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NOTE.—Since Public Law 93–344, sec. 501, changes the fiscal year to October through September, Volume 55 of these decisions will be continued an additional 3 months. The cumulative tables and index-digest, ordinarily included with the June pamphlet, will be published instead with the September 1976 pamphlet.

[B-185592]

Contracts—Negotiation—Evaluation Factors—Criteria—Application of Criteria

Allegation that part of successful proposal should have been rejected is not protest against request for proposals evaluation criteria, but against application of criteria by contracting agency in evaluating proposal. Protest filed within 10 working days after protester obtained and analyzed copy of contract, thereby learning of improper evaluation, is timely under General Accounting Office Bid Protest Procedures.

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

While concept of responsiveness is not directly applicable to proposals submitted in negotiated procurement, RFP's repeated use of this term indicates that provisions so referenced were material requirements, and that proposal failing to conform to them would be considered unacceptable.

Equipment—Automatic Data Processing Systems—Leases—Evaluation—Systems Life

Where prices of proposed lease plan for automatic data processing equipment were effective through only 4 months of 96 months' systems life, plan should have been rejected. RFP required that fixed or determinable prices throughout systems life be offered. Fact that other lease plans included in contract cover remainder of systems life is immaterial, because RFP allowed only one plan to be considered in evaluation, and unacceptable plan was only plan actually evaluated. Therefore, awards were made without reasonable assurance of lowest overall cost to Government.

Contracts—Negotiation—Cost, etc., Data—Reevaluation—Lowest Overall Cost to Government

Where awards were made based on partially unacceptable proposal and within reasonable assurance of lowest overall cost of Government, GAO recommends that Army reevaluate proposals (excluding unacceptable lease plan) and, if necessary, take appropriate termination for convenience and reaward action based upon reevaluation of proposals.

In the matter of the Computer Machinery Corporation, June 3, 1976:

The principal issue raised by the protest of Computer Machinery Corporation (CMC) is whether a portion of the proposal submitted by the successful offeror, C3, Inc., under request for proposals (RFP) No. DAHC26-75-R-0012 should have been rejected. CMC contends that it should have been, and two interested parties—Four-Phase Systems, Inc. (Four-Phase) and Inforex, Inc.—agree. The contracting agency (the Department of the Army's Computer Systems Support and Evaluation Agency) and C3 believe that C3's proposal was properly accepted.

Timeliness of Protest

The threshold question of timeliness must be addressed. CMC first protested on December 24, 1975, after the award of contracts to C3.

The Army believes that the protest is untimely because it is actually directed against the RFP's evaluation criteria. The Army points out that, accordingly, the protest should have been filed prior to the closing date for receipt of initial proposals (March 10, 1975), or, at the very latest, the closing date for best and final offers (September 15, 1975). The record also shows that CMC was debriefed on December 8, 1975, and was advised of C3's evaluated prices at that time. This was more than 10 working days prior to the filing of the protest.

However, we agree with CMC's counter-arguments that the principal issue in its protest was timely raised. As CMC points out, the question of whether a portion of C3's proposal should have been rejected does not involve any objection to the RFP's evaluation criteria. Rather, it relates to the Army's application of those criteria in evaluating C3's proposal—particularly, C3's 96-month lease plan, discussed *infra*—and in deciding to accept it.

Moreover, CMC points out that it did not receive a copy of the pertinent contract documents until December 15, 1975. CMC contends—reasonably, we think—that it could not learn of the alleged improper evalution of C3's proposal without performing various mathematical calculations based on the information contained in these documents. The protest letter filed on December 24, 1975, clearly puts into issue the question whether accepting the 96-month lease plan as part of C3's proposal was proper. Therefore, we find that the protest was filed within 10 working days after the basis for protest was known or should have been known, in accordance with section 20.2(b)(2) of our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975).

Background

The RFP contemplated the award of as many as four firm fixed-price, requirements-type contracts for the installation, purchase, lease and maintenance of Key-to-Disk-to-Tape automatic data processing systems. The RFP estimated that 64 systems would be required, divided into the following award groups:

Location	Estimated quantities	
	Small Systems	Large Systems
Overseas	*5*	*3*
Continental United States	*49*	*7*

Further, RFP section E.3 provided that "* * * The evaluation will be based and performed on 64 systems as stated in Section D, 'Evaluation and Award Factors.'"

Offers on any or all of the award groups were required to propose at least three "methods of acquisition"—purchase, lease, and lease with

option to purchase. Other methods of acquisition offered would also be considered and evaluated. RFP sections D.2, D.19. Within each method of acquisition, offerors could propose various plans. However, as to which plans would be evaluated, amendment No. 4 to the RFP provided:

> If an offeror proposes more than one plan under any method of acquisition, only the one plan (per method of acquisition) with the lowest evaluated systems life cost will be used for evaluation and be entered into any resultant contract. However, the Government reserves the right to enter more than one plan into the contract if it is determined additional plans are advantageous to the Government.

RFP section D.36 provided that lowest overall cost would be determined by taking the sum of the net evaluated costs for the methods of acquisition and dividing by the number of methods of acquisition proposed. For example, if the net evaluated costs were $100,000 (purchase), $200,000 (lease) and $300,000 (lease with option to purchase), the total evaluated cost of the proposal would be $600,000 ÷ 3, or $200,000. As noted above, the net evaluated cost of a particular method to be used in this computation would be taken from the plan offered under that method which had the lowest evaluated systems life cost. In the above example, an offeror might have proposed $100,000, $150,000 and $200,000 purchase plans, but only the $100,000 plan would be used in the overall cost computation.

C3's best and final offer proposed four methods of acquisition for each award group—purchase, lease, lease with option to purchase, and lease to ownership.

The crux of the present controversy involves the plans which C3 proposed under the lease and lease with option to purchase methods of acquisition. One of these was described as a "96 month" lease plan. In its proposal, C3 stated:

> The lease plan offered by C3, Inc. and included in our pricing schedules is a long term lease plan. For the prices quoted, the Government would be required to enter into a firm 8 years lease for the equipment and maintenance. * * *

However, as the protester points out, the C3 "96 month" lease plan was subject to a condition which sharply limited its effective duration. In this regard, the two contracts awarded to C3 state: "This plan is applicable only if equipment is installed no later than 31 March 1976." It is to be noted that the contracts were awarded to C3 on November 28, 1975, and that their basic term extends to September 30, 1976. Moreover, by exercising options the Government can extend the duration of the contracts to a maximum of 100 months after award.

C3's proposal also offered other lease plans. The proposal stated:

> At the request of the Government, C3, Inc. hereby offers four optional lease programs. These * * * are to be used only when the 8 year lease program * * * cannot be used. For these reasons, these lease programs will not be used in evaluating C3, Inc.'s cost proposal. * * *

As noted, *supra*, RFP amendment No. 4 provided that only the one plan per method of acquisition with the lowest evaluated cost would be considered in evaluating the overall proposal costs, although additional, unevaluated plans could be included in the contract. Since C3's "96 month" lease plan was the lowest in cost, it was the only plan included in the overall cost evaluation by the Army, even though the Army would be able to take advantage of its prices for only a few months subsequent to the award of the contracts. C3's other lease plans, which did not expire by March 31, 1976, were not considered in the evaluation but were included in the contracts.

This result has produced a variety of objections from CMC, Inforex and Four-Phase. The most basic contention raised is that C3's 96-month lease plan should have been rejected because it was nonresponsive to the RFP.

"Responsiveness" of C3's 96-Month Lease Plan

"Responsiveness" means the exact conformity of a bid with all of the material terms and conditions of a formally advertised solicitation. *Cf.* 37 Comp. Gen. 780 (1958); 38 *id.* 612 (1959). As such, it is a concept which is not directly applicable to proposals submitted in a negotiated procurement. *Engineered Systems, Inc.*, B-184098, March 2, 1976, 76-1 CPD 144. Nonetheless, the RFP in the present case used the term responsiveness. The following excerpts are pertinent:

D.1 *BASIS OF AWARD.* Award will be made to the responsive, responsible offeror whose offer represents the lowest overall cost to the Government, price and other factors considered.

D.2 *RESPONSIVENESS.* The offeror is cautioned to read and comply with all provisions of this solicitation. To be considered for award, an offer must comply in all material respects with the essential requirements of the solicitations so that all offerors may be equally evaluated. * * *

While the term responsiveness is inapposite in a negotiated procurement, we believe that its use in the RFP should reasonably be taken to mean that terms and conditions so referenced were intended to be material requirements, and that a proposal failing to conform to them would be considered unacceptable. *Cf. Corbetta Construction Company of Illinois, Inc.*, 55 Comp. Gen. 201 (1975), 75-2 CPD 144.

Of particular significance is the RFP's use of the term responsiveness in connection with a requirement that fixed or determinable prices be offered for the systems life. RFP sections D.7 and D.8 stated:

D.7 *FIXED PRICE OPTION. This solicitation is being conducted on the basis that the known requirements exceed the basic contract period to be awarded* but due to the unavailability of funds, the option(s) cannot be exercised at the time of award of the basic contract, although there is a reasonable certainty that funds will be available thereafter to permit exercise of the option; realistic competition for the option periods is impracticable once the initial contract is awarded; and it is in the best interest of the Government to evaluate options in order to eliminate the possibility of a "buy-in." Therefore, to safeguard the

integrity of the Government's evaluation and because the Government is required to procure ADPE and related items on the basis of fulfilling systems' specifications at the lowest overall cost, *subsequent as well as initial requirements must be satisfied on a fixed price basis.* Since the systems or items to be procured under this solicitation have an expected life of 96 months, hereafter referred to as "systems' life", and since systems' life costs are synonymous with lowest overall costs, the contract resulting from this solicitation must contain options for renewals for subsequent fiscal years throughout the projected systems' life at fixed prices, and, if applicable, at fixed prices for services not included in the initial requirement. Should the offeror desire, separate charges, if any, which will incur to the Government should the latter fail to exercise the option(s), may be stated separately. Options included in offers submitted in response to this solicitation will be evaluated as follows:

(a) *FIXED PRICES. To be considered responsive to this solicitation, offerors must offer fixed prices for the initial contract period for the initial systems or items being procured. Fixed prices, or prices which can be finitely determined, must be quoted for each separate option renewal period and must remain in effect throughout that period.*

(b) *OPTIONAL QUANTITIES.* Offers will be evaluated for purposes of award by adding the total price of all optional periods to the total price for the initial contract period covering the initial systems or items. Separate charges, if any, which will incur to the Government should the latter fail to exercise the options, will not be considered in the evaluation.

(c) *UNBALANCED PRICES.* An offer which is unbalanced as to prices for the basic and optional period may be rejected as nonresponsive. An unbalanced offer is one which is based on prices significantly less than cost for some systems and/or items and prices which are significantly overstated for the other systems and/or items.

D.8 *EVALUATION OF OPTIONS.* Evaluation of options will not obligate the Government to exercise the options. *Offers which do not include fixed or determinable systems' life prices cannot be evaluated for the total requirement and will be rejected as nonresponsive.* Offers which meet the mandatory requirements will be evaluated on the basis of lowest net evaluated cost to the Government, including all stated options. See D.7 above. [Italic supplied.]

Among other things, these provisions establish that it was necessary for the Government in evaluating the proposals to be able to accurately determine systems life costs. As noted previously, under RFP section D.36 the evaluated systems life costs for various methods of acquisition would be considered in determining a proposal's overall cost. Also, amendment No. 4 to the RFP, *supra*, clearly provided that only the *one plan* (per method of acquisition) with the lowest evaluated systems life cost would be considered in the overall evaluation.

In interpreting the RFP, we believe that RFP sections D.7, D.8, D.36 and amendment No. 4 should be read and reasonably construed together. *Cf. Lite Industries, Inc.*, 55 Comp. Gen. 529, 531 (1975), 75-2 CPD 363. In doing so, we believe that the only consistent and reasonable interpretation is that a particular plan offered under a method of acquisition, in order to be eligible for evaluation, was required to offer fixed or finitely determinable prices for both the initial contract period as well as the entire systems life.

C3's 96-month lease plan failed to conform to these terms. The plan was a 96-month lease plan in name only. In actuality, its prices were fixed and effective only through March 31, 1976—a period of

about 4 months after the award of the contracts. This does not even cover the initial contract period, much less the entire systems life Thus, it was not a plan which was eligible for consideration in the overall evaluations, and the Army erred in accepting it for evaluation. The Army should have rejected the 96-month lease plan, and instead used in the overall evaluation the next lowest cost plan proposed by C3 which contained fixed or determinable prices for the systems life.

Moreover, since the Army evaluated only C3's 96-month lease plan, and did not use C3's other lease plans in the evaluation of overall costs, the overall cost evaluation was based in part on a plan which did not offer fixed or determinable prices throughout systems life. To this extent, the overall evaluation of C3's proposed costs for the various award groups was flawed, because the portion of C3's overall costs derived from the 96-month lease plan was incorrect. The fact that C3's other lease plans were included in the contracts (as provided for by Amendment No. 4, *supra*) is irrelevant, because the pertinent issue is whether the evaluation was conducted in accordance with the terms of the RFP, not the extent of actual costs which are incurred by the Government under whatever plans are in the contracts. Under these circumstances, there is no reasonable assurance that the awards were made at the lowest overall cost for the several award groups.

In reaching this conclusion, we have carefully considered but cannot concur with the contentions advanced by the Army and C3 that the evaluation of C3's proposal was proper. The Army reports that as a result of the protest, the contracting officer recomputed C3's proposal based on the assumption that 18 systems could conceivably be delivered under the 96-month lease plan, with the balance of the requirements furnished under the other lease plans in the contracts. This reevaluation shows that C3's proposal is still lowest in evaluated price. The other offerors dispute this analysis by pointing out that no systems were in fact installed by March 31, 1976—the expiration of C3's 96-month lease plan.

We do not believe that either of these positions is pertinent. As already noted, the issues raised by the protest involve the evaluation of proposals submitted in response to the RFP and the propriety of the awards resulting therefrom. Whatever orders are actually placed under the contracts, and whatever costs are ultimately incurred by the Government, are not dispositive of these issues one way or the other. The Government must reasonably assure itself that probable lowest ultimate costs will be obtained prior to awarding any requirements contract. *Cf. Edward B. Friel, Inc.*, 55 Comp. Gen. 231, 238 (1975), 75-2 CPD 164. The RFP here established an evaluation procedure for doing this, but it was improperly applied as regards a portion of C3's proposal.

A further point mentioned in the Army's report is that section D.18 of the RFP provided: "For purposes of evaluation, the installation date will be month one (1) of the total system life." This provision might appear to justify evaluating C3's 96-month lease plan—since the plan did cover the first month of total systems life. However, we believe RFP section D.18 refers to the present value analysis of proposals—i.e., the adjustment of payments made over a period of time to reflect their present value as of the date of contract award, or some other stipulated date. As such, this section merely provides a common standard to be used in the cost evaluation of proposal plans. It does not affect the requirement that a plan be eligible for evaluation in the first place—i.e., that the plan be acceptable under the other terms and conditions established in the RFP.

C3 has pointed out that RFP section D.7 called for fixed prices in the option periods. C3 contends that since its 96-month lease plan covered the entire systems life (and thus did not involve any option periods), the Government "* * * * had firm fixed prices for each and every month of the 96 months. * * *"

C3 is correct that RFP section D.7 primarily treats of the option periods. However, it also established a requirement for fixed or determinable prices throughout the systems life, and it must be read and applied consistently with the other provisions of the RFP. Moreover, the prices of C3's 96-month lease plan were effective for only about 4 months, not 96.

C3 also suggests that "the systems' life cost for various long term leases is easily calculated; that is, the life cost of 4 two-year leases can easily be compared with the cost of 1 eight-year lease." While this may be true, the fact remains that the RFP did not provide that a combination of several lease plans could be considered in the evaluation as the lowest evaluated cost of a particular method of acquisition. Rather, the RFP provided that the evaluation would consider only the one plan with lowest evaluated systems life cost under a given method of acquisition. Also, the Army did not in fact consider a combination of C3's various lease plans in its evaluation, and therefore reasonable assurance that the awards represent the lowest overall cost is lacking.

Another of C3's contentions is that it would have been unrealistic for the Army to have refused to evaluate the 96-month lease plan simply because the plan, standing alone, could not fulfill the total estimated requirements of the Government. C3 points out that the RFP merely contained an estimate of requirements, and thus that even a minimum actual quantity of systems to be ordered could not be accurately forecast.

The RFP provided that the evaluation would be based and performed on an estimate of 64 systems (section E.3, *supra*). Also, as previously discussed, fixed or determinable prices extending over the systems life were required, and only the one lowest cost plan per method of acquisition was to be considered in the overall cost evaluation. The application of a reasonably accurate estimate of the Government's anticipated needs to the prices quoted in bids or offers is the proper basis upon which to determine lowest overall cost in awarding a requirements contract. *Edward B. Friel, Inc., supra.* See also 49 Comp. Gen. 787 (1970), where it was held that a bid which failed to offer a firm price commitment for a portion of the Government's estimated requirements was properly rejected as nonresponsive.

C3 also contends, in effect, that the RFP permitted offerors to be innovative in their pricing strategy. C3 argues that it properly took advantage of this flexibility by offering an innovative and unique competitive approach, and that other offerors which did not do likewise should not be allowed to obtain a "second bite at the apple."

The extent to which a bid or proposal can be innovative in the sense suggested by C3 depends on the circumstances of the particular case. For example, in 53 Comp. Gen. 225, 227 (1973), we remarked that a bid offering a nominal trade-in price for certain items in order to achieve a more favorable total evaluated price would not have been objectionable. However, in that case the terms of the solicitation permitted the submission of such a bid. Here, C3's proposal was innovative in a manner that rendered a portion of it unacceptable under the terms of the RFP.

The submissions in connection with the protest have raised a number of subsidiary issues. However, these have either been dropped by the protester, have been resolved by the Army's report, or otherwise appear to be academic. This decision is limited to considering those issues necessary for a proper disposition of the protest.

Recommendation

In view of the foregoing, the protest is sustained.

We recommend that the Army reevaluate the best and final offers (excluding C3's 96-month lease plans) to determine which proposal(s) offer the lowest overall cost for the various award groups. Appropriate termination for convenience and reaward action, if necessary, should then be taken.

Since our decision contains a recommendation for corrective action, we have furnished copies to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970), which requires the submission of written statements

by the Army to the Committees on Government Operations and Appropriations concerning the action taken with respect to our recommendation.

Also, by letter of today we are advising the Secretary of the Army of our recommendation.

[B-186123]

Bids—Evaluation—Tax Inclusion or Exclusion

Protest that low bidder did not include Federal Excise Tax (F.E.T.) in its bid price under invitation which provided that all Federal, State and local taxes (including F.E.T.) were included in bid price and resulting contract price is denied as bidder took no exception to requirement and unless bid affirmatively shows that taxes are excluded, it is presumed that taxes are included in bid price.

In the matter of Domar Industries, June 4, 1976:

The United States Army Tank-Automotive Command, Warren, Michigan, issued invitation for bids (IFB) No. DAAE07-76-B-1904 for 1,527 wiring harnesses for the ¾-ton two-wheeled cargo trailer.

The two lowest unit price bids of $5.78 and $5.95 were submitted by Aurora Cord & Cable Company (Aurora) and Domar Industries (Domar), respectively. Domar has protested any award to Aurora under the IFB because, allegedly, Aurora did not include Federal Excise Tax (F.E.T.) in its bid as required.

The bidding schedule of the IFB provided that the unit price included all Federal, State and local taxes, including F.E.T. In addition, the IFB incorporated by reference the standard tax clause prescribed by Armed Services Procurement Regulation § 7-103.10(a) (1975 ed.) which provides that the contract price includes, *inter alia*, all applicable Federal taxes.

Domar contends that it has knowledge that Aurora, as a standard practice, does not include the F.E.T. in its bids on Government contracts and, therefore, if the applicable F.E.T. is added to Aurora's bid, Domar's bid is low.

A review of Aurora's bid shows that no exception was taken to the requirement that F.E.T. was applicable and included in the bid price. *See* 49 Comp. Gen. 782 (1970). There was no requirement in the IFB that the F.E.T. be priced separately but only a lump-sum-unit price was required. *Cf.* 37 Comp. Gen. 864 (1958). Therefore, Domar has submitted a responsive bid and is liable for any taxes applicable to the instant procurement including F.E.T. Unless a bid affirmatively shows that taxes are excluded from the bid price, it is presumed that taxes are included in that price. 16 Comp. Gen. 1095 (1937). There need be no affirmative statement that taxes are included in the bid price. 20 Comp. Gen. 711, 715 (1941). Contrast *Allis-Chalmers Material*

Handling Sales and Service, B–183228, May 6, 1975, 75–1 CPD 280, and 41 Comp. Gen. 289 (1961), where bids on a tax-excluded basis were found to be properly rejected as nonresponsive.

Finally, Domar requests that our Office review the F.E.T. returns of Aurora for the past several years to ascertain if Aurora has been paying the F.E.T. where applicable. Domar indicates that an audit by the Internal Revenue Service of Aurora's 1973 F.E.T. procedures is unresolved to date. We believe the matter of Aurora's prior tax practices has no effect on the acceptability of that firm's bid here.

Accordingly, the protest is denied.

[B–184683]

Contracts—Protests—Merits—Court Interest

Protest filed with General Accounting Office also filed before court will be considered on merits despite presence of several untimely issues, since court has expressed interest in GAO decision.

Departments and Establishments—Rule Making Authority—Federal Aid, Grants, Contracts, etc.

Although contractual matters are statutorily exempted from rule making provisions of 5 U.S.C. 553, Secretary of Labor has waived reliance on that exemption for rule making by his Department, thereby necessitating Department of Labor compliance with statutory provisions.

Contracts—Labor Stipulations—Nondiscrimination—"Affirmative Action Programs"—Washington, D.C. Plan—Effective Date

Question of whether Department of Labor order extending Washington Plan (for fostering equal employment opportunity through Federal contractor affirmative action plans) is subject to rule making requirements of 5 U.S.C. 553 is not appropriate for decision by GAO since (1) it involves legal issue of first impression; (2) courts are not in agreement on effect of noncompliance with such requirements; (3) Washington Plan extension has been regarded as effective; and (4) matter is pending before U.S. District Court. GAO will consider Plan effective as of date of publication in Federal Register.

Contracts—Labor Stipulations—Nondiscrimination—"Affirmative Action Programs"—Commitment Requirement

Requirement in solicitation that bidders commit themselves to affirmative action provisions of Washington Plan, even though Plan had expired by bid opening date, was proper since contracting officer had been informed that Plan would be extended and solicitations may provide for specific future needs and contingencies.

Bids—Invitation for Bids—Telegraphic Amendment

Where agency issues telegraphic solicitation amendment one day before bid opening and telephonically notifies bidders of that fact who, without objecting, expressly acknowledge receipt of amendment, one bidder's assertion that agency did not issue written amendment and did not provide bidders with sufficient time to consider amendment is without merit.

Contracts—Specifications—Ambiguous—Bid Responsiveness *v.* Bidder Responsibility—Effect Not Prejudicial

Where Washington Plan bid appendix requires bidder to insert goals and sign appendix, bid which includes signed appendix without insertion of goals is nonresponsive since noncompliance with appendix requirements is not minor deviation which may be waived. Although appendix mistakenly made one reference to bidder "responsibility" instead of responsiveness, appendix read as whole indicated that compliance was to be matter of responsiveness, and record indicates that protester, who was on constructive notice of correct terminology, was not prejudiced by error.

Contracts—Specifications—Failure To Furnish Something Required—Information—Minority Manpower Utilization

Protester's assertion that solicitation was confusing and ambiguous because it only provided space for insertion of goals for time periods which had expired is without merit, since solicitation specified that goals for the last period for which space was provided would be applicable to the contract to be awarded.

Bids—Invitation for Bids—Requirements—Commitment to Washington, D.C. Minority Hiring Plan

Invitation for bids (IFB) required bidders to commit themselves only to terms and conditions of Washington Plan as spelled out in IFB. Contention that IFB was improper because it required commitment to a revised Plan not yet issued is without merit.

Bids—Invitation for Bids—Requirements—Responsive to

Bid which included signed appendix including percentage goals for two trades bidder contemplated utilizing in contract performance was responsive to requirements of IFB. Protester's assertion that bidders were required to submit estimates of manhours required for work in Washington area and of number of employees to be used is based on different appendix used in earlier case and has no applicability to instant matter.

Contracts—Awards—Sustained by General Accounting Office—Protest Not for Consideration

Protester's allegation that agency had no need to award contract prior to GAO decision on protest need not be considered since award has been sustained.

In the matter of Starline, Incorporated, June 10, 1976:

Starline, Incorporated, has protested the rejection of its bid by the General Services Administration (GSA) under Bid Package No. 4 (B–4) leading to Contract No. GS–00B–03170 for the architectural, metal and glass work at the Federal Home Loan Bank Board Building, Washington, D.C. Starline's bid was rejected because of noncompliance with solicitation provisions dealing with affirmative action requirements.

The invitation for bids (IFB) was issued on May 21, 1975; bids were opened on July 10, 1975. Two bids were received: Starline at $771,000, and Flour City Architectural Metals at $897,000. On August 1, 1975, GSA notified Starline that its bid was rejected as non-

responsive because it failed to enter its percentage goals for minority manpower utilization in Appendix A to the IFB. Appendix A set forth an affirmative action program to assure compliance with equal employment opportunity requirements, which was known as the Washington Plan. This protest was originally filed on August 7, 1975, and was amended on September 13, 1975, in response to certain facts set out in GSA's report to this Office dated August 29, 1975. We are advised that GSA awarded the contract to Flour City on August 26, 1975.

Starline's principal contention is that rejection of its low bid for failure to comply with the provisions of Appendix A was improper because the Washington Plan had expired and had not been extended in accordance with law. Alternatively, Starline claims that even if the Appendix A provisions were applicable, its failure to completely fill out Appendix A did not render its bid nonresponsive, particularly since the Washington Plan provisions of the IFB were ambiguous. Starline further argues that if its bid was nonresponsive, then Flour City's bid must also be regarded as nonresponsive. Finally, Starline contends that GSA's determination to make an award prior to our resolution of this protest was arbitrary and capricious.

On August 29, 1975, Starline instituted Civil Action No. 75–1426 in the United States District Court for the District of Columbia (*Starline, Inc.* v. *Arthur F. Sampson, et al.*), and subsequently amended its complaint twice. As amended, the complaint requested a preliminary injunction enjoining GSA and Flour City (and its parent corporation, The Seagrave Corporation) from incurring costs, preparing for performance, or in any way performing Contract No. GS–00B–03170 pending the resolution of Starline's bid protest by this Office. On October 10, 1975, Starline's Motion For Preliminary Injunction was denied. On January 5, 1976, the District Court filed a Memorandum and Order granting Starline's Motion For Continuance and denying Starline's Motion For Leave To File Third Amended Complaint without prejudice to refile subsequent to our decision.

At the outset, we point out that Starline's contentions regarding the inclusion of Washington Plan provisions in the IFB and the sufficiency and clarity of those provisions appear to be untimely under section 20.2(b)(1) of our Bid Protest Procedures. That section requires protests based on alleged solicitation defects to be filed prior to bid opening. Ordinarily, issues which are untimely raised would not be for consideration on the merits. However, it is clear from the court's Memorandum and Order of January 5, 1976, that it expects a decision on the merits of Starline's protest to be issued by this Office. We therefore will consider the matter. *Dynalectron Corporation, et al.*, 54 Comp. Gen. 1009, 1011–12 (1975). 75–1 CPD 341; *Control Data Corporation*, 55 Comp. Gen. 1019 (1976), 76–1 CPD 276.

Validity of Washington Plan Requirement

Starline first contends that the IFB's Appendix A, the Washington Plan, had expired prior to bid opening and that its bid therefore could not properly be rejected for failure to comply with it. The IFB required each bidder to sign Appendix A and to submit percentage goals for minority manpower utilization in specified trades during performance of the contract. The goals had to be at least within the ranges specified in the appendix. Different ranges for the specified trades were listed for each of several annual periods. The most recent period for which ranges of goals were listed was from May 31, 1973, until May 31, 1974. However, the appendix also provided that the goals and ranges for the year ending May 31, 1974 "will be applicable to invitations * * * until July 9, 1975."

The question regarding the validity of the Washington Plan arose because GSA found it necessary to extend the original April 22, 1975, date for opening of bids to July 10, 1975, one day after the stated expiration date of the Washington Plan goal ranges. After being advised orally by the Department of Labor (the agency responsible, under Executive Order 11246, September 28, 1965, for promulgating the Washington Plan bid appendix) that the Washington Plan was to be extended, GSA, on July 9, 1975, issued a telegraphic solicitation amendment deleting from Appendix A the July 9, 1975, cut-off date and telephonically advised the firms on the bidders' list of that fact. The Labor order addressed to the "HEADS OF ALL AGENCIES" formally extending the Plan indefinitely was issued on July 18, 1975. The order was published in the Federal Register on July 24, 1975. *See* 40 Fed. Reg. 30963.

Starline argues that these actions did not extend the Washington Plan but were only attempts by GSA and Labor to do so illegally. According to Starline, the Washington Plan bid appendix was a "rule" under 5 U.S. Code § 551 (1970), and that any attempt to extend it must be deemed rule making under 5 U.S.C. § 553 (Supp. IV, 1974). Therefore, Starline contends, pursuant to 5 U.S.C. §§ 552, 553 (Supp. IV, 1974) and 44 U.S.C. § 1505 (1970), any extension of the Washington Plan would be valid and binding upon a contracting party only after notification of the proposed extension had been published in the Federal Register by Labor and a period of 30 days had been allowed for comment. Starline further argues that GSA's attempt to apply Labor's proposed extension to the IFB was not effective because it did not comply with the requirements of Federal Procurement Regulations (FPR) § 1-2.207 (1964 ed.) dealing with solicitation amendments. Starline claims that the amendment deleting the July 9th cut-off date was not issued in writing prior to the date on which the change

was to become effective and that bidders were not permitted sufficient time to consider the amendment before submitting bids.

GSA takes the position that the Washington Plan involves contractual matters only and therefore is exempted by 5 U.S.C. § 553(a)(2) from statutory rule making requirements. GSA further argues that even if the Washington Plan extension order was required to be published in the Federal Register, Starline cannot assert the invalidity of the extension because that firm was on actual notice of the extension.

Under 5 U.S.C. §§ 551 (4), (5) (1970), a "rule" means, *inter alia*, an agency statement designed to implement, interpret, or prescribe law or policy of an agency, or any practices bearing thereon, and "rule making" is defined as the agency process for formulating, amending, or repealing a rule. 5 U.S.C. § 553 provides for general notice of proposed rule making to be published in the Federal Register unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law, for public participation in rule making procedures, and for publication of final substantive rules. 5 U.S.C. § 553(d) states that "required publication * * * of a substantive rule shall be made not less than 30 days before its effective date * * *."

Ordinarily these rule making provisions would not be applicable to this situation since, as GSA points out, the Washington Plan is implemented solely through the award of contracts and contracts matters are excepted from statutory rule making requirements by 5 U.S.C. § 553(a). However, the Secretary of Labor has provided in 29 CFR § 2.7 (1975) that:

> It is the policy of the Secretary of Labor, that in applying the rule making provisions of the Administrative Procedure Act (5 U.S.C. section 553), the exemption therein for rules relating to public property, loans, grants, benefits or contracts shall not be relied upon as a reason for not complying with the notice and public participation requirements thereof. The policy is intended to carry out Recommendation No. 16 of the Administrative Conference of the United States.

It has been held that this provision precludes Labor from relying on the statutory exception. *City of New York* v. *Diamond*, 379 F. Supp. 503 (S.D.N.Y. 1974).

We also do not believe that Starline was on "actual notice" of the extension of the Washington Plan as that term is used in 5 U.S.C. § 553(b). Starline was informed, by a telephone call on July 9 and by Amendment No. 6 to the IFB, only that the July 9, 1975, date specified in Appendix A was being deleted. Starline had no actual notice of the Washington Plan extension order and could not have since the order itself was not signed until July 18.

Nevertheless, the question of whether the rule making requirements of 5 U.S.C. § 553 are applicable to this case appears to raise a novel

issue which has yet to be judicially determined. On the one hand, "rule" and "rule making" are broadly defined in the statute and could be read as encompassing the order extending the Washington Plan, particularly if the order is viewed as imposing "rights or obligations on some party." *Carpenters 46 County Conference Board* v. *Construction Industry Stabilization Committee*, 393 F. Supp. 480, 493 (N.D. Cal. 1975). On the other hand, it is not clear that the statute envisions compliance with the full panoply of rule making requirements when a "rule" is merely extended without any change in its substantive provisions. Cf., *Detroit Edison Company* v. *U.S. Environmental Protection Agency*, 496 F. 2d 244 (6th Cir. 1974). We are unaware of any judicial decision which has expressly considered this point.

Furthermore, if an extension order is to be regarded as a rule subject to the 30-day notice requirement, there is also some question as to whether noncompliance with that requirement would result in the total invalidity of the extension. It has been held that regulations which are promulgated without regard to the 30-day publication requirement are void and of no effect. *City of New York* v. *Diamond*, *supra*, and cases cited therein. However, it has also been held that a directive promulgated under such circumstances is "invalid until 30 days after it was actually published * * * but valid thereafter." *Lewis-Mota* v. *Secretary of Labor*, 469 F. 2d 478, 482 (2nd Cir. 1972). In addition, the Washington Plan as extended has been regarded as "effective," at least with respect to procurements initiated after the extension order appeared in the Federal Register, by both this Office and the U.S. District Court. See *Peter Gordon Co., Inc.*, B–185300, March 3, 1976, 76–1 CPD 153; *Peter Gordon Company, Inc.* v. *Bokow*, Civil Action No. 76–0545 (D.D.C., April 28, 1976). In fact, even Starline, in its second amended complaint, states at one point that "the Labor Department reinstituted the Washington Plan by publishing a notice in the Federal Register * * *." Under these circumstances, and in view of the fact that this case is pending in U.S. District Court, we think it would be inappropriate for this Office to decide the purely legal question of first impression regarding the effect of Labor's failure to comply with the 30-day notice provision of 5 U.S.C. § 553 when it extended the Washington Plan. Rather, in accordance with the approach taken in *Peter Gordon Co., Inc.*, *supra*, we will regard the Plan as effective at least as of the July 24, 1975 Federal Register publication date and consider whether the Washington Plan requirements were otherwise validly included in the IFB and whether Starline's bid was responsive to those requirements.

On that basis, we do not agree with Starline's contentions that GSA improperly continued to include the Washington Plan commitment

requirement in the IFB after July 9, 1975, and that this procedure "constituted an *ex post facto* application of the Washington Plan." Even if the Plan did expire on that date, GSA had been informed by Labor that the Plan was being extended. It was thus reasonable for GSA to believe that the Plan would be in effect during part, if not all, of the performance term of the contract to be awarded. It has long been recognized that solicitations need not be limited to precise requirements existing at the time of bid opening, but may also require bidders to commit themselves to furnishing future Government needs or to meeting other contingent requirements. Requirements and indefinite delivery type contracts are prime examples of where bidders commit themselves to supplying future Government needs. Solicitations containing provisions giving the Government the option to increase the quantity of supplies to be furnished under the contract or to extend the term of performance also are in this category. Perhaps even more on point are the solicitations which require bidders who commit themselves to certain "Part I" affirmative action requirements to also commit themselves to other "Part II" requirements in the event they cease being eligible for "Part I" coverage during contract performance. *See*, e.g., *O. C. Holmes Corporation*, 55 Comp. Gen. 262 (1975), 75-2 CPD 174; 52 Comp. Gen. 874 (1973); 51 *id.* 329 (1971); B-174932, March 3, 1972. *See also A.C.E.S., Inc.*, B-181926, January 2, 1975, 75-1 CPD 1, in which a solicitation provision required the contractor to comply with the Service Contract Act in the event it was determined, after award, that the Act was applicable to the procurement. Accordingly, we believe that GSA, on the basis of the information it received from Labor, could properly include the Appendix A provisions in the instant solicitation for application after July 9, 1975.

With regard to Starline's contention that GSA failed to comply with FPR § 1-2.207, the record indicates that on July 9, 1975, Starline was telephonically notified of Amendment No. 6, that on the same date the amendment was telegraphically sent to Starline (although Starline contends it did not receive it until one week after bid opening), and that Starline's bid acknowledged the amendment in writing by number and date. Under these circumstances, we find no basis for concluding that GSA did not issue a written amendment as contemplated by the regulation. The fact that Starline might not have received the amendment in the precise form indicated by the regulation, in the absence of a showing of prejudice, cannot operate to invalidate the procurement.

With respect to Starline's argument that it was not given proper time to consider the substance of the amendment, we have held that FPR § 1-2.207(d) (1964 ed.), requires "that sufficient time elapse be-

tween issuance of the amendment and bid opening to enable *all* bidders to consider and timely ackowledge the amendment." *See* 50 Comp. Gen. 648, 653–54 (1971). Although one day between amendment issuance and bid opening would be insufficient in many instances, *see*, e.g., 45 Comp. Gen. 651 (1966), here the amendment was simple and precise (the deletion of a date), and its effect, as recognized by the District Court, was merely "to maintain a requirement that Starline * * * knew * * * all along * * *." Furthermore, Starline did not object prior to bid opening that it did not have sufficient time to consider the amendment, but instead acknowledged the amendment and attempted to comply with the Appendix A provisions. Accordingly, we find no merit to this aspect of the protest. *See* 45 Comp. Gen. 651, *supra*.

Responsiveness of Starline's Bid

Starline alternatively contends that if the Washington Plan appendix is applicable to this procurement, then GSA erred in rejecting Starline's bid as nonresponsive despite the absence from the bid of percentage goals for any of the listed trades. Starline's contention is based on four grounds. First, Starline claims that its bid was responsive because it was contractually bound by its signature at the end of Appendix A. In this respect, Starline states at the time of bid opening it was impossible to list all the trades it would use on this project and that it therefore signed Appendix A without including either the specific trades to be employed or the applicable minority manhour percentages to demonstrate its willingness to be bound by all the hiring requirements for all the trades listed in the Plan. Second, Starline asserts that the omission of goals is a minor deviation which can be corrected after bid opening. Third, Starline argues that Appendix A was ambiguous and confusing and should be strictly construed against the Government. Fourth, Starline suggests it could properly submit its goals after bid opening because the IFB made goal submission a matter of responsibility (to be determined at time of award) rather than responsiveness.

As additional support for its contention that its bid should not be rejected, Starline also points to its voluntary compliance with EEO Plan hiring goals, its assurances to GSA that it would be bound by Appendix A, its aid to GSA in effecting cost-saving changes to the specification prior to bid opening, and the fact that its bid was low by $126,000. Starline also notes that Labor has proposed modifying a similar Appendix A by providing that a signature alone would be adequate to evidence the required commitment. *See* 40 Fed. Reg. 28472–80 (1975).

We think Starline's bid was clearly nonresponsive. The invitation, on page three of Standard Form 20 (IFB for a construction contract), contained the following caveat:

NOTICE

TO BE ELIGIBLE FOR AWARD OF THE CONTRACT EACH BIDDER MUST FULLY COMPLY WITH THE REQUIREMENTS, TERMS AND CONDITIONS OF ATTACHED APPENDIX TO Standard Form 21, BID FORM, AFFIRMATIVE ACTION PLAN

EACH BIDDER MUST SIGN AND SUBMIT AS PART OF HIS BID THE AFFIRMATIVE ACTION PLAN. FAILURE TO DO SO WILL BE GROUNDS FOR REJECTION OF THE BID.

Page one of Appendix A again advised bidders that full compliance with the requirements, terms and conditions of the appendix was a prerequisite to award of the contract. The first paragraph of the Appendix A requirements, terms and conditions stated:

> No contracts shall be awarded * * * unless the bidder completes and submits, *prior to bid opening*, this document designated as Appendix A * * * which shall include specific goals of minority manpower utilization for each trade designated below * * * such goals to be * * * within the ranges established by this Appendix * * *.
>
> * * * * * * *
>
> A bidder who fails to complete or submit such goals shall not be deemed a *responsible* bidder and may not be awarded the contract * * *. In no case shall there be any negotiation over the provisions of the specific goals submitted by the bidder after the opening of bids and prior to the award of the contract. [Italic supplied.]

It has been uniformly held, in cases involving a nearly identical Washington Plan appendix and a similar Chicago Plan appendix, that the absence from a bid of goals within the prescribed ranges renders the bid nonresponsive. *Northeast Construction Company* v. *Romney*, 485 F. 2d 752 (D.C. Cir. 1973); *Rossetti Contracting Co., Inc.* v. *Brennan*, 508 F. 2d 1039 (7th Cir. 1975); 50 Comp. Gen. 844 (1971). In both *Northeast* and *Rossetti* the bidder signed and dated the appendix. However, in *Northeast*, the bid was considered nonresponsive because the bidder's failure to list any utilization goal whatsoever in Appendix A cast doubt on the nature of the bidder's commitment, while in *Rossetti*, there was similar doubt because the bidder placed brackets around the trades required and listed a utilization percentage not within the prescribed ranges.

In 50 Comp. Gen. 844, *supra*, we considered Northeast's arguments that its bid was responsive, even though it lacked percentage goals, because the appendix was signed in several places, thus evidencing the bidder's commitment to the goals as set forth in the Washington Plan, and that its failure to insert goals in the blank spaces provided was at the most a waivable minor informality. We held that Northeast's failure to submit spcific goals for minority manpower utilization

was a material deviation which could not be waived or corrected under FPR § 1-2.405. We stated as follows (50 Comp. Gen. at 846-47) :

> In the event that the contractor fails to meet the specific goals which he establishes, a determination of whether or not he exercised "good faith" in attempting to meet said goals is based and correlative upon his specific commitment thereon. Sanctions such as contract cancellation can be imposed if it is determined that the contractor did not employ the requisite "good faith." It is our view that the submission of goals by the successful bidder would operate to make the requirement for "every good faith effort" to attain such goals a material part of his contractual obligation upon award of a contract. Therefore, the obligations imposed by appendix "A" would become a part of the contract specifications against which a contractor's performance will be judged in the event he fails to attain his stated goals, just as much as his stated goals become a part of the contract specifications against which his performance will be judged in the event he does attain his stated goals.
>
> With the foregoing in mind, we cannot agree that, because it signed appendix "A" in two places, Northeast was committed to the prescribed minimum percentage ranges for minority group employment set forth in the Requirements, Terms and Conditions of the appendix. Upon examination of the Northeast bid and the attached appendix "A," we find no basis to conclude that Northeast was legally bound to at least the minimum prescribed percentage ranges. The appendix, read as a whole, is quite specific that the bidder must submit his goals, since his compliance is measured by his goals and not by the prescribed minimums. Accordingly, it is our opinion that a failure by a bidder to submit specific individual goals for minority manpower utilization constitutes such a material deviation from the stated requirements of appendix "A" that such a deficient bid cannot be regarded as eligible for award under the subject invitation.

This view has been affirmed by this Office, *see*, e.g., B-176937, March 7, 1973, was also adopted by the court in *Northeast Construction Company* v. *Romney*, *supra*, and obtains regardless of voluntary past compliance, good faith intentions, or the difference in cost between first and second low bids.

Although Starline attempts to distinguish *Northeast* and *Rossetti* on several bases, we think the holdings in those cases are clearly applicable to this situation. In our view, the only possible material difference between the Appendix A in this case and that used in the other cases that could warrant distinguishing those cases concerns the use of the term "responsible bidder" rather than "responsive bidder." The distinction is important because requirements bearing on the responsibility of a bidder may be met after bid opening while matters of bid responsiveness must be complied with at bid opening. *See*, e.g., 52 Comp. Gen. 389 (1972) ; 39 *id.* 247 (1959).

GSA reports that the term "responsible" was used as a result of an "inadvertent error in copying the appendix as issued by the Department of Labor." GSA contends, however, that it was clear from the text of the appendix that goals were to be submitted with the bid and that Starline was not misled by and cannot rely on the "typographical error." We agree.

Obviously the use of the word "responsibility" made this solicitation somewhat ambiguous. However, the existence of an ambiguity is not necessarily fatal to a solicitation since the mere use of an ambiguous

specification is not, absent a showing of prejudice, a "compelling reason" to cancel an IFB and readvertise. 52 Comp. Gen. 285, 288 (1972). In such circumstances, therefore, what must be determined is whether the ambiguity adversely affected the competition or prejudiced bidders or offerors. *See Maintenance Incorporated, et al.*, B–182268, June 25, 1975, 75–1 CPD 383; *Santa Fe Engineers, Inc.*, B–184284, September 26, 1975, 75–2 CPD 198.

Here, we believe a reading of the solicitation reasonably indicates that the completion of Appendix A was a matter of responsiveness. In two places, the IFB specified that the Appendix A affirmative action plan had to be submitted prior to bid opening or as part of the bid, and that a failure to do so would result in bid rejection. The IFB further provided that there would be no negotiation over submitted goals in the period between bid opening and award. Thus, we think the only fair reading of the IFB is that bidders had to comply with the Appendix A requirements prior to bid opening. Furthermore, we think it is questionable whether Starline, as a matter of law, could claim that it was misled by GSA's error since the Washington Plan, as promulgated by Labor, specifies "responsive" rather than "responsible" bidder and was published in the Federal Register, 35 Fed. Reg. 19352, 19357 (1970), *see* 41 CFR 60–5.30, thereby placing all bidders, including Starline, on constructive notice of the actual terms of the Plan. *See Winston Bros. Company* v. *United States*, 458 F. 2d 49, 198 Ct. Cl. 37 (1972). In addition, it does not appear that Starline was in fact misled by the error, since the record indicates that Starline did attempt to comply with the Appendix A requirements prior to bid opening.

Starline also argues that the solicitation was ambiguous and confusing because the "operative portion of Appendix A * * * is addressed to specific time periods, all of which would have expired prior to the time when this contract was to be performed," and that this also distinguishes this case from *Northeast*. We find no merit to this contention. Appendix A stated that "The following are hereby submitted by the undersigned bidder as its goals for minority manpower utilization * * *." Although specific spaces for insertion of goals were provided for various periods up to the year ending May 31, 1974, the appendix explicitly provided that the goals and ranges for that year would be applicable to the contract to be awarded. Thus, we think it was clear that goals were to be submitted and that they could be listed either in the space provided for the year ending May 31, 1974 or in any other way that would manifest the bidder's intention to be bound.

Finally, Starline contends that the IFB was defective because it required bidders to commit themselves to unknown requirements. According to Starline, Labor intends to issue a revised Washington Plan

and that it "is likely that this new Plan will also change certain of the guidelines for various trades." Starline asserts that bidders on this procurement therefore were being asked to commit themselves to these changes.

This is manifestly not so. Bidders were asked to commit themselves only to the terms and conditions contained in the IFB. Nothing in the IFB required bidders to commit themselves to any future changes in the Washington Plan. To the contrary, Appendix A specifically provided that while aspects of the Plan would be reviewed and possibly modified from time to time, the trades and ranges would not be increased "after bids have been received." Thus, any subsequent revisions to the Washington Plan would have no effect on the contractor's obligation under this contract.

Accordingly, we conclude that this case is controlled by *Northeast* and *Rossetti*, and that under the rationale of those cases Starline's bid was nonresponsive and properly rejected by GSA.

Responsiveness of Flour City's Bid

Starline's final argument is that Flour City's bid was also nonresponsive to the Appendix A requirements. Starline contends that to be responsive, a bidder must furnish not only percentage goals, but also list each trade to be used along with an estimate of the total number of manhours required for performance and, for all work to be performed in the Washington area, the number of employees to be used both in total and for each trade utilized. Because Flour City submitted only two percentage goals. Starline claims that the same strict reading of Appendix A which resulted in rejection of Starline's bid also compels rejection of Flour City's bid.

Starline's contention here is based primarily on the court's statement in *Northeast* that:

> Under Appendix A the bidder is required to submit, for each of the various trades, and for all work done in the Washington area (not merely the work on the contract) the total number of employees to be used and the number to be included in that total. 485 F. 2d at 762.

The court's statement, however, merely reflected the specific requirements of the invitation that was utilized in the *Northeast* case. Here, the IFB's Appendix A asked only for the total number of manhours to be worked by minority persons on all bidder's projects within the Washington Metropolitan Statistical Area (WMSA), including on this contract, *expressed in terms of a percentage* of the total number of manhours to be worked during the term of performance of the contract. The appendix further provided that percentage goals "need be submitted only for those trades to be used in the performance of the

* * * contract [to be awarded]." Flour City listed percentages for the two trades (iron workers [40 percent] and glaziers [30 percent]) it contemplated using to perform the contract, connecting each percentage figure to the applicable trade by means of a typewritten line. This was sufficient to commit Flour City to all Appendix A requirements. Accordingly, we find no basis for viewing Flour City's bid as nonresponsive.

Starline has also objected to GSA's decision to award the contract prior to resolution of this protest. FPR § 1-2.407(8)(b)(4)(iii) (1964 ed.) provides that an award may not be made prior to resolution of a written protest unless the contracting officer determines that a prompt award will be advantageous to the Government. GSA made such a determination on August 22, 1975, notice of which was provided this Office pursuant to section 20.4 of our Bid Protest Procedures. Essentially, GSA decided that an award had to be made so that this contract could be coordinated with others for the overall construction of the building. Starline, however, believes that there was no need compelling such a prompt award especially when a decision of this Office favorable to Starline would result in a savings to GSA of $126,000. In view of our conclusions herein sustaining the award, we do not find it necessary to consider whether it was proper to make the award while the protest was pending. B-178303, June 26, 1973. However, we point out that even if the award action was contrary to this FPR provision, the legality of an award would not be affected. B-178303, *supra;* B-168753, March 25, 1970.

The protest is denied.

[B-184875]

Appropriations—Availability—Administrative Office of United States Courts—Court Reporter Fees

Whenever a Federal District Judge, pursuant to Rule 71A(h) of the Federal Rules of Civil Procedure, appoints a Land Commission to hear suits for just compensation in land condemnation cases, and the order of reference indicates a desire for the proceeding to be recorded, attendance fees of the court reporter are chargeable to the appropriations of the Administrative Office of United States Court since the Judiciary determines if reporter shall be in attendance and normally pays attendance fees in other cases.

Courts—Reporters—Transcript Fees—Appropriation Availability

Court reporters are not entitled to payment in addition to their salaries for providing transcripts of land commission proceedings to judges or to land commissioners appointed by judges in land condemnation cases. Accordingly, neither the Department of Justice nor the Administrative Office of the United States Courts may pay for such transcripts from their appropriations. However, reporters whose services are obtained on a contract basis are entitled to payment, from the Administrative Office, in accordance with the provisions of their contracts.

In the matter of transcription expenses—Land Commission cases, June 11, 1976:

The Administrative Office of the United States Courts (Administrative Office) requests our decision as to whether Administrative Office or Department of Justice (Department) appropriations is the proper source of payment for attendance charges and transcription fees of court reporters who record proceedings before land commissioners, appointed under Rule 71A(h) of the Federal Rules of Civil Procedure, to determine just compensation in land condemnation suits brought in the Federal district courts.

This request has arisen as a result of vouchers received by the Administrative Office in four separate condemnation cases in which court reporters' claims for reimbursement of either attendance fees, transcription expenses, or both, have been presented. The Administrative Office has declined to make payment on grounds that such expenses are not properly payable from the appropriated funds of the Judiciary. Copies of the vouchers were then directed to the Department for payment on grounds that such expenses were the normal expenses of the condemnation proceedings and traditionally chargeable to the Department as the legal prosecutor in the condemnation process. The Department also declined to make payment, relying on 28 U.S. Code § 753 (1970) in asserting that it is the responsibility of the Federal courts to make payments from their appropriations. We have been asked to resolve this conflict.

The general principle with regard to costs in land condemnation cases is based on Rule 71A(l), Fed. R. Civ. P. which provides that "costs [in such cases] are not subject to Rule 54(d)." (Rule 54(d) provides generally that all costs shall be allowed to the prevailing party.) In clarifying the intent of Rule 71A(l), the Advisory Committee on Rules in its Notes states that "Costs shall be awarded in accordance with the law that has developed in condemnation cases." This implements the established rule that the condemnor (i.e. the United States) may not recover its costs against the condemnee, since to charge the latter with the cost of taking would violate the constitutional prohibition against the taking of private property without just compensation. *Grand River Dam Authority* v. *Jarvis*, 124 F. 2d 914 (10th Cir., 1942).

The Administrative Office relies heavily on this general rule in maintaining its position. It also notes that the Advisory Committee Notes contain the following quotation from the Lands Division Manual of the Department of Justice:

> Costs of condemnation proceedings are not assessable against the condemnee, unless by stipulation he agrees to assume some or all of them. *Such normal expenses of the proceeding as bills for publication of notice, commissioners' fees,*

the cost of transporting commissioners and jurors to take a view, fees for attorneys to represent defendants who have failed to answer, and witness' fees, are properly charged to the government, though not taxed as costs. Similarly, if it is necessary that a conveyance be executed by a commissioner, the United States pay his fees and those for recording the deed * * *. [Italic supplied.]

It is contended that both attendance fees and transcription expenses of court reporters are "normal expenses" as contemplated by the Advisory Committee, and as such are chargeable to the appropriations of the Department of Justice as legal prosecutor and moving party on behalf of the United States in land commission proceedings.

A. *Attendance Fees*

The first issue concerns the payment of fees to the reporters for attending the sessions. The Department of Justice contends that the so-called Court Reporters Act, as amended, approved January 20, 1944, Public Law 78–222, 58 Stat. 5, (now codified at 28 U.S.C. § 753 (1970)), controls the payments in these cases and requires payment by the Judiciary. It also contends that funds are appropriated to the Judiciary for these particular expenses, thereby precluding payment by the Department.

Section 753(b), Title 28, U.S. Code, states in part that:

One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of the court or by one of the judges, and shall record verbatim by shorthand or by mechanical means which may be augmented by electronic sound recording subject to regulations promulgated by the Judicial Conference: (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) *such other proceedings as a judge of the court may direct or as may be required by rule or order of court or as may be requested by any party to the proceeding.* The Judicial Conference shall prescribe the types of electronic sound recording means which may be used by reporters. * * *

The reporter shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made. [Italic supplied.]

The Department of Justice takes the position that when the appointment of land commissioners is made by the district judge under Rule 71A(h), the attendance of a court reporter at these proceedings is also "ordered by the court," and as such clearly falls within the language of subsection (b)(3). It concludes that attendance fees are the responsibility of the courts.

The Administrative Office, on the other hand, contends that Section 753(b) gives the Federal courts no responsibility to provide a reporter for such proceedings because they are not had in "open court."

In our view, however, it is evident from the above quoted language of the statute that the authority granted by subsection (b)(3) is not restricted by the "open court" requirements of subsections (b)(1) and (b)(2). It was noted in *United States* v. *1,142.50 Acres of Land*, 194 F. Supp. 683, 684 (S.D. Ca. 1961), that proceedings before Land Com-

missioners are not official sessions of the court and a court reporter is not required to be in attendance to report the proceedings under 28 U.S.C. § 753, unless a rule or order of court is made under subsection (b)(3).

Section 753 contains other provisions applicable to the hiring of outside reporters. Subsection (a) provides in part:

> Each such court, with the approval of the Director of the Administrative Office of the United States Courts, may appoint additional reporters for temporary service not exceeding three months when there is more reporting work in the district than can be performed promptly by the authorized number of reporters and the urgency is so great as to render it impracticable to obtain the approval of the Judicial Conference.

This provision gives the district judge authority to hire additional reporters on an individual basis to meet the temporary demands of the court. In 1970, a second provision was added to the Court Reporters Act, 28 U.S.C. § 753(g), which expanded the authority of the Judiciary by allowing the contracting with court reporting agencies and firms for services to meet its temporary demands.

These sections, allowing for the contracting for additional reporters, are in accordance with the court reporter concept, as noted by the court in *Kasar* v. *Chesapeake & Chic. R.R. Co.*, 320 F. Supp. 335 (W.D. Mich., 1970) at 367:

> This section vests supervisory control over the court reporter in the district judge. Implicit in such control, and consistent with § 753(b) above, is the sole authority and responsibility of the district judge to arrange for substitute or additional reporters. The practice in this court is for a party desiring daily copy to contact both the court and the reporter well in advance of trial and make a request for extra personnel. If the court approves, the official reporter arranges, subject to the court's consent, for the necessary additional reporters. This procedure has numerous benefits. It allows the reporter to make any appropriate adjustments in an extremely busy schedule and also to participate, if so desiring, in the added compensation accompanying the furnishing of daily copy. Most importantly, it provides the court an opportunity to pass upon the qualifications of the extra reporters, and the substance of the arrangement made for their participation. To preserve control and avoid any conflict of interest, it is important that reporters are hired by the court and not by the parties. The statute requires nothing less.

See also B–51805, September 28, 1945, and B–22222, March 18, 1946, in which we held that this Act precludes the Department of Justice from procuring stenographic reporting services in conjunction with Lands Division cases when the official reporter was busy with another case. In those cases the matter of obtaining and contracting for additional reporters was solely for the consideration of the Judiciary pursuant to § 753(a). Only in those cases where no official salaried reporter has been appointed in the district or the position is vacant, can the statute be viewed as inoperative, allowing payment by the Department for the reporting service obtained. B–51805, *supra*. In *Morgan* v. *United States*, 356 F. 2d 17 (8th Cir. 1966), it was held proper for the

district court to instruct the Land Commission to assign a court reporter to prepare a transcript.

Since the courts control the appointment of reporters in land condemnation cases and since the courts pay the attendance fees of reporters at other proceedings under 28 U.S.C. 753, it seems appropriate for them to bear the financial responsibility for the attendance of reporters at these hearings. We therefore find that in Land Commission hearings for just compensation where the district judge either directly contracts with a court reporter to attend, or, in its order of reference instructs the Commission to contract for such services, then the attendance fees for these reporters are properly payable from appropriations available to the Judiciary.

B. Transcription Expenses

The second issue is which agency should pay transcription costs incurred for copies filed with the court or the Commission. Subsection (f) of 28 U.S.C. § 753 (1970) sets forth the following guidelines for the charging of transcription expenses by the reporter:

> Each reporter may charge and collect fees for transcripts requested by the parties, including the United States, at rates prescribed by the court subject to the approval of the Judicial Conference. He shall not charge a fee for any copy of a transcript delivered to the clerk for the records of court * * *.

The Administrative Office contends, among other things, that there is no mechanism provided in section 753 for the payment of transcription expenses by the Judiciary for Commission proceedings, even in the case where the official reporter is ordered to record the hearing. It also contends that the granting to the Commission under Rule 71A(h) of the powers of a special master, found in Rule 53, does not include the authority to defray the cost of transcript expenses.

The Department's contention is that it is only responsible for costs which pertain to the preparation of a transcript specifically requested by the litigating United States Attorneys Office, as a party to the proceedings. It does not see any reason for it to pay for a transcript for the use of the court. It states that pursuant to 28 U.S.C. § 753(f), the transcript should be provided either at no charge or as an expense incurred by the court, payable from funds appropriated to the Judiciary.

After carefully considering this matter, we find ourselves in agreement with the reasoning and conclusion of the Fifth Circuit Court of Appeals which in *Texas City Tort Claims* v. *United States*, 188 F. 2d 900 at 901–902 (1951), stated in pertinent part:

> * * * the question then presented for our consideration is whether the appellant [court reporter] may charge and collect a fee for services rendered in preparing such transcript requested by the judge. We think not.
>
> From a consideration of the relevant sections of the statute under which appellant was disallowed his claim, we see that "upon the request of any party

to any proceeding which had been so recorded who has agreed to pay the fee therefor, or of a judge of the court, the reporter shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request." Furthermore, the statute provides that "The reporter shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made." Thus, from these portions of the statute, we see that either a party who has agreed to pay the fee therefor, or a judge, may request and secure delivery of a transcript of the proceedings. The reporter is also required to deliver to the clerk for the records of the court a certified copy of any transcript made; that is, one made for a party paying a fee for same, or one made on the request of the judge. There is no mention of any fee being charged the judge for delivery of a transcript to him upon his request. The statute does provide that a party requesting a transcript must agree to pay a fee before a transcript will be delivered to him.

Section 753(f) of Title 28 provides the permissible fees that may be collected by a court reporter for transcripts requested by the parties. * * * It is obvious that the reference to the transcripts requested by the parties does not include judges. There is no authority specifically granted to charge and collect fees for transcripts requested by the judges; whereas, express authority is granted to require parties requesting transcripts to agree to pay for them.

After considering the legislative history of the Court Reporter Act, 28 U.S.C.A. § 753, we are of the opinion that Congress intended that such duties as preparing transcripts for judges and filing copies of transcripts with the clerks were to represent performance of the reporter's statutory duties for which he is duly compensated by his yearly salary, * * *. The Congress, in finally approving the Act, eliminated special payment for certain items such as equipment and supplies, * * * and transcripts furnished for the personal use of the judges, and substituted therefor an increase in the proposed statutory salary, with the evident intent that the statutory salary increase constituted adequate compensation to the reporters for any such items furnished or duties performed, which were not and are not susceptible of definite ascertainment on a piecework or per page basis.[1]

Compensation for copies of transcripts delivered to the clerk is included in the rates fixed for the original.[2] Thus, if a transcript is purchased by a party, the extra charge for the original thereof compensates the reporter for the copy filed with the clerk. If the transcript is ordered by the judge, the statutory salary likewise compensates the reporter for the copy which the statute requires him to file with the clerk. Therefore, a special payment for a transcript furnished at the request of a judge would constitute dual compensation. [Footnotes omitted. Italic supplied.]

We, of course, are aware that courts have indicated that in the discretion of the court, transcription fees for transcripts made for the use of judges may be taxed against the losing party in a case. See, for example, *Stacy* v. *Williams*, 50 F.R.D. 52, 56 (N.D. Miss. 1970), *Cf.* also *Wax* v. *United States*, 183 F. Supp. 163 (E.D. N.Y. 1960). However, we find the reasoning of the Fifth Circuit in the *Texas City*, case, *supra*, to be persuasive and agree with the decision of the court in that case.

Accordingly, it is our view that since the reporter is compensated through his salary for transcripts furnished for the use of a judge or, by extension, for land commissioners appointed pursuant to law by a judge, he is not entitled to additional payment therefor. Thus, in our opinion, neither the appropriations of the Judiciary nor those of the Department are available to pay court reporters for copies of tran-

scripts furnished to judges or the clerk of the court for the records of the court or to land commissioners appointed by the court.

What is stated above concerning payment for transcripts is applicable to official court reporters appointed to salaried positions under the Court Reporters Act. Those reporters whose services are obtained on a contract basis pursuant to 28 U.S.C. § 753(g) are entitled to payment in accordance with the provisions of their contracts. Fees earned by court reporters under such contracts would be for payment by the Administrative Office of the Courts as the contracting agency.

[B-185453]

Pay—Retired—Survivor Benefit Plan—Survivor Benefit Plan *v.* Civil Service Retirement Surviorship Plan—Election

A military retiree, who elects to participate in Survivor Benefit Plan (SBP), 10 U.S.C. 1447–1455, and who later elects to combine his military service credits with his civil service credits for the purpose of receiving a civil service annuity, may elect to participate in the civil service survivor benefits program at a level lower than that which he has in the SBP.

Pay—Retired—Waiver for Civilian Retirement Benefits—Revocation—Survivor Benefit Plan Participation Resumed

During period that an SBP participant has in effect a waiver of military retired pay for purposes of receiving a civil service annuity based on combining military service with civil service, under provisions of 10 U.S.C. 1450(d) and 1452(e) such SPB participation is suspended, but if waiver is no longer effective for any reason, previously elected SBP participation would be resumed and military retired pay reduced thereafter.

In the matter of the Department of Defense Military Pay and Allowance Committee Action No. 522, June 11, 1976:

This action is in response to a letter dated November 14, 1975, with enclosure, from the Assistant Secretary of Defense (Comptroller), in which he requests an advance decision concerning the level of participation in the civil service survivor benefit program permitted when a military retiree who is participating in the Survivor Benefit Plan (SBP) under 10 U.S. Code 1447–1455 (Supp. II, 1972) elects to combine his military service with civilian service for the purpose of increasing his civil service annuity. The specific question and discussion thereof is contained in Department of Defense Military Pay and Allowance Committee Action No. 522.

The specific question is stated as follows:

When a military retiree, participating in the Survivor Benefit Plan under the provisions of subchapter II, chapter 73 of title 10 USC, elects to combine his military service with his civil service for the purpose of receiving a civil service annuity, may he elect to participate in the civil service survivor benefit program

at a level lower than that which he holds in the military plan, thereby terminating his coverage in the military plan?

The discussion in Committee Action No. 522 refers to and quotes a portion of S. Report No. 92–1089, 93d Cong., 2d Sess. (1972), which states on page 26 that:

> The committee [Committee on Armed Services] intends that the waiver of contributions be effective only if the member joins the civil service survivor benefit plan *at least at the same level* of survivor protection as he was carrying under the military plan. [Italic supplied.]

It also refers to a memorandum addressed to the Deputy Assistant Secretary of Defense (Military Personnel Policy) dated January 5, 1973, from the Office of the General Counsel of the Department of Defense, in which it is indicated that the above-quoted portion of the Senate report was inserted to make it clear that if a person under the Plan elected to combine his military service with his civil service and receive a civil service annuity computed on the basis of such total service, he is not excused from continuing payment of premiums under the military plan, unless the civil service survivor benefit plan is at least at the same level as he was carrying under the military plan. It was also indicated that if the law were construed otherwise a person could be relieved of his financial obligation under the SBP by specifying as the base for the civil service survivor annuity a very small portion of his civil service annuity. In accord with such view, Department of Defense Directive 1332.27 was published requiring coverage in the civil service survivor benefit plan of at least the amount of coverage provided under the military plan.

In connection with the foregoing, the discussion also refers to our decision 53 Comp. Gen. 857 (1974), in which it was stated that the express language of subsection 1450(d), as well as the explanation of that section in S. Report No. 92–1089, clearly precludes payment of an SBP annuity where there is in effect a waiver of retired pay for the purpose of increasing civil service retirement benefits unless at the time of civil retirement the employee elected not to provide an annuity for his spouse in accordance with 5 U.S.C. 8341(b) (1970).

It is suggested that the language of that decision can be interpreted to permit a member to elect to participate in the civil service survivor benefit plan at any level and thereby terminate his coverage in the military plan, notwithstanding the language of the Senate Report quoted above.

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

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

Subsection 1452(e) provides as follows:

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

As indicated in 53 Comp. Gen. 857, *supra*, in general, deductions from military retired pay for SBP cost are not required when a retiree waives his right to receive such pay for the purpose of receiving a civil service annuity. The exception occurs when a retiree notifies the Civil Service Commission that he does not desire any spouse surviving him to receive "an annuity" under 5 U.S.C. 8341(b).

Subsection 8341(b)(1) of Title 5, U.S. Code (1970) provides that if an employee dies after having retired under subchapter III of chapter 83 of Title 5 and is survived by a spouse to whom he was married at the time of retirement, or by a widow or widower whom he married after retirement, the spouse, widow or widower is entitled to an annuity equal to 55 percent, or 50 percent if retired before October 11, 1962, of an annuity computed under subsections 8339(a)–(h) of Title 5, or of such portion thereof as may have been designated for this purpose under subsection 8339(i) of Title 5. Thus, the survivor annuity authorized under 5 U.S.C. 8341(b) may be computed as a percentage of the member's total civil service annuity or a percentage of a portion thereof.

The language of the quoted provisions of the SBP appears to be clear and unambiguous; however, the passage from S. Report No. 92–1089, quoted in the Committee Action, suggests an interpretation beyond that which appears to be the plain meaning of those provisions. Our analysis of the SBP indicates that the language of the Senate report cannot be construed as providing legal authority to mandate that the level of SBP participation be carried over into the Civil Service Commission annuity program as a required minimum.

There is nothing in 5 U.S.C. 8341, *supra*, which requires, or even restricts as an exception to those provisions, that a retired service member previously participating in the SBP may not choose any of the optional annuity coverages authorized therein. Therefore, in view of the fact that 10 U.S.C. 1450(d) prohibits payment of an SBP annuity when a retired member waives receipt of military retired pay for Civil Service Commission annuity purposes and 10 U.S.C. 1452(e) specifically eliminates the deposit requirement (10 U.S.C. 1452(d)) in such circumstances, there is no legal basis upon which the military departments can require a retired military member to select a Civil Service Commission annuity at a level not less than his previously selected

SBP participation level, or in lieu thereof, require a continuation of SBP participtaion at any level in order to make up the difference should the member choose not to maintain annuity coverage under the Civil Service Commission plan at the same minimum level as his SBP coverage.

Based on the foregoing, it is our view that a member, who elects to combine his military service with his civilian service for the purpose of receiving a Civil Service Commission annuity, may elect to participate in the Civil Service Commission annuity program at a level lower than that which he holds in the SBP.

With regard to the matter of termination of SBP coverage, it is our view that such a member's SBP participation is not terminated in such circumstances, but is merely suspended. Under the provisions of both 10 U.S.C. 1450(d) and 1452(e), the restrictions as to payment of an annuity or requirement to pay for coverage either by reduction in retired pay or deposit under subsection 1452(d) apply only as long as the waiver of military retired pay is in effect for purposes of subchapter III of Chapter 83 of Title 5. Should waiver no longer be effective for any reason, then he would resume his previously elected SBP participation and have his military retired pay reduced thereafter in accordance with 10 U.S.C. 1452(a)-(c).

The question presented is answered accordingly.

[B-185856]

Credit Cards—Fraudulent Use—Protection Under Truth in Lending Act

Pursuant to court decisions holding that liability protection of Truth in Lending Act for unauthorized use of credit cards extends to all credit cards, whether used for business or consumer purposes, Government is also protected under Act. *Equal Employment Opportunity Commission*, B-180512, May 17, 1974, 74-1 CPD 264, is overruled.

In the matter of Equal Employment Opportunity Commission—request for advance decision, June 15, 1976:

An authorized certifying officer of the Equal Employment Opportunity Commission (EEOC) requests an advance decision as to the propriety of payment of invoices submitted by Avis Rent A Car System, Inc. (Avis) for automobile rental charges in the amount of $2,568.61 resulting from the unauthorized use of a credit card issued to EEOC.

In support of the charges, Avis has submitted copies of rental agreements for the hire of automobiles bearing the imprint of the credit card issued to EEOC. Some of the agreements are unsigned

and the remaining agreements carry the signature of persons who have neither been employed nor authorized by EEOC to use its credit card. In addition, Avis submitted unsigned Check-In Reports which do not have a credit card imprint to document certain charges unsupported by rental agreements. The dates on a few of the rental agreements and Check-In Reports are incomplete, but these charges generally were incurred from April through June 1972. There is no indication that the automobiles were ever used in the performance of official agency business, and the record is void of any indication of fault or mishandling of the credit card on the part of EEOC. Avis maintains that a written agreement exists which assigns liability for the unauthorized use of the credit card to EEOC, but neither Avis nor EEOC can produce such an agreement.

The 1970 amendment to the Truth in Lending Act, 15 U.S. Code § 1601 *et seq.* (1970), which became effective January 21, 1971, limits a cardholder's liability for the unauthorized use of a credit card. Section 1643(a), of principal concern in the case, states, in pertinent part:

> A cardholder shall be liable for the unauthorized use of a credit card only if the card is an accepted card, the liability is not in excess of $50, the card issuer gives adequate notice to the cardholder of the potential liability, the card issuer has provided the cardholder with a self-addressed, prestamped notification to be mailed by the cardholder in the event of the loss or theft of the credit card, and the unauthorized use occurs before the cardholder has notified the card issuer that an unauthorized use of the credit card has occurred or may occur as the result of loss, theft, or otherwise. Notwithstanding the foregoing, no cardholder shall be liable for the unauthorized use of any credit card which was issued on or after the effective date of this section, and, after the expiration of twelve months following such effective date, no cardholder shall be liable for the unauthorized use of any credit card regardless of the date of its issuance, unless (1) the conditions of liability specified in the preceding sentence are met, and (2) the card issuer has provided a method whereby the user of such card can be identified as the person authorized to use it.

It has been held that the protection afforded by the Truth in Lending Act in effect at the time the instant charges were incurred applies to all credit cards, whether used for business or consumer purposes. *Credit Card Service Corp.* v. *F.T.C.*, 495 F. 2d 1004 (D.C. Cir. 1974); *American Airlines, Inc.* v. *Remis Industries, Inc.*, 494 F. 2d 196 (2d Cir. 1974); *see* 12 C.F.R. § 226.13(a)(4) (1975). Accordingly, we are aware of no valid basis for exempting from the Act's purview credit cards issued to the Government. Claimant has not shown compliance with the conditions precedent for limited recovery of $50 under the Act, and its claim is denied in its entirety. (While in two instances of unauthorized rentals the record does not show the year in which the card was used, we think it is incumbent upon the claimant to establish that the use occurred prior to the Act's effective date.)

Our decision, *Equal Employment Opportunity Commission*, B-180512, May 17, 1974, 74-1 CPD 264, which allowed payment to a card

issuer for the unauthorized use of a credit card was based in part on the assumption that section 1603(1) of the Truth In Lending Act exempted a claim of this type from the quoted provision as a business transaction. Since *Credit Card Service Corp.*, *supra*, decided contemporaneously, held the exemption not applicable, our earlier decision is overruled.

We note that a 1974 amendment to the Act, 15 U.S.C. § 1645, which became effective October 28, 1974, permits a card issuer and a business or other organization which provides credit cards to ten or more of its employees to agree by contract as to the liability of the organization for the unauthorized use of such credit cards without regard to the protection otherwise provided under the Act. 40 Fed. Reg. 43208 (1975). Since the instant charges were incurred prior to such amendment, we need not decide its possible applicability to the Government.

[B–131632]

Transportation—Household Effects—Military Personnel—Advance Shipments—Discharge of Member Other Than Honorable

Regulations may be promulgated under 37 U.S.C. 406(h) to authorize transportation of household effects and a private automobile of a member of the uniformed services serving overseas, without dependents, incident to the member's discharge under conditions other than honorable, similar to the transportation authorized members with dependents discharged in such circumstances. 44 Comp. Gen. 574 will no longer be followed; 45 Comp. Gen. 442 and 49 *id.* 695, overruled in part.

In the matter of transportation allowances, June 17, 1976:

This action is in response to a letter dated May 29, 1975, from the Assistant Secretary of the Army (Manpower and Reserve Affairs) requesting a decision with respect to questions which have arisen as a result of 44 Comp. Gen. 724 (1965). Specifically the questions concern the shipment of household effects, and privately owned vehicles of members without dependents when they are discharged under other than honorable conditions while stationed overseas. That request was assigned PDTATAC Control No. 75–16 and forwarded to this Office by letter dated June 3, 1975, from the Per Diem, Travel and Transportation Allowance Committee.

The submission refers to 44 Comp. Gen. 724, *supra*, as holding that 37 U.S. Code 406(h) (1970) authorizes transportation of dependents, household effects, and a privately owned motor vehicle from overseas in certain situations involving discharge of a member of the armed services under other than honorable conditions; the question presented is whether transportation of household effects and a motor vehicle is

allowable in the case of members without dependents in those same situations.

In his letter the Assistant Secretary states that 1 Joint Travel Regulations (1 JTR), para. M8015, Item 2, prohibits transportation of household effects in cases involving discharge under other than honorable conditions except in the case of members with dependents involving travel from duty stations outside the United States. It is also stated that 1 JTR para. M11002–5 relates to shipment of privately owned motor vehicles in those same situations.

The Assistant Secretary asserts that it has long been the recognized responsibility of the Government to relocate a member of the armed services and his personal belongings when that member is required to move incident to Government orders. To do otherwise, the Assistant Secretary asserts, could cause a member to lose his personal belongings because of lack of means to dispose of them. He requests that the matter be reviewed and that he be advised whether the Joint Travel Regulations may be amended to provide authority for the following:

* * * (1) for the movement of a member's baggage and household effects from the overseas location to an appropriate location in the United States or its possessions and (2) for the movement of a privately-owned motor vehicle owned by the member to an appropriate port in the United States in cases where the members discussed in your decision [44 Comp. Gen. 724, *supra*] were without dependents or had no dependents in the overseas area.

Public Law 88–431, approved August 14, 1964, 78 Stat. 439, added 37 U.S.C. 406(h), which provides in pertinent part as follows:

(h) In the case of a member who is serving at a station outside the United States or in Hawaii or Alaska, if the Secretary concerned determines it to be in the best interests of the member or his dependents and the United States, he may, when orders directing a change of permanent station for the member concerned have not been issued, or when they have been issued but cannot be used as authority for the transportation of his dependents, baggage, and household effects—

(1) authorize the movement of the member's dependents, baggage, and household effects at that station to an appropriate location in the United States or its possessions and prescribe transportation in kind, reimbursement therefor, or a monetary allowance in place thereof, as the case may be, as authorized under subsection (a) or (b) of this section; and

(2) authorize the transportation of one motor vehicle owned by the member and for his or his dependents' personal use to that location * * *.

In 44 Comp. Gen. 724, *supra*, we considered whether, under 37 U.S.C. 406(h), the Joint Travel Regulations could be amended to authorize return transportation to the United States of dependents, household effects and privately owned motor vehicles in the following situations:

a. A member discharged overseas pursuant to sentence of court martial.

b. A member returned from overseas to the United States, its territories or possessions from discharge pursuant to sentence of court martial.

c. A member returned from overseas to the United States, its territories or possessions, for administrative discharge.

d. A member returned from overseas to the United States to serve a sentence of confinement; he may or may not be discharged upon termination of confinement.

e. A member serving sentence of confinement in a civil or a military confinement facility overseas, discharge not yet effected.

Prior to the enactment of Public Law 88–431, it was held that there was no authority for the transportation of dependents and household effects at Government expense of members incident to their separation from the service under conditions other than honorable whether the member's duty assignment was within the United States or overseas. *See* 37 Comp. Gen. 21 (1957) and 42 *id.* 568, 571 (1963). However, in 44 Comp. Gen. 724, *supra*, we concluded that 37 U.S.C. 406(h), as added by Public Law 88–431, provides authority for the promulgation of regulations authorizing the return transportation of dependents, household effects and a privately owned motor vehicle of a member serving overseas in cases involving separation under other than honorable conditions whether such separation is effected overseas or in the United States.

However, prior to our decision in 44 Comp. Gen. 724, *supra*, in 44 Comp. Gen. 574 (1965) we considered whether under the provisions of 37 U.S.C. 406(h) the household effects and motor vehicle of a member overseas and without dependents could be transported at Government expense to the United States. At that time we stated that prior to the enactment of Public Law 88–431, the similar authority provided in 37 U.S.C. 406(e) was not viewed as providing authority for the advance movement of household effects independent of the dependents. Since we found no evidence of any legislative intent that subsection 406(h) was to have any broader scope in that respect than subsection 406(e), it was our view that it could not be considered as authority for the movement of the household effects and automobile of a member without dependents. *See also* 45 Comp. Gen. 442 (1966) and 49 *id.* 695 (1970).

The effect of our decisions in 44 Comp. Gen. 574, *supra*, and 44 *id.* 724, *supra*, has been to extend certain authorities with respect to overseas transportation of household effects and a privately owned motor vehicle to members with dependents, but not to members without dependents who are similarly situated.

The legislative history of Public Law 88–431 shows that at the time it was enacted, the Congress was primarily concerned with providing authority, in addition to that already contained in section 406 (e) of Title 37, for the advance movement of dependents and thus, the legislative history of Public Law 88–431 is primarily concerned with that specific subject. *See* 44 Comp. Gen. 724, 726, and 44 *id.* 574, 576.

In light of the information provided this Office by the Assistant Secretary in his letter of May 29, 1975, and in view of the difficulties resulting from our decision in 44 Comp. Gen. 574, *supra*, and 44 *id.* 724, *supra*, we have reexamined previously held positions with respect

to the scope of 37 U.S.C. 406(h). In view of the facts now before us it is our conclusion that the language of 37 U.S.C. 406(h) is broad enough to provide authority for the advance movement of the household effects and privately owned motor vehicle of a member without dependents in those five situations contained in 44 Comp. Gen. 724, and quoted above. We find nothing in the legislative history of that provision showing a specific intention to the contrary. Accordingly, we would not now object to a change in regulations in line with the Assistant Secretary's proposal. The question is answered in the affirmative.

To the extent that 44 Comp. Gen. 574 and anything stated in 45 Comp. Gen. 442 and 49 *id.* 695, are inconsistent with this decision, those decisions no longer will be followed.

[B-184561]

Subsistence—Per Diem—Thirty-Minute Rule—Arrival and Departure Time Evidence

Employee performing temporary duty (TDY) assignment was denied reimbursement of per diem for quarter beginning 6 p.m. on June 6, 1975, since he returned to residence at 6:15 p.m. after returning from TDY by earliest possible air transportation. Agency interprets provisions of Federal Travel Regulations (FPMR 101-7) para. 1-7.6e concerning 30-minute rule as requiring denial of employee's claim, absent "compelling extenuating circumstances." While agency's determination concerning "official necessity" under para. 1-7.6e will not be disturbed unless arbitrary or capricious, employee's claim may be allowed since record fully supports employee's contention that due to official necessity, he could not have arrived prior to beginning of quarter.

In the matter of Gustav W. Muehlenhaupt—claim for per diem administratively disallowed due to 30-minute rule, June 21, 1976:

This action is in response to a request from Roland V. Johnson, an authorized certifying officer with the National Park Service, Department of the Interior. Mr. Johnson questions whether he may pay an additional quarter of per diem in the amount of $7 to Mr. Gustav W. Muehlenhaupt, an employee of the National Park Service (NPS), under the circumstances described below.

Mr. Muehlenhaupt, whose permanent duty station was in San Francisco, California, was ordered to perform temporary duty (TDY) at the Grand Canyon National Park from June 2, 1975, through June 6, 1975. Incident to that TDY assignment, Mr. Muehlehaupt was paid for 4½ days' per diem, from 6 a.m., June 2, 1975, through 6 p.m., June 6, 1975. However, Mr. Muehlenhaupt also claimed per diem for the quarter beginning at 6 p.m. on June 6, 1975, on the basis that he did not arrive at his residence until 6:15 p.m. In support of his claim, he submitted with his voucher the following statement, which is quoted in pertinent part:

A full day's per diem is claimed for the day of June 6 although I arrived home only 15 minutes after 6 p.m. and not 31 minutes after 6 p.m. My time of return was governed by the airline schedules. The Operations Evaluation Team, of which I serve as Chief, met at 8 a.m. at Grand Canyon National Park on June 6. We then met with the Park Superintendent until after 12 noon; ate a hasty lunch; flew in a 10-passenger, prop driven plane over bumpy air from Grand Canyon to Las Vegas, Nevada; and caught the earliest possible flight to San Francisco. This arrived at San Francisco at 5 p.m. and there was no way in the world I could collect my baggage and drive the forty miles to my residence by 6 p.m. * * *

His claim was disallowed by the authorized certifying officer for the reason set forth in his memorandum to Mr. Muehlenhaupt, dated June 20, 1975, which is quoted below in pertinent part:

My understanding of [the Federal Travel Regulations] FPMR 101–7 [para.] 1–7.6(e) is that a quarter day per diem shall not be allowed unless a traveler is in a travel status, at least, 31 minutes after the beginning of the quarter. In your case, your Voucher shows you arrived at your home at 6:15 p.m., only 15 minutes after the beginning of the quarter. You were no longer in travel status after your arrival at your residence.

The reference in 1–7.6(e) regarding a "statement explaining the official necessity" is not clear. Presumably, all times of departure and return are official and officially necessary. The provision for a statement of explanation is undoubtedly to establish the mechanism for a deviation when there are compelling extenuating circumstances that justify a deviation from the general rule established by 1–7.6(e). In my judgment, your statement does not establish sufficient justification for a deviation.

In responding to the above memorandum, Mr. Muehlenhaupt stated that the time of his return was due to official necessity in that he returned to San Francisco, California, by the earliest possible air transportation available. He further states that he "did not tarry anywhere" on the return trip.

The controversy here centers around the so-called "thirty-minute rule," which requires an employee traveling on official business to justify for per diem purposes either his arrival or departure within 30 minutes of the beginning of a quarter. The rule is contained at Federal Travel Regulations (FPMR 101–7) para. 1–7.6e (May 1973), which provides:

Beginning and ending of entitlement. For computing per diem allowances official travel begins at the time the traveler leaves his home, office, or other point of departure and ends when the traveler returns to his home, office, or other point at the conclusion of his trip. However, when the time of departure is within 30 minutes prior to the end of a quarter day, or the time of return is within 30 minutes after the beginning of a quarter day, per diem for either such quarter day shall not be allowed in the absence of a statement with the travel voucher explaining the official necessity for the time of departure or return.

When first incorporated into the regulations (Standardized Government Travel Regulations, section 6.9c(2)), the 30-minute rule applied only to travel by automobile or other nonscheduled means of transportation. *See* 40 Comp. Gen. 400 (1961). Its purpose was to insure that per diem was not paid where an employee could not document that he was required by official necessity to depart or arrive within 30 minutes of the beginning of a quarter. The regulations were subsequently amended to include regularly scheduled means of transportation within the purview of the rule.

What constitutes "official necessity" is necessarily dependent upon the facts of each case presented. In regard to that, we have previously held that the responsibility for making the administrative determinations as to the acceptability of reasons presented for arriving or departing within 30 minutes of the beginning of a quarter of a day is a matter for the agency concerned, and this Office will not question that determination unless it is clearly shown that the agency's determination was arbitrary or capricious. B–180138, May 9, 1974. However, we believe that in this case the agency's determination relative to the nonacceptability of Mr. Muehlenhaupt's statement was based on an erroneous interpretation of FTR para. 1–7.6e, *supra.* We believe that that paragraph is not intended to "establish the mechanism for a deviation when there are compelling extenuating circumstances" as stated by the authorized certifying officer. Instead, we believe it was intended to ensure that an employee schedule his departure in a prudent manner and that he complete his return travel in an expeditious manner.

The NPS does not contend that Mr. Muehlenhaupt failed to return by the earliest possible air transportation nor do they argue that, had he been more prudent, he could have arrived at his residence prior to 6 p.m. Rather, the record shows that Mr. Muehlenhaupt arrived in San Francisco at 5 p.m. This left him 1¼ hours to disembark, obtain his baggage, locate the parked automobile to be used for transportation to his residence, load the baggage and then drive 40 miles to his residence. We believe that the above record indicates that Mr. Muehlenhaupt did return to his home in an expeditious manner, arriving at his residence at 6:15 p.m. on June 6, 1975.

Accordingly, Mr. Muehlenhaupt may be authorized payment of $7 representing per diem for the quarter beginning 6 p.m., June 6, 1975.

[B–185302]

Contracts—Awards—Small Business Concerns—Evidence

Bidder found large by Small Business Administration Size Appeals Board and which thereafter sought, but as of date of bid opening had not received, recertification as small business could not properly represent itself as small business at time of bid opening. Bidder was not therefore eligible for award of total small business set-aside.

Contracts—Awards—Small Business Concerns—Self-Certification—Purpose

Being small business under existing SBA size standard is legal status which although entered into either through bidder's self-certification/representation or administrative decision is not just matter of existing fact. While self-certifi-

cation/representation is initial step by which bidder obtains small business status, if and when SBA issues ruling that bidder is other than small business, until decision is reversed or overruled, bidder no longer enjoys status of being small under existing size standard.

Contracts—Awards—Small Business Concerns—Self-Certification—Acceptance

In accordance with Armed Services Procurement Regulation 1-703(b) contracting officer cannot accept bidder's bid opening representation of itself as being small business if he knows that bidder has not subsequently been recertified by SBA as being small.

Contracts—Termination—Convenience of Government—Not Recommended—Urgency Procurement

In view of estimated cost of terminating improperly awarded contract ($329,460 as of May 25, 1976; $461,244-$527,136 as of June 25, 1976), recommendation cannot be made that instant contract be terminated for convenience since that action would not be in Government's best interest where total contract price was $658,920 and contract award was based on determination of urgency, modified by 55 Comp. Gen. — (B-185302, Aug. 30, 1976.)

In the matter of Propper International, Inc.; Society Brand, Inc.; Bancroft Cap Company, Inc., June 23, 1976:

Invitation for bids (IFB) DSA100-76-B-0033, issued by the Defense Personnel Support Center, Defense Supply Agency (DSA), Philadelphia, Pennsylvania, solicited bids for 182,400 service caps. Originally issued on a 50-percent labor surplus set-aside basis, the IFB was subsequently amended to a combined small business/labor surplus area set-aside. Bids were opened on December 30, 1975.

During the period preceding the opening of bids, protests were filed regarding the basis upon which the procurement would be let, i.e., a 50-percent labor surplus set-aside. Both protests received in this regard were withdrawn subsequent to DSA's determination to make the procurement a combined set-aside. However, by telegram of December 5, 1975, Propper protested DSA's decision to proceed with a combined set-aside.

On December 30, 1975, the following bids were received:

	Unit Price
	Items 1 through 3
Propper	$7.225 plus 1/20 of 1-percent discount
Society Brand	$7.4485 plus ½ of 1-percent discount
Bancroft	$7.485 plus 1/10 of 1-percent discount

On January 5, 1976, Bancroft protested that:

1. Propper is ineligible for award in that its bid was nonresponsive because as of the date of bid opening Propper was other than a small business. (As set forth *infra*, Propper, while indicating in its bid that it was a large business, also stated its contention that it was a small business.)

2. Propper is nonresponsible since it lacked the required production capacity.

3. Society Brand's self-certification as to its small business status was submitted in bad faith.

4. Society Brand is nonresponsible on two counts—its lack of both financial capability and integrity.

On January 8, 1976, the Small Business Administration (SBA) Size Appeals Board issued its findings and decision in the matter of Propper's previously filed petition for recertification of Propper as a small business. The Size Appeals Board found that Propper "* * * is a small business concern for the purpose of self-certification on procurements having a size standard not to exceed 500 employees."

In its report to our Office dated March 11, 1976, DSA concluded that Propper's bid was responsive inasmuch as Propper "* * * was in fact a small business concern at the time of submission of its bid and up to the present time * * *." In accordance with this view, based on a determination of urgency, on April 8, 1976, DSA awarded the contract to Propper under Armed Services Procurement Regulation (ASPR) § 2-407.8(b)(3)(iii) (1975 ed.).

With regard to the question of Propper's eligibility for award of the instant procurement as a small business the following chronology is relevant:

February 15, 1975—Propper found to be other than small by the Kansas City Regional Office of SBA.

July 24, 1975 —SBA Size Appeals Board determined that Propper was other than small by reason of affiliation with certain other firms, thus affirming the Kansas City Regional Office decision on this point although reversing the regional office's decision on finding that Propper was not dominant in the industry.

October 3, 1975 —Propper's petition for reconsideration denied by SBA Size Appeals Board.

—Propper filed petition for recertification with SBA Size Appeals Board.

December 16, 1975—Oral hearing held on Propper's petition for recertification.

Subsequent to the oral hearing at SBA regarding Propper's petition for recertification, Propper submitted its bid on the instant procurement. Propper indicated on the bid documents that it was a large business. However, accompanying the bid was the following telegram:

IT IS OUR CONTENTION THAT WE ARE A SMALL BUSINESS CONCERN. THE SIZE APPEALS BOARD OF SBA HELD AN ORAL HEARING DECEMBER 16, 1975 IN WASHINGTON DC FOR THE PURPOSE OF MAKING A DETERMINATION OF OUR SIZE STATUS AT OUR REQUEST. OUR COUNSEL, ANTHONY CHASE, ASSERTS THAT BY HIS RESEARCH WHICH WAS CONFIRMED CORRECT BY DSA AND SBA REPRESENTATIVES IN WASHINGTON DC OUR BID WILL BE CONSIDERED RESPONSIVE IF SBA'S FAVORABLE DETERMINATION IS ISSUED BEFORE DATE OF AWARD. THIS WILL SERVE AS OUR UPDATED CERTIFICATION AS TO OUR STATUS. ALL OTHER TERMS AND CONDITIONS OF OUR BID REMAIN THE SAME.

Based on this telegram and the fact that Propper was determined to be small by SBA on January 8, 1976, which although after bid opening was considerably prior to award, DSA concluded that Propper was eligible for award.

The pertinent provisions of ASPR § 1–703 (a) and (b) (1975 ed.) state:

(2) * * * Except as provided in (b) below, the contracting officer shall accept at face value for the particular procurement involved, a representation by the bidder or offeror that it is a small business concern.

(b) *Representation by a Bidder or Offeror.* Representation by a bidder or offeror that it is a small business concern shall be effective, even though questioned in accordance with the terms of this subparagraph (b), unless the SBA, in response to such question and pursuant to the procedures in (3) below [(size protest determinations)], determines that the bidder or offeror in question is not a small business concern. * * * The controlling point in time for a determination concerning the size status of a questioned bidder or offeror shall be the date of award, except that no bidder or offeror shall be eligible for award as a small business concern unless he has, or unless he could have (in those cases where a representation as to size of business has not been made), in good faith represented himself as small business prior to the opening of bids or closing date for submission of offers (see 2–405(ii) with respect to minor informalities and irregularities in bids). A representation by a bidder or offeror that it is a small business concern will not be accepted by the contracting officer if it is known that (i) such concern has previously been finally determined by SBA to be ineligible as a small business for the item or service being procured, and (ii) such concern has not subsequently been certified by SBA as being a small business. If SBA has determined that a concern is ineligible as a small business for the purpose of a particular procurement, it cannot thereafter become eligible for the purpose of such procurement by taking affirmative action to constitute itself as small business.

Both DSA and Propper are of the view that in order to come within the general rule that under a small business set-aside the final determination of the bidder's eligibility for award as a small business is made at the date of award (*see* B–143630, October 13, 1960), the bidder must at the time of bid opening and in good faith either represent itself as a small business concern, or have been able to do so. This representation, it is argued, can be accomplished either by the process of self-certification, i.e., checking the appropriate block on the bid form, or by other means. Propper contends that "[s]elf-certification is a

term of art which in the context of government procurement means the checking of the appropriate box on the bid form." However, the form to which Propper alludes, Standard Form 33 (Nov. 1969 ed.), states that: "The Offeror *represents* and *certifies* * * * that * * * [h]e [ ] is [ ] is not, a small business concern." [Italic supplied.] We agree with Bancroft that there is no practical or legal consequence between designating an act as a "representation" of a bidder's size status or a "self-certification" of its status.

The question then is whether Propper was in a position as of the date of bid opening to represent itself as a small business. DSA indicates that it was and believes that (1) the July 24, 1975 decision of the Size Appeals Board which found Propper to be other than a small business concluded that there was an affiliation between Propper and Society Brand based only on those firms' use of the same attorneys and accountants; (2) Propper discharged the attorneys and accountants which SBA had found created the affiliation; (3) on December 16, 1975, an oral hearing was held on Propper's petition for recertification as a small business; and (4) based on that hearing and the evidence presented, *Propper determined* that it would receive a decision to the effect that it was in fact a small business.

In this regard, Propper takes the view that whether or not a business is small is a question of actual fact and that, if the facts indicate that a bidder is small under a size standard in effect, the bidder can determine itself to be small and make that representation. Bancroft, on the other hand, takes the view that membership in the class of small business is not a matter of fact but is rather a legal status, the determination of which is ultimately the province of the SBA. We agree with Bancroft that being a small business is a legal status which, although entered into either through self-certification/representation or administrative decision, is not just a matter of existing fact. This position has been recognized by the Court of Claims in upholding the validity of an award to a firm which certified itself as a small business but which in fact became large after bid opening. The court in *Otis Steel Products Corporation* v. *United States*, 316 F. 2d 937, 940 (161 Ct. Cl. 694 (1963)), stated:

> * * * The regulation [ASPR § 1-703(b)] provides that in the absence of a question about a bidder's representation of his status, it shall be deemed to be a small business concern for the purpose of that contract. This means it shall be deemed to be one, whether it was one in fact or not. * * *

Similarly, the court has on other occasions taken the view that the legal status of the bidder at the date of award as determined by the SBA is determinative of a bidder's being small notwithstanding the fact that at the date in question the bidder was not actually small. *Allen M. Campbell Company* v. *United States*, 467 F. 2d 931 (199 Ct. Cl.

515 (1972)); *Mid-West Construction, Ltd.*, v. *United States*, 387 F. 2d 957 (181 Ct. Cl. 774 (1967)). Our Office has implicitly recognized that being a small business is a matter of legal status in 42 Comp. Gen. 108, 112 (1962), wherein it was stated that "[a] bidder *must qualify* as a small business as a condition of bidding under an invitation containing a total small business set-aside, and he *must* also *qualify* as small business at the time of receiving the award." [Italic supplied.] B–167223, September 4, 1969.

As recognized by the ASPR, SBA's regulations and our Office, the initial method by which a firm achieves the legal status of being a small business is by self-certification/representation. ASPR § 1–703(b), *supra;* 13 C.F.R. § 121.3–8 (1975). See discussion 40 Comp. Gen. 550 (1961), at 553–554. The existence of this method is based (1) in part on the congressional desire to simplify and expedite size determinations and the procurement process; and (2) the fact that the bidder should know its annual receipts, number of employees, etc., and thus if it cannot represent itself as a small business at bid opening the interests of orderly and timely procurement as set out in ASPR § 1–703(b) require rejection of the bid as "ineligible for award." See, generally, 40 Comp. Gen., *supra.* However, while self-certification/representation is the initial step by which a bidder obtains small business status, if and when the SBA issues a ruling to the effect that the bidder is other than a small business, the bidder from that date forth and until the decision is reversed or overruled no longer enjoys the status of being small under the existing size standard. *See* 53 Comp. Gen. 434, 439 (1973), affirmed *Dyneteria, Inc.*, B–178701, February 22, 1974, 74–1 CPD 89. A bidder which self-certifies/represents itself to be small but which as of the date of bid opening has been found to be other than small by SBA is ineligible for award. 53 Comp. Gen., *supra*, at 440. But see, B–174292, April 20, 1972, involving a retroactive Size Appeals Board determination that the bidder was small. In our reconsideration of 53 Comp. Gen., *supra*, which involved the effect of an SBA regional office determination that the successful bidder, Dyneteria, was other than small, and the award to Dyneteria as a small business during the pendency of an appeal of this decision to the SBA Size Appeals Board, we stated:

> In our system of jurisprudence generally, and administrative law particularly, a party may appeal an adverse decision to a higher authority. However, the existence of the higher authority and the exercise of the right of appeal do not justify an action inconsistent with the appealed ruling. To take a contrary view and adopt the position espoused by Dyneteria would permit and perhaps even encourage the circumvention of the established judicial or administrative process. An individual or official would be free to act contrary to the unfavorable decision of the lower tribunal by the simple expedient of causing an appeal to be filed. We cannot condone an interpretation which permits such a practice. * * * *Dyneteria, Inc., supra.*

With regard to the instant case, Propper made its representation as to its small business status after an SBA regional office declared it to be other than small; that decision was in part affirmed by the Size Appeals Board; reconsideration of that decision was denied by that body and a decision on recertification was pending. Under the circumstances, Propper did not then have the legal status of a small business, a fact which the contracting officer was aware of by virtue of Propper's telegram, *supra*, and its designation of itself on the bid form as a large business. As indicated in 13 C.F.R. § 121.3–8 (1975), since Propper did not have this legal status at the time of bid opening, it could not properly represent itself as being a small business. The regulation in question states in pertinent part:

> * * * In the submission of a bid or proposal on a Government procurement, a concern which meets the criteria provided in this section and which either has not been determined by SBA to be ineligible, or has been determined to be ineligible but subsequently has on the basis of a significant change in ownership, management or contractual relations, applied for recertification and had its application granted, may represent that it is a small business. * * * If a concern has been determined by SBA to be ineligible as a small business under a particular size standard and it has already self-certified as a small business on a pending procurement subject to the same or lower number of employees or annual receipts size standard (whichever is applicable), it shall immediately notify the contracting officer of such adverse size determination and shall not thereafter self-certify on a procurement subject to the same or a lower employee or annual receipts size standard (whichever is applicable) until it has applied for recertification based on a significant change in its ownership, management, or contractual relations, and has been determined eligible as a small business under such size standard by either the regional office which issued the adverse determination or the Small Business Size Appeals Board. * * *

As the regulation clearly indicates, a bidder, such as Propper, which has been determined to be other than small by the SBA may represent itself as being small only if it has both applied for and has been granted recertification. Propper was found to be large by the SBA regional office whose decision was affirmed by the Size Appeals Board which subsequently denied Propper's request for reconsideration of the matter. Per 13 C.F.R. § 121.3–6(g)(5) (1975), the decision of the Size Appeals Board constituted the final administrative remedy afforded by SBA. Therefore, in order for Propper to regain small business size status it could only do so through an application for recertification based on a significant change in ownership, management or contractual relations. 13 C.F.R. § 121.3–8, *supra*. However, since its application for recertification was not granted until after December 30, 1975, as of that date it could not properly represent itself as being small in accordance with 13 C.F.R. § 121.3–8, *supra*, and ASPR §1–703(b), *supra*.

Moreover, in accordance with ASPR § 1–703(b), a contracting officer cannot accept the bid opening representation of a bidder as to its being a small business if the contracting officer knows that the bidder

has been found large by the SBA (*see* 53 Comp. Gen., *supra*, affirmed *Dyneteria, Inc.*, *supra*, and B–174292, *supra*), and the bidder has not subsequently been recertified by SBA as being small. Propper argues that this interpretation is contrary to the focus and structure of the ASPR section in that (1) the focus of ASPR § 1–703(b) is toward determining a bidder's size status at the date of award, and (2) to read the phrase "at the date of bid opening" into the section in front of the sentence establishing the circumstances under which the contracting agency may not accept a good-faith representation as to size status would render the last sentence in ASPR § 1–703(b) unnecessary and merely redundant.

We do not agree. As to the question of when a bidder must have small business status to be eligible for award, we have held while the bidder must have small business status under the applied size standard at the time of award, it must also have this status (achieved through a proper good-faith self-certification/representation) at the time of bid opening. 42 Comp. Gen., *supra*. As we stated in 40 Comp. Gen., *supra*, at 553–554:

> Unless the submission of bids under a 100 percent small-business set-aside can be restricated solely to those who, in good faith, can certify in their bids that they are small business, no useful purpose would be served by requiring, in every instance, self-certification on size status. If bidders who, prior to bid opening, cannot in good faith certify themselves as small business may be permitted to delay contract awards in order to allow time to make application to the Small Business Administration for a small business certificate on the basis that their status may have changed sufficiently in the interim—between bid opening and award—so as to qualify as small business, the effectiveness of the small-business set-aside procedure would be seriously impaired. * * *

As to Propper's other argument, regarding the meaning of the section and the effect of our interpretation of the last sentence of ASPR § 1–703(b), we note that the initial sentence of the section deals with the effectiveness of a bidder's representation as to being a small business even though the matter is protested to SBA. We also note that ASPR § 1–703(b)(1)–(5) (1975 ed.) deals exclusively with the matter involving size protests and related areas.

The particular sentence in question reads:

> * * * If the SBA has determined that a concern is inelgible as a small business *for the purpose of a particular procurement*, it cannot thereafter become eligible for the purpose of *such procurement* by taking affirmative action to constitute itself as small business. [Italic supplied.]

As can be seen from an examination of ASPR § 1–703(b)(1)(b) (1975 ed.), in its entirety, it is only upon receipt of a timely size protest against a bidder's representation that it is small that SBA can take action with regard to the particular procurement in question. In other events, the SBA's actions are limited to prospective procurements. Therefore, we believe that the portion of ASPR § 1–703(b) to which Propper alludes merely indicates that where a timely size pro-

test is lodged against a bidder who represents itself in good faith to be a small business and SBA sustains that protest, the bidder cannot reconstitute itself to make itself come within the applicable size standard. Accordingly, our interpretation of the sentence preceding that one in question would not make it mere surplusage.

As stated above, and without questioning Propper's good faith, we do not believe that it could properly have made the necessary certification/representation of its being a small business nor do we believe that the contracting officer could, under the regulations, have accepted Propper's representation. Therefore, we believe that Propper was not eligible for award as a small business. Accordingly, since ASPR § 1–706.7 (1975 ed.) provides that in order for a bidder to obtain award of any portion of a combined small business/labor surplus area set-aside it must be a small business, we believe the award to Propper was improper. However, based on the estimated cost of terminating Propper's contract ($329,460 as of May 25, 1976; $461,244–$527,136 as of June 25, 1976), we cannot recommend that the instant contract be terminated for the convenience of the Government, since that action would not appear to be in the Government's best interests where the total contract price was $658,920 and the contract award was based on a determination of urgency.

In view of this conclusion, we see no need to consider the additional points raised by the parties.

[B–185488]

Insurance—Government—Self-Insurer

Under long-standing policy of the Government that it is self-insurer and will not purchase commercial insurance against loss or damage to its own property, insurance should not have been purchased on a NASA exhibit loaned to a unit of the Air Force for display purposes. However, since self-insurance principle is one of policy rather than positive law and instant insurance coverage was issued in good faith, premium may be paid.

In the matter of the payment of insurance premiums, June 23, 1976:

A decision has been requested by the Accounting and Finance Officer, 94th Tactical Airlift Wing (TAW), Dobbins Air Force Base, Georgia, as to the legality of payment of a $100 premium on a commercial insurance policy in the amount of $16,300 to insure certain items loaned to the TAW by the National Aeronautics and Space Administration (NASA) for purposes of display at an open house conducted September 7, 1975. The items are described as (1) 1/3 Scale Apollo Lunar Module exhibit, valued for insurance purposes at $7,500; (2) 1/40th scale rotating space shuttle model in self-

contained shipping exhibit container valued at $4,300 for insurance purposes; and (3) a lunar rock display valued at $4,500 for insurance purposes. The submission states that:

> Insurance was procured because NASA required it to cover the loan of its exhibit and would not consent to the loan to the Air Force without the Marine Floater Insurance Policy coverage.

As was stated in our decision B–175086, May 16, 1972—

> * * * it is the settled policy of the United States to assume its own risks of loss in both tort matters and damage to its own property and, hence, the Government does not ordinarily purchase insurance. This policy is based upon the theory that the magnitude of the Government's resources makes it more advantageous for the Government to carry its own risks than to have them assumed by private insurers at rates sufficient to cover all losses, to pay their operating expenses, and to leave such insurers a profit. Thus, it has been held consistently that appropriated moneys are not available for the payment of insurance premiums on Government-owned property in the absence of specific statutory authority for the payment of such premiums. 39 Comp. Gen. 145 (1959); 21 Comp. Gen. 928 (1942), and cases cited therein.

We believe that the policy of self-insurance was applicable in the present case, involving the loan of property from one Federal agency to another, and that commercial insurance coverage should not have been procured. However, this policy of self-insurance is not based on positive law, and no law or regulation affirmatively prohibits the purchase of insurance in the circumstances described here. B–175086, *supra.* Therefore, and since the insurance was apparently procured and issued in good faith, no objection will be made to payment of the voucher, if otherwise correct. In the future, commercial insurance should not be procured under similar circumstances.

[B–180010]

Appropriations—Availability—Parking Space

Federal Aviation Administration (FAA), Department of Transportation, questions propriety of implementing three arbitration awards requiring FAA to provide parking accommodations for employees. FAA does not consider it would be justified in making a determination, as required for expenditure of funds by applicable regulations, that such leased parking accommodations are necessary to avoid impairment of its operational efficiency. Inasmuch as FAA regulations incorporated by reference in the collective bargaining agreement have already made the required determination, FAA is not required to make a further determination. Accordingly, FAA may expend appropriated funds to implement awards.

In the matter of Federal Aviation Administration and Professional Air Traffic Controllers Organization—arbitration awards of employee parking accommodations, June 25, 1976:

This action involves an October 14, 1975 letter request for an advance decision from Mr. William S. Heffelfinger, Assistant Secretary for

Administration, Department of Transportation, as to the propriety of implementing three arbitration awards that require the Federal Aviation Administration (FAA), a subordinate agency of the Department, to expend appropriated funds for employee parking. Initially, the Department noted an exception to the awards and, under the provisions of section 13(b) of Executive Order No. 11491, as amended, petitioned the Federal Labor Relations Council, for review on the basis that the arbitrators had exceeded their authority and fashioned remedies that would require the improper expenditure of appropriated funds. In support of the petitions, the Department alleged that the awards did not meet the criteria set forth in two Comptroller General decisions (43 Comp. Gen. 131 (1963) and 49 Comp. Gen. 476 (1970)) and in GSA Order 7030.2C. The Council on July 24, 1975, declined to accept the petitions for review on the ground that the applicability of the GSA order and the two Comptroller General decisions had not been demonstrated in the petitions. Consequently the Department has requested a ruling from this Office on the matter.

The three arbitration cases involved are in the matters of: (1) *FAA Dallas-Fort Worth, Texas and Professional Air Traffic Controllers Organization, (PATCO)* (Schedler, Arbitrator) FLRC No. 74A–88; (2) *FAA, Portland, Oregon and PATCO* (Hanlon, Arbitrator), FLRC No. 75A–9; and (3) *FAA, Kansas City, Missouri and PATCO* (Yarowsky, Arbitrator), FLRC No. 75A–54. These cases stemmed from grievances filed by Air Traffic Controllers represented by PATCO employed at airport terminals located at Dallas-Fort Worth, Texas; Portland, Oregon; and Des Moines, Iowa. In each case, the grievants alleged that the FAA had violated Article 47 of its collective bargaining agreement with PATCO, dated April 1973, pertaining to parking accommodations which the agency had obligated itself to provide for employees within the bargaining unit. Article 47 provides:

ARTICLE 47 — PARKING

Section 1. The Employer will provide adequate employee parking accommodations at FAA owned or leased air traffic facilities where FAA controls the parking facilities. This space will be equitably administered among employees in the bargaining unit, excluding spaces reserved for government cars and visitors. There may be a maximum of three reserved spaces at each facility where such spaces are available except at facilities where there are employees with bonafide physical handicaps. *At other air traffic facilities, the Employer will endeavor to obtain parking accommodations at least equal to those provided the employees of the airport owner or operator.*

Section 2. At parking facilities under the control of FAA, the Employer will insure that employees have prompt access to and from the parking facilities.

Section 3. *Parking accommodations at FAA occupied buildings and facilities will be governed by law, regulation and agency order 4665.3A.* [Italic supplied.]

FAA Order 4665.3A, dated September 14, 1971, entitled: "Policy on Parking Accommodations at FAA Occupied Buildings and Facili-

ties," as incorporated by reference in Article 47, explicitly sets forth in detail the agency policy of providing good, close in, free or low cost parking to employees and officials of the agency. A review of the arbitration cases here involved reveals that FAA does not control the parking at any of the three air traffic facilities. Rather it must negotiate parking accommodations it requires with the airport authorities. All three arbitrators took notice of this fact and therefore focused their attention on the last sentence of section 1 of Article 47 to determine what, if any, obligations FAA had assumed as to providing parking for its employees at the three facilities.

In light of the FAA policy on parking contained in FAA Order 4665.3A, *supra*, the arbitrators, in effect, construed the referenced provision as placing an obligation on the FAA to use its best efforts to obtain parking accommodations for its employees at least equal to those provided the employees of the airport owner or operator. In all three cases, after a review of the then existing parking situations and the efforts put forth by the FAA to obtain improved accommodations, the arbitrators concluded that FAA had violated this provision of the agreement.

It is a well settled principle of law that where a collective bargaining agreement provides for binding arbitration, it is the function of the arbitrator, rather than a reviewing authority, to determine issues of fact which bear on the question of whether a particular section of the agreement has been violated. *Detroit Newspaper Publishers Association* v. *Detroit Typographical Union No. 18, International Typographical Union*, 471 F. 2d 872 (6th Cir. 1972). *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960). Thus, after a review of the opinions in all three cases, we are unable to find that the arbitrators on the basis of the evidence presented at the hearings exceeded their authority in concluding that the FAA had violated the terms and conditions of the agreement concerning FAA's obligation to endeavor to obtain employee parking accommodations at least equal to those provided the employees of the airport owner or operator.

After concluding that the agreement had been violated in the three arbitration cases, the arbitrators fashioned the following remedies. At the Dallas-Fort Worth Regional Airport, the arbitrator ordered the FAA to reserve 14 of the 20 parking spaces it controls at the ground control tower for use by air controllers. At the Portland, Oregon, airport, the arbitrator ordered the FAA to take steps to obtain and provide free parking accommodations to all employees working under the agreement in either the short term parking location or at the proposed rental car parking lot. Finally, at the Des Moines Air Terminal,

the arbitrator ordered the FAA to permit air controllers to use the regular commercial airport parking lots on a voluntary basis. Each employee would be required to pay the first $10 per month of his parking expenses, and the FAA would be required to pay the balance, if any, to the private operator of the parking facility. The arbitrator noted that this was an interim arrangement and would cease when free proximate parking was made available when the FAA relocated its facility to a new tower scheduled for operation sometime in 1976.

The Department of Transportation is of the opinion that it lacks authority to implement the aforementioned remedies under General Services Administration regulations and decisions of our Office. It relies on 43 Comp. Gen. 131 (1963); 49 *id.* 476 (1970); B–168946, February 26, 1970, and General Services Administration (GSA) Order PBS 7030.2C, dated April 10, 1970, in support of this position. We have reviewed the cited authorities and have concluded that 43 Comp. Gen. 131, *supra*, is not applicable inasmuch as that case held that an agency could not spend appropriated funds for employee parking accommodations in the absence of a statute authorizing such expenditures. The other decisions relied on generally provide that agencies may request GSA to lease employee parking accommodations under the authority that it was granted by the Federal Property and Administrative Services Act, 40 U.S. Code §§ 471 and 490, where the requesting agency certifies to GSA, pursuant to GSA Order PBS 7030.2C, that such parking is required to avoid a significant impairment of its operational efficiency. Then, the agency can use appropriated funds to reimburse GSA for the cost of the leased parking accommodations. The Department of Transportation states that the subject cases do not meet the basic standard required by the GSA order to justify this type of expenditure.

All the cited authorities are concerned with the normal situation where agencies have no independent authority to lease space and consequently must rely on GSA to procure the space and accommodations they require. These cited authorities do not purport to govern situations where agencies have independent statutory or delegated authority to procure space and facilities.

In this regard, we note that the FAA has certain independent statutory authority to procure real property. This authority is contained in 49 U.S.C. § 1344(c) which provides:

> (c) Acquisition and disposal of property.
> The Administrator, on behalf of the United States, is authorized, where appropriate: (1) to accept any conditional or unconditional gift or donation of money or other property, real or personal, or of services; (2) within the limits of available appropriations made by the Congress therefor, to acquire by purchase, condemnation, lease, or otherwise, real property or interests therein, including, in the case of air navigation facilities (including airports) owned by the United States and operated under the direction of the Administrator, easements through

or other interests in airspace immediately adjacent thereto and need in connection therewith: *Provided, That the authority herein granted shall not include authority for the acquisition of space in buildings for use by the Federal Aviation Administration, suitable accommodations for which shall be provided by the Administrator of General Services unless the Administrator of General Services determines pursuant to section 1(d) of Reorganization Plan Numbered 18, 1950, that the space to be acquired is to be utilized for the special purposes of the Federal Aviation Administration and is not generally suitable for the use of other agencies* * * *. [Italic supplied.]

The above-quoted statutory authority permits the GSA to delegate authority to the FAA to procure its own special purpose space such as that required at airports for air traffic control and for other purposes. Pursuant thereto, GSA has delegated certain leasing authority to FAA in 41 C.F.R. § 101–18.104–1(L)(2) (1975), which permits FAA to directly lease the following kinds of space:

(2) Federal Aviation Administration. The Aeronautical Center at Oklahoma City, Oklahoma, air route traffic control centers, garage space held under service contracts, land at airports, and not more than 10,000 square feet of space at airports that is used predominately as general purpose office space in buildings under the jurisdiction of public or private airport authorities.

We have been informally advised by FAA officials that FAA has construed the above-quoted regulation as providing authority for that agency to directly negotiate with airport owners and operators and lease space at airports without reference to GSA. FAA also construes this authority as permitting that agency to lease employee parking accommodations without reference to GSA, where FAA determines to its own satisfaction that the criterion, namely that such parking accommodations are required to avoid a significant impairment of the agency's operational efficiency, as set forth in paragraph 10(c) of GSA Order PBS 7030.2C, April 10, 1970, on: "Vehicle Parking Facilities," has been satisfied. Hence, according to the FAA the determination of whether the criterion for leasing employee parking accommodations has been satisfied is a matter within the sole discretion of FAA.

Our recent decisions, concerning the legality of binding arbitration awards relating to Federal employees covered by collective bargaining agreements, have held that an agency may bargain away its discretion and thereby make agreement provisions nondiscretionary agency policies, if such provisions are consistent with applicable laws and regulations, including Executive Order No. 11491, as amended (3 C.F.R. 254 (1974)). See for example, 55 Comp. Gen. 42 (1975), 54 *id.* 1071 (1975), 54 *id.* 312 (1974). Thus, if an agency bargains away its right to exercise its discretion on a matter that is normally discretionary with the agency, the agency is bound by the nondiscretionary policy expressed in the labor-management agreement, just as it would be bound by its own mandatory regulations. 54 Comp. Gen. 1071, *supra.* Consequently, the basic issue presented by this case is whether the FAA, in promulgating FAA Order 4665.3A dated September 14, 1971,

entitled "Policy on Parking Accommodations at FAA Occupied Buildings and Facilities" and in agreeing to Article 47 of the collective bargaining agreement that incorporated by reference the FAA order, affirmatively exercised its discretion in advance and, in effect, made a determination that adequate parking accommodations for air controller employees were required to avoid a significant impairment of the operational efficiency of the agency. If the agency has already affirmatively exercised such discretion, it may not properly withhold implementation of the arbitration awards where they are otherwise appropriate.

In deciding this issue, we have reviewed FAA Order 4665.3A dated September 14, 1971, *supra*, as incorporated by express reference in the agreement, which sets forth FAA policy on providing accommodations for employee parking at FAA occupied buildings and facilities. Section 4a(2) of the FAA order expressly provides that "[A]dequate parking accommodations shall be provided for the privately owned vehicles of FAA employees engaged in the maintenance and operation of agency technical facilities." In fact, that section goes on to demonstrate the importance FAA attaches to employee parking as follows:

> (a) *On Airports.* Adequate parking accommodations for FAA employees in close proximity to FAA technical facilities is considered to be an integral part of each facility.
>
> *1.* Project approvals for new facilities shall be withheld and start of construction of new facilities shall be delayed until adequate employee parking arrangements are made for all FAA technical facilities located on the airport.
>
> *2.* No new leases, permits or other instruments are to be executed or existing ones modified without the inclusion of specific statements assuring adequate employee parking accommodations at all technical facilities located on the airport. No new ADAP agreements will be entered into without obtaining assurances from the sponsor of adequate parking accommodations for employees at all FAA technical facilities on the airport.

Under section 5 of the FAA order, responsibility for determining the adequacy of parking accommodations for official and employee parking on a site-by-site basis is delegated to regional and center directors and the factors to be considered are set forth in detail. To correct deficiencies in parking, section 6 of the order permits the use of FAA funds as follows:

> (b) *Employee Parking at Technical Facilities.* A maximum effort shall be made to negotiate for adequate employee parking. In the event these efforts fail, the Regional Director may approve the expenditure of FAA funds to obtain temporary relief for the problem until such time as parking accommodations can be obtained from the airport owner/sponsor, or, in the case of off airport sites, until parking accommodations can be acquired.

A careful reading of the above-quoted FAA order clearly indicates that FAA considered adequate parking for its employees at air traffic control facilities to be essential to the performance of its mission. This

fact is evidenced by its order to withhold project approval of new facilities that involve air traffic safety improvements until adequate employee parking arrangements were made. Similarly, new leases were not to be executed nor existing ones modified without the assurance of adequate employee parking accommodations. Also, Airport Development Aid Programs (ADAP) agreements that provide Federal aid to airports were not to be entered into without such assurances. Obviously, FAA would never have ordered such drastic measures unless it had determined that adequate employee parking accommodations were essential for the maintainence of the operational efficiency of the agency.

Nor does the FAA order require us to ponder over and speculate as to what is meant by the term "adequate employee parking accommodations." For it explicitly sets forth that such accommodations should be at least equal to those provided the employees of the airport owner/operator. Further, the order states that parking accommodations should normally be within 500 feet of the work facility and not require the employee to resort to other means of transportation such as shuttle buses. Moreover, the order states that free parking for employees is a desirable objective. Finally the order indicates that adequate employee parking should be obtained at FAA expense when justified.

Based on the foregoing, we are of the opinion that FAA made a determination that adequate employee parking accommodations were required in order to avoid a significant impairment of the operational efficiency of that agency when it promulgated the order. At that time, the determination became a nondiscretionary agency policy. Moreover, FAA, by incorporating the order by express reference in its collective bargaining agreement providing for binding arbitration, subjected the provisions of the order to interpretation by a neutral arbitrator. 54 Comp. Gen. 403, 405 (1974). Thus FAA is not required to make a further determination. In interpreting the provisions of the agreement, including the order, three arbitrators have now found that FAA violated Article 47 of the agreement by failing to endeavor to provide adequate employee parking accommodations at the airports here involved and have fashioned awards that require FAA to expend appropriated funds to provide parking accommodations that satisfy the provisions of the agreement. We see no legal impediment to the expenditure of funds to implement these awards, inasmuch as we have concluded that FAA has already made the requisite determination in FAA Order 4665.3A, *supra*, and Article 47 of the collective bargaining agreement that adequate employee parking accommodations are essential to the operational efficiency of the agency.

[B-185722]

Bidders—Qualifications—Manufacturer or Dealer—Administrative Determination—Labor Department

Contention that bidder is not "manufacturer" or "regular dealer" within purview of Walsh-Healey Act is not for consideration by General Accounting Office, since responsibility for applying criteria of Walsh-Healey Act is vested in contracting officer subject to final review by Department of Labor.

Contracts—Specifications—Samples—Preproduction Sample Requirement—Evaluation Propriety

Although protester disagrees with contracting agency on evaluation of bid samples, it is concluded agency's judgment was not without reasonable basis in fact, since protester has not shown that bid samples were not fairly and conscientiously evaluated by agency.

Bids—Discarding All Bids—Invitation Defects

Workmanship requirements providing "all parts shall be free from defects or blemishes affecting their appearance" and "workmanship shall be first class throughout" are highly subjective and vague in that they fail to provide clear standard upon which bid samples will be evaluated. As such, although we agree with General Services Administration that rejection of bid samples would have been legally questionable, bids should have been rejected and procurement resolicited in terms indicating what specific characteristics, if any, bid samples would have to meet.

In the matter of the Products Engineering Corporation, June 25, 1976:

By letter dated January 12, 1976, Products Engineering Corporation (Products) protested the award of contracts to the L. A. Spievak Corporation (Spievak) under invitations for bids (IFB) FPWP-C5-55690-A-7/7/75 (hereinafter No. "1") and FPWP-C8-55692-A-8/29/75 (hereinafter No. "2").

IFB No. "1" was issued by the General Services Administration (GSA) on June 5, 1975, for a requirements contract for measuring tapes, clamps and repair kits, measuring rules, chalk lines and reels. IFB No. "2" was issued by GSA on July 28, 1975, for a requirements contract for gauges. At bid opening for IFB No. "1" on August 8, 1975, Spievak was the low bidder on items 34–38, 40–42 and 50. At bid opening on August 29, 1975, for IFB No. "2" Spievak was low bidder on items 2, 19, 42–44 and 46–47. Award was made to Spievak for items 34–38, 40–42 and 50 on IFB No. "1" and for items 2, 42–44 and 46–47 on IFB No. "2" on December 30, 1975.

Products bases its protest on the following grounds:

(1) Spievak does not qualify as a "manufacturer" or "regular dealer" within the purview of the Walsh-Healey Act, 41 U.S. Code § 35 (1970).

(2) Bid samples supplied by Spievak (specifically, for items 2, 19, 42–44 and 46–47) for IFB No. "2" did not conform to the IFB's specifications, thereby rendering the bid nonresponsive.

With regard to Products' first contention, we have on numerous occasions recognized that the responsibility for applying the criteria of the Walsh-Healey Act is vested in the contracting officer subject to final review by the Department of Labor. As such, our Office is not authorized to review determinations as to whether particular firms are "regular dealers" or "manufacturers" within the purview of the act. *Case Inc.; Bethune Quilting Company*, B–185422, January 29, 1976, 76–1 CPD 63. Accordingly, this issue is not properly for consideration by our Office.

With regard to Products' second allegation, clause 215 (Bid Samples) of IFB No. "2" in pertinent part states:

(a) * * * Samples will be evaluated to determine compliance with all characteristics listed for examination in the Invitation.
(b) Failure of samples to conform to all such characteristics will require rejection of the bid. * * *

The following subjective workmanship characteristic was listed for item 2: "Workmanship shall be first class throughout" (paragraph 3.19, Interim Amendment–1 to Federal Specification GGG–G–17b). For items 42–44 and 46–47, the following subjective workmanship characteristic was listed:

The workmanship shall be in accordance with the best grade of commercial practice covering this type of equipment. All parts shall be free from defects or blemishes affecting their appearance or which may affect their serviceability (paragraph 3.13, Federal Specification GG–G–86b, March 11, 1965).

With regard to item 19, Products alleges that the bid sample submitted by Spievak was not chrome plated as required by the specification. GSA advises that it agrees with Products' contention and that Spievak's bid was accordingly rejected for this item.

With regard to items 42 and 43 Products alleges that the bid samples submitted by Spievak were unplated, had burrs around the holes and showed definite signs of corrosion. GSA, on the other hand, states that "no deficiencies of any kind were found in Spievak's representative samples [for items 42 and 43]."

In matters concerning the evaluation of bid samples, we have stated:

* * * As procurement officers are better qualified than this Office to review and evaluate the sufficiency of offered products to determine whether they meet the requisite characteristics [of the solicitation], we will not substitute our judgment for that of the contracting agency unless the record establishes that such judgment was without basis in fact. * * *

R & O Industries, Inc., B–183688, December 9, 1975, 75–2 CPD 377. Here, the protester, though indicating his disagreement with GSA on its evaluation of Spievak's bid samples for items 42 and 43, has not

shown that the bid samples were not fairly evaluated by GSA. Thus, we must conclude that GSA's judgment concerning bid samples for items 42 and 43 was not without a reasonable basis in fact.

With regard to the bid sample representative of item 2, Products does not state areas where the sample deviated from the specifications. Concerning the bid sample representative of items 44, 46, and 47, Products contends that it did not "* * * meet the criteria of a good commercial product * * *" because it was pitted, rusty and not plated.

GSA acknowledges that defects in workmanship were found in the bid samples for items 2, 44, 46 and 47. However, it states that the defects related to appearance rather than serviceability. GSA also states that the workmanship requirements of the subject specifications "* * * are insufficient to provide bidders with a definite specification on which they may intelligently bid, or for that matter, to provide the Government with a basis for evaluating bid samples for compliance with the specifications." GSA bases its position on past decisions of our Office requiring specifications to "clearly, precisely, and unambiguously" set forth the Government's requirements. *Boston Pneumatics, Inc.*, B–180798, November 14, 1974, 74–2 CPD 260; *R & O Industries, Inc.*, *supra.* In view of this, GSA elected to pursue the following course of action:

> Accordingly, since the workmanship provisions were determined to be legally unenforceable, and therefore could not form a basis for rejecting the bids as nonresponsive (see B–176647, November 21, 1972), [52 Comp. Gen. 285 (1972)], the contracting officer elected to proceed in accordance with the guidelines set forth in General Services Procurement Regulations (GSPR) 5A–2.202–4 (g) and (i), regarding unlisted characteristics. Generally, these provisions provide a procedure whereby characteristics of an item which were not listed for examination under the applicable bid sample provisions, but which appear as deficiencies, are examined from the standpoint of whether the bidder is capable of performing in accordance with the entire specification. These provisions specifically provide:
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> "(g) If the bid sample has been found to conform to all of the characteristics listed in the solicitation, but found deficient with respect to one or more of the unlisted characteristics, a plant facilities report shall be requested as provided in § 5A–1.1205–3. A copy of the sample evaluation report shall be attached to the GSA Form 353 which shall include a request that special attention be given to the prospective contractor's ability (notwithstanding the deficiencies noted with respect to the characteristics not listed in the solicitation which were evaluated) to produce supplies fully conforming to applicable specifications. For example, can the noted deficiencies be corrected by fairly simple production or process control adjustments, or would expensive and time-consuming retooling be involved? The plant facilities report shall include a specific statement regarding the prospective contractor's ability or inability to correct each noted deficiency in objective characteristics as well as an overall appraisal of his capability."
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> * * * * * * *
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> "(i) If the plant facilities report is favorable, award may be made if otherwise proper to the low bidder whose samples conform to the characteristics listed in the solicitations. However, concurrently with award the contracting officer shall specifically, in writing, call to the attention of the contractor the inadequacies of the sample with respect to unlisted characteristics and advise him of his responsibilities to furnish items conforming to all of the requirements of the specification. A letter format for this purpose is illustrated in § 5A–76.119. A copy of such letter shall be furnished to the appropriate Quality Control Division, for use when making subsequent inspection."

Inasmuch as the listed workmanship characteristics were unenforceable, it was necessary to determine whether there were any more basic but unlisted provisions of the specification which could be evaluated to insure that the Government would receive an acceptable product in accordance with GSPR 5A-2.202-4 (g) and (i). What concerned our inspectors in their examination of the bid samples for contested items (44, 46, and 47) were the presence of pits on the bid samples which affected the appearance of these items, but this deficiency did not affect their serviceability. Under the specification (GG-G-86b) * * *, the "Finish" requirements specified in paragraph 3.3, however, would preclude the Government's acceptance of production items containing such pits. Accordingly, in conducting the plant facilities survey, GSA's Quality Assurance Specialist specifically checked whether Spievak could meet the unlisted Finish requirements of the specification. As a result of this examination, he reported: "BIDDER HAS THE CAPABILITY & MACHINERY TO PRODUCE ITEMS SO THEY WILL CONFORM TO PARA 3.3 FINISH OF SPECIFICATION GG-G-86b." Similarly, on the bid sample for Item 2, our inspectors, in examining the applicable bid sample, were concerned with burrs protruding "from the hole in the head adjacent to the rule slot." Of course, in this case, neither appearance nor serviceability was mentioned in the Workmanship clause itself, which, as noted above, only contains the vague terms "Workmanship shall be first class throughout." Burrs, [which were not for evaluation to determine the bidder's responsiveness] however, are defects which are listed as Category 210 on page 25 of Specification GGG-G-17b * * *. In response to these burr defects, our Quality Assurance Specialist stated: "BIDDER HAS NEW DRILL JIG FOR DRILLING & COUNTER BORING HOLE IN THE HEAD OF THE DEPTH RULE. DRILLING & COUNTER BORING WILL ALLIMINATE [sic] BURRS." Accordingly, the GSA Quality Assurance Specialist reported that Spievak was capable of performing as to Items 2, 42, 43, 44, 46, and 47. Pursuant to GSPR 5A-2.202-4(i), therefore, award was made to Spievak.

In *Boston Pneumatics*, *supra*, we held that "* * * the terms of the invitation must be expressed clearly, precisely, and unambiguously so all prospective bidders will know what is required of the product being offered." After reviewing the record we found that terms such as "Standard practices of manufacturers producing tools of the type required in the specification," "general service conditions," "sufficient hardness," "limits established by good commercial practice," and "reliable and effective" failed to provide bidders with a sufficiently definite specification to permit intelligent bidding. Since award had already been made, and the items delivered, we recommended that corrective measures be taken to improve the specification requirements for future procurements.

In *R & O Industries, Inc.*, *supra*, we held *inter alia* that the rejection of bid samples by GSA in a procurement of hammers on the basis that the handles were not "well proportioned" was legally questionable where the term "well proportioned" was not defined in the solicitation. However, we upheld the rejection of the same bid samples on the alternative basis, advanced by GSA, of inadequate workmanship (i.e., loose handles and hammer heads) where workmanship was defined in the specification as follows: "Workmanship shall be first class in every respect. The tools shall have no burrs, fins, sharp projections, cracks, *or any other imperfections which may impair their durability and serviceability.*" [Italic supplied.]

In the instant case, as previously noted, GSA contends that the defects found in Spievak's bid samples related to the appearance aspect of workmanship. However, even though the workmanship provision relevant to items 44, 46 and 47 provides that "[a]ll parts shall be free from defects or blemishes affecting their appearance * * *," GSA argues (based on our holding in *R & O Industries, Inc., supra*) that the bid samples could not be rejected pursuant to this provision because "[t]he provision nowhere delineates what would constitute an acceptable appearance."

Like the workmanship provision in *R & O Industries, Inc., supra*, the workmanship provision for items 44, 46, and 47 includes specific evaluation factors. However, unlike the provision in *R & O*, which defines workmanship in terms of imperfections impairing *durability and serviceability*, the instant provision defines workmanship in terms of defects or blemishes affecting *appearance*. We think that this is a material difference. The terms "durability" and "serviceability" provide a reasonably clear standard upon which bid samples are to be evaluated. The term "appearance," on the other hand, is highly subjective. As such, it fails to adequately apprise bidders of the standards upon which their bid samples will be evaluated. Thus, we agree with GSA that the workmanship provision applicable to items 44, 46, and 47 is vague.

Unlike the workmanship provision relevant to items 44, 46, and 47 which is vague because it fails to include *definitive* workmanship evaluation criteria, the workmanship requirement for item 2 is vague because it fails to include *any* workmanship evaluation criteria ("workmanship shall be first class throughout"). See *Communication Corps, Inc.*, B-179994, April 3, 1974, 74-1 CPD 168. Thus, although GSA found "* * * burrs protruding 'from the hole in the head adjacent to the rule slot,'" it again believed (based on our holding in *R & O Industries, Inc., supra*) that it could not reject Spievak's bid sample for item 2 as nonresponsive because of the indefinite workmanship requirements. Further, with regard to items 2, 44, 46, and 47, citing 52 Comp. Gen. 285 (1972), GSA argues that an indefinite workmanship requirement is "legally questionable" and does not provide a compelling reason to cancel and readvertise the instant IFB.

The decision cited by GSA concerned the procurement of typewriters by GSA. The solicitation included a bid sample requirement for variant key pressure which subsequent to bid opening GSA found to be deficient in that there was no method to test for compliance with the stated requirement. As a result, GSA canceled the solicitation and resolicited the requirement absent, *inter alia*, the variant key pressure requirement. We held that the cancellation of the solicitation was not

based on a "compelling reason" because "* * * there was no reason to believe that firms other than the original 6 bidders would bid on the resolicitation or that such bidders would have offered any different equipment if the original specifications had reflected the change." 52 Comp. Gen., *supra*, at 289. We went on to note that the net effect of a resolicitation would be to create an auction atmosphere wherein new bids would constitute responses to the prior exposed bid prices rather than to the change in requirements.

The instant case is distinguishable from the 52 Comp. Gen. decision. Here, it is possible that if there was a definitive workmanship requirement or no workmanship requirement, different equipment would have been offered. Products indicated in its letter of January 12, 1976, that it would have offered equipment comparable to Spievak's at a lower price if it had known that would be acceptable. Therefore, an "auction atmosphere" would not have been created on resolicitation in the facts and circumstances of this case.

Thus, although we agree with GSA that rejection of Spievak's bid on items 2, 44, 46, and 47 on the basis of the instant workmanship requirements would be "legally questionable," we believe that under the circumstances present here the solicitations should have been resolicited in terms indicating exactly what specific characteristics, if any, the bid samples would have to meet. However, in view of the fact that the instant contract is a requirements type contract in which the Government guaranteed to purchase a minimum 25 percent of the total estimated quantities for each item (none of which has yet been purchased), and in view of GSA's advice to us that the deficiencies noted herein have been corrected in current IFB's, we do not feel that termination of the instant contract is in the best interests of the Government.

Accordingly, no corrective action is recommended.

[B-185784]

Property—Public—Damage, Loss, etc.—Carrier's Liability—Burden of Proof

Mobile home delivered to carrier in good condition, delivered to consignee in damaged condition, and ascertainment of amount of damage establishes prima facie case. *Missouri Pacific R.R.* v. *Elmore & Stahl*, 377 U.S. 134, 138.

Transportation—Carmack Amendment of 1906—Damage to Mobile Home Shipments

Mobile home carriers are subject to Carmack Amendment, 49 U.S.C. 20(11).

Property—Public—Damage, Loss, etc.—Carrier's Liability—Common Law Rule

At common law common carrier could not escape liability by showing absence of negligence.

Property—Public—Damage, Loss, etc.—Durables

Cases involving perishable goods apply to durable goods.

Transportation—Rates—Tariffs—Ambiguous

Carrier's tariff item excluding it from liability is ambiguous, and appears to be rule exempting carrier from own negligence, and therefore is in violation of 49 U.S.C. 20(11).

Property—Public—Damage, Loss, etc.—Carrier's Liability—Burden of Proof

Carrier has burden of proof to show that inherent defect was sole cause of damage.

In the matter of Chandler Trailer Convoy, Inc., June 25, 1976:

Chandler Trailer Convoy, Inc. (Chandler) has requested review of a settlement issued by our Claims Division on November 28, 1975. In the settlement the Claims Division disallowed Chandler's claim for a refund of $1,942.66, which the Government as a subrogee collected by setoff for damage to a mobile home owned by a member of the military and transported by Chandler under Government bill of lading No. H–5671932.

The mobile home was picked up by Chandler on January 21, 1974, at Huachuca City, Arizona, and delivered in a damaged condition to its owner in Scottsburg, Indiana, on February 1, 1974. The Pre-Move Inspection Record, prepared by the carrier's representative, shows that the mobile home was in good condition at origin, with the exception of some screws loose and missing on the left side. Since the mobile home was delivered to the carrier at origin in good condition and to the owner-consignee at destination in a damaged condition, the ascertainment by the consignee of the amount of the damage ($1,-942.66) established the remaining element necessary to create a prima facie case of carrier liability. *Missouri Pacific R.R.* v. *Elmore & Stahl*, 377 U.S. 134, 138 (1964). On the basis of the prima facie case, $1,942.66 was administratively set off from money otherwise due the carrier.

Chandler does not deny that the mobile home was damaged at destination, but alleges (1) that the *Missouri Pacific* case, cited above, does not apply to the transportation of mobile homes, (2) that the damage to the mobile home occurred as the result of normal wear and tear

and/or structural or mechanical failure and not as a result of its transportation, and (3) that the mobile home was not damaged by collision.

Chandler is a motor common carrier whose main business is the transportation of mobile homes. As a common carrier, Chandler is subject to section 20(11) of the Interstate Commerce Act, 49 U.S. Code 20(11) (1970), commonly called the Carmack Amendment, made applicable to motor carriers by section 219 of the Act, 49 U.S.C. 319 (1970). See *National Trailer Convoy, Inc.* v. *United States*, 345 F. 2d 573 (170 Ct. Cl. 823 (1965)). It provides in pertinent part that a carrier "shall issue a receipt or bill of lading [for the property received], and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it * * * and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier * * * from the liability imposed * * *."

The meaning of the Carmack Amendment is explained in *L. E. Whitlock Truck Service, Inc.* v. *Regal Drilling Co.*, 333 F. 2d 488 (10th Cir. 1964), at page 491:

> At common law a common carrier undertook to carry the shipment safely, and it was liable for all loss or injury excepting only that due to acts of God, public enemy, and those arising from the inherent nature of the goods transported or resulting from the fault of the shipper. It was also a rule of common law that as to these excepted causes of damage the carrier could nevertheless be held liable if it were negligent. The carrier was liable for damages whether negligent or not if the loss was not due to the excepted causes. Therefore a carrier could not escape liability by a showing of the absence of negligence on its part. Chesapeake & Ohio Ry. Co. v. Thompson Mfg. Co., 270 U.S. 416, 46 S. Ct. 318, 70 L. Ed. 659 [1926].
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> In Secretary of Agriculture v. United States, 350 U.S. 162, 76 S. Ct. 244, L. Ed. 173 [1956], the Court considered a similar question and found that the Interstate Commerce Commission was prevented from approving tariffs which limited the common law liability of the carrier for damage. It has been held that a prima facie case has been made under the Carmack Amendment when the shipper shows that the shipment was in good condition when delivered to the carrier and further that the carrier could not escape liability if the goods are delivered in damaged condition, by showing that it was not negligent in handling the shipment. Thus the Carmack Amendment codifies the common law rule of the carrier's liability, and the federal law applies. Missouri Pacific R.R. Co. v. Elmore & Stahl, 84 S. Ct. 1142 (1964) [377 U.S. 134 (1964)], Secretary of Agriculture v. United States, supra. The Supreme Court has held that a carrier is not an absolute insurer, but is liable if the shipper makes a prima facie case and the carrier does not meet its burden to show both its freedom from negligence and that the loss was due to one of the causes excepted by the common law rule. The cases involving perishable goods are not distinguished from those where durable goods are transported. Missouri Pacific R.R. Co. v. Elmore & Stahl, supra.
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> Thus to establish the carrier's liability, it is necessary only for the claimant to show the carrier's receipt of the shipment in apparent good order, and the delivery or release of the shipment by the carrier in damaged condition. This being shown, the prima facie case is established and the burden is on the carrier to prove that the shipment was not delivered in good order, that it was delivered by it in good condition, or that the excepted causes were applicable, and it was free of negligence. United States v. Mississippi Valley Barge Line Co., 285 F. 2d 381 (8th Cir. [1960]). The Carmack Amendment thus does not change the common law rule.

It seems clear then that the principles of law remain the same even if the commodity transported is a mobile home.

Chandler alleges that normal wear and tear caused the damage to the side panels of the mobile home, as well as other damage, and that most of the damage is normal in the course of mobile home transportation. The carrier states that it is not liable for normal wear and tear and refers to a rule in Item 20 of Mobile Housing Carriers Conference, Inc., Agent, Freight Tariff No. 10–F, MF–I.C.C. No. 25, in support of its argument. The rule in that item reads in part:

> Carrier shall not be liable for loss or damage to the trailer due to normal wear and tear and road hazards while in transit nor for loss, damage or injury to the commodity being transported, or the contents, property damage or public liability caused by any structural or other defect or mechanical breakdown, of undercarriage, wheels, tires, tubes, brakes, wheel bearings, hitches, springs, frame or any other part of the commodity being transported or of its accessories and equipment, nor for the disengaging of trailer from motive power due to no negligence of the carrier, nor caused by vehicles that do not comply with any state or federal rules, regulations or specifications. Carrier shall not be liable for the loss of special or extra equipment not a part of the original equipment of the trailer unless specifically listed on the bill of lading or shipping receipt. Carrier shall not be liable for damage to personal effect of any kind unless evident upon delivery. Carrier shall not be liable for damage to electrical, mechanical or electronic machines, machinery or devices unless external damage is apparent.

The record shows that the mobile home was purchased new by the owner on July 15, 1972, and picked up by Chandler on January 21, 1974. The mobile home was only 18 months old when it was transported and the owner has attested to the fact that it was not moved prior to that date. The pre-inspection report indicates only that a few screws were loose at origin. Under these circumstances, it seems unusual that normal wear and tear could have caused nearly $2,000 damage to the mobile home.

In our opinion, the rule in Item 20 is ambiguous because it does not define normal wear and tear; it also appears to be a rule exempting the carrier from its own negligence and therefore in violation of 49 U.S.C. 20(11) (1970). *Resolute Insurance Co.* v. *Morgan Drive-Away, Inc.*, 403 S.W. 2d 913 (Ct. App. Mo. 1966); *Peter Condakes Co., Inc.* v. *Southern Pacific Co.*, 512 F. 2d 1141 (7th Cir. 1975). The rule purports to free the carrier from liability for all en route damage regardless of the carrier's negligence and has added normal wear and tear and road hazards to the five noted exceptions to a common carrier's liability. The rule also excuses the carrier from liability for concealed damage to personal effects and electrical appliances by stating that external damage to that type of property must be apparent upon delivery. See *Practices of Motor Common Carriers Of Household Goods*, 124 M.C.C. 395 (1976), at page 415, where the Interstate Commerce Commission ordered household goods carriers to amend their bills of

lading and appropriate tariffs to reflect only those defenses allowed by common law and by certain code provisions.

Chandler also refers to an estimate of repair which lists as elements of damage $500 for a new frame and $500 for labor and states that the mobile home was not involved in a collision and that damage must have been caused by an inherent weakness in the mobile home due to improper manufacture.

Chandler erroneously refers to a higher estimate of $2,443.50, prepared by Baird Mobile Houses, Inc., Salem, Indiana. However, a lower estimate of $1,942.66 was prepared by G.M. Mobile Manor, Inc., Scottsburg, Indiana, and the lower estimate was used as the measure of damage. The estimate contains a $700 cost for repair of the frame.

Chandler alleges that the mobile home was not in a collision. However, it has presented no proof of that fact nor has it presented any proof that other incidents of transportation such as excessive speed, running off the road, etc., did not cause the damage. A carrier's contributing, concurring, subsequent or superseding neglect is sufficient to make it liable notwithstanding proof of a latent defect which may relieve a carrier of liability to an owner. *McCurdy* v. *Union Pacific R.R.*, 413 P. 2d 617 (Wash. 1966). A carrier cannot exonerate itself by showing that all transportation services were performed without negligence but must establish that the loss or damage was caused solely by one of the excepted perils recognized at common law such as the fault of the shipper or the inherent nature of the goods themselves. *Boyd* v. *McCleskey*, 515 S.W. 2d 25 (Civ. App. Tex. 1974); *Super Service Motor Freight Co.* v. *United States*, 350 F. 2d 541 (6th Cir. 1965).

In *American Hoist & Derrick Co.* v. *Chicago M. St. P. & P. R.R.*, 414 F. 2d 68 (6th Cir. 1969), a case analogous to this case, the railroad contracted to transport a locomotive crane operating on its own wheels on railroad tracks. The court held the railroad liable for damage and stated at page 72: "What the railroad had to establish to avoid liability * * * was that the crane was the *sole* cause of its own destruction." The law places a burden on Chandler to establish not the general tendency of a mobile home to be damaged in transit, but that the damage was due solely to that propensity. See *Whitehall Packing Co., Inc.* v. *Safeway*, 228 N.W. 2d 365 (Wisc. 1975). Chandler has not met this burden and merely alleges that the mobile home was not in a collision or that the damage was due to an inherent defect without providing any satisfactory proof to that effect.

We agree with Chandler that some of the items contained in the repair estimate are not a proper element of damage because (1) they do not appear to have been caused by the carrier; (2) they are the

result of normal maintenance after the movement of a mobile home; and (3) they existed prior to the transportation of the mobile home. We therefore will allow Chandler's claim in part as to the following items:

(1) Apparently not caused by the carrier:	
1 formica topped pedestal table	$45.00
(2) Normal maintenance:	
1 flex gas line	5.25
5 gallons of Kool-Seal	25.00
Kool-Seal roof labor	20.00
1 electrical receptical cover	.35
Replace gas line and check for leaks	15.00
1 quart ceiling paint	3.00
(3) The pictures of the damaged trailer indicate that the portion of the floor damaged did not contain floor covering:	
1 10 foot roll of floor covering	45.00
Install floor covering	20.00
Total	$178.60

We today are instructing our Claims Division to reopen the settlement and to allow Chandler $178.60 of its claim for $1,942.66.

[B-185852]

Contracts—Negotiation—Reqests for Proposals—Protests Under—Manning Requirements

Incumbent protests against request for proposals (RFP) for aircraft maintenance services requiring offerors to insert hourly rate multiplied by estimated 600 man-hours for over and above work (11 percent of contract) because it does not provide for recognition of incumbent's experience and award to any other firm will not result in lowest cost. Protest is denied because no wide discrepancies in performance are expected as RFP contains stringent experience responsibility requirements, Government has significant control over man-hours to be expended, and man-hours estimate is reasonable. Moreover, recognition of experience is speculative and incumbent's suggested evaluation formulas would have no effect on competitive standing of offerors.

In the matter of the Boeing Company, June 28, 1976:

This is a protest by the Boeing Company (Boeing) against certain aspects of the method of evaluation in request for proposals (RFP) No. F34601-76-R-1516, issued by the Department of the Air Force (Air Force), Oklahoma City Air Logistics Center, Tinker Air Force Base, Oklahoma, for the procurement of services to perform modification and programmed depot maintenance (MOD/PDM) and other related work on the Air Force's fleet of KC-135 aerial refueling tankers.

The RFP was issued on December 1, 1975. Preproposal conferences were held on January 7 and 8, 1976. Initial proposals were received on February 4, 1976. After negotiations, best and final offers were received on February 25, 1976. Award of the contract was made to the Hayes International Corporation on or about June 10, 1976.

Generally, the RFP calls for two classes of work to be performed. The first class of work, as contained in appendix "A" (Work Specification) established requirements for PDM, modifications, flight tests, and preparation for delivery of the aircraft. All of this work is to be done on a fixed-price-per-aircraft basis. Eighty-nine percent of the contract is to be performed on a fixed-price basis.

During the course of the work described in appendix "A," the contractor is required to be "* * * alert for obvious defects in surrounding areas. Defects discovered that can be corrected by a skilled mechanic in two and one-half (2½) hours or less shall be repaired as part of the fix price." The discovered defects which will require more than 2½ hours to repair are to be forwarded to the administrative contracting officer (ACO) for disposition. This second class of work requiring more than 2½ hours of effort is known as Over and Above (O&A) work and is to be performed on the basis of a set rate per man-hour of work as opposed to a fixed unit price per aircraft. The hourly O&A work constitutes the remaining 11 percent of the total contract work effort.

Since the O&A work can only be estimated, the Air Force established a price evaluation formula therefor whereby the offeror's quoted hourly rate would be multiplied by 600 man-hours. Section D–4(7) of the RFP's evaluation and award factors provides as follows:

> Items 0005, 1005 and 2005 (Hourly Rate Over and Above): The applicable hourly rate quoted multiplied by the estimated man-hours of *600* times the quantity of aircraft of Items 0001, 1001 and 2001 as set forth above. This estimate is furnished for evaluation purpose only and is not intended as a limitation of the number of hours which will actually be experienced in the performance of the fixed hourly rate over and above work under any resultant contract. The offeror agrees that the quoted hourly rate(s) shall apply regardless of the man-hours that are experienced.

The evaluation to determine the low offeror was to take into account prices submitted for a 1-year base and two subsequent 1-year option periods. The Government unilaterally reserved the option to retain the incumbent contractor for two additional 1-year periods, subject to satisfactory negotiations.

Boeing, the then incumbent contractor for the past 5 years, objects to the 600-man-hour estimate for the O&A work at a fixed hourly rate and the 2½-hour figure for repair of defects as part of the fixed price. Due to its experience and efficiency in PDM work over the last 5 years, Boeing states that a lower man-hour estimate for O&A work should be applied to it or, conversely, a higher man-hour estimate should be applied to others. The 600-man-hour figure is characterized by Boeing

as arbitrary and, when applied, results in a meaningless comparison of offers. Boeing contends that it is patently unfair to require that all defects that may be repaired in 2½ hours or less shall be repaired as part of the fixed price, citing its current experience as the incumbent contractor.

In addition, Boeing states that the O&A evaluation should be subject to an improvement or productivity curve relying on the repetitive nature of the tasks to be performed. It is stated that one offeror should not be expected to perform at the same level of experience of other less experienced offerors. Because of these evaluation factors, Boeing argues, the evaluation will create an understatement of the lowest real/ultimate cost to the Government. In so arguing, Boeing submits sample evaluations to demonstrate its position, utilizing a 57-percent learning curve in its favor and suggests other evaluation formulas.

The Air Force explains that the 600-man-hour estimate for O&A is "far from arbitrary" and represents the agency's best estimate of the anticipated over and above work. The estimate is based on Boeing's 5-year average of 940 hours per aircraft for O&A work. In fiscal year 1976, Boeing performed 960 hours of O&A work per aircraft. The average had increased from a low of 655 hours per aircraft to a high of 1,242 hours per aircraft. The reasons for the increase related to two or three major areas. These items averaged approximately 400 man-hours per aircraft and were shifted to the fixed-price portion of the work, thereby reducing the total hourly O&A work to be estimated. Six hundred hours became the figure for the purpose of evaluation as an approximate number of hours of O&A work which might be required by subtracting the 400 man-hours from the 960 man-hours for fiscal year 1976.

The 2½-hour figure involves correcting discrepancies such as loose or broken clamps, stop-drilling of cracked areas, and replacement of loose or missing fasteners. Any of these corrections which takes more than 2½ hours becomes O&A work in its entirety. According to the Air Force, this represents a reasonable period of time within which discovered discrepancies can be corrected without causing a major disruption of the contractor's work effort.

The Air Force states that the 600-man-hour figure cannot and does not attempt to take into account experience and efficiency of the offerors since experience is a matter of responsibility. In addition, the Air Force believes any recognition of an experience factor in the price evaluation formula would be "unwarranted favoritism and entirely speculative. The experience and efficiency of the incumbent contractor should be reflected in his price, not in any evaluation formula weighted to his advantage." The 2½-hour figure is not viewed as discriminating

against the incumbent or others, but as representing an earnest attempt to reduce the overall amount of O&A work.

With respect to the use of a learning curve, it is the position of the Air Force that O&A work consists of countless and various repairs which occur irregularly and require varying degrees of effort to correct. Therefore, by its very nature, O&A work cannot be considered repetitive and does not easily lend itself to evaluation by the use of a learning curve.

It is important here to mention one of Boeing's suggested evaluation formulas reflecting a learning curve recognizing the firm's experience. Boeing suggests that while it should be evaluated as being reasonably capable of performing estimated hourly O&A tasks in 600 man-hours, any other offeror with minimal experience would need 1,060 man-hours to perform the same tasks. Thus, multiplying those figures times the fixed hourly rate would result in an evaluation representing the true ultimate cost to the Government. Of course, Boeing's objection to the 2½-hour figure also would impact any evaluation.

This suggested method of evaluation does not recognize several cogent provisions of the RFP which, in our view, would tend to eliminate, or at the very least, greatly minimize, the alleged expected inequalities in performance. In this regard, the RFP contains a section on "Demonstration of Responsibility." Proposers are cautioned that contractors will be fully responsible for properly performing the highly critical services required. The experience of a prospective contractor was made vital to the responsibility determination, as follows:

> Companies who have not had previous or current experience in the type work required to perform a contract resulting from this RFP, and who do not presently have in operation a maintenance product facility may not qualify as a responsible contractor. The nature and priority of this requirement to the overall USAF Mission is so critical that time will not permit a company to facilitize and build up its production at a slow pace.

Offerors were required to submit adequate documentation to demonstrate affirmatively their capability to timely perform. Offerors were also required to provide details on all aspects of the prior experience of the offerors and their management and line personnel on aircraft of similar or greater complexity including minimum acceptable multi-year experience levels. Further, the RFP called for a comprehensive preaward survey of a favorably considered proposal characterized as "* * * a part of the evaluation process * * *."

The pricing schedule, in which offerors were to set forth the hourly O&A rates, provided that O&A work shall be accomplished when and as directed by the ACO in accordance with section J–1, entitled "Over and Above Procedures." It is pertinent to note here that the under-

lying premise of Boeing's argument is that any contractor performing the O&A work possesses exclusive control over the number of man-hours to perform that work with appropriate payment at the fixed hourly rate. This, according to Boeing, works to its disadvantage in the evaluation.

Our review of section J–1, governing the O&A work procedures, results in the conclusion that the firm receiving the contract does not have exclusive or even dominant control over the man-hours to be expended in performing the O&A work. In this regard, section J–1 provides, in pertinent part, as follows:

(a) Written authorization to proceed on items set forth in Sections E–1(b), E–2(b), E–3(b) must be received from the ACO before performance. This authorization to proceed will be provided by Work Requests issued by the ACO.

(b) The Contractor will prepare Work Request proposals for necessary over and above work and submit them to the designated Government Quality Assurance Representative. Proposals must be identified to the contract, be serially numbered, and specify related changes, if any, to the contract delivery schedule. When applicable to aircraft, they must be consecutively numbered in a separate series for each aircraft. Upon request of the ACO, the Contractor will also prepare consolidated Work Request Proposals covering previously approved over and above items. Work Request proposals will be definitized by use of Standard Form 30.

* * * * * * *

(e) *Sections E–1(b)(2), E–2(b)(2), E–3(b)(2), Fixed Hourly Rate Items:* The price negotiated by the ACO will be based on direct labor hours multipled by the contract hourly rate. The number of direct labor hours required will be negotiated between the Contractor and the ACO. Direct labor is defined in Section J. The fixed hourly rate includes charges for direct labor costs, burdens, general and administrative expenses, warranty, other allowable costs and profit; but does not include direct parts and materials.

* * * * * * *

(g) Failure to agree upon labor hours or price shall be considered a "dispute concerning a question of fact" within the meaning of the clause of this contract entitled "Disputes."

The above provisions clearly call for negotiation between the contractor and the ACO as to the number of direct labor hours required to perform the discovered defects as O&A work before the issuance of a Work Request by the ACO. Therefore, the Government retains a significant degree of control with respect to the number of man-hours to be expended for hourly O&A work. Implicit in this procedure is the responsibility of the ACO to determine, negotiate and authorize, irrespective of the experience of the contractor, a reasonable number of man-hours to perform the O&A work. Even if a contractor believes a task will take, for example, 6 man-hours, if the ACO determines the work should take only 4 man-hours with payment at the fixed hourly rate, the "disputes" clause is utilized to resolve the disagreement. Moreover, we believe these provisions of the contract would permit the ACO to not authorize work under the O&A hourly rate category if it was believed that the discovered defect would take a skilled mechanic 2½ hours or less to correct.

The above discussion convinces us that Boeing's allegation that wide discrepancies in performance due to alleged experience differentials will occur would not be reflected by actual performance by a contractor other than Boeing. In our view, it is reasonable to conclude that effective contract administration would result in any contractor found responsible under the stringent responsibility requirements performing the O&A work at or near the stated hourly estimate, which has not been shown to be unreasonable.

We recognize that an ACO might take into account the experience of a prior incumbent in enforcing the O&A provisions of the contract. But, other factors need to be considered. For example, an experienced contractor on the same or similar aircraft may very well be able to perform the required work as efficiently as a prior incumbent. In fact, the firm awarded the contract, Hayes, was the incumbent for these requirements prior to Boeing.

We agree with the Air Force that any recognition of Boeing's experience would be highly speculative and subject to question if used in a competitive environment. We also agree with the Air Force that in a case such as this, the efficiencies and experience of offerors are best left to the individual offeror's assessment thereof in quoting prices to the Government. In conclusion, we cannot agree with Boeing that the method of evaluation has been shown to be arbitrary, unreasonable, or meaningless, or that the award will not yield the lowest ultimate cost to the Government.

Furthermore, even if the evaluation formulas advanced by Boeing had been utilized by the Air Force here, the competitive standing of the offerors would not have changed. In a report to our Office on the protest the Air Force stated, in part, as follows:

> *Application of Boeing's Suggested Formulas to the Instant Competition.* In its protest letter, Boeing suggested an evaluation formula for over-and-above work which relied on a learning curve, and at the protest conference Boeing suggested another evaluation formula for over-and-above work which is based upon a specified percentage on an offeror's total fixed price for MOD/PDM services. Even if one of Boeing's suggested evaluation formulas for over-and-above is applied to the instant procurement, however, it would not alter the position of the competing offerors.

Also, based on all available information, we have ascertained that the evaluated proposed price of the contractor, Hayes, was significantly below that proposed by Boeing for the fixed-price portion, or 89 percent of the contract work. The application of the evaulation formulas advanced by Boeing has little effect on the price differential for the fixed-price portion of the work and, consequently, had no effect on the offerors' competitive positions.

Accordingly, the protest is denied.

[B-184938]

Contracts—Subcontracts—Administrative Approval—Review by General Accounting Office

National Aeronautics and Space Administration's (NASA) exercise of general administrative functions in determining technical approaches to problem solving is not sufficient involvement in selection of subcontractor to cause our review of subcontract award since parallel development to test multiple approaches to problem solving was reasonable and specification prepared as a result thereof for use in subcontract award permitted competition, even by protester, and NASA was not involved in selection as envisioned in 54 Comp. Gen. 767.

National Aeronautics and Space Administration—Procurement Regulations—Subcontract Awards—Review

Allegation that NASA does not possess authority to implement procedure waiving review of cost-reimbursement prime contractor award of subcontracts fails in light of fact that grant of general procurement authority carries discretion for agency to contract by any reasonable method and NASA procedure waiving review of subcontracts under stipulated circumstances is reasonable exercise of discretion and was accomplished in accordance with NASA regulations.

General Accounting Office—Jurisdiction—Subcontracts

Contention that in view of audit and settlement responsibilities (31 U.S.C. 41, 53, and 71) General Accounting Office lacks authority to divest itself of subcontract reviews as matter of policy is rejected.

In the matter of Structural Composites Industries, Inc., June 29, 1976:

Structural Composites Industries, Inc. (SCI), has requested reconsideration of our decision *Structural Composites Industries, Inc.*, B-184938, October 28, 1975, 75-2 CPD 260, where we declined to consider the merits of SCI's protest of a subcontract award because it did not fall within any of the exceptions to our general policy of not considering subcontract protests stated in *Optimum Systems, Inc.*, 54 Comp. Gen. 767 (1975), 75-1 CPD 166.

The National Aeronautics and Space Administration's (NASA) prime contract with Rockwell International is for the design, development, test, and evaluation of orbiter vehicles and related support work in connection with the space shuttle. The items in question are three sets of gas storage pressure tanks.

As background, NASA states:

> The ground rules established and the concept utilized by Rockwell in its Shuttle Orbiter Program proposal was to draw on the experience and technology available from the Apollo Program. Therefore, the baseline established at award of the Shuttle Orbiter contract to Rockwell International in 1972 included high pressure gas storage tanks of an all metal configuration. In 1972, SCI was not a competitor for all metal pressure storage tanks.
>
> During the first quarter of 1973, Rockwell investigated the possibility of utilizing composite overwrapped vessels with a metal load sharing liner. This interest was in part stimulated by the NASA/Lewis funded technology development program with SCI, Contract NAS3-16770, dated June 1972. Information

from that program was presented to Rockwell during a May 7, 1973, meeting with NASA/Lewis personnel.

As a result of the interest shown by Rockwell, a meeting was requested by NASA at Houston to discuss additional data pertinent to the filament wound tank concept. During a meeting held on June 6, 1973, Rockwell presented a briefing emphasizing the need for additional development of filament wound tanks for possible Shuttle Orbiter use while at the same time retaining the contract baseline of all metal tanks.

In early 1974, the overall weight of the Shuttle Orbiter Vehicle became a serious problem. A technical status review of the filament wound tanks was given to NASA in March 1974 by Rockwell. It was indicated that a weight saving of 500 to 600 pounds per Orbiter might be achieved. However, that review also disclosed that the results of the existing development programs were so marginal that the potential use of the filament wound concept could not be technically justified. The programs reviewed included two NASA funded development programs using cryogenically stretched 301 stainless steel, NASA Contract NAS3–11194, February 1970–December 1971, and 5AL–2.5SN Titanium, Contract NAS3–12023, February 1970–December 1971. These programs were not too successful due to the high failure rate on fabricated pressure vessels. In addition, at that time the SCI development contract, NAS3–16770, was experiencing schedule and technical problems.

Because of these difficulties, yet in the interest of potentially saving substantial weight, Rockwell recommended the initiation of a development program with Brunswick utilizing titanium as the liner material to parallel and complement the existing SCI NASA funded development program.

* * * * * * *

The Rockwell proposed development program with Brunswick was authorized by NASA on March 15, 1974. On June 27, 1974, Rockwell awarded a technology program to Brunswick. This program was placed for the purpose of further developing the filament wound tank concept and was baselined to utilizing a titanium tank liner. This technology program was awarded by Rockwell based substantially on the competitive proposals submitted by SCI and Brunswick in connection with the Orbiter ARPCS Nitrogen and Oxygen pressure storage vessel procurement.

* * * * * * *

Also, Rockwell recommended and NASA approved the acquisition of titanium, a long lead time item of 40–50 weeks, to cover tank requirements if titanium was used as a liner material for overwrap tanks. However, *more* important, it protected Orbiter schedules by providing the material for all metal tanks in the event the overwrap technology was not successful. Rockwell saw no need to acquire a supply of stainless steel since stainless steel was available and was not a long lead time item. SCI's metal forming vendor (ARDE) had on hand 10,000 pounds of 301 stainless steel. Rockwell refused SCI's proposal to double the amount on hand since the material was not a long lead time item and was not the material that would be used for all metal tanks if the overwrap technology did not prove successful. Also, it is noted that on April 2, 1975, SCI stated to JSC that there was another 10,000 pounds of stainless steel ready for delivery to ARDE inventory.

By late 1974, the results of both development programs (SCI and Brunswick) had been reviewed by Rockwell and NASA. It was concluded the composite overwrapped pressure tanks with load sharing metal liners would provide substantial weight savings to Orbiter and appeared to satisfy the safety and reliability requirements. At the Shuttle Orbiter Management Review #28 held on December 17, 1974, Rockwell recommended and NASA approved the baselining of composite filament-wrapped pressure vessels. As a result, Rockwell and NASA developed a specification for Shuttle Orbiter pressure storage tanks. A procurement package was prepared by Rockwell and submitted to industry. Proposals were received in June 1975 and were evaluated by Rockwell in accordance with their approved evaluation procedures. No NASA personnel participated in this evaluation.

SCI maintains that our Office should review the award under two of the *Optimum Systems, Inc.*, standards. First, SCI alleges that

NASA so directly and actively participated in the selection of the subcontractor that the net effect of that participation was to cause or control the rejection or selection of a subcontractor, or imposed such conditions as to significantly limit the sources to which subcontracts could have been awarded. Essentially, this degree of participation by NASA is attributed to its general administration of the RI prime contract and involvement in certain critical decisions regarding technical problem solving. Since the effect of choosing or specifying one technical approach vis-a-vis other technical approaches is to limit the prime contractor's choice of a subcontractor, SCI argues that this type of involvement is sufficient to trigger our review of the resultant award. In this connection, SCI maintains that NASA's preference for the Brunswick approach of using titanium liners in the pressure tanks, as evidenced by providing titanium as Government-furnished property under Brunswick's development contract, thereby effectively mandated Brunswick's selection.

As the second basis for our review under *Optimum Systems, Inc.*, SCI alleges that NASA exhibited bad faith throughout the procurement cycle. This bad faith is said to have manifested itself in NASA's approving the subcontract award by RI (which approval SCI maintains was required under the prime contract), in the face of assurances to SCI that split awards were contemplated to insure a broad competitive procurement base. Bad faith is also alleged to have arisen in the NASA bias towards Brunswick, discussed above, concerning titanium.

Lastly, SCI questions the policy of our Office stated in *Optimum Systems, Inc., supra*, of imposing limitations on the types of subcontractor protests that we will consider. SCI notes that our authority to review subcontract awards stems from 31 U.S. Code §§ 41, 53, and 71 (1970). Once having recognized that our Office is empowered under these statutes to review subcontract awards, it is contended that we are without authority to divest ourselves of that review function as a matter of policy in derogation of our statutory mandate.

NASA has responded to SCI's charges by denying that this is the type of subcontract which our Office will review under the *Optimum Systems, Inc.*, standards. Specifically, NASA states with respect to the first standard that under the terms of the prime contract the subcontract was not one requiring review, concurrence, consent or approval, and NASA did none of the above. As for NASA's involvement in what it characterizes as "* * * the normal and usual process of monitoring the contractor's work * * *," it is NASA's position that these types of routine communications with its prime contractor were not tantamount to controlling or directing award. Further, NASA states that

none of its personnel were involved in the procurement process and that no conditions were placed upon the RI selection.

Concerning the second *Optimum Systems* standard, NASA's position is that since it conducted no review of and gave no consent, concurrence or approval to the award, no opportunity existed to exhibit fraud or bad faith in approving the award. Additionally, NASA maintains that alleged fraud or bad faith in other phases of the procurement is not supported by the record.

In *Optimum Systems*, our Office clarified and redefined our policy regarding subcontractor protests. Our Office indicated its willingness to review protests against subcontract awards under stated conditions—one of which concerns the degree of Government participation in the subcontractor selection process. Examples of specific instances when the requisite level of involvement was found were included in the case as follows:

> The Government limited the subcontractor sources and exercise control over every aspect of procurements, such that the prime contractors were "mere conduits." 47 Comp. Gen., *supra*.
>
> The Government required that the prime contractor procure certain ancillary equipment from a particular company. B–162437, August 6, 1968.
>
> The Government "directly participated in the decision" to reject a subcontract proposal and exclude it from competition on resolicitation based on the Government's negative preaward survey performed at the prime contractor's request. 49 Comp. Gen., *supra*.
>
> The agency severely limited the prime contractor's rights of selection of subcontractors and was instrumental in drafting the terms of the subcontract. B–170324, April 19, 1971.
>
> The Government hindered the testing and qualification of a potential subcontractor's product to such an extent that the subcontractor could not receive various awards. B–174521, March 24, 1972.
>
> The Government specifically recommended an award of a subcontract to a particular company. 51 Comp. Gen. 678.
>
> The prime contractor rejected a potential subcontractor since the Government required in the sole-source prime contract that only the product manufactured by another company could be used. Matter of *California Microwave, Inc.*, 54 Comp. Gen. 231 (1974). 54 Comp. Gen. 767.
>
> However, where the only Government involvement in the subcontractor selection process is its approval of the subcontract award or proposed award (to be contrasted with the circumstances set out above where direct or active Government participation in or limitation of subcontractor selection existed), we will only review the agency's approval action if fraud or bad faith is shown.

From the record in the instant case, we fail to see the type of involvement exemplified by the foregoing examples either in the award of the subject contract or in NASA's actions prior thereto. The background information furnished by NASA, quoted above, as well as the information and documentation furnished by SCI, indicates in our view that while RI was authorized by NASA in 1973 to pursue development of a filament wound tank concept, the baseline concept established by NASA in 1972 at the time of the award of the Shuttle Orbiter contract to RI was that developed by SCI pursuant to a NASA

funded technology development program. Although the proposed development program with Brunswick for the purpose of further developing the filament wound tank concept utilizing a titanium tank liner was approved by NASA in 1974, the technology program was awarded by RI on the basis of competitive proposals submitted by SCI and Brunswick.

Furthermore, while NASA approved RI's recommendation for acquisition of titanium, and refused SCI's proposal to acquire stainless steel, it appears from the record that there was a reasonable basis for such divergent action and that it was not based upon a preference for the Brunswick approach. Moreover, the record does not indicate that NASA's ultimate approval of the RI recommendation at the conclusion of both development programs to adopt the Brunswick concept was based upon bias, but rather upon valid technical considerations related to the overall program. In these circumstances, we fail to see any evidence of bias in the selection of the Brunswick concept so as to limit the subcontractor sources. As a matter of fact, it appears from the record that the RI and NASA developed specification resulting from the Brunswick development program was adequate to permit SCI and another firm to submit competitive proposals under the protested award. Furthermore, NASA denies that it either suggested, approved or directed a sole-source award to Brunswick or directed that the award not be split. While we recognize that SCI strongly disputes NASA's position with respect to the foregoing matters, we do not believe on the basis of the record that SCI has carried the burden of proof to establish that NASA's involvement or alleged bias justifies our consideration of the protest under the first *Optimum Systems* standard.

SCI also maintains that under the "subcontracts" clause in the RI prime contract, NASA was required to approve any subcontract for developmental work. While SCI recognizes that article XLI of the prime contract exempts subcontracts from the approval requirements when the contracting officer has granted prior written approval of the contractor's purchasing system, SCI alleges that article XLI was unauthorized. The effect of this, it is contended, is that NASA was required to review and approve the subcontract award, which responsibility was not discharged. SCI's contention in this regard is based upon the standard subcontractor approval clause (NASPR § 7.402-8) included in RI's contract pursuant to NASA Procurement Regulation (NASPR) § 23.201-2 (1975 ed.), which sets forth the types of subcontracts for which prior consent is or is not necessary. SCI contends that the present subcontract for developmental work is excluded from the category not requiring prior approval and, therefore, the deviation

from the approval requirement was unauthorized and in violation of the NASPR.

NASA's position is that article XLI was authorized since it was issued pursuant to a deviation granted by the NASA Assistant Administrator for Procurement in response to a request by the Johnson Space Center. Therefore, since RI's purchasing system had been approved, pursuant to Space Shuttle Directive No. 3, up to $10 million, or for sensitive subcontracts below that minimum, it is NASA's position that no subcontract review or approval was required or made.

SCI's position in this regard ignores NASPR § 23.000, which sets forth policies applicable to the review by NASA of contractor's procurement systems, the approval of which it is stated will usually "* * * obviate the need for reviewing and consenting to individual subcontracts." Further, NASPR § 1.109–2 provides that deviations from the NASA procurement regulations (as defined in NASPR § 1.109–1) are authorized when approved by the Director of Procurement or his authorized representative. Space Shuttle Directive No. 3 was issued by the Director of the Space Shuttle program and concurred in by the Director of Procurement. The procedures followed in obtaining the deviation comported with NASPR § 1.109. Nor do we think that the general provisions of article XXV of RI's prime contract, "Government Approvals/Concurrences," cited by SCI, which outline NASA's general rights in this regard, may be deemed to supersede the specific provisions of article XLI. Since NASA was not required to and did not particiapte in the subcontract selection, it follows that no bad faith could be present and the second standard under *Optimum Systems* is not applicable.

Anticipating the possibility of this conclusion, SCI urges that even if NASA followed its regulations in granting the deviation, such act was in excess of NASA's authority. SCI's basis for this allegation is that NASA's statutory authority does not permit the award of cost-plus-a-fixed-fee development programs without its prior approval. Any contrary conclusion, SCI urges, would be tantamount to permitting circumvention of the statute merely by authorizing any deviations the agency sees fit.

SCI does not point to any specific section of chapter 137 of 10 U.S.C. upon which this argument is based, and our reading of chapter 137 does not support SCI's conclusion. The Court of Claims has commented upon the powers conferred upon agencies under this chapter in *G. L. Christian and Associates* v. *United States*, 320 F. 2d 345, 348 (1963):

> * * * a general legislation empowering, in broad terms, a government agency to procure and to make contracts normally covers all phases of that process—from

the solicitation of bids or proposals, to the making of the contract through its administration and performance, to its completion or termination. "The power to purchase on appropriate terms and conditions is, of course, inferred from every power to purchase." *Priebe & Sons* v. *United States*, 332 U.S. 407, 413, 68 S. Ct. 123, 127, 92 L. Ed. 32 (1947). Unless the Congress has prohibited the agency from entering some phase of the contractual process (or using some otherwise lawful method of contracting), a grant of wide and general authority to contract and procure will extend to all reasonable phases and methods.

Under this interpretation of the procurement authority granted by chapter 137, we believe that NASA acted reasonably in waiving its subcontract approval authority under the stipulated circumstance. Since we find no Congressional prohibition against NASA's approach and since we also find that NASA's action was a reasonable exercise of its general procurement authority, SCI's argument on this point fails.

SCI also maintains that we do not have the authority to divest ourselves of subcontract reviews, as a matter of policy, on grounds of impracticality of remedial action. We are not persuaded by this approach. The Comptroller General, as head of the General Accounting Office, has wide latitude to determine, as a matter of policy, how best to satisfy its statutory mandates. The policy announced in *Optimum Systems* was a result of a carefully reasoned approach to our function in the area of reviewing subcontract awards in light of the lack of privity with the Government and our authority to scrutinize the expenditure of public funds. In responding to a similar argument in *Probe Systems, Incorporated*, B–182236, April 25, 1975, 75–1 CPD 260, we stated:

With regard to Probe's contention that 31 U.S.C. § 71, requiring the General Accounting Office to settle and adjust all claims and demands by or against the Government, obligates this Office to entertain its protest against the award of the subcontract here in question, our decision in the *Matter of Optimum Systems, Incorporated*, B–183039, *supra*, amounts to a rejection of that argument. In fact, that decision makes it clear that the extent of our consideration of subcontractor's protests is a matter of policy and the reasons for the stated policy are indicated * * *. Furthermore, as noted in that decision, appropriate attention in our audit functions involving the award of subcontracts under cost-reimbursement type contracts will be given to any evidence indicating that the cost to the Government has been unduly increased because of improper procurement actions by the prime contractor.

In view of the above, we remain of the opinion, as expressed in our October 28, 1975, decision, that no basis exists for our review of this subcontract award.

[B–186134]

Contracts—Requirements—Maximum/Minimum Order Limitation

Determination to issue requirements solicitation to satisfy needs of Government for cleaning compounds, solicitation containing minimum and maximum order limitation, is valid determination within ambit of sound administrative discretion where solicitation is issued pursuant to requirements of secton 1–3.409 of Federal Procurement Regulations and section 5A–72.105–3(c) of General Services Procurement Regulations and results in overall economy to Government.

Contracts—Requirements—Estimated Amounts Basis—Best Information Available

It is not impossible to forecast costs of items for 1 year in advance even though there is no guaranteed minimum quantity since solicitation supplied estimates of quantities which would be ordered, estimates being based on information made available to GSA such as quantities of particular item ordered on prior contracts. These estimates provide guide or basis for bidding. Also, as basis to estimate freight costs, solicitation listed final destination for each item and estimated peak monthly requirement for each item.

Contracts—Requirements—Prices—Overall Costs

Fact that prices of items under contract calling for definite quantity with fixed delivery might be lower than prices under requirements contract does not mean that the overall cost to Government is less since indirect costs associated with definite quantity contract must be considered such as cost of extra warehouse storage for additional inventory, generated excess inventory, and cost of transporting excess inventory to other locations.

In the matter of National Chemical Laboratories of Pa., Inc., June 29, 1976:

By letter of March 16, 1976, with enclosures, National Chemical Laboratories of Pa., Inc. (NCL), requested our Office to hold up award under solicitation No. 9PR–814–76/KE pending an investigation as to the propriety of issuing this requirements type solicitation. NCL contends that the above solicitation would furnish supplies to the Government at an excessive price and is also unfair to the contractor involved.

According to NCL, it is virtually impossible to forecast increases in costs for 1 year in advance, not only in the case of raw materials but especially in the case of freight costs to various destinations. Additionally, NCL alleges that since the quantities indicated are only estimated quantities and there is no guaranteed minimum quantity, the Government is under no obligation to order any quantity at all while the contractor must guarantee any quantity that the Government requests and guarantee the price as well. NCL states the view that a definite qauntity bid with a fixed delivery date will result in the best possible price to the Government and will eliminate any inequity to the contractor.

The solicitation in question, issued on February 20, 1976, by the General Services Administration (GSA), covers the Government's estimated requirements for specific cleaning compounds for the period July 1, 1976, through June 30, 1977. On the basis of an urgency determination dated May 11, 1976, award was made prior to our resolution of the protest.

The authority for the issuance of requirements contracts is set forth in section 1–3.409 of the Federal Procurement Regulations (FPR) (1964 ed. circ. 1) wherein it states:

One of the following indefinite delivery type contracts may be used for procurements where the exact time of delivery is not known at time of contracting.

* * * * * * *

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(b) *Requirements contract—(1) Description.* This type of contract provides for filling all actual purchase requirements of specific property or services of designated activities during a specified contract period with deliveries to be scheduled by the timely placement of orders upon the contractor by activities designated either specifically or by class. Depending on the situation, the contract may provide for (i) firm fixed-prices, (ii) price escalation, or (iii) price redetermination. An estimated total quantity is stated for the information of prospective contractors, which estimate should be as realistic as possible. The estimate may be obtained from the records of previous requirements and consumption, or by other means. Care should be used in writing and administering this type of contract to avoid imposition of an impossible burden on the contractor. Therefore, the contract shall state, where feasible, the maximum limit of the contractor's obligation to deliver and, in such event, shall also contain appropriate provision limiting the Government's obligation to order. When large individual orders or orders from more than one activity are anticipated, the contract may specify the maximum quantities which may be ordered under each individual order or during a specified period of time. Similarly, when small orders are anticipated, the contract may specify the minimum quantities to be ordered.

(2) *Application.* A requirements contract may be used for procurements where it is impossible to determine in advance the precise quantities of the property or services that will be needed by designated activities during a definite period of time. Advantages of this type of contract are:

(i) Flexibility with respect to both quantities and delivery scheduling;

(ii) Supplies or services need be ordered only after actual needs have materialized;

(iii) Where production lead time is involved, deliveries may be made more promptly because the contractor is usually willing to maintain limited stocks in view of the Government's commitment;

(iv) Price advantages or savings may be realized through combining several anticipated requirements into one quantity procurement; and

(v) It permits stocks to be maintained at minimum levels and allows direct shipment to the user.

Generally, the requirements contract is appropriate for use when the item or service is commercial or modified commercial in type and when a recurring need is anticipated.

Also, in this connection, section 5A–72.105–3(c)(2) of the General Services Procurement Regulations (GSPR) states as follows:

The fluctuating demands of our customer agencies makes this type of contract *preferable* since actual requirement even within a reasonable percentage cannot generally be determined in advance. This type of contract will preclude the necessity for the Federal Supply Service to actually purchase material not required which may later have to be transferred to other depot locations or declared excess with subsequent loss to the General Supply Fund.

This regulation further states that a requirements type contract should not be used if it is found that reasonable prices from responsible sources of supply cannot be obtained. Pursuant to the rationale and authority of the above regulations, the contracting officer decided to issue a requirements type solicitation.

Regarding NCL's contention that it is impossible to forecast costs for 1 year in advance, GSA has provided estimated quantities. These estimates are based on information made available to GSA such as quantities of the particular items ordered on prior contracts. While it is true that these quantities are only estimates and the Government is under no obligation to order the full quantity, they do provide a guide or basis for bidding. Our Office has held, with respect to requirements type contracts, that where the quantities for the various items to be procured are not known, the solicitation must provide some basis for

bidding, such as providing estimated quantities for the various items. *See* 52 Comp. Gen. 732, 737 (1973). Regarding freight costs, GSA has listed the final destination of each item with the estimated peak monthly requirement for the item. This would appear, under the circumstances, to be a sound basis to estimate freight costs.

Concerning NCL's complaint that there is no guaranteed minimum quantity which the Government must order while the contractor must guarantee any quantity that the Government orders as well as the price, GSA states that it was not in the Government's best interest to use a guaranteed minimum clause. GSA explained that GSPR 5a–72.105–3(c)(3) provides for the use of a clause similar to the guaranteed minimum clause when it is deemed necessary to shorten the delivery time for initial orders under a new contract by inducing the contractor to produce supplies in advance of receipt of actual purchase orders or where there is a short supply of the item being procured. GSA points out that the present procurement does not shorten the delivery time, nor are the items being procured in short supply. In this regard, it is noted that our Office in 52 Comp. Gen., *supra*, which involved a requirements contract similar to the one in the present case, held that a provision that "No guarantee is given that any quantities will be purchased" was proper. Also, we note that under the present solicitation, the contractor is not required to furnish all the Government's requirements without limitation, since the Government does agree to abide by certain minimum and maximum order limitations. While the minimum order limitation of $100 might be considered to be too low, the maximum order limitation of $30,000 would appear to be sufficient to protect the contractor from being inundated with orders beyond its production capacity.

NCL contends that a solicitation calling for a definite quantity with a fixed delivery date would be preferable to a requirements type solicitation since it would not only be more equitable to the contractor, but would result in the best possible price to the Government. GSA states that a definite quantity solicitation may result in the lowest price to the Government if the only expenditure considered is the amount expended for a given item. However, other indirect expenditures also must be considered such as:

1. The impact on the General Supply Fund
2. Manpower resources
3. Warehouse costs
4. Control of inventory
5. Generated excess
6. Transportation costs to other locations to use up generated excess

It is GSA's view that if these expenditures are considered, the requirements type solicitation offers the most economically feasible

method of procuring the items in question. We see no valid basis on which to question GSA's determination as to the overall economy to the Government of the requirements type solicitation.

We recognize that there are certain difficulties entailed in forecasting costs for a 1-year period in order to submit a bid on a requirements type solicitation and realize that perhaps it would be easier for the bidder if the solicitation were for a definite quantity with a fixed delivery date. However, we have also recognized that the determination of how best to satisfy the Government's requirements is within the ambit of sound administrative discretion, and we will not substitute our judgment for that of the agency in the absence of a clear showing of abuse of the discretion permitted it. 48 Comp. Gen. 62, 65 (1968). In the present case because of the large number of customers to be served and the uncertainty as to their requirements, GSA was of the view that a requirements type contract would best serve its needs. We find no basis to disagree with this view.

For the above reasons, the protest by NCL is denied.

[B-138942]

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

Consistent with the Fly America Guidelines, traveler should use certificated service available at point of origin to furthest practicable interchange point on a usually traveled route. Where origin or interchange point of such route is not serviced by a certificated carrier, noncertificated service should be used to the nearest practicable interchange point to connect with certificated service. Travelers will not be held accountable for nonsubstantial differences in distances between points serviced by certificated carriers. The foregoing principles are not controlling where their application results in use of noncertificated service for actual travel between the United States and another continent.

In the matter of the Fly America Act—selecting between flight schedules, June 30, 1976:

This decision is rendered for the purpose of providing clarification concerning application of the Comptroller General's "GUIDELINES FOR IMPLEMENTATION OF SECTION 5 OF THE INTERNATIONAL AIR TRANSPORTATION FAIR COMPETITIVE PRACTICES ACT OF 1974" issued March 12, 1976.

The Guidelines require Government-financed commercial foreign air transportation to be performed by certificated air carriers where such service is available. While providing that considerations of convenience, preference and cost, as well as availability of foreign excess currencies, are not relevant to the determination of whether certificated service is available, the Guidelines expressly provide that passenger

service by a certificated air carrier will be considered to be "unavailable":

(a) when the traveler, while en route, has to wait 6 hours or more to transfer to a certificated air carrier to proceed to the intended destination, or

(b) when any flight by a certificated air carrier is interrupted by a stop anticipated to be 6 hours or more for refueling, reloading, repairs, etc., and no other flight by a certificated air carrier is available during the 6-hour period, or

(c) when by itself or in combination with other certificated or noncertificated 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 noncertificated air carrier or carriers.

(d) when the elapsed travel time on a scheduled flight from origin to destination airports by noncertificated air carrier(s) is 3 hours or less, and service by certificated air carrier(s) would involve twice such scheduled traveltime.

Section 5 of Public Law 93-623, the International Air Transportation Fair Competitive Practices Act of 1974, 88 Stat. 2104 (49 U.S. Code 1517), requires the Comptroller General to disallow any expenditures from appropriated funds for payment for personnel or cargo transportation on noncertificated air carriers "in the absence of satisfactory proof of the necessity therefor."

It has been pointed out that while the Guidelines limit an employee's selection of airline schedules, they do not otherwise specifically indicate which, as between several schedules, the employee should use to accomplish the necessary travel. A case in point is that of a traveler requiring transportation between Ankara, Turkey, and Stuttgart, Germany.

For the purpose of discussion it will be assumed that there are no constraints upon the employee's departure or arrival time and that he is on notice that the travel can be accomplished by any of the four schedules set forth below:

SCHEDULE I	
Monday/Tuesday/Thursday/Saturday/ Sunday	
LV: Ankara	0830—Lufthansa
AR: Frankfurt	1210
LV: "	1325—Lufthansa
AR: Stuttgart	1410
SCHEDULE II	
Wednesday/Friday/Saturday	
LV: Ankara	0800—Pan Am
AR: Rome	1100
LV: "	1650—Alitalia
AR: Stuttgart	1940

SCHEDULE III
Wednesday/Friday/Saturday

LV: Ankara		0800—Pan Am
AR: Istanbul		0855
LV: "		1430—Pan Am
AR: Frankfurt		1620
LV: "	1650 or	2120—Lufthansa
AR: Stuttgart	1730 or	2200

SCHEDULE IV
Daily—except Saturday

LV: Ankara		1130—Turkish flight
AR: Istanbul		1220
LV: "		1430—Pan Am
AR: Frankfurt		1620
LV: "	1650 or	2120—Lufthansa
AR: Stuttgart	1730 or	2200

Under the Guidelines, the traveler should first ascertain whether certificated service is available in Ankara. Where such service is available at point of origin, the traveler's selection is properly limited to those schedules by way of a usually traveled route originating with a certificated air carrier. Thus, in the example under consideration, the employee's choice is limited to Schedules II and III. In the absence of appropriate regulations in the nature of the Department of State's Uniform State/AID/USIA Foreign Service Travel Regulations, 6 FAM 134, selection between two or more schedules should be made consistent with the basic principles and policy considerations set forth below.

The purpose behind section 5 of the International Air Transportation Fair Competitive Practices Act of 1974 is to counterbalance the advantages many foreign airlines enjoy by virtue of financial involvement and preferential treatment by their respective foreign governments. The clear intent of Congress was that United States Government-financed foreign air transportation be accomplished by certificated carriers to the extent possible. Thus, where a traveler is faced with a choice between several different schedules, all of which involve the use of certificated air carriers, the intent of Congress is best carried out by his selection of the schedule which makes the greatest use of certificated service.

In many cases the proper selection will be obvious. In those cases, where a traveler selects a schedule that utilizes certificated service for substantially less of the travel than an available alternative scheduling would permit, his use of noncertificated service will be considered excessive and hence not necessary to the extent it exceeds the lesser use he might have made of noncertificated service.

We do not believe, however, that a traveler can reasonably be expected to consult a mileage guide or otherwise precisely determine the distances between origin, destination and various interchange points in selecting between flight schedules. For this reason a traveler will not be considered to have improperly used noncertificated service where the geography of the alternative schedules is not such as to put him on notice of substantial differences in distances between points serviced by certificated air carriers.

In the example at hand, certificated service is available under Schedule III from Ankara via Istanbul to Frankfurt, while such service is available under Schedule II between Ankara and Rome. The conscientous traveler should, of course, select Schedule III, thereby making use of certificated air service to the furthest practicable interchange point on a usually traveled route. However, the distances between the cities involved would appear different to travelers depending upon the particular map consulted, so that it is unreasonable to assume that the average traveler would be apprised of the fact that the distance from Ankara to Frankfurt is substantially greater than the distance between Ankara and Rome. In the circumstances and since both schedules involve transportation over usually traveled routes, the traveler could appropriately proceed by either Schedule II or Schedule III.

We recognize that neither the Guidelines nor the above-stated principles give clear guidance to the traveler whose airport at point of origin is not serviced by a certificated carrier. In such cases, the general policy considerations expressed above would nonetheless be applicable and in order to fully carry out the intent of section 5, the traveler should proceed by noncertificated carrier from point of origin to the nearest practicable interchange point on a usually traveled route to connect with certificated service. Assuming the traveler's selection were limited to Schedules I and IV, he would thus be obliged to select Schedule IV which clearly involves substantially more travel by certificated carrier than does Schedule I. Similar considerations apply where use of a noncertificated carrier is unavoidable en route. Noncertificated service should be used only to the nearest practicable interchange point on a usually traveled route to connect with service by a certificated air carrier.

There is one situation in which the nuances of the above principles should not be controlling. Where the use of certificated carrier from point of origin to the furthest practicable interchange point, or the use of noncertificated service to the nearest practicable interchange point to connect with certificated service, leaves the traveler at a location from which he has no choice but to use a noncertificated carrier for actual transportation between the United States and another continent the traveler should otherwise route his travel to assure that such

intercontinental transportation is furnished by certificated carrier to the extent such service is available under the Guidelines.

Payments for excessive use of noncertificated air service will be disallowed under the March 12 Guidelines as implemented by the foregoing principles.

[B–186291]

Checks—Undelivered—Disposition

Incident to evacuation of U.S. personnel and local national employees from Vietnam, employees turning in Vietnamese piasters were given receipts on the bases of which Treasury checks were subsequently issued. Checks for payees still in Vietnam were placed in special deposit account pursuant to 31 U.S.C. 123–128 for benefit of payees and may not be paid out to relatives in U.S. who claim power of attorney to receive proceeds.

In the matter of Nguyen Thi Chung and Chau Thi Nguyen—claims for proceeds of checks issued to relatives, June 30, 1976:

Two claims, involving similar facts and legal issues, have been submitted by the Chief Disbursing Officer, Bureau of Government Financial Operations, Fiscal Service, Department of the Treasury, pursuant to 4 GAO § 5.1 (September 1, 1967) due to doubt as to the claimants' entitlement to funds currently deposited to Treasury receipt account No. 20F3875. The question presented in each claim is whether the proceeds of a United States Treasury check issued to a payee in Vietnam may be paid to a claimant in the United States, purportedly acting for the payee or based on a right derived from the payee.

The record shows that in anticipation of the evacuation of United States personnel and local national employees from Vietnam, the United States Disbursing Officer in Saigon was authorized to accept Vietnamese piasters from local national employees in exchange for either United States currency or Treasury checks. In some cases, due to lack of time, the disbursing officer issued receipts on Standard Form 1165, "Receipt For Cash-Subvoucher," for the piasters turned in. It was apparently intended that Treasury checks would be issued, based on the receipts, subsequent to evacuation.

The submission in claim No. Z–2618527 reveals that check No. 613,154 was issued to Nguyen Thi Kim Lan on the basis of one of these Standard Form 1165 receipts, dated April 28, 1975. Nguyen Thi Kim Lan remained in Vietnam. By letter dated April 29, 1975, Nguyen Thi Chung, the payee's cousin, was authorized by the payee to "get my Receipt for Cash-Subvoucher in amount of $2,000 to be issued subsequently." The check was not forwarded to the payee in Vietnam but was deposited to Treasury receipt account No. 20F3875, pursuant to provisions of sections 123 to 128, Title 31, U.S. Code (1970). Nguyen Thi Chung contends that she is entitled to the proceeds of check No. 613,154 on the basis of the April 29, 1975, authorization from the payee.

In claim No. Z–2622548 the submission indicates that check No. 613,-

145 was issued on the basis of a Standard Form 1165 receipt payable to Nguyen Van Minh. The payee was killed during the evacuation from Vietnam. His wife remained in Saigon. His daughter, Chau Thi Nguyen, who was evacuated to the United States, claims the proceeds of the check based on her possession of the Receipt for Cash-Sub-voucher, Standard Form 1165. She states that, after her father was killed, her mother gave her the receipt with the intention that she be able to get the money. This check also has been deposited to Treasury receipt account No. 20F3875, pursuant to provisions of sections 123 to 128, Title 31, U.S. Code (1970).

Section 123, Title 31, U.S. Code (1970), provides that no check drawn against funds of the United States or any of its agencies shall be sent from the United States for delivery in a foreign country in any case in which the Secretary of the Treasury determines that postal, transportation, or banking facilities in general, or local conditions in the country to which the check is to be delivered, are such that there is not a reasonable assurance that the payee will actually receive the check and be able to negotiate it for full value. The amounts of such undelivered checks are eventually to be transferred to a special deposit account with the Treasurer of the United States. 31 U.S.C. § 124 (1970).

31 U.S.C. § 125 (1970) provides, in pertinent part, that payment of the amounts which have been deposited in the special deposit account in accordance with 31 U.S.C. § 124 (1970) shall be made by checks drawn against it by the Secretary of the Treasury, "* * * only after the claimant shall have established his right to the amount of the check * * *" to the satisfaction of the Secretary of the Treasury, and the Secretary has determined that there is a reasonable assurance that he will actually receive the check and be able to negotiate it for full value. It is provided in 31 U.S.C. § 127 (1970) that the Secretary of the Treasury is authorized to prescribe such rules and regulations as he in his discretion may deem necessary or proper for the administration and execution of the foregoing provisions. The Secretary of the Treasury on April 15, 1976, determined that postal, transportation and banking facilities in general, or local conditions in Vietnam, are such that there is not a reasonable assurance that the payee of a check drawn against funds of the United States will actually receive the check and be able to negotiate it for full value, and therefore, that such checks should be withheld in accordance with sections 123 to 128, Title 31, U.S. Code (1970). 41 Fed. Reg. 15846, 15847 (1976).

In the case of Nguyen Thi Chung, claim No. Z–2618527, a Standard Form 1165 receipt was issued to the payee, Nguyen Thi Kim Lan, in the amount of $2,000, dated April 28, 1975. According to the claimant, the payee gave the claimant the receipt, along with a letter of authorization intended to allow the claimant to collect the amount claimed on

behalf of the payee. The letter, dated April 29, 1975, reads in part as follows:

> * * * To authorize Mrs. Nguyen-Thi-Chung ID No. 4604. To get my Receipt for cash-Subvoucher in amount of $2,000 to be issued subsequently.

While the letter of authorization by its terms would have permitted the claimant, Mrs. Chung, to get only the receipt, rather than the check to be issued on the strength of the receipt, that interpretation is inconsistent with Mrs. Chung's statement that the payee, Mrs. Lan, was then in possession of the receipt and gave it to Mrs. Chung. Mrs. Chung's explanation is supported by the fact that the receipt issued to Mrs. Lan predates the authorization to "get my receipt."

However, even on the assumption that Mrs. Lan fully intended to authorize Mrs. Chung to collect the money on her behalf (and that the confusing language of the authorization document is attributable to difficulty in expressing that intent in English), the claim could not be paid to Mrs. Chung. Regulations issued by the Secretary of the Treasury pursuant to 31 U.S.C. § 127 state, at 41 Fed. Reg. 15847 (1976), that:

> (d) Powers of attorney for the receipt or collection of checks or warrants or for the proceeds of checks or warrants included within the determination of the Secretary of the Treasury [that there is not a reasonable assurance that checks intended for delivery in Vietnam will be received by the payee and that they can be negotiated for full value] will not be recognized.

Thus, even assuming that the letter of authorization amounts to a valid power of attorney, constituting Mrs. Chung as Mrs. Lan's attorney-in-fact for purposes of collecting the funds in question, the Treasury regulation would preclude payment to Mrs. Chung.

In the case of Chau Thi Nguyen, claim No. Z–2622548, the payee reportedly having been killed, a power of attorney, even if one existed, would be without effect. The claimant possesses the Standard Form 1165 receipt but there is no evidence, beyond the claimant's statement, to indicate that the payee, Nguyen Van Minh, or his estate, intended the claimant to be given the proceeds of the check. (The claimant does not assert that she herself is the next of kin.) The statute provides for the funds to be held for the payee (or, by implication, his estate) in these circumstances. We are aware of no basis in this case to deviate from that rule.

The special deposit account in the Treasury, established pursuant to 31 U.S.C. § 124, is regarded as a trust fund for the benefit of the payees of the checks. It is the view of this Office that there is no statute of limitation which would run against a claim of a person for whom the trust was created. B–144046, October 31, 1960. It is for the protection of the payees that the funds are thus held. Should conditions change, it may become possible to make payment to the payees or their estates.

For the above stated reasons, we concur in the determination of the Chief Disbursing Officer not to certify for payment the claims of Nguyen Thi Chung and Chau Thi Nguyen.

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ABSENCES (*See* **LEAVES OF ABSENCE**)

ADMINISTRATIVE PROCEDURES

Contract exclusion

Although contractual matters are statutorily exempted from rule making provisions of 5 U.S.C. 553, Secretary of Labor has waived reliance on that exemption for rule making by his Department, thereby necessitating Department of Labor compliance with statutory provisions 1160

ADVERTISING

Services

Procurement

Delivery type contract

Use of indefinite delivery type of contract to procure advertising services is not improper since applicable regulations provide only that agencies may use basic ordering agreement for obtaining advertising services but do not preclude use of other contractual vehicles and since advertising services are a "commercial item." 1111

AGRICULTURE DEPARTMENT

Forest Service

Cooperative agreements

Educational institutions

Income from bequest

Forest Products Laboratory, Department of Agriculture, has authority to accept bequest from private citizen only for purpose of establishing and operating forestry research facilities. It may not enter into cooperative agreement with University of Wisconsin Foundation to invest proceeds of bequest and to use income for fellowships, scholarships, special seminars and symposia since agency may not do indirectly what it cannot do directly 1059

National forest permittees

Department of Agriculture (Agriculture) may, pursuant to section 5 of Granger-Thye Act, enter into cooperative agreements with National Forest permittees whereby Agriculture maintains and operates waste disposal systems, permittees pay Agriculture their pro rata share of expenses for this operation and maintenance, and Agriculture deposits payments in cooperative trust accounts 1142

AIRCRAFT
Carriers
Bills of lading
Notice requirements
Bills of lading *v.* tariffs Page

Claim against air carrier for damage to shipment moved on Govt. bill of lading is not subject to notice requirements of governing air tariff because use of Govt. bill of lading—which in Condition 7 contains waiver of usual notice requirements—is required by air tariff and creates ambiguity over applicability of notice requirements which is resolved in favor of shipper 958

Foreign
Use prohibited
Availability of American carriers

Consistent with the Fly America Guidelines, traveler should use certificated service available at point of origin to furthest practicable interchange point on a usually traveled route. Where origin or interchange point of such route is not serviced by a certificated carrier, noncertificated service should be used to the nearest practicable interchange point to connect with certificated service. Travelers will not be held accountable for nonsubstantial differences in distances between points serviced by certificated carriers. The foregoing principles are not controlling where their application results in use of noncertificated service for actual travel between the United States and another continent 1230

AIR FORCE
Exhibit loaned by NASA to TAW
Insurance premiums

Under long-standing policy of the Government that it is self-insurer and will not purchase commercial insurance against loss or dmage to its own property, insurance should not have been purchased on a NASA exhibit loaned to a unit of the Air Force for display purposes. However, since self-insurance principle is one of policy rather than positive law and instant insurance coverage was issued in good faith, premium may be paid 1196

ALASKA
Employees
Renewal agreement travel
Travel expenses

Notwithstanding Federal Travel Regulations (FPMR 101–7) para. 1–7.5, round-trip travel expenses of employee incident to vacation leave may be paid pursuant to FTR para. 2–1.5h(2)(b) because leave provisions of former paragraph, dealing with interruptions of official travel, are inapplicable to overseas tour renewal agreement travel which is governed by latter section 1035

Vacation leave
Leave-free travel time

Employee, whose duty station is at Juneau, Alaska, must be charged annual leave for each day he would otherwise work and receive pay while on vacation leave, irrespective of when he commenced or completed travel, because 5 U.S.C. 6303(d), which provides leave-free travel time for employees whose duty station is outside the United States, does not apply to travel from Alaska, which is a State 1035

ALLOWANCES
Military personnel
Family separation allowances. (See **FAMILY ALLOWANCES, Separation**)

APPROPRIATIONS
Availability
Administrative Office of U.S. Courts
Court reporter fees Page

Whenever a Federal District Judge, pursuant to Rule 71A(h) of the Federal Rules of Civil Procedure, appoints a Land Commission to hear suits for just compensation in land condemnation cases, and the order of reference indicates a desire for the proceeding to be recorded, attendance fees of the court reporter are chargeable to the appropriations of the Administrative Office of United States Courts since the Judiciary determines if reporter shall be in attendance and normally pays attendance fees in other cases ---------- 1172

Ambulance services

Employee, while on temporary duty, lost consciousness during a high-blood-pressure seizure. Ambulance expense for his transportation to hospital at temporary duty post is not reimbursable under Federal Travel Regulations ---------- 1080

Bombing incident to rescue operation

Use of funds to make punitive bombing strikes, *i.e.*, those unrelated to protection of *Mayaguez* crew being rescued or forces protecting crew would appear to be in contravention of seven funding limitation statutes. However, Executive branch testimony indicates that bombing strikes were related to the rescue operation ---------- 1081

Books and periodicals. (*See* **BOOKS AND PERIODICALS, Appropriation availability**)

Evacuation of foreign nationals

There is no significant support for constitutional presidential authority to rescue foreign nationals as such. However, in the case of Saigon evacuation, since decision to rescue foreign nationals was determined to be incidental to and necessary for rescue of Americans, General Accounting Office cannot say expenditure of fund for such evacuation was improper ---------- 1081

Expenses incident to specific purposes
Necessary expenses

Appropriated funds may be used to purchase subscription to periodical if subscription is justified as a "necessary" agency expense. Subscription need not be considered indispensable. 21 Comp. Gen. 339 is no longer applicable ---------- 1076

Objects other than as specified
Prohibition

Proposed cooperative agreement provision which would permit recipient of funds to use funds for unspecified purposes in future at its own option is not proper. Appropriated funds may be used only for purposes for which appropriated. Proposed provision does not limit future use of funds to authorized purposes only ---------- 1059

APPROPRIATIONS—Continued
Availability—Continued
Parking space Page
Federal Aviation Administration (FAA), Department of Transportation, questions propriety of implementing three arbitration awards requiring FAA to provide parking accommodations for employees. FAA does not consider it would be justified in making a determination, as required for expenditure of funds by applicable regulations, that such leased parking accommodations are necessary to avoid impairment of its operational efficiency. Inasmuch as FAA regulations incorporated by reference in the collective bargaining agreement have already made the required determination, FAA is not required to make a further determination. Accordingly, FAA may expend appropriated funds to implement awards---- 1197
Limitation
Combat activities in Southeast Asia
Seven funding limitation statutes prohibit use of appropriated funds for combat activity in Indochina. While legislative history of seven acts is not entirely clear respecting President's rescue power, there are some specific statements that such power is not restricted, and the overall intent of seven acts was to curtail bombing and offensive military action in Southeast Asia. Therefore, President's recent evacuation of Americans from Saigon did not conflict with such statutes---- 1081
Necessary expense availability. (*See* **APPROPRIATIONS, Availability, Expenses incident to specific purposes, Necessary expenses**)

ARBITRATION
Award
Implementation by agency
Effective date
Arbitrator's award setting effective date for increase in wage rates at Yakima Project Office, Bureau of Reclamation, may be fully implemented where governing collective-bargaining agreement calls for arbitration of unresolved negotiation issues involving wage rates, and record is clear that impasse existed on date collective-bargaining agreement became effective, and that, on same date, it was clear that there would be substantial increase in wage rates. Agencies and unions may negotiate preliminary agreement setting effective date for wage increases before exact amount of increase is known; therefore, arbitrator may resolve same issue---- 1006
Parking accommodations
Federal Aviation Administration (FAA), Department of Transportation, questions propriety of implementing three arbitration awards requiring FAA to provide parking accomodations for employees. FAA does not consider it would be justified in making a determination, as required for expenditure of funds by applicable regulations, that such leased parking accommodations are necessary to avoid impairment of its operational efficiency. Inasmuch as FAA regulations incorporated by reference in the collective bargaining agreement have already made the required determination, FAA is not required to make a further determination. Accordingly, FAA may expend appropriated funds to implement awards---- 1197

ARBITRATION—Continued
Award—Continued
Retroactive promotion with backpay
Nonexistent position Page

Federal Labor Relations Council requested decision on legality of arbitrator's award of retroactive promotion and backpay. Arbitrator found grievant was assigned higher duties but was not given temporary promotion as provided in negotiated agreement. Award may not be implemented since new position had not yet been classified and grievant cannot be promoted to a position which did not exist---------- 1062

AUTOMATIC DATA PROCESSING SYSTEMS (*See* **EQUIPMENT, Automatic Data Processing Systems**)

AUTOMOBILES
Transportation. (*See* **TRANSPORTATION, Automobiles**)

AWARDS
Contract awards. (*See* **CONTRACTS, Awards**)

BANKRUPTCY
Referees
Compensation
Increases
Cost-of-living adjustments

Cost-of-living increases of 28 U.S.C. 461 should be applied to the increment of compensation fixed for the referee duties of combination referees in bankruptcy-magistrates while the cost-of-living increases of 5 U.S.C. 5307 may be applied to the increment of compensation fixed for magistrate duties of these officials. The entire compensation of combination clerk-magistrates is subject to the cost-of-living adjustment provisions of 5 U.S.C. 5307---------- 1077

BIDDERS
Qualifications
Experience
Literal requirements

Cases which hold that in absence of finding of nonresponsibility, bid may not be rejected solely for bidder's failure to meet literal requirement of responsibility criteria set forth in solicitation will no longer be followed. 53 Comp. Gen. 36, 52 *id.* 647, 45 *id.* 4 and other similar decisions are therefore overruled in part. Meeting such definitive criteria of responsibility, either precisely or through equivalent experience, etc., is actual prerequisite to affirmative determination of responsibility, since waiver of such requirement may prejudice other bidders or potential bidders who did or did not bid in reliance on its application---------- 1051

Newly organized firm
Capabilities of officials, etc., considered

Experience of corporate officials prior to formation of corporation can be included when examining corporation's overall experience level for bidder responsibility determination. Therefore, mere fact that corporation had only existed since early 1975 is not determinative of its ability to meet "approximately 5 years" experience requirement---------- 1051

BIDDERS
Qualifications—Continued
Experience—Continued
Specialized, etc. Page

Record does not support affirmative responsibility determination where agency made *sub silentio* finding that bidder had demonstrated level of achievement equivalent to or in excess of minimum level of experience set forth in IFB, i.e., that it had worked on more complex equipment for requisite length of time (approximately 5 years) wherein same sort of expertise needed in instant contract was brought to bear, since record indicates only that bidder (1) had some experience with equipment; (2) had some experience with highly sophisticated equipment; and (3) had 5 years' general experience, and does not indicate extent of experience with either specific or more complex equipment ---------- 1051

Manufacturer or dealer
Administrative determination
Labor Department

Contention that bidder is not "manufacturer" or "regular dealer" within purview of Walsh-Healey Act is not for consideration by General Accounting Office, since responsibility for applying criteria of Walsh-Healey Act is vested in contracting officer subject to final review by Department of Labor ---------- 1204

Responsibility *v.* bid responsiveness
Bid deviations

Bidder's failure to complete blanks in "Descriptive Schedules" made bid nonresponsive and was not matter of bidder's responsibility as claimed by agency ---------- 999

Bidder ability to perform

Where bidder never successfully passes demonstration required by IFB to establish technical ability to perform in responsible manner—a specific and objective responsibility criterion contained in solicitation—GAO finds there was no reasonable basis upon which contracting officer could find bidder responsible ---------- 1043

Descriptive literature requirement

Inclusion in IFB of six pages of "Descriptive Schedules" containing over 200 blanks in which bidders were to insert specific information concerning equipment being supplied; which were expressly made part of specifications; which were to be furnished with bid; and as to which bidders were advised to fill in all blanks or be found nonresponsive, was descriptive literature requirement even though agency failed to use descriptive literature clauses prescribed by regulations ---------- 999

Minority hiring goals

Where Washington Plan bid appendix requires bidder to insert goals and sign appendix, bid which includes signed appendix without insertion of goals is nonresponsive since noncompliance with appendix requirements is not minor deviation which may be waived. Although appendix mistakenly made one reference to bidder "responsibility" instead of responsiveness, appendix read as whole indicated that compliance was to be matter of responsiveness, and record indicates that protester, who was on constructive notice of correct terminology, was not prejudiced by error ---------- 1160

Responsiveness *v.* responsibility. (*See* **BIDDERS, Responsibility *v.* bid responsiveness**)

BIDS

Ambiguous

Bid modification

Not prejudicial to other bidders Page

Bid containing allegedly ambiguous price term may be accepted where no prejudice could result to other bidders because bid is low under all possible interpretations and bidder agrees to be bound by interpretation yielding lowest bid ---- 1146

Amendments

Written

Where agency issues telegraphic solicitation amendment one day before bid opening and telephonically notifies bidders of that fact who, without objecting, expressly acknowledge receipt of amendment, one bidder's assertion that agency did not issue written amendment and did not provide bidders with sufficient time to consider amendment is without merit ---- 1160

Competitive system

Late bids

Totality of information of record more reasonably supports conclusion that hand-carried bid did not arrive at designated depositary room by time for bid opening, notwithstanding time/date stamp showing timely receipt. Time/date stamp was mechanical hand stamp, not automatic timepiece, and manually adjustable to show approximate time in 15-minute intervals ---- 1103

Minor deficiencies in bid

Listing of subcontractors

No valid purpose served

Although solicitation requirement for listing of pipe suppliers is not fully met by low bidder who lists two possible suppliers for certain categories of pipe, award may be made to low bidder. Facts show that listing requirement was inadvertently included in solicitation by agency and that second low bidder who complied fully with listing requirement was not prejudiced thereby. Moreover, listing requirement serves no valid purpose for Govt. where item being procured is commercially available as in instant case ---- 955

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

Subcontractors

National Aeronautics and Space Administration's (NASA) exercise of general administrative functions in determining technical approaches to problem solving is not sufficient involvement in selection of subcontractor to cause our review of subcontract award since parallel development to test multiple approaches to problem solving was reasonable and specification prepared as a result thereof for use in subcontract award permitted competition, even by protester, and NASA was not involved in selection as envisioned in 54 Comp. Gen. 767 ---- 1220

Cover letter

Qualifying bid. (*See* **BIDS, Qualified, Letter, etc., Containing conditions not in invitation**)

BIDS—Continued
Discarding all bids
Invitation defects Page

Workmanship requirements providing "all parts shall be free from defects or blemishes affecting their appearance" and "workmanship shall be first class throughout" are highly subjective and vague in that they fail to provide clear standard upon which bid samples will be evaluated. As such, although we agree with General Services Administration that rejection of bid samples would have been legally questionable, bids should have been rejected and procurement resolicited in terms indicating what specific characteristics, if any, bid samples would have to meet ---- 1204

Resolicitation
Revised specifications

Solicitation should be canceled and requirement resolicited where (1) low bidder found to be responsible by agency is ineligible for award because bidder failed to comply with specific and objective responsibility criterion in IFB; and (2) only other bidder's price is almost $8 million higher than that of low bidder. Also, determination that low bidder was responsible shows that specific and objective criterion was unnecessary ---- 1043

Evalution
Bidders' qualfications. (*See* **BIDDERS, Qualifications**)
Conformability of equipment, etc. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered**)
Delivery provisions
Requirements contracts

Fact that prices of items under contract calling for definite quantity with fixed delivery might be lower than prices under requirements contract does not mean that the overall cost to Government is less since indirect costs associated with definite quantity contract must be considered such as cost of extra warehouse storage for additional inventory, generated excess inventory, and cost of transporting excess inventory to other locations ---- 1226

Tax inclusion or exclusion

Protest that low bidder did not include Federal Excise Tax (F.E.T.) in its bid price under invitation which provided that all Federal, State and local taxes (including F.E.T.) were included in bid price and resulting contract price is denied as bidder took no exception to requirement and unless bid affirmatively shows that taxes are excluded, it is presumed that taxes are included in bid price ---- 1159

Invitation defects
Discarding all bids. (*See* **BIDS, Discarding all bids, Invitation defects**)
Invitation for bids
Ambiguous
Minority hiring goals

Protester's assertion that solicitation was confusing and ambiguous because it only provided space for insertion of goals for time periods which had expired is without merit, since solicitation specified that goals for the last period for which space was provided would be applicable to the contract to be awarded ---- 1160

BIDS—Continued
Invitation for bids—Continued
Requirements
Commitment to Washington, D.C. minority hiring plan Page
Invitation for bids (IFB) required bidders to commit themselves only to terms and conditions of Washington Plan as spelled out in IFB. Contention that IFB was improper because it required commitment to a revised Plan not yet issued is without merit---- 1160
Responsive to
Bid which included signed appendix including percentage goals for two trades bidder contemplated utilizing in contract performance was responsive to requirements of IFB. Protester's assertion that bidders were required to submit estimates of manhours required for work in Washington area and of number of employees to be used is based on different appendix used in earlier case and has no applicability to instant matter---- 1160
Telegraphic amendment
Where agency issues telegraphic solicitation amendment one day before bid opening and telephonically notifies bidders of that fact who, without objecting, expressly acknowledge receipt of amendment, one bidder's assertion that agency did not issue written amendment and did not provide bidders with sufficient time to consider amendment is without merit- 1160
Late
Hand-carried delay
Evidence
Despite allegation that clause included in invitation for bids as required by regulation (Armed Services Procurement Regulation 7–2002.2 (c)(ii)) provides that only acceptable evidence to establish time of bid receipt at Government installation is time/date stamp of installation, all evidence relevant to time of receipt of hand-carried bid is considered since regulation applies only for consideration of late mailed and telegraphic bids, and not late hand-carried bids---- 1103
Mishandling determination
Record *v.* time/date stamp
Totality of information of record more reasonably supports conclusion that hand-carried bid did not arrive at designated depositary room by time for bid opening. notwithstanding time/date stamp showing timely receipt. Time/date stamp was mechanical hand stamp, not automatic timepiece, and manually adjustable to show approximate time in 15-minute intervals---- 1103
Telegraphic modifications
Evidence of timely delivery
Time/date stamp inaccurate
Time/date stamp on bid modification may be disregarded in determining time of receipt at Government installation where independent evidence establishes that times marked by machine were inaccurate and were inconsistent with stipulated order of receipt---- 1146
Where time/date stamp is inaccurate, contracting officer may seek other documentary evidence maintained by installation, including telegrams, for purpose of establishing time of receipt of bid modification at Government installation---- 1146

BIDS—Continued
Late—Continued
Telegraphic modifications—Continued
Mishandling by Government Page
Decision to consider late bid modification was proper where documentary evidence maintained by Government installation established that bid would have been timely received in bid opening room but for Government mishandling following receipt in communications center-- 1146
Prices
Bid containing allegedly ambiguous price term may be accepted where no prejudice could result to other bidders because bid is low under all possible interpretations and bidder agrees to be bound by interpretation yielding lowest bid ---------- 1146
Letter containing conditions not in bid. (*See* **BIDS, Qualified, Letter, etc., Containing conditions not in invitation**)
Negotiated procurement. (*See* **CONTRACTS, Negotiation**)
Nonresponsive to invitation
Conformability of equipment. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered**)
Options
Exercise of option. (*See* **CONTRACTS, Options**)
Protests. (*See* **CONTRACTS, Protests**)
Qualified
Letter, etc.
Containing conditions not in invitation
Statement in cover letter accompanying bid that bidder would supply equipment specified in "Descriptive Schedules" "or equal" was reservation by bidder of right to substitute unidentified components for those described in bid, thereby rendering bid nonresponsive---------- 999
Rejection
Discarding all bids. (*See* **BIDS, Discarding all bids**)
Requests for proposals. (*See* **CONTRACTS, Negotiation, Requests for proposals**)
Responsiveness
Concept
No basis exists for rejection of bid as nonresponsive under argument that generator offered would not meet specifications where bidder inserted acceptable information in "Descriptive Schedules" and furnished with bid letter from generator manufacturer certifying that generator would comply with specifications ---------- 999
Responsiveness *v.* bidder responsibility
Untimely protest is considered on merits because it reflects serious misunderstanding by agency of concepts of responsibility and responsiveness as applied in prior GAO decisions ---------- 999
Bidder's failure to complete blanks in "Descriptive Schedules" made bid nonresponsive and was not matter of bidder's responsibility as claimed by agency---------- 999
Samples. (*See* **CONTRACTS, Specifications, Samples**)
Specifications. (*See* **CONTRACTS, Specifications**)

BOARDS, COMMITTEES AND COMMISSIONS
Land Commission
Land condemnation cases
Court reporter fees Page

Whenever a Federal District Judge, pursuant to Rule 71A(h) of the Federal Rules of Civil Procedure, appoints a Land Commission to hear suits for just compensation in land condemnation cases, and the order of reference indicates a desire for the proceeding to be recorded, attendance fees of the court reporter are chargeable to the appropriations of the Administrative Office of United States Courts since the Judiciary determines if reporter shall be in attendance and normally pays attendance fees in other cases ---- 1172

Court reporters are not entitled to payment in addition to their salaries for providing transcripts of land commission proceedings to judges or to land commissioners appointed by judges in land condemnation cases. Accordingly, neither the Department of Justice nor the Administrative Office of the United States Courts may pay for such transcripts from their appropriations. However, reporters whose services are obtained on a contract basis are entitled to payment, from the Administrative Office, in accordance with the provisions of their contracts ---- 1172

BOOKS AND PERIODICALS
Appropriation availability
Expenses incident to specific purposes
Necessary expenses

Appropriated funds may be used to purchase subscription to periodical if subscription is justified as a "necessary" agency expense. Subscription need not be considered indispensable. 21 Comp. Gen. 339 is no longer applicable ---- 1076

BUREAU OF LABOR STATISTICS (*See* **LABOR DEPARTMENT, Bureau of Labor Statistics**)

CHECKS
Undelivered
Disposition

Incident to evacuation of U.S. personnel and local national employees from Vietnam, employees turning in Vietnamese piasters were given receipts on the bases of which Treasury checks were subsequently issued. Checks for payees still in Vietnam were placed in special deposit account pursuant to 31 U.S.C. 123–128 for benefit of payees and may not be paid out to relatives in U.S. who claim power of attorney to receive proceeds -- 1234

CIVIL AERONAUTICS BOARD
Filed tariff provisions
Valid until rejected

Provisions of tariffs filed with Civil Aeronautics Board are valid unless and until rejected by the Board ---- 958

CLAIMS
Transportation
Contractor liability
Air carriers
Loss or damage to Government shipment Page

Claim against air carrier for damage to shipment moved on Govt. bill of lading is not subject to notice requirements of governing air tariff because use of Govt. bill of lading—which in Condition 7 contains waiver of usual notice requirements—is required by air tariff and creates ambiguity over applicability of notice requirements which is resolved in favor of shipper 958

CLASSIFICATION
Reclassification
Effective date
Promotions

Federal Labor Relations Council requested decision on legality of arbitrator's award of retroactive promotion and backpay. Arbitrator found grievant was assigned higher duties but was not given temporary promotion as provided in negotiated agreement. Award may not be implemented since new position had not yet been classified and grievant cannot be promoted to a position which did not exist 1062

COMMISSIONS (*See* **BOARDS, COMMITTEES AND COMMISSIONS**)

COMPENSATION
Double
Concurrent military retired and civilian service pay
Disability retirement
Disability incurred in line of duty. (*See* **COMPENSATION, Double. Concurrent military retired and civilian service pay, Exemptions, Disability incurred in line of duty**)
Exemptions
Disability incurred in line of duty

For purposes of establishing employment retention preference (5 U.S.C. 3501(a)(3) and 3502), exemption from reduction in retired pay under Dual Compensation Act (5 U.S.C. 5532(c)), and full credit for years of military service for annual leave accrual (5 U.S.C. 6303(a)) as civilian employee of Federal Govt., determinations as to whether service member's disability retirement from uniformed service resulted from injury or disease incurred as direct result of armed conflict or caused by instrumentality of war during period of war can only be made by uniformed service from which he is retired and neither employing agency nor this Office has authority to change that determination 961

First-40-hour employees. (*See* **OFFICERS AND EMPLOYEES, Hours of work, Forty-hour week, First forty-hour basis**)
Increases
Cost-of-living adjustments
Maximum limitation

Cost-of-living provisions of 28 U.S.C. 461 do not apply to compensation of part-time United States magistrates and citizen jury commissioners. Inasmuch as section 461 lists the specific classes of judicial officers covered by its provisions, all not mentioned are deemed to have been intentionally excluded. However, 5 U.S.C. 5307 authorizes administrative adjustment of the statutory maximum compensation for part-time United States magistrates and citizen jury commissioners 1077

COMPENSATION—Continued
Increases—Continued
Wage board employees. (*See* **COMPENSATION, Wage board employees, Increases**)
Overtime
Fair Labor Standards Amendments of 1974, Pub. L. 93–259
Traveltime
Commuting time Page
Govt. vehicle in which employee commuted carried essential equipment and supplies for his employer. Commuting time is generally not compensable under FLSA; however, where commuting employee also transports equipment and supplies for employer, traveltime is compensable overtime even though commuting in Govt. vehicle is of benefit to employee, since activity is employment under FLSA as it is done in part for benefit of employer ---------- 1009
Training courses
Mine inspectors' travel, which due to nature of mine inspection work is found to be inherent part of and inseparable from their work, is compensable as regular or overtime work. However, mine inspectors are prohibited from receiving overtime compensation for any time they spend in training under Government Employees Training Act. 5 U.S.C. 4109. B–179186, October 24, 1973, modified ---------- 994
Traveltime
Commuting time
Employee was allowed to commute in Govt. vehicle from Fort Sam Houston to Camp Bullis, his duty station. Employee's workday started at 7:30 a.m., at which time he picked up the vehicle at Fort Sam Houston. He returned from Camp Bullis after 4 P.M., end of his regular workday. His claim for overtime compensation for return travel is denied since such traveltime was part of his normal travel from work to home and commuting time is noncompensable under 5 U.S.C. 5544(a) ---------- 1009
Vacation leave travel
Fair Labor Standards Act inapplicable
Claim for compensation and premium (overtime) pay for period of time during which employee is traveling on vacation leave may not be paid because such time is not compensable official duty time. Further, since Fair Labor Standards Act (FLSA) applies only where employee has in fact worked during period for which compensation and premium pay is claimed, FLSA is inapplicable to vacation leave travel ---------- 1035
Prevailing wage employees. (*See* **COMPENSATION, Wage board employees**)
Traveltime
Entitlement
Mine inspectors who work first-40-hour workweeks may be compensated for time spent in travel on official business during their first 40 hours. Any time spent in nontravel work after first 40 hours is compensable overtime. B–179186, October 24, 1973, modified ---------- 994
Overtime compensation status. (*See* **COMPENSATION, Overtime, Traveltime**)

COMPENSATION—Continued
Wage board employees
Increases
Effective date Page

Arbitrator's award setting effective date for increase in wage rates at Yakima Project Office, Bureau of Reclamation, may be fully implemented where governing collective-bargaining agreement calls for arbitration of unresolved negotiation issues involving wage rates, and record is clear that impasse existed on date collective-bargaining agreement became effective, and that, on same date, it was clear that there would be substantial increase in wage rates. Agencies and unions may negotiate preliminary agreement setting effective date for wage increases before exact amount of increase is known; therefore, arbitrator may resolve same issue ---------- 1006

CONGRESS
Resolutions
War Powers

Section 4 of War Powers Resolution requires President to report to Congress the basis for, facts surrounding, and estimated duration of introduction of U.S. Armed Forces in three types of situations. However, since Resolution does not expressly require President to specify which situation prompted the report and such specification is immaterial anyway since final decision of initiation of section 5 actions is up to Congress, it appears that the President met section 4 requirements ---------- 1081

CONSUMER PRICE INDEX (*See* **LABOR DEPARTMENT, Bureau of Labor Statistics, Consumer price index**)

CONTRACTING OFFICERS
Authority
Contract awards

Where procurement is conducted by field purchasing office but contract award is signed by Deputy Chief of higher echelon organization within agency of which purchasing office is a part, award is valid since Deputy Chief's contracting officer authority extends throughout organization ---------- 1111

CONTRACTORS
Conflicts of interest
Organizational
Development or prototype items

No organizational conflict of interest is shown where contractor who performed both contract definition including development of specifications, and actual system development is awarded contract for initial production that only it can provide ---------- 1019
Development
Selection

Protester's fear that militarized disk being developed under contract for development of improved sonar system will become standard disk for use throughout agency without meaningful competition is without merit since agency indicates that it will finance development of "second source" contractor and conduct competitive procurement for standard disk ---------- 1019

CONTRACTORS—Continued
Development—Continued
Selection—Continued Page
Fact that contractor engaged in development tasks prior to award of development and that agency intends to pay for costs incurred in those efforts does not indicate illegal action. Payment under such circumstances appears to be authorized by regulatory provision 1019
Responsibility
Contracting officer's affirmative determination accepted
Exceptions
Not supported by record
Record does not support affirmative responsibility determination where agency made *sub silentio* finding that bidder had demonstrated level of achievement equivalent to or in excess of minimum level of experience set forth in IFB, i.e., that it had worked on more complex equipment for requisite length of time (approximately 5 years) wherein same sort of expertise needed in instant contract was brought to bear, since record indicates only that bidder (1) had some experience with equipment; (2) had some experience with highly sophisticated equipment; and (3) had 5 years' general experience, and does not indicate extent of experience with either specific or more complex equipment 1051
Reasonableness
Since agency's determination as to small business firm's responsibility was not reasonable, options should not be exercised and future needs resolicited based upon proper statement of actual needs in clear and precise terms 1051
Specific and objective responsibility criteria
Pilot patent production demonstration contained in IFB and administered to bidder to ascertain technical capability constitutes specific and objective responsibility criterion and, therefore, GAO will review contracting officer's affirmative responsibility determination to see if criterion has been met 1043
Determination
Review by GAO
Where bidder never successfully passes demonstration required by IFB to establish technical ability to perform in responsible manner—a specific and objective responsibility criterion contained in solicitation—GAO finds there was no reasonable basis upon which contracting officer could find bidder responsible 1043

CONTRACTS
"Affirmative action programs." (*See* CONTRACTS, Labor stipulations, Nondiscrimination, "Affirmative action programs")
Amounts
Indefinite
Requirements contracts. (*See* CONTRACTS, Requirements)
Automatic Data Processing Systems. (*See* EQUIPMENT, Automatic Data Processing Systems)

CONTRACTS—Continued
Awards
Authority to contract
Contracting officer. (*See* CONTRACTING OFFICERS, Authority, Contract awards)
Not prejudical to other bidders Page
Although solicitation requirement for listing of pipe suppliers is not fully met by low bidder who lists two possible suppliers for certain categories of pipe, award may be made to low bidder. Facts show that listing requirement was inadvertently included in solicitation by agency and that second low bidder who complied fully with listing requirement was not prejudiced thereby. Moreover, listing requirement serves no valid purpose for Govt. where item being procured is commercially avaliable as in instant case 955
Small business concerns
Evidence
Bidder found large by Small Business Administration Size Appeals Board and which thereafter sought, but as of date of bid opening had not received, recertification as small business could not properly represent itself as small business at time of bid opening. Bidder was not therefore eligible for award of total small business set-aside. Modified by 55 Comp. Gen. — (B–185302, Aug. 30, 1976) 1188
Self-certification
Acceptance
In accordance with Armed Services Procurement Regulation 1–703(b) contracting officer cannot accept bidder's bid opening representation of itself as being small business if he knows that bidder has not subsequently been recertified by SBA as being small. Modified by 55 Comp. Gen. — (B–185302, Aug. 30, 1976) 1188
Purpose
Being small business under existing SBA size standard is legal status which although entered into either through bidder's self-certification/representation or administrative decision is not just matter of existing fact. While self-certification/representation is initial step by which bidder obtains small business status, if and when SBA issues ruling that bidder is other than small business, until decision is reversed or overruled, bidder no longer enjoys status of being small under existing size standard. Modified by 55 Comp. Gen. — (B–185302, Aug. 30, 1976) ... 1188
Sustained by GAO
Protest not for consideration
Protester's allegation that agency had no need to award contract prior to GAO decision on protest need not be considered since award has been sustained 1160
Cost-type
Negotiations. (*See* CONTRACTS, Negotiation, Cost-type)
Court reporters. (*See* COURTS, Reporters, Contract services)
Data, rights, etc.
Disclosure
Protest procedures
Because of policy not to hear post-award proprietary data protests and since relief being sought by post-award protester is injunctive in nature—relief not available through GAO—aspect of protest will not be considered 1040

CONTRACTS—Continued
Data—Continued
Disclosure—Continued
Solicitation Page
GAO has provided some protection against unauthorized disclosure of proprietary data in solicitation which includes data without owner's consent. If protest against solicitation disclosing data is lodged after award, policy has been not to hear protest---- 1040
Status of information furnished
Since question whether protester's data is proprietary will not be considered, capability of prime contractor to successfully complete contract without data will not be questioned---- 1040
Default
Performance deficiencies
Determination
Function of contracting agency
GAO will not consider protester's request that termination for default of turnkey housing contract be recommended as appropriate remedy in connection with prior decision upholding protest. Questions involved in protest as to adequacy of contract performance are matters of contract administration—which is function of contracting agency, not GAO. Also, performance defects alleged by protester do not necessarily establish grounds for termination for default, and contracting agency states it has no cause to take such action---- 972
Equal employment opportunity requirements. (*See* CONTRACTS, Labor stipulations, Nondiscrimination)
Federal Supply Schedule
Requirements contracts
Administrative discretion
Determination to issue requirements solicitation to satisfy needs of Government for cleaning compounds, solicitation containing minimum and maximum order limitation, is valid determination within ambit of sound administrative discretion where solicitation is issued pursuant to requirements of section 1-3.409 of Federal Procurement Regulations and section 5A-72.105-3(c) of General Services Procurement Regulations and results in overall economy to Government---- 1226
Labor stipulations
Nondiscrimination
"Affirmative action programs"
Commitment requirement
Requirement in solicitation that bidders commit themselves to affirmative action provisions of Washington Plan, even though Plan had expired by bid opening date, was proper since contracting officer had been informed that Plan would be extended and solicitations may provide for specific future needs and contingencies---- 1160
Washington, D.C. plan
Commitment requirement
Invitation for bids (IFB) required bidders to commit themselves only to terms and conditions of Washington Plan as spelled out in IFB. Contention that IFB was improper because it required commitment to a revised Plan not yet issued is without merit---- 1160

CONTRACTS—Continued
Labor stipulations—Continued
Nondiscrimination—Continued
"Affirmative action progams"—Continued
Washington, D.C. plan—Continued
Effective date Page

Question of whether Department of Labor order extending Washington Plan (for fostering equal employment opportunity through Federal contractor affirmative action plans) is subject to rule making requirements of 5 U.S.C. 553 is not appropriate for decision by GAO since (1) it involves legal issue of first impression; (2) courts are not in agreement on effect of noncompliance with such requirements; (3) Washington Plan extension has been regarded as effective; and (4) matter is pending before U.S. District Court. GAO will consider Plan effective as of date of publication in Federal Register ---------- 1160

Walsh-Healey Public Contracts Act
Manufacturer or dealer determination. (*See* **BIDDERS, Qualifications, Manufacturer or dealer**)

Mistakes
Allegation before award. (*See* **BIDS, Mistakes**)
Negotiated. (*See* **CONTRACTS, Negotiation**)
Negotiation
Auction technique prohibition
Disclosure of price, etc.

If information in initial proposal(s) is improperly disclosed, giving one or more offerors competitive advantage, it is desirable to make award on basis of initial proposals, if possible, because conduct of negotiations and submission of best and final offers may constitute use of prohibited auction technique ---------- 1066

Awards
Not prejudicial to other offerors

Where agency makes some errors in conducting cost evaluation of proposals but record indicates errors were not prejudicial in view of overall evaluation, award based on overall evaluation is not subject to objection ---------- 1111

Validity

Where procurement is conducted by field purchasing office but contract award is signed by Deputy Chief of higher echelon organization within agency of which purchasing office is a part, award is valid since Deputy Chief's contracting officer authority extends throughout organization ---------- 1111

Competition
Award under initial proposals

Since lowest-priced initial proposal is 47 percent in excess of Government estimate (28 percent in excess of revised upward estimate), General Accounting Office does not object to contracting officer's determination that fair and reasonable price under Armed Services Procurement Regulation 3-805.1(a)(v) is lacking, and that award should not be made on basis of initial proposals, notwithstanding desirability of such action where proposal information has been improperly disclosed ---------- 1066

CONTRACTS—Continued
Negotiation—Continued
Competition—Continued
Competitive range formula
Basis of evaluation Page

Incumbent protests against request for proposals (RFP) for aircraft maintenance services requiring offerors to insert hourly rate multiplied by estimated 600 man-hours for over and above work (11 percent of contract) because it does not provide for recognition of incumbent's experience and award to any other firm will not result in lowest cost. Protest is denied because no wide discrepancies in performance are expected as RFP contains stringent experience responsibility requirements, Government has significant control over man-hours to be expended, and man-hours estimate is reasonable. Moreover, recognition of experience is speculative and incumbent's suggested evaluation formulas would have no effect on competitive standing of offerors 1214

Contracting officer's duty to secure

On reconsideration, GAO decision 55 Comp. Gen. 201—which sustained protest against award of negotiated turnkey housing procurement and recommended remedy involving renewal of competition among offerors and possible termination for convenience of existing contract—is modified in part. After considering points raised in requests for reconsideration by contracting agency, contractor and protester, recommendation in prior decision is withdrawn, and in all other respects decision is affirmed 972

Equal bidding basis for all offerors

Where Navy improperly disclosed first offeror's initial proposal prices and attempted to eliminate unfair advantage by disclosing both offerors' prices before best and final offers, first offeror was disadvantaged because it was not advised that second offeror had alleged mistake in its proposal, requesting substantial downward price correction. GAO recommends that unless second offeror agrees to release of its mistake in proposal claim to first offeror, it be eliminated from competition. If second offeror agrees to disclosure, Navy should obtain one additional round of best and final offers before proceeding with award 1066

Key component breakout

Agency's refusal to break out key component of improved sonar system for separate procurement is justified in view of agency's judgment that such breakout would involve unacceptable technical (due in part to increased concurrency of development and production efforts) and delivery risks as well as increased costs 1019

Sole source of supply. (*See* **CONTRACTS, Negotiation, Sole source basis**)

Conflicts of interest prohibitions
Organizational

No organizational conflict of interest is shown where contractor who performed both contract definition including development of specifications, and actual system development is awarded contract for initial production that only it can provide 1019

CONTRACTS—Continued
Negotiation—Continued
Cost, etc., data
"Realism" of cost
Page
Agency's selection of contractor on basis of lower evaluated costs is not improper, even though evaluation section of solicitation indicates cost realism as the least important evaluation factor, since solicitation, on Standard Form 33A, indicated that price (cost quantum) would also be considered and cost or price may become determinative factor in award selection when competing proposals are essentially equal, notwithstanding fact that other factors are of greater importance in overall evaluation scheme 1111
Reasonableness of proposed cost
Since lowest-priced initial proposal is 47 percent in excess of Government estimate (28 percent in excess of revised upward estimate), General Accounting Office does not object to contracting officer's determination that fair and reasonable price under Armed Services Procurement Regulation 3-805.1(a)(v) is lacking, and that award should not be made on basis of initial proposals, notwithstanding desirability of such action where proposal information has been improperly disclosed 1066
Where agency cannot identify precise future requirements and therefore requests estimated costs on basis of hypothetical plan which includes the types of tasks and services actually required, estimated costs submitted by offerors provide adequate basis for cost comparison between competing proposals to determine probable relative cost to agency of accepting one proposal rather than another 1111
Agency's cost evaluation of proposals is not subject to objection where agency's determination of realism of proposed costs is supported by reasonable basis, even though agency essentially relies on information contained in proposals rather than seeking independent verification of each item of proposed costs, since extent to which proposed costs will be examined is matter for agency 1111
Where prices of proposed lease plan for automatic data processing equipment were effective through only 4 months of 96 months' systems life, plan should have been rejected. RFP required that fixed or determinable prices throughout systems life be offered. Fact that other lease plans included in contract cover remainder of systems life is immaterial, because RFP allowed only one plan to be considered in evaluation, and unacceptable plan was only plan actually evaluated. Therefore, awards were made without reasonable assurance of lowest overall cost to Government 1151
Reevaluation
Lowest overall cost to Government
Where awards were made based on partially unacceptable proposal and without reasonable assurance of lowest overall cost to Government, GAO recommends that Army reevaluate proposals (excluding unacceptable lease plan) and, if necessary, take appropriate termination for convenience and reaward action based upon reevaluation of proposals .. 1151

CONTRACTS—Continued
Negotiation—Continued
Cost-reimbursement basis
Indefinite delivery contract Page
Use of cost-reimbursement provisions in indefinite delivery contract is not prohibited by regulations and record suggests that regulations were not intended to foreclose agency from awarding this type of contract ---- 1111
Cost-type
Fee based on "estimated cost" of order
Provision in cost-type indefinite quantity contract specifying that fee to be paid on each delivery order will be based on "costs being paid" does not render contract contrary to statutory prohibition against cost-plus-percentage-of-cost contracts since contract itself does not confer entitlement to payment and fee for actual delivery order is being based on "estimated cost" of each order ---- 1111
Disclosure of price, etc.
Auction technique prohibition
If information in initial proposal(s) is improperly disclosed, giving one or more offerors competitive advantage, it is desirable to make award on basis of initial proposals, if possible, because conduct of negotiations and submission of best and final offers may constitute use of prohibited auction technique ---- 1066
Inadvertent
Where information in initial proposal has been improperly disclosed and award cannot be made on basis of initial proposals, conduct of negotiations and submission of best and final offers should be undertaken in such manner as to place offerors in relatively equal competitive positions and to eliminate, insofar as possible, unfair competitive advantage which any offeror may have obtained through improper disclosure of proposal information ---- 1066
Evaluation factors
Conformability of equipment, etc.
Technical deficiencies. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered, Technical deficiencies, Negotiated procurement**)
Cost realism
Agency's selection of contractor on basis of lower evaluated costs is not improper, even though evaluation section of solicitation indicates cost realism as the least important evaluation factor, since solicitation, on Standard Form 33A, indicated that price (cost quantum) would also be considered and cost or price may become determinative factor in award selection when competing proposals are essentially equal, notwithstanding fact that other factors are of greater importance in overall evaluation scheme ---- 1111
Agency's cost evaluation of proposals is not subject to objection where agency's determination of realism of proposed costs is supported by reasonable basis, even though agency essentially relies on information contained in proposals rather than seeking independent verification of each item of proposed costs, since extent to which proposed costs will be examined is matter for agency ---- 1111

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Criteria
Application of criteria Page

Allegation that part of successful proposal should have been rejected is not protest against request for proposals evaluation criteria, but against application of criteria by contracting agency in evaluating proposal. Protest filed within 10 working days after protester obtained and analyzed copy of contract, thereby learning of improper evaluation, is timely under General Accounting Office Bid Protest Procedures 1151

Method of evaluation
Formula

Incumbent protests against request for proposals (RFP) for aircraft maintenance services requiring offerors to insert hourly rate multiplied by estimated 600 man-hours for over and above work (11 percent of contract) because it does not provide for recognition of incumbent's experience and award to any other firm will not result in lowest cost. Protest is denied because no wide discrepancies in performance are expected as RFP contains stringent experience responsibility requirements, Government has significant control over man-hours to be expended, and man-hours estimate is reasonable. Moreover, recognition of experience is speculative and incumbent's suggested evaluation formulas would have no effect on competitive standing of offerors 1214

Point rating
Evaluation guidelines

Source selection officials' determination that competing proposals are technically equal, despite point spread of 47 out of 1000 and lower echelon requiring activity's conclusion that higher rated proposal is superior, is not subject to objection since point scores are only guides for decision-making 1111

Price consideration

Whether difference in point scores assigned to competing technical proposals is significant is for determination on basis of what difference might mean in performance and what it would cost Government to take advantage of it. Therefore, agency decision to award contract to less costly offeror despite competing offeror's higher technical point rating is proper exercise of discretion by selection officials 1111

Fixed-price, etc.
Cost data, etc. (*See* **CONTRACTS, Negotiation, Cost, etc., data**)
Late proposals and quotations
Court interest

Although protest issues going to solicitation defects were filed after closing date for receipt of proposals and are therefore untimely raised, General Accounting Office will consider them because of interest of U.S. District Court in GAO decision 1111

Modification of proposal
Price increase

Contracting agency's position that late price increase submitted by successful offeror upon extending its proposal did not involve late modification to proposal or any unequal treatment to other offerors is without merit. Decision is affirmed that late price increase was late modification within meaning of RFP late proposals clause, and that agency's acceptance amounted to conduct of irregular discussions with successful offeror, since no discussions were held with other offerors within competitive range 972

CONTRACTS—Continued
Negotiation—Continued
Offers or proposals
Best and final
Page
Where information in initial proposal has been improperly disclosed and award cannot be made on basis of initial proposals, conduct of negotiations and submission of best and final offers should be undertaken in such manner as to place offerors in relatively equal competitive positions and to eliminate, insofar as possible, unfair competitive advantage which any offeror may have obtained through improper disclosure of proposal information ---------- 1066
Additional rounds
Where Navy improperly disclosed first offeror's initial proposal prices and attempted to eliminate unfair advantage by disclosing both offerors' prices before best and final offers, first offeror was disadvantaged because it was not advised that second offeror had alleged mistake in its proposal, requesting substantial downward price correction. GAO recommends that unless second offeror agrees to release of its mistake in proposal claim to first offeror, it be eliminated from competition. If second offeror agrees to disclosure, Navy should obtain one additional round of best and final offers before proceeding with award ---------- 1066
Evaluation
Conflict between evaluators
Where procuring activity believes one proposal is superior to another, determination made by higher echelon within agency that proposals are technically equal is not subject to objection since higher level personnel were acting within the scope of their authority for procurement involved ---------- 1111
Errors
Not prejudicial
Where agency makes some errors in conducting cost evaluation of proposals but record indicates errors were not prejudicial in view of overall evaluation, award based on overall evaluation is not subject to objection ---------- 1111
Preparation
Costs
GAO recommendation made to Navy in prior decision sustaining protest—which contemplated renewal of competition among offerors, with possible result that existing turnkey housing contract be terminated for convenience—is withdrawn upon reconsideration. Information presented by agency and contractor concerning value of work in place at time of decision, plus extent of subcontracting for materials, indicates implementation of such recommendation is not feasible. Protester's only possible remedy rests with its claim for proposal preparation costs, which will be considered in future GAO decision if protester wishes to pursue claim ---------- 972
Responsiveness
Concept not applicable to negotiated procurements
While concept of responsiveness is not directly applicable to proposals submitted in negotiated procurement, RFP's repeated use of this term indicates that provisions so referenced were material requirements, and that proposal failing to conform to them would be considered unacceptable ---------- 1151

CONTRACTS—Continued
Negotiation—Continued
Prices
Cost and pricing data evaluation Page
Agency's selection of contractor on basis of lower evaluated costs is not improper, even though evaluation section of solicitation indicates cost realism as the least important evaluation factor, since solicitation, on Standard Form 33A, indicated that price (cost quantum) would also be considered and cost or price may become determinative factor in award selection when competing proposals are essentially equal, notwithstanding fact that other factors are of greater importance in overall evaluation scheme ---- 1111
Life cycle cost *v.* purchasing price
Where prices of proposed lease plan for automatic data processing equipment were effective through only 4 months of 96 months' systems life, plan should have been rejected. RFP required that fixed or determinable prices throughout systems life be offered. Fact that other lease plans included in contract cover remainder of systems life is immaterial, because RFP allowed only one plan to be considered in evaluation, and unacceptable plan was only plan actually evaluated. Therefore, awards were made without reasonable assurance of lowest overall cost to Government ---- 1151
Reasonableness
Since lowest-priced initial proposal is 47 percent in excess of Government estimate (28 percent in excess of revised upward estimate), General Accounting Office does not object to contracting officer's determination that fair and reasonable price under Armed Services Procurement Regulation 3-805.1(a)(v) is lacking, and that award should not be made on basis of initial proposals, notwithstanding desirability of such action where proposal information has been improperly disclosed ---- 1066
Technical status of low offeror
Whether difference in point scores assigned to competing technical proposals is significant is for determination on basis of what difference might mean in performance and what it would cost Government to take advantage of it. Therefore, agency decision to award contract to less costly offeror despite competing offeror's higher technical point rating is proper exercise of discretion by selection officials ---- 1111
Pricing data. (*See* **CONTRACTS, Negotiation, Cost, etc., data**)
Requests for proposals
Protests under
Manning requirements
Incumbent protests against request for proposals (RFP) for aircraft maintenance services requiring offerors to insert hourly rate multiplied by estimated 600 man-hours for over and above work (11 percent of contract) because it does not provide for recognition of incumbent's experience and award to any other firm will not result in lowest cost. Protest is denied because no wide discrepancies in performance are expected as RFP contains stringent experience responsibility requirements, Government has significant control over man-hours to be expended, and man-hours estimate is reasonable. Moreover, recognition of experience is speculative and incumbent's suggested evaluation formulas would have no effect on competitive standing of offerors ---- 1214

CONTRACTS—Continued
Negotiation—Continued
Requests for proposals—Continued
Protests under—Continued
Timeliness
Solicitation improprieties Page

Although protest issues going to solicitation defects were filed after closing date for receipt of proposals and are therefore untimely raised, General Accounting Office will consider them because of interest of U.S. District Court in GAO decision ---- 1111

Variation from requirements

Contentions made by contracting agency—to effect that turnkey housing RFP did not require specific responses in proposals, that deviations from requirements in successful proposal were minor, that blanket offer covered all requirements, that price of successful proposal was "reasonable" within provisions of ASPR 3-805, and generally, that all offerors were fairly treated—do not convincingly demonstrate errors of fact or law in prior GAO decision. Decision is affirmed that award to proposal which substantially varied from RFP requirements was improper in light of provisions of 10 U.S.C. 2304(g) and ASPR 3-805 ---- 972

Sole source basis
Propriety

Agency's decision to procure design and development of improved system from sole-source supplier without breaking out one component of system for competitive procurement is not subject to objection where record shows agency had reasonable basis for decision ---- 1019

Specifications. (*See* CONTRACTS, Specifications)
Specifications conformability. (*See* CONTRACTS, Specifications, Conformability of equipment, etc., offered, Technical deficiencies, Negotiated procurement)
Technical acceptability of equipment, etc., offered. (*See* CONTRACTS, Specifications, Conformability of equipment, etc., offered, Technical deficiencies, Negotiated procurement)
Termination. (*See* CONTRACTS, Termination)
Options
Not to be exercised
Requirements to be resolicited

Since agency's determination as to small business firm's responsibility was not reasonable, options should not be exercised and future needs resolicited based upon proper statement of actual needs in clear and precise terms ---- 1051

Performance
Ability to perform
Administrative responsibility to determine

GAO will not consider protester's request that termination for default of turnkey housing contract be recommended as appropriate remedy in connection with prior decision unholding protest. Questions involved in protest as to adequacy of contract performance are matters of contract administration—which is function of contracting agency, not GAO. Also, performance defects alleged by protester do not necessarily establish grounds for termination for default, and contracting agency states it has no cause to take such action ---- 972

CONTRACTS—Continued
Prices
Taxes
Inclusion or exclusion Page
Protest that low bidder did not include Federal Excise Tax (F.E.T.) in its bid price under invitation which provided that all Federal, State and local taxes (including F.E.T.) were included in bid price and resulting contract price is denied as bidder took no exception to requirement and unless bid affirmatively shows that taxes are excluded, it is presumed that taxes are included in bid price 1159
Proprietary, etc., items. (*See* **CONTRACTS, Data, rights, etc.**)
Protests
Award approved
Approval sustained by GAO
Protest not for consideration
Protester's allegation that agency had no need to award contract prior to GAO decision on protest need not be considered since award has been sustained 1160
Burden of proof
Protester
Although protester disagrees with contracting agency on evaluation of bid samples, it is concluded agency's judgment was not without reasonable basis in fact, since protester has not shown that bid samples were not fairly and conscientiously evaluated by agency 1204
Contracting officer's affirmative responsibility determination
General Accounting Office review discontinued
Exceptions
Fraud
Since question whether protester's data is proprietary will not be considered, capability of prime contractor to successfully complete contract without data will not be questioned 1040
Not supported by record
Record does not support affirmative responsibility determination where agency made *sub silentio* finding that bidder had demonstrated level of achievement equivalent to or in excess of minimum level of experience set forth in IFB, i.e., that it had worked on more complex equipment for requisite length of time (approximately 5 years) wherein same sort of expertise needed in instant contract was brought to bear, since record indicates only that bidder (1) had some experience with equipment; (2) had some experience with highly sophisticated equipment; and (3) had 5 years' general experience, and does not indicate extent of experience with either specific or more complex equipment 1051
Data, rights, etc., disclosure
GAO has provided some protection against unauthorized disclosure of proprietary data in solicitation which includes data without owner's consent. If protest against solicitation disclosing data is lodged after award, policy has been not to hear protest 1040
Because of policy not to hear post-award proprietary data protests and since relief being sought by post-award protester is injunctive in nature—relief not available through GAO—aspect of protest will not be considered 1040

CONTRACTS—Continued
Protests—Continued
Merits
Court interest
Page
When court expresses interest in GAO decision, merits of protest will be considered even though protest might have been untimely filed..... 1019
Protest filed with General Accounting Office also filed before court will be considered on merits despite presence of several untimely issues, since court has expressed interest in GAO decision..... 1160
Performance under contract continued
GAO does not recommend that contract awarded to nonresponsive bidder be terminated for convenience of Govt., after considering urgency of procurement, good faith (albeit erroneous) reliance by agency on prior GAO decisions and untimeliness of protest..... 999
Subcontractor protests
Contention that in view of audit and settlement responsibilities (31 U.S.C. 41, 53, and 71) General Accounting Office lacks authority to divest itself of subcontract reviews as matter of policy is rejected.... 1220
Timeliness
Considered on merits
Untimely protest is considered on merits because it reflects serious misunderstanding by agency of concepts of responsibility and responsiveness as applied in prior GAO decisions..... 999
Negotiated contracts
Allegation that part of successful proposal should have been rejected is not protest against request for proposals evaluation criteria, but against application of criteria by contracting agency in evaluating proposal. Protest filed within 10 working days after protester obtained and analyzed copy of contract, thereby learning of improper evaluation, is timely under General Accounting Office Bid Protest Procedures..... 1151
Solicitation improprieties
Protester's post-award assertion that solicitation was defective for failing to include as evaluation factor cost of possible damages arising from release of alleged proprietary data is untimely filed under Bid Protest Procedures..... 1040
Requirements
Estimated amounts basis
Best information available
Where agency cannot identify precise future requirements and therefore requests estimated costs on basis of hypothetical plan which includes the types of tasks and services actually required, estimated costs submitted by offerors provide adequate basis for cost comparison between competing proposals to determine probable relative cost to agency of accepting one proposal rather than another..... 1111
It is not impossible to forecast costs of items for 1 year in advance even though there is no guaranteed minimum quantity since solicitation supplied estimates of quantities which would be ordered, estimates being based on information made available to GSA such as quantities of particular item ordered on prior contracts. These estimates provide guide or basis for bidding. Also, as basis to estimate freight costs, solicitation listed final destination for each item and estimated peak monthly requirement for each item..... 1226

CONTRACTS—Continued
Requirements—Continued
Maximum/minimum order limitation Page
Determination to issue requirements solicitation to satisfy needs of Government for cleaning compounds, solicitation containing minimum and maximum order limitation, is valid determination within ambit of sound administrative discretion where solicitation is issued pursuant to requirements of section 1-3.409 of Federal Procurement Regulations and section 5A-72.105-3(c) of General Services Procurement Regulations and results in overall economy to Government 1226
Prices
Overall costs
Fact that prices of items under contract calling for definite quantity with fixed delivery might be lower than prices under requirements contract does not mean that the overall cost to Government is less since indirect costs associated with definite quantity contract must be considered such as cost of extra warehouse storage for additional inventory, generated excess inventory, and cost of transporting excess inventory to other locations 1226
Research and development
Production and development combination propriety
Agency's refusal to break out key component of improved sonar system for separate procurement is justified in view of agency's judgment that such breakout would involve unacceptable technical (due in part to increased concurrency of development and production efforts) and delivery risks as well as increased costs 1019
Protester's fear that militarized disk being developed under contract for development of improved sonar system will become standard disk for use throughout agency without meaningful competition is without merit since agency indicates that it will finance development of "second source" contractor and conduct competitive procurement for standard disk 1019
Small business concerns. (*See* **CONTRACTS, Awards, Small business concerns**)
Specifications
Ambiguous
Bid responsiveness *v.* bidder responsibility
Effect not prejudicial
Where Washington Plan bid appendix requires bidder to insert goals and sign appendix, bid which includes signed appendix without insertion of goals is nonresponsive since noncompliance with appendix requirements is not minor deviation which may be waived. Although appendix mistakenly made one reference to bidder "responsibility" instead of responsiveness, appendix read as whole indicated that compliance was to be matter of responsiveness, and record indicates that protester, who was on constructive notice of correct terminology, was not prejudiced by error 1160
Changes, revisions, etc.
Notification
Where agency issues telegraphic solicitation amendment one day before bid opening and telephonically notifies bidders of that fact who, without objecting, expressly acknowledge receipt of amendment, one bidder's assertion that agency did not issue written amendment and did not provide bidders with sufficient time to consider amendment is without merit 1160

CONTRACTS—Continued
Specifications—Continued
Conformability of equipment, etc., offered
Ability to meet requirements
Page
No basis exists for rejection of bid as nonresponsive under argument that generator offered would not meet specifications where bidder inserted acceptable information in "Descriptive Schedules" and furnished with bid letter from generator manufacturer certifying that generator would comply with specifications 999
Superior product offered
Where procuring activity believes one proposal is superior to another, determination made by higher echelon within agency that proposals are technically equal is not subject to objection since higher level personnel were acting within the scope of their authority for procurement involved 1111
Technical deficiencies
Negotiated procurement
Agency's refusal to break out key component of improved sonar system for separate procurement is justified in view of agency's judgment that such breakout would involve unacceptable technical (due in part to increased concurrency of development and production efforts) and delivery risks as well as increased costs 1019
While concept of responsiveness is not directly applicable to proposals submitted in negotiated procurement, RFP's repeated use of this term indicates that provisions so referenced were material requirements, and that proposal failing to conform to them would be considered unacceptable 1151
Descriptive data
Failure to complete descriptive schedules
Bid nonresponsive
Bidder's failure to complete blanks in "Descriptive Schedules" made bid nonresponsive and was not matter of bidder's responsibility as claimed by agency 999
Failure to insert specific information
Bid nonresponsive
Inclusion in IFB of six pages of "Descriptive Schedules" containing over 200 blanks in which bidders were to insert specific information concerning equipment being supplied; which were expressly made part of specifications; which were to be furnished with bid; and as to which bidders were advised to fill in all blanks or be found nonresponsive, was descriptive literature requirement even though agency failed to use descriptive literature clauses prescribed by regulations 999
Failure to submit horsepower data
Bidder's failure to submit with bid manufacturer's horsepower curves substantiating engine horsepower claimed in bidder's entry upon "Descriptive Schedules" also resulted in nonresponsive bid 999

CONTRACTS—Continued
Specifications—Continued
Failure to furnish something required
Information
Minority manpower utilization Page

Where Washington Plan bid appendix requires bidder to insert goals and sign appendix, bid which includes signed appendix without insertion of goals is nonresponsive since noncompliance with appendix requirements is not minor deviation which may be waived. Although appendix mistakenly made one reference to bidder "responsibility" instead of responsiveness, appendix read as whole indicated that compliance was to be matter of responsiveness, and record indicates that protester, who was on constructive notice of correct terminology, was not prejudiced by error---- 1160

Protester's assertion that solicitation was confusing and ambiguous because it only provided space for insertion of goals for time periods which had expired is without merit, since solicitation specified that goals for the last period for which space was provided would be applicable to the contract to be awarded---- 1160

Samples
Preproduction sample requirement
Evaluation propriety

Although protester disagrees with contracting agency on evaluation of bid samples, it is concluded agency's judgment was not without reasonable basis in fact, since protester has not shown that bid samples were not fairly and conscientiously evaluated by agency---- 1204

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

Subcontractors
Competitive system procedure application. (*See* **BIDS, Competitive system, Subcontractors**)
Government control

Allegation that NASA does not possess authority to implement procedure waiving review of cost-reimbursement prime contractor award of subcontracts fails in light of fact that grant of general procurement authority carries discretion for agency to contract by any reasonable method and NASA procedure waiving review of subcontracts under stipulated circumstances is reasonable exercise of discretion and was accomplished in accordance with NASA regulations---- 1220

Listing
Invitation requirement
Listing inadvertently included

Although solicitation requirement for listing of pipe suppliers is not fully met by low bidder who lists two possible suppliers for certain categories of pipe, award may be made to low bidder. Facts show that listing requirement was inadvertently included in solicitation by agency and that second low bidder who compiled fully with listing requirement was not prejudiced thereby. Moreover, listing requirement serves no valid purpose for Govt. where item being procured is commercially available as in instant case---- 955

Procurement procedures

Contention that in view of audit and settlement responsibilities (31 U.S.C. 41, 53, and 71) General Accounting Office lacks authority to divest itself of subcontract reviews as matter of policy is rejected---- 1220

CONTRACTS—Continued
Subcontracts
Administrative approval
Review by GAO Page

National Aeronautics and Space Administration's (NASA) exercise of general administrative functions in determining technical approaches to problem solving is not sufficient involvement in selection of subcontractor to cause our review of subcontract award since parallel development to test multiple approaches to problem solving was reasonable and specification prepared as a result thereof for use in subcontract award permitted competition, even by protester, and NASA was not involved in selection as envisioned in 54 Comp. Gen. 767 1120

Tax matters
Federal taxes
Inclusion or exclusion in bid evaluation

Protest that low bidder did not include Federal Excise Tax (F.E.T.) in its bid price under invitation which provided that all Federal, State and local taxes (including F.E.T.) were included in bid price and resulting contract price is denied as bidder took no exception to requirement and unless bid affirmatively shows that taxes are excluded, it is presumed that taxes are included in bid price 1159

Termination
Convenience of Government
Erroneous evaluation

Where awards were made based on partially unacceptable proposal and without reasonable assurance of lowest overall cost to Government, GAO recommends that Army reevaluate proposals (excluding unacceptable lease plan) and, if necessary, take appropriate termination for convenience and reaward action based upon reevaluation of proposals 1151

Lack of competition

On reconsideration, GAO decision 55 Comp. Gen. 201—which sustained protest against award of negotiated turnkey housing procurement and recommended remedy involving renewal of competition among offerors and possible termination for convenience of existing contract—is modified in part. After considering points raised in requests for reconsideration by contracting agency, contractor and protester, recommendation in prior decision is withdrawn, and in all other respects decision is affirmed 972

GAO recommendation made to Navy in prior decision sustaining protest—which contemplated renewal of competition among offerors, with possible result that existing turnkey housing contract be terminated for convenience—is withdrawn upon reconsideration. Information presented by agency and contractor concerning value of work in place at time of decision, plus extent of subcontracting for materials, indicates implementation of such recommendation is not feasible. Protester's only possible remedy rests with its claim for proposal preparation costs, which will be considered in future GAO decision if protester wishes to pursue claim 972

CONTRACTS—Continued
Termination—Continued
Convenience of Government—Continued
Not recommended
Urgency procurement Page

In view of estimated cost of terminating improperly awarded contract ($329,460 as of May 25, 1976; $461,244-$527,136 as of June 25, 1976), recommendation cannot be made that instant contract be terminated for convenience since that action would not be in Government's best interest where total contract price was $658,920 and contract award was based on determination of urgency. Modified by 55 Comp. Gen. — (B-185302, Aug. 30, 1976)---- 1188

Defaulting contractor. (*See* **CONTRACTS, Default**)
Not in Government's best interest
Urgency of procurement, lack of bad faith, etc.

GAO does not recommend that contract awarded to nonresponsive bidder be terminated for convenience of Govt., after considering urgency of procurement, good faith (albeit erroneous) reliance by agency on prior GAO decisions and untimeliness of protest---- 999

Solicitation inappropriate
Unduly restrictive of competition

Solicitation should be canceled and requirement resolicited where (1) low bidder found to be responsible by agency is ineligible for award because bidder failed to comply with specific and objective responsibility criterion in IFB; and (2) only other bidder's price is almost $8 million higher than that of low bidder. Also, determination that low bidder was responsible shows that specific and objective criterion was unnecessary-- 1043

Transportation services
Terms
Bills of lading and tariffs

Terms of contract of carriage under which carrier transports goods include both bill of lading and published applicable tariff---- 958

CORPORATIONS
Officers
Newly organized corporation
Bidders' experience

Experience of corporate officials prior to formation of corporation can be included when examining corporation's overall experience level for bidder responsibility determination. Therefore, mere fact that corporation had only existed since early 1975 is not determinative of its ability to meet "approximately 5 years" experience requirement---- 1051

COURTS
Citizen jury commissioners
Compensation
Increases
Cost-of-living adjustments

Cost-of-living provisions of 28 U.S.C. 461 do not apply to compensation of part-time United States magistrates and citizen jury commissioners. Inasmuch as section 461 lists the specific classes of judical officers covered by its provisions, all not mentioned are deemed to have been intentionally excluded. However, 5 U.S.C. 5307 authorizes administrative adjustment of the statutory maximum compensation for part-time United States magistrates and citizen jury commissioners---- 1077

COURTS—Continued
Magistrates
Compensation
Increases
Cost-of-living adjustments Page

Cost-of-living increases of 28 U.S.C. 461 should be applied to the increment of compensation fixed for the referee duties of combination referees in bankruptcy-magistrates while the cost-of-living increases of 5 U.S.C. 5307 may be applied to the increment of compensation fixed for magistrate duties of these officials. The entire compensation of combination clerk-magistrates is subject to the cost-of-living adjustment provisions of 5 U.S.C. 5307 1077

Reporters
Transcript fees
Appropriation availability

Whenever a Federal District Judge, pursuant to Rule 71A(h) of the Federal Rules of Civil Procedure, appoints a Land Commission to hear suits for just compensation in land condemnation cases, and the order of reference indicates a desire for the proceeding to be recorded, attendance fees of the court reporter are chargeable to the appropriations of the Administrative Office of United States Courts since the Judiciary determines if reporter shall be in attendance and normally pays attendance fees in other cases 1172

Court reporters are not entitled to payment in addition to their salaries for providing transcripts of land commission proceedings to judges or to land commissioners appointed by judges in land condemnation cases. Accordingly, neither the Department of Justice nor the Administrative Office of the United States Courts may pay for such transcripts from their appropriations. However, reporters whose services are obtained on a contract basis are entitled to payment, from the Administrative Office, in accordance with the provisions of their contracts 1172

CREDIT CARDS
Fraudulent use
Protection under Truth in Lending Act

Pursuant to court decisions holding that liability protection of Truth in Lending Act for unauthorized use of credit cards extends to all credit cards, whether used for business or consumer purposes, Government is also protected under Act. *Equal Employment Opportunity Commission*, B–180512, May 17, 1974, 74–1 CPD 264, is overruled 1181

DAMAGES
Public property. (*See* **PROPERTY, Public, Damage, loss, etc.**)

DECEDENTS' ESTATES
Pay, etc., due military personnel
Persons implicated in death of decedent
Claim determined on basis of award of life insurance proceeds

Civil action in case of widow versus decedent's mother for proceeds of life insurance policy which ruled in favor of mother on specific jury finding that widow unlawfully and intentionally killed member and which conclusion was upheld by United States Court of Appeals, while not binding on GAO, is to be given considerable weight in our consideration of survivor claims where parties and issues before such court involve, in part, matters before this Office 1033

DECEDENTS' ESTATES—Continued
Persons causing death of decedent
Evidence of intent Page
Claim of widow of deceased service member for entitlement to both six months' death gratuity (10 U.S.C. 1477) and unpaid pay and allowances (10 U.S.C. 2771), where she admitted killing him and was indicted for murder, is denied, even though she claimed self-defense and *nolle prosequi* was entered on indictment, since due to certain information of record, the lack of felonious intent cannot be established 1033

DEFENSE DEPARTMENT
Procurement
Contracting methods
Prototype or parallel development
No organizational conflict of interest is shown where contractor who performed both contract definition including development of specifications, and actual system development is awarded contract for initial production that only it can provide 1019
Without open and competitive bidding
Fact that contractor engaged in development tasks prior to award of development and that agency intends to pay for costs incurred in those efforts does not indicate illegal action. Payment under such circumstances appears to be authorized by regulatory provision 1019

DEPARTMENTS AND ESTABLISHMENTS
Rule making authority
Federal aid, grants, contracts, etc.
Although contractual matters are statutorily exempted from rule making provisions of 5 U.S.C. 553, Secretary of Labor has waived reliance on that exemption for rule making by his Department, thereby necessitating Department of Labor compliance with statutory provisions. 1160

DISCHARGES AND DISMISSALS
Military personnel
Other than honorable
Transportation of dependents, household effects, etc.
Regulations may be promulgated under 37 U.S.C. 406(h) to authorize transportation of household effects and a private automobile of a member of the uniformed services serving overseas, without dependents, incident to the member's discharge under conditions other than honorable, similar to the transportation authorized members with dependents discharged in such circumstances. 44 Comp. Gen. 574 will no longer be followed; 45 Comp. Gen. 442 and 49 *id.* 695, overruled in part 1183

DISCRIMINATION (*See* **NONDISCRIMINATION**)

DISTRICT OF COLUMBIA
Firemen and policemen
Compensation
Increases Page
Applicable to U.S. Park Police and Executive Protective Service
Under sec. 501 of D.C. Police and Firemen's Salary Act of 1958, as amended, officers and members of U.S. Park Police and Executive Protective Service (formerly White House Police) are entitled to same rates of compensation as those granted under that Act to Metropolitan Police Force of D.C. By virtue of sec. 501, enactment of legislation by Council of D.C. increasing salaries of Metropolitan Police under 1958 Act will have effect of granting like increases to U.S. Park Police and Executive Protective Service until Congress otherwise provides---------- 965

DONATIONS
Acceptance
Agriculture Department
Forest Service
Purpose of bequest
Forest Products Laboratory, Department of Agriculture, has authority to accept bequest from private citizen only for purpose of establishing and operating forestry research facilities. It may not enter into cooperative agreement with University of Wisconsin Foundation to invest proceeds of bequest and to use income for fellowships, scholarships, special seminars and symposia since agency may not do indirectly what it cannot do directly---------- 1059

EQUAL EMPLOYMENT OPPORTUNITY
Commission
Credit cards
Authorized use
Pursuant to court decisions holding that liability protection of Truth in Lending Act for unauthorized use of credit cards extends to all credit cards, whether used for business or consumer purposes, Government is also protected under Act. *Equal Employment Opportunity Commission*, B–180512, May 17, 1974, 74–1 CPD 264, is overruled---------- 1181
Contract provisions. (*See* **CONTRACTS, Labor stipulations, Nondiscrimination**)

EQUIPMENT
Automatic Data Processing Systems
Leaseback
Third party
Trial basis
Various GSA proposals for third party leaseback of installed and uninstalled ADPE are tentatively approved by GAO provided that equipment manufacturer's consent to leaseback arrangement be obtained where necessary. However, recommendation is made that leaseback proposals be instituted on trial basis because of problems which may arise---------- 1012
Lease-purchase agreements
Acquisition of equipment
Direct assignment by Govt. of purchase option under ADPE lease to third party lessee for purpose of accomplishing leaseback of equipment to Govt. under more favorable terms constitutes procurement transaction rather than disposal of property and therefore laws governing disposal of Govt. property are not for application---------- 1012

EQUIPMENT—Continued
Automatic Data Processing Systems—Continued
Leases
Evaluation
Systems life
Page

Where prices of proposed lease plan for automatic data processing equipment were effective through only 4 months of 96 months' systems life, plan should have been rejected. RFP required that fixed or determinable prices throughout systems life be offered. Fact that other lease plans included in contract cover remainder of systems life is immaterial, because RFP allowed only one plan to be considered in evaluation, and unacceptable plan was only plan actually evaluated. Therefore, awards were made without reasonable assurance of lowest overall cost to Government---- 1151

Selection and purchase
Procurement with ADP fund
General Services Administration control

While GSA proposed leaseback arrangements tentatively are approved, GAO recommends that GSA should continue to seek adequate ADP Fund capitalization to finance ADPE purchases. Furthermore, each proposed leaseback should be approved by GSA (no blanket delegation to agencies) and lease or purchase determinations should be made and documented before leasebacks are used---- 1012

EVIDENCE
Sufficiency
To establish time of receipt of bid modification
Time/date stamp inaccurate

Time/date stamp on bid modification may be disregarded in determining time of receipt at Government installation where independent evidence establishes that times marked by machine were inaccurate and were inconsistent with stipulated order of receipt---- 1146

Where time/date stamp is inaccurate, contracting officer may seek other documentary evidence maintained by installation, including telegrams, for purpose of establishing time of receipt of bid modification at Government installation---- 1146

FAMILY ALLOWANCES
Separation
Type 2
Ship duty
Home port changes

Family separation allowance (FSA), Type II, if otherwise allowable may not be paid to naval personnel assigned to ships merely because ship has moved from its home port but eligibility depends upon where dependents actually reside. If they reside within 50 miles (or 1½ hours traveltime) of ship while at some other port, FSA may not be paid---- 991

Residence location

Following decision 52 Comp. Gen. 912, if ship moves from its home port to another port within 50 miles (or 1½ hours traveltime as provided in para. 30313, DODPM) of the home port, those members attached to ship whose dependents do not reside in area of home port do not become entitled to family separation allowance, Type II---- 991

FEES
Court reporter
Transcript fees. (*See* **COURTS, Reporters, Transcript fees**)
Transcripts
Court reporters. (*See* **COURTS, Reporters, Transcript fees**)

FOREST SERVICE
Other than timber sales. (*See* **AGRICULTURE DEPARTMENT, Forest Service**)

FUNDS
Appropriated. (*See* **APPROPRIATIONS**)

Private donations
Income from bequest
Use
Unspecified purposes

Page

Forest Products Laboratory, Department of Agriculture, has authority to accept bequest from private citizen only for purpose of establishing and operating forestry research facilities. It may not enter into cooperative agreement with University of Wisconsin Foundation to invest proceeds of bequest and to use income for fellowships, scholarships, special seminars and symposia since agency may not do indirectly what it cannot do directly 1059

Proposed cooperative agreement provision which would permit recipient of funds to use funds for unspecified purposes in future at its own option is not proper. Appropriated funds may be used only for purposes for which appropriated. Proposed provision does not limit future use of funds to authorized purposes only 1059

GENERAL ACCOUNTING OFFICE
Contracts
Contractor's responsibility
Contracting officer's affirmative determination accepted
Exceptions

Pilot patent production demonstration contained in IFB and administered to bidder to ascertain technical capability constitutes specific and objective responsibility criterion and, therefore, GAO will review contracting officer's affirmative responsibility determination to see if criterion has been met 1043

Record does not support affirmative responsibility determination where agency made *sub silentio* finding that bidder had demonstrated level of achievement equivalent to or in excess of minimum level of experience set forth in IFB, i.e., that it had worked on more complex equipment for requisite length of time (approximately 5 years) wherein same sort of expertise needed in instant contract was brought to bear, since record indicates only that bidder (1) had some experience with equipment; (2) had some experience with highly sophisticated equipment; and (3) had 5 years' general experience, and does not indicate extent of experience with either specific or more complex equipment .. 1051

Since agency's determination as to small business firm's responsibility was not reasonable, options should not be exercised and future needs resolicited based upon proper statement of actual needs in clear and precise terms 1051

GENERAL ACCOUNTING OFFICE—Continued
Contracts—Continued
Protests. (*See* CONTRACTS, Protests)
Decisions
Advance
Disbursing and certifying officers
Questions not on voucher
Page
Where certifying officer seeks GAO advance decision on matters of travel incident to change of permanent duty station or attendance of meetings or training but submits voucher relating only to propriety of of payment of items incident to vacation leave travel, GAO will not render decision on matters unrelated to accompanying voucher..... 1035
Reconsideration
New contentions *v.* errors in law or fact
Contentions made by contracting agency—to effect that turnkey housing RFP did not require specific responses in proposals, that deviations from requirements in successful proposal were minor, that blanket offer covered all requirements, that price of successful proposal was "reasonable" within provisions of ASPR 3-805, and generally, that all offerors were fairly treated—do not convincingly demonstrate errors of fact or law in prior GAO decision. Decision is affirmed that award to proposal which substantially varied from RFP requirements was improper in light of provisions of 10 U.S.C. 2304(g) and ASPR 3-805..... 972
Prior recommendation withdrawn
On reconsideration, GAO decision 55 Comp. Gen. 201—which sustained protest against award of negotiated turnkey housing procurement and recommended remedy involving renewal of competition among offerors and possible termination for convenience of existing contract—is modified in part. After considering points raised in requests for reconsideration by contracting agency, contractor and protester, recommendation in prior decision is withdrawn, and in all other respects decision is affirmed..... 97?
Jurisdiction
Subcontracts
National Aeronautics and Space Administration's (NASA) exercise of general administrative functions in determining technical approaches to problem solving is not sufficient involvement in selection of subcontractor to cause our review of subcontract award since parallel development to test multiple approaches to problem solving was reasonable and specification prepared as a result thereof for use in subcontract award permitted competition, even by protester, and NASA was not involved in selection as envisioned in 54 Comp. Gen. 767..... 1220
Contention that in view of audit and settlement responsibilities (31 U.S.C. 41, 53, and 71) General Accounting Office lacks authority to divest itself of subcontract reviews as matter of policy is rejected..... 1220

GENERAL ACCOUNTING OFFICE—Continued
Recommendations
Contracts
Agency review of protest reports
Prior to submission to GAO Page

Though recommendation for corrective action in prior decision sustaining protest is withdrawn, decision on reconsideration makes further recommendations to Secretary of Navy. Naval Facilities Engineering Command's (NAVFAC) procedures for furnishing protest reports should be reviewed to ensure that all relevant documents—including individual technical evaluators' numerical scoring of proposals—are furnished to GAO. Also, since award was improper, Secretary should cause review of NAVFAC's actions in procurement to be undertaken to ensure compliance with law in future negotiated turnkey housing procurements--- 972

Prior recommendation
Not feasible
Withdrawn

GAO recommendation made to Navy in prior decision sustaining protest—which contemplated renewal of competition among offerors, with possible result that existing turnkey housing contract be terminated for convenience—is withdrawn upon reconsideration. Information presented by agency and contractor concerning value of work in place at time of decision, plus extent of subcontracting for materials, indicates implementation of such recommendation is not feasible. Protester's only possible remedy rests with its claim for proposal preparation costs, which will be considered in future GAO decision if protester wishes to pursue claim---------- 972

GENERAL SERVICES ADMINISTRATION
General Supply Fund
Direct and indirect costs

Fact that prices of items under contract calling for definite quantity with fixed delivery might be lower than prices under requirements contract does not mean that the overall cost to Government is less since indirect costs associated with definite quantity contract must be considered such as cost of extra warehouse storage for additional inventory, generated excess inventory, and cost of transporting excess inventory to other locations---------- 1226

Procurement
Requirements contracts

Determination to issue requirements solicitation to satisfy needs of Government for cleaning compounds, solicitation containing minimum and maximum order limitation, is valid determination within ambit of sound administrative discretion where solicitation is issued pursuant to requirements of section 1–3.409 of Federal Procurement Regulations and section 5A–72.105–3(c) of General Services Procurement Regulations and results in overall economy to Government---------- 1226

GIFTS
Donations. (*See* **DONATIONS**)

GRATUITIES
Six months' death
Member killed by person claiming Page
Claim of widow of deceased service member for entitlement to both six months' death gratuity (10 U.S.C. 1477) and unpaid pay and allowances (10 U.S.C. 2771), where she admitted killing him and was indicted for murder, is denied, even though she claimed self-defense and *nolle prosequi* was entered on indictment, since due to certain information of record, the lack of felonious intent cannot be established 1033

HOUSING
"Turnkey" developers
Contracts
Negotiation procedures
On reconsideration, GAO decision 55 Comp. Gen. 201—which sustained protest against award of negotiated turnkey housing procurement and recommended remedy involving renewal of competition among offerors and possible termination for convenience of existing contract—is modified in part. After considering points raised in requests for reconsideration by contracting agency, contractor and protester, recommendation in prior decision is withdrawn, and in all other respects decision is affirmed 972
Though recommendation for corrective action in prior decision sustaining protest is withdrawn, decision on reconsideration makes further recommendations to Secretary of Navy. Naval Facilities Engineering Command's (NAVFAC) procedures for furnishing protest reports should be reviewed to ensure that all relevant documents—including individual technical evaluators' numerical scoring of proposals—are furnished to GAO. Also, since award was improper, Secretary should cause review of NAVFAC's actions in procurement to be undertaken to ensure compliance with law in future negotiated turnkey housing procurements 972

INSURANCE
Government
Self-insurer
Under long-standing policy of the Government that it is self-insurer and will not purchase commercial insurance against loss or damage to its own property, insurance should not have been purchased on a NASA exhibit loaned to a unit of the Air Force for display purposes. However, since self-insurance principle is one of policy rather than positive law and instant insurance coverage was issued in good faith, premium may be paid 1196

INTERIOR DEPARTMENT
Appropriations. (*See* **APPROPRIATIONS, Interior Department**)
Bureau of Mines
Mine inspectors
Overtime and traveltime
Mine inspectors who work first-40-hour workweeks may be compensated for time spent in travel on official business during their first 40 hours. Any time spent in nontravel work after first 40 hours is compensable overtime. B–179186, October 24, 1973, modified 994

INTERIOR DEPARTMENT—Continued
Bureau of Mines—Continued
Mine inspectors—Continued
Overtime and traveltime—Continued Page

Mine inspectors' travel, which due to nature of mine inspection work is found to be inherent part of and inseparable from their work, is compensable as regular or overtime work. However, mine inspectors are prohibited from receiving overtime compensation for any time they spend in training under Government Employees Training Act. 5 U.S.C. 4109. B–179186, October 24, 1973, modified 994

National Park Service
Park police
Compensation
Increases

Under sec. 501 of D.C. Police and Firemen's Salary Act of 1958, as amended, officers and members of U.S. Park Police and Executive Protective Service (formerly White House Police) are entitled to same rates of compensation as those granted under that Act to Metropolitan Police Force of D.C. By virtue of sec. 501, enactment of legislation by Council of D.C. increasing salaries of Metropolitan Police under 1958 Act will have effect of granting like increases to U.S. Park Police and Executive Protective Service until Congress otherwise provides 965

INTERNAL REVENUE SERVICE
Employees
Claim for additional reimbursement for temporary quarters

Internal Revenue Service employee, transferred from Sao Paulo, Brazil, to Washington, D.C., incurred 48 days of temporary quarters expenses. Reimbursement for such expenses is limited to 30 days since extension for additional 30 days may be granted only for transfers to or from Alaska, Hawaii, the territories or possessions, Puerto Rico, or the Canal Zone. 5 U.S.C. 5742a(a)(3). Claim for expenses of additional 18 days spent in temporary quarters may not be allowed 1107

LABOR DEPARTMENT
Bureau of Labor Statistics
Consumer price index
Food prices
Subsistence
Relocation expenses

Transferred employee spent $912.59 for food items in 30-day period, including $425.70 in 1 day. Because Federal Travel Regulations (FPMR 101–7) para. 2–5.4a limits reimbursement to reasonable costs of meals (including groceries consumed while in temporary quarters) and Department of Labor statistics indicate family, similar to that of employee, would spend between $329 and $413 per month, such expenses are considered unreasonable in absence of additional evidence that they were justified 1107

LEASES
Automatic Data Processing Systems
Equipment. (*See* **EQUIPMENT, Automatic Data Processing Systems, Leases**)
Parking space
Appropriations. (*See* **APPROPRIATIONS, Availability, Parking space**)

LEAVES OF ABSENCE
Vacation leave
Outside continental U.S.
Accrual
Beginning date Page
Where administrative agency establishes tour of duty of 2 years, less time spent by the employee on the immediately preceding vacation leave trip, employee begins to earn vacation leave rights for each successive tour of duty on the biennial date for the commencement of such leaves of absence ---- 1035
Alaska employees
Employee, whose duty station is at Juneau, Alaska, must be charged annual leave for each day he would otherwise work and receive pay while on vacation leave, irrespective of when he commenced or completed travel, because 5 U.S.C. 6303(d), which provides leave-free travel time for employees whose duty station is outside the United States, does not apply to travel from Alaska, which is a State ---- 1035
Travel expenses. (*See* **TRAVEL EXPENSES, Vacation leave**)

MEDICAL TREATMENT
Ambulance services
Employee, while on temporary duty, lost consciousness during a high-blood-pressure seizure. Ambulance expense for his transportation to hospital at temporary duty post is not reimbursable under Federal Travel Regulations ---- 1080

MILITARY PERSONNEL
Annuity elections for dependents
Survivor Benefit Plan. (*See* **PAY, Retired, Survivor Benefit Plan**)
Automobiles
Transportation. (*See* **TRANSPORTATION, Automobiles, Military personnel**)
Dependents
Annuity election
Survivor Benefit Plan. (*See* **PAY, Retired, Survivor Benefit Plan**)
Disability determinations
Authority
For purposes of establishing employment retention preference (5 U.S.C. 3501(a)(3) and 3502), exemption from reduction in retired pay under Dual Compensation Act (5 U.S.C. 5532(c)), and full credit for years of military service for annual leave accrual (5 U.S.C. 6303(a)) as civilian employee of Federal Govt., determinations as to whether service member's disability retirement from uniformed service resulted from injury or disease incurred as direct result of armed conflict or caused by instrumentality of war during period of war can only be made by uniformed service from which he is retired and neither employing agency nor this Office has authority to change that determination ---- 961
Disability retired pay. (*See* **PAY, Retired, Disability**)
Discharges. (*See* **DISCHARGES AND DISMISSALS, Military personnel**)
Family separation allowances. (*See* **FAMILY ALLOWANCES, Separation**)
Gratuities. (*See* **GRATUITIES**)
Pay
Retired. (*See* **PAY, Retired**)

MILITARY PERSONNEL—Continued
Record correction
Retirement status Page
Where retired service member has sought correction of military records under 10 U.S.C. 1552 and Correction Board has denied relief sought, such action is final and conclusive on all officers of U.S. and not subject to review by GAO ---------- 961
Survivor Benefit Plan. (*See* **PAY, Retired, Survivor Benefit Plan**)
Transportation
Automobiles. (*See* **TRANSPORTATION, Automobiles, Military personnel**)
Household effects. (*See* **TRANSPORTATION, Household effects, Military personnel**)

MISCELLANEOUS RECEIPTS
National forest permittee's fees
Department of Agriculture (Agriculture) may, pursuant to section 5 of Granger-Thye Act, enter into cooperative agreements with National Forest permittees whereby Agriculture maintains and operates waste disposal systems, permittees pay Agriculture their pro rata share of expenses for this operation and maintenance, and Agriculture deposits payments in cooperative trust accounts ---------- 1142

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
Exhibit loaned to Air Force (TAW)
Insurance premiums
Under long-standing policy of the Government that it is self-insurer and will not purchase commercial insurance against loss or damage to its own property, insurance should not have been purchased on a NASA exhibit loaned to a unit of the Air Force for display purposes. However, since self-insurance principle is one of policy rather than positive law and instant insurance coverage was issued in good faith, premium may be paid ---------- 1196
Procurement regulations
Subcontract awards
Review
National Aeronautics and Space Administration's (NASA) exercise of general administrative functions in determining technical approaches to problem solving is not sufficient involvement in selection of subcontractor to cause our review of subcontract award since parallel development to test multiple approaches to problem solving was reasonable and specification prepared as a result thereof for use in subcontract award permitted competition, even by protester, and NASA was not involved in selection as envisioned in 54 Comp. Gen. 767 ---------- 1220
Allegation that NASA does not possess authority to implement procedure waiving review of cost-reimbursement prime contractor award of subcontracts fails in light of fact that grant of general procurement authority carries discretion for agency to contract by any reasonable method and NASA procedure waiving review of subcontracts under stipulated circumstances is reasonable exercise of discretion and was accomplished in accordance with NASA regulations ---------- 1220

NONDISCRIMINATION
Contracts. (*See* **CONTRACTS, Labor stipulations, Nondiscrimination**)

OFFICERS AND EMPLOYEES
Ambulance services
Temporary duty. (*See* **TRAVEL EXPENSES, Temporary duty, Ambulance services**)
Compensation. (*See* **COMPENSATION**)
Dual compensation. (*See* **COMPENSATION, Double**)
Hours of work
Forty-hour week
First forty-hour basis
Overtime and traveltime Page

Mine inspectors who work first-40-hour workweeks may be compensated for time spent in travel on official business during their first 40 hours. Any time spent in nontravel work after first 40 hours is compensable overtime. B–179186, October 24, 1973, modified 994

Household effects
Transportation. (*See* **TRANSPORTATION, Household effects**)
Leaves of absence. (*See* **LEAVES OF ABSENCE**)
Moving expenses
Relocation of employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)
Overtime. (*See* **COMPENSATION, Overtime**)
Per diem. (*See* **SUBSISTENCE, Per diem**)
Promotions
Reclassified positions
Incumbent's status

Federal Labor Relations Council requested decision on legality of arbitrator's award of retroactive promotion and backpay. Arbitrator found grievant was assigned higher duties but was not given temporary promotion as provided in negotiated agreement. Award may not be implemented since new position had not yet been classified and grievant cannot be promoted to a position which did not exist 1062

Reduction-in-force
Veterans preference

Where retired service member has sought correction of military records under 10 U.S.C. 1552 and Correction Board has denied relief sought, such action is final and conclusive on all officers of U.S. and not subject to review by GAO 961

Relocation expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)
Transfers
Relocation expenses
Subsistence expenses
Reasonableness of meal costs

Although employing agency has initial responsibility to determine reasonableness of expenditures for subsistence while occupying temporary quarters, General Accounting Office has right and duty to review circumstances of each case submitted to it regarding reasonableness of such expenses 1107

OFFICERS AND EMPLOYEES—Continued
Transfers—Continued
Relocation expenses—Continued
Temporary quarters
Computation of allowable amount
Subsistence expenses Page

Employee, transferred from Sao Paulo, Brazil, to Washington, D.C., spent $912.59 for food items in 30-day period, including $425.70 in 1 day, for his family of four. Based upon U.S. Department of Labor statistics, monthly food budget for family of four in Washington, D.C., would have been between $329 and $413. Therefore, amount of food expenses should be reduced to reasonable amount in computing temporary quarters allowance ---- 1107

Subsistence expenses
High cost of living area

Determination of reasonableness of expenditures of employee for subsistence while occupying temporary quarters may be made (by employing agency or GAO)by reference to statistics and other information gathered by Government agencies, such as U.S. Department of Labor, Bureau of Labor Statistics, regarding living costs in relevant area ---- 1107

Reasonableness of meal costs

Transferred employee spent $912.59 for food items in 30-day period, including $425.70 in 1 day. Because Federal Travel Regulations (FPMR 101–7) para. 2–5.4a limits reimbursement to reasonable costs of meals (including groceries consumed while in temporary quarters) and Department of Labor statistics indicate family, similar to that of employee, would spend between $329 and $413 per month, such expenses are considered unreasonable in absence of additional evidence that they were justified ---- 1107

Time limitation

Internal Revenue Service employee, transferred from Sao Paulo, Brazil, to Washington, D.C., incurred 48 days of temporary quarters expenses. Reimbursement for such expenses is limited to 30 days since extension for additional 30 days may be granted only for transfers to or from Alaska, Hawaii, the territories or possessions, Puerto Rico, or the Canal Zone. 5 U.S.C. 5742a(a)(3). Claim for expenses of additional 18 days spent in temporary quarters may not be allowed ---- 1107

Travel by foreign air carriers. (*See* **TRAVEL EXPENSES, Air travel, Foreign air carriers, Prohibition, Availability of American carriers)**
Travel expenses. (*See* **TRAVEL EXPENSES)**
Traveltime
Status for overtime compensation. (*See* **COMPENSATION, Overtime, Traveltime)**
Wage board
Compensation. (*See* **COMPENSATION, Wage board employees)**

PARKING FACILITIES
Federal Aviation Administration
Arbitration award implementation Page
Federal Aviation Administration (FAA), Department of Transportation, questions propriety of implementing three arbitration awards requiring FAA to provide parking accommodations for employees. FAA does not consider it would be justified in making a determination, as required for expenditure of funds by applicable regulations, that such leased parking accommodations are necessary to avoid impairment of its operational efficiency. Inasmuch as FAA regulations incorporated by reference in the collective bargaining agreement have already made the required determination, FAA is not required to make a further determination. Accordingly, FAA may expend appropriated funds to implement awards 1197

PAY
Civilian employees. (*See* **COMPENSATION**)
Retired
Disability
Disability not result of active duty
Where retired service member has sought correction of military records under 10 U.S.C. 1552 and Correction Board has denied relief sought, such action is final and conclusive on all officers of U.S. and not subject to review by GAO 961
Survivor Benefit Plan
Survivor Benefit Plan *v.* Civil Service Retirement Survivorship Plan Election
A military retiree, who elects to participate in Survivor Benefit Plan (SBP), 10 U.S.C. 1447–1455, and who later elects to combine his military service credits with his civil service credits for the purpose of receiving a civil service annuity, may elect to participate in the civil service survivor benefits program at a level lower than that which he has in the SBP 1178
Waiver for civilian retirement benefits
Revocation
Survivor Benefit Plan participation resumed
During period that an SBP participant has in effect a waiver of military retired pay for purposes of receiving a civil service annuity based on combining military service with civil service, under provisions of 10 U.S.C. 1450(d) and 1452(e) such SBP participation is suspended, but if waiver is no longer effective for any reason, previously elected SBP participation would be resumed and military retired pay reduced thereafter 1178

POWERS OF ATTORNEY
Revocation
Death
Incident to evacuation of U.S. personnel and local national employees from Vietnam, employees turning in Vietnamese piasters were given receipts on the bases of which Treasury checks were subsequently issued. Checks for payees still in Vietnam were placed in special deposit account pursuant to 31 U.S.C. 123–128 for benefit of payees and may not be paid out to relatives in U.S. who claim power of attorney to receive proceeds 1234

PRESIDENT
Authority
Military personnel utilization Page
Section 3 of War Powers Resolution requires the President to consult with Congress before and during introduction of U.S. Armed Forces into hostilities or situations clearly indicating imminent hostilities. Legislative history of section 3 is clear that requirement is not satisfied by token statement of actions intended to be taken. While evidence in hearings subsequent to *Mayaguez* rescue suggests President merely informed Congress of decisions already made, requirements of section 3 are not sufficiently definitive to establish violation in present circumstances ---- 1081
Protection of American lives and property abroad
President possesses some unilateral constitutional power to protect lives and property of Americans abroad, even in absence of specific congressional authorization. Courts have sustained or alluded to such authority and its exercise has considerable historical support. Language of War Powers Resolution as whole indicates it was not meant to directly restrict President's power, its basic purpose being to involve Congress in decision-making process of future wars. Thus War Powers Resolution in effect neither initially precludes nor sanctions military initiatives by the President for these purposes ---- 1081
Rescue of foreign nationals
Seven funding limitation statutes prohibit use of appropriated funds for combat activity in Indochina. While legislative history of seven acts is not entirely clear respecting President's rescue power, there are some specific statements that such power is not restricted, and the overall intent of seven acts was to curtail bombing and offensive military action in Southeast Asia. Therefore, President's recent evacuation of Americans from Saigon did not conflict with such statutes ---- 1081
War Powers Resolution effect
Section 4 of War Powers Resolution requires President to report to Congress the basis for, facts surrounding, and estimated duration of introduction of U.S. Armed Forces in three types of situations. However, since Resolution does not expressly require President to specify which situation prompted the report and such specification is immaterial anyway since final decision of initiation of section 5 actions is up to Congress, it appears that the President met section 4 requirements ---- 1081

PROPERTY
Public
Damage, loss, etc.
Carrier's liability
Burden of proof
Mobile home delivered to carrier in good condition, delivered to consignee in damaged condition, and ascertainment of amount of damage establishes prima facie case. *Missouri Pacific R.R.* v. *Elmore & Stahl*, 377 U.S. 134, 138 ---- 1209
Carrier has burden of proof to show that inherent defect was sole cause of damage ---- 1209

PROPERTY—Continued
Public—Continued
Damage, loss, etc.—Continued
Carrier's liability—Continued
Carmack Amendment to ICC Act Page
Mobile home carriers are subject to Carmack Amendment, 49 U.S.C. 20(11) 1209
Common law rule
At common law common carrier could not escape liability by showing absence of negligence 1209
Durables. (*See* **PROPERTY, Public, Damage loss, etc., Durables**)
Prima facie case. (*See* **PROPERTY, Public, Damage loss, etc., Carrier's liability, Burden of proof**)
Durables
Cases involving perishable goods apply to durable goods 1209
Surplus
What constitutes
Direct assignment by Govt. of purchase option under ADPE lease to third party lessee for purpose of accomplishing leaseback of equipment to Govt. under more favorable terms constitutes procurement transaction rather than disposal of property and therefore laws governing disposal of Govt. property are not for application 1012

REGULATIONS
Travel
Joint
Military personnel
Transportation of household effects, etc.
Dishonorable discharge
Regulations may be promulgated under 37 U.S.C. 406(h) to authorize transportation of household effects and a private automobile of a member of the uniformed services serving overseas, without dependents, incident to the member's discharge under conditions other than honorable, similar to the transportation authorized members with dependents discharged in such circumstances. 44 Comp. Gen. 574 will no longer be followed; 45 Comp. Gen. 442 and 49 *id.* 695, overruled in part 1183

SMALL BUSINESS ADMINISTRATION
Contracts
Awards to small business concerns. (*See* **CONTRACTS, Awards, Small business concerns**)

SUBSISTENCE
Per diem
Thirty-minute rule
Arrival and departure time evidence
Employee performing temporary duty (TDY) assignment was denied reimbursement of per diem for quarter beginning 6 p.m. on June 6, 1975, since he returned to residence at 6:15 p.m. after returning from TDY by earliest possible air transportation. Agency interprets provisions of Federal Travel Regulations (FPMR 101–7) para. 1–7.6e concerning 30-minute rule as requiring denial of employee's claim, absent "compelling extenuating circumstances." While agency's determination concerning "official necessity" under para. 1–7.6e will not be disturbed unless arbitrary or capricious, employee's claim may be allowed since record fully supports employee's contention that due to official necessity, he could not have arrived prior to beginning of quarter 1186

TAXES
Bid evaluation. (*See* **BIDS, Evaluation, Tax inclusion or exclusion**)
Contract matters. (*See* **CONTRACTS, Tax matters**)
Federal
Excise
Contract price adjustment Page
Protest that low bidder did not include Federal Excise Tax (F.E.T.) in its bid price under invitation which provided that all Federal, State and local taxes (including F.E.T.) were included in bid price and resulting contract price is denied as bidder took no exception to requirement and unless bid affirmatively shows that taxes are excluded, it is presumed that taxes are included in bid price 1159
Government contracts
Inclusion or exclusion in bids. (*See* **BIDS, Evaluation, Tax inclusion or exclusion**)

TRANSPORTATION
Air carriers
Foreign
American carrier availability
Authority to use foreign aircraft
Consistent with the Fly America Guidelines, traveler should use certificated service available at point of origin to furthest practicable interchange point on a usually traveled route. Where origin or interchange point of such route is not serviced by a certificated carrier, noncertificated service should be used to the nearest practicable interchange point to connect with certificated service. Travelers will not be held accountable for nonsubstantial differences in distances between points serviced by certificated carriers. The foregoing principles are not controlling where their application results in use of noncertificated service for actual travel between the United States and another continent 1230
Loss and damage liability
Claim against air carrier for damage to shipment moved on Govt. bill of lading is not subject to notice requirements of governing air tariff because use of Govt. bill of lading—which in Condition 7 contains waiver of usual notice requirements—is required by air tariff and creates ambiguity over applicability of notice requirements which is resolved in favor of shipper 958
Automobiles
Military personnel
Advance shipments
Discharge of member other than honorable
Regulations may be promulgated under 37 U.S.C. 406(h) to authorize transportation of household effects and a private automobile of a member of the uniformed services serving overseas, without dependents, incident to the member's discharge under conditions other than honorable, similar to the transportation authorized members with dependents discharged in such circumstances. 44 Comp. Gen. 574 will no longer be followed; 45 Comp. Gen. 442 and 49 *id.* 695, overruled in part 1183

TRANSPORATATION—Continued
Automobiles—Continued
Military Personnel—Continued
Ferry transportation
English Channel Page

Member who is authorized travel by privately owned vehicle (POV) as advantageous to the Government incident to temporary duty at various places in Switzerland and Germany away from his permanent duty station in London, England, is not entitled to reimbursement of full fare including charge for transportation of an automobile by Hovercraft from Dover to Calais and return; however, he may be reimbursed an amount reasonably representing that part of the fare attributable to personal travel. 49 Comp. Gen. 416, modified ---------- 1072

Bills of lading
Contract status

Terms of contract of carriage under which carrier transports goods include both bill of lading and published applicable tariff ---------- 958

Cargo Preference Act
Shipments to Chittagong, Bangladesh

LASH (Lighter Aboard Ship) services to be performed partly with privately owned United States-flag commercial vessels and partly with a foreign-flag FLASH system to deliver certain Government-sponsored cargoes to port of Chittagong in Bangladesh contravenes the 1954 Cargo Preference Act because direct service to Chittagong is available by U.S.-flag breakbulk vessels and because special circumstances (here, geographic configuration of port precluding use of normal LASH unloading operations) cannot be used to circumvent the cargo preference laws ---- 1097

Carmack Amendment of 1906
Damage to mobile home shipments

Mobile home carriers are subject to Carmack Amendment, 49 U.S.C. 20(11) ---------- 1209

Carriers
Motor shipments. (*See* **TRANSPORTATION, Motor carrier shipments**)

Claims
Generally. (*See* **CLAIMS, Transportation**)

Household effects
House trailer shipments
Damages en route

Mobile home delivered to carrier in good condition, delivered to consignee in damaged condition, and ascertainment of amount of damage establishes prima facie case. *Missouri Pacific R.R.* v. *Elmore & Stahl*, 377 U.S. 134, 138 ---------- 1209

Military personnel
Advance shipments
Discharge of member other than honorable

Regulations may be promulgated under 37 U.S.C. 406(h) to authorize transportation of household effects and a private automobile of a member of the uniformed services serving overseas, without dependents, incident to the member's discharge under conditions other than honorable, similar to the transportation authorized members with dependents discharged in such circumstances. 44 Comp. Gen. 574 will no longer be followed; 45 Comp. Gen. 442 and 49 *id.* 695, overruled in part ------ 1183

TRANSPORATION
Rates
Tariffs
Ambiguous Page
Carrier's tariff item excluding it from liability is ambiguous, and appears to be rule exempting carrier from own negligence, and therefore is in violation of 49 U.S.C. 20(11) ---- 1209
Construction
Against carrier
Claim against air carrier for damage to shipment moved on Govt. bill of lading is not subject to notice requirements of governing air tariff because use of Govt. bill of lading—which in Condition 7 contains waiver of usual notice requirements—is required by air tariff and creates ambiguity over applicability of notice requirements which is resolved in favor of shipper ---- 958
Filed with Civil Aeronautics Board
Validity
Provisions of tariffs filed with Civil Aeronautics Board are valid unless and until rejected by the Board ---- 958
Tariffs. (*See* **TRANSPORTATION, Rates, Tariffs**)
Trailers
Trailer shipments
Civilian personnel. (*See* **TRANSPORTATION, Household effects, House trailer shipments**)
Travel allowance
Military personnel
Travel expenses. (*See* **TRAVEL EXPENSES, Military personnel**)
Vessels
Foreign
American vessel availability
While on vacation leave, employee traveled from Victoria, British Columbia, to Prince Rupert, British Columbia, by foreign bottom carrier. Although such travel was not authorized, reimbursement may be made if otherwise proper since route was reasonable and no American vessel was available for travel ---- 1035

TRAVEL EXPENSES
Air travel
Foreign air carriers
Prohibition
Availability of American carriers
Consistent with the Fly America Guidelines, traveler should use certificated service available at point of origin to furthest practicable interchange point on a usually traveled route. Where origin or interchange point of such route is not serviced by a certificated carrier, noncertificated service should be used to the nearest practicable interchange point to connect with certificated service. Travelers will not be held accountable for nonsubstantial differences in distances between points serviced by certificated carriers. The foregoing principles are not controlling where their application results in use of noncertificated service for actual travel between the United States and another continent ---- 1230
Foreign vessel use. (*See* **TRANSPORTATION, Vessels**)

TRAVEL EXPENSES—Continued
Military personnel
Temporary duty
Hovercraft crossing of English Channel Page

Although there is no authority in current regulations under which full fare (including that part attributable to transportation of the automobile) for Hovercraft crossing of the English Channel may be paid incident to temporary duty travel of military personnel, it does not appear that payment of such full fare would be objectionable under appropriate regulations if travel by automobile, including transoceanic ferry service, is specifically authorized as advantageous to the Government since the transportation of the automobile may be considered as incident to authorized travel of the member in appropriate circumstances. 1072

Permanent change of station
Relocation expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)
Temporary duty
Ambulance services

Employee, while on temporary duty, lost consciousness during a high-blood-pressure seizure. Ambulance expense for his transportation to hospital at temporary duty post is not reimbursable under Federal Travel Regulations 1080

Vacation leave
Renewal agreement travel

Notwithstanding Federal Travel Regulations (FPMR 101–7) para. 1–7.5, round-trip travel expenses of employee incident to vacation leave may be paid pursuant to FTR para. 2–1.5h(2)(b) because leave provisions of former paragraph, dealing with interruptions of official travel, are inapplicable to overseas tour renewal agreement travel which is governed by latter section 1035

UNIONS
Agreements
Wage increases
Wage board employees

Arbitrator's award setting effective date for increase in wage rates at Yakima Project Office, Bureau of Reclamation, may be fully implemented where governing collective-bargaining agreement calls for arbitration of unresolved negotiation issues involving wage rates, and record is clear that impasse existed on date collective-bargaining agreement became effective, and that, on same date, it was clear that there would be substantial increase in wage rates. Agencies and unions may negotiate preliminary agreement setting effective date for wage increases before exact amount of increase is known; therefore, arbitrator may resolve same issue 1006

VEHICLES
Rental
Credit card use

Pursuant to court decisions holding that liability protection of Truth in Lending Act for unauthorized use of credit cards extends to all credit cards, whether used for business or consumer purposes, Government is also protected under Act. *Equal Employment Opportunity Commission*, B–180512, May 17, 1974, 74–1 CPD 264, is overruled 1181

Transportation. (*See* **TRANSPORTATION, Automobiles**)

VESSELS
Travel. (*See* **TRANSPORTATION, Vessels, Foreign**)

VIETNAM
Evacuation
Foreign nationals
Propriety of expenditures Page

Seven funding limitation statutes prohibit use of appropriated funds for combat activity in Indochina. While legislative history of seven acts is not entirely clear respecting President's rescue power, there are some specific statements that such power is not restricted, and the overall intent of seven acts was to curtail bombing and offensive military action in Southeast Asia. Therefore, President's recent evacuation of Americans from Saigon did not conflict with such statutes---------- 1081

There is no significant support for constitutional presidential authority to rescue foreign nationals as such. However, in the case of Saigon evacuation, since decision to rescue foreign nationals was determined to be incidental to and necessary for rescue of Americans, General Accounting Office cannot say expenditure of fund for such evacuation was improper-- 1081

Undelivered checks issued to evacuees

Incident to evacuation of U.S. personnel and local national employees from Vietnam, employees turning in Vietnamese piasters were given receipts on the bases of which Treasury checks were subsequently issued. Checks for payees still in Vietnam were placed in special deposit account pursuant to 31 U.S.C. 123–128 for benefit of payees and may not be paid out to relatives in U.S. who claim power of attorney to receive proceeds-- 1234

WHITE HOUSE
Executive Protective Service
Compensation
Increases

Under sec. 501 of D.C. Police and Firemen's Salary Act of 1958, as amended, officers and members of U.S. Park Police and Executive Protective Service (formerly White House Police) are entitled to same rates of compensation as those granted under that Act to Metropolitan Police Force of D.C. By virtue of sec. 501, enactment of legislation by Council of D.C. increasing salaries of Metropolitan Police under 1958 Act will have effect of granting like increases to U.S. Park Police and Executive Protective Service until Congress otherwise provides---------- 965

WORDS AND PHRASES
Auction technique

If information in initial proposal(s) is improperly disclosed, giving one or more offerors competitive advantage, it is desirable to make award on basis of initial proposals, if possible, because conduct of negotiations and submission of best and final offers may constitute use of prohibited auction technique---------- 1066

Breakout
Key component breakout

Agency's refusal to break out key component of improved sonar system for separate procurement is justified in view of agency's judgment that such breakout would involve unacceptable technical (due in part to increased concurrency of development and production efforts) and delivery risks as well as increased costs---------- 1019

WORDS AND PHRASES—Continued

"Commercial item" Page

Use of indefinite delivery type of contract to procure advertising services is not improper since applicable regulations provide only that agencies may use basic ordering agreement for obtaining advertising services but do not preclude use of other contractual vehicles and since advertising services are a "commercial item."---------- 1111

"Estimated cost"

Provision in cost-type indefinite quantity contract specifying that fee to be paid on each delivery order will be based on "costs being paid" does not render contract contrary to statutory prohibition against cost-plus-percentage-of-cost contracts since contract itself does not confer entitlement to payment and fee for actual delivery order is being based on "estimated cost" of each order---------- 1111

Executive Protective Service (formerly White House Police)

White House Police (changed to Executive Protective Service)

Under sec. 501 of D.C. Police and Firemen's Salary Act of 1958, as amended, officers and members of U.S. Park Police and Executive Protective Service (formerly White House Police) are entitled to same rates of compensation as those granted under that Act to Metropolitan Police Force of D.C. By virtue of sec. 501, enactment of legislation by Council of D.C. increasing salaries of Metropolitan Police under 1958 Act will have effect of granting like increases to U.S. Park Police and Executive Protective Service until Congress otherwise provides---------- 965

FLASH (Float On/Float Off Feeder LASH Vessel)

LASH (Lighter Aboard Ship)

LASH (Lighter Aboard Ship) services to be performed partly with privately owned United States-flag commercial vessels and partly with a foreign-flag FLASH system to deliver certain Government-sponsored cargoes to port of Chittagong in Bangladesh contravenes the 1954 Cargo Preference Act because direct service to Chittagong is available by U.S.-flag breakbulk vessels and because special circumstances (here, geographic configuration of port precluding use of normal LASH unloading operations) cannot be used to circumvent the cargo preference laws---------- 1097

Hovercraft

Member who is authorized travel by privately owned vehicle (POV) as advantageous to the Government incident to temporary duty at various places in Switzerland and Germany away from his permanent duty station in London, England, is not entitled to reimbursement of full fare including charge for transportation of an automobile by Hovercraft from Dover to Calais and return; however, he may be reimbursed an amount reasonably representing that part of the fare attributable to personal travel. 49 Comp. Gen. 416, modified---------- 1072

Leasebacks

While GSA proposed leaseback arrangements tentatively are approved, GAO recommends that GSA should continue to seek adequate ADP Fund capitalization to finance ADPE purchases. Furthermore, each proposed leaseback should be approved by GSA (no blanket delegation to agencies) and lease or purchase determinations should be made and documented before leasebacks are used---------- 1012

WORDS AND PHRASES—Continued

Mayaguez crew — Page

Use of funds to make punitive bombing strikes, *i.e.*, those unrelated to protection of *Mayaguez* crew being rescued or forces protecting crew would appear to be in contravention of seven funding limitation statutes. However, Executive branch testimony indicates that bombing strikes were related to the rescue operation 1081

Mayaguez rescue

Section 3 of War Powers Resolution requires the President to consult with Congress before and during introduction of U.S. Armed Forces into hostilities or situations clearly indicating imminent hostilities. Legislative history of section 3 is clear that requirement is not satisfied by token statement of actions intended to be taken. While evidence in hearings subsequent to *Mayaguez* rescue suggests President merely informed Congress of decisions already made, requirements of section 3 are not sufficiently definitive to establish violation in present circumstances 1081

Realism of proposed costs

Agency's cost evaluation of proposals is not subject to objection where agency's determination of realism of proposed costs is supported by reasonable basis, even though agency essentially relies on information contained in proposals rather than seeking independent verification of each item of proposed costs, since extent to which proposed costs will be examined is matter for agency 1111

Transoceanic ferry service

Although there is no authority in current regulations under which full fair (including that part attributable to transportation of the automobile) for Hovercraft crossing of the English Channel may be paid incident to temporary duty travel of military personnel, it does not appear that payment of such full fare would be objectionable under appropriate regulations if travel by automobile, including transoceanic ferry service, is specifically authorized as advantageous to the Government since the transportation of the automobile may be considered as incident to authorized travel of the member in appropriate circumstances. 1072

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