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[B-180732, B-181971, B-182091]

Contracts—Specifications—Qualified Products—Listing—Restrictive Interpretation

Agency's position that only bids submitted by manufacturers or their authorized distributors under qualified products list (QPL) procurements can be considered responsive is overly restrictive interpretation of QPL requirements contained in Armed Services Procurement Regulation (ASPR) 1-1101 *et seq.*, and would constitute QPL a qualified bidders list.

Bids—Omissions—Information—Qualified Products Information—Test Number Identification

Bidder under QPL procurement, who fails to identify manufacturer or applicable QPL test number, but who identifies product's manufacturer's designation, is responsive to invitation for bids (IFB), and omissions may be waived as minor informalities.

Contracts—Specifications—Conformability of Equipment, etc., Offered—Tests—Qualified Products Acceptance Test Requirements—Applicable to All Bidders

Qualified products list acceptance test requirements in Military Specification incorporated into IFB for supply of QPL products are applicable to all bidders, not just manufacturers, even though tests may have once been performed by manufacturer to Government's satisfaction or products are former Government surplus property.

Contracts—Specifications—Tests—Necessary Amount of Testing—Administrative Determination

No probative evidence has been presented which would show QPL acceptance tests in Military Specification incorporated into IFB for supply of QPL products are not necessary to determine products' acceptability. Responsibility for establishment of tests and procedures is within ambit of technical activity responsible for qualification of QPL products.

Contracts—Specifications—Military—Acceptance Test Requirements—Qualified Products

Contractor, who supplies products under QPL procurement, is not relieved from its obligation to perform acceptance tests required by Military Specification on basis that product passed qualification tests.

Bidders—Qualifications—Preaward Surveys—Information Timeliness

Contracting officer's determination that bidder was nonresponsible for QPL procurement, which was based on negative preaward survey conducted over 5 months previous for procurement of different article, had no reasonable basis.

Bids—Evaluation—Contrary to Terms of Solicitation—Presumption of Unacceptability

Agency's presumption that bidders offering surplus material can meet QPL requirements only if bidder affirmatively volunteers and shows in its bid that it could meet acceptance test, QPL, and other Government requirements, is contrary to basic procurement policy.

Contracts—Specifications—Conformability of Equipment, etc., Offered—Noncompliance—Rejection of Bid

Bidder for Navy QPL products, who offers products on which elastomer components exceed age limitations allowed under applicable shelf life requirements, which have not been shown to be unreasonable, is nonresponsive. Allegedly different Air Force shelf life requirements are not necessarily determinative of Navy's shelf life requirements.

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

Question whether surplus bidders under solicitations for aircraft and aircraft related pars—incorporating ANA Bulletin No. 438c (age controls for age-sensitive elastomeric items)—can comply with Bulletin requirements for identification, marking, and storage of parts containing elastomeric components is one affecting responsibility.

Contracts—Specifications—"New Material" Clause—Exception—New, Unused Surplus

"New Material" clause in solicitation does not preclude bids offering new unused unreconditioned surplus material which is not overage or deteriorated.

Contracts—Specifications—Government Surplus Clause—Failure To Include—Effect

Navy's contention that surplus material can never be considered unless it has been specifically invited by solicitation is overly restrictive interpretation of ASPR 1-1208(c). Provision states that no special consideration or waiver of contract requirements can be extended to surplus material by virtue of fact that it once was owned by Government. Therefore, agency must determine whether surplus is acceptable for each procurement and include appropriate limitation in solicitation if it is determined that surplus is not acceptable. Failure to include "Government Surplus" clause is not sufficient notice to bidders that surplus is not acceptable.

Contracts—Specifications—"New Material" Clause—Reconditioning *v.* Refurbishing

Upon examination of part, which revealed it could be easily and quickly disassembled and reassembled by nontechnical people, and in absence of any apparent critical tolerances for reassembly, General Accounting Office (GAO) has doubts whether bidder's proposed replacement of overage elastomer components in new unused "critical" aircraft related part would constitute "reconditioning" in violation of "New Material" clause. However, GAO cannot disagree with ASO determination that elastomer replacement in different aircraft part constituted "reconditioning."

Bids—Rejection—Nonresponsive—Bidder's Intent Not Indicated

Bidder, who intends to "refurbish" new unused parts by replacing elastomer components, but who does not indicate this intent in its bid, may be rejected as nonresponsive where bid indicates that parts bidder is offering would exceed allowable shelf life unless elastomers are replaced.

Contracts—Specifications—Qualified Products—Changes—Machinery, Products, etc.

Although it is within discretion of QPL preparing activity to determine whether replacement of elastomer components in QPL aircraft and aircraft related parts has sufficiently changed the parts so as to consider them no longer qualified, there is some question whether they remain qualified products in view of disassembly and reassembly processes necessary to replace elastomers.

Bids—Invitation for Bids—Cancellation—Not Prejudicial to Other Bidders

Although it would seem that contracting officer, who canceled IFB for supply of aircraft parts after determining that nonresponsive bid offering surplus material met Government's actual minimum needs for much lower cost and who negotiated sole-source contract with surplus bidder on "public exigency" basis, acted improperly in failing to solicit other bidders on same basis, other bidders were not prejudiced since it is unlikely they would have offered surplus and low surplus bid was responsive to IFB.

Contracts—Specifications—Qualified Products—Sole Source Negotiation

Low bidder offering surplus parts under IFB for supply of QPL aircraft parts appears to be responsive bidder, inasmuch as surplus bids were not precluded in QPL procurements and bid offering new, unused, unreconditioned, nondeteriorative surplus parts was not in violation of "New Material" clause. Decision to cancel and negotiate sole-source award on virtually same basis to surplus bidder was proper.

Contracts—Specifications—Military—Conformance Requirement

Although agency's determination whether existing Military Specifications will meet its actual needs will not be questioned unless shown to have no reasonable basis, Military Specifications are mandatory, and procuring agency should, under ASPR 1–1108, ask QPL preparing activity for waiver of those requirements (including contract acceptance test requirements) included in Military Specification defining qualified product, which are not to be required of sole-source contractor receiving award after cancellation of QPL solicitation.

Contracts—Specifications—Qualified Products—Requirement—Waiver

Cancellation of IFB and negotiation of sole-source award to low bidder offering surplus material was not improper, even though contracting officer failed to ask QPL preparing activity for required waiver of those QPL requirements, which were not required of bidder, pursuant to ASPR 1–1108; however, recommendation is made that waiver be gotten prior to exercise of option under contract.

Bidders—Qualifications—Manufacturer or Dealer—Determination

Protest that surplus dealer is not "regular dealer" within purview of Walsh-Healey Public Contracts Act, 41 U.S.C. 35–45, and related implementing regula-

tions, ASPR 12-601 and 12-607, and therefore is ineligible for award, is not for consideration, since such determinations are exclusively vested with contracting officer subject to final review by Department of Labor.

Bids—Competitive System—Restrictions on Competition—Prohibition—Surplus Material

Navy "blanket" prohibition of all surplus material (whether new and unused surplus or reconditioned surplus) is not in compliance with requirements for "free and open" competition and drafting specifications stating Government's actual needs. Navy contracting officer and cognizant technical personnel should determine, if possible under circumstances of particular procurement, at time solicitation is issued whether surplus and/or reconditioned material will meet its actual needs.

In the matter of D. Moody & Company, Inc.; Astronautics Corporation of America, July 1, 1975:

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INTRODUCTION

This decision concerns protests of three procurements of aircraft and aircraft related parts by the United States Navy Aviation Supply Office (ASO), Philadelphia, Pennsylvania. These protests generally involve the requirements in these procurements that the items furnished thereunder be approved for inclusion on a qualified products list (QPL) and ASO's policy concerning bids offering surplus parts under QPL procurements. Inasmuch as we have found that ASO is erroneously and overly restrictively interpreting the applicable regulations, we will take this opportunity to review ASO's policy in this regard.

We believe it appropriate to treat these protests together, even though different parties are involved under each procurement, since the issues involved substantially overlap. None of the interested parties has been prejudiced by this treatment, since they were given full opportunity to comment on the issues and our treatment of these protests is consistent.

INVITATION FOR BIDS (IFB) N00383-74-B-0332

(Our Reference: B-180732)

IFB N00383-74-B-0332 was issued by ASO on December 7, 1973, for the procurement of 42 aircraft hydropneumatic pressure accumulators, Federal Stock Number (FSN) 1R 1650-640-8486 YX, Government Designation MS 28700-4. Clause F-621 of the IFB required that the articles furnished were to be in accordance with Military Specification MIL-A-5498C (ASG) of February 25, 1957, and Military Standard MS-28700. Paragraph 3.1 of MIL-A-5498C (ASG) required:

> The accumulators furnished under this Specification shall be a product which has been tested and has passed the Qualification tests specified herein.

The applicable QPL for MIL-A-5498C (ASG) is QPL 5498-18 of May 9, 1970.

In section L-1200 part II of the IFB, the "New Material" clause set out in Armed Services Procurement Regulation (ASPR) § 7-104.48 (1973 ed.) was incorporated by reference. *See* ASPR § 1-1208(a) (1973 ed.). The "New Material" clause provides generally that the bidder furnish "* * * new (not used or reconditioned, and not of such age or so deteriorated as to impair their usefulness or safety) * * *" articles under the contract unless provision is made for other than new material in the IFB. There was no provision for the furnishing of other than new material under the contract.

In response to the IFB, three timely bids (Parker-Hannifin Corporation's bid was late and determined to be not acceptable) were received by bid opening, January 8, 1074, as follows:

Bidder	Unit price	Total price
D. Moody & Co., Inc. (Moody)	$97.00	$4,074.00
York Industries, Inc. (York)	139.75	5,869.50
Teledyne Sprague Engineering Corporation (Sprague)	183.00	7,686.00

York and Sprague both had products qualified for listing on QPL-5498-18 under MS-28700-4. In its bid, Moody offered:

> * * * 42 ea. 1650-640-8486YX Accumulator P/N [part number] 1008700-4 at $97.00 ea. new surplus obtained from AF Surplus approximately May '70.

Upon perusing the QPL, it can be ascertained that The Bendix Corporation (Bendix) is listed as the manufacturer of P/N 1008700–4 under MS–28700–4. However, Moody is nowhere listed on the QPL.

ASO rejected Moody's bid because Moody was not included on the applicable QPL, the surplus material offered by Moody was found to be in violation of the "New Material" clause and Moody was found to be not a responsible contractor. Subsequently, Moody protested to our Office against the rejection of its bid.

IFB N00383–74–B–0515 (Our reference: B–181971)

IFB N00383–74–B–0515 was issued by ASO on March 18, 1974, for the procurement of 555 oxygen mask hose connectors, type MC–3A, FSN 1R 1660–694–8121 LX, Government Designation MS–22016. Clause F–621 required that the articles furnished were to be in accordance with Military Specification MIL–C–19246C and QPL 19246–4 of January 25, 1973. The "New Material" clause was also incorporated by reference into the IFB and no provision was made for other than "new" material.

In response to the IFB, four bids were received by bid opening, April 9, 1974, as follows:

Bidder	Unit price	Total price
Moody	$4.24	$2,353.20
Fluid Power, Inc. (Fluid)	8.28	4,595.40
Sierra Engineering Co. (Sierra)	9.24	5,128.20
Crown Distributing Co.	10.40	5,772.00

Fluid and Sierra both had products qualified for listing on QPL 19246–4. In its bid Moody offered:

* * * 555 ea. 1660–694–8121 LX Connector Sierra P/N 224–01 Type MC–3A at $4.24 ea. new surplus obtained from AF Surplus approximately June '69.

Sierra P/N 224–01 is a part listed on the QPL. However, Moody is nowhere listed on the QPL.

ASO rejected Moody's bid because Moody was not included on the applicable QPL and Moody's offer of surplus material was in violation of the "New Material" clause. ASO also noted that the elastomer components in the surplus material offered exceeded the 12-month age requirements of paragraph 3.3.1.1 of MIL–C–19246C. Subsequently, Moody protested to our Office against the rejection of its bid stating that it was intending to "refurbish" the oxygen mask hose connectors by replacing the elastomer components. However, ASO has stated that this "reconditioning" of the connectors still could not make Moody's bid acceptable.

IFB N00383-74-B-0596 (Our Reference: B-182091)

IFB N00383-74B-0596 was issued by ASO on April 30, 1974, requesting bids on five stepladder quantities (8 ea., 10 ea., 12 ea., 25 ea., 50 ea.) of attitude indicators, ARU-2B/A, in accordance with Military Specification MIL-I-27193B (USAF) of March 8, 1963, and one lot of related data. Section 3.1 of MIL-I-27193B (USAF) required:

The indicators furnished under this specification shall be a product which has been tested, and passed the qualification tests specified herein, and has been listed on or approved for listing on the applicable qualified products list.

The applicable QPL for MIL-I-27193B (USAF) is QPL 27193-6 of January 2, 1970. The "New Material" clause was also incorporated by reference into the IFB, but no provision was made for other than "new" material.

The three bids received by bid opening June 5, 1974, were evaluated on the basis of furnishing 12 indicators as follows:

Bidder	Unit price	Extended unit price	Data	Total price
Alden Sales Co. (Alden)	$1,798.00	$21,576.00	$10.00	$21,586.00
Astronautics Corporation of America (Astronautics)	4,440.00	53,280.00	----------	53,280.00
Lear-Siegler, Inc. (LSI)	4,530.00	54,360.00	6,991.00	61,351.00

Astronautics and LSI both had products qualified for listing on QPL-27193-6. In its bid Alden offered items with manufacturer's P/N 102379 manufactured by Astronautics in accordance with QPL-27193-6 and MIL-I-27193 with FSN 6610-939-5237. Alden stated that the indicators offered were in:

NEW CONDITION, FORMER GOV'T SURPLUS PURCHASED FROM McCLELLAN AIR FORCE BASE SEALED BID SALE. THE ABOVE PRICE INCLUDES ANY REFURBISHING, TESTING, AND PACKING IN ACCORDANCE WITH CONTRACT.

The Navy considered Alden's bid to be nonresponsive to the IFB since Alden was not listed on the applicable QPL and its offer of surplus material was in violation of the "New Material" clause. However, in view of the difference between the bid prices of Alden and Astronautics, the contracting officer requested the Defense Contract Administrative Services Region (DCASR), Baltimore, Maryland, to conduct a preaward survey on Alden and answer certain questions regarding the history, condition and source of the articles

being offered by Alden. In response to these questions, DCASR identified the property offered and stated that the surplus parts were new and unused material acquired from Tinker Air Force Base, Oklahoma. DCASR also found "from visual observation only, zero refurbishing will be required. Original manufacturer's tags were still attached to few units." ASO states that then:

* * * the Contracting Officer asked cognizant technical personnel at ASO whether the offered surplus material could be considered acceptable. In their review of the matter, ASO technical personnel talked with ACO personnel to further inquire as to the condition of the material, talked with the Commodity Manager at Tinker Air Force Base to assure that the property wasn't disposed of because it was defective, and talked to NARF (Naval Air Rework Facility) Pensacola, personnel and engineers at NAD (Naval Ammunition Depot), Crane, Indiana to ascertain the extent of refurbishing and tests they considered necessary prior to acceptance of the material. Based upon this review, cognizant ASO technical personnel advised the Contracting Officer that the material could be accepted provided:

a. The material is in a new and unused condition.

b. The material shows no signs of cracks, wear, damage, or corrosion.

c. All detailed items which are considered deteriorative in nature, i.e., O rings, rubber grommets, defective bearings, etc., are replaced with original manufacturer's parts.

d. Final inspection and acceptance of material are conducted by NARF Pensacola, Florida, with all units subjected to the acceptance tests set forth in paragraphs 4.6.1. through 4.6.25, 4.6.27, 4.6.29, 4.6.32, and 4.6.39 of the specification and any other inspections and test procedures deemed necessary to insure the receipt of acceptable material.

e. Material which fails to meet above requirements are returned to Alden for replacement.

They also advised that they computed that the inspection costs to be incurred by NARF Pensacola in inspection and test of the material was $960 and that they were prepared to transfer such funds to NARF in the event a contract was awarded to Alden.

The Navy also found that:

* * * the Contracting Officer considers it within his authority to cancel the solicitation and to procure the surplus material if cognizant technical personnel advise that they consider the material acceptable and if significant savings may result therefrom. Since the difference between Alden's bid and Astronautics' bid is $31,694, and the cost of testing to the Government is only $960, it is apparent that, if the surplus material were acceptable to the Government, the Government would realize a significant savings in the procurement of the surplus material. Accordingly, since cognizant technical personnel have advised that they consider that, if the refurbishing and testing requirements they outline are met, the offered material would be acceptable, the Contracting Officer intends to cancel the solicitation and to procure the surplus material from Alden. In the contract executed with Alden, the Contracting Officer will require compliance with the specification requirements set forth above.

Astronautics protested any award to Alden as being in violation of the "New Material" clause and the QPL requirements. Astronautics also noted that the acceptance tests under the proposed sole-source award to Alden apparently omitted many of the tests listed in MIL-I-27193B (USAF), which are essential for determining the fitness of the equipment for its intended use. Astronautics also contends that the cancellation of the IFB and the resultant award to Alden subverted the competitive process. Astronautics also alleges that Alden is not a

"regular dealer" as required by ASPR § 12–601 (1974 ed.) and § 12–603.2 (1974 ed.) and is therefore ineligible for award.

Notwithstanding Astronautics' protest, ASO on November 29, 1974, gave notice of its intent to make an award because of urgency as follows:

a. The Attitude Indicator ARU–2B/A under IFB N00383–74–B–0596 are urgently required for installation in production aircraft KC–130R and EC–130Q. To date, approximately six (6) months has elapsed since the bid opening. Deliveries of this item are required commencing in January 1975 through June 1975. The procurement lead time for new material from an established QPL source is 180 days. The procurement lead time from surplus should be substantially shortened since the articles are in existence and only testing is required. The Navy has no stock from which to supply the requirements since the KC–130R and EC–130Q are Air Force aircraft, which aircraft the Navy is procuring for special purposes. The Air Force was contacted and they too advised that these requirements could not be filled from Air Force stock.

b. Further delay in the award of a contract will create additional costs to the Government for out-of-phase installations and/or storage costs for aircraft which cannot be delivered for lack of the required GFAE (Government-Furnished Aeronautic Equipment), or will require an emergency procurement of a less economical quantity at substantially higher prices than that being procured hereunder.

We have been informed that the contract was awarded on January 16, 1975, and the initial quantity of 12 indicators has been delivered. The contract also included an option, which has been extended to be exercised by July 15, 1975.

QPL Requirements

As indicated above, the three IFB's only invited bids offering QPL products. ASPR § 1–1107.1(a) (1974 ed.) provides that whenever qualified products are to be procured by the Government, only bids or proposals offering products which have qualified prior to the opening of bids or award of negotiated contracts can be considered for awards.

ASO has claimed that a bid under a QPL procurement is responsive only if the bidder offering the QPL product is the product's manufacturer or an authorized distributor of the manufacturer. In support of this proposition, ASO makes reference to ASPR § 1–1101(a) (1974 ed.) which states:

(a) It is sometimes necessary to test products in advance of any procurement action to determine if a product is available that will meet specification requirements. In such cases, the specification may require qualification of the product. Qualification is the entire process by which products are *obtained from manufacturers or distributors*, examined and tested for compliance with specification requirements, and then identified on a list of qualified products. Qualification is performed in advance and independent of any specific procurement action. [Italic supplied.]

ASO indicates that the term "distributor" is defined at paragraph 4–103(b) of chapter IV of the Defense Standardization Manual 4120.3–M, January 1972 (which is incorporated into ASPR by ASPR § 1–1101(c) (1974 ed.)) as a distributor authorized by the manufac-

turer to distribute the manufacturer's product. ASO states its rationale for limiting responsive bids under QPL procurements to those submitted by manufacturers and authorized distributors as follows:

> * * * the contracting officer considers that once a qualified product leaves the Government as surplus material, control over the article is lost and the conditions under which the articles are held are not known. Confidence in the material could only be re-established by—at the very least—a complete examination and test of the items. However, the solicitation did not contain a provision therefor and it is not considered feasible to do so. * * *

The purpose of the QPL system is to allow the Government to efficiently procure items on which substantial testing would be required to insure that they would meet the Government's requirements or critical items of which safe operation is imperative, by permitting the extensive tests needed to show that the particular product will meet the Government's requirements to be conducted prior to the actual procurement action. ASPR § 1-1103 (1974 ed.) specifically provides that QPL requirements may be included in specifications only when one or more of the following conditions exists:

> (i) The time required to conduct one or more of the examinations and tests to determine compliance with all the technical requirements of the specification will exceed 30 days (720 hours). * * *
> (ii) Quality conformance inspection would require special equipment not commonly available.
> (iii) It covers life survival or emergency life saving equipment. * * *

Our Office has consistently held that the QPL method of procurement is ordinarily proper in view of the authority contained in the Armed Services Procurement Act of 1947, 10 U.S. Code § 2305 (1970) and the Federal Property and Administrative Services Act of 1949, 41 U.S.C. § 253 (1970), which vest individual agencies with a reasonable degree of discretion to determine the extent of competition that may be required consistent with the individual agency's needs. 36 Comp. Gen. 809 (1957); 43 *id.* 223 (1963); B-178478, June 29, 1973. Nevertheless, we have recognized that the use of a QPL, while proper under certain circumstances, is inherently restrictive of competition and have objected to the improper use of these requirements. 38 Comp. Gen. 357 (1958); 40 *id.* 348 (1960); 43 *id.*, *supra;* 51 *id.* 47 (1971). Also, in view of the restrictive nature of the qualified products system of procurement, we have held that its provisions should be liberally construed so as not to unnecessarily restrict competition. *See* B-158096, March 8, 1966; 51 Comp. Gen., *supra.*

With a view to the foregoing, we believe that ASO is making an unduly restrictive interpretation of the QPL requirements. *See* B-174350(2), June 16, 1972; B-179232, December 5, 1973. Contrary to the interpretation given it by ASO, we read the clear and unambiguous language of ASPR § 1-1101(a) (1974 ed.), quoted above, as explaining the *qualification* process by which manufacturers and dis-

tributors qualify their products, and not as a limitation on bidders eligible to bid on QPL *procurements*. Indeed, this distinction is made clear in ASPR § 1-1101(a) (1974 ed.) itself as follows:

> * * * Qualification is performed in advance and *independent* of any specific procurement action. [Italic supplied.]

The QPL procurement process is a two step process: the first step is the process of qualifying the product and the second step is the agency's procurement of the qualified product. These steps are mutually exclusive, and a firm which passes the tests qualifying the product need not be the same firm that bids the qualified product. In this connection, we have consistently held that the mere listing of a product on a QPL does not relieve a contractor from its obligation of delivering an item which meets the specifications. 41 Comp. Gen. 124 (1961); 43 *id.*, *supra*.

Moreover, the QPL requirements recognize the validity of bids submitted by bidders other than manufacturers or distributors in ASPR § 1-1107.1(c)(3) (1974 ed.), which provides:

> (3) In procuring qualified products by formal advertising, invitations for bids will be distributed to suppliers in the same manner as if a qualified product were not involved, and will not be restricted to suppliers whose products have been qualified.

Also, paragraph 4-202.3 of Chapter IV of the Defense Standardization Manual 4120.3-M states:

> *Furnishing Products not Requiring Additional Listing.* A supplier, to be eligible for award of contract to furnish a qualified product manufactured by a firm other than the supplier and marked with the brand designation of the manufacturer, is required to state in his bid the name of the actual manufacturer, the brand designation and the qualification test reference. Additional listing in the QPL is required only when the product is rebranded with the brand designation of the distributor (see par. 4-202.2).

Finally, in B-174350(2), *supra*, we found that the General Services Administration's similar interpretation of the Federal Procurement Regulations' QPL requirements as limiting responsive bids in QPL procurements to those otherwise proper bids submitted by manufacturers or authorized distributors was incorrect and overly restrictive on competition. As we stated in B-179232, *supra*, which involved a Defense Supply Agency (DSA) procurement, "* * * we agree that it is not essential that the supplier be listed on the QPL * * *" in order to be eligible for award under a QPL procurement.

ASO's overly restrictive interpretation of the QPL requirements would make a QPL a qualified bidders list. Our Office has held that such prequalification of *bidders* (as opposed to products) results in an unwarranted restriction on the free and full competition contemplated by the applicable statutes. *See* 52 Comp. Gen. 569 (1973); *id.* 987 (1973); 53 *id.* 209 (1973); *Logicon, Inc.*, B-181616, November 8, 1974; *Department of Agriculture's Use of Master Agreement*, 54 Comp. Gen. 606 (1975); *METIS Corporation*, 54 Comp. Gen. 612 (1975).

ASO has rationalized its preclusion of bidders, other than manufacturers and authorized distributors, from competing on QPL procurements on its greater confidence that a manufacturer or authorized distributor will offer the required qualified product and its lack of similar confidence in bidders, such as Moody and Alden, who offer surplus products which have left the control of the Government, manufacturer, or the manufacturer's authorized distributor. ASO bases this lack of confidence in surplus products under QPL procurements on its lack of complete knowledge as to what happened to the QPL products once they have left the control of the "qualified" bidders or the Government (e.g., the products might have been abused or stored under adverse conditions), or as to the source of these products (e.g., they may have come from a batch of the product which was not qualified or they might have been sold as defective by the Government).

However, there is nothing in the QPL regulations which in any way precludes bids offering surplus material. Also, the IFB's did not specifically state that surplus material was not acceptable. It would seem, absent specific identification requirements in the IFB with which a bidder did not comply, that a particular bidder's inability to meet the contract requirements is a matter of contractor responsibility, which must be determined on the facts and circumstances of the specific case and the abilities and capabilities of the specific bidder, and which should not be determined with a "blanket" presumption of product unacceptability and a preclusion of a class of bidders from competition, especially considering that this presumption is based upon an erroneous interpretation of the relevant ASPR provisions. (Responsibility of bidders offering surplus material is discussed below.)

ASO has essentially created one standard for treating the bids of manufacturers and distributors, and another standard for treating the bids of other bidders (especially surplus dealers). Such a dual standard is nowhere sanctioned by the applicable regulations. With regard to a similar unstated dual standard which was applied by DSA in a protested procurement which was the subject of our decision in B-162931, February 21, 1968, we stated:

> * * * the principal administrative objection to the award to White is that the Government does not have data from which it can ascertain that the surplus Hartman parts offered by White are of the same quality as the Hartman parts offered by Hartman and other offerors. It is suggested that the surplus parts may have deteriorated in storage, may have been subjected to rough handling, may be from rejected lots, etc. However, these same conditions could very well exist in respect to the parts offered by the name brand manufacturer or other offerors of its products, and the Government apparently does not seek assurances from these offerors against these contingencies and apparently it would have no means of ascertaining any deficiencies, since admittedly it has no data which can be used for testing the parts.
>
> * * * Moreover, the RFP afforded sufficient protection and remedies to the Government respecting the furnishing and receipt of new and unused Government surplus property as would have afforded a basis for an award at a lower price to White.

Similarly, the QPL requirements in each of the IFB's in question here required intensive tests (both individual and sampling), whose purpose would seem to be to insure that the Government received an acceptable product meeting its needs. Therefore, so long as Moody and Alden can pass the acceptance tests, meet the QPL identification and informational requirements of the IFB, and receive an affirmative preaward survey, we do not believe that it could be reasonably found that the products Moody and Alden were offering did not meet the IFB QPL requirements, and we believe compliance with these requirements should restore ASO's confidence in the products being offered by such surplus dealers.

Sufficiency of Identification of QPL Product Offered

ASO also argues that Moody's bid under the IFB in B–180732 must be considered nonresponsive, since it failed to identify the applicable QPL test number under which the product Moody is offering is qualified. ASO considers that, without Moody furnishing this test number, the contracting officer cannot conclude that the product identified by Moody is the same part that was qualified by the product's manufacturer and that this omission cannot be waived as a minor informality.

Where QPL products are to be procured, ASPR § 1–1107.2(a) requires the use of appropriate language in the solicitation to give notice to potential bidders or offerors that only bids or proposals offering products qualified prior to bid opening or the award of a negotiated contract would be considered for award. This clause (section B–220 of each of the IFB's in question here) states in pertinent part:

NOTICE—QUALIFIED END PRODUCTS (1969 DEC)

Awards for any end items which are required to be qualified products will be made only when such items have been tested and are qualified for inclusion in a Qualified Products List identified below (whether or not actually included in the List) at the time set for opening of bids, or the time of award in the case of negotiated contracts. Offerors should contact the office designated below to arrange to have the products which they intend to offer tested for qualification.

The offeror shall insert the item name and the test number (if known) of each qualified product in the blank spaces below.

Item Name_____
Test Number_____

Offerors offering products which have been tested and qualified, but which are not yet listed, are requested to submit evidence of such qualification with their bids or proposals, so that they may be given consideration. If this is a formally advertised procurement, any bid which does not identify the qualified product being offered, either above or elsewhere in the bid, will be rejected. * * *

Inasmuch as ASPR § 1–1107 (1974 ed.) was issued pursuant to the Armed Services Procurement Act of 1947, 10 U.S.C. § 2301 *et seq.* (1970), it has the force and effect of law and is binding not only on bidders but also on the procuring agencies. See *Paul* v. *United States*, 371 U.S. 245 (1963).

Consequently, a bidder's failure to indicate the identity of the product it is offering in such a manner as to permit the procuring agency to determine that its product is qualified must be considered a material omission rendering its bid nonresponsive. 45 Comp. Gen. 397 (1966); B-158197, April 5, 1966; B-161779, August 7, 1967; B-163575, March 26, 1968; B-166255, August 1, 1969; 51 Comp. Gen. 415 (1972); B-179232, *supra.*

However, as we stated in B-161779, *supra:*

> In determining whether a bid sufficiently identifies a qualified product we are mindful that we have criticized certain practices adopted in the administration of Qualified Products procurements which restricted competition unnecessarily. See 38 Comp. Gen. 357; 40 Comp. Gen. 348. Consequently, in order to prevent a further, unnecessary restriction of competition by adopting uniform requirements as to what constitutes sufficient product identification, we have proceeded on an ad hoc basis in resolving this question. For example, we have held that the mere failure of a bidder to list the Test Number of his qualified product does not necessarily render his bid nonresponsive if he has included the place of manufacture of his offered product so as to allow the contracting officer to determine the product was qualified. 45 Comp. Gen. 397. Where identification of the product in the Item Name blank of the Qualified Products Clause would have meant mere repetition of the description of the product as detailed in the invitation, a bid was not rendered nonresponsive because it failed to contain the Item Name and Test Number of the offered product. B-158197, April 5, 1966. * * *

Also see 53 Comp. Gen. 249 (1973), where we found that since the agency knew the IFB specifications, QPL number, type and size of the item, and the fact that the bidder was the item's manufacturer, it could ascertain the item's name and the applicable QPL test number and identify the item offered by the bidder, who failed to fill in the test number and the item's name in the "Notice-Qualified End Products" clause. In view of the foregoing, it is clear that the identification of a product offered by a bidder who fails to fill in the blanks in the "Notice-Qualified End Products" clause can result from the conjunctive use of such information as product designation, manufacturers name, QPL test number, and QPL list number. *See* 51 Comp. Gen. 415, 418 (1972).

In B-180732, Moody did not identify the manufacturer or the applicable QPL test number. However, without any undue administrative burden, ASO can easily determine these designations, since it knows the applicable QPL list number (QPL-5498-18), by noting and locating the manufacturer's designation identified by Moody in its bid (1008700-4) on the QPL and by simply looking across that column to ascertain the manufacturer (Bendix) and the test number (BuAer ltr. Aer-AE-189 of June 26, 1957). Consequently, we believe that Moody's bid in this case sufficiently identified the product it was offering and its omission of the name of the manufacturer and the applicable test number may be regarded as a waivable minor informality not rendering Moody's bid nonresponsive.

We do not regard the insertion of the QPL test number as being of such significance, in and of itself, as to make its omission from a bid

an indication that the bidder may not or cannot offer a product which has been qualified. In this regard, we note that Moody or any other bidder could just as easily itself perused the applicable QPL and have placed the appropriate test number appearing there in its bid. We also note that the "Notice-Qualified End Products" clause itself indicates that the insertion of the QPL test number is not absolutely essential inasmuch as it only requires insertion of the QPL test number "(if known)."

Also, we believe it is clear that under the terms and conditions of the IFB, Moody was, by virtue of its bid, obligated to furnish a product which had been qualified and which conformed to the IFB specifications. 41 Comp. Gen. 124; 43 *id. supra;* 49 *id.* 224 (1969); B–169290, June 1, 1970. As indicated above and discussed below, if it can be shown that Moody or any other bidder cannot deliver a conforming product, it can be found to be nonresponsible. Therefore, in view of the foregoing, we cannot find that Moody's failure to identify the QPL test number obligated it to meet less than the conditions and specifications required in the IFB.

Also, since ASO could have determined the identity of the product Moody was offering by perusing Moody's bid, the IFB and the QPL incorporated into the IFB, we cannot view the mandatory language of the "Notice-Qualified End Products" clause and paragraph 4–202.3 of Chapter IV of the Defense Standardization Manual 4120.3–M (which is set forth above) as requiring rejection of its bid.

It should also be noted that the foregoing reasoning would also apply to the IFB protested under B–181971, where Moody also failed to list the QPL test number.

QPL Acceptance Test Requirements and Bidder Responsibility

ASO also states that Moody could not comply with the acceptance test requirements of both B–180732 and B–181971, which were specifically incorporated into the IFB's by MIL–A–5498C(ASG) and MIL–C–19246C respectively. The acceptance tests in MIL–A–5498C (ASG) consisted of both individual and sampling tests and are set out in paragraph 4.3. The first article inspection and quality conformance inspections and tests in MIL–C–19246C are set out in paragraphs 4.4 and 4.5.

ASO bases its determination that Moody is unable to meet the acceptance test requirements on a preaward survey conducted by DCASR, Oklahoma City, Oklahoma, on Moody's facilities for a previous solicitation, and the fact that Moody did not in its bid specifically indicate its ability to comply with these tests. In addition, ASO claims

the preaward survey revealed that Moody was also nonresponsible because it had an inadequate inspection system and a bad past performance record.

ASO has also taken the position that a bidder offering surplus material in unspecified condition without a showing in its bid that it meets all of the Government's requirements cannot constitute an offer to deliver material meeting the specifications.

In response, Moody claims that it was not required to comply with the tests since they are only applicable to the manufacturer, and since these items are QPL items, it must be presumed that they were properly tested. In this regard, Moody notes that the Government is more intimately aware of the circumstances of the production, acceptance and sale as surplus of the QPL items than a surplus bidder and since ASO had not specifically alleged that the articles Moody was offering were sold by the Government as defective that it can only be assumed that no disability in the articles exists and that testing is not required. Moody also notes that the preaward survey was outdated and therefore no longer a valid basis for finding Moody nonresponsible. Moody also claims it has an adequate inspection system and refers to a statement by the Government's Quality Assurance Representative (QAR) for Moody's plant as follows:

I concur that D. MOODY & CO., INC. is qualified under MIL-I-45208A Inspection (and test) System Requirements.

We believe it is clear that the acceptance, first article, and quality conformance tests contained in MIL-A-5498C(ASG) of B-180732 and MIL-C-19246C of B-181971 were mandatory requirements of the contracts awarded under each of the IFB's. (Just as is the case of the acceptance test requirements in section 4.5 of MIL-I-27193B (USAF), which is incorporated into the IFB under B-182091.) In this regard, we are of the view that the following statements in the Military Specifications in question here leave no doubt that these tests are requirements of each contract awarded:

MIL-A-5498C(ASG)—section 4.3.1—*Individual Tests.*—Each accumulator submitted for acceptance *under contract* shall be subjected to the following tests * * *. [Italic supplied.]

MIL-A-5498C(ASG)

4.3.2.1 *Accumulators.*—Accumulators, up to 2 percent *of the order*, but not less than one accumulator, which have passed the Individual tests specified in 4.3.1, may be selected by the Inspector for further tests to determine conformance with any of the requirements of this specification as may be considered necessary. [Italic supplied.]

MIL-C-19246C—section 4.2

* * * * * * *

(b) *First article inspection*—First article inspection consists of examinations and tests performed on samples which are representative of the production item after award of a contract to determine that the production item meets the requirements of this specification.

(c) *Quality conformance inspection*—Quality conformance inspection consists of examinations and tests performed on individual products or lots to determine conformance of the products or lots with the requirements set forth in this specification.

These test requirements are not limited to manufacturers as is contended by Moody. This is true even though these tests may have once been completely and satisfactorily performed for a previous order made to the Government under a QPL contract. As noted by ASO, there is a legitimate need for testing surplus QPL items which have been outside the control of the QPL manufacturer or the Government and which may have been abused or improperly stored. It is also possible that the QPL acceptance tests were waived for the previously procured items. Also, the fact that the Government had control over the items and had records of whether or not they were purchased under a QPL procurement and had passed all acceptance tests cannot be considered a substitute for these test requirements because it is possible that the parts may have been mishandled, improperly stored, or simply deteriorated with age while in the possession of the surplus dealer, manufacturer or the Government. In any case, ASPR § 1–1208 (c) (1974 ed.), which is discussed below, makes it clear that former Government surplus must fully comply with all of the specifications and other contract requirements (e.g., test requirements) or else it cannot be accepted. Finally, this is not an improper dual standard of treatment for manufacturers and surplus dealers, as discussed above, since manufacturers are required to meet the same acceptance test requirements as surplus dealers.

With regard to the propriety of requiring these tests, our Office has consistently taken the position that the procurement agencies have the primary responsibility for drafting specifications reflecting their actual needs. 38 Comp. Gen. 190 (1958); 44 *id.* 302 (1964); B–178288, May 24, 1973. When a specification lends itself to free and open competition, as required by applicable statutes, and it is shown that any restrictive provisions therein are no greater than necessary to protect a legitimate interest of the Government, our Office will not question the specification. *See* B–176708, February 2, 1973; *Hy-Gain Electronics Corp.*, B–180740, December 11, 1974; *Manufacturing Data Systems, Inc.*, B–180586, B–180608, January 6, 1975. In this regard, we have consistently held that the responsibility for the establishment of tests and procedures necessary to determine product acceptability is within the ambit of the expertise of the cognizant technical activity. *See* B–174868, July 14, 1972; B–176256, November 30, 1972; B–177312, April 19, 1973; B–178584, August 29, 1973; B–179205, December 4, 1973; B–178498, December 11, 1973.

In B–180732 and B–181971, Moody has not presented any probative evidence which would tend to show that the acceptance tests required by

the technical activity responsible for the qualification of the products under MIL–A–5498C (ASG) and MIL–C–19246C (Naval Air Systems Command (NAVAIR)) are not necessary to insure that the products offered are acceptable. The fact that some of the tests may be preproduction or production tests which only can be performed by the manufacturer is not a sufficient reason for our Office to question the requirement.

Also, the fact that an item passed qualification tests does not relieve a contractor from performing the acceptance tests which the cognizant technical activity responsible for qualifying and listing qualified products believes necessary to insure the Government's receipt of a product meeting its minimum requirements. As noted above, the fact that a bidder is offering an item qualified for listing on a QPL does not relieve it of its obligation of complying with the terms, conditions and requirements of the contract and offering a product acceptable to the Government. 41 Comp. Gen. 124; 49 *id.* 224.

ASO based its determination that Moody could not comply with the QPL acceptance test and inspection system requirements under the IFB's in B–180732 and B–181971 on a preaward survey conducted by DCASR on July 31, 1973, in response to a Navy request arising out of Moody's low bid under ASO's NOO383–73–B–0759 for the procurement of pressure indicators for the A–1 and P/SP–2H aircraft. This preaward survey revealed, from the inspection of a sample of the pressure indicators offered by Moody, that the sample had been used and overhauled in violation of the IFB's "New Material" clause and that Moody did not possess the capability to manufacture or properly test the pressure indicators. DCASR also noted that Moody's past performance record was unsatisfactory and recommended that award not to be made to Moody. Based on the preaward survey, ASO found Moody to be a nonresponsible bidder on the IFB's protested under B–180732 and B–181971.

In Western Ordnance, Inc., B–182038, December 23, 1974, we stated:

> Our Office has consistently held that the question of a prospective contractor's responsibility is a matter for determination by the contracting officer involved. See *Matter of RIOCAR*, B–180361, May 23, 1974, and cases cited therein. One of the important elements of a bidder's responsibility is the capability to perform in accordance with the requirements set forth in the solicitation, which includes such factors as equipment and personnel. Resolving this question of fact necessarily involves the exercise of a considerable range of judgment and discretion by the contracting officer. It is not the function of our Office to determine whether Western Ordnance has demonstrated a capability to perform this contract; rather, our function is to review the record to determine whether the contracting officer's exercise of judgment and discretion in finding Western Ordnance nonresponsible was reasonable under the circumstances. In this regard, we have stated that a contracting officer's determination of responsibility or nonresponsibility will not be disturbed absent a reasonable basis therefor. See *Matter of Leasco Information Products, Inc. et al.*, 53 Comp. Gen. 932; 51 Comp. Gen. 233 (1971).

It is also clear that a contractor, who is found not to have the ability to meet the IFB test requirements or deliver a qualified product otherwise meeting the contract requirements, can be found to be nonresponsible for the particular procurement. *See* B–150427, February 5, 1963; B–174350(1), June 16, 1972; B–176318, September 29, 1972; B–176708, *supra.*

Notwithstanding the foregoing, we believe it was improper for ASO to have relied on this July 31, 1973, negative preaward survey to find Moody nonresponsible for the IFB's protested here, which had bid openings dated January 8, 1974, and April 9, 1974, respectively. A contracting officer may not solely rely on a preaward survey conducted on a potential contractor's facilities for a prior procurement of a different article over 5 months prior to an IFB's bid opening (over 8 months in the case of the IFB under B–181971) to find the contractor nonresponsible. As we stated in *Western Ordnance, Inc., supra:*

> * * * The fact that Western Ordnance was determined to be nonresponsible for the immediate procurement does not reflect in any way upon the firm's eligibility for future contracts, since determinations of responsibility are required to be made on "as current a basis as feasible with relation to the date of contract award." See ASPR § 1–905.2 (1974 ed.)

Moreover, DCASR found that Moody only lacked adequate test facilities for the pressure indicators being procured under IFB N00383–73–B–0759. The acceptance tests for the accumulators and connectors procured (B–180732 and B–181971) are different than those required for the indicators. Also, it may have been possible for Moody to have subcontracted the QPL acceptance test requirements. In addition, Moody could show compliance with any preproduction or production acceptance tests by showing that they were properly performed by the manufacturer.

Although Moody's inspection system was found unacceptable based on its apparent inability to properly test and inspect the items being purchased for that procurement at that time, we do not believe that it was reasonable for the contracting officer to rely on an outdated preaward survey to find Moody's inspection system inadequate for the procurements docketed under B–180732 and B–181971. In addition, Moody's inspection system was found by the preaward survey to meet the minimum quality assurance and inspection requirements for surplus dealers, a fact which has been subsequently confirmed in the QAR's statement furnished by Moody. However, it would seem that this finding would not necessarily preclude future findings of inadequacy of Moody's inspection system for a QPL item.

Therefore, based on the foregoing, we must conclude that ASO's finding that Moody was nonresponsible had no reasonable basis. We

note, however, that ASO has stated that with respect to future procurements new preaward surveys would be conducted.

Moreover, the stated presumption by ASO of the unacceptability of surplus material offered by a bidder, who does not in its bid specify the exact condition of the material offered and affirmatively volunteer and show that it could meet all of the IFB requirements (including QPL and test requirements), is not bottomed on established procurement principles. There were no requirements in the IFB's for the submission of supporting data concerning the offering of surplus property as a condition of eligibility for award. By submitting unqualified bids under an IFB, bidders offering surplus property would be responsive to the advertised requirements subject only to responsibility findings. *See* B–155524, January 14, 1965; B–160377, May 31, 1967; B–162931, *supra;* B–165809, January 24, 1969. A bidder cannot be expected to respond in its bid to informational requirements concerning its ability to meet the IFB specifications where these requirements are not called for in the IFB. Under such circumstances, if the contracting officer requires information, which has not been required to be submitted in a bid, concerning the exact condition or source of the surplus material offered by a low bidder or the low bidder's ability to perform in accordance with the IFB specifications, he may inquire of the surplus bidder as to how it will comply with the specifications, and if that bidder is unable to meet the IFB requirements, the bidder could be determined to be non-responsible.

Shelf Life Limitations

ASO also claims that the articles Moody offered under the IFB's docketed under B–180732 and B–181971 did not comply with the shelf life limitations of the articles' elastomer components. This also meant that the offered materials were in violation of the "New Material" clause (discussed below).

In this regard, ASO refers to the IFB schedule involved in B–180732 which references the shelf life of the accumulators as 3 years, after which deteriorable parts must be replaced. Also, paragraph 5.1(b) of the Air Force-Navy Aeronautical (ANA) Bulletin No. 438c, dated February 15, 1965, entitled *Age Controls of Age-Sensitive Elastomeric Items*, provides that the elastomeric O-rings in the unused accumulators may not exceed 4 quarters (12 months). This Bulletin was incorporated by reference by section G–700–G of the IFB's here under consideration (B–180732 and B–181971). Moody's bid was not in compliance with these requirements, inasmuch as Moody stated in its bid that it *acquired* the accumulators from the Air Force in 1970, or more than 3 years from the date the accumulators were assembled.

Moody questions the validity of the 3-year shelf life limitation and alleges that since the accumulators were Air Force surplus and the Air Force considers them nondeteriorative, that ASO cannot limit the shelf life. It is clear that the Air Force's minimum needs are not necessarily determinative of ASO's minimum needs. *See* B–178584, *supra.* Since Moody has presented no probative evidence which would show that the 3-year shelf life limitation is unreasonable, we may not question this requirement.

Paragraph 3.3.1.1 of MIL–C–19246C involved in B–181971 states:

3.1.1.1 *Age*—Elastomer components shall not be more than 12 months old from the date of manufacture to the date of delivery to any Government service or to any airframe or accessory manufacturer.

We have no basis to find this requirement unreasonable. Moreover, Moody admits that it would have to replace the elastomer components in the oxygen mask hose connectors in order to comply with this limitation. The acceptability of Moody's proposed "refurbishment" of the connectors is considered below.

ASO maintains that Moody cannot meet the cure and assembly date marking, manufacturing identity, and storage requirements for age control of age-sensitive elastomeric items set out in paragraphs 5.3, 5.4, and 5.5 of ANA Bulletin No. 438c, and that Moody must demonstrate in its bid its compliance with the Bulletin.

These paragraphs provide in pertinent part:

* * * * * * *

5.3.1 Prior to assembly, the age control of uninstalled elastomer items and products shall be based on the cure date. Cure date shall be marked on containers in accordance with MIL–STD–129 * * *

5.3.2 The age control of an assembly containing elastomer items shall be based on the assembly date. Assembly date shall be physically marked on the assembly * * * Assembly-date information shall also be indicated on unit, intermediate, and shipping containers containing a single line item. Exterior shipping containers containing major assemblies comprising two or more subassemblies that embody rubber items shall be identified by the date of the oldest assembly contained therein. * * *

5.3.3 Packages which include mixed categories of cured rubber items shall be physically marked with the assembly date of the oldest assembly in the package and this assembly date shall be indicated on the unit, intermediate, and shipping containers for the items.

5.4 *Manufacturing identity.*—In all cases, the manufacturer or the distributor shall maintain complete manufacturer identity (manufacturer's name, cure date, assembly date, specifications on cure-dated items) of the items, products, or assemblies for subsequent transmittal when sold to a contractor, subcontractor, or the Government.

5.5 *Storage.*—Rubber items, products, and assemblies that contain age-sensitive polymers shall be protected from circulating air, sunlight, fuel, oil, water, dust, and ozone (which is generated by electric arcs, fluorescent lamps, and similar electrical equipment). The storage temperature should not exceed 100° F. and shall not exceed 125° F.

We believe paragraphs 5.3.1 and 5.4 and the first part of paragraph 5.3.2 of ANA Bulletin No. 438c concerning product and manufacturer identification are applicable only to the manufacturer or authorized distributor of the product, while the last part of paragraph 5.3.2 and

paragraphs 5.3.3 and 5.5 are applicable to all suppliers. However, it may be that Moody would require some of the information maintained by manufacturers and authorized distributors under paragraph 5.4 in order to comply with paragraphs 5.3.2 and 5.3.3.

Also, we agree with ASO that if Moody cannot comply with the above-quoted marking and storage requirements, it may be nonresponsible. However, as we have previously stated, we do not feel that Moody must respond in its bid to identification requirements not otherwise required by the IFB. These matters should have been resolved by a timely pre-award survey after bid opening. We have found no indication, on the basis of the record before us (which includes the old preaward survey), that Moody could not have complied with the marking and storage requirements applicable to it in either of the two procurements considered here.

If Moody was unable to identify the cure or assembly dates of the accumulators or connectors (assuming arguendo that it was not known that the elastomers exceeded their applicable shelf life), then there would be for application paragraph 5.1(d) of ANA Bulletin No. 438c:

> (d) Elastomer items controlled by this bulletin shall be rejected when the cure date cannot be determined.

"New Material" Clause

ASO contends that Moody's bids and Alden's bid under these procurements (all of which offered surplus material) must be rejected as nonresponsive because they contravene the "New Material" clause of the IFB's. ASO further maintains that any bid offering surplus is nonresponsive unless the IFB specifically invites bids offering surplus items, and a bid offering surplus material cannot be considered where the "Government Surplus" clause is not included in the IFB, as was the case here. ASO also observes that since the parts offered by Moody clearly exceeded the shelf life of the accumulators and the connectors, respectively, consideration of its bids involved in B–180732 and B–181971 was precluded by the "New Material" clause prohibition of materials "of such age or so deteriorated as to impair their usefulness or safety."

ASPR § 1–1208 (1974 ed.), which governs the procurement of used and reconditioned material and former Government surplus property and which sets out the circumstances for use of the "New Material" clause and the "Government Surplus" clause, states:

> *Procurement of Used and Reconditioned Material and Former Government Surplus Property.*
> (a) Generally, all supplies or components thereof, including former Government property, purchased, shall be new (not used or reconditioned, and not of such age or so deteriorated as to impair their usefulness or safety). However,

the needs of the Government may sometimes be met, and economies effected, through the purchase of items which are not new. Solicitations shall include the New Material clause in 7-104.48, except when the clause would serve no useful purpose. This clause is appropriate for use not only in supply contracts, but also in service contracts which may involve an incidental furnishing of parts, such as contracts for overhaul, maintenance or repair.

(b) In all procurements in which the contracting officer has determined that supplies and components which are used or reconditioned but which fully comply with the specifications and other contract requirements are acceptable, the solicitation shall include provisions clearly indicating the supplies or components which need not be new, and details concerning their acceptability. In determining whether such supplies and components may be purchased, the following criteria shall be considered:

(i) safety of persons or property;

(ii) final cost to the Government (including maintenance, inspection, testing, and useful life);

(iii) performance requirements; and

(iv) availability and cost of new supplies and components (for example, out-of-production items).

(c) Items previously sold as Government surplus shall not be accepted unless it is determined that the surplus property offered fully meets the applicable specifications and other contract requirements. In addition, care must be exercised to insure that the prices paid for such items are reasonable giving due consideration to overall cost savings to the Government without affecting quality. Where a contract calls for material to be furnished at cost, the allowable charge for any Government surplus property furnished shall be the cost at which the contractor or his affiliate acquired the property.

(d) The solicitations shall include the Government Surplus clause in 7-104.49, except when the clause would serve no useful purpose.

The "New Material" clause states:

Except as to any supplies and components which the Specification or Schedule specifically provides need not be new, the Contractor represents that the supplies and components including any former Government property identified pursuant to the "Government Surplus" clause of this contract to be provided under this contract are new (not used or reconditioned, and not of such age or so deteriorated as to impair their usefulness or safety). If at any time during the performance of this contract, the Contractor believes that the furnishing of supplies or components which are not new is necessary or desirable, he shall notify the Contracting Officer immediately, in writing, including the reasons therefor and proposing any consideration which will flow to the Government if authorization to use such supplies is granted.

The "Government Surplus" clause states:

(a) In the event the bid or proposal is based on furnishing items or components which are former Government surplus property or residual inventory resulting from terminated Government contracts, a complete description of the items or components, quantity to be used, name of Government agency from which acquired, and date of acquisition shall be set forth on a separate sheet to be attached to bid or proposal. Notwithstanding any information provided in accordance with this provision, items furnished by the Contractor must comply in all respects with the specifications contained herein.

(b) Except as disclosed by the Contractor in (a) above, no property of the type described herein shall be furnished under this contract unless approved in writing by the Contracting Officer.

Under these regulations—in the absence of language in the IFB's indicating that the items being procured need not be new—the furnishing of new items as required by the "New Material" clause is mandatory. 47 Comp. Gen. 390, 396 (1968); *D. Moody & Co., Inc.*, B-178591, B-178970, February 4, 1974. Consequently, since there is nothing in the three IFB's in question here authorizing anything but new materials, bidders had to offer new items in order to be eligible for award.

However, contrary to ASO's assertions that no surplus material can ever be offered under the "New Material" clause, the clear and unambiguous language of this clause envisions that either new manufactured or new surplus items would be acceptable under the IFB's. *See* B–155524, *supra;* B–162931, *supra;* 47 Comp. Gen., *supra; D. Moody & Co., Inc., supra.* The clause defines "new" to be "not used or reconditioned, and not of such age or so deteriorated as to impair their [the items] usefulness or safety." The clause does not preclude the procurement of new unused unreconditioned surplus material which is not too old and which has not deteriorated. Compare 47 Comp. Gen., *supra,* where it was found that "overhauled certified" surplus material did not qualify as "new."

In support of its contention that no offer of surplus can be considered under an IFB unless it is specifically invited by the IFB, ASO refers to ASPR § 1–1208(c) (1974 ed.), quoted above. This is an overly restrictive interpretation of the regulation since the regulation only states that former Government surplus cannot be accepted unless it fully meets the contract requirements as they are set out in the IFB. We interpret this to mean that no special considerations or waivers of contract requirements can be given to surplus items because they may have once been owned by the Government, and that surplus items must meet the same requirements as any other items offered under the contract.

These overly restrictive interpretations of ASPR § 1–1208 (1974 ed.) are apparently related to ASO's basic distrust of surplus items, which, as we indicated above, is not, in and of itself, sufficient reason to eliminate surplus items from award consideration unless the contracting officer and cognizant technical personnel determine, on a reasonable basis, that surplus material would not be acceptable. *See* B–162931, *supra.* A written determination of the unacceptability of surplus material should be included in the IFB (where applicable). In this regard, we have held that bidders cannot be expected to be aware of a contracting officer's discretionary determination regarding the inclusion or noninclusion of contract conditions or limitations, such as whether surplus material would be acceptable, except from perusing the IFB itself; nor can they compete on an equal basis unless they know in advance the basis on which their bids will be evaluated. *See* 36 Comp. Gen. 380 (1956); *DPF Incorporated,* B–180292, September 12, 1974; *Grunley-Walsh Construction Company, Inc.,* B–181593, October 24, 1974.

Similarly, we cannot agree with ASO's assertion that the noninclusion of the "Government Surplus" clause in the IFB's prevents consideration of bids offering surplus. Although ASO evidently believed

that the inclusion of the clause would serve no useful purpose because surplus material could not be accepted under a QPL procurement, we believe the only effect of noninclusion would be that a bidder offering surplus material would not have to include in its bid the information called for in the "Government Surplus" clause regarding the description and source of the offered surplus material. Although it would seem that the clause should not be included in an IFB where it was determined before issuance that surplus would not be acceptable, a bidder should not be expected to "ferret" out the reasons why the contracting agency failed to include a normally standard clause in an IFB. See *Grunley-Walsh Construction Company, Inc., supra.*

In view of the foregoing, we need not consider Moody's argument that ASO implicitly recognized that Government surplus was acceptable under the IFB's by virtue of paragraph I-926 ("Inspection" clause) in each of the IFB's, although it is noted that we have held that the "Inspection" clause does not modify in any way the "New Material" clause so as to allow the acceptance of "reconditioned" or overage material. *See* 47 Comp. Gen., *supra.*

As was indicated above, since we cannot, on the record before us, object to the stated shelf life requirements for accumulators and connectors, we must conclude that the items Moody was offering under the IFB's considered under B-180732 and B-181971 violated the "New Material" clause's prohibition of materials "of such age or so deteriorated as to impair their usefulness or safety."

"Reconditioned" Material

After its initial protest had been filed in B-181971, Moody claimed that it had intended to "refurbish" the oxygen mask hose connectors it was offering by replacing the outdated elastomer components with appropriately cure-dated and tested elastomers. This would mean that the "refurbished" connectors would no longer exceed their applicable shelf life or violate the "New Material" clause. Moody claims that this is a well-known and common practice in military supply agencies. Moody draws a distinction between "refurbished" and "reconditioned" materials—the latter of which are also not "new" as required by the "New Material" clause. Moody states that "reconditioning" contemplates reworking to "like new" condition an item worn out by use or made of unstable and decayed elements, i.e., *repairing* the item. Moody does not believe that the replacing of two elastomer components—which it states is a simple task—is "reconditioning" within the meaning of the "New Material" clause.

The Navy has responded that the "refurbishing" Moody claimed it was to perform on the connectors came under the "New Material"

clause's "reconditioning" prohibition. ASO argues that a connector with replaced components (elastomer or otherwise) must be regarded as a "reconditioned" connector. ASO also notes that this item is very critical, since it contains a valve that controls oxygen flow to the airplane pilot, and is coded as consumable and is disposed of rather than repaired when considered unsafe for use, due to the connector's low cost and critical application. In this connection, ASO does not stock replacement elastomer components for the connectors, nor does it have any technical manuals or maintenance plans therefor. ASO also notes that the quality of the elastomer components is critical to the safe operation of the connectors.

Although Moody did not so offer in its bid involved in B–180732, it could also have replaced the four elastomer components in the hydropneumatic accumulators (also allegedly a relatively simple process) in which case the same basic arguments set out above could be made. In this regard, ASO states that the accumulators are used in the C–130 aircraft's braking system to prevent hydraulic surges, and are, therefore, critical to the aircraft's safe operation.

Moody supplied an oxygen mask hose connector to our Office. We found it was an easy task for nontechnical people to completely and properly disassemble and reassemble the item. In addition, this sample, which appeared to be new and unused, was examined by a General Accounting Office engineer. Based upon our examination, we have doubt whether the replacement of the elastomers in this item constitutes "reconditioning." Moreover, even if it could be considered "reconditioning," we have doubts as to the propriety of the prohibition of the replacement of the elastomers in the procured connectors, especially considering that there are apparently no critical tolerances in replacing the elastomers or reassembling the connectors (unlike the situation in *D. Moody & Co., Inc.*, 53 Comp. Gen. 742 (1974), where reassembly of the solenoid valve had to be done to a .0025-inch tolerance).

It would seem, therefore, that new and unused connectors, in which the elastomers (which were cure-dated and tested in accordance with the applicable requirements) have been replaced, after which each of the connectors was subjected to the required intensive QPL individual acceptance tests of MIL–C–19246C, could well meet the Government's requirements, notwithstanding the connectors' critical safety application. In any case, we believe that some consideration should be given to not discarding these items, where they are new and unused, because they have an age of over a year.

As for the accumulators involved in B–180732, we cannot, on the basis of the record before us (we have not physically examined this part), disagree with ASO's position that Moody's replacement of the elastomer components would be "reconditioning" and as such pre-

cluded by the "New Material" clause. In this regard, we would tend to agree with ASO that, in the ordinary case, replacing components necessary for the safe and proper functioning of "critical" aircraft and aircraft related parts, which can only be accomplished by disassembling and reassembling the part, would be considered "reconditioning."

In view of the foregoing, we do not feel that it is necessary to draw a fine line of distinction between the terms "recondition" and "refurbish."

ASO points out that, even assuming that these "refurbished" items were not "reconditioned," Moody must state in its bid that it will replace the elastomer components in order for it to be bound to do so under the contracts awarded pursuant to the IFB's. On the other hand, Moody claims that it need not specifically state in its bid that it plans to "refurbish" the items it is offering, since a bidder binds itself by its bid to deliver conforming and acceptable articles unless it qualifies its bid (which Moody did not do).

We agree with ASO that Moody should have indicated in its bid that it would replace the elastomer components in the items in question, if it intended to do so. Moody's bid clearly indicates that Moody had acquired both the accumulators and connectors more than 4 years previously while the shelf life was apparently only 3 years for the accumulators and only 1 year for the connectors. Consequently, we believe that, without further explanation in its bid indicating that it intended to replace the elastomer components, Moody's bid could be interpreted to mean that Moody was offering items that had not been reworked and which exceeded the shelf-age limitations set by the Government. Therefore, we cannot say that Moody's bid obligated it to "refurbish" those parts and, at best, Moody's bid must be considered ambiguous in this regard, since there is no specific condition in the IFB's providing for such reworking of the items. It is well-settled that an ambiguous bid may not be explained after bid opening with extraneous evidence in order to make it responsive to the IFB requirements, since the bidder would then, in effect, have an election as to whether or not it wished to have its bid considered by explaining the bid in such a manner as to either meet the IFB requirements or not meet such requirements. *See* 40 Comp. Gen. 393 (1961); 50 *id.* 302 (1970); *A. D. Roe Company, Inc.*, 54 Comp. Gen. 271 (1974). The general obligation of a bidder to conform to the IFB requirements (which we discussed above) is not applicable to cases where the face of the bid contains information in apparent derogation of a material IFB requirement. *See* 50 Comp. Gen. 8 (1970); B–175178, May 25, 1972; B–177258, February 7, 1973. Therefore, we agree that ASO could

have rejected Moody's bid as nonresponsive for exceeding the shelf-age limitations, since we cannot say that Moody obligated itself by its bid to replace the elastomer components.

There may also be some question as to whether the "refurbished" accumulators and connectors offered by Moody are still qualified products. It is clear that the QPL and Military Specification preparing activity (in these cases, NAVAIR) has the discretion to determine whether the "refurbishing" by Moody has sufficiently changed the product as to remove its qualification. *See* paragraph 4–109, Defense Standardization Manual 4120.3–M; B–176159, September 26, 1972, affirmed at B–176159, January 24, 1973. We have recognized that a change of place of manufacture or assembly of a once qualified item causes it to be subject to requalification (or removal from the QPL) before it again would be eligible for award under a QPL procurement, and that if it has not been requalified before bid opening, it must be rejected. *See* B–167304, August 27, 1969; B–171558, February 11, 1971; 52 Comp. Gen. 142 (1972); 53 *id.* 249. Since the accumulators and connectors are being disassembled, the elastomers replaced, and reassembled by Moody, and not at the plant at which they were qualified, we have some doubt that they can still be considered qualified products.

Summary of B–180732 and B–181971

Although we have raised objections to ASO's overly restrictive interpretations of the applicable regulations governing the procurement of qualified and/or surplus items and to ASO's determination that Moody was nonresponsible, we cannot object to ASO's ultimate decision that Moody's bids under the IFB's docketed under B–180732 and B–181971 could not be accepted due to their nonresponsiveness. The items offered by Moody were in excess of their applicable shelf life and, consequently, were unacceptable under the "New Material" clause. Also, ASO has advised (albeit after the awards had been made) that cognizant technical personnel have determined that the accumulators and connectors are so critical that surplus could never have been determined acceptable in these cases. In any event, performance under these procurements has long since been completed.

B–182091

In B–182091, although ASO regarded the low bidder to be nonresponsive by virtue of its offer of surplus material, it decided, in view of the over $30,000 difference between Alden's bid and the next low bid, and after a positive preaward survey and a determination by cognizant technical personnel that surplus material was acceptable, to cancel

the IFB and negotiate a sole-source award on a "public exigency" basis to Alden. The complete facts and rationale for ASO's actions in this regard are set out above.

In a supplemental report dated September 25, 1974, on B–180732, ASO sets forth its general policy concerning its response when it receives what it regards as "unsolicited" surplus bids as follows:

> * * * since the materials procured by ASO are essentially aeronautical items on which surplus material could not be accepted unless complete assurance were had with respect to the quality of the items, the Contracting Officer does not consider it possible to invite bids offering surplus material. * * * This is so because surplus material can be accepted only after such tests and evaluation as are considered necessary considering the age and condition of the material. Accordingly, where an uninvited offer of surplus material is received under an IFB at ASO, the Contracting Officer refers the question to the cognizant technical personnel and requests advice as to whether surplus material might be considered. If the price offered by the bidder offering surplus material shows that a significant saving might be realized through the purchase of material (after considering testing costs and other costs the Government might incur through the use of surplus material), the cognizant technical personnel visit, or request representatives of the ACO to visit, the contractor's facility to examine the surplus material to determine its age and condition. In some cases where the items offered are dynamic components, the items cannot be purchased unless a complete history of the use of the items, including number of operating hours taken from a log book or other substantiating document, and other information relative to the use of the part is furnished. Depending upon the age and condition of the material, cognizant technical personnel will then advise whether the material may be considered acceptable and what testing or refurbishing is required to make the offered material acceptable. Where, as a result of the foregoing, it appears in the interest of the Navy to consider procurement of such surplus material, the Invitation for Bids is cancelled. The material is then procured under a negotiated contract after the solicitation of a price from the surplus dealer that is based upon its compliance with the quality assurance provisions developed for the offered surplus material. If the prices bid in response to the cancelled IFB by concerns offering new material indicates the possibility of their furnishing new material at prices competitive with the approximate price expected to be offered by the surplus dealer, offers are also solicited from such concerns. The foregoing cannot be accomplished before the initial solicitation of bids since, even if it were possible to develop general specifications for the refurbishing of a particular item of surplus material irrespective of the age or condition of the material, the volume of procurements at ASO would preclude the possibility of preparing such specifications to cover the very few instances (of course, unknown in advance) in which bids offering surplus material are received. In view of the foregoing, we cannot and do not invite bids offering surplus material in any solicitation initially issued by ASO, but, where a bid is received that offers surplus material, will investigate its acceptability and, if acceptable, resolicit the procurement as outlined above.

While we have serious reservations as to the propriety of this policy, as will be discussed below, we believe that ASO's actions taken here are consistent with this policy, and that Moody apparently is not being "singled out" in these cases for adverse treatment. In this regard, ASO has compared its actions involved in B–181971 and B–182091 by noting that the difference between the bid prices in B–182091 was over $30,000 (not including the $960 cost of Government testing which ASO believed was necessary to insure receipt of an acceptable product) while the difference between the bids in B–181971 was only $2,242 (not including the cost of Government testing of $2,500).

The application of this policy as to docket B–182091 is somewhat analogous to the situations in B–164481, September 30, 1968, and B–171226, January 8, 1971, in which we recognized generally the propriety of an agency's reevaluating its minimum needs upon receipt of a low nonconforming proposal under a request for proposals, and deciding that other than "new" material would be acceptable and making an award on that basis to the low offeror, so long as the agency gave the other offerors an equal opportunity to compete on the same basis. In the present case, based on ASO's belief that Alden's bid was nonresponsive to the IFB by virtue of its offer of surplus material, it would seem that ASO should have solicited the other bidders to give them an opportunity to submit offers on the same basis as Alden before it awarded the sole-source contract to Alden. However, unlike B–164481, *supra*, we are unable to find that the other bidders were prejudiced by this apparent oversight, since it would seem unlikely in this particular case that the other bidders, who are manufacturers of the attitude indicators, would have offered surplus material. Indeed, Astronautics in its protest has never claimed that it would have offered surplus material, even if it had been given the opportunity.

However, on the basis of the record before us, we do not believe that Alden's bid was nonresponsive to the IFB; nor do we believe that Alden was a nonresponsible prospective contractor. In this regard, as we indicated above, a bidder offering surplus material is not automatically precluded from bidding on a QPL procurement so long as the product it is offering is qualified and can otherwise meet the IFB requirements. Also, since it was found that the items that Alden was offering were new and unused, those items did not violate the "New Material" clause.

Furthermore, Alden specifically indicated in its bid that it would perform all of the required QPL acceptance tests. Alden has since indicated that all of these tests were satisfactorily performed, except some of those tests listed in paragraph 4.5.2.2 (Sampling Plan B) of MIL–I–27193B (USAF), which would be harmful or destructive to the indicators tested. (Since the initial contract quantity was less than 15, "Sampling Plan B" tests would not seem to be required for this initial order.)

Alden also indicated in its bid that it would "refurbish" the indicators, if necessary; however, it appears that nothing had to be done to the indicators which would qualify as "reconditioning," or which would otherwise be in violation of the "New Material" clause. In this regard, we have been informed that the attitude indicators are classified as nondeteriorative, inasmuch as they are "hermetically" sealed. *See* paragraph 6.3.1 of MIL–I–27193(B) (USAF).

Moreover, the preaward survey was positive and Alden was found to have the ability to offer acceptable material meeting the contract

requirements. Furthermore, there was no finding that Alden had inadequate test facilities or any inability to perform the required tests. Consequently, on the basis of the record before us, we believe that award could have been made under the IFB to Alden, notwithstanding ASO's contrary belief.

However, ASO's decision to cancel the IFB would appear to properly fall under ASPR § 2-404.1(b)(v) (1974 ed.) which permits cancellation where the bids received indicate that the needs of the Government can be satisfied by a less expensive article than that which the IFB originally invited. *See* B-162487, December 29, 1967. Also, in view of our belief that Alden was the low responsive and responsible bidder under the IFB, we cannot object to the decision to negotiate a sole-source award to Alden and cannot find that the award to Alden prejudiced the other bidders. Even if Alden's bid was nonresponsive, we would be unable to find that ASO's decision to negotiate on a "public exigency" basis with Alden had no reasonable basis, since, as indicated in detail above, ASO has stated that although the indicators were urgently needed and required to be delivered commencing in January 1975 to June 1975, neither the Navy nor the Air Force had enough of this item in stock to satisfy requirements.

ASO admits that the QPL acceptance tests under the IFB were mandatory and material contract requirements necessary to insure the quality of the material received. However, notwithstanding its belief at the time of award that some of these material QPL test requirements would not be performed and that it would not receive a qualified product from Alden as was required by MIL-I-27193B (USAF), it did not ask the preparing activity responsible for the listing and qualification of the attitude indicators (Wright Patterson Air Force Base, Ohio) for a waiver of the qualification requirements as required by ASPR § 1-1108 (1974 ed.), which states:

Waiver of Qualification Requirement

When procuring a product under a specification which includes qualification requirements either for the end item or for components of the end item, such qualification requirements can be waived only by the activity that prepared the specification. In appropriate cases, when requested by the contracting officer, the preparing activity may waive qualification requirements. A notice, issued by the preparing activity, directing a waiver of the qualification requirement, constitutes adequate authorization for waiver of product qualification requirements. Where waivers have been granted, solicitations shall specifically indicate that the qualification requirement is inapplicable. Such information shall also be included in any Synopsis of the procurement.

It would seem that the purpose of this "waiver" requirement is to maintain the technical integrity of QPL's and the Military Specifications defining qualified products by allowing the preparing activity to review and grant waivers of QPL requirements by purchasing activities. *See* ASPR §§ 1-1202 (d) and (e) (1974 ed.); Defense Standardization Manual 4120.3-M, Chapter II, paragraph 2-101;

B-162449, November 2, 1967, affirmed B-162449, January 23, 1968; B-164780, September 12, 1968, affirmed at B-164780, November 4, 1968.

A literal reading of this requirement may lead one to believe that waiver need only be requested where the procuring activity proposes to waive requirements for qualification testing and QPL listing (as opposed to acceptance tests required by a mandatory QPL Military Specification). However, we believe the regulation reasonably contemplates that the term "qualification requirement" encompasses all of the mandatory requirements relating to QPL procurements. The qualification process is but one facet of the integral system for procuring qualified products. In our view, this system also necessarily includes a contractor's compliance with all applicable requirements (including acceptance test requirements) of the Military Specification defining the qualified product. To otherwise interpret this requirement would subvert the purpose for having such a waiver requirement. Just as a procuring activity may jeopardize the technical integrity of a qualified product by failing to require delivery of a product qualified for listing on a QPL without receiving an appropriate waiver, the procuring activity may equally jeopardize the product's technical integrity by not allowing the activity responsible for preparing and maintaining the applicable Military Specification and QPL an opportunity to review the effect that a particular proposed waiver of Military Specification requirements would have on the quality or reliability of the qualified product prior to an award based on a relaxation of such mandatory requirements.

ASO states that the contracting officer did not obtain a waiver of the QPL requirements from the preparing activity prior to the execution of the contract with Alden because he did not consider a waiver required; that is, he did not believe he was procuring QPL articles to the Military Specification. ASO points out, in the alternative, that the Military Specification was not considered adequate for the procurement of surplus indicators and that under such circumstances our Office has recognized that the use of a Military Specification is not mandatory. *See* 44 Comp. Gen. 27 (1964) and *Ampex Corporation*, 54 Comp. Gen. 488 (1974).

We have recognized that ASPR § 1-1202(a) (1974 ed.) mandates the utilization of a Military Specification, where available, as is the case here. 43 Comp. Gen. 680 (1964); 44 *id.*, *supra;* 50 *id.* 691 (1971); 53 *id.* 295 (1973). ASPR § 1-1202(b) (1974 ed.) lists certain exceptions to this requirement, none of which appears to be applicable here.

Also, we have recognized that determinations as to whether an existing Federal Specification or Military Specification will meet the actual needs of the agency in a particular situation and the drafting of

appropriate contract specifications to reflect those needs are primarily the responsibility of the agency concerned, which our Office will not question unless such determinations can be shown to have no reasonable basis. 44 Comp. Gen., *supra;* Ampex Corporation, *supra.* However, 44 Comp. Gen., *supra*, and *Ampex Corporation*, *supra*, do not stand for the proposition, as is suggested by ASO, that Military Specifications are not mandatory, nor do these decisions in any way imply that the procuring agency is excused from obtaining a QPL waiver where the Military Specification will, in fact, satisfy the Government's requirements. 43 Comp. Gen. 680; B–152861(2), April 10, 1964; B–159550, November 25, 1966; 53 Comp. Gen. 295. In this regard, in B–153404(2), July 23, 1964, the forwarding letter to the Secretary of the Navy accompanying 44 Comp. Gen., *supra*, we criticized the Navy for its failure in that case to make a proper review for deviating from the Federal Specification in the IFB, and noted that such deviations should be authorized only on a convincing showing of compelling needs.

It should also be noted that in both 44 Comp. Gen., *supra*, and *Ampex Corporation*, *supra*, it was found that the Military Specifications were *not* adequate to meet the Government's requirements, whereas here (B–182091) there is no question but the QPL items on which the IFB was based satisfied ASO's actual needs. As we have previously indicated, we are not persuaded by ASO's contention that no surplus dealer can adequately demonstrate that it can meet QPL requirements. Indeed, it would appear, on the basis of the record before us, that Alden has demonstrated that it is offering a QPL product and that it can meet all QPL exceptance test requirements. Consequently, we do not believe that ASO has shown that the Military Specification is not adequate for the procurement of this surplus material, especially in view of the fact that it appears that no additional contract requirements have been imposed on Alden that were not set forth in the IFB or the Military Specification.

Proper procurement procedures required ASO to obtain an appropriate QPL waiver from the cognizant Air Force activity prior to award of the Alden contract. However, we do not believe this failure under the circumstances of this case was prejudicial to the other offerors. In B–158096, March 8, 1966, we stated:

> The establishment of a Qualified Products List is solely for the Government's benefit, and the Government may elect under ASPR 1–1109 not to use it. There are no assurances made to qualified firms that the Government will purchase QPL items only from such firms. Hence, when the Government elects not to use a QPL as the basis for procurement, a qualified source cannot have an award set aside as being invalid notwithstanding the lack of precise compliance with administrative procedures.

Similarly, we believe an overly strict application of the ASPR § 1–1108 (1974 ed.) procedures would be unwarranted under the circumstances

of the present case. *See* B–162449, *supra;* B–164780, *supra;* B–167554, December 9, 1969. Compare 53 Comp. Gen. 295, where the Navy failed to utilize a Military Specification in a procurement despite the fact that it was apprised of the existence of this Specification, which met its actual needs, over 6 months prior to award, which was prejudicial to an offeror, who, with the knowledge of the Navy, went to the time and expense of qualifying its product to compete under the procurement.

In the present case, there is no indication that any bidder went to any expense relying on ASO's IFB requirement that all acceptance tests would be performed. Moreover, award probably could well have been made to Alden under the IFB and none of the tests waived. In any event, performance and delivery of the initial quantity of indicators has been completed.

However, an option is scheduled to be exercised on this contract by July 15, 1975. If the option quantity is in excess of 15, "Sampling Plan B" would appear to be required by MIL–I–27193B (USAF), which, with one exception, ASO has previously indicated that it did not require of Alden. (If option quantity is under 15, "Sampling Plan B" tests would not appear to be required.) We also note that ASO has previously indicated that 5 of the required "Sampling Plan A" tests were not going to be performed by Alden, although Alden has indicated that it performed all of the "Sampling Plan A" tests and many of the "Sampling Plan B" tests on the initial contract quantity. Consequently and in view of our determination that ASO improperly failed to obtain a waiver under ASPR § 1–1108 (1974 ed.) when it apparently did not require Alden to perform all of the QPL acceptance tests, we recommend that consideration be given to requiring all applicable QPL acceptance tests be performed by Alden on the option quantity and all other Military Specification requirements be complied with, or, in the alternative, that a waiver be obtained from the cognizant Air Force technical authority, prior to exercise of the option, of those tests which ASO feels are unnecessary or uneconomical.

Walsh-Healey Act

Astronautics has also protested that Alden is not a "regular dealer," as it certified in its bid, and is therefore ineligible for award under the Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35–45 (1970), and related implementing regulations, ASPR § 12–601 *et seq.* (1974 ed.). The Walsh-Healey Act provides, *inter alia*, with certain exceptions not here material, that every contract exceeding $10,000 in amount entered into by any Government agency for the procurement of supplies shall contain a stipulation that the contractor is a manufacturer of, or regular dealer in, such supplies. Our Office is not

authorized to review determinations of whether a particular firm is a regular dealer or manufacturer within the purview of the Walsh-Healey Act and the related implementing regulations, and we have consistently denied jurisdiction in this area, since such determinations are exclusively vested with the contracting officer subject to final review by the Department of Labor. See *Corbin Sales Corporation*, B–181454, July 10, 1974; *Trand Advertising Company*, B–182212, February 19, 1975; *F & H Manufacturing Corporation*, B–183491, April 29, 1975.

Conclusions

We do not recommend disturbing any of the three awards involved here, although we have recommended as to B–182091 that ASO either require compliance with the applicable Military Specification requirements if the option in that contract is exercised, or ask for a waiver from the QPL preparing activity, prior to exercise of the option, of those QPL requirements with which ASO has determined compliance to be unnecessary. Nevertheless, we are concerned with ASO's overly restrictive interpretations of the QPL requirements and the "New Material" clause and its use of an outdated preaward survey to find a bidder nonresponsible.

We are also concerned as to ASO's general policy concerning bids offering surplus material. For the most part, ASO apparently has a "blanket" prohibition against all surplus material (whether new and unused surplus or "reconditioned" surplus) under its procurements for "essentially aeronautical" items. This prohibition is not called for nor sanctioned by regulation, and ASO does not specifically inform bidders in its solicitations that surplus material would not be acceptable. This policy is at odds with the statutory requirement for "free and open" competition and is not reflective of the Government's actual needs. ASPR § 1–1201 (1974 ed.) states in pertinent part:

> (a) Plans, drawings, specifications or purchase descriptions for procurements *shall state only the actual minimum needs of the Government* and describe the supplies and services in a manner which will encourage maximum competition and eliminate, insofar as possible, any restrictive features which might limit acceptable offers to one supplier's product, or the products of a relatively few suppliers. Items to be procured shall be described by reference to the applicable specifications or by a description containing the necessary requirements. * * * [Italic supplied.]

The contracting officer and his cognizant technical personnel, if possible under the circumstances of the particular procurement, should determine at the time solicitations are issued whether surplus and/or reconditioned material will meet the Government's actual needs for a particular procurement. Of course, the determination should be based on the actual conditions under which the supplies have been used in the past and how they might be used in the future. See *Particle*

Data, Inc., B–179762, B–178718, May 15, 1974; *Manufacturing Data Systems Incorporated, supra.*

We appreciate ASO's legitimate concern that surplus material should not be accepted for aeronautical items unless there is complete assurance of the quality of the surplus items. We are, however, concerned with ASO's practice of restricting "free and open" competition in conducting these procurements in the case of bidders offering surplus and/or reconditioned material. This deficiency is being brought to the attention of the agency for corrective action.

[B–183543]

Contracts—Negotiation—Late Proposals and Quotations—Identification Erroneous

Where proposal package was received in proper office by required time, and such receipt was verified by procurement personnel in response to offeror's telephone call, but without reference to offeror's mislabeling of package with non-existent request for proposals number, proposal may be considered timely received, notwithstanding return of package to offeror unopened as result of incorrect labeling, and subsequent resubmission after closing date for submission of proposals but before award.

In the matter of Kirschner Associates, Inc., July 1, 1975:

Kirschner Associates, Inc. (Kirschner) protests the rejection of its proposal for an assessment of the status of bi-lingual vocational training, submitted in response to request for proposals (RFP) No. 75–26, issued by the Office of Education (OE), Department of Health, Education, and Welfare. Initial proposals were due in the OE Application Control Center (ACC) by 3:30 p.m., March 7, 1975, and the Kirschner hand-carried proposal package, although erroneously sent to the address designated in the RFP for mailed offers, was received in the ACC on the morning of March 7. However, Kirschner had transposed two numbers on the face of the proposal package, so that the package indicated that it contained a proposal for RFP No. 76–25 (a non-existent RFP), rather than for RFP No. 75–26.

Prior to the deadline for receipt of proposals, a Kirschner employee telephoned the ACC and asked whether Kirschner's proposal had been received. The record conflicts as to the manner by which either party to the conversation identified the package, but it is clear that the ACC employee did, at the least, verify receipt of a proposal submitted by Kirschner. As a result of Kirschner's mislabeling, however, ACC personnel assumed that the proposal was in response to RFP No. 75–25, under which initial proposals had been due 4 days earlier, and therefore Kirschner's proposal was rejected as late in accordance with paragraph 8 of the Solicitation Instructions and Conditions relative to late proposals. The package was returned to Kirschner where, upon receipt on March 24, it was reshipped to the ACC with the indication that it was

intended for RFP No. 75–26. The proposal has been evaluated by OE, but further action is being withheld pending a decision by this Office as to whether the proposal may be considered for award.

Although the Kirschner proposal package was mislabeled, we believe that ACC personnel should have discovered the error without returning the package to the sender. Federal Procurement Regulations § 1–2.401(b) (1964 ed.) provides for the opening of unidentified bids solely for the purposes of identification. Under the circumstances of the instant case, it would have been reasonable to treat Kirschner's proposal in the same manner. We note that Kirschner's employee did in fact telephone the ACC to verify receipt of its proposal, and although the record is unclear as to the extent of the verification requested, it is clear that Kirschner was informed that its proposal had been received. Once verification of receipt is requested, it must be undertaken responsibly and, therefore, when the ACC employee was specifically directed to Kirschner's proposal package, the duty arose to identify any obvious error thereon, in this case the labeling with a non-existent RFP number. Accordingly, since the package was received in the proper office by the required time, we believe the proposal should be considered timely received.

Notwithstanding the timely receipt, we are left with the question of the effect of the return of the proposal to Kirschner. Clearly, under a formally advertised procurement the return of a bid to the sender after the bid opening would prevent its further consideration for award under any circumstances. *See* in this connection 46 Comp. Gen. 859 (1967). Here, however, we are dealing with a negotiated procurement. Unlike formal advertising, competition proposals are not publicly opened during the evaluation process. In view thereof, we see no overriding reason to insist that the return of the proposal to Kirschner should prevent it from being thereafter considered for an award upon its resubmission to the contracting agency.

Accordingly, the Kirschner proposal may be considered for award as proposed.

We would point out, however, that consideration of a resubmitted offer may be proper only where such offer was physically received by the procuring activity by the designated time but improperly returned. Where actual receipt of the proposal was late, the applicable untimeliness provisions are controlling.

[B–181799]

Gratuities—Selective Reenlistment Bonus—Computation—Multiplier—Use of Unexpired Term of Prior Enlistment

Service member who, within 3 months of the expiration of his current enlistment or extension thereof, is discharged pursuant to the authority of Secretary concerned under 10 U.S.C. 1171, where such discharge is for the sole purpose of reenlisting, may not have that unexpired term of enlistment or extension

thereof considered as "additional obligated service" for the purpose of determining the multiplier for Selective Reenlistment Bonus (SRB) computation under 37 U.S.C. 308, as amended by Public Law 93-277, May 10, 1974, 88 Stat. 119.

Gratuities—Selective Reenlistment Bonus—Computation—Multiplier—Use of Years, Months and Days of Service

The SRB entitlement provided for in 37 U.S.C. 308, as amended, may not be computed by using as the multiplier, the years, months and days of additional obligated service because that section clearly and unambiguously limits that multiplier to "the number of years, or the monthly fractions thereof, of additional obligated service."

Gratuities—Selective Reenlistment Bonus—Computation—Multiplier—Use of Full Month of Service Only

For the purpose of computing the SRB under 37 U.S.C. 308, as amended, a fraction of a month of additional obligated service may not be counted as a full month in determining the monthly fractions of a year because, unlike similar statutes where specific authorization to do so is provided therein, 37 U.S.C. 308, as amended, contains no authorization to permit fractions of months to be counted as whole months.

In the matter of the Selective Reenlistment Bonus, July 2, 1975:

This action is in response to a letter from the Assistant Secretary of Defense (Comptroller), requesting an advance decision concerning the computation of the Selective Reenlistment Bonus (SRB) entitlement under the provisions of 37 U.S. Code 308 (1970), as amended by section 2(1) of Public Law 93-277, approved May 10, 1974, 88 Stat. 119. The specific questions and a discussion of each are contained in Department of Defense Military Pay and Allowance Committee Action No. 507, which was enclosed with the request.

Four questions are presented in the Committee Action, one of which is as follows:

* * * may a member who, within three months before the expiration of the term of his enlistment or extended enlistment, is discharged for the purpose of reenlisting count the full term of his new enlistment as additional obligated service for the purpose of (SRB) computation under 37 U.S.C. 308, as revised by PL 93-277, 10 May 1974?

The discussion in the Committee Action states that 10 U.S.C. 1171 (1970) provides that a member who is discharged within 3 months before the expiration of the term of his enlistment or extended enlistment, is entitled to all the benefits which would have accrued if he had completed his enlistment or extended enlistment, except for the pay and allowances for the period not served. It is also stated that 10 U.S.C. 1171 seems to dictate an affirmative answer to this question; however, doubt arises because it appears that Congress, in enacting the SRB, intended that the SRB not be paid for any period for which a member was already committed to serve.

Section 1171 of Title 10, U.S. Code, provides in pertinent part as follows:

Under regulations prescribed by the Secretary concerned and approved by the President, any regular enlisted member of an armed force may be discharged

within three months before the expiration of the term of his enlistment or extended enlistment. * * *

Subsection 308(a) of Title 37, U.S. Code, provides that an SRB is to be paid to an otherwise qualified member who reenlists or voluntarily extends his then current enlistment and is to be computed by using a multiplier measured by the number of years, or monthly fractions thereof, of "additional obligated service."

In general, when a person is discharged, his service obligation under his then current enlistment period terminates effective that date for all purposes. If he reenlists thereafter for any period, such period would clearly constitute "additional obligated service" within the meaning of 37 U.S.C. 308(a). However, when a member's discharge is approved specifically for the purpose of his immediate reenlistment, such as under paragraph 5–10 of Army Regulation 635–200 (change 41, July 25, 1973), we do not consider that the former obligation is terminated. In such a situation, the balance of the member's then current enlistment or extension of that enlistment would remain as a period of existing obligated service for the purpose of 37 U.S.C. 308(a) and if he is "discharged for the purpose of immediate reenlistment," only the difference between the remainder of the existing obligated service and the term of the reenlistment may be considered as "additional obligated service" for the purposes of computing the SRB.

Therefore, while it is evident that the Secretary of Defense has the authority under 10 U.S.C. 1171 to unconditionally discharge a member within 3 months of the expiration of his enlistment or extended enlistment, it is our view that if the discharge afforded the member is for the purpose of immediate reenlistment, then the unexpired term of his then current enlistment or extension thereof may not be considered as "additional obligated service" for purposes of computing an SRB.

Accordingly, this question is answered in the negative.

The other three questions presented in the Committee Action are as follows:

1. May Selective Reenlistment Bonus (SRB) entitlement under 37 U.S.C. 308, as revised by PL 93–277, 10 May 1974, be computed by using, as the multiplier, the years, months and days of additional obligated service?

2. If the answer to question 1 is negative, may 15 or more days of additional obligated service be counted as a full month in determining monthly fractions of a year for SRB computation under 37 U.S.C. 308, as revised by PL 93–277, 10 May 1974?

3. If the answer to question 2 is affirmative, may any partial month of additional obligated service be counted as a full month for such bonus computation?

The Committee Action states with regard to the first question quoted above, that 37 U.S.C. 308(a) provides that the number of years, or the monthly fractions thereof, of additional obligated service will be used as a multiplier in computing the amount of the SRB payable. On the other hand, 37 U.S.C. 308(d) provides for recoupment of the SRB, when recoupment is required, in terms of the "percentage of the SRB that the unexpired part of his enlistment is to the total enlistment

period for which the bonus was paid." The Committee Action indicates that this requirement calls for recoupment on a daily basis. However, recognizing that payment of the SRB computed on a daily basis may be prohibited by the provisions of 37 U.S.C. 308(a), the Committee Action points out that since recoupment is on a daily basis, it seems logical and equitable that payment should also be on a daily basis.

Subsection 308(a) of Title 37, U.S. Code, as amended by Public Law 93-277, *supra*, provides in pertinent part that a member of the uniformed services who meets the requirements of subsection (1) through (4):

> may be paid a bonus, not to exceed six months of the basic pay to which he was entitled at the time of his discharge or release, multiplied by the number of years, or the monthly fractions thereof, of additional obligated service, not to exceed six years, or $15,000, whichever is the lesser amount. * * *

In this regard, subsection 308(d) of the same title provides that:

> A member who voluntarily, or because of his misconduct, does not complete the term of enlistment for which a bonus was paid to him under this section shall refund that percentage of the bonus that the unexpired part of his enlistment is of the total enlistment period for which the bonus was paid.

Under the quoted provisions, basic entitlement to an SRB arises only upon the member's reenlistment or extension of his then current enlistment for a period of at least 3 years. That subsection also provides for the computation of the bonus on the basis of "the number of years, or monthly fractions thereof, of additional obligated service." Thus, a member who is discharged prior to the expiration of his term of service for the purpose of immediate reenlistment and who reenlists for a period of 3 years would be qualified for the SRB. And, computation of that bonus would be based only on that service time which the member voluntarily obligated himself to serve beyond the expiration date of his then current enlistment or extension thereof. However, since we find no statutory basis for interpreting the words "years, or monthly fractions thereof" as permitting computation on a daily basis, the first question quoted above is answered in the negative.

It is to be noted that in a number of instances, the period of additional obligated service for which an SRB is to be computed will involve service not evenly divided into years and months. Thus, if a member's additional obligated service includes a number of days which cannot be counted because of the limitation contained in section 308(a), then for the purposes of recoupment of the bonus, it would not be inappropriate to view the period of enlistment for which a bonus is paid as being only the years and months of such service, excluding the days for which a bonus was not paid. Further, the unexpired period of enlistment for which the bonus was paid may be considered as not including the days excluded from the bonus computation and that such additional days could be considered as the final days of the full enlistment or extension. We believe that computation of bonuses and

recoupment as indicated above would not be inconsistent with the purpose of the law and avoid the inequitable results referred to in the Committee Action.

The second question presented is whether 15 or more days of additional obligated service may be counted as a full month in determining monthly fractions of a year for purposes of the SRB computation. The Committee Action states that if daily fractions of a year are not authorized, perhaps rounding of fractions of a month offers the next most equitable approach to computing the amount of SRB payments; otherwise, payments would be based only on full months of additional obligated service. The Committee Action also states that the restriction of the multiplier to full months of additional obligated service and the disregarding of all fractions of a month could deprive a member of SRB compensation for from 1 to 29 days of additional obligated service.

The Committee Action further states that if 15 or more days of additional obligated service counted as a full month for SRB computation, some members would receive extra SRB compensation while others still would be deprived of SRB compensation for from 1 to 14 days of additional obligated service. While the Committee Action expresses the view that the Government should "break even" if this method is used, it points out that there appears to be no precedent for the counting of fractions of a month as a full month in the computation of any type of military compensation, but that there is precedent for counting fractions of a year as a whole year in the computation of military compensation, e.g., in determining the multiplier for computation of readjustment pay authorized by 10 U.S.C. 687, a part of a year that is 6 months or more is counted as a whole year, and a part of a year that is less than 6 months is disregarded.

Subsection 687(a) of Title 10, U.S. Code (1970), which authorizes a readjustment payment upon involuntary release from active duty, provides in pertinent part as follows:

> * * * For purposes of this subsection—
>
> * * * * * * *
>
> (2) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded * * *.

Unlike 10 U.S.C. 687(a), which specifically authorizes counting fractions of years as whole years in certain circumstances, 37 U.S.C. 308, as amended, makes no provision for counting fractions of months as whole months, nor is there anything in the legislative history of Public Law 93-277, *supra*, to indicate that such a counting was intended. In the circumstances, it is our view that in the absence of specific statutory authority so permitting, fractions of months may not be counted as whole months for the purpose of computing an SRB. The second question quoted above is answered in the negative, and in view thereof, the third question requires no answer.

[B-183061]

Compensation — Promotions — Retroactive — Administrative Error—Collective Bargaining Agreement

Collective-bargaining agreement provides that certain Internal Revenue Service career-ladder employees will be promoted effective the first pay period after 1 year in grade, but promotion of seven employees covered by agreement were erroneously delayed for periods up to several weeks. Since provision relating to effective dates of promotions becomes nondiscretionary agency requirement, if properly includable in bargaining agreement, General Accounting Office will not object to retroactive promotions based on administrative determination that employees would have been promoted as of revised effective dates but for failure to timely process promotions in accordance with the agreement.

In the matter of Internal Revenue Service employees—retroactive promotion with backpay, July 2, 1975:

This matter concerns a request on behalf of a District Director of the Internal Revenue Service (IRS), Department of the Treasury, for a decision as to whether the office concerned may retroactively adjust the promotion dates of seven IRS employees whose promotions were erroneously delayed for various periods of time up to approximately 2 months beyond the date they should have become effective pursuant to a collective-bargaining agreement between the IRS and the National Treasury Employees Union (NTEU).

The record, as provided by the agency, indicates that the seven employees, employed as Revenue Agent Trainees and assigned to work in the Stabilization Program were placed in career-ladder positions. All seven employees progressed satisfactorily in the Internal Revenue Agent Training Program. It was erroneously presumed by the IRS supervisors concerned that career-ladder type promotions were automatically processed so that employees would be promoted on their eligibility date in the absence of an unacceptable performance certification. The fact that promotion action requests were not submitted was not discovered until November 22, 1974, whereupon promotion requests for the seven employees were processed and made effective on November 24, 1974.

The delayed effective date of the promotions prompted the seven employees to file a grievance on December 6, 1974, through their union representative, alleging a violation of article 7, section 5, of the Multi-District Agreement between the IRS and the NTEU which states:

> All employees in career ladder positions will be promoted on the first day period after a period of one year or whatever lesser period may be applicable provided the employer has certified that the employee is capable of satisfactorily performing at the next higher level.

The grievance has been held in abeyance pending our decision, which could conceivably resolve the matter if the retroactive adjustment is held to be proper and is administratively implemented by IRS.

The data on the subject IRS employees is as follows:

Agent	Appointment Date	Promotion Action	Eligibility Effective Date
Aldinger, Evelyn E.	9/24/73	GS–7 to GS–9	9/29/74
Booth, Barbara J.	9/24/73	GS–7 to GS–9	9/29/74
Dittmann, Donald A.	9/24/73	GS–5 to GS–7	9/29/74
Harvel, Charles M.	9/24/73	GS–7 to GS–9	9/29/74
Wallins, Sanford H.	10/1/73	GS–7 to GS–9	10/13/74
Wiechec, Donald A.	10/9/73	GS–7 to GS–9	10/13/74
Zingaro, David J.	10/1/73	GS–5 to GS–7	10/13/74

Our decisions have generally held that personnel actions, including promotions, cannot be made retroactively effective unless clerical or administrative errors occurred that (1) prevented a personnel action from taking effect as originally intended, (2) deprived an employee of a right granted by statute or regulation, or (3) would result in failure to carry out a nondiscretionary administrative regulation or policy if not adjusted retroactively. *See* 54 Comp. Gen. 263 (1974), and decisions cited therein; 52 *id.* 920 (1973); and 50 *id.* 850 (1971). We have also recognized that the above-stated exceptions to the general rule, prohibiting retroactively effective personnel actions, may constitute "unjustified or unwarranted personnel action[s]" under 5 U.S. Code § 5596 (1970), and consequently be remediable through the payment of backpay (B–180056, May 28, 1974, and 54 Comp. Gen. 312 (1974)).

Furthermore, our recent decisions considering the legality of implementing binding arbitration awards, which relate to Federal employees covered by collective-bargaining agreements, have held that the provisions of such agreements may constitute nondiscretionary agency policies if consistent with applicable laws and regulations, including Executive Order 11491, as amended. Therefore, when an arbitrator acting within proper authority and consistent with applicable laws and Comptroller General decisions, decides that an agency has violated an agreement, that such violation directly results in a loss of pay, and awards backpay to remedy that loss, the agency head can lawfully implement a backpay award for the period during which the employee would have received the pay but for the violation, so long as the relevant provision is properly includable in the agreement. *See* 54 Comp. Gen. 312 (1974); 54 *id.* 435 (1974); 54 *id.* 888 (1975). Similarly, an agency head on his own initiative, without waiting for the matter to come before an arbitrator, may conclude that the agreement has been violated and institute the same remedy.

In this case, no challenge to the propriety of including article 7, section 5, of the Multi-District Agreement has been presented either to this Office or to the Federal Labor Relations Council in accordance with Executive Order 11491, as amended. Since that issue is not before us, our consideration is limited to the question of whether compliance with the provision in question would constitute a violation of existing statutes, regulations, or Executive orders. It does not appear that compliance would be such a violation in the instant case. The provision is a lawful exercise of the agency's discretion to effect promotions in a timely manner.

In view of the foregoing, we would have no objection to prearbitration administrative action changing the effective dates of promotion for the seven employees to the eligibility effective dates indicated above, if the agency determines that subject employees would have been promoted to the positions indicated on the eligibility dates indicated, but for the administrative failure to timely process such promotions. Changes in the promotion dates would also require adjustment of waiting periods for within-grade step increases.

[B-182153]

Quarters Allowance—Basic Allowance for Quarters (BAQ)—Junior Reserve Officer Training Corps Instructors—Recalled to Active Duty—Overseas Areas

Where retired members are employed as administrators or instructors in the Junior Reserve Officer Training Corps (JROTC) program under 10 U.S.C. 203(d) at Department of Defense–operated schools on U.S. military bases in foreign countries and occupy Government owned or controlled quarters which are determined by such installation commander to be adequate for the member and dependents for his grade or rating if called to active duty at that location, such retired member may not be credited with basic allowance for quarters in the computation of the "additional amount" payable to him under 10 U.S.C. 2031 (d)(1).

Debt Collections—Waiver—Basic Allowance for Quarters (BAQ)—Junior Reserve Officer Training Corps Instructors

While the "additional amount" to which a retired member employed as a JROTC instructor becomes entitled under 10 U.S.C. 2031(d)(1) is the difference between retired or retainer pay and active duty pay and allowances to which entitled if called or ordered to active duty, such amount is neither retired pay nor active duty pay, rather, is compensation paid to such member in a civilian capacity. As such, recovery by the United States of any erroneous payments of that "additional amount" may only be waived, if at all, under 5 U.S.C. 5584.

In the matter of payment to JROTC instructors, July 3, 1975:

This action is in response to a request for advance decision from the Assistant Secretary of Defense (Comptroller) concerning the

crediting of basic allowance for quarters (BAQ) to Junior Reserve Officer Training Corps (JROTC) instructors in the circumstances discussed in Department of Defense Military Pay and Allowance Committee Action No. 515, which was enclosed with the request.

The questions presented in the Committee Action are:

1. In establishing the rate payable to Junior Reserve Officer Training Corps (JROTC) instructors in overseas areas, may credit for basic allowance for quarters (BAQ) be allowed if adequate Government quarters (single or family-type as appropriate) are furnished without cost to the individual?
2. If the answer to Question 1 is in the negative, may overpayments heretofore made to such instructors, representing that portion of the payment based on BAQ, be forgiven under the provisions of 10 U.S.C. 2774?

The discussion in the Committee Action states that, pursuant to the provisions of 10 U.S. Code 2031(d), the Secretary of the military department concerned may authorize qualified instructors to employ as administrators and instructors in the JROTC program retired officers and noncommissioned officers, as well as members of the Fleet Reserve and Fleet Marine Corps Reserve, whose qualifications are approved by the Secretary and the institution concerned. Included in the JROTC program are Department of Defense operated schools located on United States military bases in foreign countries. In this connection, the Committee Action states that the Department of Defense publishes a brochure entitled "Overseas Employment Opportunities for Educators," which apparently outlines the conditions of employment to the prospective job applicant, including the position of JROTC instructor, and contains detailed information regarding housing, living and working conditions.

It is indicated that the current edition of this publication for the 1974/1975 school year informs prospective employees that:

* * * In most overseas areas, living quarters are provided by the United States Government. These quarters may be in dormitories, apartments, old hotels, converted office buildings, or new and modern quarters. Single employees may be required to share living quarters. In other areas, it may be necessary to share bath and kitchen facilities. Quarters are adequate, but do not compare to housing to which most Americans are accustomed. In some areas, the employee must locate and rent his own living quarters. Furnishings, heating and plumbing often do not meet United States' standards. If living quarters must be rented, a living quarters allowance which usually covers expenses, is paid by the United States Government.

The Committee Action goes on to state that, pursuant to 10 U.S.C. 2031(d)(1), retired members employed as JROTC instructors are entitled to receive their retired or retainer pay and an additional amount of not more than the difference between their retired pay and the active duty pay and allowances which they would be entitled to receive if ordered to active duty. In this regard, the Committee Action points out that if, in the situation contemplated, a retired member were called to active duty and provided adequate Government quarters at his duty station, entitlement to BAQ would not accrue. How-

ever, if the same individual were to revert to a retired status and accept employment as a JROTC instructor, the compensation to which he would be entitled for such employment would, under the interpretation of 10 U.S.C. 2031(d)(1) presently being employed, have BAQ included as an integral part of the computation formula irrespective of whether or not Government quarters are occupied. It is further pointed out that, if BAQ were so included in the computation of JROTC instructors pay with no appropriate deduction because of occupancy of Government quarters, the total amount payable would be more than such retired individual would be entitled to receive if called or ordered to active duty.

The Committee Action suggests that if the above interpretation of 10 U.S.C. 2031(d)(1) is incorrect and it becomes necessary to recover overpayments arising out of the fact that the individual involved occupied Government quarters, difficulty is anticipated in situations where the Government quarters involved are considered to be inadequate. Further, the establishing of a fair rental value under these circumstances could be a problem, since the quarters in question may be considered adequate by foreign standards but not by United States standards.

In connection with the above, it is pointed out in the Committee Action that the Internal Revenue Service has expressed the view that the reference to active duty pay and allowances in 10 U.S.C. 2031(d)(1) merely provides a formula for computing the amount of compensation. As a result, no part of the compensation paid by an educational institution to a retired member of an armed force engaged in the JROTC program under the above-cited provisions may be considered as an "allowance" subject to the exclusion provision of section 1.62–2(b) of the Income Tax Regulations.

Section 2031 of Title 10, U.S. Code, provides in pertinent part:

> (c) The Secretary of the military department concerned shall, to support the Junior Reserve Officers' Training Corps program—
>
> (1) detail officers and noncommissioned officers of an armed force under his jurisdiction to institutions having units of the Corps as administrators and instructors;
>
> * * * * * * *
>
> (d) Instead of, or in addition to, detailing officers and noncommissioned officers on active duty under subsection (c)(1), the Secretary * * * may authorize qualified institutions to employ * * * retired officers and noncommissioned officers * * * subject to the following:
>
> (1) Retired members so employed are entitled to receive their retired or retainer pay and an additional amount of not more than the difference between their retired pay and the active duty pay and allowance which they would receive if ordered to active duty, and one-half of that additional amount shall be paid to the institution concerned by the Secretary of the military department concerned from funds appropriated for that purpose.

Under the above-cited provisions, retired members employed by the institutions as administrators and instructors in the program are en-

titled to receive their retired or retainer pay and "an additional amount" of "not more than" the difference between their retired or retainer pay and the "active duty pay and allowances which they would receive if ordered to active duty."

The phrase "active duty pay and allowances" is neither defined in the law nor in the legislative history of that law. However, it is noted that the prior history of the program and the proposed legislative changes in the program which were introduced between 1950 and the introduction of H.R. 9124 in 1963 (which eventually became Public Law 88–647), reference was continually being made to the detailing of active duty personnel to the various educational institutions where JROTC units were maintained. While section 2031(c) carries forward this concept, the legislative history of H.R. 9124, indicates that considerable opposition to a continuation of a JROTC program existed. One of the objections apparently raised was the cost of the program in terms of the active duty personnel who were to be detailed as administrators and instructors. It appears that in response to such objections, the language presently contained in 10 U.S.C. 2031(d)(1) was introduced and in H. Report No. 925, 88th Cong., 1st Sess. 24 (1963), the following explanation appears:

> * * * The committee was of the opinion that the military departments should be permitted to utilize retired personnel * * * so as to minimize the drain of these programs on their active duty military personnel and also reduce the budgetary implications of these programs. Retired military personnel receive between 50 to 75 percent of their basic pay while on the retired rolls. The Government receives no particular benefit from this payment. Therefore, the committee believes that many retired officers would be desirous of volunteering for duty in connection with the ROTC program and, thus, permit the military departments to operate these programs with such retired personnel with consequent savings in both dollars and manpower.

While subsection (d)(1) provides that the upper limit of the "difference between" that an employing institution may pay to a retired member is "the active duty pay and allowances which * * * [he] would receive if ordered to active duty," when considering the legislative history of Public Law 88–647, *supra*, we do not believe that it was congressionally intended that such upper limit automatically was to include credit for a basic allowance for quarters for computation purposes. To do so automatically in every instance would ignore the fact that numerous active duty members do occupy Government owned or controlled quarters at their duty station adequate for themselves and their dependents, and are ineligible to receive a quarters allowance.

It is our view that the provisions of 10 U.S.C. 2031(d) must be read in conjunction with subsection (c) and represent a compromise whereby a retired military member may be substituted for a member serving on active duty who would otherwise be detailed to the particular institution in question. Therefore, in order to determine that which a retired member would be entitled to receive as "an additional

amount" in such circumstances, it is necessary to determine his entitlements as though he were called or ordered to active duty for the purpose of serving at that institution.

As stated in the Committee Action, the schools in question are located on United States military bases and we presume that the Government owned or controlled quarters previously referred to are either located on or controlled by the military installation. In such circumstances, the Department of Defense Military Pay and Allowances Entitlements Manual (DODPM) provides that the installation commander is authorized to determine the adequacy of such assigned or occupied quarters (paragraph 30222, DODPM), and established the fair rental value of quarters designated as inadequate (paragraph 30223, DODPM). Thus, where a retired member occupies Government quarters, which would be administratively determined to be adequate for himself and his dependents, if with dependents, for his grade, rank or rating, if called to active duty at that location, then BAQ entitlement would not exist and would, therefore, not be a proper item of "active duty pay and allowances" for the purpose of computation under 10 U.S.C. 2031(d)(1). Accordingly, the first question is answered in the negative.

With regard to the second question, 10 U.S.C. 2774 provides authority whereby recovery by the United States of erroneous payments of pay and allowances, including retired pay, may be waived.

The "additional amount" paid by an employee institution under 10 U.S.C. 2031(d)(1) is neither retired pay nor does it constitute a portion of "active duty pay and allowances" since the individuals in question are not serving on active duty. While a retired member of an armed force is authorized to be employed by an institution as a JROTC instructor because he is an otherwise qualified retired member, such employment is to be considered as being in a civilian capacity. Therefore, any erroneous payment made as a result of computing the "additional amount" authorized by 10 U.S.C. 2031(d)(1) may only be forgiven under the provisions of 5 U.S.C. 5584, if it is to be forgiven at all. The second question is answered accordingly. See in this connection B-179186, October 24, 1973.

[B-182526]

Compensation—Removals, Suspensions, etc.—Deductions From Backpay—Outside Earnings—In Excess of "Back Pay" Due

Employee was restored to duty after his service had been terminated during probation as a result of racial discrimination. Total interim earnings from private enterprise are for offset against total Federal backpay otherwise due, even though this results in no backpay payment. Interim earnings may not be computed and set off on a pay period by pay period basis to reduce the effect of interim earnings.

Debt Collections—Waiver—Civilian Employees—Leave Payments—Lump-Sum Leave Payment

Employee was restored to duty after his service had been terminated during probation as a result of racial discrimination. Lump-sum pay for annual leave may not be considered for waiver under 5 U.S.C. 5584, since payment was proper when made. Also, there is no authority to waive payment of retirement deductions on the amount of Federal pay that would have been earned during the period of separation, notwithstanding interim earnings exceeded amount of Federal pay.

In the matter of backpay computation—discrimination, July 3, 1975:

The National Finance Center, United States Department of Agriculture, has requested an advance decision as to the computation of backpay due Mr. Bennie L. Moore incident to a cancellation of the personnel action which terminated his services during probation. It is stated that the termination was the result of racial discrimination, with his career-conditional appointment of June 28, 1970, terminated effective November 20, 1970.

It appears that Mr. Moore's appointment is seasonal, with an alternating tour of duty of 19 pay periods of full-time status and 7 pay periods of called-when-needed (CWN) status. When cancellation of the termination was made on December 10, 1972, Mr. Moore was restored to his CWN status. He started working again intermittently on January 22, 1973, and went to full-time work on April 9, 1973. It is stated that during the interim period he was off the rolls, Mr. Moore's total private employment earnings exceeded his estimated Government earnings, had he not been terminated.

Specifically the agency asks the following questions:

Question No. 1: In computing the back pay of Mr. Bennie L. Moore and offsetting private earnings against the back pay, may the Government and private pay be computed and offset on a pay period by pay period basis in view of the seasonal nature of both the Government and private employment?

Question No. 2: If the back pay and offset may not be computed on a pay period by pay period basis, as in Question No. 1, may the Government pay which would have been earned for the period 3/21/71 to 5/15/71 (the initial period during which the claimant would have worked had he not been terminated and during which he had not yet located other employment) be disregarded in offsetting private earnings, regardless of the excess private earnings later?

Question No. 3: If questions No. 1 and 2 are answered in the negative, is the $346.40 paid in lump sum for 72 hours of annual leave and 8 hours holiday pay, subject to consideration for waiver under 5 U.S.C. 5584?

Question No. 4: If questions No. 1 and 2 are answered in the negative, is the $973.19 unpaid retirement deduction for the period of separation subject to consideration for waiver under 5 U.S.C. 5584? If the deductions are not waivable, the period concerned will be treated as an optional deposit period (i.e., counted for service credit toward eligibility but with a reduction of annuity unless deposit is made).

Additionally the agency states the following:

Mr. Moore was advised by the Winema National Forest that he would receive no back pay, and that he would be required to pay for retirement deductions and to refund his lump-sum pay. Mr. Moore has filed an objection to making these payments. We have investigated, and due to the unwarranted delay in taking

any action, have advised the employing unit to restore Mr. Moore's annual leave to his account and make it available for his use even though he has not refunded the lump-sum payment. He has been advised that your decision will be requested to insure that he has not been denied any benefits to which he is entitled * * *.

The agency states it understands the regulations, which seem quite clear, but in effect it asks that an exception be made in Mr. Moore's case since it feels that applying the total private earnings for the whole period against lost Federal earnings is inequitable in Mr. Moore's case. The agency states that both the Federal and private employment are seasonal in nature; that there were periods of unemployment when Mr. Moore would otherwise have worked for the Forest Service; and that the private earnings were inflated by overtime hours considerably in excess of that which was typical of Forest Service employees in jobs similar to the one from which Mr. Moore was improperly removed. The agency recognizes that its request would require a modification of the guidelines set forth in the Federal Personnel Manual, FPM 990–2, book 550, subchapter S8–7, and Comptroller General decisions, 48 Comp. Gen. 572 (1962) and B–148637, January 29, 1968.

The agency refers to an "equity" concept in the regulations, 5 C.F.R. § 713.271, under part 713, Equal Opportunity, Remedial Actions. With respect to the instant case, section 713.271(b)(3) (1973), provides that the remedial action for an employee such as Mr. Moore, who was discriminated against, is—

(3) Cancellation of an unwarranted personnel action and restoration of the employee.

The only method provided in part 713 for the computation of backpay is that it be computed in the same manner prescribed by 5 C.F.R. § 550.804.

Subsection 550.804(e), which sets forth in part how the backpay due an employee is to be computed, provides:

(e) In computing the amount of back pay due an employee under this section and section 5596 of title 5, United States Code, the agency shall deduct the amounts earned by the employee from other employment during the period covered by the corrected personnel action. The agency shall include as other employment only that employment engaged in by the employee to take the place of the employment from which the employee was separated by the unjustified or unwarranted personnel action.

Federal Personnel Manual (FPM) Supplement 990–2, book 550, subchapter 8, at subparagraph S8–5f (January 21, 1969), further explains the requirement of the above regulation as follows:

f. *Amount of entitlement.* When an employee has been separated from his position by an unjustified or unwarranted personnel action which is corrected, the amount of his entitlement is the difference between the amount his Government income should have been and the amount which he actually earned in an employment obtained to take the place of his Government employment. If the employee had been demoted by an unjustified or unwarranted personnel action which is corrected, the amount of his entitlement is the difference between the amount his income should have been in the proper grade and the amount of his income in the lower grade. If the employee were already working in a parttime job

at the time of his removal, suspension, or furlough from his Government employment as a result of the unjustified or unwarranted personnel action, the part-time job is not *other employment* within the meaning of section 5596 of title 5, United States Code, because it does not take the place of the Government employment. If the employee were able to expand his part-time job to a full-time job, or were to take a second part-time job, as a substitute for Government employment, only those hours worked on the full-time job in excess of the aggregate of the hours worked on the part-time job, or only the hours worked on the second part-time job, as the case may be, are considered as other employment in place of Government employment. *In other words, the only earnings from other employment that need not be deducted from back pay are earnings from outside employment the employee already had before the unjustified suspension or separation.* (See Comptroller General decision B–148637, dated January 29, 1968.) An agency should obtain a statement or affidavit from the employee covering his outside earnings. [Italic supplied.]

Thus, the test applied by this Office to determine whether income received is deductible from backpay is based upon a comparison of the outside work performed or income received prior to improper separation and that performed after such separation. In 48 Comp. Gen. 572, it was held that the law does not contemplate a daily or weekly comparison of the backpay with the employee's outside earnings, but rather the total amount of outside earnings is compared with the total amount of backpay. This principle was subsequently incorporated in the FPM Supplement. Therefore, we find no basis in the applicable law or regulation that would permit an affirmative answer to the agency questions 1 and 2 and, accordingly, they are answered in the negative.

With respect to question 3, we point out that the lump-sum leave payment made at the time of Mr. Moore's separation was proper. The fact that he was ordered restored to his position as of the date of his improper separation does not operate to have the retroactive effect of making the lump-sum leave payment erroneous and subject to waiver. *See* B–175061, March 27, 1972. Therefore, such payment should be collected in accordance with the provisions of 5 U.S. Code § 6306(a) (1970).

In reconstructing Mr. Moore's leave account the annual leave restored may not, under 5 U.S.C. § 5596(b)(2), be credited in an amount that would cause the amount of leave to the employee's credit to exceed the maximum amount of the leave authorized for the employee by law or regulation. The provisions of 5 U.S.C. § 6304(d)(1)(A) (Supp. III, 1973), providing for restoration of annual leave lost through administrative error after June 30, 1960, are not for application, since the Civil Service Commission regulations do not consider an unjustified or unwarranted personnel action under section 5596 as an administrative error. See attachment to Federal Personnel Manual Letter No. 630–32, dated January 11, 1974.

With respect to question 4, 5 U.S.C. § 5596(b)(2) provides that the employee is deemed to have performed service for the agency during the interim separation period. Thus, all Federal pay that would have

been earned during the interim period is subject to deductions for retirement fund contributions in the absence of any civil service regulation stating otherwise. 28 Comp. Gen. 333 (1948); 34 *id.* 657 (1955). The requirement for collection of that amount would not be for waiver under 5 U.S.C. § 5584, since no erroneous payment of pay has been made. In this connection the Civil Service Commission, which is responsible for the administration of the civil service retirement system, including the adjudication of claims thereunder, 5 U.S.C. § 8347 (1970), has advised informally that it has no authority to waive payment of the retirement deduction.

[B-184136]

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

In appropriate instances where questions of payments to be made by a Governmental department are presented to the Comptroller General for decision by a departmental official who is not the department head, the questions will be decided and transmitted to the department head as if he had submitted them under 31 U.S.C. 74.

Travel Expenses—Air Travel—Foreign Air Carriers—Prohibition—Availability of American Carriers

Department of Health, Education, and Welfare employee may use foreign flag air carriers during travel while performing temporary duty because the use of one such carrier saved more than 12 hours from the origin airport to the destination airport than the use of an American flag air carrier, and the use of the other such carrier is essential to accomplish the Department's mission, which would render American flag air carriers "unavailable" under section 5 of the International Air Transportation Fair Competitive Practices Act of 1974, Public Law 93-623, 88 Stat. 2104 (49 U.S.C. 1517).

In the matter of the use of foreign flag air carrier during travel, July 3, 1975:

The Director of the Center For Disease Control, Public Health Service, Department of Health, Education, and Welfare has requested an advance decision as to whether the cost of a foreign flag air carrier used for travel incident to performing temporary duty shown in the submitted itinerary of Joseph F. Giordano can be paid. Since requests for decisions in matters such as this should be applied for by the head of a department or establishment of the Government, the submission will be treated as a request for an advance decision by the Secretary of the Department of Health, Education, and Welfare and answered accordingly. 41 Comp. Gen. 767 (1962).

The submitted itinerary showed that Mr. Giordano departed his permanent duty station Atlanta, Georgia, by American flag air carrier Sunday morning June 22, 1975, and arrived at San Juan, Puerto

Rico, Sunday afternoon. He made connections there by an American flag air carrier, finally landing at Port of Spain, Trinidad, Sunday evening. From Port of Spain Mr. Giordano took a foreign flag air carrier to Georgetown, Guyana, Tuesday evening June 24. On Thursday afternoon, June 26, Mr. Giordano took a foreign flag air carrier from Georgetown back to Port of Spain and then took an American flag air carrier out of Port of Spain Friday morning, June 27, which made connections at San Juan Friday afternoon with an American flag air carrier back to his permanent duty station, a few hours later.

Although the letter from the Director accompanying the itinerary stated that "* * * by using a foreign carrier leaving on Friday morning, he [Mr. Giordano] will be able to return to his official station that same afternoon," the itinerary correctly showed that American flag air carriers were used on Friday to get the traveler back to his official duty station by Friday afternoon. Evidently the accompanying letter was referring to the traveler using a foreign flag air carrier to get him from Georgetown to Port of Spain on Thursday afternoon, as shown on the submitted itinerary, rather than using a foreign flag air carrier on Friday because it is only by using a foreign flag carrier out of Georgetown on Thursday afternoon after the conclusion of his temporary duty that the traveler was able to be in Port of Spain in time to catch *any* flights out of Port of Spain on Friday.

The last flight out of Port of Spain on any given day is at 9:15 a.m., and there is only one flight by an American flag air carrier (a daily flight) from Georgetown to Port of Spain, leaving Georgetown at 9 a.m. and arriving in Port of Spain at 9:45 a.m.—one half hour after all the flights have left Port of Spain for the day. Therefore, if the traveler had used an American flag air carrier at the conclusion of his temporary duty to get from Georgetown to Port of Spain, rather than the foreign flag air carrier shown on the submitted itinerary, he would have had to wait until Friday morning at 9 a.m., which would have entailed him missing all the flights out of Port of Spain on Friday, and, as was correctly stated in the accompanying letter, "* * * the traveler will be delayed one whole day and will be required to travel on a non-work day, arriving at his official station on Saturday afternoon." The issue raised by the Director is the necessity of using an American flag air carrier if such use would be responsible for prolonging the actual travel time 24 hours.

Although the Director's accompanying letter mentioned that Congressional policy set forth in S. Con. Res. 53, 87th Cong. dated October 1, 1962, 76 Stat. 1428, permits use of a foreign carrier when necessary to avoid unreasonable delay, expense, or inconvenience, this policy has been superseded by section 5 of the International Air Transportation Fair Competitive Practices Act of 1974, Public Law 93–623,

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88 Stat. 2104 (49 U.S. Code 1517), which provides generally that American flag air carriers must be used whenever such service is "available." Since the Comptroller General has the responsibility under section 5 of this act of disallowing expenditures from appropriated funds for Government-financed commercial foreign air transportation performed on a foreign flag air carrier in the absence of satisfactory proof of necessity, our Office issued implementing guidelines published in 40 Fed. Reg. 26076, June 20, 1975, which listed some of the instances in which American flag air carriers would be considered "unavailable" so that the necessity for using foreign flag air carriers could be shown. Pertinent to Mr. Giordano's problem is guideline 4(c) which states:

> Passenger service by a certificated air carrier will be considered to be "unavailable": * * * when by itself or in combination with other certificated or non-certificated air carriers (if certificated air carriers are "unavailable") it takes 12 or more hours longer from the origin airport to the destination airport to accomplish the agency's mission than would service by a non-certificated air carrier or carriers.

The origin airport for Mr. Giordano's return trip after the conclusion of his temporary duty on Thursday afternoon was Georgetown, and since the next American flag air carrier out of Georgetown did not leave until Friday morning at 9 a.m., entailing a 24-hour delay in the return trip for the reasons already outlined, this American flag air carrier is considered "unavailable," and the use of the foreign flag air carrier from Georgetown to Port of Spain is approved.

Although the Director's accompanying letter did not mention or discuss the justification for using the foreign flag air carrier that was shown on the submitted itinerary to get the traveler from Port of Spain to Georgetown on Tuesday evening, the matter is for decision since the traveler's entire itinerary was submitted and American flag air carriers are required by section 5 of the act to be used where they are "available." There was no American flag passenger service from Port of Spain to Georgetown on Tuesday, and we note that the only American flag passenger service on Wednesday left Port of Spain at 12:30 a.m. Wednesday morning and arrived at 1:45 a.m. Wednesday morning. Based on the assumption that the traveler conducted official business later Wednesday morning during normal business hours, Guideline 2 is pertinent, which states:

> Generally, passenger or freight service by a certificated air carrier is "available" if the carrier can perform the commercial foreign air transportation needed by the agency and if the service will accomplish the agency's mission. Expenditures for service furnished by a non-certificated air carrier generally will be allowed only when service by a certificated air carrier or carriers was "unavailable."

We would agree with an administrative determination which found that if the traveler were required to take the American flag air carrier that was scheduled to arrive in Georgetown Wednesday morning at 1:45 a.m., it would not be possible for the traveler to get to his hotel

accommodations and perform the necessary personal functions that would enable him to properly conduct the agency's mission later Wednesday morning during the normal hours of business. Therefore, assuming that such a determination has been made, the American flag air carrier is considered "unavailable," and the use of the foreign flag air carrier from Port of Spain to Georgetown is approved.

We do not consider that granting a traveler reasonable hours of rest during his travel status so that he is able to perform the Department's mission upon arrival is inconsistent with Guideline 3(d) which states:

> Passenger or freight service by a certificated air carrier is considered "available" even though: * * * service by a non-certificated air carrier is more convenient for the agency or traveler needing air transportation.

Undoubtedly situations will arise in which the determination whether a particular American flag air carrier is "available" under Guideline 3(d) or "unavailable" because it could not satisfy the Department's mission under Guideline 2 will be difficult to make. These situations should appropriately be handled on a case-by-case basis. However, in this instance, where it appears that the traveler got less than 6 hours rest before beginning the performance of his temporary duty on Wednesday morning, the American flag air carrier is "unavailable," and the use of the foreign flag air carrier justified.

[B-182231]

Compensation—Overtime—Administrative Approval Requirement

Employee alleged that she was compelled to perform substantial amounts of overtime because her superiors assigned her an abnormal workload. Her claim is denied since she failed to show the work was ordered or induced by an official who had authority to order or approve overtime and failed or refused to do so.

Fair Labor Standards Act—Applicability—Employees of United States—Fair Labor Standards Amendments, Pub. L. 93-259—Professional Employees Exempted From Overtime Provisions

Although Fair Labor Standards Act of 1938 has been amended to apply to Federal employees, professional employees are exempted from application of the overtime provisions of the Act. 29 U.S.C. 213(a)(1).

In the matter of overtime compensation, July 10, 1975:

This decision is in response to a request for a reconsideration of the disallowance by our Transportation and Claims Division (TCD) of a claim submitted by Shirley N. Bingham, an employee of the National Labor Relations Board (NLRB), for overtime compensation.

Ms. Bingham states that since July 1, 1970, she served as a Compliance Officer, an attorney position, in District 20 of the National

Labor Relations Board. She contends that, although she was not explicitly ordered to work overtime either orally or in writing, she had no alternative but to do so in order to retain her position in good standing. She states that position cutbacks, a heavy case load, lack of instruction in duties, and lack of orderly office procedures were factors underlying the circumstances which compelled her to perform overtime work. She further states that she was prohibited from referring her problems which caused her to work overtime to the Regional Director by the Regional Attorney. TCD, in Settlement Certificate Z-2137042, July 15, 1974, disallowed the claim because the overtime work was neither authorized or approved as required by 5 U.S. Code 5542 (1970).

Ms. Bingham has implied that recent amendments to the Fair Labor Standards Act of 1938, 29 U.S.C. 201-219 (1970), by the Fair Labor Standards Amendments of 1974, Public Law 93-259, 88 Stat. 55, 29 U.S.C. 203 note, would make the Act applicable to her. Ms. Bingham errs in this contention, however, since persons employed in a professional capacity are exempted from the overtime provisions of the Fair Labor Standards Act. 29 U.S.C. 213(a)(1) (1970).

The main thrust of Ms. Bingham's request for reconsideration of her claim is that she was compelled by her supervisors to perform the overtime in order not to fall behind in the performance of her work. Therefore, we have considered whether her case falls within the ambit of the ruling of the Court of Claims in *Baylor* v. *United States*, 198 Ct. Cl. 331 (1972). That case summarizes the principles for establishing whether an employee may be paid overtime on the basis that overtime was ordered or induced by the employee's supervisors.

In *Baylor* the court stated in 198 Ct. Cl. at 359 the following:

* * * This case is important in that it illustrates the two extremes; that is, if there is a regulation specifically requiring overtime promulgated by a responsible official, then this constitutes "officially ordered or approved" but, at the other extreme, if there is only a "tacit expectation" that overtime is to be performed, this does not constitute official order or approval.

In between "tacit expectation" and a specific regulation requiring a certain number of minutes of overtime there exists a broad range of factual possibilities, which is best characterized as "more than a tacit expectation." Where the facts show that there is more than only a "tacit expectation" that overtime be performed, such overtime has been found to be compensable as having been "officially ordered or approved," even in the absence of a regulation specifically requiring a certain number of minutes of overtime. Where employees have been "induced" by their superiors to perform overtime in order to effectively complete their assignments and due to the nature of their employment, this overtime has been held to have been "officially ordered or approved" and therefore compensable. *Anderson* v. *United States*, 136 Ct. Cl. 365 (1956) * * * (Customs Border Patrol Inspectors); *Adams* v. *United States*, 162 Ct. Cl. 766 (1963) (Inspectors of the Border Patrol of the Immigration and Naturalization Service); *Byrnes* v. *United States*, 163 Ct. Cl. 167, 324 F. 2d 966 (1963), *as amended*, 330 F. 2d 986 (1964) (Investigators of the Internal Revenue Service Alcohol and Tobacco Tax Division). In *Rapp* v. *United States* * * * [340 F. 2d 635 (Ct. Cl. 1964)] the court held that the performance of overtime by employees of the

Civil Defense Administration was not voluntary but was "induced" by the employees' reasonable and understandable fear that they would jeopardize their positions if they did not perform the additional after-hours duty. The court concluded that the "induced" duty officer tours were "officially ordered" and "approved" within the meaning of the Federal Employees Pay Act of 1945, * * * [now codified at 5 U.S.C. 5542 (1970)]

The court in *Baylor*, at 360, also stated that:

As a prerequisite in this type of case, plaintiff has the burden of proving that the order or approval to perform overtime was issued by an official who had the authority to do so. *Bowling* v. *United States*, 181 Ct. Cl. 968 (1967); *Bilello* v. *United States*, 174 Ct. Cl. 1253 (1966); *Albright* * * * [v. United States, 161 Ct. Cl. 356 (1963)]. * * *

The court in *Bilello*, *supra*, stated at 1257, the following:

The common denominator derived from these results is that a regulation requiring approval of overtime by a designated official before it can be paid is binding on claimants unless the regulation is unreasonable or the official who has withheld formal written approval has nevertheless actively induced and encouraged the overtime. Mere knowledge on his part, without affirmative inducement or written sanction, would not seem to be sufficient. * * *

In order to determine whether Ms. Bingham is entitled to overtime compensation, it is necessary to determine whether she was ordered or induced to perform the work in question by an official who had authority to order or approve overtime work. The record indicates that such authority was vested in the Regional Director and that he was required to obtain approval of the central office when the workload of a staff member required extended periods of overtime.

The claimant has stated that she obtained her appointment on July 1, 1970, and subsequent to that date appealed to the Regional Attorney, a Mr. Harvey Letter, for assistance, stating that the overtime work necessitated by her job was injurious to her health. She further stated that Mr. Letter would not provide such assistance and explicitly ordered her not to discuss her need for assistance with the Regional Director. She further stated that Mr. Letter left the NLRB in 1972. It is clear from Ms. Bingham's own statements that there was no reason that she could not have discussed her need for assistance with the Regional Director subsequent to Mr. Letter's departure. For the period prior to Mr. Letter's departure, his injunction not to discuss the matter with the Regional Director should have been appealed. As the court in *Bilello* stated, at 174 Ct. Cl. 1258, in a similar situation—

* * * Administrative efficiency requires observance of orderly forms, and by voicing their demands through proper channels the plaintiffs conceivably could have secured a ruling which would have resulted either in an order for overtime compensation or in a justified refusal on the part of the plaintiffs to continue performing overtime work without compensation.

There is no indication in the record that Ms. Bingham claimed any overtime prior to May 7, 1974, when she sent a memorandum to the Deputy General Counsel of the NLRB. In that communication she made known her problems and requested overtime compensation. That request was denied by a memorandum dated June 14, 1974, on the basis

that the overtime had not been officially ordered or approved. Subsequently, on August 29, 1974, she requested the Regional Director to approve the overtime in question. On December 20, 1974, the Regional Director denied her overtime compensation and admonished her for not discussing her problems with him earlier.

In view of the above, we cannot state that Ms. Bingham has met the prerequisite, as set forth in *Baylor*, *supra*, of proving that she was ordered or induced to perform overtime by an official who had authority to do so. In fact, the record indicates that the official who did have authority to order or approve overtime, the Regional Director, had no knowledge of the problem, and therefore could not have induced the overtime.

Accordingly, the disallowance of the claim for overtime compensation by Ms. Bingham is sustained.

[B-168691]

Pay—Judge Advocates General—Assistants—Officers Serving in Positions—Entitled to Pay of Rear Admirals

Court of Claims in *Selman* v. *United States*, 204 Ct. Cl. 675 held that naval officers ordered to serve in positions of Assistant Judge Advocates General are entitled to at least the pay of a rear admiral (lower half) while serving in such positions whether they were "detailed" or "assigned" to such positions. Our decision at 50 Comp. Gen. 22 which determined that such officers were not entitled to pay of rear admiral (lower half) will no longer be followed. Consequently, the successors to the plaintiffs in *Selman* in the statutorily created positions are also entitled to receive the pay of rear admiral (lower half).

In the matter of the pay of Assistant Judge Advocates General of the Navy, July 14, 1975:

This action is in response to a letter dated April 4, 1975, from the Secretary of the Navy, requesting an advance decision concerning the entitlement of certain naval officers serving in the positions of Assistant Judge Advocates General of the Navy to receive the pay of a rear admiral (lower half). This request was cleared through the Department of Defense Military Pay and Allowance Committee and assigned submission No. SS-N-1231.

The Secretary states that the question of the entitlement of Assistant Judge Advocates General of the Navy to receive the pay of a rear admiral (lower half) was previously presented here for determination of entitlement and by our decision, 50 Comp. Gen. 22 (1970), we concluded that entitlement did not exist. The Secretary also states that the question was then taken to the United States Court of Claims and in the case of *Selman* v. *United States*, 204 Ct. Cl. 675 (1974), the Court determined, with respect to the plaintiffs named in that action and who were the claimants in 50 Comp. Gen. 22, *supra*, that they were entitled

to the pay of a rear admiral (lower half) while serving in the statutorily created positions.

The Secretary further states that the Judge Advocate General of the Navy is of the opinion that the successors to the named plaintiffs in the statutorily created positions of Assistant Judge Advocates General are also entitled to the pay of a rear admiral (lower half). As a result, we have been requested to reconsider our position with regard to such entitlement.

In our decision at 50 Comp. Gen. 22, *supra*, we considered the situation where two Navy captains were ordered to report for duty as Assistant Judge Advocates General, but where the Chief of Naval Personnel specifically intended not to "detail" the officers so as to create entitlement to flag rank within the meaning of 10 U.S. Code § 5149(b) and indicated that the Secretary of the Navy would have to approve such a detail. Paragraph 10214b(2) of the Department of Defense Military Pay and Allowance Entitlements Manual, then in effect, provided that an officer is entitled to the basic pay of rear admiral (lower half) when "detailed" as Assistant Judge Advocate General, but 37 U.S.C. § 202(*l*) provided (and now provides) that unless appointed to a higher grade under another provision of law, an officer of the Navy serving as Assistant Judge Advocate General of the Navy is entitled to the basic pay of a rear admiral (lower half).

Section 202(*l*) of Title 37, U.S. Code, provides as follows:

> Unless appointed to a higher grade under another provision of law, an officer of the Navy or Marine Corps serving as Assistant Judge Advocate General of the Navy is entitled to the basic pay of a rear admiral (lower half) or brigadier general, as appropriate.

From our analysis of the legislative history of sections 202(*l*) of Title 37 and 5149(b) of Title 10, which sections originated in the act of December 8, 1967, Public Law 91–179, 81 Stat. 548, we stated in that decision that we were unable to ascertain an intent that any captain or officer of lesser rank should be paid the pay of a rear admiral (lower half). In that decision we held that the matter was entirely too doubtful for our Office to conclude that Congress intended that the pay provisions of 37 U.S.C. § 202(*l*) should apply to officers so administratively assigned, but at the same time intended to deny them the benefits specifically provided by 10 U.S.C. § 5149(b) as to the rank and grade for an officer "detailed" to so serve.

In *Selman* v. *United States*, *supra*, the Court of Claims, considering that the same situation, stated that the captains were ordered to report for duty as Assistant Judge Advocates General and they served in this capacity but because of a nonstatutory limit on the number of naval flag officers, imposed by the Senate Armed Forces Committee (the Stennis Ceiling), neither was advanced to the rank of rear

admiral, "which the role of [Assistant Judge Adovcate General] normally calls for."

In the court's view the Government offered a three-pronged defense: (1) that section 202(*l*) of Title 37, U.S. Code, must be read in conjunction with section 5149(b) of Title 10, since both provisions were contained in the same public law; (2) that proper discernment of the meaning of section 202(*l*) requires consideration of the legislative history; and (3) that acceptance of plaintiffs' construction of section 202(*l*) would effectively constitute "judicial promotion." The court found none of these arguments to have merit.

The basis for the court's decision is as follows:

> At the outset, we conclude this case can be decided on a simple, fundamental principle of statutory construction: a clear and unambiguous statute speaks for itself. * * *
>
> Section 202 obviously directs that an officer of the Navy, while serving as [Assistant Judge Advocate General], is entitled to the pay of a rear admiral (lower half). Contrary to defendant's contention, nothing could be more clearly stated. Because plaintiffs during the relevant periods were Navy officers who undisputedly "served" as [Assistant Judge Advocates General], regardless of the means by which they were named to such positions, they are entitled to judgment on their claims for back pay as a matter of law. 204 Ct. Cl. at 680.

The Court of Claims has now clearly held that an officer, who is "detailed" or "assigned" to the position of Assistant Judge Advocate General and who serves in that position, is entitled to the pay of a rear admiral (lower half) under the provisions of section 202(*l*) of Title 37, U.S. Code. In view of that judicial precedent we will no longer follow the decision 50 Comp. Gen. 22, *supra*, to the extent that it is inconsistent with the Court's holding in the *Selman* case.

Accordingly, the successors to the plaintiffs in *Selman* in the statutorily created positions are entitled to the pay of rear admiral (lower half) and our decision 50 Comp. Gen. 22, *supra*, will no longer be followed.

[B-178205]

Contracts—Negotiation—Awards—Validity

Validity of award by Federal Energy Administration (FEA) for dedicated automatic data processing services through facilities management contract was not affected by Brooks Act, 40 U.S.C. 759, and implementing regulations and policies, because FEA was entitled to rely on authorizations to proceed with procurement given by Office of Management and Budget (OMB) and General Services Administration after reviews of solicitation and FEA's cost and other justifications. Also, provisions of OMB Circular No. A-54 and Federal Management Circular 74-5 concerning ADPE acquisitions are ordinarily executive branch policy matters not for resolution by General Accounting Office (GAO).

Contractors—Incumbent—Elimination From Competitive Range—Negotiated Contract

Agency's elimination of incumbent contractor from competitive range had reasonable basis. Totality of many allegedly "informational" deficiencies made proposal so materially deficient that it could not be made acceptable except by major

revisions and additions. Incumbent's low proposed estimated costs did not have to be considered since proposal was found to be totally technically unacceptable. There is no basis for favoring incumbent in competitive range determination with presumptions based merely on prior satisfactory service, since proposal must demonstrate compliance with essential requests for proposals (RFP) requirements.

Contracts—Negotiation—Competition—Competitive Range Formula—Predetermined Cut-Off Score—Not Prejudicial

Although use of predetermined cut-off score to establish competitive range is not in accord with sound procurement practice, it is not prejudicial to offeror eliminated from competitive range in view of offeror's low technical score of 44.8 points on 100-point scale in relation to scores of proposals included in competitive range (96.3, 92.1 and 88.2).

Contracts—Negotiation—Cost-Plus-Award-Fee Contracts—Estimated Costs—Automatic Data Processing Services

Recognizing that low cost estimates should not be accepted at face value and that agency should make independent cost projection of estimated costs, agency's determination, after cost analysis, that successful offeror's proposed low estimated costs for cost-plus-award-fee contract for automatic data procesing services were realistic, was reasonable, notwithstanding lack of complete explanation of why proposed costs were substantially less than those of protester, who offered similar computer configuration.

Contracts—Negotiation—Evaluation Factors—Factors Other Than Price—Relative Importance of Price

Although RFP, which only stated that "cost is an important factor in selection of the offeror for contract award," was defective for failing to apprise offerors of *relative* importance of estimated costs vis-a-vis other specified evaluation factors, there was no prejudice because successful offeror's proposal received highest score on technical evaluation and offered lowest evaluated estimated costs, and proposals of other offeror in competitive range completely responded to all factors considered in award selection.

Contracts—Negotiation—Competition—Exclusion of Other Firms—No Exclusion on Basis of Potential or Theoretical Conflict of Interest

In absence of condition in solicitation which clearly limited proposals only to those firms (including officers of firms) which have no connection with oil or gas industry. together with clearly supportable reason for so limiting competition, and since there is no relevant legal prohibition, award of automatic data processing services contract by FEA to firm whose Chairman of Board of Directors has some interest in oil or gas industry was not improper. Firm should not be excluded from competition simply on basis of theoretical or potential conflict of interest.

Contracts—Specifications—Conformability of Equipment, etc., Offered—Administrative Determination—Basis of Evaluation

Procuring agency had reasonable basis for determining, after discussions had been conducted, that successful offeror's proposal for automatic data processing services complied with RFP requirements concerning data base management system, testing, manpower, dedicated facilities, communications processors, and telecommunications network.

Contracts—Negotiation—Awards—Offerors' Noncompliance With RFP Requirements—Countervailing Factors

Although successful offeror for computer services in facilities dedicated exclusively to FEA did not comply with RFP "internal" security requirement of protection from read access by FEA users to other FEA users' programs and codes and operating system located in computer's main memory, countervailing factors mandate against disturbing award because of agency's improper relaxation of mandatory requirement without informing other offerors, e.g., lack of certainty of deficiency's effect on award selection or of whether offerors would have changed offers if specification was relaxed, agency's short life, and large excess costs and adverse affect on agency's performance of basic functions.

Contracts—Protests—Timeliness—Considered on Merits

Although protest against exclusion from competitive range was untimely filed under GAO's bid protest procedures, issues raised by protest will be considered on merits in view of GAO's continuing audit interest in particular procurement and assurances made by GAO representatives that protest would be considered. However, untimely protest of another protester against exclusion from competitive range filed over 4 months after protestor became aware of reasons its proposal was rejected will not be considered on merits in view of advanced stage of GAO review.

In the matter of PRC Computer Center, Inc.; On-Line Systems, Inc.; Remote Computing Corporation; Optimum Systems, Inc., July 15, 1975:

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BACKGROUND

By telegram dated December 5, 1974, PRC Computer Center, Inc. (PRC) protested the award of contract C–03–50054–00 to Optimum Systems, Inc. (OSI) pursuant to request for proposals (RFP) 50054,

issued by the Federal Energy Administration (FEA) for dedicated automatic data processing (ADP) services. By telegram dated December 13, 1974, On-Line Systems, Inc. (OLS) also protested the award to OSI. By letter dated June 12, 1975, Remote Computing Corporation (RCC) protested the OSI award.

At the time award was made on November 27, 1974, this procurement was the subject of an audit by our Office pursuant to a request from the Chairman, Government Activities Subcommittee, House Committee on Government Operations. By letter dated November 20, 1974, we had raised certain questions with FEA as to the conformity of its proposed acquisition of ADP services under a facilities management contract with the requirements of Public Law 89-306, October 30, 1965, 79 Stat. 1127, 40 U.S. Code 759 (1970) (commonly referred to as the Brooks Act), and related implementing regulations (41 C.F.R. Part 101-32 (1974)). A primary concern was whether FEA had received a proper delegation of ADP procurement authority from the General Services Administration (GSA), which is responsible under the Brooks Act for coordinating and providing for the economic and efficient purchase, lease, and maintenance of ADP equipment (ADPE) for the Federal Government. By letter dated December 16, 1974, we also requested GSA's views on these issues.

On December 10, 1974, FEA was first notified by our Office that a protest had been filed and that a documented report responsive to the protest would be required. We formally requested FEA's report on the protests by letter dated December 16, 1974. By letter dated January 27, 1975, FEA advised our Office that it was unable to submit its report on the protests within 20 working days in accordance with the then effective section 20.5 of our Interim Bid Protest Procedures and Standards, 4 C.F.R. § 20.5 (1974). After numerous inquiries by representatives of our Office into the status of this report, FEA submitted its report on the protests and the issues raised concerning compliance with the Brooks Act and related implementing regulations to our Office on April 17, 1975. GSA had only submitted its report on April 9, 1975. The protesters and other interested parties were given the opportunity to respond and comment on the reports, and a conference on the protests was held on May 2, 1975. Supplementary materials were subsequently found necessary to properly consider the merits of the protests, the last of which were received in our Office on June 27, 1975.

FEA decided that the contract for dedicated ADP services was necessary to meet its responsibilities in regulating the petroleum industry and combating the "energy crisis," inasmuch as the fulfillment of these responsibilities requires the gathering, retention and distribution of massive amounts of information. FEA also intended to consolidate much of its ADP requirements, previously performed by

various sole-source contractors and through interagency agreements. FEA states that it has effected significant cost savings and has a more efficient information storage and retrieval system by virtue of this consolidation.

The RFP was issued on September 9, 1974, and called for the submission of separate technical and cost proposals for the furnishing of dedicated ADP services under a cost-plus-award-fee (CPAF) facilities management contract. The RFP contemplated that the ADP services and support be provided in two phases. The Phase I level of service was to be provided by a single central processing unit (CPU) to be delivered and operational by January 2, 1975. Phase I service continued until June 30, 1975. By June 1, 1975, an option had to be exercised for Phase II service, which called for a significantly larger multi-processing system consisting of two or more CPU's for services and support for the period July 1, 1975, to June 30, 1976. FEA reserved the right to continue using the Phase I level of service during the 1976 fiscal year rather than exercising the Phase II option. FEA exercised the option for Phase II service on May 30, 1975.

FEA summarized what it regarded as the most salient characteristics of the procured ADP services in section I–A of the RFP as follows:

> * * * (1) central multiple processor hardware installed at the contractor's facility which must be within a 30 mile radius of the FEA central office at the Federal Bldg., 12th and Penn., Ave., N.W. Washington, D.C.; (2) a national communications network of dedicated and dial-up lines to support from 134 terminals at installation time, up to a maximum of 500 terminals; (3) all systems software to fully support the system; (4) personnel to manage, operate, and maintain the facility; (5) training courses for FEA programmers, analysts, etc.; (6) dedication of the entire facility, including personnel, hardware, and physical plant to exclusive FEA processing 24 hours per day, seven days per week; and (7) options for a 10% expansion for both Phase I and Phase II.

FEA established a Selection Evaluation Board (SEB) in accordance with section II–F of the RFP in order to evaluate the technical proposals received under the RFP. Each of the six members of the SEB reviewed each proposal received in a two step process. First, the proposals were evaluated to determine whether the RFP mandatory requirements were met by each proposal. If a particular proposal was unanimously found to have failed to substantially comply with the mandatory requirements, it was rejected as "nonresponsive." Surviving proposals were then evaluated and compared on a 100-point scale based on the following evaluation criteria set out in Attachment A, which was incorporated into the RFP:

1. *Knowledge of subject matter and experience*—30 points
   a. *Understanding Integrated Computation/Communication Network Techniques.* * * *
   b. *Awareness of Major Problems.* * * *
   c. *Prior Experience.* * * *
2. *Experience and Background of Offeror Personnel*—30 points
   a. *Project Leader.* * * *
   b. *Project Staff.* * * *

3. *Technical Approach*—40 points
   a. *Management Plan.* * * *
   b. *Objectives of Approach.* * * *
   c. *Efficiency and Flexibility of Approach.* * * *

Proposals receiving more than 60 cumulative points (averaging the scores given to each of the proposals by each Board member) were to be considered acceptable and forwarded to the FEA procurement office for cost evaluation. The SEB was not given the cost proposals for use in its technical evaluation.

By the closing date for receipt of proposals, October 15, 1974, seven proposals were submitted (PRC submitted two proposals—Alternative A and Alternative B). Three of the technical proposals (including that submitted by RCC) were unanimously rejected by the SEB as "nonresponsive" to the RFP requirements. On the second step of the SEB's evaluation, the following technical scores were assigned:

OSI	96.3
PRC Alternative B	92.1
PRC Alternative A	88.2
OLS	44.8

Consequently, the SEB eliminated OLS from award consideration, unanimously finding that a contract resulting from OLS's proposal would not produce satisfactory service.

The remaining offerors were then evaluated by the FEA procurement office on the basis of cost. The adjusted estimated costs of the remaining cost proposals were:

OSI	$7,191,222
PRC Alternative B	10,315,870
PRC Alternative A	8,074,591

In addition, discussions were held with OSI and PRC to clarify their proposals. FEA found that OSI's proposed estimated costs were realistic and reasonable and in view of the fact that OSI received the high technical score and proposed the lowest costs, OSI was selected for award.

The amount of the contract award of Phase I to June 30, 1975, was for $1,577,440 including the 7-percent award fee pool which was not included in the estimated costs for the cost evaluation. The total contract value including the option for Phase II is $7,691,597 (including award fee pool).

After award, PRC, OLS and RCC filed protests in our Office. PRC's basic contentions are that (1) OSI's proposed estimated costs were not realistic and (2) several of the mandatory RFP requirements were waived for OSI without a similar opportunity being given to PRC. OLS's basic contentions are that (1) FEA acted unreasonably in eliminating OLS from the competitive range and (2) the mandatory RFP

requirements concerning the data base management system (DBMS) were not met by OSI. Both PRC and OLS question the propriety and legality of the award since OSI's Chairman of the Board of Directors may have some interests in the petroleum industry. RCC's basic contention is that it was improperly excluded from the competitive range.

FEA contends that OLS's protest should not be considered since it was not timely filed under our Interim Bid Protest Procedures and Standards in effect at that time. FEA notes that although OLS was debriefed on December 4, 1974, at which time it was informed of the alleged procurement deficiencies which formed the bases for its protest, its bases for protest were first set forth in its letter dated December 16, 1974, to our Office. FEA contends that OLS's initial telegram of December 13, 1975, did not conform to the requirements of section 20.1(b) of our procedures (4 C.F.R. § 20.1(b) (1974)), since it did not contain a statement of the grounds of protest, nor did it specifically request a ruling by the Comptroller General. FEA also notes that OLS's subsequent letters raising additional bases for protest, e.g., OSI's alleged failure to meet the RFP DBMS requirements, do not show when OLS became aware of these bases of protest, nor do they demonstrate that they were timely submitted.

OLS's protest did not meet the timeliness requirements of our bid protest procedures then in effect since its December 13 telegram was not filed in our Office within 5 working days after OLS became aware of its bases for protest. However, in view of our Office's continuing audit interest in this procurement and assurances made by representatives of our Office that OLS's protest would be considered, we will treat the issues raised by OLS on the merits.

We will not, however, consider RCC's protest on the merits. RCC concedes that it was made aware of the basis for rejection of its proposal on February 6, 1975. RCC states that it waited until June 12, 1975, to protest because it assumed the same standard of "responsiveness" applied to all of the offerors and only recently became aware that OSI failed in a substantial way to meet the RFP requirements. However, in view of the over 6-month period from the date of award and the over 4-month period from when RCC became aware of the reasons its proposal was rejected, it is clear that RCC did not protest within 10 working days after its basis for protest was "known or *should have been known*" [Italic supplied], as is required by section 20.2(b)(2) of our new Bid Protest Procedures (40 Fed. Reg. 17979 (1975)). (Our new procedures are applicable to this protest since it was received in our Office after June 2, 1975.) Therefore, RCC's protest is untimely. In view of the advanced stage of our review of this procurement when RCC's protest was received in our Office, it will not be considered on the merits. Nevertheless, our Office

conducted an in-depth review of the legality and propriety of this procurement.

BROOKS ACT AND IMPLEMENTING REGULATIONS AND POLICIES

The Brooks Act generally authorizes and directs GSA to coordinate and provide for the economic and efficient purchase, lease and maintenance of ADPE by Federal agencies. GSA has implemented the Brooks Act insofar as it covers the direct procurement of all ADPE, software, maintenance services, and supplies by Federal agencies in 41 C.F.R. Subpart 101–32.4 (1974). This subpart generally provides that agencies have no authority to procure ADPE except under a proper delegation of procurement authority from GSA. It also sets forth procedures to be followed in ADPE procurements under the delegated authority. In addition, to partially implement its management responsibilities under the Brooks Act, GSA has promulgated 41 C.F.R. Subpart 101–32.2 (1974), which generally requires agencies to defer obtaining ADP time or related services from commercial sources unless such ADP requirements cannot be satisfied from Federal ADP sources. *See* 41 C.F.R. § 101–32.203–2 (1974). See generally *Potomac Research Incorporated*, B–182823, April 29, 1975.

The Office of Management and Budget (OMB) Circular No. A–54, which sets forth policies for the acquisition of ADPE, was effective until July 30, 1974, when it was superseded by Federal Management Circular (FMC) 74–5. These Circulars generally provide that ADPE should only be acquired after the agency determines what its actual ADP requirements are, analyzes the viability and costs of the various alternative methods of acquisition of the necessary ADPE (e.g. purchase or lease), and documents its determinations in this regard.

FEA coordinated with both GSA and OMB in perfecting the RFP's terms and conditions. On June 28, 1974, FEA submitted a Form 2068, "Request for ADP Services," to GSA pursuant to 41 C.F.R. § 101–32.203–2 (1974) for GSA's authorization. GSA, which is responsible for implementing the Brooks Act, and OMB completely reviewed the RFP and FEA's cost and other justifications for the proposed ADP services. Based upon their reviews, OMB on July 26, 1974, and GSA on September 10, 1974, authorized FEA to proceed with the procurement as proposed.

Our Office expressed reservations in our November 20, 1974, letter that FEA may not have complied with the Brooks Act and implementing regulations since this procurement appeared to be an ADPE acquisition, and not just a procurement of ADP services. Subsequent to our letter, FEA made certain modifications to the contract actually

awarded to OSI. We now believe that the validity of the award was not affected by the Brooks Act and implementing regulations because FEA was entitled to rely on GSA's and OMB's authorizations to proceed with the procurement.

Also, while we have some reservations as to the adequacy of the cost analyses made by FEA, we regard the provisions of OMB Circular No. A–54 and FMC 74–5 as matters of Executive branch policy, which are ordinarily not within the decision functions of the General Accounting Office. See *Xerox Corporation*, B–180341, May 10, 1974; *Federal Leasing, Inc.*, 54 Comp. Gen. 872 (1975). *Cf.* 43 Comp. Gen. 217, 221 (1963); 53 *id.* 86 (1973); *General DataComm Industries, Inc.*, B–182556, April 9, 1975.

PROPRIETY OF FEA's EXCLUDING OLS FROM THE COMPETITIVE RANGE

OLS contends that there is no reasonable basis for its exclusion from the competitive range and discussions. OLS characterizes the deficiencies in its proposal as merely "informational" and alleges that any problems could easily have been resolved during a short round of discussions. OLS contends that its proposal responded to all RFP requirements and that FEA should simply have asked for any more information it desired, especially since OLS was the incumbent contractor for many of the sole-source contracts being consolidated and its performance under these contracts had been found to be entirely satisfactory. OLS also claims that FEA was compelled to at least hold discussions with it in view of its low proposed estimated costs of $6,000,000, which were $1,700,000 below OSI's proposed estimated costs (actually the difference is closer to $1,200,000 due to the addition of the award fee pool into OSI's contract price).

In response, FEA indicates that OLS's proposal was weak and deficient in many areas which when viewed in their totality made it clear that OLS's proposal was so defective as to make meaningful discussions fruitless. FEA also now questions the realism of OLS's low estimated costs.

We have held that a proposal must be considered to be within a competitive range so as to require discussions unless it is so technically inferior or out of line in price as to preclude meaningful discussions. 48 Comp. Gen. 314 (1968); 53 *id.* 1 (1973). We have also recognized that the determination of whether a proposal is in the competitive range, particularly with respect to technical considerations, is primarily a matter of administrative discretion which will not be disturbed by our Office absent a clear showing that the determination lacked a reasonable basis. *See* 48 Comp. Gen., *supra.* It is not our function to evaluate

proposals, and we will not substitute our judgment for that of the cognizant contracting officials by making an independent judgment as to the precise numerical scores which should have been assigned each proposal by the SEB. See *Ohio State University*, B–179603, April 4, 1974; *Applied Systems Corporation*, B–181696, October 8, 1974; *National Designers, Inc.*, B–181741, December 6, 1974; *METIS Corporation*, 54 Comp. Gen. 612 (1975).

A proposal may be excluded from the competitive range for "informational" deficiencies which are so material that major revisions and additions would be required to make it acceptable. *See* B–174597(1), April 21, 1972; B–176294, October 27, 1972; 52 Comp. Gen. 382, 386 (1972); 52 *id.* 865 (1973); *Phelps Protection Systems, Inc.*, B–181148, November 7, 1974; *Comten-Comress*, B–183379, June 30, 1975. In determining whether allegedly "informational" deficiencies in a submitted proposal are of such nature that an agency, within the reasonable exercise of its discretion, may exclude that proposal from the competitive range, our Office has, at times, looked at the following factors: (1) how definitely the RFP has called for the detailed information, the omission of which was relied on by the agency for excluding a proposal from the competitive range, *see* B–173264, December 22, 1971; B–174597 (1) and (2), *supra;* 53 Comp. Gen. 1; *MEI-Charlton, Inc.*, B–179165, February 11, 1974; *Moxon, Incorporated/SRC Division*, B–179160, March 13, 1974; (2) the nature of the "informational" deficiencies, e.g., whether they tended to show that the offeror did not understand what it was required to do under the contract or merely made the proposal inferior but not unacceptable, *see* 47 Comp. Gen. 29 (1967); B–173716, December 7, 1971; *MEI-Charlton, supra; Moxon, supra;* (3) the scope and range of the proposal "informational" deficiencies, e.g., whether the offeror had to essentially rewrite its proposal to correct the deficiencies, see *MEI-Charlton, Inc., supra; Moxon, supra;* (4) whether only one offeror was found to be in the competitive range, *see* 45 Comp. Gen. 417 (1966); 47 *id., supra;* 52 *id.* 718 (1973); and (5) whether a deficient but reasonably correctable proposal represented a significant cost savings, *see* B–167291(3), December 1, 1969; 47 Comp. Gen. 29; *EG&G, Inc., Education Systems Division*, B–182848, May 6, 1975.

Applying these factors to the evaluation, we find that FEA's decision to exclude OLS's proposal from the competitive range had a reasonable basis.

With regard to the amount of details to be included in a satisfactory proposal, FEA has indicated:

*** * * The determination of the amount of credit OLS, or any other offeror, would receive, however, was not based upon whether an area was covered, but rather how well the particular area was covered by the offeror in his proposal. Certainly, the failure to discuss a particular area is considered in determining how well the area is discussed.**

The evaluation criteria are clear in this regard. Paragraph 4 of Attachment A to the RFP states:

> How well does the proposal and service definition compare with the others? Is the offeror's definition of end product, complete, clear/and clearly related to the specifications in the statement of work?
>
> a. Are the offeror's proposal and service definition largely free of direct plagiarism from the Statement of Work?
>
> b. Does the end product definition require little interpretation and "reading between the lines?"
>
> c. Are all elements requested in the RFP clearly identifiable in the end end product definition?

These criteria make clear that merely "parroting" back or generally responding to the RFP requirements with no details of how the particular requirement would be met would not be a satisfactory response. We find that this pargraph, together with the rest of the evaluation criteria, are sufficiently definite to put the offerors on notice that an evaluation penalty would be assessed for incomplete responses to the RFP requirements. Under such circumstances, penalizing an offeror for gross "informational" deficiencies is reasonable, even if the offeror is thereby eliminated from the competitive range.

We have carefully reviewed OLS's proposal, the SEB summary and breakdown of numerical scores, and the individual SEB member's personal evaluation comments and numerical score breakdowns, to determine the validity and reasonableness of the low numerical score assigned to OLS which eliminated it from the competitive range. It is not our function to reassess the precise numerical score given to OLS but only to ascertain whether the SEB had a reasonable basis for excluding OLS from the competitive range.

Some of the major deficiencies which the SEB found in OLS's proposal are listed below together with the OLS responses and our observations.

1. *FEA*—OLS's proposed project manager did not have the requisite 1-year experience in successfully managing a project of the same general type, magnitude and complexity (RFP sections II–B–2.b and c). The proposed project manager's previous management experience in marketing activity, as set forth in OLS's proposal and attached resume, did not satisfy this requirement, nor did the fact that he managed OLS's FEA activities for 6 months prior to the OSI contract.

OLS response—Proposed project manager's work as marketing manager where he trained and managed the technical personnel who worked with the firm's customers and his 6 months experience on FEA's site should have met the RFP requirements.

We do not believe OLS's proposed project manager meets the RFP's minimum 1-year requirement, nor are we persuaded that the prior experience of the proposed manager which OLS *indicated in its proposal* fulfilled this requirement.

2. *FEA*—The RFP required the offeror to show that it had successfully provided computer services comparable in size and scope to the FEA requirements (RFP section II–B–1). OLS failed to show evidence of prior company experience in providing computer services for scientific processing, simulation, mathematical matching, and micrographics.

OLS response—This was not called for in the RFP and in any case it would be merely an "informational" deficiency.

OLS clearly did not identify in any way its experience in the aforementioned areas in its proposal, nor has it stated in its protest correspondence that it has such experience. Paragraph 1.c of the evaluation criteria (quoted above) clearly indicated that offerors would be evaluated on their prior experience in the various specific types of ADP related work called for under the FEA contract.

3. *FEA*—OLS's proposed management plan was considered technically inferior in that it contained no breakdown of individual tasks to be performed or a schedule for performing them, even though an acceptable management plan was an important aspect of the total proposal (RFP section II–B–3.f).

OLS response—OLS's management plan was suitable and it was almost ludicrous for FEA to feel it needed such additional information since OLS had been one of its main incumbent contractors.

Paragraph 3 of the evaluation criteria (quoted above) not only stresses the importance of an acceptable management plan, but also makes clear that the plan should be broken down into the pertinent details. It is not unreasonable to expect a breakdown of individual tasks or a schedule for performing them. A comparison of OLS's plan with those submitted by OSI and PRC substantiates FEA's position that the OLS plan was technically inferior and substantially incomplete.

4. *FEA*—The amount of main memory proposed by OLS for Phase I of the contract was "* * * 1.6 million characters. The memory is composed of five modules, each with a capacity of 320K characters each. * * *" The RFP required 1,600,000 characters of main memory, not including that part of main memory taken up by the contractor's software (RFP sections II–C–1 and II–C–3). The proposed OLS configuration proposed only a total of 1,600,000 characters of memory without any provision for the necessary system software. Therefore, OLS's proposal was deficient.

OLS response—OLS states that it was actually offering five memory modules, each with a capacity of 392,000 characters, and that 320,000 characters in each module were available exclusively to FEA.

Since the OLS proposal does not indicate that the amount of characters in main memory were "net" figures indicating the amount of

main memory available to FEA, the agency objections seem to be reasonable and appropriate.

5. *FEA*—OLS only proposed two channels to random access storage for Phase I, even though the RFP required at least three channels (RFP section II–C–4).

OLS response—OLS contends that FEA's claim of deficiency is in error, since it proposed for Phase I one subsystem for High Speed Random Access Storage (HSRAS) and two subsystems, each with its own channel, for High Capacity Random Access Storage (HCRAS). OLS claims that this was in accordance with FEA's letter dated September 19, 1974, prior to the closing date for receipt of proposals, to all potential offerors, as follows:

> DEC has asked if each CPU may have two channels rather than three to HCRAS.
> The answer is yes. The requirement is for three channels to all random access storage (HCRAS and HSRAS). This is illustrated in Attachment D of the technical specification, which shows one channel to HSRAS and two channels to HCRAS. Furthermore, the requirement is for functionally equivalent speed and backup of channel failure. If functional equivalency could be established for this requirement, that would be sufficient.

We note that OLS's schematic for the Phase I central hardware clearly indicated that only two channels were proposed (one to HSRAS and one to the two subsystems of HCRAS). This is the only reference in OLS's proposal to the number of channels it offered. Also, OLS has not demonstrated that its proposed configuration is functionally equivalent to the RFP requirements. We find that OLS's proposal as written does not meet the RFP requirements as clarified by the September 19 letter.

6. *FEA—OLS* proposed only one high-speed line printer instead of the two required by the RFP (RFP section II–C–6).

OLS response—This is an admitted oversight.

7. *FEA*—OLS responded to the RFP requirements that the offeror provide software packages for simulation, linear programming and non-linear programming with a general assertion that it has capabilities and technical assistance in these areas (RFP section II–D–5). The OLS proposal was considered technically inferior since it nowhere identified the software packages which would be provided.

OLS response—OLS states that the RFP only stated in the barest terms:

> Software packages for simulation, linear programming and non-linear programming must be provided.

Consequently, OLS contends that it would be unreasonable to penalize an offeror for responding in similarly general terms, and if FEA wanted more information it should have asked OLS.

We do believe it was reasonable for FEA to find OLS's proposal

deficient for failing to even identify the software packages it would use for simulation and linear and non-linear programming. The general terms of the RFP requirement do not make mere "parroting" back an adequate response. General requirements often are intended to elicit specific responses, as we believe was the case here.

The SEB also found the OLS proposal deficient because it did not: (1) specify where in the Washington, D.C. area its proposed service facility was located; (2) address the RFP requirement that each offeror must agree not to divert key management and supervisory personnel from the FEA contract without the contracting officer's consent; (3) address the RFP requirement for courier service between the service facility and FEA and there was no guarantee that the courier service supplied by OLS would have the essential security clearances; (4) specifically assert that the proposed equipment and telecommunications network were in conformance with the applicable Federal Information Processing Standards Publication; (5) assert that it would or could supply the maximum total of 500 terminals required in Phase II; (6) provide sufficiently detailed resumes of the key management personnel to adequately evaluate the capabilities of the proposed staff; (7) provide specific details as to the implementation and beginning dates of the service facility; (8) directly state that it could meet the required dates for either Phase I or Phase II; (9) contain adequate information about the implementation of the FEA physical security requirements; and (10) discuss how the contract's 10-percent increased quantity option might be accomplished.

While any one of the many aforementioned deficiencies may not itself be sufficient reason to exclude OLS from the competitive range, as a totality they justify the FEA conclusion that OLS's proposal was so materially deficient that it could not be made acceptable, except by major revisions and additions. Consequently, we conclude that FEA acted reasonably in excluding OLS's proposal from the competitive range.

Moreover, we believe that any offer—whether or not from an incumbent—must demonstrate compliance with essential RFP requirements. There is no basis for favoring incumbents in competitive range determinations with presumptions merely on the basis of prior satisfactory performance. We have held it is proper to eliminate an incumbent from the competitive range for failure to translate whatever advantages or capabilities which might have accrued from its incumbency into an initial proposal. *See* 52 Comp. Gen. 718; *Potomac Research Incorporated*, *supra; EG&G, Inc.*, *supra.*

Of particular significance, the elimination of OLS did not have the effect of leaving only one offeror in the competitive range, as in B–167291, *supra;* 45 Comp. Gen. 417; 47 *id.* 29; and B–173716, *supra.*

In this case, three proposals submitted by two offerors were placed in the competitive range.

OLS contends that, notwithstanding its alleged "informational" deficiencies, its significantly low offered costs mandated its inclusion in the competitive range pursuant to Federal Procurement Regulations (FPR) § 1–3.805–1 (1964 ed.). However, where, as here, a technical proposal has been found to be totally unacceptable, it may be eliminated from the competitive range without regard to its low *estimated* costs. 52 Comp. Gen. 382, 388; *Potomac Research Incorporated, supra.* FPR § 1–3.805–2 (1964 ed.) recognizes that costs should not be considered controlling in cost reimbursement type contracts since they are merely estimates, and award on such a basis may encourage the submission of unrealistically low estimates and increase the likelihood of cost overruns.

The RFP required an offeror to receive a score of 60 points on a 100-point scale to be in the competitive range. The establishment of such a predetermined cut-off score is not in accord with sound procurement practice. *See* 50 Comp. Gen. 59 (1970); *Moxon, supra.* Nevertheless, the inclusion of a predetermined cut-off score in this evaluation plan was not prejudicial to OLS in view of its low score (44.8) in relation to others received (96.3, 92.1, 88.2). *See* 52 Comp. Gen. 382, 387; 53 *id.* 240 (1973).

From the foregoing, we find that OLS was properly excluded from the competitive range, the SEB members did not go outside the parameters of the evaluation criteria to derogate OLS's proposal, and there is no indication of bias against OLS. In view of this, it is not necessary to discuss the FEA position taken during the course of the protest that OLS's low estimated costs were unrealistic.

OLS also contends that (1) acceptance of its proposal would have saved the cost of conversion to the new system and (2) OSI is not complying with the contract requirements since FEA has had to contract directly for the performance of such conversion tasks. Since the RFP did not require this conversion to be performed by the contractor, these contentions have no merit.

COST REALISM OF OSI's PROPOSAL

A cost evaluation was made of the proposed estimated costs of those offerors found to be in the competitive range. The cost evaluation considered the total proposed estimated costs for both Phase I (contract period ending June 1975) and Phase II (option period ending June 1976) of the project.

The total evaluated estimated costs (including base fee) proposed by the three firms in the competitive range were as follows:

Offeror	Technical Score	Estimated Cost Phase I	Estimated Cost Phase II	Total Estimated Cost
OSI	96.3	$1,477,057	$5,714,165	$7,191,222
PRC Alternative B	92.1	2,300,505	8,015,365	10,315,870
PRC Alternative A	88.2	1,815,850	6,258,741	8,074,591

The cost figures set out above reflect adjustments made for minor clerical errors in each of the cost proposals and the total estimated costs of the 500 terminals offered by OSI. This computation was not included in OSI's cost proposal due to OSI's uncertainty as to the schedule for the phasing in of the terminals (although OSI clearly indicated its unit prices for the terminals in its cost proposal and identified the terminals in its technical proposal). PRC has indicated that it had the same uncertainty as to the timing for the phasing in of the terminals.

The estimated costs set out above, on which basis the cost proposals were evaluated, include the base fee (3-percent of the total estimated costs) to which a contractor would be entitled under the CPAF contract to be awarded (unless it had defective cost or pricing data (discussed below)). These figures do not reflect the award fee pool of 7-percent of the total estimated costs, to which a contractor has no vested right until the FEA Director of Procurement awards the contractor that part of the pool which he finds the contractor to be entitled. The award fee pool under OSI's CPAF contract is $100,383 for Phase I and $399,992 for Phase II for a total pool of $500,375. This makes OSI's total contract value $7,691,597.

PRC has protested that OSI's proposed costs are not realistic and that FEA has made an insufficient cost analysis. In contending that OSI's proposed costs are not realistic, PRC refers to its Alternative B proposal, which it states offered equipment similar to the IBM 370/168 CPU configuration offered by OSI (PRC's Alternative A proposal offered equipment manufactured by the Burroughs Corporation (Burroughs)), but which proposed in excess of $3 million more in estimated costs than OSI's cost proposal. PRC claims that part of the difference may be explained by OSI's allegedly deficient proposed manning of the ADP facility (discussed below) and by OSI's proposed sharing of the communications network and front-end processors (discussed below). PRC claims that the substantial remaining difference in estimated costs between the two proposals demonstrates the insufficiency of FEA's cost analysis, and that OSI has made a

"buy-in" at an unreasonably low cost, and that cost overruns are certain to occur. PRC claims that FEA should have made an item-by-item comparison of all cost components in the proposals, which would have revealed the unreasonableness of OSI's proposed costs.

In support of its contentions, PRC has submitted the results of its own cost analysis of OSI's proposal and concluded that OSI's estimated costs should have been approximately $8,775,000 (excluding fees), giving OSI the benefit of the doubt. PRC's cost analysis is in part based on FEA's cost estimate for dedicated services, set out in Attachment 14 of FEA's report on these protests, which was prepared in order to compute and compare FEA's various alternatives for consolidating FEA's computer resources. By making substantial alterations and various assumptions concerning this Government estimate, PRC has "normalized" and adjusted the estimate (which included costs which would not be incurred by the contractor, e.g., conversion costs) to a cost figure which it regards as what FEA should have known to be a reasonable estimate for the contract at the time the contract was awarded. PRC's "normalized" version of the Government estimate is $9,784,000 (excluding fees). PRC concludes its cost analysis shows that OSI's proposal was either not cost realistic or was based upon furnishing shared facilities in violation of the RFP requirements, since it is more than $2 million below the Government estimate and more than $3 million below PRC's cost estimate (excluding fees).

The cost analysis performed by FEA consisted of a comparison of the OSI and the PRC Alternative A and Alternative B proposals to one another based on the following general factors:

Materials
Direct Labor
Labor Overhead
Travel/Per Diem
Other Direct Costs
General and Administrative Expenses
Fee
Total Estimated Costs

(At the request of OSI and FEA, we will not disclose the precise numbers in this comparison.) Contrary to PRC's assertion, the cost of the terminals was "normalized" for this comparison and all cost proposals in the competitive range were evaluated based on the same terminal "phase in" time. In addition, although all components of the direct labor costs were compared on an item-by-item basis, no corresponding comparison was made with respect to the components of the other general cost categories.

FEA technical and cost evaluators site-surveyed the PRC and OSI facilities. This included independent corroboration of the offerors' capabilities and cost back-up by reviewing (among other things) the latest audited financial statements, business backlog, security, materials and equipment, and the quotations and invoices supporting the cost proposals received. The detail in the cost proposals was reviewed and evaluated to determine whether the proposed costs were fair and reasonable in light of the RFP requirements, and notice was taken of circumstances which allowed OSI to offer such low costs.

FEA has indicated that the final updated cost comparison estimate for dedicated services, which was included in Attachment 14 of FEA's report, and on which PRC apparently based its cost analysis, was prepared after the award to OSI. FEA states that this cost estimate was based upon a rough handwritten estimate prepared in July 1974 prior to the RFP's issuance as part of a cost comparison study justifying this procurement. We have broken down and extended this cost estimate (which was based on monthly costs) to reflect the total estimated costs for each phase of the project:

Item	Phase I	Phase II
Main Frame	$648,000	$2,460,000
Terminals	246,000	492,000
Telecommunications	150,000	300,000
Personnel	840,000	1,680,000
Site	120,000	240,000
Software	150,000	300,000
Profit	210,000	600,000
	$2,364,000	$6,072,000

The total project estimate ($8,436,000) seems to include under profit approximately the total base fee and award fee pool included in OSI's contract. We understand, however, that it omits several costs which would be incurred under the contract as awarded (e.g., micrographics). Nevertheless, this estimate was apparently the only one FEA had prepared prior to the closing date for receipt of proposals, and it was evidently used as a point of reference for the cost evaluation. FEA states that the cost evaluators kept the original FEA "cost figures" in mind when they reviewed the cost proposals, but they did not regard these figures as refuting the credibility of any of the cost proposals reviewed. FEA has noted that in order to foster the broadest possible competition, wide latitude in hardware/software utilization was given to offerors by the RFP, which accounts for the great variances in the costs proposed by the various offerors.

Finally, with regard to OSI's cost proposal, the Environmental Protection Agency (EPA), with whom OSI has a similar contract, was contacted to ascertain whether OSI has had any problems with EPA from an operational or accounting standpoint. EPA officials indicated that EPA had not experienced any unusual problems. From its review, FEA concluded that OSI's estimated costs were not only low but also were reasonable and realistic and did not constitute a "buy-in."

Our Office has recognized that a low cost estimate proposed by an offeror should not be accepted at face value and that under FPR § 1-3.807-2 (1964 ed., Amend. 103, March 1972), an agency should make an independent cost projection of the estimated costs reflected in the cost proposal. See *Raytheon Company*, 54 Comp. Gen. 169 (1974); *Signatron, Inc.*, 54 Comp. Gen. 530 (1974); *Aracor-Jitco, Inc.*, 54 Comp. Gen. 896 (1975). However, FPR § 1-3.807-2 specifically recognizes that the scope of such an analysis "is dependent on the facts surrounding the particular procurement and pricing situation" and on "the amount of the proposed contract and the cost and time needed to accumulate the necessary data for analysis." The cost analysis regulations do not require an item-by-item comparison in every case. The award of cost-reimbursement contracts requires procurement personnel to exercise informed judgments as to whether cost proposals are realistic in light of the proposed costs and the technical approach. Such judgments must properly be left to the administrative discretion of the procuring agency, since it is in the best position to assess the "realism" of the proposed estimated costs and technical approaches, and must bear the major criticism for any difficulties or expenses experienced by reason of a defective analysis. 50 Comp. Gen. 390, 410 (1970); B-176311 (1), (2) and (3), October 26, 1973; *ILC Dover*, B-182104, November 29, 1974.

On the basis of our review of the record, we are unable to completely rationalize or explain the reasons for the substantial difference between PRC's and OSI's proposed estimated costs for similar equipment configurations, although we may speculate that FEA thought that PRC's estimated costs were too high. However, in view of the foregoing, we are unable to conclude that FEA's determination that OSI's estimated costs were realistic has no reasonable basis. 50 Comp. Gen. 390; 51 *id.* 621 (1972); 52 *id.* 738 (1973); *ILC Dover*, *supra*; *Ohio State University*, *supra*. Contrast *Vinnell Corporation*, B-180557, October 8, 1974. As noted above, FEA substantially relied on the fact that OSI was performing a very similar contract for EPA, whereas PRC did not have as similar experience. Also, PRC has not shown that its "cost analysis" of OSI's cost proposal (which PRC prepared without the benefit of OSI's cost proposal) is any more accurate than the FEA's appraisal of OSI's proposal, especially considering PRC's

many assumptions and adjustments to what it mistakenly regarded as the Government estimate and considering that PRC could well be unaware of competitive advantages which OSI may have in purchasing or leasing the equipment necessary for performing the contract or in allocating its personnel and facilities. In addition, OSI's proposed estimated costs for the contract ($6,981,769, less fees) does not appear to be out of line with the actual Government estimate ($7,626,000, less profit and some of the contract requirements), especially considering the wide array of ADP configurations that could be proposed under the RFP.

PRC contends that OSI is "buying-in." One of the purposes of a preaward cost analysis is to insure that such a "buy-in" does not occur. *See* 50 Comp. Gen. 788 (1971). As indicated above, PRC has presented no probative evidence to show that FEA's conclusion as to the realism of OSI's cost proposal had no reasonable basis.

A CPAF contract was awarded in part to control cost overruns and to prevent the possibility of a "buy-in." The amount OSI is to be awarded from the award fee pool is based in substantial part on OSI's ability to prevent cost overruns and perform within its estimated costs.

In addition, General Provision No. 19b requires a contractor to give notice to the Government if it has reason to believe a cost overrun will occur. It also provides that the Government is not obligated to reimburse the contractor for costs in excess of the estimated costs until the Government notifies the contractor to proceed on the basis of a revised estimate.

Moreover, OSI has been required to certify that to the best of its knowledge and belief, the cost or pricing data contained in its cost proposal was accurate, complete and current. *See* FPR § 1-3.807-3 (1964 ed.). If this certified cost or pricing data is subsequently found to have been inaccurate, incomplete or noncurrent as of the effective date of OSI's certificate, the Government is entitled to an adjustment of the negotiated price (including fees) to exclude any significant sums by which the price was increased because of the defective data. *See* clause 27 of the contract's general provisions and FPR § 1-3.807-5 (1964 ed.).

In any case, we have recognized that while the Government does not favor the practice of "buying-in," this practice is not illegal. *See* 50 Comp. Gen. 788.

We have some doubt as to the weight given cost in the award selection. The only RFP references to the importance of cost in FEA's evaluation scheme are (1) "boilerplate" language on page 2 of the introductory statement to the RFP:

> Awards will be made to responsible offerors, whose offers, conforming to this Request for Proposals, are most advantageous to the Government considering evaluation criteria, cost, and other factors.

and (2) section II–F of the RFP, which stated in pertinent part:

> * * * cost is an important factor in selection of the offeror for contract award.

In addition, detailed cost proposals (separate from technical proposals) were required to be submitted in accordance with the instructions in Exhibit D incorporated into the RFP.

We may speculate that the quoted language means that the cost evaluation had essentially a "veto" effect where an offeror showed costs which were either unreasonably high or unrealistically low, or cost may have been the deciding factor where the proposals were ranked technically equal. However, the *relative* importance attached to cost in the award selection is not clear from the RFP, nor even from FEA's award selection deliberation. We believe the RFP was defective for failing to apprise offerors of the relative importance of cost vis-a-vis the other specified evaluation factors. *See* 52 Comp. Gen. 161 (1972); *id.* 738; *ILC Dover, supra; Signatron, Inc., supra.* Intelligent competition requires that offerors be advised of all evaluation factors and the relative importance of those factors. *See* 49 Comp. Gen. 229 (1969); 50 *id.* 59; *id.* 246 (1970); 51 *id.* 153 (1971); *BDM Services Company*, B–180245, May 9, 1974; *Hercules Incorporated*, B–180831, October 8, 1974. Where offerors are not apprised of the relative importance of cost and technical evaluation factors, there exists the possibility of the submission of proposals which unwittingly emphasized factors of little importance or deemphasized factors of critical importance to the selection decision. As we stated in *Signatron, Inc., supra:*

> * * * We believe that each offeror has a right to know whether the procurement is intended to achieve a minimum standard at the lowest cost or whether cost is secondary to quality. Competition is not served if offerors are not given any idea of the relative values of technical excellence and price. * * *

Although the RFP was defective for failing to disclose the relative weight to be accorded estimated costs, we find no prejudice inuring to the other competitive offeror and do not believe the award should be disturbed for this defect. This is so because, irrespective of the weight given cost, OSI's proposal, as evaluated, received the high score on the technical evaluation and offered the lowest estimated costs as evaluated by FEA. *See* 52 Comp. Gen. 161; *BDM Services Company, Inc., supra.* In addition, the alternative proposals of PRC completely responded to the cost and technical considerations that formed the bases for the competition. Therefore, whatever the relative importance of cost as applied by FEA, the completeness of the PRC proposals preclude the conclusion that the skeletal RFP coverage on the importance of cost misled PRC into submitting proposals to its competitive detriment.

PRC also refers to cost allocation problems which would occur where OSI has shared facilities. PRC contends that the Government could well overpay OSI under such circumstances since PRC believes that it is unlikely that OSI would properly allocate its costs for the shared

items between FEA and the other users of the facilities, such as EPA.

General Provision 19a of the contract states that costs will be paid in accordance with Subpart 1-15.2 of the FPR, which specifically provides that costs may only be paid if reasonable and allocable to the contract and sets out detailed rules for determining the validity of such costs. These rules, if properly applied, protect the Government from overpayments where facilities have been shared. In any case, this is a matter of contract administration not appropriate for consideration in a bid protest.

PRC also refers to certain contract modifications and to certain instances where it believes OSI has failed to comply with the contract requirements. PRC states this shows that FEA is meeting the "buy-in" and cost overrun problems by allowing reductions in service without equitable reductions in price. However, PRC has presented no probative evidence to support its contention, and this is also a matter of contract administration.

CONFLICT OF INTEREST

The protesters have contended that Mr. Clint Murchison, Jr., Chairman of OSI's Board of Directors, holds interests in the oil and gas industry and that this should have disqualified OSI from the award because the contractor must process sensitive proprietary data necessary for regulating the petroleum industry and for effectively combating the "energy crisis."

FEA has reported that it has been informed that Mr. Murchison has some interests in the oil and gas industry. However, in the absence of a condition in the RFP which limited proposals only to those firms (including officers of the firms), which have no connection with the oil or gas industry, together with a clearly supportable reason for so limiting competition, we are unable to sustain the protests on this point. Moreover, we are unaware of any legal prohibition in any statute or regulation, which would in any way have limited OSI's full participation in this procurement. Under somewhat similar circumstances, we have held that a firm should not be excluded from competition simply on the basis of a theoretical or potential conflict of interest See *Logicon, Inc.*, B-181616, November 8, 1974; *Exotech Systems, Inc.* 54 Comp. Gen. 421 (1974); *VAST, Inc.*, B-182844, January 31, 1975.

Although there are some problems with the security of the ADP system which FEA accepted for award (detailed below), we do not believe that the sensitive proprietary data stored in the ADP system has been rendered any less secure by virtue of Mr. Murchison's relationship with OSI. Not all OSI personnel are authorized access to the FEA ADP facility; only those personnel with a "bonafide requirement

for access" are permitted entry. On page 2–4 of the FEA User's Guide it is stated:

> OSI personnel assigned to perform on this contract, including couriers, have obtained or will be able to obtain the appropriate secret-level security clearances, except when access can be precluded to sensitive or classified information under escort provisions. Couriers will have acquired clearances prior to employment under the proposed contract.

In addition, FEA security procedures, currently in use in the administration of the contract, *specifically* provide that neither a Department of Defense clearance nor *company position* automatically authorizes a person access to the FEA facility. Such access may only be granted with the authorization of the FEA Project Manager based on a "bona-fide requirement for access." While there is provision for escorting nonauthorized personnel in the facility, no personnel for whom an escort is required can be admitted to the FEA facility during periods when classified work is in progress.

Finally, there is no evidence that Mr. Murchison's relationship in any way affected FEA's selection of OSI for award.

COMPLIANCE OF OSI's PROPOSAL WITH RFP REQUIREMENTS

Both OLS and PRC have protested that OSI's proposal failed to meet various RFP requirements set out below. The drafting of specifications to meet the Government's minimum needs, as well as the determination of whether items offered meet the specifications, is properly the function of the procuring agency. Consequently, we will only question an agency's determination in this regard if shown not to have a reasonable basis. *See* 49 Comp. Gen. 195 (1969); 52 *id.* 393 (1972); B–179320, December 17, 1973.

Data Base Management System

OLS has protested that the DBMS proposed by OSI was not functionally equivalent to OLS's OLIVER DBMS, as was required by section II–D–13 of the RFP. In addition, OLS notes that shortly after award FEA agreed that a different DBMS would better meet its needs. OLS contends this change so soon after award demonstrates that OSI's initially offered DBMS could not meet the RFP requirements. OLS suggests that this precipitate decision to change DBMS's may indicate FEA's improper favoring of OSI's proposal.

In response to the RFP DBMS requirements, OSI proposed to use IBM's Information Management System (IMS) in conjunction with OSI's proprietary On-Line Executive (OLE), an interactive interface developed for IMS. The SEB found that OSI's proposed IMS/OLE package satisfied the RFP DBMS requirements. However, shortly

after award, FEA reports that after studying and discussing the specific contract needs for a DBMS, OSI by letters dated December 23, 1974, and January 10, 1975, suggested that another DBMS, i.e., INQUIRE, might be more appropriate. Although FEA has tentatively approved the change from IMS/OLE after examining INQUIRE's capabilities with relation to other DBMS's abilities, no formal modification has been issued.

Section II–D–13 states:

> A data base management language for creating, updating and retrieving from a data base in both interactive and batch without conventional programming must be provided. This language must be useable by non-data processing personnel with a minimum amount of training. Packages equivalent in scope and concept to On-Line Systems Oliver are *suggested.* [Italic supplied.]

This requirement does not, as is argued by OLS, require functional equivalency to OLS's OLIVER, since packages equivalent in scope and concept to OLIVER are merely "suggested."

Our review discloses that OLIVER, IMS/OLE, and INQUIRE, all comply with the RFP requirements. The only specified salient features for the DBMS are:

1. The capability for creating, updating and retrieving from a data base in both interactive and batch modes without conventional programming.

2. Useability by non-data processing personnel with a minimum amount of training.

It is clear that each complies with the basic salient characteristics. In addition, although there are certainly differences among their capabilities, we find that IMS/OLE and INQUIRE are in the same "ballpark" as OLIVER, which is all that is required by the RFP.

While we believe that FEA should have more specifically defined its actual DBMS needs in the RFP, no offeror was prejudiced by the RFP's lack of specificity, since all DBMS's offered complied with the RFP.

Benchmark and Acceptance Testing

OLS also protests that the RFP benchmark and acceptance test requirements were improperly waived for OSI, in particular with regard to OSI's proposed DBMS. However, there were no benchmark test *requirements* in the RFP, although section II–C–1 stated in pertinent part:

> FEA reserves the right to observe an operational demonstration of the proposed hardware and software prior to award.

FEA also indicated during the Bidders Conference on September 12, 1974, that it had developed an acceptance test package which it would use only if it could not make a direct judgment on whether part of the proposed system was functionally equivalent to the RFP re-

quirements. FEA states that the SEB, in its technical judgment, had no doubt that all items proposed by OSI were functionally equivalent to the RFP requirements, so that no acceptance tests were conducted on OSI's system. OLS has presented no probative evidence which would cause us to doubt the reasonableness of FEA's actions in this regard.

Manpower Requirements

PRC has also protested that the manpower proposed by OSI was insufficient to satisfy the RFP requirements. In support of its contentions, PRC refers to its Alternative B proposal which proposed approximately 40 percent more manpower than that proposed by OSI.

The RFP did not have any specific manpower requirements but rather only stated:

> a. The contractor shall provide the necessary personnel to completely operate the computing facility including systems software and hardware maintenance and programmer assistance including systems programmers, analysts and computer service engineers, on a seven-day week basis for the duration of the contract. (RFP section II-B-2.a) * * *
>
> b. The contractor shall provide sufficient numbers of operating personnel to operate the computer facility at maximum processing capability. (RFP section II-B-3.b)

FEA states that since the amount of manpower needed to operate a given facility is a function of the particular hardware, software and management techniques proposed by an offeror, it would have been inappropriate to specify particular manpower levels. In response to the RFP, OSI specifically indicated that it could meet the RFP requirements and it proposed a detailed management plan to support its assertions in this regard.

In its cost analysis, FEA made a detailed comparison between the direct labor and the direct labor costs proposed by each of the offerors in the competitive range resulting in the following conclusions.

> *PRC*—Estimated manhours appear to be high based on operation of equipments which differ from those used by OSI. The technical operations requirement of equipments will have to be reviewed by GTR to determine technical feasibility in compliance with proposal requirements.
>
> *OSI*—Estimated manhours appear to be tight, however, it is feasible to assume that similar program experience on current contracts such as for EPA and others that this service can be provided within proposed manhour range. * * *
>
> *PRC*—Does not provide calendar spread such as OSI, which leaves one to wonder about assembly of numbers in proposal plan as to whether calculations were made without visibility on paper for overall perspective requirements.
>
> *OSI*—Has provided calendar visibility and appears to be submitting their best competitive bid proposal and have considered their existing EPA contract experience which is similar requirements. * * *
>
> *PRC* bid has approximately 40% more man-hours than OSI to operate equipment and provide services. PRC hours are based on estimating from previous experiences in the industry.
>
> *OSI* has based their estimates on actual experience on their EPA contract which is for the same type of services.

FEA informed PRC during negotiations that its manpower requirements seemed high, but PRC did not avail itself of the oppor-

tunity to revise its proposal. In deciding that OSI's proposed manpower was sufficient, FEA apparently largely relied on OSI's actual experiences under its similar EPA facilities management contract. FEA also apparently discussed this matter with EPA representatives.

FEA's belief that OSI's proposed manpower was reasonable is said to be corroborated by its experience with OSI under the contract. In view of the foregoing and based on our review of the record, we conclude that FEA's judgment regarding OSI's proposed manpower was reasonable.

Dedicated Facilities

Section I–A(6) of the RFP requires:

> Dedication of the entire facility, including personnel, hardware, and physical plant to exclusive FEA processing 24 hours per day, seven days per week, * * *

Also, section II–A–3 of the RFP states in pertinent part:

> * * * The contractor must reserve all hardware, software, and other facilities for the exclusive dedicated use by FEA, 24 hours per day, seven days a week.

One of the major reasons for these "dedication" requirements was to protect the security of the data which FEA was to store on this ADP system.

PRC claims that its technical and cost analysis of OSI's successful proposal clearly reveals OSI's intention to use currently available equipment—now being used for providing similar services to EPA under a facilities management contract—which is less powerful than that required by the RFP. Clearly this would violate the RFP requirements.

However, in response to the RFP, OSI unequivocably stated in its proposal:

> OSI is also aware that the entire facility, including personnel, hardware, and physical plant, will be dedicated to the exclusive use of the FEA, 24 hours per day, seven days per week, * * *

Although OSI specified in its proposal that its facility for the dedicated services for FEA would be at the same Bethesda, Maryland, address at which the EPA contract was being performed, OSI dedicated all of the space, hardware and software (see discussion of front-end processors below) where the FEA contract was to be performed exclusively to the use of FEA. The fact that the FEA facility and EPA facility were located in the same building does not mean the FEA facility was not dedicated to FEA. A FEA representative specifically indicated during the Bidders Conference on September 12, 1974:

> * * * I guess I could envision an existing concern possibly building a wall between whatever they have now and what they are proposing to have; and if they had the adequate security provisions of a secure site, as specified in the DOD Manual, so be it. (See page 6 of the Minutes of the Bidders Conference.)

Indeed, the FEA site survey of these facilities indicated that the facilities were "dedicated" exclusively to FEA and met the RFP physical

security requirements. In any case, shortly after award was made, OSI decided to move its dedicated FEA facility to a new building in Rockville, Maryland.

Moreover, OSI did not propose sharing CPU's with the EPA project or using "less powerful" equipment than that required by the RFP, nor is there any indication that this was OSI's actual intent. Our review indicates that all hardware (see discussion of front-end processors below) was dedicated exclusively to FEA and fully meets the RFP requirements.

Front-End Communications Processors

The RFP required one front-end communications processor for Phase I and two or more processors for Phase II (RFP section II-C-8). The front-end communications processors contemplated by the RFP are special purpose single application stored program computers which monitor the state of the communications lines, transmit and receive characters, and assemble and disassemble messages transmitted to and from the ADP facility CPU over the telecommunications network. In some networks (*not* the one used by FEA), the front-end communications processors may also perform a message switching function as well, routing messages received to other communications processors or to other CPU's.

OSI indicated in its proposal that it intended to use two Comten 3670 front-end processors, which were currently being used on the EPA project, for performing Phase I of the FEA contract, and that it would expand the capacity of both Comten 3670's and dedicate a portion of each to support the FEA telecommunications network. For Phase II, OSI indicated that a third Comten 3670 would be provided.

PRC has protested that OSI's proposed shared front-end processors violated the RFP provisions requiring that all facilities, including hardware, be dedicated exclusively for FEA's use, and that the award was improper in that a mandatory RFP requirement had been waived for OSI without PRC receiving a similar opportunity.

The SEB evaluation minutes do not indicate that the SEB noticed that OSI was proposing shared front-end processors. However, FEA states that during negotiations, when it became aware of OSI's intent, OSI was informed of the need to provide one front-end processor for exclusive use by FEA for Phase I and at least two front-end processors exclusively for use by FEA for Phase II. FEA further indicates that OSI agreed to provide a single Comten 3670 for Phase I for use by FEA on a non-shared basis at no change in cost.

PRC has disputed FEA's position that this matter was taken care of during negotiations. However, we have found no probative evidence

that this was not the case, even though FEA has been unable to furnish any memorialization of these discussions to our Office.

In any case, after consulting with technical experts, we agree with FEA's lately taken position that OSI's proposed front-end processor configuration substantially complied with the RFP "dedication" and security requirements. We note that FEA repeatedly stressed during the September 12, 1974, Bidders Conference, attended by all interested potential offerors, that "functionally equivalent" items or services shown to meet FEA's needs as stated in the RFP were acceptable, even though not in accordance with the strict language of a particular RFP requirement. Consequently, even though, strictly speaking, the Comten 3670's were not dedicated exclusively to FEA, the "shared" Comten 3670's with software separation substantially complied with the RFP "dedication" criteria and complied with the RFP's security requirements.

PRC has disputed this position, stating that software, i.e., a program operating in the processor which sorts out messages, does not meet the "dedication" requirements, nor does it protect against unauthorized access to the computer. PRC goes on to state that if software is adequate protection and satisfies the "dedication" criteria, then the logical extension would be to allow many users to share the main CPU.

We are unable to agree with PRC's arguments. Software can, in fact, provide adequate separation/protection in a system which is used *only* for a single application, such as message processing, as are the Comten 3670's here. Indeed, if the main CPU were being used for a single application only, then software could provide separation/protection among users with dissimilar authority to access data. Such controls can be effective in single application situations because the type of access and control a user can extend into the computer in such situations is defined by the *application* (software) rather than the computer and consequently can be contained. This kind of separation/protection cannot ordinarily be effected where general user programming capability is provided for in the computer system. With this software separation, a non-FEA user ordinarily cannot get access (accidentally or intentionally) into FEA's CPU by virtue of the front-end processor being "shared." This "shared" use in no way compromises the security of the ADP system and satisfies the RFP's security requirements.

Since it appears that the "shared" front-end processor "problem" was settled during negotiations with OSI (it is clear that OSI did use in Phase I an "unshared" Comten 3670 dedicated exclusively to FEA) and since we believe that OSI's proposed front-end processor configuration substantially complied with the RFP requirements in

any case, we cannot find that the RFP's mandatory requirements for "dedicated" front-end processors have been waived for OSI.

PRC has also contended that the line-handling capacity of the Comten 3670's proposed by OSI for Phase II of the project is insufficient to service the full Phase II complement of 500 terminals, as is required by the RFP. However, as was apparently clarified during negotiations, OSI proposed two Comten 3670's, each of which was capable of supporting the connection of up to 384 lines, which is clearly sufficient to service the full Phase II requirement of 500 terminals. In addition, PRC itself also proposed two Comten 3670's and specifically asserted in its proposal that they were fully capable of handling the total communications load. We also believe the 500 terminals were within the capability of the three "shared" Comten 3670's originally proposed by OSI.

Telecommunications Network

The RFP required offerors to operate, support and maintain a complete operational data communications network, including transmission lines, modems and remote terminals. In response to this requirement, OSI stated:

> The proposed network is an integrated structure of equipment and software that takes maximum advantage of an already existing network serving ten regional office cities.

PRC protests that OSI's proposed sharing of a telecommunications network violates the above-quoted RFP requirements for "dedicated" facilities. PRC also contends that such a shared network raises serious data security problems in that if someone can use the network he can also have access to the computer. PRC also claims that a "dial-up" telephone network is error prone and sensitive data could easily be routed to a wrong location by malfunctions of telephone company equipment. PRC further claims that it is technically infeasible to share a communications network yet not share a communications processor, i.e., where a network is shared by several classes of users (e.g., FEA, EPA and others) *only* a communications processor can sort out and route messages to the proper terminals and the proper computer. As indicated above, it is PRC's contention that shared processors are violative of the RFP's "dedication" requirements.

The RFP required that all facilities be reserved "for the exclusive dedicated use by FEA" (RFP section II–A–3). On the other hand, section II–E–1 of the RFP, which sets forth the specific requirements and features of the telecommunications network stated in pertinent part:

> * * * For the ten (10) Regional Offices, the Type VI proposed terminal devices are to interface the system via dedicated (i.e., not dial-up) telecommunications facilities.

We believe that this latter requirement clearly indicates that the term "dedicated" means "not dial-up" in the case of the telecommunications facilities. This necessarily recognizes that "shared" telecommunications facilities would be acceptable. Also, section I–A of the RFP specifically indicated that a shared telecommunications network was contemplated in requiring:

* * * (2) a national communications network of dedicated and dial-up lines [which must necessarily be shared] * * *

While the general language requiring dedication of facilities in section II–A–3 of the RFP standing alone may well be interpreted to mean that the telecommunications network could not be shared, the intent of the RFP should not be determined by the consideration of an isolated section or provision; rather the RFP must be considered in its entirety and each provision must be construed in its relationship to the other provisions and in light of the general purposes intended to be accomplished. *See* 39 Comp. Gen. 17, 19 (1959); 52 *id.* 278 (1972). A reading of the RFP as a whole clearly indicates that a shared telecommunications network would be acceptable, so long as the Type VI terminals in the Regional Offices interfaced the ADP system via "dedicated" (i.e. not dial-up) lines.

In any case, at the Bidders Conference, which, as already noted, was attended by representatives of OSI, PRC and OLS, FEA clearly indicated that a shared telecommunications network would be acceptable under the RFP:

MR. SCHNELLWATERS Alan Schnellwater, Remote Computer Corporation. Along these same lines, would that mean there is not possibility of sharing data communications networks? Or, to put it another way, can a data communications network be shared?

MR. LINDEN [FEA representative]: Okay, I think we have indicated in the RFP that there are certain lines that would be required to be dedicated, i.e., that the ten 4800 BAUD to the regions be dedicated. I mean, I would think that they could be made a part of another network, an existing network. (page 7, Minutes of the Bidders Conference)

Also, PRC claims that where a shared network exists, anyone who can use the network has access to the computer. PRC claims that this raises severe data security problems, especially since PRC believes the adequacy of OSI's software security system to prevent such access is questionable. While we agree that a person using the network (i.e., in the case of a "dial-up" line, anyone who knows the phone number connected to the FEA facility's computer) can reach the computer, he must be able to provide a valid user identification code, a valid project identification code, a valid terminal identification code, *and* a valid user password before he can gain *access* to use the FEA ADP system. See RFP section II–B–7.a.1. OSI's proposal appears to fully comply with these "external" protection requirements.

It also has been alleged by PRC that "dial-up" communications are susceptible to misrouting through malfunctions of telephone company

equipment, and that such misroutes raise serious data security problems. While such misroutes are possible, we cannot agree that this possibility poses any serious security problems. Only through the improbable set of circumstances where the data being transmitted over the "dial-up" communications are misrouted to an active circuit connected to another terminal will the data be exposed. In addition, where the misrouting occurs while attempting to make the initial connection, and the user, by some remote chance, is routed to another computer, access to that computer is not possible without the proper log-on sequence including passwords. Consequently, we believe the possibility of data being transmitted over "dial-up" communications being prejudicially exposed through misrouting is *de minimus*.

It is also possible that "dial-up" lines may be wiretapped; however, this possibility would exist even where dedicated communications are utilized unless the communications have been encrypted, which was clearly not required by the RFP. In any case, we note that PRC itself also proposed some "dial-up" lines in its communications network in response to the RFP.

We also cannot agree with PRC's assertion that there is no way to connect FEA users to the FEA computer where a shared communications network exists without going through a shared front-end communications processor. OSI was able to do this by providing separate telephone numbers for the "WATS-in" and local "dial-up" lines to be terminated in a rotary or circuit exclusively used by FEA. OSI proposed that its "dedicated" (i.e., not "dial-up") lines be routed either directly to the "non-shared" front-end processor or through a multiplexor over high-speed 9600 BAUD lines through another multiplexor to the front-end processor (which, as apparently made clear during negotiations, is connected solely to FEA's CPU). The 9600 BAUD lines routed through the multiplexors may be "shared" (yet be dedicated since they are not "dial-up") with other users since the channels in these lines are separated in such a manner that there is only the remotest chance of routing data to the wrong user of the line, as is explained below.

The multiplexor mentioned in OSI's configuration of its "dedicated" communications is a hard-wired, nonprogrammed electronic device that interleaves characters from a number of low-speed digital communications lines in a predetermined order onto a single high-speed line for efficient transmission to a distant point. A receiving multiplexor separates the interleaved characters from the single high-speed line and distributes them in a predetermined fashion onto low-speed lines corresponding to the order in which the input lines at the transmitting end are connected. The unit of interleaving in the multiplexor, which is commonly called a channel, is uniquely associated with a

line input position of the multiplexor. Channel assignments are made by running a wire from the terminal, which is transmitting the data, to a particular input position on the multiplexor.

Terminal users have no way of affecting either the channel assignment (which is controlled by the wiring) or the interleaving of the characters (which is predetermined by the timing logic of the multiplexor). Therefore, even though a single "dedicated" high-speed line is "shared" by many channels, a security problem could arise from such "sharing" only where the multiplexor interleaving timing logic failed in such a way as to change the order of interleaving. Multiplexors typically have special logic to insure that such timing failures are detected and in some cases automatically corrected. In any case, the disclosure of sensitive data in a prejudicial manner due to multiplexor failure is remote.

Therefore, it was possible (and indeed OSI proposed this ability in its proposal, as modified by the negotiations) not to share the Comten 3670 front-end processors, yet "share" the telecommunications network. In any case, as we set out in detail above, it would not be fatally deficient to offer shared front-end processors under the RFP, inasmuch as the shared processors, with appropriate software separation, satisfy the RFP "dedication" and security requirements.

From our review of OSI's proposal, we conclude that it met all of the RFP communications network requirements, including the requirements that the communications facilities used for connection of all of the Type VI terminals in the ten Regional Offices to the FEA facility ADP system be "dedicated."

Security Requirements

We have completely reviewed OSI's compliance with the RFP's security requirements—even though the protesters have only alluded to OSI's lack of security in broad general terms—in view of the sensitive data to be processed by this system. Based upon our review, in consultation with technical experts, we conclude that OSI's proposal failed to comply with certain mandatory RFP security requirements.

The RFP contained both "external" and "internal" security requirements. The "external" security requirements are intended to protect the ADP system and its programs and data from unauthorized access, manipulation or destruction by anyone not authorized by FEA to use the system, and to provide physical security for the computer and the data therein. These requirements include limitation of physical access to the ADP facility (RFP section II–B–3.i) and access to the system only by use of four validated identification codes (RFP section II–B–7.a.3, discussed above). The RFP also states:

The installation must be secure in the sense that persons, other than FEA personnel or their authorized representatives, would be unable to access, read, copy or destroy material, data, or specialized software handled or contained in the proposed system. (RFP section II–B–3–i.)

In addition to these "external" security requirements, the RFP specified certain "internal" (to the ADP system) security control requirements, i.e., protection of data on the system from users, who are authorized to use the system but who are not authorized to have access to some of the data on the system. In this regard, FEA clearly indicated in the RFP and has subsequently stated that all authorized users of the dedicated FEA ADP system are not authorized access to all data being processed on the system. This concept of differentiated levels of access to the data on the system among authorized users of the system is clearly recognized in the RFP requirements that there be three classes of file restrictions (public, selected private and private) (RFP section II–B–3.i.1); that there be two levels of file restrictions (read only, unrestricted) (RFP section II–B–3.i.2); and that file protection through password and account name/number be provided (RFP section II–D–10).

The RFP also states in pertinent part:

g. *Protection. The system shall provide for protection of user programs, the operating system, and the areas in which their code resides, from read or write access by other users.* This includes protection from writing and reading by unauthorized programs and any other interference caused by software or hardware—for example, hardware or software priority conflicts, errors, and any other capabilities that the contractor feels are necessary for the efficient and effective protection of the system. Instructions such as I/O, interrupt control, sensing, halts, setting protection boundaries and unused machine codes shall not be directly executable by the application users. [RFP section II–A–4.g.]

* * * * * * *

Main memory and/or storage protection shall be assured in areas where authorization and validation operations are being conducted * * *. [Italic supplied.] (RFP section II–B–3.i.4.)

Section II–A–4.g makes it clear that these last quoted requirements are "internal" security requirements by specifying that the requirements are for protection from access "*by other users*" to the user programs, the operating system and the areas where users' codes reside, all of which at times reside in the computer main memory. The context of these requirements clearly indicates that the term "users" refers to persons authorized to use the computer system, and, therefore, relates to "internal" security.

In response to the RFP security requirements, OSI proposed in pertinent part:

OSI has recognized the need to prevent users from accessing other users' data or sensitive system data. As a result of this need, OSI has developed a means to limit each user's sphere of data accessibility to his/her own data sets [files] via account-number assignments. At OSI, users are assigned a four-character account number, a three-character initial set, a terminal identification code, and a three-character keyword.

* * * * * * *

Additionally, OS and the IBM 370/168 incorporate, via system architecture and system software, protection for user programs and system software residing in memory. User program execution is always under the control of system software and hardware, and the execution of any privileged operations (e.g., physical I/O, halts, and setting protect keys) are denied to user programs.

* * * * * * *

As a result of past experience, OSI proposes the implementation of password protection for highly sensitive information, plus file protection via account numbers to discourage misuse of another user's data and to ensure maximum security.

The protection of one multi-programmed task from the inadvertent *storage* of data into another task's region of [main] memory is provided through a series of "storage protect keys" and is a function of the IBM 370/168 hardware and OS software. Each task, including the operating system (OS, HASP, and TSO), is assigned a distinct storage protection key for each 2,048 bytes it occupies. The hardware intercepts any task which attempts to *store* data into another task's region and passes this information on to the operating system. At this point, the operating system abnormally terminates the task with a completion code which indicates to the user that his/her program attempted to *store* data outside its own boundaries. Depending on the JCL used to run the program, a dump of the user's region and the address of the instruction which attempted the illegal *store* operation will be provided to assist the user to resolve the problem * * *. [Italic supplied.]

The system software and hardware configuration proposed by OSI under the RFP was the IBM's OS/MVT operating system used on the IBM 370/168 CPU.

The hardware/operating system configuration proposed by OSI did not (and indeed could not) meet the mandatory RFP security requirements set out above, in that the OS/MVT operating system on the IBM 370/168 CPU cannot protect against *read* access to the main memory of the CPU. (OS/MVT clearly can protect against a user's write access, i.e., storing, altering, or erasing data in other users' regions in the main memory, including the operating system.) The RFP makes it clear that this requirement is material. The requirement for protection from read access is contained in the first sentence of the protection requirements for the ADP system.

This protection against read access is critical because the user programs (when being executed), the operating system (always), and the areas in which user's codes (when being validated) reside are in the main memory. Without this protection, a user of the ADP system can read any data *anywhere* in the main memory, including the operating system. (Even though he could not read the data directly from the files without a valid password.) A user also can read data from any other user's "region" in the main memory containing a program in execution. In addition, a thoughtful user would be able to identify other users' passwords and identifiers, since these identifiers have to be read into the main memory in order to test the validity of a user's log-on attempt. This would mean that a user utilizing another user's passwords can masquerade as the other user and obtain access to the other user's files (which are protected by the passwords).

FEA has asserted that the system's provisions for "password" protection against reading or writing in *files*, storage protection of the programs and data in the main memory, and the fact that privileged instructions are not available to all users sufficiently comply with the RFP requirements. We disagree. The clear language of these requirements indicates that protection of the main memory from *read* access is required. FEA has not claimed that the system has such ability. Read protection of the *files* (which are not in the main memory) does not comply with this requirement. Indeed, if a user finds out other users' passwords by perusing the main memory at the proper time and the proper place, the files protected by these passwords are no longer protected.

This "weakness" in the OS/MVT/IBM 370/168 CPU configuration is well recognized in the computer industry. Indeed, in the PRC Alternative B proposal, PRC, who also offered the OS/MVT operating system, specifically stated:

> OS/MVT satisfies all of the FEA requirements *except read protection* * * *. [Italic supplied.]

PRC went on to state that reading across user boundaries would be difficult, however, and require a detailed knowledge of the IBM system, since PRC states that a program seldom resides in the same location twice.

We have ascertained that while a program may not reside in the same place twice, it presents no real barrier to the individual who wishes to find other users' passwords and other identifying information. The individual can do this by writing a program to search the entire main memory for any and all instances of distinguishable data patterns that have the form of the passwords or other identifiers being sought (which are readily distinguishable from computer instructions, numeric data and other information found in a computer's main memory). He can then have the results of his search displayed to him. Further, we have ascertained that the region of the main memory used by the operating system to validate user access codes generally does not change over extended periods of time, and once identified can be the subject of an intensive localized search program. Finally, it is noted that such unauthorized reading of the main memory will *not* be detected by the operating system.

OSI's response to these RFP requirements, quoted above, makes no reference to the system's ability to prevent read access to the main memory, although OSI does state several times that it protects against unauthorized storage of data in another user's designated region in the main memory (i.e., write access protection).

We also note that it is not beyond the "state of the art" to comply with these requirements. For example, read protection can be pro-

vided on the IBM 370/168 CPU with the IBM standard operating system, VS2, Release 2 (although the VS2, Release 2, may be less efficient than OS/MVT). Also, PRC's Alternative A proposal actually proposed (and could deliver) full read and write protection of data in the main memory on the Burroughs' B-6700 ADP system.

In view of the foregoing, we conclude that OSI failed to meet a material RFP security requirement. In view of FEA's clearly stated need for security and protection of sensitive information, we find FEA's relaxation of this mandatory requirement without informing all offerors to be neither prudent nor proper. *See* FPR § 1-3.805-1(d) (1964 ed.).

CONCLUSION

FEA should not have made the award to OSI without either amending the solicitation or otherwise notifying the other offerors that the read protection requirements would no longer be required. However, we believe that there are countervailing factors which mandate against disturbing the award to OSI.

PRC's Alternative B proposal admittedly contained exactly the same deficiency we found in OSI's proposal since it also offered the OS/MVT operating system. The third ranking PRC Alternative A proposal did meet the read protection requirements but it received a technical score of 88.2 (to be compared with the 96.3 and 92.1 scores received by the other two offers in the competitive range), due to other evaluated deficiencies. Also, FEA has informed our Office that it intends to change from the OS/MVT operating system to the VS2, release 2, operating system, which meets the RFP's read protection requirements, in October 1975.

The record provides no indication that FEA recognized OSI's failure to protect against read access to the main memory as a defect at any time during the negotiations. We can only speculate that FEA may have decided that it did not require the degree of "internal" security it specified in the RFP, or that this "deficiency" was trivial and OSI's proposal was so clearly superior to PRC's Alternative A proposal (which proposed the Burroughs' equipment) that it would have selected OSI in any case, or that it may not have even recognized that OSI's and PRC's Alternative B proposals did not comply with these security requirements. Also, we have no way of knowing how many points (if any) the SEB would have deducted from OSI's and PRC's (Alternative B) technical evaluation scores if the SEB had considered this deficiency, or what effect (if any) deductions made would have had on the award selection. Although we do recognize that, if FEA had enforced this requirement, OSI and PRC would have had to revise (perhaps substantially) their proposals to remedy this de-

ficiency, we can only speculate as to whether any offeror would have revised its proposal upon notification that this requirement would be waived. In this regard, we note that no protestor or any other interested party raised this issue to our Office.

Even though the time to issue this decision was materially extended by FEA's delays in submitting its report on the protests, the fact remains that the contract has been in performance for over 6 months and the option has been exercised for Phase II, which will end on June 30, 1976, the same date that the authority for FEA terminates. See section 30 of Public Law 93–275, May 7, 1974, 88 Stat. 115, 15 U.S.C. 761 note. Consequently, if it was recommended that this requirement be resolicited, the new contract period would cover less than a year since it would take several months to accomplish the resolicitation. This would make the cost for these ADP services much more expensive because of the shorter contract period over which contract costs could be amortized.

FEA estimates that over $12 million in excess costs (e.g., termination and resolicitation costs) would be incurred if this award were disturbed (we have not verified the accuracy of this estimate), and that FEA does not have the funding available in the 1976 fiscal year budget to cover such excess costs. FEA advises that termination of or unplanned modifications in this contract would have severe operational impacts throughout FEA, since the system would have to be redesigned, data collection procedures changed, FEA users retrained, and existing relationships with data sources, principally those in energy-related industries, revised. Finally, according to FEA, it would be *impossible* to fulfill its congressionally mandated responsibilities, such as the energy management and analysis programs, if this award were disturbed.

Therefore, we do not believe that it would serve the Government's best interests to recommend that the award to OSI be disturbed. See *DPF Incorporated*, B–180292, September 12, 1974; *Bristol Electronics, Inc.*, 54 Comp. Gen. 521 (1974). However, it is essential that FEA strictly limit access to the ADP system to those persons whose participation is necessary. We plan to monitor the system's operation to insure compliance with this standard.

In view of the foregoing, the protests of PRC, OLS and RCC are denied. We are bringing the procurement deficiencies found in our review to the attention of the Administrator of FEA by letter of today.

[B-178701]

Contractors—Responsibility—Determination—Review by GAO—Effect of Issuance of Certificate of Competency by SBA

General Accounting Office (GAO) will not review determination of responsibility when Small Business Administration (SBA) issues certificate of competency (COC) in view of SBA's statutory authority, absent *prima facie* showing that action was taken fraudulently or with such wilful disregard of facts as to necessarily imply bad faith. Under this standard, GAO reviewed COC file and found no evidence of fraud or bad faith.

Bids—Collusive Bidding—Allegations Unsupported by Evidence

Unsupported allegation that successful bidder, issued COC by SBA, bid collusively with another bidder, and was not unaffiliated bidder as represented in bid is not sufficient to overcome certification of unaffiliation in bid and lack of evidence to show violation of certification.

Contracts—Labor Stipulations—Minimum Wage Determinations—Effect of New Determination

When contract is awarded on basis of old wage rates after new Service Contract Act wage determination has been received after bid opening, option should not be exercised since proper way to determine effect of new wages is to recompete rather than assume new rate would affect bidders equally. Recommendation is being referred to appropriate congressional committees pursuant to Legislative Reorganization Act of 1970, 31 U.S.C. 1172.

In the matter of Dyneteria, Inc., July 15, 1975:

Dyneteria, Inc. (Dyneteria), protests the award of a contract by the Air Force to Tombs & Sons, Inc. (Tombs), for full food services at Lowry Air Force Base, resulting from invitation for bids (IFB) No. F05600-74-B-0394.

The IFB was a total small business set-aside for estimated meal requirements on three items: item 1—August 1974–July 1975; item 2—August 1975–July 1976; item 3—August 1976–July 1977. While items 2 and 3 were designated as renewal options, the IFB indicated at section D2, "Basis of Award," that the award would be made on the basis of the total evaluated price for all three items. The IFB cautioned that bids for less than the entire service period would not be considered.

When bids were opened on April 30, 1974, Dyneteria was fifth low at $5.8 million. The first three low bidders were determined to be nonresponsible as a result of negative recommendations in preaward surveys. Only the third low bidder, Tombs, elected to file an application for a certificate of competency (COC) with the Small Business Administration (SBA). The bases for the contracting officer's determination of nonresponsibility related solely to Tombs' capacity and credit to do an acceptable job. On August 13, 1974, the Associate Administrator, Procurement Assistance, SBA, issued COC-VII-166-K applicable to Tombs. Thereafter, award was made to Tombs.

Insofar as Dyneteria's protest concerns Tombs' responsibility, we have held that SBA has the authority under 15 U.S. Code § 637(b)(7) (1970) to issue COC's and that we have no authority to review such an SBA determination. 53 Comp. Gen. 344 (1973); *Thi Service Company*, B–181055, June 19, 1974; and *Marine Resources, Inc.*, B–179738, February 20, 1974. However, in our view, an examination into the circumstances of the issuance of a COC is warranted where a protester alleges and submits evidence which *prima facie* indicates that the SBA action was taken fraudulently or with such wilful disregard of the facts as to necessarily imply a fraudulent intent.

At a bid protest conference held at our Office pursuant to § 20.9 of our Interim Bid Protest Procedures and Standards (4 C.F.R. part 20 (1974 ed.)), Dyneteria alleged that the COC was issued without consideration of any facts. This allegation was predicated on the fact that there was no supporting evidence in the record before our Office that would indicate any reasoned judgment was undertaken by SBA before it issued the COC. Therefore, we requested and received from SBA its file on the COC. Dissemination of the contents of the file was restricted by SBA because the information contained therein was deemed to be confidential under the Freedom of Information Act, 5 U.S.C. § 552 (1970). From our review of the file, we are satisfied that the COC was not issued fraudulently or with such disregard of the facts as to imply a fraudulent intent.

Dyneteria also alleges that Tombs was not an unaffiliated corporation as indicated in Tombs' bid. Rather, protester maintains that Tombs and Jets Services, Inc. (Jets) (the seventh low bidder) were joint venturers and that this clandestine arrangement afforded the two firms a competitive advantage. As this matter raises the possibility of collusive bidding, we note that both Tombs and Jets certified when their bids were submitted that the bid prices were reached independently, without consultation with a competitor for the purpose of restrictly competition, or in violation of other conditions enumerated at paragraph 8 of Standard Form 33 and paragraph 18 of Standard Form 33A. Both forms were contained in the IFB and submitted with their bids. There is no evidence of record that indicates that the certification of independent price determination was violated.

Moreover, the record indicates that a representative of Jets was initially at a preaward meeting on July 16 with Tombs, SBA and the Air Force concerning Tombs' responsibility and whether it should file an application for a COC. The Jets representative was stated to be in attendance at Tombs' request. However, as soon as that fact became known to the Air Force and SBA, the Jets representative was required to leave the meeting. This presence prompted inquiry of Tombs whether any joint venture existed between it and Jets. The response was negative. There being no evidence of any improper arrangement

between the two bidders, and in view of the certification contained in the Tombs' bid, we believe the actions of the Air Force in awarding the contract to Tombs were reasonable in this regard.

With respect to whether or not Tombs was small business, we have held that under 15 U.S.C. § 637(b)(6) (1970) a decision of the SBA regarding the size status of a concern is conclusive and may not be ignored by our Office. *Fort Vancouver Plywood Company*, B-179737, May 13, 1974. We note, in this vein, that the SBA regulations provide at 13 C.F.R. § 121.3-4 (1974) that a size determination is required to be made as a prerequisite to issuing a COC.

Dyneteria also contends that Tombs was afforded an opportunity to renegotiate its price after bids were opened. The Air Force acknowledges that it did hold several post-bid opening meetings with Tombs. However, price was not the topic of discussion. The meetings concerned Tombs' responsibility and the negative preaward survey. We believe the fact that the contract was awarded at the Tombs' bid price is an adequate response to this contention.

Dyneteria also questions the Air Force's issuance of a post-award upward adjustment ($137,214) of Tombs' contract price. Dyneteria views such issuance as support for its contention that the Tombs' price was unreasonable and demonstrated a lack of responsibility. The Air Force has provided its response to this charge by supplemental report to our Office dated February 11, 1975, containing detailed cost negotiation data. Dissemination has been restricted by the Air Force because the cost data therein reflecting the negotiations preceding the issuance of the modification contain information proprietary to Tombs. Without revealing specific data, the essence of the supplemental report is as follows.

The IFB and resulting contract incorporated by reference the provision applying the Service Contract Act of 1965 (41 U.S.C. § 351 (1970)) (SCA) to the procurement as required by section 7-1903.41 (a) of the Armed Services Procurement Regulation (ASPR) (1974 ed.). The IFB contained the Department of Labor's (DOL's) Service Contract Act wage determination 73-311 (Rev. 2) with hourly wage rates from $2.35 to $4.54. On May 16, 1974, DOL issued revision 3 to determination No. 73-311, which increased the applicable hourly rates to range from $2.57 to $4.97. On August 30, 1974, the Assistant Administrator, Employment Standards Administration, DOL, wrote the contracting officer regarding the ramification of the new wage determination. The Assistant Administrator noted that the higher wage determination resulted from a new collective bargaining agreement (cba) on April 30, 1974, between the union and Dyneteria, the predecessor contractor.

The revised wage determination was issued May 16, approximately 2 weeks after bid opening and almost 3 months before award. ASPR § 12–1005.3(a)(ii) (1974 ed.) provides that the contracting officer need not incorporate into the solicitation wage rates issued less than 10 days before bid opening but he may, in the proper circumstances, resolicit utilizing new wage rates issued after bid opening. B–177317, December 29, 1972. We also recognize that there is some question whether the 10-day rule applied in the case of new prevailing wage rates based on a predecessor contractor's collective bargaining agreement (although under proposed revised regulations, 40 Fed. Reg. 16082, April 9, 1975, the 10-day rule would specifically be made applicable to the predecessor's collective bargaining agreement). However, it is not necessary to decide the applicability of the 10-day rule to predecessor collective bargaining agreements. If the cba rates did not have to be incorporated into the contract, we see no basis for the contract modification; if the cba rates had to be incorporated, they were available well before award and the IFB should have been canceled and a new IFB issued with the cba rates.

The rule that the contract awarded should be the contract advertised is well established. See *Prestex, Inc.* v. *United States*, 320 F. 2d 367, 112 Ct. Cl. 620 (1963). Competition is not served by assuming that the new wage rates would affect all bids equally. It may well be that another bidder was already paying wages at or above those in the new determination so that his prices would not have increased at all. Thus, it is possible that the contract as amended no longer represents the most favorable prices to the Government. Speculation as to the effect of a change in the specifications, including a new wage determination, is dangerous and should be avoided where possible. *See* B–177317, *supra*. The proper way to determine such effect is to compete the procurement under the new rates.

Since the firm term of the contract has been completed, we cannot recommend action with respect to it. However, in view of our conclusion, we recommend that the option not be exercised and the requirement resolicited competitively.

As this decision contains a recommendation 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–182175]

Bids—Evaluation—Aggregate *v.* Separable Items, Prices, etc.—All or None Bid

Where invitation for bids (IFB) permits multiple awards, "all or none" bid lower in aggregate than any combination of individual bids available may be

accepted by Government even though partial award could have been made at lower unit cost.

Bids—Modification—After Bid Opening—Evidence to Substantiate Allegation Lacking

In absence of evidence affirmatively showing that low responsive bidder added "all or none" qualification to bid after opening, award is not questioned even though an appearance of impropriety was created when bid opening officer and preparer of bid abstracts, respectively, failed to read aloud or note qualification in violation of Armed Services Procurement Regulation (ASPR) on bid opening procedures. General Accounting Office (GAO) reviewed answers by Government employees to written interrogatories propounded by protester and received expert handwriting analysis from United States Secret Service.

Bids—Changes, Erasures, Reviews, etc.—Initialing

Contention that "all or none" qualification on bidding schedule was change in bid requiring initialing by bidder is without merit because (1) qualification was not change; (2) asuming qualification was change, bidding schedule was initialed; and (3) lack of initialing of change could have been waived as minor informality.

Bids—Qualified—All or None—Failure to Read Aloud and Record Qualification—Validity of Award

Failure of procuring activity personnel to read aloud and properly record on abstracts "all or none" qualification is deviation of form from procurement regulations, not of substance, and does not affect validity of award. However, in view of failure of procuring activity personnel to follow ASPR bid opening procedures, GAO recommends that Secretary of Army take appropriate action to insure compliance with applicable ASPRs.

Bids—Invitation for Bids—Interpretation—Oral Explanation

Oral explanation furnished bidder regarding manner of award has no legal effect where IFB requires bidders to request in writing any explanation desired regarding meaning or interpretation of IFB.

Contracts—Protests—Wording

Mailgram to procuring activity prior to award advising that "* * * should the low bid be withdrawn the specifications are quite clear as to the procedure for this basis of award for which we would be in line" should have been construed as a preaward protest, but does not affect validity of award which is not subject to question.

In the matter of George C. Martin, Inc., July 21, 1975:

This matter concerns the protest of George C. Martin, Inc., against the award of a contract to A. A. Beiro Construction Co., Inc., for the construction of the Harry Diamond Laboratories Phase III Support Complex, Adelphi, Maryland. Counsel for Martin contends that the award to Beiro was illegal because of irregularities in the bid opening and award procedures, the failure of the procuring activity to act properly on Martin's preaward protest, ambiguities contained in the invitation for bids (IFB), and the failure of the contracting officer

to reject Beiro's bid as nonresponsive. Counsel requests that award of one of the two base bid schedules be made to Martin, or in the alternative, that the entire contract be readvertised.

On May 17, 1974, IFB No. DACA31-74-B-0100 was issued by the Department of the Army, Baltimore District, Corps of Engineers. Amendment No. 3, dated June 3, 1974, revised the price schedule to provide for Base Bid Schedule "A," Radiation Facility with one additive item, and Base Bid Schedule "B," Explosive Load and Test Facility and Explosive Storage with three additive items. Amendment No. 3 also added the following sentence to paragraph 28.6 of the Special Provisions, Contractor Quality Control: "Note: If Schedule 'A' and 'B' are awarded in a single contract, the CQC requirements will be limited to those required by Schedule 'A.' "

Bids were opened on June 19, 1974, and counsel for Martin states that a representative of Martin attended the bid opening. Bids were submitted on both schedules by Martin, Beiro, A & M Gregos, Inc., Savoy Construction Co., Inc., and William F. Klingensmith, Inc. The Beiro bid was signed by Alexander A. Beiro as president. Martin's counsel states that neither at the opening nor in the abstract of bids was any indication given that the bid submitted by Beiro was in any way conditioned, limited or qualified. The record supports Martin's contention in this regard. An abstract of bids was prepared which discloses the following information.

Bidder	Total Amount of Base Bid Schedule A	Total Amount of Base Bid Schedule B
A. A. Beiro Construction Co., Inc.	$1,948,000	$1,128,000
A & M Gregos	1,484,000	820,000
George C. Martin, Inc.	1,887,000	1,267,000
Savoy Construction Co., Inc.	2,348,000	1,063,000
William F. Klingensmith	2,033,920	1,428,000

As shown on the abstract, Gregos submitted the low bid on both schedules. After bid opening, however, Gregos claimed a mistake in its bid. While the claim of mistake was being considered by the Corps of Engineers, on August 9, 1974, the Corps sent a mailgram to Martin requesting a 30-day extension of the bid acceptance period which was due to expire on August 18, 1974. By mailgram of August 14, 1974, Martin, aware that the Gregos bid might be withdrawn, advised the Corps of Engineers that "* * * SHOULD THE LOW BID BE WITHDRAWN THE SPECIFICATIONS ARE QUITE CLEAR AS TO THE PROCEDURE FOR THIS BASIS OF AWARD

FOR WHICH WE WOULD BE IN LINE." We note that the abstract indicated that with Gregos' bid withdrawn, Martin became the low bidder on Schedule "A," and Savoy became the low bidder on Schedule "B." Therefore, Martin expected to receive an award on Schedule "A."

After submitting clear and convincing evidence that established the existence of a mistake, Gregos was permitted to withdraw the low bid by letter from the contracting officer dated August 16, 1974. Beiro was awarded the contract for Base Bid Schedules "A" and "B" on the same date.

Two factors unknown to Martin at that time resulted in the award of the entire contract to Beiro. First, the procuring activity reports that, although Beiro's bid on Base Bid Schedule "A" was not lower than Martin's, Beiro had conditioned its bid to require the Government to award Beiro either Schedule "A" alone or both Schedules "A" and "B." The condition consisted of the handprinted notation "ONLY IF SCHEDULE 'A' IS AWARDED" adjacent and just below the total amount inserted for Schedule "B." As mentioned above, the condition was neither read aloud at bid opening nor recorded on the abstract of bids.

Second, the Corps of Engineers reports that an examination of Savoy's bid revealed that the totals inserted for Base Bid Schedules "A" and "B" were not the figures one would obtain by adding items 1 and 2 of each schedule. The procurement clerk attempted to resolve this discrepancy by striking out the totals Savoy had entered and, on each schedule, substituting the sum of items 1 and 2. This change was reflected on the abstract of bids. However, by letter dated June 26, 1974, Savoy notified the procuring activity that the figures for item 2 of Schedule "A" and item 2 of Schedule "B" had been mistakenly transposed. The original totals were correct but the $700,000 figure that appeared in item 2 of Schedule "A" should have been inserted in item 2 of Schedule "B," and the $450,000 appearing in item 2 of schedule "B" should have been inserted in item 2 of Schedule "A." Since Savoy's mistake was a clerical mistake apparent on the face of the bid, and since Savoy had furnished written verification of the bid actually intended, Savoy was permitted to correct the bid in accordance with the provisions of the Armed Services Procurement Regulation (ASPR) § 2-406.2 (1973 ed.). A second abstract of bids was prepared to reflect Savoy's corrected bid prices. We observe here that, like the original abstract, the second abstract contains no reference to the condition in the Beiro bid. The correction of Savoy's apparently low bid on Schedule "B" to $1,313,000 from $1,063,000 resulted in Beiro's bid on Schedule "B" being the lowest.

Because of these two factors, the combination of Beiro's bid for Schedules "A" and "B" constituted the lowest responsive bid available for acceptance, and Beiro was awarded both schedules. By mailgram dated August 19, 1974, to the Corps of Engineers, Martin protested the award of Base Bid Schedule "A" to Beiro on the grounds that Martin was the low bidder on Schedule "A" and that the IFB required the Government to award separately Base Bid Schedules "A" and "B."

By letter to our office dated September 4, 1974, and subsequent correspondence, Martin and its counsel protested the award to Beiro. After reviewing the Corps of Engineers' initial report on the protest to our Office, counsel for Martin states that it first learned that Beiro's bid was conditioned by the handprinted notation and that the Savoy bid had been corrected.

On January 16, 1975, in accordance with section 20.9 of our then subsisting bid protest procedures (4 C.F.R. Part 20 (1974)) a conference on the protest was held at our Office with representatives of all interested parties. At this conference, counsel for Martin highlighted the principal basis for the protest. Counsel contends that "The absence of any reference to this condition at the bid opening or in the Abstract of Bids raised a substantial question as to whether the condition was actually entered on Beiro's bid response at the time of the bid opening, or was subsequently inserted, and if so, when and by whom."

During the conference, to fully develop the record on this serious allegation, the parties agreed that counsel for Martin would submit to the Corps of Engineers written interrogatories for responses under oath by all persons having access to the bids. Counsel for Martin submitted a letter dated January 30, 1975, to the Corps of Engineers enclosing written interrogatories. Copies of the responses of the Corps of Engineers' personnel to the interrogatories were furnished our Office under cover letters of February 27 and March 3, 1975.

The primary issue for resolution is whether Beiro's bid was properly qualified at the time of bid opening. Assuming that it was, the record indicates that the combination of Beiro's bid for Schedules "A" and "B" constituted the lowest responsive bid available to the Government. Paragraph 19 of the IFB provided:

> AWARD ON MULTIPLE SCHEDULES: The Government further reserves the right to make award on any or all schedules of any bid, unless the bidder qualifies such bid by specific limitation; also to make award to the bidder whose aggregate bid on any combination of schedules is low.

In view of this provision and since the IFB contained no prohibition against bidding on an "all or none" basis, bidders were permitted to qualify their bids without rendering the bid nonresponsive. Beiro's

price for the total amount of Base Bid Schedule "B" which was followed by the phrase "Only if Schedule 'A' is awarded" was a permitted qualification assuming that this phrase appeared on Beiro's bid prior to bid opening. ASPR § 2–404.5 (1973 ed.) provides that, unless the IFB so states, a bid is not rendered nonresponsive by the fact that the bidder specifies that award will be accepted only on all, or a specified group, of items included in the invitation.

Where, as in the present case, an IFB permits multiple awards, our Office has held that an "all or none" bid lower in the aggregate than any combination of individual bids available may be accepted by the Government even though a partial award could be made at a lower unit cost. See *Oregon Culvert Co., Inc.*, B–183406, June 12, 1975; *General Fire Extinguisher Corporation*, 54 Comp. Gen. 416 (1974). Under the provision set forth in paragraph 19, the Government reserved the right to select the lowest price for any schedule of any bid, unless a bidder qualified its bid by specific limitation. The Government also reserved the right to award to the bidder whose aggregate bid on any combination of schedules is low. Assuming that Beiro's bid contained the written qualification at the time of bid opening, the combination of Beiro's price for Schedules "A" and "B" constituted the lowest responsive bid available to the Government. Martin's contention that the Government would save $61,000 is conditioned upon a combination of Martin's Schedule "A" and Beiro's Schedule "B," which combination is not susceptible to award by reason of Beiro's qualification. The record discloses that, comparing any other combination of Schedules "A" and "B" of responsive and responsible bids, does not establish a price that is less than the combination of Beiro's Schedules "A" and "B."

Counsel for Martin contends that the answers to interrogatories, in conjunction with the known facts of what transpired at the bid opening, lead to the conclusion that the qualification "Only if Schedule A is awarded" did not appear on the Beiro bid form at the bid opening and the circumstances warrant a finding of bid tampering. Further, counsel contends that, in view of this, the Government was required to consider Martin's August 14, 1974, mailgram as a preaward protest.

We have reviewed the evidence contained in the answers to the interrogatories for the purpose of determining whether Beiro's bid was, in fact, qualified at the time of bid opening. We have carefully considered all the evidence submitted bearing on this question and we do not agree with Martin's allegation. The answers, to the interrogatories submitted to several Government employees by counsel for Martin, do not establish that any Government employee notice Beiro's qualification at or just after bid opening or when the abstracts were prepared. Moreover, the failure of the bid opening officer to read the

qualification aloud or the abstracts preparer to note the qualifications are represented as "oversights." There is no affirmative evidence to show that the qualification was not on Beiro's bid at bid opening.

At least one employee of the Government states that he noticed the qualification on or about June 23, 1974 (4 days after bid opening), on the first occasion that he saw Beiro's bid form while reviewing the bids on Gregos, Martin and Beiro to determine their responsiveness. Other Government employees state that they noticed Beiro's qualification on the first occasion that they saw Beiro's bid form which was subsequent to bid opening. There is no statement from any of the employees submitting interrogatories which would indicate that at the time of bid opening Beiro's bid did not contain the qualification at the time the bid was submitted. In response to the interrogatory "Do you have any knowledge of any irregularities or improprieties in the handling of bids under this procurement or of any other matters which should be brought to the attention of the General Accounting Office in connection with this protest?" all Government employees answered in the negative.

In view of the seriousness of Martin's contention that the Beiro qualification may have been added after bid opening, we requested the United States Secret Service, Special Investigations Division, to examine Beiro's original bid form to determine whether Alexander A. Beiro, the president of Beiro who signed the bid, had inserted the qualification and, if possible, when the handprinted qualification may have been affixed to the bid. In addition, we requested information as to the source and timing of the affixation of the handprinted initials "AAB" which appeared on the bidding schedule. By letter dated April 28, 1975, the Secret Service advised that it would be necessary to have comparable handprinted specimens of Mr. Beiro before proceeding with an analysis. The report further advised that a study of the original bidding schedule failed to reveal any evidence that would suggest when the handprinted qualification was placed on the bid and that it was doubtful whether this question could be answered through document examination.

Following receipt of the report from the Secret Service, counsel for Beiro agreed to our request that Alexander A. Beiro appear at our Office and submit handwriting specimens which we advised Beiro would then be submitted to the Secret Service for examination. It should be noted that the handwriting specimens of Beiro were voluntarily furnished our Office by Alexander A. Beiro even though he had previously furnished our Office with an affidavit stating that, prior to the bid form being taken to Baltimore by another employee of the company, Beiro inscribed the qualification in his own hand. Beiro's handwriting specimens were submitted to the Secret Service, which

reported on May 5, 1975, that Beiro wrote the initials "AAB" on the face and the reverse of the original and duplicate bidding schedules and hand-printed the notation "Only if Schedule 'A' is awarded" on the reverse of the original and duplicate price schedules.

In view of the Secret Service reports which state that the Beiro qualification and initials were placed on the bid by Beiro we must conclude that no Government employee added the Beiro qualification after bid opening. We recognize that no independent evidence has been presented to establish whether the qualification was affixed to the bid before opening as Beiro asserts, or after, as suggested by Martin. However, our Office has exhausted the administrative measures available. In the absence of affirmative evidence indicating that the qualification of Beiro's bid was affixed after bid opening, we conclude that Beiro's bid was properly qualified and as such was the lowest responsive total bid available to the Government.

Martin contends that even assuming the qualification appeared on the Beiro bid form at bid opening the failure to read aloud and properly record the qualifications were clear violations of ASPR § 2–402.1 and § 2–403 (1973 ed.). Martin states that since these violations went to the heart of the award of this procurement and call into question the integrity of the competitive bidding process followed here, the award should be held illegal.

Although ASPR § 2–402.1 (1973 ed.) requires that when practical bids should be read aloud to all persons present and ASPR § 2–403 requires the abstract of bids to contain any information required for bid evaluation, the failure of the procuring activity to read aloud and properly record Beiro's qualification was a deviation of form, not of substance, and therefore does not affect the validity of the award.

We share Martin's concern that the failure of the bid opening officer to mention Beiro's "all or none" qualification at the bid opening and the failure of the two abstracts to indicate that Beiro's bid contained such a qualification creates an appearance of impropriety in the bidding procedure. Accordingly, we are recommending, by letter of today, to the Secretary of the Army that appropriate steps be taken to insure that all procuring activity personnel involved with bid opening procedures comply with those portions of the ASPR applicable to bid opening procedures. What occurred here can only serve to undermine the confidence of potential bidders for Government contracts. However, there is no affirmative evidence to warrant the termination of the Beiro contract.

Martin contends that Beiro's qualification was a change in its bid which was not initialed as required by the IFB and therefore Beiro's bid was not properly for consideration. We do not agree with this con-

tention. The instructions to bidders, Standard Form 22, provides at paragraph 5(a) that:

> If erasures or other changes appear on the [bid] forms, each erasure or change must be initialed by the person signing the bid.

The qualification was part of Beiro's bid as originally submitted and was not a change which was required to be initialed. Further, assuming, arguendo, that the handwritten qualification was a change, the record indicates that the bidding schedule of Beiro's bid containing the qualification was, in fact, initialed. Moreover, even if Beiro had failed to initial the change the deviation could have been waived as a minor informality and would not have been cause for rejection of the bid as nonresponsive. See *Corbin Sales Corporation*, B-182978, June 9, 1975.

Martin further argues that the "Special Bid Conditions" set forth in the "Notes to Bidders" section of the IFB required separate award for Schedules "A" and "B." In this regard, the IFB states:

> (a) The bidder(s) offering the lowest total base bid amounts for schedules A and B combined, if within the total project funds determined by the Government to be available before the bids are opened * * *.

Martin states that, prior to submitting its bid, it was assured by the "Issuing Office" of the Corps of Engineers that the intent of the above-cited provision was that award of bid items "A" and "B" would be made separately if it resulted in a savings to the Government. We do not agree that this provision required separate awards for Schedules "A" and "B." Under this provision the low bidder or bidders for purposes of award would be the bidder or bidders offering the lowest total base bid amount for Schedules "A" and "B" combined. Further, paragraph 19, Award on Multiple Schedules, of the IFB specifically provides:

> The Government further reserves the right to make award on any or all schedules of any bid, unless the bidder qualifies such bid by specific limitation; also to make award to the bidder whose aggregate bid on any combination of schedules is low.

Under this provision, the Government reserved the right to make an award to the bidder submitting the lowest overall bid. Any oral explanation Martin may have received to the contrary would have no legal effect in view of the provision contained in paragraph 1 of the Instructions to Bidders which clearly stated that oral explanations or instructions given before the award of the contract would not be binding and that any explanation desired by a bidder regarding the meaning or interpretation of the IFB must be requested in writing. In view of this provision, any questions regarding the manner in which award would be made should have been submitted in writing prior to bid opening.

Martin also contends that Beiro's bid was nonresponsive on the ground that its qualification "Only if Schedule 'A' is awarded" which was handprinted just below Beiro's total amount for Base Bid Sched-

ule "B" was at best an ambiguous qualification. We do not agree with this contention. The only reasonable interpretation of this qualification is that Beiro would accept an award for Schedule "B" only if the firm also received an award for Schedule "A." If Schedule "B" had been awarded to someone other than Beiro, its bid for Schedule "A" would stand alone and, if low, would have resulted in an award to Beiro for Schedule "A."

We agree with Martin's contention that its mailgram of August 14, 1974, sent to the Baltimore District Corps of Engineers should have been considered as a protest prior to award. This mailgram stated in pertinent part:

* * * WE FURTHER WISH TO ADVISE THAT SHOULD THE LOW BID BE WITHDRAWN THE SPECIFICATIONS ARE QUITE CLEAR AS TO THE PROCEDURE FOR THIS BASIS OF AWARD FOR WHICH WE WOULD BE IN LINE.

Although Martin's mailgram did not state that its firm was protesting the award, the implication is clear that Martin expected to receive an award if the low bid was withdrawn and that its mailgram would constitute a protest if it did not receive an award. Our Office has held that for the purposes of GAO consideration, a request by a disappointed bidder for our review of the procurement need not contain the exact words of protest before it can be characterized and considered as a bid protest. See *Johnson Associates, Inc.*, 53 Comp. Gen. 518 (1974). However, in view of our conclusion that there is no legal basis to question the award to Beiro, failure of the procuring activity to consider the August 14 mailgram as a preaward protest does not affect the validity of the award.

For the reasons stated, the protest is denied.

[B–181934]

Appointments—Absence of Formal Appointment—Reimbursement for Services Performed

Army officer, assigned as Executive Assistant to Ambassador-at-Large, retired from Army in anticipation of civilian appointment to that position, After retirement he continued to serve as Executive Assistant for 7 months before Department of State determined he could not be appointed. Claimant is a *de facto* officer who served in good faith and without fraud. He may be paid reasonable value of services despite lack of appointment in view of fact that had compensation been paid, claimant could retain it under *de facto* rule or recovery could be waived under 5 U.S.C. 5584. Although he was not paid, admininistrative error arose when claimant in good faith entered on duty with understanding of Government obligation to pay for services. On reconsideration, B–181934, October 7, 1974, is overruled, and 52 Comp. Gen. 700, amplified.

In the matter of compensation for services rendered pending appointment, July 23, 1975:

This action is a reconsideration of decision B–181934, dated October 7, 1974, which disallowed the claim of Lieutenant Colonel Robert

G. M. Storey, United States Army (Retired), for compensation during the period November 1, 1973, to June 11, 1974, when he served as Executive Assistant to Ambassador-at-Large Ellsworth P. Bunker, at the Department of State, Washington, D.C. The Ambassador, the claimant, and the Department of State have submitted additional information that now provides a basis for favorable reconsideration of the claim. The record before us shows the following facts.

Colonel Storey served as Military Assistant to Ambassador William Sullivan in the East Asian Bureau of the Department of State from June 1970 to September 1973. On September 20, 1973, Ambassador Bunker requested the Director General of the Foreign Service at the Department of State to assign Colonel Storey as his Executive Assistant and to arrange for his outside hire and appointment as a Foreign Service Reserve Officer with the grade FSR–2. Colonel Storey was immediately transferred into Ambassador Bunker's office and began performing the duties of his new position. At the same time, steps were initiated for his appointment as a civilian.

According to additional information supplied by Ambassador Bunker in support of reconsideration, it became apparent that the Department of Defense could not assign a replacement in the East Asian Bureau as long as Colonel Storey remained on active military detail to the Department of State. Accordingly, Colonel Storey felt an obligation to resign from the Army, even though he had not wished to do so until his appointment in the Foreign Service Reserve was confirmed. He submitted his resignation on October 29, 1973, and his retirement from the Army was made effective on October 31, 1973.

Ambassador Bunker, in a letter dated October 25, 1974, states the following:

> * * * From that time until June 1974 both LTC Storey and I continued to expect that he would be appointed. Indeed, I was assured periodically by Department officials concerned that LTC Storey's application was well in process and that a successful decision could be expected.
>
> Under these circumstances, from November 1, 1973, until June 11, 1974, LTC Storey worked for me in the position of "Executive Assistant to the Ambassador at Large." With the exception of handling classified documents, he performed all the tasks required by this position and was fully accepted in this job by officials within the Department of State as well as other government departments. Throughout this period, my expectation was that verification of his appointment was imminent. Certainly there was never any doubt but that LTC Storey was operating in this position under color of authority and with the approval of the Department of State, nor was there any doubt that he was occupying and satisfactorily carrying out a job required for the operation of this office of the Department of State and was occupying a position which otherwise would have been filled by a Department officer.

However, Colonel Storey was not immediately appointed into the Foreign Service, apparently because the routine security investigation had not been completed. Colonel Storey continued to serve as Executive Assistant to Ambassador Bunker with the expectation that he would shortly receive an appointment which would be made retroactive to November 1, 1973. The retroactive appointment was specifically re-

quested by Ambassador Bunker in a November 13, 1973, memorandum to the Director General of the Foreign Service, and all parties appeared to be unaware of the prohibition against such appointments.

Inasmuch as Colonel Storey's Department of Defense security clearance was revoked at his retirement, he lost access to classified material. Then a problem arose in the Department of State's security clearance investigation that required the development of additional information. However, the lack of security clearance apparently had little impact on his job performance. Ambassador Bunker wrote several memoranda to the Director General of the Foreign Service and other high officials in the Department of State during the ensuing months explicitly setting forth Colonel Storey's unpaid status and complaining of the delay in his appointment. Apparently all these officials were of the opinion that the problem in the investigation could be quickly resolved and Colonel Storey would be appointed. Unfortunately, the problem could not be satisfactorily resolved and in fact became a permanent obstacle to his appointment. Finally, on June 11, 1974, the Deputy Director General/Director of Personnel informed Colonel Storey that he would not be appointed as a Foreign Service Officer and on that date he ceased serving as Executive Assistant to Ambassador Bunker.

On reconsideration, we are of the opinion that Colonel Storey was a *de facto* officer of the Government. We have defined a *de facto* officer as follows:

> An officer "*de facto*" is one who performs the duties of an office with apparent right and under color of an appointment and claim of title to such office. That is, where there is an office to be filled, and one acting under color of authority fills said office and discharges its duties, his actions are those of an officer "*de facto*" * * *. 30 Comp. Gen. 228, 229 (1950).

Colonel Storey satisfies the criteria of the above-quoted definition. As an Army officer, he was assigned to the authorized position of Executive Assistant to the Ambassador-at-Large with the knowledge and concurrence of the Director General of the Foreign Service. After retirement, he continued to fill the office and discharge its duties for more than 7 months. He acted with the authority of Ambassador Bunker and the Department of State and had the apparent right and title to the office. He served in good faith and with no indication of fraud. The lack of appointment is no obstacle to *de facto* status in view of the services rendered in good faith and under color of authority.

Notwithstanding Colonel Storey's *de facto* status, previous rulings have denied any payment of compensation not already received by the officer. 15 Comp. Gen. 587 (1936); 23 *id.* 606 (1944); 38 *id.* 175 (1958); B–90406, December 1, 1949; B–122347, March 30, 1955; B–174848, February 24, 1972; B–163720, April 2, 1968; and B–154308, June 12, 1964. The above-cited cases involved fault on the part of the employee. However, the *de facto* rule was also applied in cases involving employees who, in good faith, performed services under color of authority. 28 Comp. Gen. 514 (1949), and B–148827, May 23, 1962.

However, the latter rulings were modified in 52 Comp. Gen. 700 (1973) where we allowed compensation to be paid after termination to a *de facto* employee. There, prior to any payment of compensation, it was discovered that an administrative error had been made in appointing an active-duty military member to a civilian position. In allowing payment, we referred to recent statutes permitting administrative adjustment where administrative error results in overpayments or underpayments to employees and other persons. *See* 5 U.S. Code §§ 5584, 5596. We stated that a primary reason for those statutes was to relieve the Congress of the need to consider private bills for the relief of individuals whose claims, though equitable, could not be paid because no legal basis for payment existed.

Under 5 U.S.C. § 5584, we pointed out that recovery could be waived of overpayments caused by administrative error through no fault on the part of employees involved. Moreover, any repayments made to the Government prior to the waiver determination are refunded to the overpaid employee. Therefore, even though the claimant there, Mr. Wilmer, had not received any payment for his civilian services, we applied the waiver statute by analogy and stated the following rationale for changing the prior rule (52 Comp. Gen. 700, at 702):

> However, the instant situation does contain a unique element setting it apart from the usual case of error discovered prior to payment. Mr. Wilmer has not been paid anything for the services he rendered the Government. Moreover, he would not only have been entitled to consideration for waiver if he had been paid, but, indeed, under the *de facto* rule referred to he would have been entitled to retain the amount involved as a matter of right. *It, therefore, seems appropriate, where no payment at all is provided for services rendered, to consider for purposes of the waiver statute, that the administrative error and "overpayment" arose at the point in time when Mr. Wilmer entered on duty with the understanding of a Government obligation to pay for his services.* Particularly does this seem so when it is recognized that refunded overpayments ultimately waived are redisbursed to the employees involved.
>
> *In the circumstances, bearing in mind the intent of the Congress as expressed in the legislation cited—that individuals should not be penalized as a result of Government errors—we would not object to payment for services rendered by Mr. Wilmer.* [Italic supplied.]

That decision, in effect, extended the *de facto* rule to permit payment, even after termination, of the reasonable value of services rendered by persons who served in good faith. Accordingly, the prior decisions listed above will no longer be followed to the extent that they are inconsistent with 52 Comp. Gen. 700, *supra*, and this decision.

Hence, we conclude that the Government should compensate Colonel Storey for the reasonable value of the services he rendered from November 1, 1973, to June 11, 1974, while serving as Executive Assistant to Ambassador Bunker. The Department of State has advised us that the reasonable value of Colonel Storey's services would equate to grade FSR–3, step 7 level, or an annual rate of $32,663. The payment should be reduced by normal deductions, including the deduction from his military retirement pay under 5 U.S.C. § 5532 (1970). Our decision B–181934, October 7, 1974, is hereby overruled.

[B-152040, B-158422]

Debt Collections—Waiver—Military Personnel—Pay, etc.—Total Amount of Erroneous Payment

Amount of claim of United States against a member of uniformed services arising out of overpayments of pay and allowances, which is subject to consideration for waiver under 10 U.S.C. 2774, is total amount of erroneous payments made, even where audit of member's pay account reveals under payment of pay and allowances, whether that underpayment involves the same item of pay and allowances or a different item than was involved in the overpayment, or was in the same or a different period.

Debt Collections—Waiver—Military Personnel—Pay, etc.—Amount of Claim—Effect of Set-Off

Where member requests waiver of claim under 10 U.S.C. 2774, which is less than the total erroneous payment, and he does not know that an accounting setoff for underpayment which was otherwise due him has been made or of his right to request waiver for that amount, or that erroneous payment was actually determined to be for greater amount, we would act on entire erroneous payment in view of beneficial nature of law. However, where member knows of the proper total erroneous payment, accounting setoff for an underpayment and his right to request waiver in such amount, but requested waiver of amount less than total, we would act only on amount of waiver request.

In the matter of Department of Defense Military Pay and Allowance Committee Action No. 502, July 25, 1975:

This action is in response to a letter from the Assistant Secretary of Defense (Comptroller) requesting a decision by this Office on several questions relating to the indebtedness to be considered for waiver under the provisions of 10 U.S. Code 2774 in the circumstances described in Department of Defense Military Pay and Allowance Committee Action No. 502, enclosed with the request.

The discussions contained in the Committee Action states that the primary purpose for the submission was to question and obtain a review of the interpretation and application of 10 U.S.C. 2774 and the implementing Standards for Waiver contained in 4 C.F.R. 91, *et seq.*, made by the Transportation and Claims Division (TCD) of this Office, with particular reference made to the case of Lieutenant Colonel Robert S. Hopkins, II.

The pertinent facts of that case as set forth in the discussion were:

On 14 September 1973, AFAFC sent to the Comptroller General an application by LtCol Robert S. Hopkins II for waiver pursuant to Pub. L. 92-453 of a claim arising out of erroneous payments of basic pay and flight pay because of use of an erroneous pay date. The error was discovered during a pay date reconciliation examination conducted by AFAFC in April 1973. The examination revealed that the member had been overpaid a total of $791.67 during the period 1953-1958, and that he had been underpaid $26 during 1960. A claim was made against the member for the net indebtedness of $765.67, and the member requested waiver of the claim. These facts were set forth in a Review of Findings prepared by AFAFC/JA, it was determined that the conditions for waiver in the case had been met, and it was recommended in the aforementioned letter to the Comptroller General that the claim against LtCol Hopkins in the amount of $765.67 be waived.

In a 17 October 1973 letter to AFAFC signed by the Deputy Director of the GAO Transportation and Claims Division, the claim against LtCol Hopkins was waived; however, the amount waived was $791.67. The letter stated that: "Since the amount of the overpayment and the amount of the underpayment may not properly be set off against one another for the purposes of considering waiver under the cited act, we are considering the amount of the overpayment subject to waiver consideration to be $791.67."

With regard to the above, the discussion makes reference to decision B–177377, December 29, 1972, also involving waiver by this Office. In that case, the indebtedness in question was also identified to this Office as a net indebtedness. We held therein that the amount which must be considered for waiver was the gross amount of indebtedness and the deductions for FICA and Federal income withholding tax were to be included.

The discussion goes on to state that as a result of that decision it has become the practice of the services not to exclude those items from the amount being considered for waiver and indicates agreement that such withholding items were those which this Office was referring to in the Comptroller General's report to Congress on "Operation of the Law Permitting Waiver of Erroneous Payments of Pay," B–152040, B–158422, September 15, 1972. However, the Committee Action discussion goes on to state that the before-mentioned letter in Colonel Hopkins' case, indicates that our policy regarding the amount of money to be waived is at variance with that which the services believe the policy should be and that which the services believe the statute requires.

In this regard, the Committee Action points out that waiver authority under 10 U.S.C. 2771 relates to a "claim" of the United States rather than an "indebtedness" as does the remission authority contained in 10 U.S.C. 9837(d). Further, it applies to a "claim arising out of an erroneous payment" rather than an "erroneous payment" itself and that such focus is continued by the implementing regulations set forth in 4 C.F.R. 91, *et seq.*

The Committee Action goes on to state that if it is determined that the total erroneous payment is the amount to be considered for waiver, then it would appear to be necessary, at least in some instances, to change the method of establishing the amount of indebtedness, citing as examples, indebtednesses which arise from excess leave taken and where the total amount actually paid a member for his period of service exceeds his statutory entitlements.

Based on the above, the following questions are asked:

1. Is the amount to be considered for waiver under Public Law 92–453 in each case the *total* erroneous payment or the amount of *claim* asserted by the Government?
2. Would the answer to question 1 be the same if the same audit or re-examination that discovered the overpayment had also detected an underpayment, and both overpayment and underpayment had occurred in a prior pay period?
3. Would the answer to question 2 be the same if both the overpayment and underpayment were for the same type of pay and allowance; e.g., basic pay or flight pay?

4. If the answer to question 1 is that the total erroneous payment is to be considered for waiver, is such answer the same if the individual specifically requests waiver of an amount less than the total erroneous payment?

5. Is the answer to question 4 the same if it is clear that the individual is aware of the amount of total erroneous payment and his right to request waiver thereof, but nevertheless requests waiver of less than that amount?

Section 2774 of Title 10, U.S. Code, provides in pertinent part:

(a) A claim of the United States against a person arising out of an erroneous payment of any pay or allowances * * * to or on behalf of a member or former member of the uniformed services * * * the collection of which would be against equity and good conscience and not in the best interest of the United States, may be waived in whole or in part by—

(1) The Comptroller General; or
(2) the Secretary concerned * * * when—
(A) the claim is in an amount aggregating not more than $500;

* * * * * * *

(c) A person who has repaid to the United States all or part of the amount of the claim, with respect to which a waiver is granted under this section, is entitled, to the extent of the waiver, to refund * * *

* * * * * * *

(e) An erroneous payment, the collection of which is waived under this section, is considered a valid payment for all purposes.

While the words "A claim * * * arising out of an erroneous payment" are used in 10 U.S.C. 2774(a), we believe that such language should not be interpreted in the restrictive sense as suggested by the submission. A review of the legislative history of 10 U.S.C. 2774 (Public Law 92–453), shows that the act was the culmination of a long recognized need to provide authority to relieve administratively members of the uniformed services of liability to repay erroneous payments of pay and allowances which arose as the result of administrative errors. It was recognized that other than the remission of indebtedness provisions of 10 U.S.C. 9837(d) and other similar provisions, no authority existed to relieve administratively such members of liability to repay erroneous payments of pay and allowances regardless of the circumstances under which payments were made or received.

The purpose of H.R. 7614, which became Public Law 92–453, as stated in H.R. Report No. 92–195, 92d Cong., 1st Sess. 1 (1971), was "to provide uniform authority to relieve members * * * of erroneous payments of pay and allowances * * *." A similar statement of purpose is contained in S. Report No. 92–1165, 92d Cong., 1st Sess. 1 (1971). In this connection, these reports and the hearings are replete with references to the concept that the subject matter for consideration for waiver is "erroneous payments" rather than a claim which might ultimately be made by the Government after various interim accounting setoffs are taken.

Basically, entitlement to pay and allowances accrues to members of the military service on a monthly basis. *See* 5 U.S.C. 5505. Should there be an overpayment of an otherwise proper item of pay and allowances or payment of an item to which the member is not properly entitled, such payments are clearly erroneous payments and the United States is authorized to make collection of all such payments.

Prior to enactment of Public Law 92–453, setoffs due to underpayments of pay and allowances in subsequent pay periods or cash payments by a member only served the purpose of reducing or possibly eliminating the indebtedness altogether. In such circumstances, while it could be argued that the member is no longer indebted to the United States to the extent of the recovery made, in light of the refund provision contained in 10 U.S.C. 2774(c), we do not believe that it was congressionally intended that, to the extent that any setoff or cash repayment was made, such portion of the indebtedness never existed. Since authority to make collection from a military member's pay account for a specific reason is limited by law, one reason being improper payments, it is our view that when an indebtedness is discovered, the total amount of such erroneous payments finally computed to be due, without credit for cash recovery or setoff, would constitute the erroneous payment and the measure of the member's indebtedness subject to consideration for waiver under 10 U.S.C. 2774, which indebtedness may be waived in whole or in part under the Standards for Waiver promulgated by this Office. The first question is answered accordingly.

As previously stated, payments of military pay and allowances basically accrue on a month-to-month basis. Where payment is made to a member which contains an overpayment of an otherwise proper entitlement or payment of an item of pay and allowances to which the member was not entitled, such excessive payments would constitute erroneous payments. If, in the post-audit or reexamination of such a member's account, it was discovered that as a result of another administrative error, an underpayment of an otherwise proper entitlement was made either in the same pay period or in a subseqeunt period covered by the audit, it is our view that such amount which is otherwise properly due the member should not be set off from the overpayment prior to establishing the member's indebtedness to be considered for waiver under 10 U.S.C. 2774, even where the overpayments are for the same item of pay or allowance. Questions 2 and 3 are answered accordingly.

With regard to the last two questions, we assume that at the time a member or former member requests waiver of the overpayment of a specified indebtedness in an amount less than the total debt he was either unaware that any setoffs had already been made or if made, that he had a right to receive such payment, or that upon a reexamination of his account the erroneous payment was actually determined to be for a greater amount. If that is the case, then where the individual specifically requested waiver of such reduced amount or the examination revealed a larger erroneous payment, we would act on the entire erroneous payment and not limit our actions to the requested sum in

view of the beneficial nature of 10 U.S.C. 2774. If, however, the member or former member knew of the total erroneous payment and his right to request waiver thereof, but nevertheless requested waiver of an amount less than the total erroneous payment, and this Office became aware of the foregoing, we would consider only the lesser amount for waiver. Questions 4 and 5 are answered accordingly.

With regard to the foregoing, nothing contained therein should be construed as limiting authority to take into account underpayments of pay and allowances when the question of whether to waive or not to waive is being resolved in the individual case under the Standards for Waiver. The fact that the individual concerned has in his pay account underpayments which may offset part or all of the overpayments being considered for waiver may well influence the determination of the Department concerned or this Office as to whether full or partial collection "would be against equity and good conscience and not in the interest of United States," a stated condition of waiver in 10 U.S.C. 2774. *See also* 4 C.F.R. 91.5(c).

On review of the matter of our Transportation and Claims Division action in the case of Colonel Hopkins, it is our view that such action was consistent with the above and the equitable principles contained in the Standards for Waiver and was correct.

[B-118678]

Oil and Gas—Leases—Within National Wildlife Refuges—Disposition of Receipts From Oil and Gas Rights

Receipts from oil and gas leases on lands within the National Wildlife Refuge System, and administered by the Fish and Wildlife Service, whether the lands were made part of the System by acquisition or by withdrawal from the public domain, are required to be disposed of pursuant to 16 U.S.C. 715s rather than pursuant to the Mineral Leasing Act which generally prescribes disposition of receipts from leases of mineral rights in the public lands, because, to the extent there is a conflict between the requirements of the statutes, the more recent one is controlling.

In the matter of the disposition of receipts from leases of oil and gas rights within the National Wildlife Refuge System, July 29, 1975:

This decision is in response to a request from the Solicitor, Department of the Interior, asking whether we concur in the conclusion of a memorandum prepared by his office, that receipts from oil and gas leases on wildlife refuges created by withdrawals of public lands are required to be reserved in the discrete "refuge receipts account" established pursuant to 16 U.S. Code § 715s (1970) and distributed according to the scheme established thereby, rather than to be covered into the Treasury pursuant to the Mineral Leasing Act, 30 U.S.C. § 191, and distributed as are other mineral lease receipts under the latter act.

The question arises as a result of the 1964 amendment to 16 U.S.C. § 715s. Prior to the amendment, section 715s provided generally that 25 percent of the net proceeds from the sale or other disposition of "* * * surplus wildlife, or of timber, hay, grass, or other spontaneous products of the soil, shell, sand, or gravel, and from other privileges * * *" on national wildlife refuges was to be paid annually by the Secretary of the Treasury to the counties in which the refuges are located, to be used for public schools and roads. Refuges established under the Migratory Bird Conservation Act, or any other law, proclamation, or Executive order, and administered by the United States Fish and Wildlife Service, were included.

Public Law 88-523, 78 Stat. 701, August 30, 1964, amended 16 U.S.C. § 715s to read in pertinent part as follows:

(a) Beginning with the next full fiscal year and for each fiscal year thereafter, all revenues received by the Secretary of the Interior from the sale or other disposition of animals, timber, hay, grass, or other products of the soil, minerals, shells, sand, or gravel, from other privileges, * * * during each fiscal year in connection with the operation and management of those areas of the National Wildlife Refuge System that are solely or primarily administered by him, through the United States Fish and Wildlife Service, shall be covered into the United States Treasury and be reserved in a separate fund for disposition as hereafter prescribed. * * * The National Wildlife Refuge System (hereafter referred to as the "System") includes those lands and waters administered by the Secretary as wildlife refuges, wildlife ranges, game ranges, wildlife management areas, and waterfowl production areas established under any law, proclamation, Executive, or public land order.

* * * * * * *

(c) The Secretary, at the end of each fiscal year, shall pay, out of the net receipts in the fund (after payment of necessary expenses) for such fiscal year, which funds shall be expended solely for the benefit of public schools and roads as follows:

(1) to each county in which reserved public lands in an area of the System are situated, an amount equal to 25 per centum of the net receipts collected by the Secretary from such reserved public lands in that particular area of the System * * *; and

(2) to each county in which areas in the System are situated that have been acquired in fee by the United States, either (A) three-fourths of 1 per centum of the cost of the areas, * * * or (B) 25 per centum of the net receipts collected by the Secretary from such acquired lands in that particular area of the System within such counties, whichever is greater. The determinations by the Secretary under this subsection shall be accomplished in such manner as he shall consider to be equitable and in the public interest, and his determinations hereunder shall be final and conclusive.

Among other changes which it made to section 715s, the 1964 amendment added minerals to the list in subsection (a), quoted above, of sources of revenues in the refuge system to be reserved in a separate fund in the Treasury (referred to as the "refuge receipts account") and to be distributed in accordance with subsection (c).

The Mineral Leasing Act, originally enacted in 1920 (Act of February 25, 1920, ch. 85, 41 Stat. 437, as amended, 30 U.S.C. § 181 *et seq.* (1970)) authorizes the Secretary of the Interior to lease all lands subject to disposition thereunder which are known or believed to contain oil or gas deposits. 30 U.S.C. § 226 (1970). Lands subject to disposition include lands owned by the United States containing deposits of oil.

30 U.S.C. § 181. All moneys received from sales, bonuses, royalties, and rentals of public lands under the Mineral Leasing Act are required to be paid into the Treasury. Of those amounts, 37½ percent is to go to the State within which the lands are located for roads or schools; 52½ percent is to be paid into the fund established under the Reclamation Act (43 U.S.C. § 371 *et seq.* (1970)) (except in the case of Alaska, where this amount goes to the State). The remainder is to be credited to miscellaneous receipts.

The question presented is therefore whether receipts from oil and gas leases on wildlife refuges created by withdrawals of public lands are required to be disposed of pursuant to the scheme of the Mineral Leasing Act or to that of the 1964 amendment of 16 U.S.C. § 715s. We conclude that disposition of receipts from mineral leases, including oil and gas leases, on lands within the National Wildlife Refuge System, is governed by 16 U.S.C. § 715s, and not by the Mineral Leasing Act.

We agree with the draft memorandum of the Solicitor that oil and gas are included in the term "minerals" in 16 U.S.C. § 715s, as amended. As the memorandum points out, the common understanding of the term "minerals" is that it includes oil and gas. Moreover, if there were any doubt that oil and gas were so included in this case, it would be resolved by the legislative history of the 1964 amendment. It is clear from that history that it was expected that the national wildlife refuge system would be the recipient of revenues from oil and gas. Thus, in reporting on S. 1363, 88th Congress, the bill which was the derivative source of the 1964 amendment to 16 U.S.C. § 715s, the House Committee on Merchant Marine and Fisheries discussed the potential effect of a pending Supreme Court decision which could deprive the United States of oil and gas revenues from a refuge in Louisiana on the income of the wildlife refuge system. H. Report No. 1753, 88th Cong., 2d Sess. 11. As the Solicitor's draft memorandum points out,

> * * * Since the Government could not be deprived of oil and gas revenues unless, except for the court case, it would receive them through the operation of the word "minerals," this concern reflects a clear belief on the part of the House Committee, that when the Committee used the word "minerals," oil and gas were included.

In view of the requirement of 16 U.S.C. § 715s that revenues received by the Secretary for the sale or other disposition of minerals in connection with the national wildlife refuge system be disposed of as prescribed thereunder, and of the conclusion that oil and gas are minerals within the meaning of that section, there is an apparent conflict between section 715s and the Mineral Leasing Act, which prescribes a scheme for disposition of moneys received from leases of oil and gas on public lands different from that under 16 U.S.C. § 715s. The general rule of statutory construction in such circumstances is

that in case of a conflict between a new provision and prior statutes relating to the same subject matter, the new provision, as the later expression of the legislature, is controlling. In accordance with this rule, we conclude that Congress intended the disposition of receipts from minerals on wildlife refuges to be governed by 16 U.S.C. § 715s, as amended. We note that to hold otherwise, as the Solicitor's memorandum points out, would be to deprive section 715s(c) (1) of Title 16, prescribing a specific scheme of distribution for revenues from refuges created by reservation, of any meaning.

The Solicitor's memorandum notes that "refuge withdrawal orders," the administrative actions whereby lands are withdrawn from the public domain for refuge purposes, have commonly included a provision explicitly excluding the Mineral Leasing Act from the effect of the withdrawal. For example, Public Land Order 3999 (31 Fed. Reg. 6907 (1966)) provides for the addition to a wildlife refuge of certain lands by withdrawing them—

> * * * from all forms of appropriation under the public land laws (30 U.S.C. Ch. 2), but not from leasing under the mineral leasing laws * * *.

The question was raised whether this fact would change the foregoing conclusion.

If given effect, the exclusion from the withdrawal order of leasing under the mineral leasing laws could result in the distribution of proceeds of mineral leases on the withdrawn lands according to the Mineral Leasing Act rather than 16 U.S.C. § 715s. In view of our conclusion that the law requires proceeds of mineral leases on lands withdrawn from the public domain in order to become part of the national wildlife refuge system to be distributed according to 16 U.S.C. § 715s, the Secretary of the Interior is without authority to promulgate public land orders which would result in a different distribution of proceeds. Accordingly, public land orders which purport to exclude the mineral leasing laws from withdrawal for wildlife refuge purposes are, to that extent, without effect.

Finally, the memorandum addresses the question whether the fact that, at the time of acquisition of certain refuge lands, the United States already held mineral rights with respect to such lands, would have any effect on the requirement for disposition of mineral receipts from such lands. The 1964 amendment to section 715s of Title 16 contemplates no distinction in the method of disposition of refuge receipts according to the method of acquisition of the refuge. We agree with the memorandum that, if the lands acquired form part of the National Wildlife Refuge System after acquisition, and are primarily administered by the United States Fish and Wildlife Service, then 16 U.S.C. § 715s applies, requiring that all receipts to which the United States is entitled from the disposition of oil and gas resources within the refuge must enter the refuge receipts account.