bidder's bid was accepted by the Government. In *Hyster, supra,* the Government representative improperly refused the timely tender of the "late" bidder's bid, and only accepted the "late" bid after bid opening had commenced. However, the other bids were not read aloud upon opening; the "late" bidder, although still in possession of its bid, was not in the bid opening room during most of the bid opening; the "late" bidder made no attempt to gain access to the other bids which, although available for inspection in the bid opening room, were constantly monitored prior to the acceptance of the "late" bid; and the agency advised our Office that there was no indication that the "late" bidder gained any knowledge of the other bids after opening and prior to the "late" bid's acceptance.

In view of the foregoing, we concur with the Navy's determination that Avantek's bid must be rejected as late.

In addition, we do not believe the circumstances of this case provide a sufficient basis to compel cancellation and resolicitation. The United States Court of Claims stated in *Massman Construction Company* v. *United States,* 102 Ct. Cl. 699, 719 (1945), *cert. denied,* 325 U.S. 866 (1945):

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

To the same effect, see ASPR § 2–404.1 (1975 ed.), which requires "a compelling reason" for cancellation and resolicitation after bid opening. Although defective specifications may, under appropriate circumstances, be sufficient reason to cancel and resolicit, we have held that the fact that inadequate or deficient provisions are in the IFB does not, *per se,* require cancellation of an IFB once bids have been opened and the prices exposed. 52 Comp. Gen. 285 (1972); *Edward B. Friel, Inc.,* 55 Comp. Gen. 488 (1975), 75–2 CPD 333.

The present situation is analogous to the cases where a bidder is erroneously not solicited or not timely solicited by a procuring activity, or where a bidder fails to receive an amendment extending the bid opening due to Government fault. We have held in such cases that if the method of solicitation, in fact, provided adequate competition and reasonable prices, the failure to solicit or supply an amendment to a particular bidder does not, absent a showing of a deliberate intent to exclude that bidder, afford a sufficient basis to cancel a solicitation and readvertise. B–167928, December 8, 1969; 49 Comp. Gen. 707 (1970); B–176261, August 14, 1972; B–178967(1), November 5, 1973. We believe this rule is applicable here.

In view of the foregoing, and since there is adequate competition, a bid price offered by a timely bidder (W–J) which is clearly regarded as reasonable by the Navy, and an absence of any indication of prejudice to any other prospective bidder, no compelling reason exists to cancel and resolicit, and award may be made under the present IFB.

Accordingly, Avantek's protest is denied. However, we are bringing the serious procurement deficiencies set out above to the attention of the Secretary of the Navy.

[B–185498]

Bids—Mistakes—Recalculation of Bid—Correction v. Withdrawal

Contracting officer's determination that bidder alleging mistake should be permitted to withdraw but not to correct its bid was proper where correction would increase price on item of work from $97,079 to $223,440, thus bringing total bid to within $5,000 of second low bid in $670,000 procurement.

In the matter of Asphalt Construction, Inc., February 9, 1976:

This case concerns the refusal of the District of Columbia to permit correction of a bid submitted by Asphalt Construction, Inc. under invitation for bids 0984–AA–02–0–5 C for field and track improvements for Ballou, Coolidge and Woodson senior high schools. Four bids were received and opened on November 5, 1975:

Bidder	Unit Bid A (all work at Ballou)	Unit Bid B (all work at Woodson)	ADD ALT. 1 (all work at Coolidge)
Asphalt Const. Co	$259,952	$189,981	$97,079
Corson & Gruman	$249,821	$209,000	$219,500
Klingensmith, Inc	$239,700	$222,300	$218,700
Ratrie, Robbins & Schweizer, Inc	$288,239	$220,674	$225,271

Four other additives were included in the bid schedule but were not considered due to the unavailability of funding. Award was to be made to one bidder on the basis of unit bids A and B, plus any alternatives.

By letter dated November 7, 1975, Asphalt notified the contracting officer that it had made an error and requested permission to increase its bid price. In support of its alleged mistake Asphalt submitted its work papers and explained that subcontractor suppliers were extremely late in releasing their prices, as the result of which Asphalt received its quote from American Biltrite, Inc. at 2:30 p.m. for inclusion in the bid which would be opened at 3 p.m. Asphalt indicated that the cost of the Biltrite item, $126,380, was not extended into the total

column of the work paper for Additive Alternate 1. This omission resulted in a total bid of only $97,079 for an item on which the next lowest bid was $219,500. Asphalt requests that it be given leave to adjust its price for Additive Alternative 1 to $223,459. If correction were permitted, Asphalt's bid for the three items to be awarded would still be $4,929 below the bid of Corson & Gruman.

By memorandum of November 29, 1975, the District of Columbia Director of General Services submitted to the District Contract Review Committee a proposal to deny the request of Asphalt to correct its bid price. This conclusion was based in part on the following:

(b) Asphalt Construction, Inc.'s Additive Alternate No. 1 in comparison to the other bidders and the Government estimate, reflects a constructive notice of error, recognizable on the face of the bid documents, that demands rejection unless clear, convincing and conclusive evidence is submitted to substantiate correction in bid price.

* * * * * * *

(d) * * * The $4,929 saving that the District of Columbia would recognize by by awarding this contract to Asphalt Construction, Inc. at the corrected bid price for Additive Alternate No. 1 would not justify the possible erosion of public confidence in the competitive bidding system that the District of Columbia would experience. With the number of irregularities, omissions, deletions, additions and unauthorized conditions incorporated with the bids submitted to this Department, substantiation no more convincing than the data submitted by Asphalt Construction, Inc. could easily become a standard procedure with bidders attempting to rectify their bid prices.

By memorandum of November 24, 1975, the Acting Chairman of the Contract Review Committee notified the Director of General Services that the Committee had reviewed the proposal and concurred with the Director. Thereafter, Asphalt by letter of December 9, 1975, requested this Office to permit the correction.

Our Office has frequently held that to allow correction of an error in bid prior to award, a bidder must show by clear and convincing evidence that an error has been made, the manner in which the error occurred, and the intended bid price. 49 Comp. Gen. 480 (1970). To the same effect see Federal Procurement Regulations § 1–2.406–3(a)(2)(1964 ed.). The authority to correct bid mistakes prior to award is vested in the procuring agency and the weight to be given the evidence in support of an alleged mistake is a question of fact to be considered by the agency whose decision will not be disturbed by our Office unless there is no reasonable basis for the decision. 53 Comp. Gen. 232, 235 (1973).

Counsel for Asphalt has alleged that the District had adopted a policy which permits withdrawal of erroneous bids, but effectively prohibits their correction under any circumstances. We think that the decision to permit withdrawal or correction is within the discretion of the agency, but that such discretion must be exercised on a case by case basis in accordance with the principles discussed above rather than on a broad policy basis.

It is clear that the contracting officer was not entirely convinced that Asphalt would have been the low bidder if a mistake had not been made in computing its bid. In this regard, we note that the requested correction would raise the price for one item from $97,079 to $223,440, thus bringing the total bid to within 1 percent, or $5,000, of the second low bid in a $670,000 procurement. Moreover, the evidence of mistake (aside from the subcontractor quote submitted after bid opening) consisted entirely of work sheets prepared by the bidder. Under these circumstances we believe that the contracting officer reasonably determined that correction was not appropriate.

With regard to our decision 49 Comp. Gen. 480 (1970), cited by Asphalt in support of its request for correction, we note that although the correction permitted in that instance exceeded $750,000, a difference in excess of one and one-half million dollars remained between the two lowest bidders in that $12–14 million procurement. The facts of that case are therefore not analogous in the instant case.

On the basis of the foregoing, we believe that the decision of the District to allow withdrawal of the bid of Asphalt, but to prohibit correction of its bid, was proper.

[B-182355]

Contracts—Labor Stipulations—Davis-Bacon Act—Wage Underpayments—Claim Priority—Underpaid Workers *v.* IRS Levy

Where it was determined that contractor had underpaid three employees in violation of Davis-Bacon Act, 40 U.S.C. 276a, and funds were administratively withheld from balance due on contract to cover underpayments, claims of underpaid workers have priority over later IRS levy. 46 Comp. Gen. 178, which held that IRS levy had priority over claims of underpaid employees, is modified to extent that it is inconsistent.

Claims—Assignments—Contracts—Validity of Assignment

Bank claiming balance due under contract on basis of assignment from contractor does not have valid claim against Government since assignment was not made pursuant to Assignment of Claims Act, 31 U.S.C. 203 and 41 U.S.C. 15. Distribution of contract balance, withheld to cover Davis–Bacon underpayments, is authorized. But due to lapse of time since violations occurred and bankruptcy of contractor, debarment is not warranted.

In the matter of Richard T. D'Ambrosia d.b.a. Ambrosia Construction Company, February 11, 1976:

The present case involves the question of who has priority to funds withheld to cover underpayments of workers as a result of violations of the Davis-Bacon Act, 40 U.S. Code § 276a, by Richard T. D'Ambrosia d.b.a. Ambrosia Construction Company, incident to its performance of Department of Navy Contract N62464–67–C–

0410, for the installation of a sprinkler system in Building No. 42, Naval Station, Boston, Massachusetts.

The contract was awarded on June 29, 1967, and included the labor standards provisions of Standard Form 19–A (including the Davis-Bacon provisions) and the Secretary of Labor's Wage Decision No. AG–9,870, dated April 9, 1967, as modified on April 24, 1967. During the performance of the contract it was determined by the Navy that three workers had been underpaid a total of $2,440.53. This amount, in addition to an amount covering liquidated damages, was withheld, from the amount due the contractor under the contract, some time prior to July 8, 1969, the date on which the contract was completed. However, the money was not forwarded to the General Accounting Office (GAO) until March 1974, for reasons which will be explained later.

On November 13, 1969, the contractor filed a petition in bankruptcy in the United States District Court for the District of Massachusetts. The petition of July 16, 1970, to establish title and for turnover to the Referee in Bankruptcy indicates that there was a contract balance of $8,000, which we assume included the withholdings of $2,440.53 covering Davis-Bacon violations, $3,840 for liquidated damages, leaving $1,719.47. However, according to the Resident Officer in Charge of Construction at the Boston Naval Shipyard, the amount due on the contract was $7,886.28 minus $2,441.53 (correct amount was $2,440.53) for the wage underpayments and $3,840.00 covering liquidated damages, leaving a contract balance of $1,604.75. The petition also indicated that the Rockland Trust Company had asserted a claim against the contract balance. Due to the inability of the parties involved to agree on a hearing date and to obtain a decision on the claims of the creditors, the Resident Officer in Charge of Construction, Boston Naval Shipyard, recommended, on May 4, 1971, that the money withheld by the Navy to cover Davis-Bacon violations be transmitted to GAO for disbursement to the underpaid workers. On June 16, 1971, the Internal Revenue Service (IRS) asserted a claim of $98,375.01 against the contract balance. According to the record, there followed a lengthy legal battle involving the various creditors, the Rockland Trust Company, the Navy and the IRS over the division of the bankrupt's assets. On March 7, 1974, the $2,440.53 was finally forwarded to GAO.

The only question which is before us is which party (IRS, the Rockland Trust Company and the underpaid workers) has priority to the $2,440.53, against which no other claims have been asserted.

Regarding the claim by the Rockland Trust Company, set out in the petition of July 16, 1970, to the Bankruptcy Court, it appears

to be based on an alledged assignment by the contractor to the bank of amounts owed it (the contractor) under the contract. However, there is no evidence of record to indicate that an assignment exists under the Assignment of Claims Act, 31 U.S.C. § 203 (1970). This being the case, its claim while effective between the parties would not be valid against the Government. B–176890, April 18, 1973.

In regard to IRS' claim and the underpaid workers' claims, we recognize that the Government, in this case the IRS, has the common law right of setoff against amounts owed the contractor by the Government. *United States* v. *Munsey Trust Co.*, 332 U.S. 234 (1957). However, the courts have held that IRS levies cannot attach to property in which the taxpayer has no interest. See *Atlantic Refining Company* v. *Continental Casualty Company*, 183 F. Supp. 478 (1960), *United States* v. *Burgo*, 175 F. 2d 196, 198 (1949). The reason for this is that the Government's rights under sections 6321 and 6322 of Title 26 of the U.S. Code (the statutory authority for IRS liens) can rise no higher than the rights of the taxpayer. *Central Surety and Insurance Corporation* v. *Martin Infante Co., Inc.*, 272 F. 2d 231 (1959). The issue which must therefore be resolved is whether or not the contractor had, at the time of the IRS levy, an interest in the withheld funds against which the IRS levy could attach.

The Davis-Bacon Act, at 40 U.S.C. § 276a(a), provides that:

> * * * there may be withheld from the contractor so much of the accrued payments *as may be considered necessary by the contracting officer* to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents. [Italic supplied.]

Also, 40 U.S.C. § 276a–2(a), authorizes the Comptroller General "to pay directly to laborers and mechanics from any accrued payments withheld under the terms of the contract any *wages found to be due* laborers and mechanics * * *." [Italic supplied.] However, once the money is withheld and segregated by the contracting officer for the specific purpose of covering alleged Davis-Bacon underpayments, the contractor has no interest in those monies to which an IRS levy can attach. Since the rights of IRS can rise no higher than the contractor's rights, IRS' right to the money would only be a contingent right to the fund should the Comptroller General determine that the contractor was entitled to the withheld monies. Certainly, where there is no IRS levy the contractor would have no right to the money between the time it was withheld by the contracting officer and the time the Comptroller General makes his preliminary determination and, additionally, if the Comptroller General made a determination that the workers were, in fact, underpaid, the contractor

would be totally divested of any right to the money. Since IRS "stands in the contractor's shoes," so to speak, it (IRS) would not have priority to the withheld funds over the underpaid workers should the Comptroller General determine that the workers had been underpaid.

Additionally, we believe that to give IRS priority to funds withheld for the specific purpose of paying workers, who have been underpaid in violation of the Davis-Bacon Act, would be contrary to the intent of the Act, i.e., to protect the employees from substandard earnings by fixing a wage floor under Government projects. See *United States* v. *Binghamton Construction Co., Inc.*, 347 U.S. 171 (1954). To rule otherwise would permit IRS to effectively defeat the purpose of the Act by allowing it to set off against the funds before the Comptroller General makes his preliminary determination of who is entitled to the money. The reason for this is that in most, if not all, instances by the time the Comptroller General had made his preliminary determination IRS would have already issued its levy and setoff against the funds, thus, leaving the Comptroller General with no funds with which to pay the workers should he decide that they were, in fact, underpaid. This unfortunate result is due to the delay caused by the various administrative proceedings between the time the money is withheld and the time that the funds are received by GAO.

Accordingly, 46 Comp. Gen. 178 (1966) is modified to the extent that it is inconsistent with our holding in the present case. Our Claims Division has been authorized to distribute the $2,440.53 to the underpaid workers.

Regarding the question of debarment of the contractor for violation of the Davis-Bacon Act (see 40 U.S.C. § 276a–2(a)), in view of the fact the contractor is bankrupt and the lapse of time since the violations occurred we are of the view that debarment would be inappropriate.

[B–183936]

Officers and Employees—Transfers—Relocation Expenses—Pro Rata Expense Reimbursement—House Purchase or Sale—Two-Family Dwelling

Employee who purchased two-family dwelling is entitled to pro rata reimbursement of otherwise allowable real estate expenses since OMB Circular No. A–56 does not contemplate application of fixed 50 percent formula whenever an employee purchases a two-family dwelling. In establishing the applicable reimbursement percentage when more than 50 percent is claimed, the agency should require the employee to submit specific information as to the space occupied by the employee as residence and living quarters and, if necessary, an expert opinion as to the propriety of the percentage claimed.

Officers and Employees—Transfers—Relocation Expenses—House Purchase—Pro Rata Expense Reimbursement—Flat Fee Expenses

Where employee purchases two-family dwelling, otherwise allowable real estate expenses which are based on a flat fee, without regard to purchase price, should, if reasonable, be reimbursed in toto.

In the matter of pro rata reimbursement for purchase of two-family dwelling, February 11, 1976:

This matter is before us on a request for an advance decision from an authorized certifying officer of the Internal Revenue Service. It concerns the allowability of certain real estate expenses which were incurred by Mr. Richard L. Alpin, an employee of the Service, in connection with the purchase of a two-family home at Rocky Point, New York, on December 4, 1972, in connection with his transfer to Holtsville, New York.

The record shows that Mr. Alpin claimed 85 percent of the expenses incident to his purchase of the two-family dwelling. He states that his family exclusively occupied the main floor of the house, the basement, a two-car garage, patio, and all grounds. The tenants are said to occupy an apartment "equivalent" to the main floor of the dwelling. Also, Mr. Alpin states that the tenants may not use the grounds, patio, basement, garage, or main floor. Mr. Alpin claims reimbursement of 85 percent of the following real estate expenses because the portion of exclusive use by his family is 85 percent of the total purchase:

Legal fees	$175.00
Legal fees	360.00
Record fees	15.15
Appraisal fees	40.00
Termite inspection	21.40
Credit report	10.00
Mortgage insurance	162.00
Fee insurance	126.00
Document stamps	45.65
Mortgage stamps	57.62
Gratuity	5.00
Total	$1,017.82

Pending resolution of the matter by this Office, the claimed real estate expenses of $865.15 (85 percent of $1,017.82) have been administratively suspended from the travel voucher in the apparent belief that Mr. Alpin's reimbursement entitlement was limited to

one-half of his real estate expenses (total expenses divided by the number of dwelling units).

Title 5, U.S. Code, section 5724a(a)(4) (1970), allows reimbursement to transferred employees of certain real estate expenses incident to the purchase of a residence at the new duty station. The governing statutory regulation, section 4.1 of Office of Management and Budget Circular No. A–56, revised August 17, 1971, provides in pertinent part as follows:

> *Payment of expenses by employee—pro rata entitlement* * * * If the residence is a duplex or another type of multiple occupancy dwelling which is occupied only partially by the employee * * * *expenses will be reimbursed on a pro rata basis* * * *. [Italic supplied.]

The foregoing regulation does not necessarily contemplate the application of fixed percentage formulas whenever an employee purchases a multiple occupancy dwelling. *See* B–176531, November 29, 1973; B–166402, May 7, 1969. Rather, the regulation provides that otherwise allowable real estate expenses will be reimbursed on a *pro rata* basis between those portions of the purchased property which are actually and reasonably utilized as living quarters and those portions of such property which are devoted, in whole or in part, to commercial or nonresidence use. *Cf.* B–163187, February 19, 1968. Depending upon the facts of each case, the allowable percentage of reimbursement may, therefore, be greater or lower than 50 percent in the case of the purchase of a two-family dwelling.

The prorating of expenses involves a determination that should initially be made by the administrative agency to which the claim is submitted. 54 Comp. Gen. 597, 598 (1975). It would appear that when an employee purchases a two-family dwelling and rents one of the units, he normally would be entitled to be reimbursed 50 percent of the otherwise allowable expenses. B–166402, May 7, 1969. However, in the present case, Mr. Alpin claims 85 percent of the costs. Therefore, the certifying officer should obtain more specific information and, if necessary, require Mr. Alpin to submit an opinion by a real estate expert that specifies which costs of purchase are fairly attributable to that portion of the purchase utilized as the employee's residence and living quarters. Expenses of purchase which are allocable to the leased portions of the dwelling or allocable to those areas appurtenant to the dwelling utilized by the tenants, are neither allowable expenses nor includable in the reimbursement percentage. In this connection we point out that although Mr. Alpin maintains that the tenants have no use of the grounds, some consideration must be given to the area through which tenants enter into and exit from the leased quarters.

Additionally, the agency should take into account the billing practices of attorneys, realtors, and insurers in the Rocky Point locality. There are certain services which are performed for a flat fee, without regard to the purchase price, whereas the fees for other services are assessed on the basis of a percentage of the purchase price. Fees that are based on a percentage of the purchase price must be prorated in accordance with a ratio formula of residence and living quarters value to the purchase price of the entire property. If a flat fee is charged, without regard to the purchase price, the otherwise allowable real estate expenses should not be prorated but should be paid in toto, assuming the fee is reasonable in amount and in line with other charges for similar services in the Rocky Point area. *See* 54 Comp. Gen. 597, 599 (1975); B–183612, August 13, 1975.

In this connection, however, Mr. Alpin's travel voucher is not supported by documentation showing that the claimed expenses were actually incurred. Until such time as Mr. Alpin submits supporting documentation, as required by section 4.3a of the Circular, no portion of the claim is for allowance. Moreover, while certain items, such as record fees, appear to be reimbursable, others such as legal fees and gratuity appear to be partly or wholly nonreimbursable. Therefore, when the expenses are documented they should be examined to determine whether they are reimbursable under the provisions of section 4.2 of the Circular.

The voucher is returned herewith for processing consistent with the foregoing.

[B–166506]

Travel Expenses—Convention, Conferences, etc.—Attendees—State Officials

Decision B–166506, July 15, 1975, holding payment by Environmental Protection Agency of transportation and lodging expenses of State officials attending National Solid Waste Management Association Convention is prohibited by 31 U.S.C. 551, unless otherwise authorized by statute, is affirmed. Provision of Administrative Expenses Act (5 U.S.C. 5703(c)), permitting payment of such expenses for persons serving the Government without compensation does not provide necessary exception to 31 U.S.C. 551 since attendees at conference are not providing a direct service to the Government and are therefore not covered by 5 U.S.C. 5703(c).

Funds—Federal Grants, etc., to Other Than States—Applicability of Federal Statutes—Appropriation, etc., Restrictions

Proposed lump-sum grant by Environmental Protection Agency (EPA) to American Law Institute to provide scholarships to defray transportation, food, and lodging expenses at environmental law seminar does not violate 31 U.S.C. 551 which prohibits use of appropriated funds to pay expenses of conventions or gatherings without specific authority since expenditures of properly authorized grant funds are not subject to restrictions upon the direct expenditure of appropriations.

In the matter of funding of conferences, February 12, 1976:

This decision to the Administrator, United States Environmental Protection Agency (EPA), is in response to two requests for reconsideration or modification of our decision of July 15, 1975, B–166506, which held that payment by EPA of transportation and lodging expenses for 87 State officials at the National Solid Waste Management Association Convention held in San Francisco on November 13–16, 1974, violated 31 U.S. Code § 551 (1970), set forth below:

> Unless specifically provided by law, no moneys from funds appropriated for any purpose shall be used for the purpose of lodging, feeding, conveying, or furnishing transportation to, any conventions or other form of assemblage or gathering to be held in the District of Columbia or elsewhere. This section shall not be construed to prohibit the payment of expenses of any officer or employee of the Government in the discharge of his official duties.

EPA had sponsored the convention jointly with the Association, a non-Government organization, and had charged the payment to its Office of Solid Waste Management Program travel funds. Payment was made directly to the individual attendees upon the submission of vouchers.

On October 3, 1975, the EPA Administrator asked us to reconsider our July 15 decision in light of 5 U.S.C. § 5703(c) (1970). Section 5703(c) provides in pertinent part:

> An individual serving without pay or at $1 a year may be allowed transportation expenses under this subchapter and a per diem allowance under this section while en route and at his place of service or employment away from his home or regular place of business. * * *

Relying on 27 Comp. Gen. 183 (1947) and 39 *id.* 55 (1959), EPA urges that the State officials attending the Solid Waste Management Convention be deemed individuals serving without pay for purposes of section 5703(c). EPA's argument is set forth in the following paragraphs from its October 3 letter:

> If, as seems well-settled, 5 USC 5703(c) authorizes payment of travel and per diem to persons requested to travel on official government business, it would seem that the legality of such payments depends upon whether the travel is in fact official, that is, whether an activity is within an agency's statutory charter, and not upon whether a "conference" occurs at the traveler's destination.
>
> Since 42 USC 3253 directs EPA to "encourage, cooperate with, and render financial and other assistance to appropriate (agencies and individuals)" in connection with solid waste disposal programs, and 42 USC 3254 directs the Agency to encourage the enactment of uniform state and local laws, it would seem that a conference directed towards these ends would be official Agency business. * * *
>
> The number of participants invited to such a conference would not seem relevant to a determination as to its legality. We likewise perceive no useful distinction between bringing participants to an EPA-sponsored meeting and sending participants to a meeting sponsored by others if EPA has determined that such travel is necessary or useful and if that determination is consistent with EPA's statutes.

Chapter 57 of Title 5 of the U.S. Code is concerned primarily with the authorization of travel and transportation expenses for Government employees and as a general rule, an agency's appropriation for

travel expenses would not be available to support the travel of anyone else. Section 5703(c), quoted *supra*, provides a limited exception for "dollar a year men" who, while not Government employees, are nevertheless serving the Government. Thus, even without considering the prohibition in 31 U.S.C. § 551, there was no authority to use EPA travel funds to pay expenses of persons who were neither Government employees nor "dollar a year men" under the exception provided by section 5703(c).

The relationship between 5 U.S.C. § 5703(c) and 31 U.S.C. § 551 has never been discussed in any of our prior decisions. However, if EPA's contention is valid, then section 551 would be effectively repealed to the extent that a meeting or conference is administratively determined to be related to official agency business. Section 5703(c) originated as section 201(d) of the Independent Offices Appropriation Act, 1946, approved May 3, 1945, Public Law 49, ch. 106, 59 Stat. 106, 131. It was enacted as permanent legislation the following year as section 5 of the Administrative Expenses Act of 1946, approved August 2, 1946, Public Law 600, ch. 744, 60 Stat. 806, 808.

We have reviewed the legislative histories of both Acts and have found no evidence of any congressional intent to impart to section 5703(c) the scope suggested by EPA. Rather, it is clear from the legislative history—and, in fact, implicit in the statutory language—that this authority applies only to persons performing a direct service for the Government, such as experts, consultants, or other advisors, to permit travel to confer with Government officials in connection with the performance of that service. See Hearings on H.R. 4586 [Administrative Expenses bill] before the House Committee on Expenditures in the Executive Departments, 79th Cong., 2d Sess. 23–25 (1946); H.R. Report No. 2186, 79th Cong., 2d Sess. 5 (1946); S. Report No. 1636, 79th Cong., 2d Sess. 5 (1946).

We thus do not believe that section 5703(c) was ever intended to establish the proposition that anyone may be deemed a person serving without compensation merely because he or she is attending a meeting or convention, the subject matter of which is related to the official business of some Federal department or agency, nor do we believe the cases cited by EPA support such a conclusion. The subject individuals in 39 Comp. Gen. 55, *supra*, were members of the Commission on International Rules of Judicial Procedure and were clearly serving the Government because they were appointed to the Commission by the President pursuant to statutory directive. The travel in 27 Comp. Gen. 183, *supra*, involved persons called by a Government officer to confer upon official business—the so-called "invitational travel" situation. We believe that being called upon

to confer with agency staff on official business is different from attending a meeting or convention in which a department or agency is also interested. In this context, both statutes may be construed and given effect consistently.

For the reasons stated, we do not believe the expenditures involved in our July 15 decision would be authorized under 5 U.S.C. § 5703(c), and therefore affirm our prior decision.

The second request for an opinion, dated November 24, 1975, from the EPA General Counsel concerns the legality of a proposed grant by EPA to the American Law Institute (ALI) to partially fund attendance by law students and practicing environmental lawyers at the sixth annual ALI-ABA-Smithsonian Institution seminar on environmental law to be held in February 1976. The objectives of the ALI seminar are set forth in the following excerpt from ALI's application to EPA for grant funds for the 1975 seminar:

> One of the major purposes of these conferences is to furnish the opportunity for lawyers who represent public interest and other citizen groups to obtain further professional training in their chosen field, as well as to provide exposure by students enrolled in environmental law courses to professionals working in this area. The presence of these public interest, environmental lawyers and law students also adds a public service dimension to the entire conference, inasmuch as many of the regular attendees are from industry or from law firms that represent industries. The presence of the public interest, environmental lawyers and law students is necessary, therefore, not only to stimulate and train these individuals to better quality work in the law, but also to provide industry representatives with the opportunity to meet with those lawyers who are working for public interest and citizen groups.

EPA points out that the grant would be made to ALI in a lump sum to provide "scholarships" to law students and public interest environmental lawyers selected to attend the seminar. The individual "scholarships" awarded by ALI would then be used by the attendees for transportation, food, and lodging expenses.

EPA has authority to provide training by grant in several statutes. For example, section 103 of the Clean Air Act, as amended, 42 U.S.C. § 1857b (1970), provides in pertinent part:

> (a) The Secretary shall establish a national research and development program for the prevention and control of air pollution and as part of such program shall—
>
> (1) conduct, and promote the coordination and acceleration of, research, investigations, experiments, training, demonstrations, surveys, and studies relating to the causes, effects, extent, prevention, and control of air pollution;
>
> (2) encourage, cooperate with, and render technical services and provide financial assistance to air pollution control agencies and other appropriate public or private agencies, institutions, and organizations, and individuals in the conduct of such activities;
>
> * * * * * * *
>
> (b) In carring out the provisions of the preceding subsection the Secretary is authorized to—
>
> * * * * * * *
>
> (2) cooperate with other Federal departments and agencies, with air pollution control agencies, with other public and private agencies, institutions,

and organizations, and with any industries involved, in the preparation and conduct of such research and other activities;

(3) make grants to air pollution control agencies, to other public or nonprofit private agencies, institutions, and organizations, and to individuals, for purposes stated in subsection (a)(1) of this section;

* * * * * * *

(5) provide training for, and make training grants to, personnel of air pollution control agencies and other persons with suitable qualifications; * * *

There is similar training grant authority in section 104 of the Federal Water Pollution Control Act, 33 U.S.C. § 1254 (Supp. III, 1973), and section 204 of the Solid Waste Disposal Act, 42 U.S.C. § 3253. Thus, EPA clearly is authorized to sponsor training of persons other than Government employees in the areas specified in the various statutes, and to make grants for this purpose. Unlike the situation in our July 15 decision, the environmental law seminar here involved is to be financed by a grant from EPA to ALI. Thus payments for travel, food, and lodging of attendees will be made from grant proceeds rather than as direct expenditures from EPA's travel appropriation.

As the EPA General Counsel points out, we have consistently held that, when Federal grant funds are granted to and accepted by the grantee—

the expenditure of such funds by the grantee for the purposes and objects for which made are not subject to the various restrictions and limitations imposed by Federal statute or our decisions with respect to the expenditure, by Federal departments and establishments, of appropriated moneys in the absence of a condition of the grant specifically providing to the contrary.

43 Comp. Gen. 697, 699 (1964) and decisions cited. In 43 Comp. Gen. 697, we held that the expenditure of National Science Foundation research grant funds by the grantee for the acquisition or use of aircraft did not contravene the provision of law, now found at 31 U.S.C. § 638a(b) (1970), prohibiting the use of appropriated funds by the non-military agencies for the purchase, maintenance, or operation of aircraft without specific authority, where such expenditure had been administratively determined "to be required for the effective accomplishment of the purpose or objects" of the grant. This principle applies equally here; and it is therefore our view that payment of travel and related expenses under the proposed grant to ALI in the instant case is not prohibited by 31 U.S.C. § 551. *Cf.* B–83261, February 10, 1949.

[B–185433]

Contracts—Negotiation—Requests For Proposals—Amendment—What Constitutes

Protester is not justified in relying on oral statements of contracting personnel prior to closing date for receipt of proposals, which would have changed the standard cost and pricing data form specified in request for proposals (RFP). Oral representation one day prior to closing date for receipt of proposals without confirmation in writing does not constitute amendment of RFP.

Contracts—Negotiation—Late Proposals and Quotations—Hand Carried

Protester's proposal, hand-delivered after time specified as closing date for receipt of proposals, was properly not considered since it did not fall within one of exceptions in applicable late proposal clause in RFP which would permit its consideration. Protester's delay in obtaining documents until day before closing date for receipt of proposals, which allegedly caused lateness of proposal, is deemed a significant intervening cause of the lateness.

Contracts—Negotiation—Requests For Proposals—Protests Under—Timeliness—Solicitation Improprieties

Protest against alleged action of contracting personnel in orally amending RFP so that only protester was required to use standard cost and pricing form different than all other competitors on day before closing date for receipt of proposals, submitted within 10 days of notification of reasons why agency would not consider proposal, is timely notwithstanding that action occurred before closing date for receipt of proposals since it was not an impropriety apparent on the face of the solicitation. See 40 Fed. Reg. 17979, April 24, 1975.

In the matter of Young Engineering Systems, February 12, 1976:

Young Engineering Systems (Young) protests the refusal of the Naval Electronic Systems Command (Navelex) to consider its proposal submitted 95 minutes after the time specified as the closing date for receipt of proposals under request for proposals (RFP) N00039–76–R–0054(Q) for an air traffic control and automatic landing system engineering support.

The RFP established 3:30 p.m. EDST, October 31, 1975, as the closing date for receipt of proposals. Young's proposal was hand-carried to the proper room at 4:05 p.m. EDT (5:05 EDST). The RFP contained the clause entitled "Late Proposals, Modifications of Proposals and Withdrawals of Proposals (1974 Apr)." None of the exceptions in the clause which would permit consideration of Young's otherwise late proposal are applicable. Accordingly, by letter dated November 4, 1975, received by Young on November 6, 1975, Navelex informed Young that its proposal would not be considered because it was late.

On November 3, 1975, Young wrote to the contracting officer requesting that its proposal be considered because the Government, at its discretion, may consider a late proposal if its price is low, the proposal is technically superior or is otherwise in the Government's best interest. Additionally, Young alleged that on the day prior to the closing date for receipt of proposals (October 30) the contracting officer verbally instructed Young's owner to utilize DD Form 633–4, rather than the DD Form 633–1 referenced in the RFP. Young asserts, in part, that changes required to be made in its cost proposals due to the difference in forms caused the proposal to be late. On November 4, 1975, Young wrote the Commander, Navelex, and requested a meet-

ing on the matters outlined above, which occurred on November 14, 1975. In the interim, by letter dated November 13, 1975, received by the General Accounting Office (GAO) on November 19, 1975, Young filed its protest with our Office.

By letter dated November 21, 1975, Navelex responded to Young's charges. The response noted that although the RFP was issued October 6, 1975, it was not until October 29, 1975, that Young telephoned the contracting officer to notify him that Young's RFP did not contain any DD Form 633–1. Also noted was the fact that Young's RFP was the only one out of 30 issued which did not contain a DD Form 633–1. It is further stated by Navelex that on October 30, 1975, when Young arrived at the contracting office, the individual named in the RFP as the person to contact for information states that he gave Young copies of both DD Form 633–1 and 633–4 with the instructions to use whichever form was more convenient.

Navelex maintains that Young's protest is untimely under section 20.2(a) of our Bid Protest Procedures, 40 Fed. Reg. 17979, April 24, 1975, which requires that protests based upon alleged improprieties in the solicitation must be protested prior to the initial closing date for receipt of proposals. We view the protest as timely. There was no impropriety on the face of the solicitation. The problem arose as a result of actions taken, not as a result of improprieties apparent in the solicitation. Thus, Young's protest, being filed on November 19, 1975, within 10 days of the date Navelex informed Young of the reasons the proposal would not be considered (November 6), is timely.

Young challenges Navelex's version of the October 30 events. Young maintains that the Navelex official who gave him the DD Forms 633 instructed Young to use DD Form 633–4 which is applicable to research and development work, rather than the DD Form 633–1 for technical services. Young maintains that this directive constituted a verbal amendment of the RFP, with which only Young was required to comply. Young notes that the DD Form 633–1 required estimates on a per man-month basis, whereas the DD Form 633–4 required more detailed estimates for the entire term of the proposed contract.

On the basis of the foregoing, Young asserts that since it submitted the only proposal responsive to the RFP, as verbally amended, all other proposals should be rejected and award made to Young. Additionally, Young has requested Navelex to provide a deposition of the contracting officer's response to certain questions regarding whether Young was directed to use DD Form 633–4, and specifically not to use DD Form 633–1. Alternatively, Young requests that GAO direct the Navy to reduce all amendments to writing, and start the procurement over on the basis of the RFP, as orally amended.

Navelex has declined to submit the deposition requested. As indicated at a conference held at our Office pursuant to section 20.7 of our Procedures, Young was informed that GAO could not compel the Navelex to comply with the request. Our Procedures are not intended to be a full-scale adversary proceeding with sworn testimony. *Julie Research Laboratories, Inc.*, 55 Comp. Gen. 374 (1975), 75–2 CPD 232.

The RFP, at section C, paragraph 12, deleted paragraphs 7 and 8 of Standard Form 33A, dated March 1969, Modification or Withdrawal of Offers and Late Offers and Modification or Withdrawals. Inserted in their stead was the provision entitled "Late Proposals, Modification of Proposals and Withdrawals of Proposals (1974 Apr)," which provides as pertinent:

> (a) Any proposal received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made; and
>
> (i) it was sent by registered or certified mail not later than the fifth calendar day prior to the date specified for receipt of offers * * *;
>
> (ii) it was sent by mail * * * and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation;
>
> (iii) it is the only proposal received.
>
> * * * * * * *
>
> (e) Notwithstanding the above, a late modification of an otherwise successful proposal which makes its terms more favorable to the Government will be considered at any time it is received and may be accepted.

On the strength of subsection (e) above, Young alternatively argues that since its proposal was the only "responsive" proposal submitted, it was the most favorable to the Government and may, therefore, be considered and accepted.

Generally, an offeror is charged with the responsibility of ensuring that its proposal arrives at the proper place at the proper time. By choosing a method of delivery other than those specified in the late proposal clause for possible consideration in the event the proposal arrived late, an offeror assumes a high degree of risk that its proposal will be rejected if untimely delivered. *Emergency Care Research Institute*, B–181204, August 23, 1974, 74–2 CPD 118. Even when a hand-carried proposal is delivered late, we have permitted acceptance of the proposal where improper action by the Government was the proximate cause of the lateness. *Hyster Company*, 55 Comp. Gen. 267 (1975), 75–2 CPD 176, and cases cited therein. But when actions of the offeror are the significant or intervening cause of the delay in delivering the proposal, whether anticipated or not, a late proposal is not for acceptance. *Associate Control Research and Analysis, Inc.*, B–184071, September 25, 1975, 75–2 CPD 186, and cases cited therein.

It is germane to our consideration that subsection C(15) of the RFP indicates in two places that offerors were required to submit

DD Forms 633–1 with their proposals. It is also significant that paragraph 3 of Standard Form 33A which was incorporated in the RFP, requires that:

> Any explanation desired by an offeror regarding the meaning or interpretation of the solicitation, drawings, specifications, etc., must be requested in writing and with sufficient time allowed for a reply to reach offerors before the submission of their offers. Oral explanations or instructions given before the award of the contract will not be binding. Any information given to a prospective offeror concerning a solicitation will be furnished to all prospective offerors as an amendment of the solicitation, if such information is necessary to offerors in submitting offers on the solicitation or if the lack of such information would be prejudicial to uninformed offerors.

On the foregoing record, we agree that Navelex acted properly in rejecting Young's untimely proposal. Initially, there is a dispute of fact whether the Navelex personnel instructed Young to use the DD Form 633–4, or merely provided copies of both DD Form 633–1 and 633–4, with direction that either one would be acceptable. We need not decide this controversy since even assuming, *arguendo*, that Young had been instructed to use the DD Form 633–4, the RFP provided that such oral instruction would not be binding on the Government. Proceeding further on the assumption that Young was instructed to use the DD Form 633–4, Young has presented no evidence to indicate why utilizing the DD Form 633–4 (as opposed to using the DD Form 633–1) required such extra time that occasioned the lateness in delivering its proposal. Moreover, there is no explanation why Young waited until the day before proposals were due to attempt to get a copy of the applicable DD Form 633. Such delay on Young's part must be viewed as a significant intervening cause of the tardiness.

As for Young's contention that Navelex, in its discretion, could consider Young's proposal, we agree with Navelex that Young is mistaken on this point. The Government may accept a late modification of an otherwise timely and apparently successful proposal only if it makes the terms more favorable to the Government. Notwithstanding Young's assertion that only its proposal could be accepted as complying with what Young erroneously considers an oral amendment of the RFP, Young's lateness concerns its initial proposal, not a modification of a timely proposal. Therefore, subsection (e) of the late proposal clause, quoted above, is inapplicable.

Nor can we sustain Young's argument that its proposal was the only responsive one submitted. First, the concept of responsiveness is not apposite to negotiated procurement. Second, since the statements of the Navelex personnel did not constitute an amendment of the RFP, proposals submitted on the basis of DD Form 633–1, as specified in the RFP, were acceptable.

On the present record, the protest is denied.

[B-185341]

Officers and Employees—Training—Personal v. Government Expenses—Examination Costs—Accredited Rural Appraisers

Exams not an integral part of a course of instruction are not within definition of "training" in 5 U.S.C. 4101(4). Therefore, Government reimbursement of costs of an exam leading to certification of Government employee as accredited rural appraiser is not permitted by terms of Government Employees' Training Act, 5 U.S.C. 4101-4118.

In the matter of the payment of costs of accredited rural appraiser exam, February 13, 1976:

Mr. John A. Hancock, an authorized certifying officer of the Bureau of Reclamation, Department of the Interior, asks (his reference LM-360) whether he may pay the expenses incurred by a Bureau employee while taking an exam to qualify as an Accredited Rural Appraiser. The expenses submitted for reimbursement totaled $347.75 and, as itemized by the employee, included round trip airfare from Denver, Colorado, to Lubbock, Texas; allied transportation costs; 3¼ days per diem, and a registration fee for the exam.

The certifying officer's letter and the supporting documents explain that a designation as an accredited rural appraiser is highly desirable. Accredited rural appraisers are recognized by courts as experts in their field. In condemnation cases, which involve expert testimony concerning land acquisition worth thousands of dollars, private landowners often employ appraisers accredited by professional organizations as witnesses in their behalf. The Bureau is of the view that if Government appraisers testifying for the Government are to enjoy equal credibility, they too must be professionally accredited. Because of the value of professional certification of its employees, the Bureau of Reclamation pays tuition and per diem for courses preparatory to such certification, as permitted by 5 U.S. Code 4101, 4109(a)(2)(1970). As noted above, the certifying officer asks here, however, whether an employee may be reimbursed for the costs of taking the qualifying exam after his study for the exam has been completed. For the reasons outlined below, we conclude that payment is not proper.

In his letter to us, the certifying officer states that he originally disallowed the claim because of the rulings in 47 Comp. Gen. 577 (1968) and the cases cited therein. That case concerned payments to Montana, by the Federal Government, of fees required to accompany the mandatory applications of Bureau of Reclamation employees for State certification as water and waste water operators. Briefly, we denied payment because no Federal statute specifically authorized the imposition of such fees. We held that in the absence of such a

statute, the supremacy clause, U.S. Constitution, Article V, cl. 2, forbade payment of these fees, which represented a State-imposed hindrance to the operation of the Federal Government. Since the fees required for the accredited rural appraiser exam are not mandatorily imposed by a State, that decision does not bear directly on this situation.

The Government Employees' Training Act, Public Law 89–554, 80 Stat. 432, September 16, 1966, 5 U.S.C. 4101–4118 (1970), is the basic authority for training Government employees. 5 U.S.C. 4109(a)(2) (1970) authorizes the head of an agency to pay, or reimburse an employee for, all or a part of the necessary expenses of training, including travel and per diem, transportation costs, tuition and matriculation fees, library and laboratory fees, purchase or rental of books, materials, and supplies, and other services or facilities directly related to the training of the employee. The training for which the head of an agency is permitted to pay is defined by 5 U.S.C. 4101(4) (1970) as:

> * * * the process of providing for and making available to an employee, and placing or enrolling the employee in, a planned, prepared, and coordinated program, course, curriculum, subject, system, or routine of instruction or education, in scientific, professional, technical, mechanical, trade, clerical, fiscal, administrative, or other fields which are or will be directly related to the performance by the employee of official duties for the Government, in order to increase the knowledge, proficiency, ability, skill, and qualifications of the employee in the performance of official duties.

In contrast to this definition of "training," an "examination" tests the employee on the skills acquired by his training, which may also qualify an employee for professional certification or license.

The provisions of ch. 410, § 6–3(d)(4) of the Federal Personnel Manual, in discussing services related to training for which payment is proper, state that:

> * * * an examination fee may be paid if the examination is used as a diagnostic tool to determine deficiencies in knowledges and skills needed by an employee for the performance of official duties so as to ascertain his training needs when the agency is unable to determine those needs through supervisory evaluation or other available agency appraisal system or when such evaluation or appraisal system would be more costly. The cost of an examination would not otherwise be payable except when the cost of the examination is inextricably mixed with the cost of a program of training or when the examination process itself is designed to impart knowledges and skills to the examinee.

Under this explication of the statute, the costs of an examination given to conclude a university course, for example, would normally be payable. The costs of the accredited rural appraiser exam, on the other hand, are not payable; we have no indication that the examination fee is inextricably mixed with the cost of the preparation for the exam.

While 5 U.S.C. 4109 (1970), *supra*, authorizes agency payment of some or all training costs, and while the implementing regulation

contained in the Federal Personnel Manual, ch. 410, § 6–1(a) permits an agency head to define "necessary training expenses" for the purpose of payment of those expenses, an agency head is not authorized to expand the statutory definition of "training" or to pay for items not contemplated by that definition. Because an examination such as the one here involved does not fall within the definition of training, no reimbursement is possible for fees charged for an examination or for allied costs, such as travel and per diem, incurred while taking an exam which is not a part of a regular course of instruction.

Certain other decisions may demonstrate this point. In appropriate circumstances the head of an agency might provide assistance to members of his legal staff whom he determines under the Government Employees' Training Act should take a bar review course. Nonetheless, in 22 Comp. Gen. 460 (1942), we denied reimbursement of a fee imposed on an attorney working for the Federal Trade Commission when he sought to represent the Government before the 10th Circuit Court of Appeals. There we held that an officer or employee bears the duty of qualifying himself for the performance of his official duties, and that if a license is required for that purpose, he must procure it at his own expense. That decision was reaffirmed by 47 Comp. Gen. 116 (1967), which again denied reimbursement to a Government attorney of the fee he had paid in order to practice before the 10th Circuit Court of Appeals. We reasoned that the privilege to practice before a particular court is personal to the individual and normally is his for life. Thus, payment for that privilege should be from personal funds. Similarly, professional accreditation as a rural appraiser is personal to its holder and will remain with him whether or not he remains in the employ of the Government; thus payment here again should be from personal funds. *See also* 46 Comp. Gen. 695 (1967).

Accordingly, based on the relevant statute and regulation, payment for the costs of the accredited rural appraiser exam would be improper. The voucher which accompanied the submission will be retained in our Office.

[B–182487]

Military Personnel—Retirement—Travel and Transportation Entitlement—Personal Expense Requirement

Member, who on retirement traveled to his home of selection in Iran with his wife on an American flag commercial air carrier chartered by his new employer and who had $950 included in his annual statement of earnings by his employer an an amount paid to a third party for travel expenses, is not entitled to reimbursement of air travel expenses since that travel was not performed at personal expense as required by the applicable regulations.

Mileage—Military Personnel—Retirement—Last Duty Station to Port of Embarkation

Member, who on retirement traveled to his home of selection in Iran from Fort Hood, Texas, on an American flag commerical air carrier, is not entitled to be reimbursed for transoceanic air travel since the travel was not performed at personal expense. However, he is entitled to a mileage allowance for himself and his wife from Fort Hood to the appropriate aerial port of embarkation but is limited to payment of mileage to the actual port of embarkation Dallas, Texas, since this was the only travel performed at personal expense and paragraph M4151 of the JTR provides that mileage is an allowance payable for travel performed at personal expense.

In the matter of CW4 Carl R. Vertrees, USA, retired, February 17, 1976:

This action is in response to correspondence from Chief Warrant Officer Carl R. Vertrees, USA, Retired, SSAN 402–34–4913, requesting reconsideration of our Transportation and Claims Division settlement dated August 1, 1974, which disallowed his claim for reimbursement for air travel performed incident to travel to their home of selection following retirement from the United States Army.

The record shows that by Letter Order Number S4–154 dated April 16, 1973, the member was retired from the United States Army, effective May 31, 1973, at Fort Hood, Texas. After traveling by private automobile from Fort Hood to Dallas, Texas, the member departed Dallas on August 17, 1973, by chartered American flag commercial air carrier and arrived at his home of selection in Isfahan, Iran, on August 21, 1973. Similarly, after traveling by private automobile from Copperas Cove, Texas—which is in the vicinity of Fort Hood—to Dallas, the member's wife departed Dallas on the same chartered airline on October 20, 1973, and arrived in Isfahan, Iran, on October 23, 1973.

On January 27, 1974, the member filed a claim with the Army Finance and Accounting Center for reimbursement of the cost of such travel for himself and his wife from his last duty station at Fort Hood to his home of selection in Iran. In response to a request for additional information, by letter dated May 7, 1974, the member indicated that while the exact cost of the air fare was not known, his employer in Iran, Bell Helicopter International, Inc., paid the airline for the cost of the air transportation and on Internal Revenue Service Form No. 4782 (Employee Moving Expense Information), his employer reported that the amount of $950 was paid to a third party for the benefit of the employee, representing the cost of travel, meals and lodging in moving from the old residence to the new area of employment.

On July 2, 1974, the Army Finance and Accounting Center forwarded the claim to our Transportation and Claims Division for appropriate action and recommended payment in the amount of

$591.84, which represents the computed cost to the Government to provide transportation for the member and his dependent.

Settlement dated August 1, 1974, allowed reimbursement in the amount of $19.26 for personal and dependent travel from Fort Hood to Dallas but disallowed the portion of the claim relating to air travel because no personal expense was incurred by the member for such travel. It was indicated that under the provisions of paragraphs M4159–1 and M7002–2, Volume 1 of the Joint Travel Regulations, reimbursement was authorized only for transportation procured at personal expense.

The member requests reconsideration of that settlement because in his view a portion of his income ($950), on which he states that he paid FICA and Federal income taxes, was used to pay for his and his wife's travel, and therefore the cost of such travel was at his personal expense. In support of his position, the member also states that he is aware of a situation in which a retired member took a similar trip on the same airline, paid for by the same method, and was paid $1,035.72 by the Department of the Army.

Sections 404 and 406 of Title 37, U.S. Code (1970), provide that under uniform regulations prescribed by the Secretaries concerned, a member who is retired with pay may select his home and receive travel and transportation allowances thereto for himself and his dependents. Implementing regulations are contained in Volume 1 of the Joint Travel Regulations. Paragraph M4159–1 of the regulations (change 234, August 1, 1972), provides that a member traveling under permanent change of station orders (including separation from the service or relief from active duty) to, from, or between points outside the United States which orders did not specify group travel or direct travel by a specific mode of transportation will be entitled to:

1. the allowances prescribed in par. M4150 or M4154, as applicable, for the official distance between the old permanent station and the appropriate aerial or water port of embarkation serving the old duty station;
2. transportation by Government aircraft or vessel, if available, otherwise Government procured transportation or reimbursement for transportation procured at personal expense for the transoceanic travel involved (see subpar. 4) * * * and
3. the allowances prescribed in par. M4150 or M4154, as applicable, for the official distance between the appropriate aerial or water port of debarkation serving the new station and the new permanent station.

Paragraph M4150–1, change 243, May 1, 1973, provided for payment of mileage at the rate of $0.06 per mile as a member's permanent change of station travel allowance. However, paragraph M4151 of those regulations provides that mileage is an allowance to cover the cost of travel regardless of mode which a "member is authorized to and does perform * * * at his personal expense." Paragraph M4159–4a of the regulations, change 235, September 1, 1972

(currently paragraph M4159–5a), provided that when travel by Government transportation is authorized and the member performs transoceanic travel by another mode of transportation "at personal expense," the member is entitled to reimbursement for the cost of the transportation utilized not to exceed the cost to the Government to provide such transportation.

In regard to dependent travel, paragraph M7003–1 provides that a member entitled to transportation of dependents in accord with paragraph M7000 (including travel from the last permanent duty station to home upon retirement) is authorized a monetary allowance in lieu of transportation (exclusive of transoceanic travel) performed by dependents "at personal expense."

The member contends that since his employer reported to the Internal Revenue Service as required by 26 U.S.C. 82 (1970), that the cost of his and his wife's air travel was $950 and included this amount in his annual statement of income, he in effect paid for the cost of the air travel "at personal expense." We note, however, that the member was allowed to deduct amounts paid for reasonable moving expenses under the provisions of 26 U.S.C. 217 (1970). Under that provision the air fare here in question was no doubt a deductible item. *See* 26 U.S.C. 217(b)(1)(B). In this case, the new employer agreed to provide transportation to the place of employment for the member and his wife. This was done by providing transportation in kind from Dallas to the work site in Iran. The member incurred no personal expense for travel to Iran except for local transportation in the United States. The provisions of the Internal Revenue Code which are designed to provide equitable treatment of moving costs incurred by taxpayers, whether self employed or otherwise, do not furnish the basis for a holding that the cost of air travel here involved was a personal expense of the member.

Further, even if another retired member may have been improperly reimbursed by the Department of the Army for expenses incurred in a similar situation that does not provide a legal basis for payment in the present situation.

Since it appears that the only travel performed by the member at personal expense was from his last duty station, Fort Hood, to Dallas, the actual place of embarkation, and since mileage based on that travel has been paid, no further payments for the member's travel are due. Further, since the member's wife performed travel on a similar basis and since payment has been made on a similar basis, no further payment is due in this case.

Accordingly, the settlement of August 1, 1974, is sustained.

[B-184427]

Indian Affairs—Contracts—Bureau of Indian Affairs—Indian Self-Determination Act—Applicability of Federal Contracting Laws and Regulations

Proposed award of school design contract to Indian school board under title I, Public Law 93-638—"Indian Self-Determination Act"—is not objectionable, provided requirements of act and its regulations are satisfied. Act provides contracting authority covering broad range of Indian programs and independent of contracting laws and regulations ordinarily applicable to Interior Department, including Brooks Bill architect-engineer selection procedure (40 U.S.C. 541, *et seq.*, and Federal Procurement Regulations subpart 1-4.10). Therefore, protest by architectural firm competing in Brooks Bill procurement initiated prior to school board's application for contract under Public Law 93-638 is denied.

In the matter of Boyer, Biskup, Bonge, Noll, Scott & Associates, Inc., February 18, 1976:

The Bureau of Indian Affairs (BIA) proposed to cancel a procurement of architect-engineer (A-E) services, and instead award a contract to the Little Wound, South Dakota, School Board under the Buy Indian Act, 25 U.S. Code § 47 (1970). The School Board planned to subcontract the design work for a new school to members of an A-E firm which had been selected as a competitor in the canceled procurement. Another of the selected A-E firms protested, claiming that this action would violate, among other provisions, the prohibition in BIA regulations against brokerage-type arrangements (in which an inexperienced Indian contractor obtains the contract and subcontracts the work to a non-Indian party).

The Interior Department takes the position that an award can be made to the School Board under the authority of the Indian Self-Determination and Education Assistance Act, Public Law 93-638, January 4, 1975, 88 Stat. 2203 (25 U.S.C. 450, note). The Department states that it considers two resolutions adopted by the School Board on April 1, 1975, as an application for a "tribal contract" under Public Law 93-638 and the implementing regulations issued pursuant to section 107(b)(4) (25 U.S.C. 450k(b)(4)) of title I of the statute—the "Indian Self-Determination Act."

The foregoing are the essential facts involved in the protest of Boyer, Biskup, Bonge, Noll, Scott & Associates, Inc. (Boyer). The question to be resolved is whether title I of Public Law 93-638 provides a suitable and sufficient legal basis for BIA to proceed with the award. For the reasons which follow, we conclude that it does.

Initially, we note that certain congressional findings and declarations of policy underlying the provisions of Public Law 93-638 are set forth in sections 2 (25 U.S.C. 450(a)(2)) and 3 (25 U.S.C. 450a) of the

statute. Section 2 states that the Congress finds, *inter alia*, that true self-determination is dependent upon an educational process which will insure the development of qualified people to fulfill meaningful leadership roles, and that parental and community control of the educational process is of crucial importance to the Indian people. The congressional declaration of policy in section 3 of the statute states that Congress recognizes the United States' obligation to respond to the strong expression of the Indian people for self-determination; that Congress is committed to the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs to effective and meaningful participation by Indian people in planning, conducting and administering programs; and that a major national goal is to provide the quality and quantity of educational services which will permit Indian children to achieve the measure of self-determination essential to their well-being.

Further, section 102(a) of title I, Public Law 93–638 (25 U.S.C. 450f(a)), provides as follows:

The Secretary of the Interior is directed, upon the request of any Indian tribe, to enter into a contract or contracts with any tribal organization of any such Indian tribe to plan, conduct, and administer programs, or portions thereof, provided for in the Act of April 16, 1934 (48 Stat. 596) [25 U.S.C. § 452], as amended by this Act, any other program or portion thereof which the Secretary of the Interior is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208) [see 25 U.S.C. § 13], and any Act subsequent thereto: Provided, however, That the Secretary may initially decline to enter into any contract requested by an Indian tribe if he finds that: (1) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory; (2) adequate protection of trust resources is not assured, or (3) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract: *Provided further,* That in arriving at his finding, the Secretary shall consider whether the tribe or tribal organization would be deficient in performance under the contract with respect to (A) equipment, (B) bookkeeping and accounting procedures, (C) substantive knowledge of the program to be contracted for, (D) community support for the contract, (E) adequately trained personnel, or (F) other necessary components of contract performance. [Italic supplied.]

Significantly, the statute directs the Secretary to enter into contracts with tribal organizations for the programs specified, and provides that he may decline to do so only upon finding that one of the stated conditions is present in a given case. In regard to the types of programs which are referenced in this section, we note that 25 U.S.C. § 452 authorized the Secretary to enter into contracts for, among other purposes, the education of Indians. 25 U.S.C. § 13 provides that BIA, under the direction of the Secretary, shall expend appropriated funds for a number of stated purposes involving the benefit, care, and assistance of Indians, one of which is "General support and civilization, including education." Also, we note that the statute appropriating funds for BIA programs in fiscal year 1975 (Public Law 93–404,

August 31, 1974, 88 Stat. 803, 809) makes reference to a number of the general purposes, including education, which are stated in 25 U.S.C. § 13. The appropriations law includes monies for BIA to obtain A–E services by contract. It would appear that a BIA procurement of A–E services for an Indian organization is reasonably to be regarded as one of the types of "programs" within the scope of section 102(a) of Public Law 93–638.

Concerning the application of section 102's contracting authority in relation to other laws, we note that section 106(a) of title I, Public Law 93–638 (25 U.S.C. 450j), provides:

> Contracts with tribal organizations pursuant to sections 102 and 103 of this Act shall be in accordance with all Federal contracting laws and regulations except that, in the discretion of the appropriate Secretary, such contracts may be negotiated without advertising and need not conform with the provisions of the Act of August 24, 1935 (49 Stat. 793), as amended: *Provided, That the appropriate Secretary may waive any provisions of such contracting laws or regulations which he determines are not appropriate for the purposes of the contract involved or inconsistent with the provisions of this Act.* [Italic supplied.]

The Commissioner of Indian Affairs, exercising rulemaking authority delegated by the Secretary, has promulgated regulations implementing Public Law 93–638. *See* 40 Fed Reg. 51282, 51331 (1975). These amend the BIA regulations in 41 C.F.R. chapter 14H (1975) by adding a new part 14H–70. Section 14H–70.003 of the new regulations provides in pertinent part:

> To the extent that the Federal Procurement Regulations and Interior Procurement Regulations, 41 CFR Chapter 1, Chapter 14, and Chapter 14H (except 41 CFR Part 14H–1) respectively are not made specifically applicable to contracts entered into pursuant to the Act by reference in this Part 14H–70 they are hereby waived. If this part conflicts with any of the provisions of either the Federal Procurement Regulations or Interior Procurement Regulations the provisions of this Part 14H–70 shall govern.* * *

It is reasonably clear from the foregoing that the Indian Self-Determination Act as implemented contemplates the exercise of contracting authority by the Secretary over a broad range of Indian matters, including programs relating to education, and that the procurement procedures under the act are to be without the encumbrances and restrictions imposed on ordinary departmental procurements by virtue of the Federal Procurement Regulations (FPR's) and the Interior Procurement Regulations. The FPR's, which the departmental regulations supplement, are issued under the Federal Property and Administrative Services Act of 1949, as amended (the Property Act), 40 U.S.C. § 471, *et seq.* (1970). The procedure normally to be followed in contracting for A–E services is prescribed in an amendment to the Property Act known as the Brooks Bill (Public Law 92–582, October 27, 1972, 86 Stat. 1278, 40 U.S.C. § 541, *et seq.* (Supp. II, 1972)). The Brooks Bill procedure essentially involves the conduct of discussions with not less than three A–E firms as pro-

spective contractors for a particular project, based on their statements of qualifications on file with the agency, or on those which may be submitted in response to publication of the project; the selection of not less than three of these firms as most highly qualified to provide the services required; and the negotiation of a contract with the highest qualified firm at a fair and reasonable price, or with the other A–E firms in the order of selection until a contract at a fair and reasonable price can be obtained. See FPR subpart 1–4.10 (1964 ed. amend. 150). This was the procedure being followed in the present case until the School Board requested that the contract be awarded to it.

Since the Brooks Bill is an amendment to the Property Act, and since the Indian Self-Determination Act as implemented contemplates the exercise of procurement authority which is independent of and apart from the Property Act requirements as implemented in the FPR's, subject only to the restrictions imposed by Congress in title I itself or applied by the Secretary in regulations issued thereunder, it follows that title I provides a legal basis for award of a contract to the School Board in this case. This conclusion is, of course, subject to the proviso that all requirements imposed by title I and the departmental regulations in part 14H–70, *supra*, are found to be satisfied in the case of the School Board. We would also note that in view of section 102(a)'s mandatory language, *supra*, and of the fact that the School Board's resolutions specifically referenced Public Law 93–638, it appears that award of a contract to the School Board is not only authorized but required, unless the Department determines that one or more of the act's requirements are not met in this case.

In view of the foregoing, the questions raised concerning BIA's initial plans to contract with the School Board under the authority of the Buy Indian Act are academic.

The protest is denied.

[B–132900]

Contracts—Termination—Convenience of Government—Antideficiency Act Violations

Army proposal to terminate for convenience of Government contracts executed in violation of Antideficiency Act is authorized since proposed termination action would mitigate consequences of Antideficiency Act violation with respect to these contracts, in that termination costs would presumably be less than obligations now attributable to contracts.

Appropriations—Obligation—Contracts—Prior Year—Charged to Current Appropriations

Army proposal to complete prior year contracts executed in violation of Antideficiency Act by applying current year funds is improper in light of longstanding

rule that, except as otherwise provided by law, expenditures attributable to contracts made under particular appropriations remain chargeable to those appropriations.

Contracts—Modification—No Cost Stop Work Order—Effect

Army proposal to enter into contract modification providing for no cost stop work order, for partially performed contracts executed in violation of Antideficiency Act, would freeze Government liability at amount already due, unless supplemental appropriation is enacted. We perceive no legal objection to proposal since it would maintain status quo and reserve to Congress maximum flexibility in deciding whether to make deficiency appropriation in amount necessary to liquidate actual obligations already incurred or to permit Army to realize full contract benefits by making appropriation greater than actual existing deficiency.

Appropriations—Deficiencies—Antideficiency Act—Violations—Contracts—Modification

Army proposal to modify contracts executed in violation of Antideficiency Act, to make Government's obligation to pay subject to future availability of funds, but under which Government would continue to accept benefits, is of dubious validity as means of mitigating effects of Antideficiency Act violation, since contractors might recover under contracts or on *quantum meruit* theory even if appropriation was not subsequently made available by Congress. Moreover, proposal may prejudice congressional options by requiring Congress to fully appropriate for continued performance or allow Army to receive benefits at expense of contractors.

Interest—Payment Delay—Contracts

Army proposal to pay interest on amounts already due or subsequently to become due and payable under contracts executed in violation of Antideficiency Act, and for which payment has been delayed due to unavailability of funds, is improper since this would increase amount of overobligation, constituting new and additional violation of Antideficiency Act.

To the Chairman, Committee on Appropriations, House of Representatives, February 19, 1976:

By letter of December 19, 1975, with enclosure, you requested our views on the legality and propriety of certain actions proposed to be taken by the Department of the Army (Army) to deal with overobligations in four separate Army procurement appropriations: Procurement of Equipment and Missiles, Army, 1971/1973; Other Procurement, Army, 1972/1974; Procurement of Weapons and Tracked Combat Vehicles, Army, 1972/1974; and Procurement of Weapons and Tracked Combat Vehicles, Army, 1973/1975. The exact amount is not yet known, but the Army estimates that the ultimate overobligations and consequent cash deficiencies will be approximately $160 to $180 million.

It appears that the overobligation results from numerous contracts—some completed and others in progress—for which recorded obligations exist in the full contract amounts. Most of these contracts have been identified. Approximately 900 contractors and suppliers are currently

performing and/or awaiting payment for completed work on 1,200 contracts financed by these accounts. No payments have been made since November 11, 1975, when the Secretary of the Army directed an immediate halt to disbursement of funds from these appropriations.

Obviously these contracts violate the "Antideficiency Act," R.S. § 3679, as amended, 31 U.S. Code § 665 (1970), which provides in pertinent part as follows:

> (a) No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.

See also, 41 U.S.C. § 11(a) (1970); *see, e.g.*, 42 Comp. Gen. 272, 275 (1962). The Army is now in the process of preparing the report to the President and the Congress concerning this violation, containing "all pertinent facts together with a statement of the action taken thereon," as required by subsection (i)(2) of the Antideficiency Act, 31 U.S.C. § 665(i)(2).

In connection with consideration of the Supplemental Appropriations Act, 1976, approved December 18, 1975, Public Law 94–157, 89 Stat. 826, the Army requested statutory authority to use $165 million from its current fiscal year 1976 appropriations "for payment of unliquidated obligations heretofore incurred and chargeable to" the four prior year appropriations. A provision granting such authority, in the form of a new account captioned "Liquidation of Obligations—Army," was included in the version of the Supplemental Appropriations Act, 1976 (H.R. 10647), passed by the Senate. However, the conference committee deleted this provision from the bill, "without prejudice to those contractors having valid claims against the Government." H.R. Report No. 94–718, 9 (1975). The conference report stated in this regard, *id.* at 10, as follows:

> The conferees are in agreement that the relief sought by the Army at this time, in the absence of the report required by law, would violate the spirit and intent of the Anti-Deficiency Act. In view of this violation, which may very well have criminal implications, and the admitted inadequate and faulty accounting and procurement management practices on the part of the Army, the conferees feel that relief should be withheld until a full review of this matter can be made by the Congress before funds are made available to restore those accounts that are in a deficiency status.
>
> At the same time, the conferees are most sympathetic to those contractors who must suffer hardships while awaiting payment of vaild claims against the Army. The conferees strongly urge, therefore, that the appropriate Army finance and contracting officers expeditiously take the necessary steps to validate those outstanding claims and so notify in writing the contractors involved. This certification would serve to formally validate in writing each contractor's claim, or portion thereof, and such certification can then be used by the contractor to obtain a loan or other financial relief in order to offset any cash flow problem he might incur as a direct result of the Army's over-obligation of certain prior year procurement appropriations.

The conferees further agreed to address this problem and to give it special attention in the second supplemental appropriation bill early next year if, in the meantime, the Army complies with the reporting procedures in accordance with the statutory requirements of the Anti-Deficiency Act.

In a letter to you dated December 19, 1975, enclosed with your letter to us, the Assistant Secretary of the Army (Financial Management) observed with respect to this problem:

* * * Based upon information currently available, the affected contracts fall into two broad categories: those which are completed or near completion; and those under which performance is still continuing. The Army's current concern focuses on the latter group of contracts in which the contractors are continuing to perform and incur costs. Acknowledging that this difficult situation is one of the Army's own making, the Army is under some obligation to ameliorate the effects of the nonpayment on the contractors involved.

The "certification of claims" procedure directed in the Conference Committee report on the Supplemental Appropriation Bill is designed to provide adequate, albeit temporary, relief for those contractors who have completed or substantially completed performance. They may be able to secure private financing to tide them over until the Army is allowed to resume payment from the deficient appropriations. However, this procedure may not be adequate for those contractors who have ongoing programs. It could result in precipitating immediate suit in the Court of Claims for breach of contract. Additionally, contractors, perceiving their need to preserve their rights to damages for breach of contract and their attendant obligation to mitigate damages, may elect to stop performance under their contracts and thus adversely affect critically needed Army programs.

In view of the foregoing, the Assistant Secretary proposed several alternative courses of action with respect to uncompleted contracts as follows:

1. Immediately terminate for convenience of the Government those contracts which are for items for which there is not a critical requirement. It is not anticipated that many contracts will fall within this category.

2. If there is a validated requirement:

a. Apply current funds to contracts on which payment has been stopped if current funds are available directly or through reprogramming, or;

b. Enter into a contract modification providing for a no cost stop work order, or;

c. Enter into a contract modification which would recognize the Government's obligation, subject to the subsequent availability of funds, to pay amounts due under the contract and, possibly, reasonable interest. Certificates of nonpayment would be furnished to contractors. In return for such commitment by Army, the contractors would be requested to agree to defer any action they might have for breach of contract. Subsequent performance under the contract would be at the risk of the contractor in that he would be assuming that legislative relief would be granted.

We have not attempted in this letter to make a detailed factual analysis of the Army's proposals listed above as they relate to the presumably numerous and varied types of procurement actions and contracts that are involved. Rather, our response is necessarily limited to a conceptual analysis of the proposals on the basis of the Assistant Secretary's letter to you and additional representations made to us in the course of informal discussions with officials of the Department of the Army. Before proceeding to discussion of the specific actions listed above, we offer several general observations which may be relevant to the Committee's consideration of this matter.

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As noted, it is our understanding that the full amounts of the contracts here involved already exist as recorded obligations and thus provide the measure of the reportable Antideficiency Act violation. Since full recorded obligations already exist, the actions proposed by the Army will technically not increase the overobligation in most cases (with one exception, relating to interest, as discussed hereafter). However, the effects of the violation can be mitigated in terms of the need for deficiency appropriations to the extent that contracts have not yet been fully performed. We believe it is obvious that, once an Antideficiency Act violation has been discovered, the agency concerned must take all reasonable steps to mitigate the effects of the violation insofar as it remains executory. The Assistant Secretary's letter to you seems to recognize this principle in stating:

> The Army would be remiss if it did not point out that the foregoing course of action is proposed with respect to active contracts to minimize the possibility of a continuation of the R.S. 3679 problem. However, the Army believes the course of action outlined above conforms with the intent of the Committee direction; and further considers it to be in the Government's best interest and equitable to the contractor's performing in good faith.

Determination of what mitigation efforts are reasonable necessarily depends upon the particular circumstances involved. Ordinarily the most direct approach in the case of an overobligation by contract would be to terminate the contract for the convenience of the Government, thereby holding the actual deficiency for liquidation purposes to those costs payable to the contractor under the Termination for Convenience clause. However, there may be cases in which this approach would be inconsistent with the best interests of the Government or where more flexible alternatives exist. The Army proposals must be evaluated in this context.

Apparently the basic design of the various Army proposals is to minimize the effects of the Antideficiency Act violation while at the same time preserving the possibility that full performance may ultimately be realized under most of the contracts still in process. The latter objective is sought to be justified essentially by considerations of equity to the contractors and avoiding disruption of critically needed Army programs. While these justifications may be valid, they require some elaboration.

We do not doubt that the contractors are blameless in this matter and have legitimate legal and equitable interests. As to the justification in terms of program needs, while it may be true that the Army has "critical needs" for performance under these contracts from its own perspective, since the contracts resulted in an overobligation of appropriations, such "needs" go beyond the moneys provided by the Congress in enacting the four appropriations involved. Also, some of

the Army proposals, if effected, could blur the distinction between necessary deficiency appropriations and *de facto* supplemental funding and could severely limit congressional options. These points are developed hereafter.

We would also point out that some of the proposals would require the acquiescence of the contractors. We have no idea whether, or to what extent, contractors will be willing or able to agree. Our analysis of the specific proposals, in the order presented by the Assistant Secretary, is set forth below.

Action 1.

Immediate termination of those contracts "for which there is not a critical requirement" will fix the Government's final obligation under each contract at the amount payable pursuant to the Termination for Convenience clause. While termination costs would be subject to liquidation by a deficiency appropriation, presumably such costs would be less than the recorded obligations now attributable to those contracts. As noted previously, the proposed termination action is the most that can be done to mitigate the consequences of the Anti-deficiency Act violation with respect to these contracts. There would be no legal objection to termination for convenience.

Action 2a.

The proposal to apply current funds (either directly or through reprogramming) to payments on continuing contracts is apparently designed to achieve full performance of such contracts and also provide some immediate relief to contractors by cash payments. In our opinion, this action would be precluded by 31 U.S.C. 712a (1970), which provides:

> Except as otherwise provided by law, all balances of appropriations contained in the annual appropriation bills and made specifically for the service of any fiscal year shall only be applied to the payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made within that year.

The purpose of this provision is to restrict the use of annual appropriations to expenditures required for the service of the particular fiscal year for which they were made. *See* 42 Comp. Gen. 272, 275 (1962). We have long held, consistent with the above statute, as well as 31 U.S.C. § 665(a) and 41 U.S.C. § 11, *supra*, that a claim against a fixed year appropriation, when otherwise proper, is chargeable to the appropriation for the fiscal year in which the liability was incurred. *See, e.g.*, 18 Comp. Gen. 363, 365 (1938); 50 Comp. Gen. 589, 591 (1971). The same rule requires, of course, that all liabilities and expenditures attributable to contracts made under the instant 3-year procurement appropriations remain chargeable to those appropriations.

As we understand the proposal, the prior year contracts under which the funds were originally obligated, would not be canceled. Rather, only the source of funding those obligations would be changed, so that current year funds would be used to pay for performance already contracted for in previous years. Under these circumstances, 31 U.S.C. § 712a would preclude the use of current appropriations to fund these prior year contracts since such transactions would constitute neither "the payment of expenses properly incurred" nor "the fulfillment of contracts properly made" in fiscal year 1976.

The Army presumably recognized that it had no existing authority to apply current funds to these prior year contracts in proposing that such statutory authority be provided in the Supplemental Appropriations Act, 2a described *supra*. See also the Senate report on this legislation, S. Report No. 94–511, 15 (1974) ("Existing law prohibits payments of obligations financed by these [prior year] accounts."). Thus action 2a, as proposed, would accomplish what the Congress specifically rejected in the Supplemental Appropriations Act.

Action 2b.

Under this proposal, the contractors would be required to temporarily discontinue performance, upon issuance of "no cost stop work orders," but the contracts would remain in effect. If funds eventually became available, performance could be completed. However, if the Congress chose not to make funds available, the contracts would presumably be terminated for the convenience of the Government at that time. While this proposal would, in effect, freeze the Government's liability at the amount already due under the contracts unless and until appropriations subsequently became available, the obvious intent is to enable the contractors to eventually complete the subject contracts and thereby enable the Army to receive full performance.

Thus action 2b would serve to hold the Antideficiency Act violation to its present level for liquidation purposes, *i.e.*, termination costs based on the contractor's performance up to the time of the stop work order. By the same token, the amount of deficiency appropriations necessary for these contracts would now be less than the full contract costs already recorded as obligated. Consequently, any appropriations subsequently made available at the full recorded contract amounts would in part be of a supplemental rather than deficiency nature. This situation may be illustrated by the following example:

Assume that one of the contracts involved is a $1,000,000 contract to furnish materials, which is partially performed at the time of the stop work order. Presumably the full $1,000,000 contract price was recorded as an obligation at the time the contract was made, and will remain so since the contract is not terminated by the stop work order.

However, once performance is suspended, the Government's actual obligation for purposes of a liquidating deficiency appropriation is frozen at some amount less than $1,000,000 based on Termination for Convenience costs at that stage of performance—$500,000 for illustration purposes. Thus an appropriation of $500,000 would be sufficient to liquidate the deficiency. An appropriation of the full $1,000,000 would permit resumption and completion of the contract notwithstanding the Antideficiency Act violation and over and above the legislative remedy necessary to cure the deficiency.

We perceive no legal objection to proposed action 2a since it would, in effect, maintain the status quo, thereby reserving to the Congress maximum flexibility in determining how best to deal with the situation. As noted above, Congress could decide to make only a deficiency appropriation necessary to liquidate actual obligations already incurred, and this amount would have been held to a minimum. On the other hand, should Congress decide to permit the Army to realize the full contract benefits by making an appropriation greater than the actual existing deficiency, the stop work orders could be rescinded and performance resumed. In our view, the crucial factor with respect to action 2b is that the report required to be filed by the Army pursuant to the Antideficiency Act fully apprise the Congress of the foregoing considerations and consequences, particularly the fact that appropriations in the full recorded amounts of obligations under these contracts is not necessary to cure the deficiencies.

Action 2c.

Under this proposal, contracts would be modified to recognize the Government's obligation, subject to the subsequent availability of appropriations, to pay the full contract amounts "and, possibly, reasonable interest." Although continued performance is said to be "at the risk of the contractor in that he would be assuming that legislative relief would be granted," the Army clearly contemplates that performance will in fact continue and intends to accept the benefits therefrom.

Like action 2b, the proposed contract modification under action 2c purports to freeze the Government's liability at the amount now due and payable (except to the extent that payment of interest is included, as discussed hereafter). However, unlike action 2b, we have serious doubts that the instant proposal would accomplish such a result. Even if the proposal would effectively limit the Government's liability in a strict legal sense, we believe that its implementation would seriously prejudice congressional options in dealing with the overobligation problem.

Defense Department contracting procedures under the Limitation of Cost/Funds (LOF) clause and cases in which Government liability under implied-in-fact contracts for *quantum meruit* has been decreed, seem relevant to the legal viability of the "contractor risk" approach proposed here. In brief, under the LOF clause, used mainly in cost-reimbursement contracts, the contractor must notify the Contracting Officer in writing when he expects to incur costs within the next 60 days in excess of a predetermined percentage of the total amount allotted to the contract. If the Contracting Officer does not allot additional funds to the contract upon receiving such notice, the contractor is under no obligation to continue performance, and the Government is under no obligation to reimburse the contractor for costs incurred in excess of the total allotment. The clause, therefore, represents a contracting situation similar to that proposed by the Army under action 2c.

Even though the LOF clause, by its terms, makes payment for contractor performance contingent on subsequent allotment of funds, the Armed Services Board of Contract Appeals has ruled in certain cases that the contractor is entitled to reimbursement for costs incurred above the amount allotted. In *Consolidated Electrodynamics Corp.*, 63 BCA ¶ 3806 (1963), the Board indicated that reimbursement might be proper where (1) the Government induced performance, (2) indicated to the contractor the urgency of the procurement, (3) continued to administer the subject contract, and (4) accepted the goods. The Board indicated that the LOF clause was designed to relieve the Government of additional expense while at the same time relieving a contractor of continued performance, and that the clause could not be used to obtain the contractor's performance at his own expense without just and fair compensation. Similarly, in *Clevite Ordnance, Division of Clevite Corp.*, 62 BCA ¶ 3330 (1962) recovery was allowed based on assurances by Government officials that funding would be provided when new appropriations became available, and the Government had reaped the benefits of contractor performance based on these representations. But see *General Electric Co.* v. *United States*, 412 F. 2d 1215, 188 Ct. Cl. 620 (1969); *Acme Precision Products, Inc.*, 61–1 BCA ¶ 3051 (1961); *Weinschel Engineering Co.*, 62 BCA ¶ 3348 (1962); *Pickard & Burns Electronics*, 68–2 BCA ¶ 7149 (1968), and *Engelhard Industries, Inc.*, 68–1 BCA ¶ 6951 (1968), where reimbursement was denied in somewhat different circumstances. Moreover, in *The Marquardt Corp.*, 66–1 BCA ¶ 5576 (1966) citing to *American Machine & Foundry Co.*, 65–1 BCA ¶ 4654 (1965), the Board indicated at page 22,247:

* * * It has been held generally in this and other contexts that when the Government takes and uses contract-generated material or services it is obligated to pay for them.

Even if the contract modification here proposed is considered effective to preclude recovery *under the contract*, cases in which recovery has been granted on the basis of some form of *quantum meruit* or *quantum valebant* claim for the fair value of services rendered or material provided, may be relevant. We denied such a claim in B-176498, October 2, 1973, under a contract containing a Limitation of Cost clause on the ground that in performing after the allotted amount had been reached, the contractor was acting as a "pure volunteer." However, the questions of whether the contractor was acting as a volunteer and whether a benefit had actually been bestowed upon the Government in the instant situation could only be resolved through litigation.

Analogous cases do establish the general proposition that the United States may be liable on implied-in-fact contracts. *See, e.g., Security Life and Accident Insurance Co* v. *United States*, 357 F. 2d. 145, 148 (5th Cir. 1966). A contract implied in fact is one founded upon a meeting of minds, which although not embodied in an express contract, is inferred, as a fact from the conduct of the parties showing, in the light of surrounding circumstances, their tacit understanding. See *Porter* v. *United States*, 496 F. 2d 583, 590, 204 Ct. Cl. 355, *cert. denied*, 95 S. Ct. 1446 (1974); *Stewart Sand and Material Co.* v. *Southeast State Bank*, 318 F. Supp. 870, 874 (D. Mo. 1970). Where the contractor acts gratuitously in incurring costs with only the mere hope that a contract may subsequently be entered into with the United States, reimbursement has been denied. See *Wells* v. *United States*, 463 F. 2d 434, 199 Ct. Cl. 324 (1972). However, where benefits are received and retained by the Government under an existing contract, recovery has been allowed. *A. L. Coupe Construction Co., Inc.* v. *United States*, 139 F. Supp. 61, 134 Ct. Cl. 392 (1956), *cert. denied*, 352 U.S. 834 (1956). Ordinary principles of equity and justice have been held to preclude the United States from retaining services, material, and benefits, while at the same time refusing to pay for them. See *Prestex Inc.* v. *United States*, 320 F. 2d 367, 373, 162 Ct. Cl. 620 (1963). These cases indicate that recovery by the contractors might not necessarily be barred by simple inclusion in the contract of a provision indicating that any performance was at the contractor's own risk.

The Army's proposal here seems to present a much stronger case for recovery than most of the cases cited. Under the Army's proposal, an *existing* contract for performance by the contractor and payment by the Government would be modified so as to provide for contractor

performance, *if* he wished to perform, with only the possibility of Government payment. There would appear to be no reason for the modification if the Government did not want and expect performance. If performance was not expected, the existing contracts could simply be terminated for the convenience of the Government. Instead, however, payment on the contracts has been stopped, presumably constituting breach of the contract terms, and the contractors have been requested to enter into a contract modification providing that payment is now contingent upon the future availability of funds. Moreover, the Government fully intends to accept the benefits of continued performance under the contracts, which call for the completion of various construction projects and supply contracts. This does not seem to be the type of case wherein benefit to the Government would be difficult to establish.

In essence, the Army proposes to leave existing contracts in effect, at least tacitly encourage continued performance, receive the benefits of performance, but at the same time require contractors to assume the risk of nonpayment. While judicial precedent in this regard is not absolutely clear, it does generally appear to support recovery in such circumstances. It is questionable, therefore, whether the Army's proposal would achieve the desired result of freezing the Government's liability at the amounts now due under the contracts.

Even if the Army could avoid additional legal liability in these circumstances absent necessary appropriations, implementation of this proposal would, in our view, severely restrict congressional options in considering whether such appropriations should be granted. First, it would not be clear whether deficiency appropriations in the full contract amounts are necessary to liquidate obligations since, for the reasons stated above, the Government's legal "obligation" is uncertain. More fundamentally, the Congress would be placed in the position of either accepting a *fait accompli* and fully appropriating for contract performance or, by refusing to fully appropriate, allowing the Army a windfall at the expense of the contractors—a result which seems inequitable at best. Moreover, even if the Congress declined to appropriate for the continued performance, the contractors might still bring suit under the contracts or on a *quantum meruit* theory as described above. Any judgments so obtained in the amount of $100,000 or less would then be payable from the permanent judgment appropriation pursuant to 31 U.S.C. § 724a (1970).

In view of the foregoing considerations, we believe that proposed action 2c is of dubious validity at best as a means of mitigating the effects of the Antideficiency Act violation.

Finally, there is clearly no legal basis for the inclusion of interest payments under proposed action 2c. It is well settled that payment of interest by the Government may not be made except when interest is provided for in legal and proper contracts or when allowance of interest is specifically directed by statute. See *Angarica* v. *Bayard*, 127 U.S. 251 (1888); *United States* v. *North American Transportation and Trading Co.*, 253 U.S. 330 (1920); *Seaboard Air Line Railway Co.* v. *United States*, 261 U.S. 299 (1923); *Smyth* v. *United States*, 302 U.S. 329 (1937); *United States* v. *Hotel Co.*, 329 U.S. 585 (1947). Certainly, therefore, no interest can be paid on any amounts already due and payable to the instant contractors, or which will become due and payable prior to any contract modification, unless the existing contracts provide therefor. *See* B–103315, February 14, 1972. Moreover, any contract modification providing for interest on amounts which subsequently become due and payable, would actually increase the amount of the overobligation, above the full contract amounts already recorded as obligated. Therefore, inclusion of an interest provision would constitute a new and additional violation of the Antideficiency Act and related statutes controlling the obligation of appropriations. *Cf.* 51 Comp. Gen. 251, 252 (1971).

To summarize our conclusions as discussed above, action 1—termination of contracts for which no critical requirement exists—would be authorized. Action 2a—using current funds to liquidate prior year obligations—is precluded by law. Action 2b—issuance of no cost stop work orders—is authorized but its impact upon the need for deficiency funding should be disclosed to the Congress. Action 2c—obtaining continued performance on a purported "contractor risk" basis—is of dubious validity at best, and seems inferior to action 2b as a mitigation measure. Provision for interest payments under action 2c is clearly unlawful.

[B–183956]

Leaves of Absence—Administrative Leave—Awaiting Arrival of Movers

Transferred employee seeks restoration of 8 hours annual leave charged to leave account while awaiting arrival of movers on a scheduled day of travel. If agency to which employee is assigned determines that claimant delayed travel while reasonably and necessarily awaiting movers, General Accounting Office would interpose no objection if claimant was administratively excused for such time as was essential for such purpose.

Transportation—Household Effects—Packing by Employee—Reimbursement Claim

Employee, whose household effects were shipped under "actual expense" method of shipment, seeks allowance for personally packing household goods. Under

"actual expense" method, the Government is the shipper and the authority to incur packing expenses is vested in agency. Since agency contracted with carrier to pack and transport household goods, employee who, without authority, undertakes to pack household goods does so voluntarily and is not entitled to reimbursement.

Officers and Employees—Transfers—Relocation Expenses—Temporary Quarters—Security Deposit Forfeited

Employee who cancels 3-month lease for temporary quarters and forfeits security deposit for breach of lease, is not entitled to reimbursement on theory that forfeited security deposit constitutes an allowable subsistence expense.

Officers and Employees—Transfers—Relocation Expenses—House Purchase—Insurance

Employee who purchased "owners title policy" incident to the purchase of a residence at his new duty station as distinguished from "mortgage title policy" is precluded by section 4.2d of OMB Cir. No. A–56, revised August 17, 1971, from being reimbursed for such cost.

In the matter of Alex Kale—restoration of annual leave, travel and relocation expenses incident to a permanent change of station, February 19, 1976:

This action is in response to a letter dated May 17, 1975, from Mr. Alex Kale, an employee of the National Aeronautics and Space Administration (NASA), requesting review of a settlement certificate (Claim No. Z–2531903) issued by the Transportation and Claims Division (now the Claims Division) of this Office. Mr. Kale apparently appeals that part of the settlement which disallowed his claim for (1) restoration of 8 hours annual leave charged to his leave account incident to his failure to perform scheduled travel while awaiting the arrival of movers; (2) an allowance for personally packing certain "high value" household goods incident to a permanent change of station; and (3) reimbursement for the cost of a title insurance policy paid in connection with the purchase of a residence at his new duty station. Mr. Kale also seeks reimbursement for a security deposit which he forfeited for canceling a 3-month lease in connection with the occupancy of temporary quarters at his new duty station.

As indicated above, Mr. Kale seeks the restoration of 8 hours of annual leave charged to his leave account incident to his failure to perform travel while awaiting movers in connection with a permanent change of station from Long Island, New York, to Houston, Texas, under Travel Order X80463 A–1, dated January 15, 1973. The record shows that Mr. Kale's last work day in New York was January 29, 1973. He reported at his new duty station on February 6, 1973. According to Mr. Kale's travel orders, his authorized travel dates were from January 30 through February 4, 1973. However, the

movers did not arrive as scheduled at the New York residence on January 29, 1973; instead, they arrived and departed on January 30, 1973. Although January 30 was an authorized day of travel, Mr. Kale states that carrier scheduling difficulties precluded his departure from New York until the morning of January 31. Since the Financial Office at Mr. Kale's new duty station was unaware of any authority to allow administrative leave for awaiting movers and because Mr. Kale performed no travel on January 30, his leave account was charged 8 hours annual leave for this period.

Although time taken by an employee for the care of personal affairs should ordinarily be charged to annual leave, the personal business involved here (awaiting carrier to move household goods) was occasioned by a change of official station at the direction and for the benefit of the Government rather than by the purely private affairs of the employee. From all indications in the record, the claimant was ready, willing, and able to proceed to Houston, as scheduled, on January 30, the delay being attributable to carrier scheduling difficulties over which the employee apparently had neither control nor advance knowledge.

The Civil Service Commission has issued no general regulations on the subject of granting an excused absence (commonly called administrative leave) to employees who, as here, claim to have unavoidably and necessarily delayed departure while awaiting movers in connection with a permanent change of station. In the absence of a governing statute, this Office has held that, under the general guidance of the decisions of this Office, the agency to which the employee is assigned is responsible for determining the situations in which an employee may be excused from duty without charge to annual leave. 53 Comp. Gen. 582, 584 (1974); B–180693, May 23, 1974. See Federal Personnel Manual Supplement 990–2, Book 630, Subchapter S11–5a (Revised July 1969).

In this regard we have recognized, in situations analogous to those presented here, the propriety of granting administrative leave during periods when an employee is unavoidably detained while awaiting or arranging for the transportation of household goods incident to a permanent change of station. *See* B–171947(2), October 20, 1971; B–160838, March 10, 1967. Therefore, if it is administratively determined that the time spent by Mr. Kale at his New York residence on January 30 was, without fault of the employee, reasonably and necessarily used in connection with effecting the transportation of household goods incident to a permanent change of station, we would interpose no objection to his being administratively excused, without a charge to annual leave, for such time as was essential for such purpose.

Additionally, Mr. Kale seeks an allowance for various undocumented expenses incurred in connection with his personal packing of "high value" household goods. The record shows that Mr. Kale shipped 14,720 pounds of household goods, which were 3,720 pounds in excess of the maximum allowable of 11,000 pounds. The claimant states that he, rather than the carrier, packed 41 cartons of "high value" household goods and that he personally purchased various packing materials. He contends that the carrier billed the Government for these materials and services and received payment therefor. However, this latter allegation is wholly unverified and, as such, will not further be considered.

Mr. Kale's household goods were shipped on a Government Bill of Lading by the "actual expense" method of shipment. Under this method the contract for shipment is between the Government and a designated carrier and the household goods are shipped by the Government not by the employee. Office of Management and Budget Circular No. A–56, section 6.3b(1)(2), revised August 17, 1971. As such, the authority to incur expenses incident to the packing of household goods is vested in the agency concerned. There is no regulation, under the "actual expense" method, which authorizes an allowance for services voluntarily provided by an employee, even though the expense of such service would be reimbursable if provided by an authorized carrier. B–169407, October 19, 1970. Although Mr. Kale's efforts may have relieved the carrier of the need to pack certain of the household effects being transported and may have incidentally effected a savings to the Government, it appears that Mr. Kale voluntarily rendered those services without authority to obligate the Government for whatever sums may be involved.

Accordingly, the claim for an allowance incident to the personal packing of Mr. Kale's household goods is not for allowance, and the decision of the Transportation and Claims Division (now Claims Division) disallowing reimbursement therefor is sustained.

Under travel authorization No. X80463 A–1, dated January 15, 1973, authorizing Mr. Kale to travel from Long Island to Houston incident to a permanent change of station, Mr. Kale was authorized temporary quarters not to exceed 30 days. Prior to securing permanent housing in Houston, Mr. Kale found it necessary to occupy temporary quarters. In so doing, he entered into a 3-month lease with Kings Park Apartments, an apartment building in Houston. In making claim for a temporary quarters allowance, Mr. Kale indicated that, under the terms of the lease, he was to pay $207 per month in rent and a security deposit of $50. After residing in the leased quarters for less than 3 months, Mr. Kale canceled the lease and moved into

permanent quarters. As a result, the deposit was not refunded and Mr. Kale seeks reimbursement therefor.

Office of Management and Budget Circular No. A–56, section 8.4a, revised August 17, 1971, which prescribes allowable subsistence expenses incident to an employee's permanent change of station, provides, in relevant part, as follows:

> a. *Actual expenses allowed.* Reimbursement will be only for actual subsistence expenses incurred provided these are incident to occupancy of temporary quarters and are reasonable as to amount. *Allowable subsistence expenses include only charges for* meals * * * [and] *lodging* * * * [Italic supplied.]

A "security deposit," under applicable Texas law, is defined as follows:

> (1) "Security deposit" means any advance or deposit of money, regardless of denomination, the primary function of which is to secure full or partial performance of a rental agreement for a residential premises. "Security deposit" does not include advance rentals. Vernon's Ann. Civ. St. Art. 5236e, § 1(1).

Thus, the term "security deposit," as distinguished from a subsistence expense in the nature of rent, refers to a deposit which protects the lessor against violation of the rental or other provisions of the lease. Since Mr. Kale forfeited the security deposit for breach of the lease for temporary quarters, such forfeiture may not be considered as a rental or lodging expense reimbursable to Mr. Kale as part of his actual subsistence allowance. B–178343, December 26, 1973.

In connection with the purchase of a residence at his new duty station (Houston), Mr. Kale states that he incurred a portion of the cost of a "mortgage title policy" and claims it as an allowable expense incurred in connection with a real estate transaction.

Office of Management and Budget Circular No. A–56, section 4.2d, revised August 17, 1971, states that "the cost of a mortgage title policy" is a reimbursable item of expense. However, the record shows that the policy for which Mr. Kale seeks reimbursement is an "owners title policy" and section 4.2d of OMB Circular No. A–56 specifically precludes reimbursement for the cost of such a policy. As distinguished from a "mortgage title policy," the cost of which is reimbursable, an "owner's title policy" is one which the purchaser of a residence obtains for his own protection and, as such, is regarded as a nonreimbursable personal expense, incurred at the employee's election, and not necessarily essential to the consummation of a real estate transaction. *See* B–175716, July, 5, 1972; B–170571, November 16, 1971.

In view thereof, the general rule proscribing reimbursement for the cost of an owner's title policy is for application. The claim for reimbursement is therefore disallowed, and the decision of the Transportation and Claims Division (now Claims Division) is sustained.

[B–184002]

Leaves of Absence—Annual—Accrual—Maximum Limitation—Forfeiture Due to Administrative Error

Employee retired effective December 31, 1974, and received a temporary appointment effective January 1, 1975, not to exceed June 30, 1975. Since there was no break in service, the employee's annual leave balance was transferred to his new appointment and he forfeited 80 hours of annual leave at end of leave year pursuant to 5 U.S.C. 6304. Agency is requested to determine whether it violated mandatory requirement to advise employee he would forfeit annual leave if he accepted temporary appointment without break in service. If such violation occurred, leave is for restoration under 5 U.S.C. 6304(d)(1)(A).

In the matter of John J. Lynch—restoration of annual leave due to administrative error, February 19, 1976:

This decision is made pursuant to a request by John J. Lynch, a former employee of the Department of the Army, that we review Settlement No. Z–2576807, April 25, 1975, wherein our Transportation and Claims Division (now Claims Division) disallowed his claim for an additional lump-sum payment for unused annual leave.

Mr. Lynch retired from the Department of the Army effective December 31, 1974. At that time he had an annual leave balance of 560 hours and a maximum annual leave carryover of 480 hours established under 5 U.S. Code § 6304(c) (1970). Then Mr. Lynch received a temporary appointment effective January 1, 1975, not to exceed June 30, 1975. There was no break in service and Mr. Lynch's leave balance was transferred to his new position. *See* 33 Comp. Gen. 591 (1954) and 36 *id.* 209 (1956). Accordingly, no lump-sum payment was made for the 560 hours to his credit. Instead, at the end of the pay period on January 11, 1975, he forfeited 80 hours of annual leave when his balance was reduced to the 480-hour carryover limit established in accordance with 5 U.S.C. § 6304(c).

Mr. Lynch states that if he had not accepted the temporary appointment upon his retirement he would have received a lump-sum payment for the entire 560 hours of annual leave to his credit instead of forfeiting 80 hours of annual leave. He, therefore, requests that we reconsider our settlement of April 25, 1975, which disallowed his claim. Mr. Lynch believes that the Army's failure to advise him that he would forfeit 80 hours of annual leave constitutes an administrative error for the purpose of 5 U.S.C. § 6304(d)(1)(A) (Supp. III, 1973). In its letter of March 13, 1975, the Army admits that it failed to advise Mr. Lynch of such forfeiture if he did not use the leave by the end of the leave year. However, neither in the denial of the claim by the Army nor the subsequent denial by our Transportation and Claims Division was the application of the provisions of 5 U.S.C. § 6304(d)(1)(A) raised. That provision reads as follows:

(d)(1) Annual leave which is lost by operation of this section because of—
(A) administrative error when the error causes a loss of annual leave otherwise accruable after June 30, 1960;

* * * * * * *

shall be restored to the employee.

What constitutes an administrative error under section 6304(d)(1)(A) in a particular case is a matter for which primary jurisdiction lies with the agency involved. B–171947.65, December 13, 1974, and B–182229, November 7, 1974. The Army has made no determination under the quoted statute concerning whether Mr. Lynch's leave was forfeited due to an administrative error. However, we note that decisions of our Office have construed an administrative error as the failure of an agency to carry out written administrative regulations having mandatory effect for the purpose of correcting erroneous pay rates, etc. 31 Comp. Gen. 15 (1951); 34 *id.* 380 (1955); 39 *id.* 550 (1960); and 53 *id.* 926 (1974). In this connection, we have also held that, when counseling an employee is required by administrative regulations, such as in cases concerning retirement, failure to give correct advice on such matters as the employee's service credits constitutes an administrative error. B–174199, December 14, 1971.

In view of the above we are instructing our Claims Division to obtain an additional administrative report. If the Army violated a regulation which required that employees be counseled concerning an impending forfeiture of annual leave under the above-described circumstances, then Mr. Lynch's forfeited annual leave may be restored under the provisions of 5 U.S.C. § 6304(d)(1)(A). If the report indicates that no administrative error was made, the disallowance will be sustained.

[B–184990]

Officers and Employees—Promotions—Temporary—Detailed Employees

Air Force detailed a GS–4 employee to a GS–5 position for over 1 year beginning July 1, 1970, without obtaining Civil Service Commission's prior approval of extension beyond 120 days. Agency's discretionary authority to retain employee on detail continues no longer than 120 days, after which agency must either have obtained Commission approval or grant employee temporary promotion. Since agency failed to obtain approval, employee is entitled to retroactive temporary promotion from 121st day of detail to its termination.

Compensation—Promotions—Temporary—Detailed Employees—Retroactive Application

Decision of December 5, 1975, 55 Comp. Gen. 539, entitling otherwise qualified employee to temporary promotion on 121st day of detail to higher grade position when prior approval of extension of detail beyond 120 days has not been obtained from Civil Service Commission will be applied retrospectively to extent permitted by 6-year statute of limitations applicable to General Accounting Office.

In the matter of Marie Grant—extended detail to higher grade position, February 20, 1976:

This decision is rendered in response to a request to resolve a claim for backpay of Ms. Marie Grant.

Ms. Grant occupied a GS–4 accounting technician position at Kelly Air Force Base, Texas, on July 1, 1970. On that date she was detailed to a GS–5 accounting technician position. This detail continued at least until July 27, 1971, when her agency began a reorganization program which was carried out under reduction-in-force (RIF) procedures. A GS–5 employee who was reached through the RIF was assigned to the GS–5 position Ms. Grant was occupying. The GS–4 position to which she was permanently assigned was identified as surplus and was consequently abolished and Ms. Grant was reassigned to another GS–4 position. She has now filed a claim for backpay representing the difference in pay between grade GS–4 and grade GS–5 for the period she was detailed to the higher grade position.

Recently we had occasion to consider a similar case, 55 Comp. Gen. 539 (1975), involving a backpay claim of an employee for performing duties of a higher grade position to which he was officially detailed for an extended period. We held there that employee detail regulations contained in chapter 300 of the Federal Personnel Manual must be construed 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 have sought 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, if he is otherwise qualified. Therefore, we held in 55 Comp. Gen., *supra*, that where an agency has failed to seek prior approval of the Commission to extend an employee's detail period in a higher grade position past 120 days, it has a mandatory duty to award the employee a temporary promotion if he continues to perform the higher grade position and is otherwise qualified for the promotion.

Because our decision was based on a clarification rather than a substantive amendment to Civil Service Commission regulations governing employee details, the decision will be given retrospective as well as prospective application. Accordingly, the temporary promotion rule for details over 120 days is to be applied to any claim concerning this matter, provided the detail regulations in chapter 300, Federal Personnel Manual, in effect at the time of the detail, is substantially the same as in effect at the time of the Civil Service Com-

mission ruling. Also, the claim must be filed within the 6-year period applicable to claims cognizable by our Office as set forth in 31 U.S. Code § 71a (Supp. IV, 1974). Backpay claims involving extended details that we have previously considered and disallowed may be resubmitted for reconsideration by this Office under the conditions stated in this decision.

In the instant case the agency failed to seek approval of Ms. Grant's detail prior to the expiration of the aforementioned time limit. Therefore, she became entitled to a temporary promotion to grade GS–5 on October 29, 1970, 121 days after her detail began, since she satisfied the time-in-grade restrictions set forth in 5 C.F.R. chapter 300, subpart F (1969), and the detail regulations were substantially the same as those involved in 55 Comp. Gen. 539, *supra*. Her entitlement to the temporary promotion continued until July 27, 1971, or the date when her detail was officially terminated, whichever is later, and she began to perform the duties of a grade GS–4 position.

Pursuant to the foregoing, her agency should grant her a retroactive temporary promotion to grade GS–5 for the stated period together with backpay and make appropriate record corrections as authorized under provisions of 5 U.S.C. § 5596 and applicable implementing regulations.

[B–184318]

Contracts—Negotiation—Requests For Proposals—Protests Under—Merits

Merit of untimely protest concerning sufficiency of solicitation's evaluation factors is considered since arguments are intertwined with other timely and related issues concerning evaluation of protester's proposal.

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

Offerors are entitled to know whether procurement is intended to achieve minimum standard at lowest cost or whether cost is secondary to quality and mere statement that "cost and other factors" will be considered in award determination does not fully satisfy this requirement. However, basic technical deficiencies in proposal may not be attributed to agency's failure to fully emphasize importance of technical evaluation considerations.

Contracts—Negotiation—Competition—Competitive Range Formula—Technical Acceptability

Proposal may be found outside of competitive range on basis of technical unacceptability without consideration of cost.

Contracts—Research and Development—Technical Deficiencies—Evaluation Propriety

Where Government's statement of work is broad and general, proposal was nevertheless properly considered outside the competitive range since, consistent with evaluation factors listed in the solicitation, protester's technical proposal was

considered to be so deficient as to be wholly unacceptable. Question whether Government unfairly construed its work statement too narrowly may not be judged solely from work statement but must be determined in light of solicitation's evaluation factors.

Contracts—Negotiation—Evaluation Factors—Criteria—Divulged and Generalized

Objection to Government's failure to include detailed subordinate evaluation criteria in soliciatation may not be sustained where sufficient correlation exists between divulged criteria and generalized criteria in solicitation. Even though subcriterion is applied under two evaluation criteria of solicitation and may penalize offeror twice, such action is proper since it is supported by rational basis.

Contracts—Negotiation—Sole Source Basis—Determination and Findings—Studies and Surveys

Conduct of negotiations with only firm considered to be in competitive range does not require additional determination and findings (D&F) to support sole source award where procurement was negotiated pursuant to D&F justifiying use of negotiation authority under FPR 1-3.210(a)(8) relating to procurement of studies and surveys.

Contracts—Research and Development—Government-Furnished Property—Use Denied

Allegation that Government permitted successful offeror to use public research vessel in performance of contract but did not make vessel available to others is denied since record shows that assistance in obtaining vessels was not provided to any offeror and successful offeror acquired vessel in question 10 years ago under grant from entity which is unrelated to procuring agency.

Contracts—Negotiation—Evaluation Factors—Evaluators—Conflict of Interest Alleged

Protest that conflict of interest existed because two evaluators of proposals were students at university whose museum was awarded contract is denied since relationship between evaluators and museum was so remote as to be practically nonexistent. Record shows that only one evaluator was part-time student at distant campus involving separate administrative entities and that museum was not involved in teaching. In fact, protester fared better overall in evaluation by this individual than with other evaluators.

Contracts—Specifications—Conformability of Equipment, etc., Offered—Administrative Determination—Negotiated Procurement

Government has not unfairly changed basic accuracy requirement in solicitation for only one offeror where contract as negotiated contained original accuracy specification but merely failed to provide detailed information necessary to establish how successful offeror would in fact implement requirement. Government may insist on compliance with original specification.

Contracts—Negotiation—Changes During Negotiation—Notification—Protester Outside Competitive Range

Where contract, as negotiated, changed performance periods of solicitation, agency's failure to provide protester opportunity to submit revised proposal on basis of changed requirements was not necessary since protester was not considered to be in competitive range and changes are not directly related to reasons for rejecting protester's proposal. In absence of directly applicable Federal Pro-

curement Regulations provision, Armed Services Procurement Regulation 3-805.4(b) is followed for guidance.

Contracts—Negotiation—Requests For Proposals—Preparation Costs

Claim for proposal preparation costs is without merit since lack of good faith, arbitrariness or capriciousness must be established and no indication is apparent that proposals were not solicited and evaluated in good faith.

In the matter of the Iroquois Research Institute, February 23, 1976:

Iroquois Research Institute has protested the Government's rejection of its technical proposal submitted under a negotiated procurement conducted by the Bureau of Land Management (BLM), Department of the Interior, for a "Bearing Land Bridge Cultural Resource Study."

The request for proposal, No. 75-13, provided for award of a cost-reimbursement type contract.

Two phases of performance are contemplated. The first phase involves an analysis of geological and archeological data relating to the Outer Continental Shelf areas of the Bering and Chuckchi Seas. This analysis is to be used to develop a ranking of probable submerged habitation sites in the area. The second phase calls for a marine archaeological survey, using contemporary techniques. A final report will describe the results of the marine archaeological survey and will evaluate existing archaeological techniques and explain any newly conceived or invented techniques. The study's stated objectives are to:

a) perform a literature and data search for select geological and archaeological data;

b) analyze the archaeological and cultural resource potential of the area;

c) establish guidelines for survey priorities and intensity of survey effort; and recommend application and, if necessary, modification of current marine archaeological survey techniques and newly conceived or invented techniques, as they pertain to the Bering and Chuckchi Seas.

Proposals were received from four firms and were submitted to a Technical Proposal Evaluation Committee. It recommended award of the contract to the University of Alaska Museum (Museum) on the basis that its proposal was the only technically acceptable proposal submitted. On the basis of this advice the contracting officer determined that only the Museum was in a competitive range and therefore technical negotiations were held only with it. The Museum's

technical and cost proposals were revised during negotiations and the contract was awarded to it.

Iroquois has raised numerous questions concerning this award action. We will treat these allegations under four basic headings: A.) Deficiency in RFP; B.) Evaluation deficiencies; C.) Preferential treatment of Museum and D.) RFP changes negotiated only with Museum.

A.) Deficiency in Request For Proposals

Iroquois argues that the determination that only the Museum was within the competitive range (eligible range for negotiations) was based upon the agency's improper failure to advise offerors of the relative importance of cost in relation to the other technical evaluation factors. Protester notes that section D of the RFP gave a specific set of criteria and percentages of relative importance for each offeror's technical proposal. At the close of section D the following was stated: "award will be made to that responsible offeror, whose offer, conforming to this request for proposal, is most advantageous to the Government, cost and other factors considered." Iroquois maintains that the RFP left offerors with an extremely general statement of the solicitation's technical requirements and with no information at all on what relative importance cost was to have in the evaluation. Because of this situation, the protester maintains that the RFP did not permit effective competition. Therefore, the protester feels any award based upon this solicitation is clearly improper.

Ordinarily a protest based upon alleged solicitation improprieties which are apparent prior to submission of proposals would be considered untimely if, as here, it is filed after the time for submission of initial proposals. *See* 20.2(b)(1) of our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975). Nevertheless, we feel compelled to consider the merits of the protester's arguments concerning the RFP evaluation criteria because the issues raised are intertwined with other timely and closely related issues concerning the validity of the Government's evaluation of protester's proposal.

As the protester points out, we have stated in numerous decisions that in order to achieve effective competition the contracting agency should advise offerors of the relative importance of cost to the technical factors. See, for example, *Signatron Inc.*, 54 Comp. Gen. 530, 535 (1974), 74-2 CPD 386; *ILC Dover*, B-182104, November 29, 1974, 74-2 CPD 301. Thus, offerors are entitled to know whether a procurement is intended to achieve a minimum standard at the lowest cost or whether cost is secondary to quality. In this regard we believe that the solicitation could have more clearly explained the relative

importance of cost to technical considerations. The mere statement that "cost and other factors" will be considered in the award determination does not in our opinion fully satisfy the requirement. To this extent we agree with the protester.

However, at the same time we believe the protester overstates the effect that the RFP's failure to clarify the importance of cost, had on the evaluation of its proposal. Offerors were aware that a cost reimbursement contract was to be awarded. With regard to the award of such contracts, the Federal Procurement Regulations (FPR) provide that the offeror's cost estimate is important in determining the offeror's understanding of the project and ability to organize and perform the contract; and that the primary consideration in determining to whom the award shall be made is which contractor can perform the contract in a manner most advantageous to the Government. FPR 1-3.805-2 (1964 ed.). Moreover, the RFP did advise the offerors that proposals not conforming to the four categories of "technical standards" would "be judged unresponsive." The record shows that Iroquois' technical proposal was found to contain basic deficiencies. The evaluation team judged its proposal to be unacceptable for the following reasons:

C. Iroquois Research Institute
1. A lack of comprehension of the basic problem was noted. The offeror states that a fundamental goal of the project is to recover potential archeological artifacts (page 16). This was not requested in the RFP. Furthermore, the title of the proposal, implying preservation of Nautical Archeology in Beringia, indicated this lack of understanding of the problem.
2. There was an incomplete approach to the archeology of the area. For example, there is evidence in the literature that inhabitants of Beringia were not exclusively big-game hunters.
3. Definite arrangements for vessel leasing were not presented. As stated in the RFP, the U.S. Government will not furnish any equipment or supplies (vessels, geophysical instruments).
4. Personnel commitments were considered insufficient with regard to experience and the obvious lack of geophysical expertise.

Perhaps Iroquois might have undertaken to make definite arrangements for vessel leasing and offered other personnel if the RFP had stated more explicitly that technical considerations would be of primary importance in the evaluation. However, it is not reasonable to blame the lack of RFP guidance as to the relative importance of cost and technical factors for shortcomings in the protester's "comprehension of the basic problem" or for its "incomplete approach to the archeology of the area." We do not believe that such basic technical deficiencies in the protester's proposal may be attributed to any failure on the part of the agency to fully emphasize the relative importance of cost and technical considerations in the evaluation. A proposal may be determined to be outside the competitive range on the basis of its technical unacceptibility without regard to cost. 52 Comp. Gen. 382, 389 (1972) and 53 *id.* 1 (1973). Therefore, we think this aspect of the protest is without merit.

B.) Evaluation Deficiencies

Iroquois also objects to the elimination of all but one offeror from the competitive range and the ensuing negotiations since it believes that the Government has narrowly and unreasonably interpreted the solicitation's statement of work. In this connection, Iroquois notes that the statement of work covered both the objectives of the study and the general scope of the work in about two pages. It argues that these work requirements were extremely broad and general. In Iroquois' opinion technical proposals coming within the scope of such broad descriptions should have been considered to be within the competitive range, particularly where advantageous cost proposals were also submitted.

In our opinion, the test of whether the Government unfairly construes its work statement too narrowly should be judged not solely for the work statement but must be looked at in the light of the evaluation factors set out in the solicitation and those which the Government utilized in ranking proposals.

Regarding the Government's evaluation factors Iroquois contends that the evaluation team and the contracting officer actually substituted a format, and even a set of evaluation criteria different from that which was specified in the solicitation. In particular, Iroquois notes that the technical panel formulated a more detailed and different set of criteria than those enunciated in the RFP. Protester argues that the use of these different criteria and the ensuing point values violated a basic and clear condition of the RFP. Moreover, Iroquois believes the agency applied the identical detailed criteria under two distinct evaluation factors provided in the solicitation. Thus Iroquois argues that if a proposal was deficient under such detailed criteria, the evaluation would penalize the proposal twice for a single shortcoming and presumably would favor a proposal which was strong in that area. Iroquois does not believe this was consistent with the terms of the solicitation.

The agency contends that the subcriteria utilized in this case were developed as an internal guide and neither enlarged nor detracted from the basic criteria provided in the solicitation. The detailed criteria were developed for the purpose of eliciting the most objective evaluation possible. The contracting officer agrees that in certain respects a technical proposal which was deficient in the evaluation factor of "Understanding the Problem," might also be affected detrimentally in the area of "Method of Approach" because of such deficiency. For example, if an offeror did not show a comprehensive understanding of the hypothesis of how early man lived, such deficiency would adversely affect that offeror's rating both for "Understanding the Problem" and for "Method of Approach." It is the

agency's view that "when the foundation upon which a proposal is based is weak, then the entire structure of the proposal will, of necessity, be weakened."

Even though detailed evaluation information generally is not required to be included in the solicitation, we would not object, as a general proposition, to the use of such detailed subcriteria in the evaluation process provided there is sufficient correlation between the generalized criteria stated in the solicitation and the factors actually used. In such circumstances we are concerned with whether prospective offerors have been sufficiently advised of the evaluation criteria which will be applied to their proposals. *Kirschner Associates, Inc.*, B–178887(2), April 10, 1974, 74–1 CPD182. We note that Iroquois has not indicated precisely the subcriteria to which it objects and we see no basis for questioning the validity of the subcriteria applied in this case. We believe it is not necessarily improper to penalize an offeror twice for a single deficiency under two separate evaluation criteria. It is inevitable that a proposal which has been found to be deficient in the area of understanding the problem might also be downgraded for its method of approach. With regard to Iroquois' proposal, the technical evaluators concluded that it demonstrated a lack of comprehension of the basic problem because the proposal erroneously indicated a fundamental goal of recovering potential archeological artifacts. Furthermore, an incomplete approach to the archeology of the area was noted by the evaluators. Iroquois' proposal also was considered deficient because it failed to indicate definite arrangements for vessel leasing and its personnel commitments were considered insufficient as to experience and geophysical expertise. For these reasons Iroquois' technical proposal was regarded as not even marginally acceptable and the agency believed that a major rewrite of the proposal would be required to make it acceptable.

Moreover, we are inclined to agree with the agency's statement that potential offerors were allowed a reasonable degree of scientific freedom to investigate possible solutions to recognized problems, to obtain the required literature and to apply new methods in the evaluation of the survey techniques. While the approach taken by Iroquois may have been judged as too narrow, we cannot conclude that the agency's interpretation of the solicitation was unreasonably narrow or that the evaluation of Iroquois' proposal was not reasonable.

Iroquois also argues that the use of a competitive solicitation together with the subsequent failure to make the "Determination and Findings" (D&F) required for a sole-source procurement was improper in this case. Iroquois cites the provision in FPR 1–3.210(b) requiring the procurement agency to justify its determination to negotiate on a sole-source basis with a written "D&F."

In this connection, the agency notes that the procurement was competitively solicited and that an appropriate written "D&F" was made to justify negotiation pursuant to FPR 1–3.210(a)(8), which provides for use of negotiation procedures with respect to procurements for studies and surveys. In our opinion, such agency action satisfied the requirement for a written "D&F."

C.) Preferential Treatment of the Museum

Iroquois alleges that the Museum was permitted to use a public research vessel in performance of the contract and that such action was unfair since the vessel was not made available to any other offeror.. Specifically, Iroquois reports that its employees tried to determine the availability of the "R/V Acona," a marine research vessel which would be suitable for use in the field work to be performed under this procurement. All inquiries on the availability of this ship indicated that it was not available for use by Iroquois.

The agency has denied protester's allegation that the Museum was given an opportunity to use a public research vessel which was not made available to other offerors. Furthermore, the solicitation stated that such a vessel would not be furnished by the Government and the agency categorically denies that it provided assistance to any of the offerors regarding the acquisition of a research vessel. As to the use of "R/V Acona," the report indicates that the vessel was acquired by the University of Alaska approximately ten years ago under a grant from the National Science Foundation and that the procuring agency has no control over that vessel. Thus it appears that Iroquois' position in this regard is without merit.

Iroquois has also raised the possibility that a conflict of interest may have tainted the impartiality of two evaluators of the technical proposals. Specifically, it is alleged that those individuals, one of whom was the author of the RFP, were enrolled during the most recent academic term at the University of Alaska. On this basis the protester asserts that the technical evaluation team's rejection of all proposals except the Museum's may have been affected by a conflict of interest and that the award of the contract to the Museum was illegal and must be terminated.

However, we find no evidence of a conflict of interest, since it appears that the relationship between the two evaluators and the successful offeror was so remote as to be practically nonexistent. In this connection, the report states that the agency employee, who assisted in the drafting and evaluation of the RFP and was a member of the evaluation team was enrolled as a part-time student in the University of Alaska at Anchorage during the 1974–1975 academic year. The agency reports that the Museum is a part of the State university system but is not involved in the teaching aspects of the

system. In addition, the Anchorage campus at which this employee attended classes, and the Fairbanks campus at which the Museum is located, are separate administrative entities. Moreover, this individual's rating of the university's proposal was only two points higher than the university's average score and his rating of the protester was approximately six points higher than its average score. Therefore, Iroquois fared better overall with this individual than with the other evaluators. With regard to the second employee, the agency reports that this employee was enrolled in a school which is not a part of the University of Alaska system and the protester has offered no evidence to the contrary. Accordingly, we must conclude that the protester's allegation that a conflict of interest tainted this procurement is without substance.

D.) RFP changes negotiated only with the Museum

Iroquois alleges that the agency significantly relaxed the RFP requirements for navigational accuracy in the performance of the second phase of the contract. The solicitation specified that the marine survey be conducted according to "USGS Operating Order II 75–3, dated January 20, 1975." That order set minimum requirement for the navigational accuracy of "± 50 feet at 200 miles." According to Iroquois, this requirement would insure that the location of the square mile survey area could be identified to a specific degree of accuracy and that the location of any artifacts could be identified with the same accuracy. In this connection, the solicitation required each proposal to specify exactly how it would meet the requirements of the USGS Operating Order. The Museum's proposal was incorporated, as negotiated, into the contract and provided, in part, that: "Since accurate navigation will be of utmost importance, any ship employed on this project should be equipped with sophisticated navigational devices, such as a satellite navigator." According to the protester this effectively changes the RFP requirement for a navigational accuracy of ± 50 feet at 200 miles, since, in open sea, navigational devices such as a satellite navigator can achieve no greater consistent accuracy than approximately 300 feet at 200 miles. BLM denies that it significantly lessened the RFP requirement for navigational accuracy in its negotiations with the Museum. It maintains that the contract still requires a navigational accuracy of ± 50 feet at 200 miles since USGS Operating Order II 75–3 is incorporated in the instrument. In addition, the agency contends that the navigational system to be used by the Museum has the capability of obtaining a navigational accuracy of ±30 feet, significantly more accurate than the RFP requirement, although not a Government requirement.

In this connection our analysis indicates there is some doubt whether the Museum will, in fact, obtain the required navigational accuracy

through the use of a satellite navigator even though it is theoretically possible to do so. A conference was held on this protest and in response to our questions the Museum's representative indicated that the vessel would not remain firmly anchored against movement or swinging for appreciable periods. We think this is a requirement which is necessary to obtain the stated accuracy. Thus it appears that the Museum's proposal did not include sufficient information to establish whether or not it would meet the accuracy requirement specified by the Government. (We note, however, that the Museum's representative further indicated at the conference that the contractor might prefer to use other systems not stated in its proposal to obtain the required navigational accuracy.)

In the circumstances we believe that the agency could insist, if it intends to implement the second phase of this contract, upon compliance with the specified accuracy requirement. The agency has not relaxed its requirement in this regard since the contract, as negotiated, contained the original accuracy specifications and merely failed to provide the information necessary to establish how the contractor would in fact implement this requirement. This indicates a deficiency in the negotiation process rather than a change by the Government in its stated requirement which would have unfairly affected other offerors.

Iroquois also argues that during negotiations the Government improperly modified its performance schedule without providing other offerors with an opportunity to propose on an equal basis. The solicitation, as issued, contemplated that performance would be accomplished in two phases, with a 5-month interval between them. The Museum successfully negotiated a change, eliminating the 5-month interval by extending the time for performance of the first phase to coincide more closely with commencement of the second phase. (The time for performance of phase two was also extended from 6 to 12 weeks.) The protester contends that these were fundamental changes in the solicitation's requirements which required the contracting officer to amend the solicitation and provide all offerors with an opportunity to respond.

In this connection, we have noted the points raised by Iroquois to the effect that the extended performance time would have enabled it to improve on the personnel proposed for the work since other individuals would have been available during this period. In addition, Iroquois states that the change would provide an opportunity to prepare a more attractive and comprehensive product; permit for greater flexibility in scheduling the oceangoing vessel and other equipment needed for performance and would permit performance "with far less intensity" than required by the solicitation.

On the other hand the procuring agency believes that the changes negotiated in the performance schedule are insignificant when viewed in the light of the extensive technical deficiencies in the protester's proposal. The agency contends that the change would not have enabled the protester to upgrade its proposal inasmuch as deficiencies related, in part, to Iroquois' understanding of the problem and its method of approach to the requirement.

When, during negotiations, a substantial change occurs in the Government's requirements or a decision is reached to relax, increase or otherwise modify the scope of the work or statement of requirement, such change or modification must be made in writing as an amendment to the request for proposals, and a copy furnished to each prospective contractor. Federal Procurement Regulations 1–3.805–1(d) (1964 ed). This regulation, unlike Armed Services Procurement Regulation (ASPR) 3–805.4(b), does not specifically indicate that the stage in the procurement cycle at which the changes occur, govern which firms should be notified of the changes. In this connection, ASPR provides that if the competitive range has been established, only those offerors within the competitive range should be sent the amendment. However, no matter at what stage the procurement is in, if a change or modification is so substantial as to warrant a complete revision of a solicitation, ASPR provides that the original should be cancelled and a new solicitation issued. Since this ASPR negotiation procedure emanates from the same underlying principles and establishes a procedure which is essentially fair and practical, we feel it may be used as a guide here.

The question in this case, then, is whether the changes in the performance times are so substantial as to warrant a complete revision of the solicitation. Generally, time for performance is a material factor under Government contracts and any changes should be reflected in the solicitation. However, where, as here, the protester is not considered to be within the competitive range and such changes are not directly related to the cause for rejection, we believe that a resolicitation from Iroquois would not have served any useful purpose.

For the reasons stated, Iroquois' protest is denied.

With regard to Iroquois' claim for proposal preparation costs, the courts have recognized that offerors are entitled to have their proposals considered fairly and honestly and that recovery of preparation costs is possible if it can be shown that proposals were not so considered. However, lack of good faith, arbitrariness or capriciousness must be established as a prerequisite to recovery.

See *Heyer Products v. United States*, 177 F. Supp. 251, 147 Ct. Cl. 256 (1959); and *Keco Industries, Inc. v. United States*, 428 F. 2d 1233, 192 Ct. Cl. 773 (1970). In our opinion the record shows that proposals were solicited and evaluated in good faith.

Accordingly, the claim is denied.

[B-185515]

Bonds—Bid—Deficiencies—Amount—Monthly Percentage on 12-Month Contract

Solicitation provision requiring bid bond in amount of 20 percent of "bid," when read in context of entire bid package, may not reasonably be interpreted as applicable to monthly rather than annual bid total for a 1-year contract, even though bid schedule called for monthly bid prices. Therefore, notwithstanding low bidder's erroneous interpretation of bid guarantee provision, agency's determination to resolicit bids under corrected specification is not justified and low bid is nonresponsive.

In the matter of the Atlantic Maintenance Company, Inc., February 24, 1976:

Through invitation for bids (IFB) N62470-76-B-0560 the Norfolk Naval Shipyard solicited bids for janitorial services to be performed at the shipyard in Portsmouth, Virginia. At bid opening on December 9, 1975, the following bids were received:

BIDDER	GRAND TOTAL PER MONTH
CFE Air Cargo, Inc	$66,640.37
Atlantic Maintenance Co., Inc	$76,932.12
Government Contractors, Inc	$81,445.02
Space Services of Georgia, Inc	$95,415.58

CFE Air Cargo, Inc. (CFE), provided a cashier's check in the amount of $13,330 as a bid security. Atlantic Maintenance Company, Inc. (Atlantic), the second low bidder, protested to this Office that the bid of CFE was nonresponsive in that the CFE bid guaranty of $13,330, while approximately 20 percent of CFE's *monthly* bid, was only 1.67 percent of the *total* CFE bid for the required performance period of 12 months. In addition, Atlantic also claims that CFE lacks the experience, capability and financial resources necessary for the contracting officer to determine that CFE is a responsible bidder.

The agency report, in response to the Atlantic allegations, argues that the IFB is ambiguous in its bid guarantee requirements because it variously states the guarantee requirement as 20 percent of the bid, 20 percent of the total bid and 20 percent of the highest amount for which award can be made. Therefore, the Navy canceled the IFB and readvertised the procurement after correction of the alleged ambiguity. Atlantic has protested this action on the basis that the IFB was not ambiguous and therefore cancellation was not justified. Atlantic contends that it is entitled to the contract award under IFB

N62470–76–B–0560 since it is, in its view, the lowest responsive responsible bidder under that solicitation.

The bid security is mentioned in four places in the bid package. The cover of the bid package contained the following legend:

> Your bid must be accompanied by bid security for 20% of the highest amount for which award can be made. See Paragraph 4 of the "Instructions to Bidders."

The Schedule on page 1 of NAVFAC Form 4330/24 contains this statement under the space provided for the grand total per month:

> Bid bond required in the amount of 20% of bid.

Page 2 of the same form states:

> Bid bond in the amount of 20% of total bid required.

Finally, page 18 of the IFB, section 1C.1.A. states:

> Bid guaranty in the amount of 20% of the total bid is required.

The Navy maintains that the statement on the bid Schedule and paragraph 1C.1.A. of the IFB and presumably page 2 of NAVFAC 4330/24 are consistent in requiring a bid bond in the amount of 20 percent of the monthly amount bid. CFE, according to Navy, literally complied with these provisions. The legend on the front of the bid package to the effect that bid security in the amount of 20 percent of the highest amount for which award can be made has reference to a requirement for 20 percent of the amount bid for the 12-month performance period in the Navy's view. Further, this provision caused more confusion according to Navy, since the direction to see paragraph 4 of Instructions to Bidders is misleading because there is no paragraph 4 in the Instructions. The net effect, Navy argues, is that the IFB is ambiguous as to the bid security requirement.

We disagree. Section 1.C.3 states that award will be based on the grand total price of items listed on the Schedule multiplied by 12. A 12-month contract was contemplated and the term "total bid" would seem to be the 12-month price, since award was to be made on the 12-month basis. Any reference to a "total bid" necessarily seems to have reference to the 12-month price. The legend on the cover of the bid package also clearly referred to the amount to be bid for the entire year's work.

Only the statement on the Schedule poses a problem. The statement that the bid bond was required to be 20 percent of "bid" might be interpreted as the Navy would have it, if one were to look only at the Schedule. If the Schedule were considered in isolation, the statement, "Bid bond required in the amount of 20% of bid" might itself be ambiguous in that a reader could interpret the statement to refer to the grand total price for 1 month or the price for the 12-months of performance. However, in the context of a bid package which con-

templates a 12-month contract, which indicates award will be made on a 12-month basis and which contains two other references to a "total bid" and a third to a highest amount for which award can be made, it seems that the word "bid" in the statement on the face of the Schedule must mean the "total bid" in context, i.e., the total price bid for the 12-month award. That this conclusion is reasonable is supported by the fact that three out of four bidders on this IFB submitted bid bonds equal to 20 percent of the full 12-month price. Accordingly, we conclude, contrary to the agency, that no ambiguity existed in the bid documents when viewed as a whole.

Although we will not ordinarily question the exercise of the contracting officer's broad authority to reject all bids and readvertise, 49 Comp. Gen. 584 (1970), we are unable to acquiesce in the readvertisement because we do not believe that there existed a compelling or cogent reason to cancel the initial solicitation. Therefore, the canceled solicitation should be reinstated.

With respect to the initial allegation of Atlantic that the bid of CFE was nonresponsive, we note that CFE provided a cashier's check for 20 percent of 1 month's price or $13,330, in lieu of a bond for that amount. We also note that 20 percent of the total bid of CFE, i.e., 20 percent of the monthly price multiplied by 12, would amount to $159,937.61. Thus, the guaranty proffered by CFE was significantly less than the requirement. In such situations we have held that the failure of a bid to comply with the bid guarantee provisions requires the rejection of the bid as nonresponsive and that the failure may not be waived or otherwise excused. See *E. Sprague, Batavia, Inc.*, B–183082, April 2, 1975, 75–1 CPD 194 and *Associated Refuse and Compaction Services, Inc.*, B–180484, April 17, 1974, 74–1 CPD 201.

Based on the foregoing, we believe that an award should be made on the basis of the solicitation prior to cancellation. The bid of CFE should be rejected as nonresponsive because of its insufficient bid bond. Finally, if otherwise proper, award should be made to Atlantic Maintenance as the low responsive bidder.

[B–166802]

Travel Expenses—Private Parties—Attendants For Handicapped Honor Award Recipients—Travel to Attend Award Ceremonies

Where handicapped employee selected to be honored under the Government Employees Incentive Awards Program is unable to travel unattended because of his particular handicap and would otherwise be unable to attend award ceremony, travel expenses for an attendant to accompany him in traveling to and from the award ceremony may be paid by the employing agency as a "necessary expense" for the honorary recognition of that particular employee under 5 U.S.C. 4503. 54 Comp. Gen. 1054, distinguished.

In the matter of travel expenses—attendants for handicapped award recipients, February 26, 1976:

The Chairman of the United States Civil Service Commission has requested our opinion whether payment of travel expenses may be made to an attendant who accompanies a handicapped employee to its annual special award ceremony for outstanding handicapped Federal employees or to a major honorary award ceremony by a department or agency.

The award ceremony conducted by the Civil Service Commission is in furtherance of the Government's policy of nondiscrimination in employment because of physical handicaps as set forth at 5 U.S. Code § 7153 (1970). With respect to the award ceremony itself, subchapter 9–6 of chapter 306 of the Federal Personnel Manual states as follows:

9–6 AWARD CEREMONY

All 10 finalists will be honored at an appropriate ceremony held in March of each year in Washington, D.C. Travel costs and per diem for the finalists (and their escorts when required, e.g., when the finalist is blind, or confined to a wheelchair, or similarly handicapped as to require assistance in travel) will be paid by the employing agency.

A question has been raised concerning the propriety of the above statement that attendant travel expenses may be paid by the employing agency in view of our recent holding in 54 Comp. Gen. 1054 (1975). That decision, issued at the request of the Chairman of the Civil Service Commission, involved the question of whether the travel and transportation expenses of family members of honor award recipients could be paid by the heads of agencies as "necessary expenses" under 5 U.S.C. § 4503 (1970).

Section 4503 of Title 5, U.S. Code (1970), provides that:

The head of an agency may pay a cash award to, and incur necessary expense for the honorary recognition of, an employee who——

(1) by his suggestion, invention, superior accomplishment, or other personal effort contributes to the efficiency, economy, or other improvement of Government operations; or

(2) performs a special act or service in the public interest in connection with or related to his official employment.

In concluding that the cost of transportation and travel of family members could not be considered a "necessary expense" within the context of the above-quoted statute, we stated the following:

In 32 Comp. Gen. 134 (1952) the question arose as to whether field employees of the Department of the Interior may be reimbursed travel and miscellaneous expenses incident to the presentation to them of the Department's Distinguished Service Award at Department convocations held in Washington, D.C. The provisions of section 14 of the Act of August 2, 1946, applicable in 1952, authorized awards for meritorious service and are similar to those contained in 5 U.S.C. § 4503.

In interpreting the phrase "to incur necessary expenses" with regard to travel expenses, it was stated that travel and miscellaneous expenses incurred by officers and employees for the purpose of participating in ceremonies held at a Department

convocation in honorary recognition of exceptional or meritorious service under the incentive awards program authorized by section 14 of the Act of August 2, 1946, as amended, may be considered a direct and essential expense of the award, and within the scope and meaning of the phrase "to incur necessary expenses" as used in the statute. However, since members of the family are not directly related to the presentation of the award, we do not consider the expense of travel of members of the family to attend the award ceremony to be a direct and essential expense of the award.

Therefore, in the absence of express statutory authority, we conclude that the Commission may not issue regulations providing for the expenditure of funds to cover the cost of travel and transportation expenses associated with family attendance at award ceremonies.

The Chairman of the Civil Service Commission directs our attention specifically to the situation of handicapped employees and inquires whether the above-quoted decision was intended to preclude payment of travel expenses for family members of handicapped award recipients insofar as those family members serve as attendants to the employees who, without such assistance, would be unable to travel to the award ceremony. We are also asked whether agencies may pay the travel expenses of an attendant who is other than a member of the handicapped employee's family.

Our decision 54 Comp. Gen. 1054, *supra*, was not intended to restrict payment of travel expenses of family members of award recipients insofar as those expenses may represent costs essential and directly related to the recognition of an employee selected to be honored under the Incentive Awards provisions of chapter 45 of Title 5, U.S. Code. Ordinarily it is not essential for a family member of an award recipient to be present at or accompany the employee to the award ceremony. However, where the particular handicap of an employee is such that he is unable to travel to the award ceremony unattended, the employing agency may properly determine that the travel expenses of an attendant are "necessary expenses" for the honorary recognition of that particular employee. It is inconsequential that the attendant may or may not be a family member.

In view of the above we conclude that the Federal Personnel Manual provision is proper and that a department or agency may pay the travel expenses of an attendant for a handicapped employee, who is to be given a Civil Service Commission or major department or agency award, and who would be unable to attend the award ceremony if no attendant accompanied him.

[B–184495]

Contracts—Negotiation—Fixed-Price—Adjustment—Reimbursement

Failure of procuring activity to inform competing offeror in negotiated procurement for fixed-price contract that Government would directly reimburse contractor for interest on borrowings to finance plant expansion when reimburse-

ment is prohibited by agency procurement regulation denied such offeror opportunity to compete on equal basis.

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

Although technical "transfusion" of one offeror's unique or innovative idea to other offerors is prohibited, offeror's request for direct reimbursement by Government of its interest expense is not such a unique or innovative idea, but is suggestion for departure from procurement "ground rules" which, if accepted by agency, must be communicated to all competing offerors.

In the matter of the Union Carbide Corporation, February 26, 1976:

Union Carbide Corporation has protested the award of a contract by the National Aeronautics and Space Administration (NASA) to Air Products and Chemicals, Inc. (APCI), for NASA's east coast liquid hydrogen requirements (primarily for the space shuttle program) for the period 1975 to 1987. Union Carbide claims that NASA did not conduct meaningful discussions with it and did not provide it with an opportunity to compete on an equal basis with APCI.

The procurement was initiated with the issuance of request for proposals (RFP) No. 8–1–4–18–00009 by NASA's Marshall Space Flight Center. The RFP stated that NASA anticipated possible multiple awards for at least one portion of the contract period and it encouraged proposers with little or no liquid hydrogen production capability to submit proposals to fulfill at least a portion of the total requirement. The award of fixed-price contracts was envisioned.

On January 17, 1975, proposals were received from APCI and Union Carbide. APCI proposed to expand its current production facilities and to provide approximately 95 percent of the total requirement. Union Carbide did not propose to expand its facilities, and offered only 26 percent of the total requirement. Although neither firm was exactly compliant with the RFP and both proposed additional conditions and terms not contained in the RFP, NASA decided to conduct discussions with both offerors. This decision is explained as follows:

> Since the two proposals were so widely divergent in terms of approach and amount of product offered, they were not truly competitive in that they were not susceptible of direct comparison. However, since the RFP stated that offers for less than the total requirement would be considered, the proposals were evaluated on the basis of the period of time for which each offered to furnish the product

At the conclusion of discussions and after submission of best and final offers, NASA's Source Selection Official (SSO) selected both firms for further negotiations. As expained by the SSO:

> * * * Although APCI offered a substantially greater percentage of the total NASA requirement than did Union Carbide, it appeared that LH2 [liquid hydrogen] might have to be procured from both suppliers to meet the total requirement. * * *

* * * * * * *

Because of our inter-related uncertainties regarding the peak requirements, product availability, plant expansion possibilities, availability of private financing for expansion, and ultimate probable cost to the Government, we decided to pursue these and other related considerations with both firms prior to reaching a final selection decision. * * *

The SSO also recognized that "neither firm was fully compliant with" the RFP ground rules and that "it might become necessary to enlarge upon, if not waive, certain of them in order to be able to ultimately award an acceptable contract." Accordingly, the program office was instructed that it would be permissible to relax the original ground rules if necessary, "but only if both firms were given a substantially equal opportunity to respond to the changed ground rules."

During negotiations, NASA questioned Union Carbide on the possibility of building a new facility for the production of liquid hydrogen in the vicinity of NASA facilities. Union Carbide's response essentially was that due to the high cost of financing, the energy shortage, the excess capacity of existing facilities, and the need for a peak requirement of short duration, it would be more economical to utilize existing excess capacity while retaining options to build new plant facilities in a future, more stable economic climate. APCI's approach, however, involved the proposed expansion of its New Orleans facility, to be financed with commercial loans with NASA reimbursing APCI for actual interest incurred through short- and long-term interest pass-thru provisions.

NASA ultimately decided that it would be in the best interest of the Government to accept the APCI proposal, since that firm, through the expansion of its production facilities, would be able to provide NASA with the total or near total requirement. NASA recognized that, "for all practical purposes, effective competition for the total requirement between APCI and Union Carbide was not materializing due to the wide divergence between the two in relationship to the quantities required and differences in corporate commitments to enlarge production capacities to meet the total requirement." However, it was decided that since "APCI could furnish the entire East Coast requirement at prices which would not be unreasonable when considering the quantities required, the term of the contract, the lack of existing production capacity to meet peakload requirements, and the lack of meaningful competition," award should be made to APCI.

A fixed-price requirements contract, with a basic performance term of 12 years, was awarded to APCI on June 30, 1975, in the estimated amount of $286,800,000 after NASA's Assistant Administrator for Procurement approved the inclusion of several provisions, including interest pass-thru provisions in the contract. The latter provisions require NASA to pay to APCI monthly amounts representing short-

term and long-term interest on construction and capital investment loans.

Union Carbide protests NASA's failure to inform it that interest pass-thru provisions would be permitted. According to Union Carbide, NASA is prohibited from paying interest by its own regulations. Therefore, Union Carbide argues, if NASA was willing to waive its regulatory provisions for this procurement, it should have so informed Union Carbide during negotiations. NASA's failure to do so, Union Carbide claims, was a breach of NASA's duty to conduct meaningful negotiations with all offerors and denied Union Carbide all the information necessary to enable it to compete with APCI on an equal basis.

Union Carbide also protests NASA's failure to inform it during negotiations that NASA was willing to award a contract for a basic term of 12 years in lieu of the 8 years specified by the RFP. In addition, Union Carbide objects to the fact that it was not advised of the possibility that the Government might build a coal gasification plant near the contractor's production plant which would produce gaseous hydrogen, an important raw material for the production of liquid hydrogen.

It is undisputed that NASA did not inform Union Carbide that interest pass-thru provisions for financing the construction of new production facilities would be permitted. It is NASA's position that is was not required to do so because the idea for the pass-thru provisions originated with APCI rather than with NASA. The agency bases its position on NASA Procurement Regulation Directive (PRD) 70–15 (September 15, 1972), which provides that contracting officers, in conducting discussions with offerors in the competitive range, shall not "transmit information which could give leads to one proposer as to how its proposal may be improved or which could reveal a competitor's ideas."

According to NASA, "the competition was * * * primarily one of ideas or means by which more product could be made available through new or expanded production capability * * * [which] necessarily involved various financing arrangements, the scope and extent of which would be governed by each individual offeror's particular approach. * * * The exact approach taken by the proposers was left entirely up to their inventiveness and ingenuity." Thus, NASA characterizes APCI's idea that NASA directly reimburse it for interest costs as "an offeror's independent approach to solving a problem" which went "to the essence of the procurement." Under such circumstances, says NASA, it would have been improper under both PRD 70–15 and our decisions reported at 51 Comp. Gen. 621 (1972)

and 52 *id.* 870 (1973) for it to "transfuse" APCI's innovative approach to Union Carbide. However, NASA does state that during negotiations it discussed the possibility of various financing arrangements that would permit Union Carbide to expand its plant facilities and provided Union Carbide with opportunities to propose "some form of financing arrangement to increase its plant capacity without limitation."

Union Carbide does not agree that it was provided with those opportunities. While it admits that NASA and company representatives discussed various possible financing arrangements, it states that NASA "never * * * explain[ed] that a deviation from accepted cost principles was possible in the form of interest reimbursements" and therefore Union Carbide, as "an experienced Government contractor, rightfully assumed that it would not be expected to request a deviation" of NASA regulations so as to allow for direct reimbursement of interest.

As NASA points out, we indicated in 51 Comp. Gen. 621, *supra*, and 52 *id.* 870, *supra*, that technical "transfusion" should be avoided. *See also* 50 Comp. Gen. 1 (1970). This concern over possible "transfusion" arose in the context of conflicting claims as to whether the statutory requirement for discussions had been met. 10 U.S. Code 2304(g) (1970) requires that oral or written discussions be held with all offerors in a competitive range, and we have recognized that this statutory mandate can be satisfied only by discussions that are meaningful. 51 Comp. Gen. 431 (1972); *Houston Films, Inc.*, B–184402, December 22, 1975, 75–2 CPD 404. In many cases we have indicated that discussions, to be meaningful, must include the pointing out of deficiencies or weaknesses in an offeror's proposal. *See e.g., Austin Electronics*, 54 Comp. Gen. 60 (1974), 74–2 CPD 61; 50 Comp. Gen. 117 (1970). However, we have also recognized that the statutory provision:

> * * * should not be interpreted in a manner which discriminates against or gives preferential treatment to any competitor. * * * Obviously, disclosure to other proposers of one proposer's innovative or ingenious solution to a problem is unfair. We agree that such "transfusion" should be avoided. It is also unfair, we think, to help one proposer through successive rounds of discussion to bring his original inadequate proposal up to the level of other adequate proposals by pointing out those weaknesses which were the result of his own lack of diligence, competence, or inventiveness in preparing his proposal. 51 Comp. Gen. 621, 622, *supra*.

Thus, we have held that the "extent and content of meaningful discussions * * * are not subject to any fixed, inflexible rule," *Decision Sciences Corporation*, B–182558, March 24, 1975, 75–1 CPD 175, and that what will constitute such discussions "is a matter of judgment primarily for determination by the procuring agency in light of all the circumstances of the particular procurement and the requirement

for competitive negotiations * * *." 53 Comp. Gen. 240, 247 (1973). We have upheld that judgment many times in cases where some limitations were placed on the extent and content of discussions in order to avoid "transfusion" or leveling. See *Sperry Rand Corporation (Univac Division), et al.*, 54 Comp. Gen. 408 (1974), 74–2 CPD 276; *Dynalectron Corporation, et al.*, 54 Comp. Gen. 562 (1975), 75–1 CPD 17, and 54 Comp. Gen. 1009 (1975), 75–1 CPD 341; *Raytheon Company*, 54 Comp. Gen. 169 (1974), 74–2 CPD 137; 53 Comp. Gen. 240, *supra;* 52 *id.* 870, *supra;* 51 *id.* 621, *supra.*

Although it is clear from these cases that NASA is correct in stating that "negotiations must be conducted in a manner to avoid 'transfusion' of" an offeror's "innovative approach and ideas" to other offerors, we do not agree that the issue presented can be disposed of on that basis. In our view, the real issue here is not whether meaningful negotiations were conducted, but whether offerors were permitted to compete on an equal basis.

It is a fundamental principle of competitive negotiation that offerors must be treated equally by a procuring activity, and we have often pointed out that an essential element of that treatment involves providing offerors with identical statements of the agency's requirements so as to provide a common basis for the submission of proposals. *Computek Incorporated et al.*, 54 Comp. Gen. 1080 (1975), 75–1 CPD 384; B–172901, B–173039, B–173087, October 14, 1971. Accordingly, we have consistently held that when there is a change in an agency's stated needs or when an agency decides that it is willing to accept a proposal that deviates from those stated needs, all offerors must be informed of the revised needs, usually through amendment of the solicitation, and furnished an opportunity to submit a proposal on the basis of the revised requirements. *Corbetta Construction Company of Illinios, Inc.*, 55 Comp. Gen. 201 (1975), 75–2 CPD 144; *Computek Incorporated, et al., supra; Unidynamics/St. Louis, Inc.*, B–181130, August 19, 1974, 74–2 CPD 107; *Annandale Service Company, et al.*, B–181806, December 5, 1974; 48 Comp. Gen. 663 (1969).

It is clear, we think, that a similar result is warranted when there is a change in what may be termed the "ground rules" that are applicable to the procurement. For example, in 48 Comp. Gen. 605 (1969), 47 *id.* 778 (1968); B–170276, March 25, 1971, and B–166072(2), March 28, 1969, we held that when an apparent noncompetitive procurement (as where a specific firm's part number is identified by the solicitation and the firm is not aware that competitive offers are being considered) in fact becomes competitive, procuring activities must amend the solicitation and provide the manufacturer of the part numbers an "opportunity to amend [its] proposals to reflect such changes as [it] might deem appropriate in light of the competitive

nature of the procurement." B–176861, January 24, 1973. See also *Instrumentation Marketing Corporation*, B–182347, January 28, 1975, 75–1 CPD 60. Also, in *Bristol Electronics, Inc., et al.*, 54 Comp. Gen. 16 (1974), 74–2 CPD 23, we held that an agency could properly accept a proposal which deviated from a solicitation provision establishing an option price ceiling only after the contracting officer reopened negotiations or issued an amendment to the RFP deleting the provision. Further, in 51 Comp. Gen. 272 (1971), we said that while a source selection official has the right to change the relative importance of evaluation factors, "when this occurs offerors should be informed of such revisions, and be afforded an opportunity to submit proposal revisions reflecting such changes * * *." 51 Comp. Gen. at 281.

Here, we think the ground rules were changed when NASA decided it was willing to consider APCI's request that it directly reimburse APCI for the interest expense to be incurred in connection with the financing of APCI's proposed plant expansion. Until that time, the rules governing the procurement were those set forth in the solicitation and the NASA Procurement Regulation (PR). NASA PR 15.205–17 provides that interest expense is an unallowable cost item in cost-reimbursement contracts. NASA PR 15.106 provides that the principles applicable to cost type contracts "shall be used in the pricing of fixed-price type contracts * * * whenever cost analysis is performed" but that "notwithstanding the mandatory use of these cost principles, the objective will continue to be to negotiate prices that are fair and reasonable, cost and other factors considered."

NASA suggests that these provisions should be interpreted as not prohibiting interest reimbursement in a fixed-price contract when the contract "reflects the basic thrust of the regulation which is to arrive at a fair and reasonable price * * *." In this regard, the contracting officer characterizes the agreement with APCI as merely an "advance understanding" as provided for in NASA PR 15.107. In any event, says NASA, no violation of NASA regulations has taken place because "[t]o the extent that the agreement with APCI * * * might constitute a deviation from NASA regulations," the provisions of those regulations were waived pursuant to NASA PR 1.109 when the Assistant Administrator for Procurement approved the inclusion of the interest reimbursement provisions in the APCI contract.

The question, however, is not whether there has been a violation of NASA regulations, but whether both offerors were effectively appraised of NASA's willingness to depart from the regulations. That such a departure occurred in this case, we think, is quite clear, despite NASA's suggestion to the contrary. First of all, while NASA PR 15.106 does establish fair and reasonable prices as the objective of negotiating fixed-price contracts, it does not even suggest that direct

interest payments under such contracts would be permissible merely because the total cost to NASA under the contract remained reasonable.

Secondly, although subparagraph (a) of NASA PR 15.107 does provide for advance understandings as to the "reasonableness and allocability of certain items of cost [which] may be difficult to determine, particularly in connection with firms or separate divisions thereof which may not be subject to effective competitive restraints," subparagraph (b) explicitly states that "the contracting officer is not authorized by this paragraph to agree to a treatment of costs inconsistent with subparts 2 through 5. For example, an advance agreement may not provide that, notwithstanding 15.205-17, interest shall be allowable."

Thirdly, we think the interest pass-thru provisions should be recognized for precisely what they are: cost-reimbursement provisions (under an otherwise fixed-price contract) for a specific type of agreed-upon cost. As such, we think they must be regarded as subject to the cost principles of NASA PR Part 15, which of course would preclude NASA from agreeing to such provisions in the absence of a waiver under NASA PR 1.109. Thus, when NASA decided it was willing to consider the inclusion of cost-reimbursement type provisions in the contract to be awarded and was further willing to waive the provisions of NASA PR 15.205–17 in order to accommodate APCI's approach, it is our view that it changed the "ground rules" applicable to the procurement.

As indicated above, procuring activities, in order to insure that offerors are competing on an equal basis, are required to notify all such competing offerors of any change in the Government's requirements or "ground rules" and to provide them with an equal opportunity to submit offers on the basis of the change. Thus, while NASA was in no way precluded from waiving or enlarging upon the original applicable ground rules "in order to be able to * * * award an acceptable contract," it was required, as it itself recognized, to provide both firms with an "equal opportunity to respond" to the changed rules.

This essential requirement of competitive negotiated procurement was not obviated because the idea or suggestion for a particular change originated with one of the offerors. A review of our cases dealing with technical "transfusion" indicates that in almost every instance what we sought to be protected, through limited discussions with other offerors, was one offeror's ingenious or innovative idea of how to satisfy the Government's *stated requirements within the existing "ground rules."* See *Ocean Design Engineering Corporation*, 54 Comp. Gen. 363 (1974), 74-2 CPD 249; *Raytheon Company, supra;*

52 Comp. Gen. 870, *supra;* B–173677, March 31, 1972, summarized at 51 Comp. Gen. 621, *supra.* While we have recognized that an agency may waive a specification requirement for one offeror only when that offeror's "technical breakthrough" results in a "unique and innovative design" to which the specification provision would not be applicable, see *Baganoff Associates, Inc.*, 54 Comp. Gen. 44 (1974), 74–2 CPD 56, it is clear that here all that APCI proposed was that NASA depart from existing regulations and include special direct reimbursement of interest provisions in its contract, even though such provisions would also be inconsistent with the type of contract to be awarded.

Furthermore, while we do not find any reason to disagree with NASA's assertion that an offeror's innovative approaches are not limited to technical matters, but may also include proposed solutions of a financial or business nature, we believe that a proposal such as APCI's which calls for deviating from a Government regulation, regardless of whether it deals with technical or financial matters, is not unique or innovative in the sense that would permit the Government to keep from other offerors its willingness to grant the deviation. Rather, we think that under the basic concepts of fairness pursuant to which the Federal competitive procurement system operates, the Government's willingness to depart from the rules governing the procurement must be established as the new basis for competition for all competing offerors. To hold otherwise, we think, would substantially dilute the requirement for equal competition which is the touchstone of the procurement process.

In reaching this conclusion, we are mindful that NASA was faced with a complex and perhaps unique procurement situation involving a long-term arrangement that would insure the production and delivery of needed quantities of a critically important fuel for the space shuttle program. We further recognize that there were only a few potential suppliers of the fuel, that only two responded to the RFP, and that only one of them, APCI, seemed interested in the plant expansion which NASA believed was necessary to meet estimated peak need requirements. We appreciate NASA's desire to negotiate a contract that would effectuate the necessary long-term arrangement, and in this regard we understand NASA's willingness to include several unique provisions in the contract and to waive certain of its regulatory provisions in order to do so as part of its good faith efforts to reach agreement with an offeror.

We are also mindful of the NASA and APCI assertions that the interest pass-thru provisions merely reflect one portion of what in any event would be the total contract price and that the provisions

are actually advantageous to the Government. For example, APCI states that the pass-thru concept merely "isolates a significant element that of necessity is part of the total contract price and limits it to actual cost, rather than having it lumped into the price on an estimated basis with appropriate contingency as part of the contractor's fee."

We do not believe, however, that these considerations can justify the denial of an equal opportunity to compete for one of the two offerors. Although we agree with APCI that in competing for a fixed-price contract a contractor may include interest on borrowings as an element of cost to be considered in computing its total price, we note from the record that APCI was not willing to accept a fixed-price contract which merely would have allowed it to recover its interest costs through sales of liquid hydrogen to NASA. Rather, the record shows that APCI advised NASA that a contract could not be entered into unless interest expense incurred to finance its plant construction was allowed as a straight pass-thru. It was as a consequence of APCI's position that NASA agreed to the interest pass-thru provisions.

We do not question either the authority of NASA to utilize these special contract provisions or the assertion that the provisions are advantageous to the Government. However, we think it is clear that these provisions also provided APCI with advantages it would not otherwise have had, and our concern is directed at NASA's willingness to depart from its regulations in order to use these provisions without putting Union Carbide on notice of that fact. (Although NASA does not explicitly concede that the pass-thru provisions represent a departure from the NASA PR, NASA obviously recognized that they might well be so regarded when special approval for their use was obtained. As indicated above, we believe the provisions do depart from the NASA PR.)

Of course, consistent with NASA PRD 70–15, NASA could not reveal to Union Carbide details of its competitor's proposal. However, as indicated above, we do not believe that either 10 U.S.C. 2304(g) or PRD 70–15 or decisions of this Office sanction the waiver of regulatory provisions for only one of two or more competing offerors merely because the suggestion for the waiver came from that one offeror. We think that is particularly the case where the regulation to be waived could well be a major obstacle to a more competitive proposal from the other offeror.

Here the record indicates that there was a considerable difference in the approaches taken by APCI and Union Carbide in their proposals

and during the discussion and negotiation sessions with NASA. APCI proposed to furnish the bulk, if not all, of NASA's east cost liquid hydrogen requirements, based in part on a proposed plant expansion, while Union Carbide proposed to furnish only a small percentage of the requirement and declined, for several reasons, to expand its existing facilities or build new ones. It is clear, however, that Union Carbide's paramount reason for not wishing to build a new plant was the high cost of financing. Although it is apparent from the record that NASA regarded APCI's approval as more responsive to its needs, we cannot say that Union Carbide, had it been informed of the possibility of interest reimbursement (and also of a longer basic contract term), would not have submitted a proposal for at least a portion of the total liquid hydrogen requirement which would have been acceptable to NASA.

It is therefore our conclusion that NASA's negotiation of interest pass-thru provisions with APCI without informing Union Carbide that it would consider proposals which involved a departure from the NASA PR with respect to financing effectively denied Union Carbide and equal opportunity to compete. For that reason, we are recommending that negotiations be reopened with Union Carbide. Should that firm then submit a proposal, the acceptance of which would be in the best interests of the Government, then we would further recommend that NASA consider the feasibility of partially or completely (as appropriate) terminating the APCI contract for the convenience of the Government. Since NASA and APCI are now 7 months into the contract, we recognize that any undue delay may adversely impact upon NASA's mission requirements. We therefore would expect that both NASA and Union Carbide will act as expeditiously as possible in response to these recommendations so as to minimize any possible disruption to NASA's space shuttle program.

As this decision contains recommendations for corrective action to be taken, it has been transmitted by letters of today to the congressional committees named in section 232 of the Legislative Reorganization Act of 1970, Public Law 91-510, 84 Stat. 1170, 31 U.S.C. 1172 (1970).

[B-184830]

Appropriations—Defense Department—Contracts—Absence of Statutory Restrictions

Allocation of Navy appropriation for DLGN nuclear powered guided missile frigate program between DLGN 41 and DLGN 42, which was based on Navy's budget request and contained in committee reports to 1975 Defense Department

Appropriation Act, is not legally binding on Navy since it was not specified in Appropriation Act itself.

Procurement—Defense Programs—Full Funding

"Full funding" of military procurement programs is not a statutory requirement, and deviation from full funding does not necessarily or automatically indicate violation of 31 U.S.C. 665 or 41 U.S.C. 11.

Contracts—Options—Requirements v. Contract Clause—Appropriation Obligation

Where exercise of contract option required Navy to furnish various items of Government-furnished property (GFP), but contract clause authorized Navy to unilaterally delete items of GFP and make necessary equitable adjustment, full value of unobligated and undelivered GFP should not be considered an "obligation" as of time of option exercise for purposes of assessing violation of 31 U.S.C. 665 or 41 U.S.C. 11. Exercise of DLGN 41 contract option did not violate these statutes since recorded obligations and other binding commitments did not exceed available appropriations.

Appropriations—Restrictions—"Follow Ship"

Proviso in Appropriation Act requires DLGN 41 to be "follow ship" of DLGN 38 class. Proviso is not violated since DLGN 41 has same basic characteristics as prior ships of that class, notwithstanding nonincorporation of series of modifications and absent showing that unincorporated modifications would significantly alter those characteristics.

In the matter of the Newport News Shipbuilding and Dry Dock Company, February 27, 1976:

INTRODUCTION

This decision concerns the validity of the exercise of a contract option. For clarity of presentation, we have divided the text into four sections. The first section summarizes pertinent facts and sets forth the relevant chronology. Second is a brief summary of the issues presented. Since the interpretation of the 1975 Defense Department Appropriation Act is of major importance to our decision, the statutory provisions and pertinent legislative history have been synthesized in the third section. The fourth section is the body of our decision, containing our analysis of the facts, discussion of authorities, and our conclusions.

I. BACKGROUND AND CHRONOLOGY

On June 25, 1970, the Navy awarded contract number N00024–70–C–0252 to Newport News Shipbuilding and Dry Dock Company of Newport News, Virginia (hereinafter referred to as "Contractor").

The contract provided for preconstruction work on the DLGN 38 nuclear powered guided missile frigate.(*) On December 21, 1971, the contract was modified by Modification P0007 to provide for construction of the first three ships of the class, DLGN 38, 39 and 40. Modification P0007 also contained option provisions for two additional ships, DLGN 41 and 42. Subsequent modification, P00018, revised the option clause (Article 28) and provided for exercise of the DLGN 41 option by written notice given on or before February 1, 1975. The revised Article 28 provides in part:

> The Contracting Officer may increase the quantity of vessels under this contract by the timely exercise of Option 1 for DLGN 41 and, if Option 1 is exercised, by the timely exercise of Option 2 for DLGN 42 at cost and profit not to exceed a profit-cost envelope defined by the target cost, target profit, target price, share line and ceiling price set forth below.
>
> * * * * * * *
>
> The Parties agree to negotiate in good faith to reach an agreement as rapidly as possible on the provisions of this contract which require modification in order to express the agreement of the parties as to new option provisions for DLGN 41 and DLGN 42. * * *

The contract is a fixed-price incentive contract (*see* Armed Services Procurement Regulation [ASPR] § 3–404.4 [1975]), with provisions for adjustment based on the excess of actual cost over target cost and on contract escalation (labor and material). Article 28, as revised by Modification P00018, established the profit-cost envelope for the DLGN 41 as follows:

Target Cost	Target Profit	Target Price	Ceiling Price
$76, 050, 000	$9, 691, 000	$85, 741, 000	$100, 951, 000

The contract also provides for delivery by the Government of property described in the contract as "Government-Furnished Property" (GFP), to be supported by certain Government-furnished information and engineering services. Extracts from pertinent GFP provisions are set forth in Attachment 1.

On February 22, 1974 (Modification P00022), Navy authorized Contractor to expend $35 million for long lead time items relating to the DLGN 41 ("material procurement, shop fabrication and other preliminary work"). The bulk of this authorization was required by Article 28 as a prerequisite to exercising the option. In August 1974, Contractor advised Navy that it considered the DLGN 41 option invalid. Considerable correspondence between Contractor and Navy ensued, with Contractor asserting as many as 11 reasons for the invalidity of the option and Navy consistently maintaining its

(*) As of July 1, 1975, the DLGN was redesignated as Guided Missile Cruiser (CGN).

validity. On January 31, 1975, Navy notified Contractor that it was exercising the DLGN 41 option (Modification P00024).

The parties, on February 3, 1975, entered into a Memorandum of Understanding whereby they agreed to negotiate in good faith to resolve their differences, not to institute any action in any administrative or judicial tribunal, and Contractor agreed to continue performance. The Memorandum specified that it could be terminated by either party after 30 days upon 48 hours written notice. Discussions and the flow of correspondence continued, with both parties maintaining their respective positions. On August 25, 1975, Contractor notified Navy of its intent to terminate the Memorandum and to suspend performance. On August 27, 1975, Contractor requested an opinion from the Comptroller General on the validity of the option exercise.

Two days later, Navy brought suit in the United States District Court for the Eastern District of Virginia, to restrain Contractor from ceasing performance. After oral argument on Plaintiff's motion for temporary restraining order, the parties stipulated to resume performance and payment, and to join in requesting the Comptroller General's opinion, the stipulation to remain in effect for 1 year unless sooner canceled or modified by mutual agreement or by order of the Court. The stipulation was entered as the Order of the Court and the case left open on the docket pending further advice. *United States* v. *Newport News Shipbuilding and Dry Dock Company, and Tenneco, Inc.*, Civil No. 75–88–NN (E.D. Va., August 29, 1975).

Navy then submitted its report to us, dated October 1, 1975, on the allegations contained in Contractor's August 27 submission. Contractor was given the opportunity to comment on Navy's report, and did so by letter dated November 7, 1975. By letter of November 24, 1975, Navy submitted its rebuttal of Contractor's comments. Contractor advised us that it did not wish to submit any further material and the record was then closed.

II. SUMMARY OF ISSUES

The issues presented for consideration may be grouped under the following headings:

(1) Violation of the Antideficiency Act.

(2) Violation of the Appropriation Act.

(3) Violation of ASPR provisions.

The pertinent portion of the Antideficiency Act, 31 U.S. Code §665 (1970), provides:

(a) No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.

Also relevant is 41 U.S.C. § 11(a) (1970), which provides that:

No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the Departments of the Army, Navy, and Air Force, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year.

Contractor argues, citing authorities, that is has a duty to inquire into the status of the DLGN appropriation. It then points out that, in October 1973, for purposes of the fiscal year 1975 budget estimate, Navy estimated the cost of the DLGN 41 at $268,000,000. In October 1974, for purposes of the fiscal year 1976 budget estimate, Navy estimated the cost of the DLGN 41 at $337,400,000. The difference, $69,400,000, consists of the following:

$15,000,000—target price to ceiling price deficit
13,000,000—inflation deficit on GFP
41,400,000—contract escalation deficit

$69,400,000

Appropriations for the DLGN 41 prior to FY 1975 totalled $115.7 million. In its FY 1975 budget submission, Navy requested $152.3 million for construction of the DLGN 41 and $92 million for advance procurement funding of the DLGN 42, for a total of $244.3 million. Congress approved the total of the request but without specifying the breakdown in the law itself. Instead the Navy's breakdown was included in committee reports. (*See* Section III, *infra.*)

Contractor thus argues that the total appropriation available for the DLGN 41 was $115.7 million plus $152.3 million, or $268 million, which is less than the Navy's FY 1975 cost estimate by $69.4 million. Contractor further points out that Navy has authorized the expenditure of $30.4 million for long lead time activity on the DLGN 42 (Modification P00023), and thus argues in the alternative that, even if the total appropriation available is deemed to be $360 million ($115.7 million plus $244.3 million), the amount available for the DLGN 41 would be at most $329.6 million, which is still less than the Navy's FY 1975 estimate.

Navy, citing its own authorities, asserts that Contractor is under no "duty" to question the adequacy of the appropriation. In any

event, Navy points out that its budget estimates relate to the overall DLGN 41 program, not merely to the contract with Contractor, and argues that it had adequate appropriations to cover its contractual obligations. The major elements of this argument are (1) the total appropriation available for the DLGN 41 is $360 million rather than $268 million; and (2) the cost of GFP is not to be included in determining Navy's contract obligations since Navy has specific authority under the contract to delete or decrease items of GFP or to provide items from inventory.

Contractor then states that Navy had estimated the cost of GFP at approximately $166.1 million, and contends that, if substantial deletions are made from this amount, it will be impossible to satisfy the congressional mandate in the 1975 Appropriation Act that the DLGN 41 be constructed as a "follow ship" of the DLGN 38 class (*see* Section III, *infra*).

Finally, Contractor argues that the exercise of the DLGN 41 option violated ASPR §§ 1–1505 (b) and (c)(i), set forth below:

> (b) When the contract provides for price escalation and the contractor requests revision of price pursuant to such provision, or the provision applies only to the option quantity, the effect of escalation on prices under the option must be ascertained before the option is exercised.
> (c) Options should be exercised only if it is determined that:
> (i) funds are available; * * *

The argument apparently is that proper compliance with § 1–1505 would have dictated either non-exercise of the option or price revision.

III. APPROPRIATION LEGISLATION AND LEGISLATIVE HISTORY

It is not disputed that $115.7 million had been appropriated for the DLGN 41 for fiscal years prior to FY 1975. See Hearings on Department of Defense Appropriations for Fiscal Year 1975 Before a Subcomm. of the House Comm. on Appropriations, 93d Cong., 2d Sess., pt. 7, at 705 (1974).

The Navy's budget submission for FY 1975 included $152.3 million for construction of the DLGN 41 and $92 million for long lead time activity for the DLGN 42. Hearings on Department of Defense Appropriations for Fiscal Year 1975 Before a Subcomm. of the Senate Comm. on Appropriations, 93d Cong., 2d Sess., pt. 3, at 34 (1974).

Title I of the Department of Defense Appropriation Authorization Act, 1975, Public Law 93–365 (August 5, 1974), 88 Stat. 399, 400, provides in pertinent part that "$244,300,000 shall be used only for the DLGN nuclear powered guided missile frigate program." It is

beyond question that this amount reflects the budget request. Thus, the House Committee on Armed Services reported as follows:

> The bill provides $256.0 [sic] million for the guided missile nuclear powered frigate (DLGN) program. Of this sum, $152.3 million is for the completion of DLGN 41, for which the Congress provided long lead time funds last year, and $92.0 million in additional long lead time items for DLGN 42, for which the Congress also provided long lead time funds last year. The Department of Defense will require full funding of the balance of the moneys needed for the construction of DLGN 42 next year.

H.R. Report No. 93–1035, 93d Cong., 2d Sess. 22 (1974). *See also* S. Report No. 93–884, 93d Cong., 2d Sess. 74 (1974). The Conference Report points out that the Conference adopted the more specific language of the House (the amounts involved, however, were not in disagreement):

> *Authorization by item for ship construction*
> The House language sets forth the amounts of money which are authorized specifically and only for each program. The Senate amendment did not include such language.
> The House conferees pointed out the desirability of having better congressional control over shipbuilding funds since in the past many programs have been terminated and the funds transferred to other programs without prior approval of the committees.
> The Senate recedes.

S. Conf. Report No. 93–1038, 93d Cong., 2d Sess. 22 (1974).

The Appropriations Committees approved the full amount authorized by Public Law 93–365 for the DLGN program. The House Committee on Appropriations, in its report on the appropriation bill (H.R. 16243), stated:

> The program recommended will provide . . . $244,300,000 for construction of DLGN 41 and for advance procurement funding for DLGN 42. These ships are to be constructed as follow ships of the *Virginia* (DLGN 38) Class, * * *

H.R. Report No. 93–1255, 93d Cong., 2d Sess. 120 (1974). The Senate report provides more detail:

> *DLGN nuclear powered guided missile frigate.*—$152.3 million is recommended for the procurement of one DLGN nuclear powered guided missile frigate. The sum recommended and $115.7 million in advance procurement funds will procure DLGN—41, the fourth of the DLGN—38 class. The mission of this class of ships is to operate offensively, in the presence of air, surface or subsurface threats, independently or with nuclear or conventional strike forces and other Naval forces or convoys. The ship is of 11,000 tons displacement with nuclear propulsion and equipped with the Tartar D guided missile system, automatic 5″ guns and long range radar. An additional $92.0 million is recommended for the procurement of long-lead-time items for DLGN—42.
> The funds are recommended on the basis of constructing these two nuclear frigates as sister ships of three DLGN 38—Class frigates now under construction using existing contract options. The authorizing committees have included in the authorizing Act language to limit these funds for this purpose.
> The Navy testified the AEGIS anti-air warfare weapon system, which is currently under development, is being considered for installation on a future class of escort ships intended to escort aircraft carriers. However, the development schedule for AEGIS shows it will be many years before production units suitable for shipboard installation will be available.

The Committee reaffirms its previous position that construction of nuclear powered submarines and ships should be supported by Congress whenever feasible and in the best interest of the Navy. The Committee considers construction of DLGN 41 and DLGN 42 should proceed now as follow ships of the DLGN 38 Class and not be deferred for years in anticipation of successful development of a hopefully better weapon system.

The Committee supports the action of the authorizing legislation with regard to construction of DLGN 41 and DLGN 42. Consequently, language has been provided in the bill setting the funds aside for this purpose only.

S. Report No. 93–1104, 93d Cong., 2d Sess. 143 (1974).

Against this background, title IV of the Department of Defense Appropriation Act, 1975, Public Law 93–437 (October 8, 1974), 88 Stat. 1212, 1220, appropriated—

for the DLGN nuclear powered guided missile frigate program, $244,300,000, which shall be available only for construction of DLGN 41 and for advance procurement funding for DLGN 42, both ships to be constructed as follow ships of the DLGN 38 class; * * *

The clause requiring the DLGN 41 and 42 to be "follow ships" of the DLGN 38 class had been proposed by the Senate and was adopted in conference. H.R. Conf. Report No. 93–1363, 93d Cong., 2d Sess. 21 (1974).

IV. DISCUSSION AND CONCLUSIONS

At the outset, we see no need to resolve the question of Contractor's duty or lack of duty to inquire into the status or adequacy of the appropriation. At least with respect to our involvement in the matter, Contractor did in fact question the appropriation, the parties stipulated to join in seeking our opinion, and this stipulation was adopted as the Order of the United States District Court.

The main question to address is the amount of appropriations legally available under Public Law 93–437 for the DLGN 41, that is, whether the full $244,300,000 contained in the Act is available, or whether the subdivision in the committee reports is controlling. In this respect, Contractor presents a logically appealing argument. Since the $244,300,000 was intended to cover two items—construction of DLGN 41 and advance procurement for DLGN 42—and since the Act does not specify how that amount is to be applied between the two items, resort must be had to the legislative history to determine the application. Under this theory, the total amount available for DLGN 41 is $268 million—the $152.3 million approved for the DLGN 41 for FY 1975 plus the $115.7 million appropriated in prior years.

We have frequently expressed the view that subdivisions of an appropriation contained in the agency's budget request or in com-

mittee reports are not legally binding upon the department or agency concerned unless they are specified in the appropriation act itself. 17 Comp. Gen. 147 (1937); B–163058, March 17, 1975; B–164031(3), April 16, 1975; *LTV Aerospace Corporation*, 55 Comp. Gen. 307 (1975), 75–2 CPD 203. *Cf.* B–149163, June 27, 1962. *See also* our Reports LCD–75–310 and LCD–75–315, January 20, 1975, entitled "Legality of the Navy's Expenditures For Project Sanguine During Fiscal Year 1974." This is not to say that legislative history is immaterial. It merely recognizes that a degree of flexibility is desirable in the financial operations of Federal departments and agencies, and that Congress may at any time readily restrict that flexibility with respect to a particular item by inserting the desired limitation in the appropriation act. The agency is by no means free to simply disregard an expression in pertinent committee reports. The realities of the annual appropriations process, as well as nonstatutory arrangments such as reprogramming, provide safeguards against abuse.

Our position was stated in B–164031(3), *supra*, as follows:

> Our Office has traditionally taken the position that, in a strict legal sense, the total amount of a line item appropriation may be applied to any of the programs or activities for which it is available in any amount absent further restrictions provided by the appropriation act or another statute.

In *LTV Aerospace Corporation*, *supra*, our most recent and most exhaustive statement in the area, we considered a restriction in a conference report which stated that $20 million was being provided for a Navy Combat Fighter but that "Adaptation of the selected Air Force Air Combat Fighter to be capable of carrier operations is the prerequisite for use of the funds provided." The appropriation in question was a lump-sum appropriation for "expenses necessary for basic and applied scientific research, development, test, and evaluation." After a detailed discussion of pertinent authorities, including those cited above, we held that the restriction in the conference report was not legally binding since it was not specified in the appropriation act itself. The following excerpts from our *LTV* decision reflect the rationale for our holding:

> In this regard, Congress has recognized that in most instances it is desirable to maintain executive flexibility to shift around funds within a particular lump-sum appropriation account so that agencies can make necessary adjustments for "unforeseen developments, changing requirements, incorrect price estimates, wage-rate adjustments, changes in the international situation, and legislation enacted subsequent to appropriations." Fisher, "Reprogramming of Funds by the Defense Department," 36 *The Journal of Politics* 77, 78 (1974). This is not to say that Congress does not expect that funds will be spent in accordance with budget estimates or in accordance with restrictions detailed in Committee reports. However, in order to preserve spending flexibility, it may choose not to impose these particular restrictions as a matter of law, but rather to leave it to

the agencies to "keep faith" with the Congress. See Fisher, *supra*, at 82. As the Navy points out, there are practical reasons why agencies can be expected to comply with these Congressional expectations. If an agency finds it desirable or necessary to take advantage of that flexibility by deviating from what Congress had in mind in appropriating particular funds, the agency can be expected to so inform Congress through recognized and accepted practices.

* * * * * * *

Accordingly, it is our view that when Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on Federal agencies.

* * * * * * *

An accommodation has developed between the Congress and the executive branch resulting in the appropriation process flexibility discussed above. Funds are most often appropriated in lump sums on the basis of mutual legislative and executive understandings as to their use and derive from agency budget estimates and testimony and expressions of intent in committee reports. The understandings reached generally are not engrafted upon the appropriation provisions enacted. To establish as a matter of law specific restrictions covering the detailed and complete basis upon which appropriated funds are understood to be provided would, as a practical matter, severely limit the capability of agencies to accommodate changing conditions.

As observed above, this does not mean agencies are free to ignore clearly expressed legislative history applicable to the use of appropriated funds. They ignore such expressions of intent at the peril of strained relations with the Congress. The executive branch—as the Navy has recognized—has a practical duty to abide by such expressions. This duty, however, must be understood to fall short of a statutory requirement giving rise to a legal infraction where there is a failure to carry out that duty.

As further noted in *LTV*, it is significant that Congress has explicitly recognized this view. In commenting on reprogramming in its report on the Department of Defense Appropriation Bill for FY 1974, the House Committee on Appropriations stated:

In a strictly legal sense, the Department of Defense could utilize the funds appropriated for whatever programs were included under the individual appropriation accounts, but the relationship with the Congress demands that the detailed justifications which are presented in support of budget requests be followed. To do otherwise would cause Congress to lose confidence in the requests made and probably result in reduced appropriations or line item appropriation bills.

H.R. Report No. 93–662, 93d Cong., 1st Sess. 16 (1973). This congressional recognition is also implicit in the excerpt from the Conference Report on Public Law 93–365 quoted in Section III, *supra*.

Contractor urges that *LTV* is inapplicable here since *LTV* involved a lump-sum appropriation whereas the DLGN appropriation is a more specific "line item" appropriation. While we recognize the factual distinction drawn by Contractor, we nevertheless believe that the principles set forth in *LTV* are equally applicable and controlling here. To be sure, any appropriation which is intended to be available for more than one item and which contains no further subdivision may be

said to contain an element of "ambiguity" since it is impossible to tell from the face of the statute how the appropriation is to be allocated among the items for which it is available. However, implicit in our holding in *LTV* and in the other authorities cited is the view that dollar amounts in appropriation acts are to be interpreted differently from statutory words in general. This view, in our opinion, pertains whether the dollar amount is a lump-sum appropriation available for a large number of items, as in *LTV*, or, as here, a more specific appropriation available for only two items.

For the reasons discussed above and in the cited authorities, we conclude that the entire $244.3 million was legally available for the DLGN 41 and that the total appropriation available for the DLGN 41 was, therefore, $360 million.

Next, it is important to distinguish between the "full funding" concept and the requirements of the Antideficiency Act. Under the full funding policy applicable to military procurement programs, funding for those programs is requested and provided at their initial stage, on the basis of the entire estimated cost of the procurement regardless of the anticipated fiscal year timing and rate of obligations. See DOD Directive No. 7200.4 (October 30, 1969). Full funding was described by Deputy Comptroller of the Navy RADM E. W. Cooke in recent hearings as follows:

> By full funding we mean at the time we budget for an item, a ship, we look at the full cost of the ship when it is delivered to the Navy. We look for escalation in the contract during the building years, plus everything it is going to cost until it is delivered, excluding outfitting and post delivery costs, is full funding, and we budget for it that way at the time we submit the request to the Congress.

Hearings on Reprograming Before a Subcomm. of the House Comm. on Appropriations, 94th Cong., 1st Sess. 316 (1975). Full funding is not required for all multi-year contractual activities. Thus, research and development programs are funded "incrementally," that is, appropriations are requested and provided in fiscal year installments limited in amount to the anticipated obligations necessary during particular fiscal years.

On January 9, 1975, the Deputy Secretary of Defense wrote to the Chairman, House Committee on Appropriations, requesting approval to deviate from full funding for the Navy shipbuilding program. The Deputy Secretary noted that strict adherence to full funding would cause the DLGN 41/42 contract options to be missed. The Chairman, on January 13, requested our views on the legality of Navy's request. In our reply to the Chairman, B–133170, January 29, 1975, we stated:

As suggested in your letter, implementation of the DOD proposal would, as a practical matter, limit congressional options. Nevertheless, we do not believe that this proposed departure from full funding is legally objectionable as such. The determinative factor here, in our view, is that the full funding policy does not constitute a statutory requirement. It is, instead, a policy developed between DOD and congressional committees and formalized by a DOD Directive. The full funding policy is in this regard similar to formalized but nonstatutory policies which govern reprogramming actions within appropriations for the military departments. * * *

As noted previously, we assume that under the DOD proposal a number of procurement actions would be initiated in fiscal year 1975 pursuant to the various line item shipbuilding programs. Procurements for certain program elements might still be capable of completion within the limits of appropriations now available, although the total cost of the entire program is not fully funded under current estimates. While initiation of such procurement actions would depart from the full funding policy, this result is not, in our view, legally objectionable for the reasons stated above. However, we believe that serious legal issues would arise to the extent that the DOD proposal might include initiation of procurement actions during fiscal year 1975 which of themselves involve predicted funding deficits. This would be the case with respect to any procurement action which, under current estimates for escalation and inflation, would cause the Government to incur obligations exceeding the amount of appropriations now available for such procurement. * * *

Considering the procurement actions in light of 31 U.S.C. § 665 and 41 U.S.C. § 11, we noted:

* * * We perceive of no reason why current agency cost estimates would not constitute an appropriate standard for determining the applicability of 41 U.S.C. § 11.

For the reasons stated, we believe that the instant DOD proposal is technically subject to legal objection if, and to the extent that, procurement actions initiated during fiscal year 1975 involve, by current estimates, costs exceeding amounts presently available therefor.

It is important to note from the foregoing that (1) full funding is not a statutory requirement, and (2) departure from full funding does not necessarily or automatically indicate a violation of 31 U.S.C. § 665 or 41 U.S.C. § 11.

In 42 Comp. Gen. 272, 275 (1962), we summarized 31 U.S.C. § 665 and 41 U.S.C. § 11 as follows:

These statutes evidence a plain intent on the part of the Congress to prohibit executive officers, unless otherwise authorized by law, from making contracts involving the Government in obligations for expenditures or liabilities beyond those contemplated and authorized for the period of availability of and within the amount of the appropriation under which they are made; to keep all the departments of the Government, in the matter of incurring obligations for expenditures, within the limits and purposes of appropriations annually provided for conducting their lawful functions, and to prohibit any officer or employee of the Government from involving the Government in any contract or other obligation for the payment of money for any purpose, in advance of appropriations made for such purpose; * * *

The first factor to consider in assessing potential violations of the statutes in question is the recording of obligations pursuant to section 1311 of the Supplemental Appropriation Act, 1955, as amended, 31 U.S.C. § 200, which provides in part:

(a) * * * no amount shall be recorded as an obligation of the Government of the United States unless it is supported by documentary evidence of—
(1) a binding agreement in writing between the parties thereto, including Government agencies, in a manner and form and for a purpose authorized by law, executed before the expiration of the period of availability for obligation of the appropriation or fund concerned for specific goods to be delivered, real property to be purchased or leased, or work or services to be performed * * *.

Obligations under contracts of the type here in question are recorded on the basis of target price. We approved this method of recording obligations in 34 Comp. Gen. 418, 420–21 (1955). Thus, the exercising of the DLGN 41 option resulted in the recording of an obligation for purposes of 31 U.S.C. § 200, with respect to Contractor, of $85,741,000.

However, the recording of obligations under 31 U.S.C. § 200 is not the sole consideration in determining violations of 31 U.S.C. § 665 and 41 U.S.C. § 11. B–133170, *supra;* B–163058, *supra.* We believe that the words "any contract or other obligation" as used in 31 U.S.C. § 665 encompass not merely recorded obligations but other actions which give rise to Government liability and will ultimately require the expenditure of appropriated funds. In B–163058, *supra,* we suggested as one example of such action conduct by a Government agency which would result in Government liability under a clear line of judicial precedent, such as through claims proceedings.

Considering the facts of the present case against this background and in the light most favorable to Contractor, we believe the following elements should be counted against the available appropriation:

(1) The target price of the DLGN 41 option, $85,741,000, which was recorded as an obligation under 31 U.S.C. § 200.

(2) Contract escalation (labor and material) and target to ceiling escalation. These are included because exercise of the option by the Navy committed the Government to pay these items even though they may not have initially been recorded as obligations. Since the final amounts cannot be definitively calculated, current estimates must be used, *i.e.*, estimates as of the time of the option exercise. B–133170, *supra.* Estimates in the record most favorable to Contractor are $70.4 million for contract escalation and $15.2 million for target to ceiling price increase, for a total of $85.6 million.

(3) Navy indicates that, at the time the DLGN 41 option was exercised, $58.55 million of DLGN 41 funds had been obligated (*i.e.*, recorded under 31 U.S.C. § 200) for program work to be performed by parties other than Contractor.

(4) Modification P00023 authorized Contractor to expend $30.4 million for advance procurement for the DLGN 42.

Totaling these items, we have:

$85,741,000—DLGN target price
85,600,000—escalation
58,550,000—other contractors
30,400,000—DLGN 42 advance procurement

$260,291,000

Subtracting this from the total appropriation available, $360 million, leaves approximately $100 million.

The decisive factor thus appears to be the extent to which GFP must be included for purposes of 31 U.S.C. § 665 and 41 U.S.C. § 11. Contractor asserts the cost of GFP at $166.1 million (presumably derived by subtracting from the October 1974 estimate of $337,400,000, the sum of target price [$85.741 million], target to ceiling price increase [$15.2 million], and contract escalation [$70.4 million]). Navy does not dispute this figure. Presumably, the $58.55 million obligated to other contractors represents items in the GFP (or related Government-furnished information or engineering services) category, thus leaving $107.55 million. If this entire amount must be added to our previous total of $260.291 million, then the appropriation is exceeded by approximately $7.5 million and the statutes violated.

In order to determine the proper treatment of GFP for the present purposes, it is necessary to examine the nature of Navy's obligation with respect to GFP under the contract. Under General Provision 11(b), Navy may unilaterally decrease GFP to be provided, or may substitute items of GFP, making whatever equitable adjustments to the contract as may thereby become necessary. Navy, in arguing that its GFP obligation cannot violate the Antideficiency Act, makes the following points:

(1) There remain three years until scheduled delivery of DLGN-41, during which the Congress may appropriate additional funds for timely new procurement of residual GFP items for DLGN-41 by the Navy. Absence of such funds in hand at present constitutes no antideficiency act violation because no new obligation (contract) has yet been created to procure such GFP items.

(2) Residual GFP items need not be purchased from extant or future appropriations. Such items can legitimately be furnished by the Navy to Newport News from existing Government inventories (*e.g.*, by removal of ordnance items from ships to be stricken from the register of U.S. Navy Ships).

(3) Navy duty to furnish enumerated GFP items is not unconditional. It is conditioned upon our right to delete GFP items (granting to or obtaining from Newport News a correlative equitable adjustment). The Navy does not dispute that deletion of such items as the nuclear reactors would not permit Newport News to deliver an operational warship of the DLGN-38 class. No such drastic deletions might be necessary, however; deletion of minor residual items not affecting the essential military characteristics of operational warships of the

DLGN-38 class might well be accomplished, thereby preserving available appropriated funds for other commitments or obligations, while faithfully discharging the Navy's GFP duties to Newport News.

Since Navy was not absolutely obligated to furnish all GFP, we do not believe that the full value of all GFP under the contract may be used to assess a violation of 31 U.S.C. § 665 or 41 U.S.C. § 11. *Cf.* 42 Comp. Gen. 272, *supra*, wherein we noted:

> One [item] appears to create a complete and outright obligation for provisioning and maintenance of a large stock of specified supplies and for keeping operational a substantial quantity of operating equipment, and although provision is made for apportioning the monthly payment for these services in the event less than the full month's services are required, *we see no provision in the contract for eliminating the requirement* except by termination of that part of the contract for the convenience of the Government. [Italic supplied.]

Id., at 277. Viewing the situation as of the time of the exercise of the option, it is impossible to determine the exact amount of recorded obligations or other liability to be incurred by Navy under the GFP provisions. Based on the preceding figures, however, it appears that the deletion of approximately $7.5 million of GFP, or approximately 4.5 percent of the estimated total of $166.1 million, would keep Navy within the available appropriation. While it remains possible that future actions by the Navy with respect to GFP might result in sufficient obligations or other Government liability so as to be objectionable under 31 U.S.C. § 665 or 41 U.S.C. § 11, we cannot conclude that such obligations or other liability existed at the time of the exercise of the option.

In view of the foregoing, it is our opinion that the exercise of the DLGN 41 option by Navy on January 31, 1975, did not violate either 31 U.S.C. § 665(a) or 41 U.S.C. § 11(a). To hold otherwise would be to view these statutes as requiring "full funding," which we do not believe to be the case. It would appear to follow that the exercise of the option also did not violate ASPR § 1-1505(c)(i).

There are two main thrusts to Contractor's allegation that the exercise of the DLGN 41 option violated the proviso in Public Law 93-437 that the DLGN 41 be constructed as a "follow ship" of the DLGN 38 class:

(1) If GFP is substantially decreased from the amount specified in the contract, the resulting ship will not be a "follow ship" of the DLGN 38 class.

(2) Over 300 modifications have been issued in the designs and specifications of the DLGN 38, 39 and 40, which have not been incorporated into the DLGN 41. If these modifications are not for the most part incorporated, the DLGN 41 cannot be a "follow ship."

Contractor thus argues that the appropriation is available only for a follow ship of the DLGN 38 class; that the DLGN 41 as ordered on January 31, 1975, is not such a follow ship; and that therefore the appropriation is not available for the DLGN 41 as ordered under the option.

The parties have urged widely divergent definitions of the "follow ship" concept. Navy contends that the concept requires merely that the ship "have the same basic characteristics as the other ships of the class." Referring to the comments in S. Rep. No. 93–1104, quoted in Section III, *supra*, Navy submits that the concept requires only that the DLGN 41 be of 11,000 tons displacement, nuclear propelled, and equipped with the Tartar D guided missile system, automatic 5″ guns, and long range radar. Navy further submits that modifications on prior ships which have not yet been incorporated into the DLGN 41 are minor in nature and do not alter the basic characteristics which define the DLGN 38 class.

Contractor argues that the "follow ship" concept requires not only that the DLGN 41 have the same basic characteristics as the preceding ships, but that it incorporate the evolutionary changes made in those preceding ships. Contractor contends that the "follow ship" concept "embraces notions of technological change and economic efficiency," and that if the evolutionary changes are not made, an immense engineering effort will be required on the part of Contractor to modify the plans for the DLGN 40 to conform to specifications for the DLGN 41 as they existed on January 31, 1975.

The record reveals considerable controversy over the unincorporated modifications. Navy points out that, in the August 29 stipulation, it agreed to negotiate in good faith to incorporate all applicable modifications. Contractor notes, however, that Navy had refused to incorporate these modifications prior to the stipulation. Navy states its reason for its refusal as follows:

> * * * Navy has taken the position * * * that, prior to exercising the option for the DLGN 41 it had no contract right to make changes unilaterally to the specifications of the DLGN 41 (other than for long lead time work). To have done so would have allowed the contractor to argue that in making such changes, the Government had prejudiced its right unilaterally to exercise the DLGN 41 option. * * *
>
> Navy counsel was concerned that if its [sic] Navy attempted to incorporate the changes unilaterally prior to option exercise Newport News could contend that this invalidated the option since it was not exercised in accordance with its terms.

Contractor counters that it would have been "hard pressed" to assert such an argument since it had requested the incorporation. Each party accuses the other of refusal to negotiate at various stages of the controversy.

The "follow ship" controversy embraces a variety of intricate issues involving the obligations of the parties under the contract, such as whether Navy would have prejudiced its right to exercise the option by incorporating the modifications. We do not consider these issues as before us under the August 29 court stipulation, and believe they are more appropriate for resolution under the "Disputes" clause of the contract. We emphasize that we are addressing only the narrow question of whether the exercise of the option violated the "follow ship" proviso of Public Law 93-437.

It seems clear that deletions of certain items of GFP would preclude the resulting ship from being a follow ship of the DLGN 38 class. Indeed, certain deletions would make delivery of an operational vessel impossible. Navy recognizes this, for example, in the case of the nuclear reactors. A deletion of this magnitude could very well be deemed a violation of the mandate of Pub. L. No. 93-437. We do not, however, believe that *every* deletion of GFP would automatically violate the follow ship requirement. Since it is not known at present which GFP items may or may not be deleted—or indeed if any deletions will be necessary—any conclusion on our part in this regard would be purely speculative. It is sufficient for purposes of the present decision to note that there have thus far been no deletions of GFP that might amount to a violation of the statutory requirement. In this connection, and in light of our previous conclusion that the entire $244.3 million appropriated for the DLGN program in FY 1975 was legally available for the DLGN 41, it is significant to reiterate that the deletion of only 4.5 percent of the total GFP (or, deducting the $58.55 million obligated, approximately 7 percent of the GFP yet to be obligated) would keep Navy within the available appropriation.

Regarding the incorporation of modifications, Navy argues that its more general definition of "follow ship" is, as noted above, supported by the legislative history of Public Law 93-437. While not in itself conclusive, the cited excerpt from S. Rep. No. 93-1104 is the only relevant discussion we have found in the legislative history. It thus may be argued that the cited characteristics—11,000 tons displacement, nuclear propelled, and equipped with the Tartar D guided missile system, automatic 5" guns and long range radar—were viewed as defining the DLGN 38 "class." Correspondingly, there is no indication in the legislative history that Congress intended a more restrictive concept.

In hearings on Defense Department appropriations for FY 1976, the following exchange took place between Representative McFall and Admiral Price:

Mr. McFall. Your statement says that the need to get the AEGIS system to sea in a firstline ship is critical. Why is it that the AEGIS antiair warfare system cannot be installed in DLGN–42?

Admiral Price. It could be installed on the DLGN–42, sir. However, we have several factors that we would have to consider.

The first is that there would be an extensive redesign effort required on that ship to put the Aegis in. Therefore, it would not be a DLGN–38 class any more. Since it would not be a DLGN-38 class, the current option which we have would not be valid and the contract would have to be renegotiated.

In other words, it would be a new contract, with the increased costs and everything that would be involved in that.

Also, the Aegis development schedule would not provide us with a system to install on a ship until 1980. This would mean that the earliest we would get the DLGN–42 if we installed Aegis on it would be in late 1982 or early 1983; thus we would lose at least 2 to 3 years of the use of this valuable ship.

The design studies that we have made show that it is cheaper to take the DLGN–42 as it now is and to later backfit the ship wih Aegis—if the Navy determines this would be necesary or desirable—than to delay the DLGN–42 to put Aegis on it originally.

For all those reasons, we do not consider that it would be advantageous at all to delay the ship waiting for Aegis.

Mr. McFall. You can put Aegis on there, backfit it?

Admiral Price. Yes; we can backfit it.

Hearings on Department of Defense Appropriations for 1976 Before a Subcomm. of the House Comm. on Appropriations, 94th Cong., 1st Sess., pt. 5, at 954 (1975). While this is of minimal value in illuminating provisions in the 1975 Act, it does, we believe, illustrate the type of problem Congress has been concerned with, *i.e.*, the compatibility of the ship with present and proposed weapon systems and the desirability of immediate construction versus postponement in relation to these systems. *See also* Hearings on Department of Defense Appropriations for 1975 Before a Subcomm. of the House Comm. on Appropriations, 93d Cong., 2d Sess., pt. 2, at 113 (1974). Rather than evidencing a concern over detailed modifications, it is, in our opinion, more likely that the "follow ship" mandate reflected the congressional decision to proceed with construction of the DLGN 41 on the basis of existing weapon systems, as opposed to postponing construction for several years in anticipation of more advanced systems which could in any event be installed in the future if desired. In addition, we believe the cited excerpt from S. Report No. 93–1104 (Section III, *supra*) supports this interpretation.

While we recognize that the question is not free from doubt, our review of Public Law 93–437 and its legislative history has not revealed a sufficient basis to dispute the more general concept of "follow ship" advanced by Navy. The record indicates that the ship ordered under the option will meet the general criteria specified in S. Report No. 93–1104. Further, Contractor has not shown that any of the unincorporated modifications significantly alter these basic

characteristics. Accordingly, we do not find sufficient legal basis to warrant a conclusion that the Appropriation Act was violated.

Finally, with respect to ASPR § 1–1505(b), Navy asserts that it did consider the effect of escalation on option prices. In light of our previous conclusion as to the availability of the $244.3 million appropriated for FY 1975, we perceive no basis to conclude that Navy acted improperly in this regard.

ATTACHMENT 1

EXCERPTS FROM CONTRACT GFP PROVISIONS

ARTICLE 11. GOVERNMENT FURNISHED PROPERTY

(a) The Government shall furnish for use under this contract in accordance with Clause 11 of the General Provisions entitled "Government Property (Fixed Price)" only the property listed in Schedule A Modification No. 7 dated 18 October 1972.

(b) The property furnished under this clause is for the installation or stowage aboard the vessel(s) being constructed under this contract. None of this property shall be used by the Contractor or a subcontractor for any purpose other than that for which such property has been furnished, unless specifically authorized in writing by the Contracting Officer. Specifically, test equipment intended to be provided to the ship, furnished to the Contractor for stowage aboard the ship, shall not be used by the Contractor for any purpose except for those tests required by Section 9670–0 of the specifications.

(c) When the Contractor is authorized to make repairs to Government Furnished Property under the Government Property Clause, Clause 11 of the General Provisions, and the Government considers any item of work to be the responsibility of a third party by reason of a warranty in favor of the Government or otherwise, the Government shall so inform the Contractor. In each such case the Contractor agrees to obtain compensation for the performance of such work from such third party and agrees that such compensation shall be in lieu of an equitable adjustment in the price of the contract as provided in the Government Property (Fixed Price), Clause 11 of the General Provisions. If the Contractor is unable to obtain compensation for any such item from such third party, he shall so inform the Government together with the reasons therefor, so that the Government may protect its interest directly against such third party and the Contractor

may present a claim for equitable adjustment against the Government in accordance with the said Clause 11 of the General Provisions.

GENERAL PROVISION 11

11. GOVERNMENT PROPERTY (FIXED PRICE).—(a) Government-Furnished Property. The Government shall deliver to the Contractor, for use in connection with an under the terms of this contract, the property described as Government-furnished property in the Schedule or specifications, together with such related data and information as the Contractor may request and as may reasonably be required for the intended use of such property (hereinafter referred to as "Government-furnished property"). The delivery or performance dates for the supplies or services to be furnished by the Contractor under this contract are based upon the expectation that Government-furnished property suitable for use (except for such property furnished "as is") will be delivered to the Contractor at the times stated in the Schedule or, if not so stated, in sufficient time to enable the Contractor to meet such delivery or performance dates. In the event that Government-furnished property is not delivered to the Contractor by such time or times, the Contracting Officer shall, upon timely written request made by the Contractor, make a determination of the delay, if any, occasioned the Contractor thereby, and shall equitably adjust the delivery or performance dates or the contract price, or both, and any other contractual provision affected by any such delay, in accordance with the procedures provided for in the clause of this contract entitled "Changes." Except Government-furnished property furnished "as is," in the event the Government-furnished property is received by the Contractor in a condition not suitable for the intended use the Contractor shall, upon receipt thereof, notify the Contracting Officer of such fact and, as directed by the Contracting Officer, either, (i) return such property at the Government's expense or otherwise dispose of the property, or (ii) effect repairs or modifications. Upon the completion of (i) or (ii) above, the Contracting Officer upon written request of the Contractor shall equitably adjust the delivery or performance dates or the contract price, or both, and any other contractual provision affected by the rejection or disposition, or the repair or modification, in accordance with the procedures provided for in the clause of this contract entitled "Changes." The foregoing provisions for adjustment are exclusive and the Government shall not be liable to suit for breach of contract by reason of any delay in delivery

of Government-furnished property or delivery of such property in a condition not suitable for its intended use.

(b) Changes in Government-furnished Property.

(1) By notice in writing, the Contracting Officer may (i) decrease the property provided or to be provided by the Government under this contract, or (ii) substitute other Government-owned property for property to be provided by the Government, or to be acquired by the Contractor for the Government, under this contract. The Contractor shall promptly take such action as the Contracting Officer may direct with respect to the removal and shipping of property covered by such notice.

(2) In the event of any decrease in or substitution of property pursuant to subparagraph (1) above, or any withdrawal of authority to use property provided under any other contract or lease, which property the Government had agreed in the Schedule to make available for the performance of this contract, the Contracting Officer, upon the written request of the Contractor (or, if the substitution of property causes a decrease in the cost of performance, on his own initiative), shall equitably adjust such contractual provisions as may be affected by the decrease, substitution, or withdrawal, in accordance with the procedures provided for in the "Changes" clause of this contract.

(c) Title. Title to all property furnished by the Government shall remain in the Government. In order to define the obligations of the parties under this clause, title to each item of facilities, special test equipment, and special tooling (other than that subject to a "Special Tooling" clause) acquired by the Contractor for the Government pursuant to this contract shall pass to and vest in the Government when its use in the performance of this contract commences, or upon payment therefor by the Government, whichever is earlier, whether or not title previously vested. All Government-furnished property, together with all property acquired by the Contractor, title to which vests in the Government under this paragraph, is subject to the provisions of this clause and is hereinafter collectively referred to as "Government property." Title to Government property shall not be affected by the incorporation or attachment thereof to any property not owned by the Government, nor shall such Government property, or any part thereof, be or become a fixture or lose its identity as personalty by reason of affixation to any realty.