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[B-185177]

Contracts—Negotiation—Offers or Proposals—Oral—Offer and Acceptance

Parties intended to be bound by agency's oral acceptance of offer to purchase rubber where past course of dealing and language of solicitation indicated that execution of written contracts was for purpose of confirming pre-existing agreement.

Contracts—Offer and Acceptance—Telephone—Enforceable Contract

In absence of statute or regulation requiring that Government sales contracts be in writing, telephonic offer to purchase stockpile rubber followed by timely telephonic acceptance creates valid and enforceable contract.

In the matter of Robert P. Maier, Inc., March 1, 1976:

The General Services Administration (GSA) has submitted for our determination the question whether a series of telephonic exchanges between a purchaser and GSA for the purchase of rubber from the national stockpile constituted valid and enforceable contracts with the purchaser, Robert P. Maier, Inc.

Pursuant to the authority of the Act of September 2, 1965, Public Law 89-168, 79 Stat. 647, GSA issued "Solicitation of Offers for Crude Natural Rubber PMDS-RUB-1" on June 28, 1973. Part 2(a) of the Instructions to Offerors states:

> Telephone offers to purchase crude natural rubber will be received and considered each Government business day * * *.

Part 2(d) provides:

> Each offeror will be advised *by telephone* of the *acceptance* or rejection of his offer as early as possible on the date the offer is received. *Such telephone acceptance shall constitute notice of award.* A *confirming* sales contract, will be mailed to each Purchaser for its execution and subsequent execution by GSA. [Italic supplied.]

On November 2, 1973, March 12, 18, and 27, 1974, and May 6, 1974, Maier telephonically offered to purchase an aggregate amount of 2,100 long tons of rubber from GSA. By telephone, a GSA contracting officer accepted the offers. The sales were recorded in GSA's Daily Record of Rubber Sales. Since that time, GSA claims that it has been ready and willing to deliver the rubber, but that no delivery instructions have been received from Maier. No confirmatory contracts have been executed.

In response to GSA's efforts to enforce the oral contracts, Maier contends that it has incurred no contractual liability because (a) the offer was not formalized and there is no executed agreement, (b) the terms of purchase were modified from credit to cash in advance, and

(c) delivery was not tendered. By letter of October 23, 1975, the Acting General Counsel of GSA requested our decision on the validity of the subject oral contracts. As the modification of Maier's line of credit in October 1974, and the failure to tender delivery took place well after telephonic acceptance, those contentions are irrelevant to the question of whether valid contracts arose out of the telephonic exchange, and will not be considered in our decision.

As a general rule, the intention of the parties determines whether a contract takes effect before a contemplated writing is executed. *Warrior Constructors Inc.* v. *International Union of Operating Engineers, Local 926*, 383 F. 2d 700, 708 (5th Cir. 1967); Corbin, Contracts § 30 (1963); Williston on Contracts, 3rd Ed. § 28A. In the instant case, the solicitation stated that offer and acceptance would take place over the telephone with a "confirming sales contract" to follow. GSA contends that the use of the word "confirming" indicates that the parties intended a pre-existing obligation. Moreover, GSA points to the fact that, in the past, Maier accepted partial or total deliveries before contract execution as evidence of Maier's intent to be bound by the oral agreement. While Maier has denied this fact, we are advised that deliveries were made from January 18, 1973, to June 6, 1973, pursuant to a telephonic acceptance of October 4, 1972, and that the confirmatory contract by Maier was not executed until September 18, 1973. Similarly, a telephonic acceptance of April 16, 1973, did not result in a writing until April 23, 1973, whereas shipments took place between April 16 and May 4. We believe that this past course of dealing between the parties indicates that the parties intended to confirm, not to create, legal obligations by executing the written contracts.

Maier points to section 5(d) of the solicitation's Conditions for Sale of Rubber, "Certification of Independent Price Determination," as evidence that GSA did not intend to be bound prior to execution of a writing. That provision states in part that if an offeror modifies or deletes the certification to the effect that the offeror has not disclosed its price to any competitor, "the bid or proposal will not be considered for award unless the bidder or offeror furnishes with the bid or proposal a signed statement [demonstrating to the head of the selling agency that the disclosure was not made for the purpose of restricting competition]." We would agree that this provision would prevent the Government from orally accepting an oral offer in which it was indicated that the bidder took exception to the required certification. Under those circumstances, acceptance could not take place until the offeror's written statement was received by the Government. There is no indication, however, that the Government and the offeror did not intend to be bound by a telephonic acceptance, once given.

Maier also contends that GSA "reserved the right to refuse/decline a contract" by reserving the right to be the final executor of the confirming contract. There is no evidence to support that contention, since the solicitation clearly states that acceptance or rejection will take place "by telephone" on the date the offer is received.

Remaining to be resolved is the question whether an oral Government sales contract is enforceable. In *Escote Manufacturing Company* v. *United States*, 169 F. Supp. 483, 144 Ct. Cl. 452 (1959), it was held that, if all the elements of a contract were present, both the Government and private contractors could enforce an oral sales agreement made between them, even though the agreements were not subsequently reduced to writing. In *Escote*, a bidder for surplus Government property sued to recover its bid deposit, alleging that the Government never accepted its offer because the contracting officer failed to sign the acceptance form. In denying the plaintiff's claim, the court stated that the Government accepted the plaintiff's offer when the contracting officer notified the bidder that its bid deposit was being retained and requested a check for the balance due under the contract. Of particular importance to the instant case, the court stated:

> Inasmuch as a contract was entered into between plaintiff and defendant, it would make no difference whether the signature of the contracting officer was on the acceptance form. Plaintiff points to no statute or regulation requiring contracts of this nature to be in writing, and we know of none. Consequently, an oral contract in this instance would be just as binding on the plaintiff as well as the Government as though it were in writing. * * * Thus it seems quite apparent that the contract forms were sent to plaintiff merely to meet the requirements of the Government's bookkeeping system, rather than to create a binding agreement. 169 F. Supp. at 488.

In *Penn-Ohio Steel Corporation* v. *United States*, 354 F. 2d 254, 173 Ct. Cl. 1064 (1965), the court ruled on the applicability of a State statute of frauds stating:

> * * * Federal not local law governs the validity and construction of Federal contracts, and under Federal law there is no requirement that contracts be in writing. 354 F. 8d 269.

Maier argues that 31 U.S. Code § 200 (1970) and 50 U.S.C. § 98 (1970), "when taken together, indicate the need for a written instrument establishing the relationship of the parties for all federal contracts." At the outset, we note that the instant sale of rubber was not made pursuant to 50 U.S.C. § 98 (1970), dealing with the acquisition and development of strategic raw materials, but pursuant to the Act of September 2, 1965, Public Law 89–168, 79 Stat. 647, which authorizes the disposal of natural rubber held in the national stockpile. Whether or not the former statute impliedly requires a writing as claimed by Maier, the latter contains no such requirement, either ex-

press or implied. Thus, the only remaining statutory requirement cited by Maier is 31 U.S.C. § 200 (a) (1) (1970) which states:

> After August 26, 1954, no amount shall be recorded as an obligation of the Government of the United States unless it is supported by documentary evidence of—
>
> (1) a binding agreement in writing between the parties thereto, including Government agencies, in a manner and form and for a purpose authorized by law executed before the expiration of the period of availability for obligation of the appropriation or fund concerned for specific goods to be delivered, real property to be purchased or leased, or work or services to be performed;

Our Office has consistently viewed this statute as establishing a procedural requirement for the purpose of facilitating the accurate determination of the amounts which Government agencies have obligated against outstanding appropriations. 51 Comp. Gen. 631 (1972).

In *United States* v. *American Renaissance Lines, Inc.*, 494 F. 2d 1059 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1020 (1974), the court held that 31 U.S.C. § 200, while not following "the typical statute of frauds format," rendered unenforceable an oral charter agreement between the Commodity Credit Corporation, a Government agency, and a private shipper for the carriage of foodstuffs. However, as Maier points out, the statute, as interpreted by the Court of Appeals, "pertains to obligation of funds only" and the instant sales of rubber do not present a question involving the obligation of appropriated funds. Therefore, 31 U.S.C. § 200 is inapplicable and does not bar enforcement of these oral sales contracts.

Finally, Maier has objected to our consideration of this question because the issues are currently pending before the GSA Board of Contract Appeals. However, as GSA points out, the sole issue presented to us is one of law: whether any contracts were created by the series of oral communications between Maier and the Government. We are not called upon to resolve any dispute of fact arising under the contract. Under these circumstances, we think consideration of the issue by our Office is appropriate. *See* 53 Comp. Gen. 167 (1973).

[B–183960]

Compensation—Promotions—Temporary—Retroactive

Employee was advised prior to a detail action that, if she so elected, she could be promoted temporarily but would not receive per diem while at temporary duty station. She elected to receive per diem in lieu of temporary promotion. Although a temporary promotion was discretionary, the agency had no right to require employee to make such a choice. Since the agency states that the employee would have been promoted but for the improper action, an unjustified or unwarranted personnel action occurred and retroactive promotion with backpay for the period of detail may be made.

In the matter of Ruth Wilson—retroactive temporary promotion, March 2, 1976:

The Department of the Treasury seeks authority to grant a temporary retroactive promotion for Ms. Ruth Wilson, an Employee Development Specialist, GS–12, in the Philadelphia Regional Office of the Internal Revenue Service (IRS), under the circumstances stated below.

According to the submission dated May 9, 1975, from Warren F. Brecht, Assistant Secretary for Administration, Ms. Wilson was detailed to the Newark District as District Training Officer, a GS–13 position, from December 10, 1973, to March 1, 1974. Prior to the detail Ms. Wilson was advised that she could be promoted on a temporary basis to the GS–13 position, but that, if she so elected, such action would constitute a change in her post of duty and she would not be entitled to a per diem allowance during the detail. Ms. Wilson elected to receive per diem instead of the temporary promotion.

Ms. Wilson later filed an internal grievance action stating that she was denied the promotion based on a misinterpretation of regulations. On review, the national office of IRS advised the regional office "that an employee assigned to a place other than his permanent duty station, at such a distance that it is not practicable for the employee to travel there daily, is entitled to per diem during the stay, even if a temporary promotion is given." Thereupon, the regional office requested authority to compensate Ms. Wilson for performing the duties of the GS–13 position during the period of the detail.

In summary, the submission to us states "[h]ere the agency had decided to temporarily promote Ms. Wilson, if she so elected. Her failure to so elect was based upon the misinformation furnished by the agency." The Department states its awareness of our decisions concerning the granting of retroactive promotions and requests our determination in light of the fact that Ms. Wilson would have been temporarily promoted if she had not relied on erroneous information furnished by the agency.

Authority under which an agency may retroactively adjust an employee's compensation is contained in the Back Pay Act of 1966, codified in 5 U.S. Code § 5596 (1970), which provides, in part, as follows:

(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—

(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the

employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period * * *.

The criteria for determining when an unjustified or unwarranted personnel action has occurred are set forth by the Civil Service Commission in 5 C.F.R. § 550.803(d) and (e) (1975) which provide:

(d) To be unjustified or unwarranted, a personnel action must be determined to be improper or erroneous on the basis of either substantive or procedural defects after consideration of the equitable, legal, and procedural elements involved in the personnel action.

(e) A personnel action referred to in section 5596 of title 5, United States Code, and this subpart is any action by an authorized official of an agency which results in the withdrawal or reduction of all or any part of the pay, allowances, or differentials of an employee and includes, but is not limited to, separations for any reason (including retirement), suspensions, furloughs without pay, demotions, reductions in pay, and periods of enforced paid leave whether or not connected with an adverse action covered by Part 752 of this chapter.

The Department of the Treasury states its doubts as to its authority to grant a retroactive temporary promotion to Ms. Wilson because of our decisions stating that "as a general rule an administrative change in salary may not be made retroactively effective in the absence of a statute so providing. 26 Comp. Gen. 706 (1947), 39 Comp. Gen. 583 (1960), 40 Comp. Gen. 207 (1960)." The Department also notes, however, that we have allowed retroactive salary adjustments where administrative errors have deprived an employee of a right granted by statute or regulation or have resulted in a failure to carry out nondiscretionary administrative regulations or policies as, for example, in 21 Comp. Gen. 369, 376 (1941), and 34 *id.* 380 (1955).

Those decisions predated the enactment of the Back Pay Act of 1966, 5 U.S.C. § 5596, and, although we have continued to follow the earlier decisions, we have recognized that the 1966 Act provided additional authority to make retroactive salary adjustments and have recognized that the erroneous actions involved in the earlier decisions would also constitute "unjustified or unwarranted personnel action[s]" under 5 U.S.C. § 5596 (1970), and consequently be remediable by the payment of backpay. 54 Comp. Gen. 312 (1974), 54 *id.* 435 (1974), 54 *id.* 888 (1975). Since 5 U.S.C. § 5596 provides broad statutory authority to rectify erroneous personnel actions by providing backpay to employees injured by such actions, it effectively covers those cases which previously could only be handled under our "administrative error" exceptions to the prohibition against retroactive salary payments. Also, we believe that instances involving unjustified or unwarranted personnel actions are taken outside of the rule against retroactivity by the Back Pay Act of 1966, *supra*. Hence, in the present case and in the future, we will apply the standards of 5 U.S.C. § 5596 to such cases.

Here the regional office of IRS, in exercising its discretionary authority to promote Ms. Wilson on a temporary basis, gave her a

choice between the promotion or per diem in lieu of subsistence in the mistaken conception that a temporary promotion effected a change of station. The record indicates that Ms. Wilson was to remain in the Newark District only during the period of the detail December 10, 1973, to March 1, 1974, not permanently. Since the detail away from Ms. Wilson's station was for a short period of time and she was to return to her old station, it is clear that a temporary promotion during the detail would not effect a change of station. Under 5 U.S.C. § 5702(a) (1970), an employee is entitled to a per diem allowance prescribed by the agency concerned for official travel away from his official station. Therefore, the choice offered her was improper. See generally *Matter of Levine*, 54 Comp. Gen. 310 (1974).

The IRS national office has found that the regional office erred in failing to properly advise Ms. Wilson. The Department of the Treasury, in submitting the matter to us, states that "Ms. Wilson would have been temporarily promoted if she had not relied on erroneous information supplied by the agency."

We, therefore, hold that an unjustified or unwarranted personnel action occurred that has resulted in the loss of pay for Ms. Wilson. As pointed out in 54 Comp. Gen. 1071(1975), an unjustified action may involve an act of omission including failure to promote. In the instant case Ms. Wilson was offered an improper choice between a temporary promotion and per diem, and, but for this improper choice, Ms. Wilson would have received a temporary promotion. In fact, as stated above, the agency had decided to process a temporary promotion prior to the commencement of the detail contingent upon her election to forego a per diem. Under these circumstances the general rule against retroactive promotions stated in 54 Comp. Gen. 263 (1974) and prior decisions does not apply.

Ms. Wilson is entitled to a retroactive temporary promotion to GS–13 and an adjustment of compensation for the period from December 10, 1973, to March 1, 1974, if otherwise proper.

[B–183830]

Housing—"Turnkey" Developers—Contracts—Negotiated Procedures

Although there were shortcomings and omissions in proposal of awardee under Navy negotiated fixed price "turnkey" family housing procurement and relatively minor inconsistencies and errors in technical evaluation of protester's and awardee's proposal, determination by Navy, in its broad discretion, that awardee had highest technically evaluated proposal had reasonable basis, and initial proposal award based upon lowest dollar per technical quality point ratio to awardee, who had higher priced, higher technically rated proposal, was reasonable despite protester's over $600,000 lower offered price.

Contracts—Negotiation—Competition—Discussions With All Offerors Requirement—Written or Oral Negotiations

Appropriateness of Navy's failure to conduct discussions with offerors within competitive range in fixed price "turnkey" family housing procurements and its award on initial proposal basis is questionable, in view of many varied acceptable approaches of meeting "turnkey" projects' performance-type specifications, since fact that offeror is highest rated does not mean it is offering such "fair and reasonable" price that oral or written discussions would not be required, even if there are several competitive offerors.

Contracts—Negotiation—Cost, etc., Data—Reasonableness of Proposed Cost

Although doubt exists as to general appropriateness of Navy's failure to conduct discussions and making award on initial proposal basis in Navy "turnkey" family housing procurements and even though Navy's only justification of record for failing to conduct discussions was that awardee's proposal contained no major variances from request for proposals (RFP), Navy's failure was not unjustified or illegal in particular procurement, since offerors apparently submitted best possible offers at lowest prices, which allows inference that adequate competition existed to insure "fair and reasonable" price and since awardee's price could be considered "fair and reasonable."

Contracts—Negotiation—Competition—Award Under Initial Proposals

Award may be made on initial proposal basis without discussions with offerors in competitive range to offeror, who proposed higher fixed price than other presumably acceptable offeror under Navy "turnkey" family housing procurement, since winning offeror, who received lowest dollar per quality point ratio, had "lowest evaluated price" under Armed Services Procurement Regulation 3-807.1 (b)(1) (1974 ed.). The language "lowest evaluated price" should be defined to include all factors involved in award selection. B-170750(2), February 22, 1971, modified.

Contracts—Negotiation—Competition—Discussion With All Offerors Requirement—Failure To Discuss—Not Unjustified or Illegal

Where substantial technical uncertainties exist in initial proposals, discussions should be conducted with offerors in competitive range and award should not be made on initial proposal basis because "adequate price competition" cannot be found to exist under such circumstances. However, proposal of awardee in present Navy "turnkey" family housing procurement, who received award on initial proposal basis, substantially complied with RFP requirements. Therefore, Navy's failure to conduct discussions was not unjustified or illegal.

Contracts—Negotiation—Awards—Prejudice Alleged—Insider Information

Contrary to protester's assertions, Navy denies that contractor received "insider information" substantially prior to closing date for receipt of proposals relating to precise evaluation criteria and numerical breakdown. Also, General Accounting Office records do not indicate that awardee was supplied this information during bid protest involving prior procurement having identical evaluation scheme.

Contracts—Negotiation—Evaluation Factors—Defective Request for Proposals Provisions

Navy RFP for "turnkey" family housing, which listed major technical criteria in descending order of importance and listed and explained all subcriteria of

major criteria, although subcriteria's relative weight was not disclosed, has satisfied requirement that prospective offerors be informed of broad scheme of scoring to be employed and given reasonably definite information as to degree of importance to be accorded to particular factors in relation to each other. Disclosure of precise numerical weights is not required. However, RFP is defective for failing to disclose role of price in evaluation scheme.

Contracts—Negotiation—Evaluation Factors—Method of Evaluation—Technical Proposals

Where Navy RFP for "turnkey" family housing failed to disclose manner in which price would be compared to technical evaluation criteria even though price was considered, i.e., award was made to offeror having lowest price per quality point ratio, disclosure of precise evaluation formula shortly before closing date for receipt of proposals was not meaningful disclosure. However, in view of advanced state of contract and since prejudice to unsuccessful offerors was speculative, protest is denied.

In the matter of Shapell Government Housing, Inc. and Goldrich and Kest, Inc., March 9, 1976:

BACKGROUND

Shapell Government Housing, Inc. and Goldrich & Kest, Inc., a joint venture (Shapell), has protested the award of a contract to TGI Construction Corporation, and the Gallegos Corporation, a joint venture (TGI), under request for proposals (RFP) N62474–75–R–6010, issued by the Western Division, Naval Facilities Engineering Command, San Bruno, California. The RFP solicited proposals for the design and construction of 500 units of Navy family housing in Murphy Canyon Heights, Naval Complex, San Diego, California, on a "turnkey" basis. The RFP contemplated the award of a firm-fixed price contract.

The RFP indicated the basis of award in Section 1C.7 as follows:

* * * The Navy reserves the right to reject any or all proposals at any time prior to award; to negotiate with any or all proposers; to award a contract to other than the proposer submitting the lowest price offer; and, to award a contract to the proposer submitting the proposal determined by the Navy to be the most advantageous to the Government. * * *

* * * PROPOSERS ARE ADVISED THAT IT IS DEFINITELY POSSIBLE THAT AWARD MAY BE MADE WITHOUT DISCUSSION OR ANY CONTACT CONCERNING THE PROPOSALS RECEIVED. THEREFORE, PROPOSALS SHOULD BE SUBMITTED INITIALLY ON THE MOST FAVORABLE TERMS FROM A PRICE AND TECHNICAL STANDPOINT WHICH THE PROPOSER CAN SUBMIT TO THE GOVERNMENT. DO NOT ASSUME THAT YOU WILL BE CONTACTED OR AFFORDED AN OPPORTUNITY TO CLARIFY, DISCUSS, OR REVISE YOUR PROPOSAL.

Section 1C.14a of the RFP summarized the evaluation criteria as follows:

Evaluation will be made on the basis of site design, site engineering, dwelling unit design, and dwelling unit engineering and specifications, and cost. Basis for the evaluation will include the quality, durability, and maintainability of materials, equipment, products and other features provided, and consideration of life cycle costs.

The proposals were to be evaluated in accordance with the Navy Facilities Engineering Command Technical Evaluation Manual for Turnkey Family Housing (Manual). A modified version of the Manual was included in the RFP. Section II of the modified Manual stated:

MAJOR EVALUATION AREAS. The major areas of consideration in the technical evaluation of turnkey family housing proposals have been established by the Department of Defense as a result of a report to the Department by a tri-service committee representing all of the armed forces. These major areas, in order of decreasing importance, are as follows:

(1) Dwelling Unit Design
(2) Dwelling Unit Engineering and Specifications
(3) Site Design
(4) Site Engineering

In addition, the modified Manual listed all of the subcriteria included under each of these major criteria. Each of the subcriteria was explained in the modified Manual and the salient characteristics on which compliance with the subcriteria was to be judged were listed. However, the precise numerical point breakdown contained in the Manual was not included in the modified Manual.

In response to the RFP, six proposals were received from five offerors. Shapell submitted two proposals numbered 0006 and 0011. The proposals were identified only by number to preserve anonymity in the technical evaluation, but for purposes of clarity we will discuss the proposals here by name. The proposals were evaluated by a Technical Evaluation Team and the Contracts Evaluation and Selection Board in accordance with the Manual. The Board assigned a technical quality point score based on a 1,000 point scale. No discussions were conducted with any of the offerors. Award was made on the basis of initial proposals to the offeror receiving the lowest dollar per quality point ($/q.p.) ratio. The ratio was obtained by dividing an offeror's total number of technical quality points into the offeror's proposed fixed price. The proposals submitted received the following scores:

Offeror	Price	Technical Quality Points	$/q.p. Ratio
TGI	$13, 698, 000	662	$20, 692
Ecoscience & Associates	13, 746, 609	633	21, 716
M. J. Brock & Sons and Malone Development Company, a joint venture	13, 990, 000	613	22, 822
Shapell proposal 0006	13, 095, 000	579	22, 617
Shapell proposal 0011	13, 188, 000	553	23, 848
Minority Contractors Association of Los Angeles and Nominees	17, 899, 510	544	32, 904

Award was made to TGI on April 28, 1975, in the amount of $13,698,000.

PROPRIETY OF THE EVALUATION OF PROPOSALS

Shapell protests that the evaluation of its two proposals and TGI's proposal was arbitrary, capricious and contrary to the RFP requirements. Shapell has subsequently decided not to pursue its protest concerning the evaluation of its 0011 proposal in order to simplify matters. In support of its contentions, Shapell has made a comprehensive comparison of the relative merits of its 0006 proposal and TGI's proposal. This comparison includes four detailed charts comparing the proposals based on the subcriteria discussed in the Manual. These charts compare the alleged relative weaknesses and strengths of each proposal with regard to each of the subcriteria, and contain a reevaluation and rescoring of the proposals. In addition, in its correspondence and attached affidavits, Shapell has elaborated on its contentions in this regard. These comparisons purportedly demonstrate the substantial superiority of Shapell's proposal, and that the Navy acted unreasonably in awarding TGI a significantly greater number of technical quality points than Shapell, especially considering that Shapell's price was over $600,000 less than TGI's offered price.

The specific alleged deficiencies in TGI's proposal and the alleged superiorities of Shapell's proposal as compared to TGI's proposal are too numerous to discuss here. However, we have completely reviewed and compared the proposals of TGI and Shapell, including the numerous specific contentions and comparisons made by Shapell, as well as the Navy's scoring and evaluation of the proposals.

This procurement for the construction of family housing was conducted under the "turnkey" method. Consequently, offerors were required to propose to a performance-type specification setting forth only minimum broad standards and basic configurations. As we observed in 51 Comp. Gen. 129, 131 (1971):

> * * * under the "turnkey" method, a developer builds in accordance with plans and specifications prepared by his own architect and to a standard of good design, quality and workmanship. Necessarily, the guidance in the solicitation is limited to an indication of the features required, such as style of house, number of bedrooms and baths, etc., and an indication of where the housing is to be located on the site—essentially, performance specifications. * * *

Under such circumstances, the selection of the best qualified contractor in a "turnkey" procurement is best made by the administrative office concerned in the exercise of its sound judgment as to the best interests and advantage to the Government. See *NIIA Housing, Inc.*, B–179196, April 24, 1974, 74–1 CPD 211.

In addition, as we stated in *Applied Systems Corporation*, B–181696, October 8, 1974, 74–2 CPD 195:

* * * It is not the function of our Office to evaluate proposals and we will not substitute our judgment for that of the contracting officials by making an independent determination as to which offeror in a negotiated procurement should be rated first and thereby receive an award. B–164552(1), February 24, 1969. The overall determination of the relative desirability and technical adequacy of proposals is primarily a function of the procuring agency and in this regard, we have recognized that the contracting officer enjoys a reasonable range of discretion in the evaluation of proposals and in the determination of which offer or proposal is to be accepted for award as in the Government's best interest. B–178887(2), April 10, 1974; B–176077(6), January 26, 1973. Since determinations as to the needs of the Government are the responsibility of the procuring activity concerned, the judgment of such activity's specialists and technicians as to the technical adequacy of proposals submitted in response to the agency's statement of its needs ordinarily will be accepted by our Office. B–175331, May 10, 1972. Such determinations will be questioned by our Office only upon a clear showing of unreasonableness, an arbitrary abuse of discretion, or a violation of the procurement statutes and regulations. B–179603, April 4, 1974; B–176077(6), January 26, 1973.

Also see *Riggins & Williamson Machine Company, Inc.*, 54 Comp. Gen. 2783 (1975), 75–1 CPD 168; *Institute for Social Concerns*, B–181800, May 1, 1975, 75–1 CPD 274.

We believe the determination of TGI as having the highest technically evaluated proposal had a reasonable basis. There were shortcomings and omissions in TGI's proposal, e.g., TGI's failure to submit a plumbing diagrammatic layout as required by the RFP. (TGI's proposal was downgraded for this defect.) However, on the whole, TGI's deficiencies and its failures to comply with RFP requirements were relatively minor. Compare *Corbetta Construction Company of Illinois, Inc.*, 55 Comp. Gen. 201 (1975), 75–2 CPD 144, where the omissions and inconsistencies with RFP requirements in the proposal of the awardee under a Navy "turnkey" housing procurement were substantial.

Also, we have found some relatively minor inconsistencies and errors in the technical evaluation of TGI's proposal, e.g., the assignment of 22 points out of a possible 20 maximum quality points by the Board to TGI's proposal for the Bathing item of the Dwelling Unit Design section of the technical evaluation scheme (Section III–J of the Manual). However, considering the 1,000 point technical scale and the relatively wide differences between the technical scores, we do not believe that the minor errors we have found could have affected the award selection.

We have also found some areas where Shapell's 0006 proposal was apparently misevaluated. For example, the Navy apparently downgraded Shapell's proposal because the "living room and dining room areas * * * [for some proposed units] were below RFP minimums," even though, from our review, we believe Shapell met or exceeded the RFP minimum requirements in this regard. Nevertheless, on the basis of our overall review of Shapell's 0006 proposal and the Navy's evaluation thereof, we are unable to conclude that the Navy evaluated

Shapell's proposal in an unfair or unreasonable manner. In this regard, Shapell's 0006 and 0011 proposals only received the fourth and fifth highest technical scores respectively of the six proposals received.

The Navy clearly took Shapell's low offered prices into account in making the award selection by virtue of its use of the $/q.p. ratio. We have recognized the propriety of using this formula to determine the proposal most advantageous to the Government in terms of price and total technical points. See *NHA Housing, Inc., supra; TGI Construction Corporation*, 54 Comp. Gen. 775 (1975), 75-1 CPD 167; *Bell Aerospace Company*, 55 Comp. Gen. 244 (1975), 75-2 CPD 168. Also, in negotiated fixed-price procurements, it is clear that price need not be the controlling factor, and award may be made to a higher-priced, higher technically rated offeror. See *Bell Aerospace Company, supra*, and cases cited therein. Indeed, Section 1C.7 of the RFP (quoted above) specifically recognized that award could be made to other than the offeror who submitted the lowest price. In view of the foregoing, TGI's low $/q.p. ratio and the Board's specific finding that there was a marked separation between TGI's technical proposal and the others received, we believe that the Navy's determination to make the award to TGI despite its higher offered price was reasonable.

PROPRIETY OF THE FAILURE TO CONDUCT DISCUSSIONS

We have some general observations concerning the appropriateness of the Navy decision not to conduct discussions with any of the offerors but rather to make its award selection on the basis of initial proposals. In negotiated procurements, discussions are generally required to be conducted with offerors within a competitive range except in certain specified instances.

The statute requiring such discussions and setting forth the exceptions to the rule, 10 U.S. Code § 2304(g) (1970), states:

> In all negotiated procurements in excess of [$10,000] in which rates or prices are not fixed by law or regulation and in which time of delivery will permit, proposals, including price, shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured, and written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price, and other factors considered: *Provided, however,* That the *requirements* of this subsection *with respect to written or oral discussions need not be applied to procurements* in implementation of authorized set-aside programs or to procurements *where it can be clearly demonstrated from the existence of adequate competition* or accurate prior cost experience with the product, *that acceptance of a initial proposal without discussion would result in fair and reasonable prices* and where the request for proposals notifies all offerors of the possibility that award may be made without discussion. [Italic supplied.]

This statute is implemented, in much the same terms, in Armed Services Procurement Regulation (ASPR) § 3–805.1 (1974 ed.). The only arguable applicable exception to the general rule that discussions be conducted, which may seem to be applicable to the present procurement, is set out at ASPR § 3–805.1(a)(v) (1974 ed.) as follows:

> [where] it can be clearly demonstrated from the existence of *adequate competition* or accurate prior cost experience with the product or service that acceptance of the most favorable initial proposal without discussion would result in *a fair and reasonable price*, provided however that the solicitation notified all offerors of the possibility that award might be made without discussion, and provided that such award is in fact made without any written or oral discussion with any offeror. [Italic supplied.]

ASPR § 3–807.1(b)(1)a (1974 ed.) sets forth the criteria for "adequate price competition" as follows:

> Price competition exists if offers are solicited and (i) at least two responsible offerors (ii) who can satisfy the purchaser's (e.g., the Government's) requirements (iii) independently contend for a contract to be awarded to the responsive and responsible offeror submitting the lowest evaluated price (iv) by submitting priced offers responsive to the expressed requirements of the solicitation. Whether there is price competition for a given procurement is a matter of judgment to be based on evaluation of whether each of the foregoing conditions (i) through (iv) is satisfied. Generally, in making this judgment, the smaller the number of offerors, the greater the need for close evaluation.

See 52 Comp. Gen. 346 (1972); *Corbetta, supra.*

In the present case, although prospective offerors were advised in the RFP that award on the basis of initial proposals could be made (see Section IC–7 of the RFP, quoted above), there is no indication in the record that the Navy made any determination upon receipt and evaluation of the proposals whether there was adequate competition so that acceptance of TGI's initial proposal without any discussions would result in a "fair and reasonable" price. From our review of the record, the only justification given by the Board for failing to conduct discussions which we have found was that TGI's proposal contained no major variances from the RFP and that, therefore, discussions were not warranted.

Although five presumably competitive offerors submitted proposals under the present RFP, we have some doubts as to the appropriateness in general of not conducting oral or written discussions in "turnkey" family housing procurements. As discussed above, "turnkey" procurements generally allow for many widely varied approaches in the design and construction of the family housing projects, since offerors are only required to meet performance-type specifications. Because of this wide variance of approaches, although an offeror has received the lowest $/q.p. ratio, that does not mean it is necessarily offering such a "fair and reasonable" price that oral or written discussions would not be required, notwithstanding the existence of several competitive of-

ferors, since a true basis for comparison of the proposals to insure that a "fair and reasonable" price was received may be lacking.

It may be argued that this same problem exists in many cost-reimbursement contracts, where we have recognized the propriety of awards on an initial proposal basis. *See* 52 Comp. Gen. 346; B–177986 (2), October 3, 1973. However, prior to the award of cost-reimbursement contracts, the Government is required to make an independent cost projection of the offerors' proposed estimated costs. *See* ASPR § 3–807.2(c) (1974 ed.); *Raytheon Company*, 54 Comp. Gen. 169 (1974), 74–2 CPD 137; *Signatron, Inc.*, 54 Comp. Gen. 530 (1974), 74–2 CPD 386; *Tracor-Jitco, Inc.*, 54 Comp. Gen. 896 (1975), 75–1 CPD 253. This means that the Government has an independent gauge in cost-reimbursement contracts (not generally available in fixed-price "turnkey" procurements), in addition to the competitive environment created by other acceptable proposals, to judge the fairness and reasonableness of the proposed awardee's estimated costs. *See* B–177986(2), *supra.*

In addition, we believe it is ordinarily conducive to the Government's receiving the best possible contract at the lowest price to conduct discussions with all offerors within a competitive range even if an award on an initial proposal basis may be technically justified. We believe this to be particularly the case where there is a possibility that the existence of competition will not necessarily insure that the Government pays the lowest price for the highest quality, a situation which we believe may exist here. Just because an initial proposal is ranked best overall does not necessarily mean that it is the best deal the Government can get. Discussions allow an opportunity for the Government to improve on the deal it was first offered, and give the Government the flexibility to get the most for its money.

Notwithstanding our general concern regarding the appropriateness of the Navy's failure to conduct discussions in "turnkey" procurements, we are unable to find that the Navy's failure to conduct discussions was unjustified or illegal in this case. In this regard, we have held that "competition" sufficient to support award of a negotiated contract on an initial proposal basis exists where several offerors submit independent cost and technical proposals, as was the case here, and the offeror with the most favorable proposal, price and other factors considered, is selected for award at a "fair and reasonable" price. *See* B–168085, December 29, 1969; B–173915, December 21, 1971; B–176066 (1), August 28, 1972; 52 Comp. Gen. 346; B–177986(2), *supra.* Ordinarily, the existence of several competitive offers helps to insure a "fair and reasonable" price for the Government because competitive pressures generally force offerors under negotiated procurements to

"trade off" between cost and technical factors in order to offer the best possible proposal at a "fair and reasonable" price.

We believe it may reasonably be inferred from the facts and circumstances surrounding this case that the Navy could well have found that adequate competition existed which insured a "fair and reasonable" price. In this regard, it would appear to be likely that the offerors in the present case submitted their best possible offers at the lowest price, especially in view of the RFP's explicit warning regarding the real possibility of no discussions with any of the offerors. Also, TGI's price could be considered "fair and reasonable," notwithstanding that Shapell's price for a different and lower evaluated configuration was significantly lower.

With regard to the fact that TGI's price was higher than Shapell's offered prices, we note that one of the criteria contained in ASPR § 3-807.1(b)(1)a (1974 ed.) (quoted above) defining "adequate price competition" is that the offerors independently contend for a contract to be awarded to the "responsive" and responsible offeror submitting the *lowest evaluated price.* We have found this criterion not to be applicable in the award of cost-type contracts, see 52 Comp. Gen. 346, and have recognized the propriety of awards on an initial proposal basis, in appropriate circumstances, to technically superior offerors who propose higher estimated costs than those proposed by offerors submitting technically inferior, albeit acceptable, proposals. *See* B-170633(1), May 3, 1971; B-177986(2), *supra.* Similarly, in negotiated awards of fixed-price contracts, we have recognized the propriety of awards to the highest evaluated offerors, who have proposed prices higher than other offerors submitting technically acceptable proposals. *See* B-173218 (1), (2), (3) and (4), November 16, 1971. In this regard, we believe the language "lowest *evaluated* price" [italic supplied] should be defined to include all of the factors in the award evaluation. B-170750(2), February 22, 1971, is modified insofar as it is inconsistent with this decision. That is, in the present case, the offeror, who received the "lowest evaluated price" and therefore the award, was TGI, who received the lowest $/q.p. ratio, even though TGI's price was higher than another presumably acceptable offeror.

Also, in *Corbetta, supra,* we recognized that where substantial technical uncertainties exist in initial proposals—whether due to the proposals' failure to conform to a key technical requirement, or to the cumulative effect of a large number of relatively minor items—award should not be made on an initial proposal basis because written or oral discussions need to be conducted to the extent necessary to resolve the uncertainties. This is also related to one of the necessary criteria for "adequate price competition" contained in ASPR § 3-807.1(b)(1)a

(1974 ed.), i.e., the requirement that there be at least two responsible offerors "*responsive*" to the RFP requirements. As we stated in *Corbetta, supra*, the reason for this rule is that:

> Where the Government's technical evaluators have noted a substantial number of questionable and uncertain areas in the initial proposals and no discussions are conducted, it becomes uncertain whether the Government is obtaining the most advantageous contract from a price and technical standpoint by making an award on the basis of the initial proposals. We believe discussions are required to clarify the actual technical quality being offered and also to determine whether any of the Government's requirements should be modified. We believe this is so regardless of whether the initial proposals are rated, in an overall sense, as technically acceptable, or whether they contain blanket offers to conform to the requirements.

However, the facts and circumstances of the present case are clearly distinguishable from those which existed in *Corbetta, supra*, in that TGI's proposal did not have substantial technical uncertainties but rather it substantially complied with the RFP requirements and contained only "minor variances" from RFP technical criteria.

AWARDEE'S ALLEGED POSSESSION OF THE PRECISE EVALUATION SCHEME

Shapell has also alleged that it was denied the right to compete on an equal basis with TGI because, substantially prior to the submission of proposals, TGI was provided with "insider information," i.e., the unexpurgated Manual, disclosing the precise evaluation criteria and numerical breakdown, material which was not furnished to Shapell in a timely manner. Shapell asserts that TGI obtained the Manual by virtue of its participation in the protest involved in our decision in *TGI, supra*. In support of its contentions in this regard, an affidavit of one of Shapell's officers refers to the officer's conversation with the architect employed by TGI to prepare its proposal. The affidavit indicates that the architect admitted that he was informed prior to or in the course of preparing TGI's proposal on this RFP of the weight which would be accorded the various evaluation criteria and the allowable points for these criteria, and that he used this information to best advantage in preparing TGI's proposal. Shapell claims that it only received a copy of the Manual on March 14, 1975 (Friday), at approximately 5 p.m., and its request for an extension of the closing date for receipt of proposals from March 17, 1975 (Monday), at 2:30 p.m., was improperly denied. Shapell asserts that one weekend is not enough time to make any real revisions in a proposal on a project of this scope. Shapell also claims that had it been given more time it would have made such revisions in its proposals as to have clearly made its proposals the highest rated technically.

The Manual was released to all of the offerors shortly before the closing date for receipt of proposals under the RFP as a result of a "Freedom of Information Act" request made by TGI. The Navy asserts that it did not release the unrevised Manual to TGI prior to the fulfillment of TGI's "Freedom of Information Act" request in mid-March 1975, and upon release of the Manual to TGI, all prospective offerors were given equal access to the Manual as rapidly as possible. In addition, our records on *TGI*, *supra*, do not indicate that TGI was ever supplied the Manual by our Office.

In view of the foregoing, we are unable to conclude that TGI did, in fact, have a copy of the Manual long before the other offerors, notwithstanding the contrary statements in Shapell's affidavits. Also, we cannot find that the Navy's denial of Shapell's request for an extension of the closing date for receipt of proposals was unreasonable in view of the ASPR § 3-501(b)(3)D(i) (1974 ed.) prohibition against the disclosure of the precise evaluation process (discussed below) and the Navy's belief that all offerors were on an equal footing insofar as their knowledge (or lack thereof) of the evaluation scheme was concerned.

SUFFICIENCY OF THE SOLICITATION'S DISCLOSURE OF THE EVALUATION SCHEME

Shapell also protests that the RFP was defective inasmuch as it did not disclose the precise evaluation scheme upon which the proposals were judged. Shapell alleges that since the precise numerical breakdown of the evaluation criteria and subcriteria, which is set forth in the Manual, was not timely included in the RFP, and was only supplied to the offerors shortly before the closing date for receipt of proposals, the offerors were prejudicially disabled from effective competition.

As an example of the alleged prejudicial nature of the undisclosed subcriteria, Shapell notes that the Master Television Antenna System subcriteria of the Site Engineering evaluation criteria (Section II-G of the Manual) was assigned seven technical quality points, whereas the subcriteria for the Street System of the Site Engineering criteria (Section II-H of the Manual), a substantially greater monetary investment, was assigned only 10 quality points. Shapell asserts that no offeror could reasonably fathom from the bare language of the RFP that the television antenna system would be assigned almost as many points as the entire street system, especially since the assignment of such a similar amount of points conflicted with the dictates of common sense experience and practicality.

As another example, Shapell refers to the Bathing subcriteria of the Dwelling Unit Design criteria (Section III–J of the Manual). Shapell states that although Section 2A.2.C of the RFP *mandated* one and one half baths in the three bedroom, one story dwelling units and two baths in the three bedroom, two story dwelling units, TGI was awarded extra points because its proposal offered two baths in the three bedroom, one story units and two and one half baths in the three bedroom two story units. (As discussed above, the Navy erroneously assigned TGI more than the 20 maximum possible points.) Shapell contends that Section 2A.2.C seemed clear that this was a mandatory number of baths rather than a minimum number of baths. Shapell asserts that its interpretation was reasonable in view of the fact that the quarters were for junior enlisted men rather than senior servicemen, who would presumably be entitled to better facilities. Shapell contends that only the precise criteria in the undisclosed Manual made it clear that additional points would be awarded for additional baths.

Our Office has consistently taken the position that offerors should be informed of "the broad scheme of scoring to be employed" and given "reasonably definite information as to the degree of importance to be accorded to particular factors in relation to each other." 49 Comp. Gen. 229 (1969); 50 *id.* 59 (1970); *BDM Services Company*, B–180245, May 9, 1974, 74–1 CPD 237. Detailed evaluation information need not be included in the RFP. 50 Comp. Gen. 565 (1971); *Kirschner Associates*, B–178887(2), April 10, 1974, 74–1 CPD 182. We have also found that while offerors should be informed of the relative weight or importance attached to the evaluation criteria, the disclosure of the precise numerical weights to be used in the evaluation process is not required. 50 Comp. Gen. 565, 575; 50 *id.* 788, 792 (1971); B–170449(1), November 17, 1970; *BDM Services Company*, *supra*. Indeed, ASPR § 3–501(b)(3)D(i) (1974 ed.) specifically prohibits the disclosure of the precise numerical weights to be used in the evaluation of the proposals.

In the present case, we believe the Navy's disclosure of the technical evaluation factors was adequate. In the modified Manual included in the RFP, the four technical evaluation criteria were listed in descending order of importance or priority, a method for disclosing relative weights of evaluation criteria which we have recognized as ordinarily proper. See *BDM Services Company*, *supra*, and cases cited therein. With regard to the RFP's nondisclosure of the numerical or relative weights of the subcriteria, we have held that the relative weight of subcriteria need not be disclosed so long as the subcriteria are definitively descriptive of the principal criteria whose relative weight has been adequately disclosed. See *AEL Service Corporation*,

53 Comp. Gen. 800 (1974), 74–1 CPD 217. In view of the foregoing and inasmuch as the RFP actually disclosed and explained all of the subcriteria to be considered in assigning technical quality points, we believe the requirement that prospective offerors be advised of the evaluation criteria to be applied has been satisfied, insofar as the *technical* evaluation factors are concerned. *See* 50 Comp. Gen. 565; 51 *id.* 397 (1972); *Kirschner Associates, Inc., supra; AEL Service Corporation, supra; Graphical Technology Corporation*, B–181723, March 27, 1975, 75–1 CPD 183. (See the discussion concerning the disclosure of price below.)

With regard to the specific examples of alleged evaluation scheme deficiencies which Shapell has cited as prejudicially disabling it from effective competition, we offer some further observations.

We note that in the modified Manual in the RFP (as well as in the unexpurgated Manual), it was indicated that points would be added within the 20 point maximum for additional bathrooms under the Bathing subcriteria of the Dwelling Unit Design criteria. We believe this refutes Shapell's contention that the number of baths specified in Section 2A.2.C of the RFP was an absolutely mandatory number rather than a minimum number.

With regard to Shapell's questioning of the similar number of points assigned to the Master Television Antenna System subcriteria (7 points) and the Street System subcriteria (10 points) of the Site Engineering criteria, we have consistently found that the various factors to be considered in the point evaluation of proposals and the relative weights to be assigned to each factor are matters primarily for consideration by the procuring activity, and our Office will not substitute its judgment for that of the agency unless it is clearly and convincingly shown that the agency's actions in establishing and applying such factors and weights are not reasonably supportable by the facts. *See* 50 Comp. Gen. 565, 574; B–173951, February 8, 1972; *BDM Services Company, supra.* In explaining the reasons for the similar weights assigned to these subcriteria, the Manual (but not the modified Manual) states:

> * * * For example, under site engineering, it would appear that very nearly as much weight (7 points) for the provision of a master TV antenna system has been given than to the entire street system (10 points). It would seem, offhand, that such a major investment item as the street system should weigh far more heavily in the evaluation process than the TV antenna system. The RFP, however, sets a relatively strict standard of minimum acceptability on the street system in terms of width and pavement thickness. The relative weighting of 10 points given to this system is keyed to the much more limited flexibility, which the proposer has to provide us a more substantial road system, as compared to the greater flexibility he has to provide us with a TV antenna system providing the maximum number of channels and clarity of reception for the benefit of the occupants.

In view of the Manual's statement, we are unable to conclude that the Navy's assignment of points for these subcriteria was unreasonable. In any case, we note that all offerors were assigned either 2 or 3 points for the Master Television Antenna System subcriteria and from 2 to 5 points for the Street System subcriteria. Since TGI received 662 technical quality points or 29 points more than the next offeror and 83 and 109 points more than Shapell's proposals, we can perceive no possible prejudice to Shapell or any other offeror by assigning these subcriteria a similar number of points.

In addition, our review has not caused us to question the reasonableness of the other precise weights assigned evaluation criteria and subcriteria.

This procurement was deficient for failing to disclose the role of price in the award selection scheme. In *TGI*, *supra*, which involved the same evaluation scheme and procuring activity as the present case, we found the RFP deficient for failing to apprise prospective offerors as to the manner in which price would be compared to the technical evaluation criteria in determining the awardee, i.e., the RFP did not in any way indicate that the $/q.p. ratio would be utilized.

The Navy asserts that it did, in fact, disclose the relationship of price in the evaluation scheme prior to the closing date for receipt of proposals by furnishing the prospective offerors with a copy of the unrevised Manual. (See the above discussion regarding the release of the Manual.) However, we agree with the protester that this was not really a meaningful disclosure with regard to this procurement, in that one weekend does not seem to be sufficient time for an offeror to make any significant changes in its proposal for a project of this scope to take into account the new disclosure of the role of price in the evaluation scheme.

However, any possible prejudice to the unsuccessful offerors by virtue of this deficiency is speculative. In this regard, we note that although Shapell proposed significantly lower prices, TGI's proposal was found to be far superior technically to either of Shapell's proposals. Since, as indicated in *TGI*, *supra*, the relative weight accorded price in the evaluation scheme is not discernible, we are unable to find any prejudice. Moreover, the decision in *TGI*, *supra*, where we first brought this deficiency to the Navy's attention, was issued on March 20, 1975, after the closing date for receipt of proposals under the present RFP. In any case, the Navy has informed us that over $2.3 million has already been paid TGI and approximately 23 percent of the work has been completed under the contract.

Therefore, Shapell's protest is denied. However, we are bringing the procurement deficiencies we have found in our review of this procurement to the attention of the Secretary of the Navy.

[B-183848]

Pay—Retired—Survivor Benefit Plan—Retirement Eligibility Requirement

Air Force officer who had over 20 years' service when he died while on active duty was not eligible for retirement under 10 U.S.C. 8911 because less than 10 years of such service was as a commissioned officer. Neither was he eligible for retirement under 10 U.S.C. 8914 which applies to enlisted members since at the date of his death he was an officer. Therefore, his widow is not entitled to a Survivor Benefit Plan annuity under 10 U.S.C. 1448(d) since such annuity is contingent upon member having been qualified for retired pay.

In the matter of Captain James F. Macey, USAFR (deceased), March 9, 1976:

This action is in response to a letter dated April 7, 1975 (RPTA), from Captain M. V. Starr, USAF, Accounting and Finance Division, Headquarters Air Force Accounting and Finance Center, Denver, Colorado, requesting an advance decision as to whether payment of a Survivor Benefit Plan (SBP) annuity under 10 U.S. Code 1448(d) (Supp. II, 1972) may be made to the widow of Captain James F. Macey, USAFR (Deceased), 346-28-8551. This request was approved by the Department of Defense Military Pay and Allowance Committee as submission No. DO-AF-1236, and forwarded to this Office by Headquarters United States Air Force letter dated May 1, 1975 (ACFA).

The submission indicates that Captain Macey died on January 17, 1975, while serving on active duty as a commissioned officer in the Air Force. Under the provisions of 10 U.S.C. 1448(d), the spouse of a retirement-eligible member of an armed force is, under certain conditions, eligible for an SBP annuity when the member dies while serving on active duty. Subsection 1448(d) provides as follows:

(d) *If a member of an armed force dies on active duty after he has become entitled to retired pay, or after he has qualified for that pay except that he has not applied for or been granted that pay,* and his spouse is eligible for dependency and indemnity compensation under section 411(a) of title 38 in an amount that is less than the annuity the spouse would have received under this subchapter if it had applied to the member when he died, the Secretary concerned shall pay to the spouse an annuity equal to the difference between that amount of compensation and 55 percent of the retired or retainer pay to which the otherwise eligible spouse described in section 1450(a)(1) of this title would have been entitled if the member had been entitled to that pay based upon his years of active service when he died. [Italic supplied.]

The legislative history of 10 U.S.C. 1448(d) shows that it was included to provide protection for personnel still on active duty who are

"eligible for retirement" so that a member who remains on active duty would not earn less survivor benefits than a member who retired at the "same grade and with the same years of service." *See* 53 Comp. Gen. 847, 849 (1974). Therefore, in order for Captain Macey's widow to be entitled to an SBP annuity, Captain Macey must have been eligible for retirement at the date of his death. *See also* 53 Comp. Gen. 887, 889 (1974).

The submission shows that Captain Macey began his military service on January 3, 1955, in an enlisted status and continued in such status through September 9, 1970, when he was honorably discharged to accept a commission. He was commissioned a second lieutenant, effective September 10, 1970, and served as a commissioned officer until his death. At the date of his death Captain Macey had completed 20 years and 15 days of active military service, 4 years 4 months and 8 days of which had been active service as a commissioned officer.

Retirement for length of service for Air Force officers is authorized by 10 U.S.C. 8911 (1970), which provides as follows:

> The Secretary of the Air Force may, upon the officer's request, retire a regular or reserve commissioned officer who has at least 20 years of service computed under section 8926 of this title, *at least 10 years of which have been active service as a commissioned officer.* [Italic supplied.]

While at the date of his death Captain Macey had over 20 years of service, only 4 years 4 months and 8 days of such service was as a commissioned officer. Thus, he was not eligible or qualified for retirement under 10 U.S.C. 8911.

As the submission indicates, retirement for length of service for Air Force enlisted personnel is authorized by 10 U.S.C. 8914 (1970), which provides in pertinent part as follows:

> Under regulations to be prescribed by the Secretary of the Air Force, a regular enlisted member of the Air Force who has at least 20, but less than 30, years of service computed under section 8925 of this title may, upon his request, be retired. * * *

As the submission indicates, if Captain Macey had not vacated his enlisted status in 1970 to accept a commission, and if he had served in an enlisted status until his death in 1975, he apparently would have died while on active duty after having qualified for retirement under 10 U.S.C. 8914. However, that was not the case—he was an officer, not "a regular enlisted member," at the time of his death and, therefore, he was not qualified for retirement under 10 U.S.C. 8914.

In that connection it is our understanding that even if an SBP annuity were considered payable by reason of Captain Macey's prior enlisted status, his widow would not be entitled to additional payments. This is so because an SBP annuity may be paid only to the extent that it exceeds dependency and indemnity compensation (DIC) payable by the Veterans Administration under 38 U.S.C. 411(a), and DIC

payable in this case exceeds the SBP payments which would be allowable on the basis of the member's enlisted grade and total years of service.

Thus, under the facts of this case as provided in the submission, at the date of his death, Captain Macey was not eligible for retirement under 10 U.S.C. 8911, 8914, or any other law of which we are aware, nor would any other officer have been eligible in the same situation in the "same grade and with the same years of service" as Captain Macey. 53 Comp. Gen. 847, *supra*. Accordingly, he was not entitled to or qualified for retired pay and, consequently, his widow may not be paid an SBP annuity under 10 U.S.C. 1448(d). The voucher enclosed with the submission will be retained in this Office.

[B–183814]

Subsistence—Per Diem—"Lodgings-Plus" Basis—Staying With Friends, Relatives, etc.

Employee may not be paid per diem under the lodgings–plus system based on payment of $14 per night for lodging at home of son's neighbor absent information showing that the $14 amount reflects additional expenses incurred by host as a result of the employee's stay. However, the agency may issue regulations providing that, when it is known in advance that employees will lodge with friends or relatives, it may determine that the lodgings–plus system is inappropriate and establish specific per diem rates under Federal Travel Regulations para. 1–7.3c.

In the matter of Clarence R. Foltz—per diem for lodging in noncommercial quarters, March 10, 1976:

Mr. R. G. Bordley, Chief, Accounting and Finance Division, Office of the Comptroller, Defense Supply Agency (DSA), requested a decision concerning the allowability of Mr. Clarence R. Foltz' claim for per diem incident to his temporary duty assignment in Richmond, Virginia, during February 1975. Incident to such duty Mr. Foltz spent 2 of the 3 nights for which lodgings were required in Roanoke, Virginia, where he stayed with his son's neighbor. The propriety of computing the per diem allowance under the lodgings–plus system on the basis of the $14 amount paid to the son's neighbor for lodgings for each of the 2 nights is questioned since the quarters were in a private residence and the amount paid slightly exceeds the amount paid by Mr. Foltz for commercial accommodations for the intervening night.

In requesting an opinion concerning Mr. Foltz' per diem entitlement, DSA cites our decision 52 Comp. Gen. 78 (1972) which held that claims involving noncommercial lodgings should be supported by information indicating that lodging charges are the result of expenses incurred by the party providing the lodging. The agency states that compliance with this decision is administratively burdensome in view of the difficulty involved in verifying the required cost information. The DSA

suggests that per diem allowances payable for lodgings at noncommercial establishments be based instead on the "lowest amount charged for a suitable accommodation available in any commercial lodging within a reasonable distance of the temporary or newly assigned duty station." It is suggested that in the event an employee accepts noncommercial lodgings at a higher cost, he be obliged to submit the type of substantiating documentation referred to in 52 Comp. Gen. 78, *supra.*

Paragraph 1–7.3c of the Federal Travel Regulations (FPMR 101–7) (May 1973) as in effect at the date of Mr. Foltz' temporary duty assignment and at the present time, provides as follows regarding the agency's responsibility for prescribing individual rates when lodgings are required:

c. *When lodgings are required.* For travel in the conterminous United States when lodging away from the official station is required, agencies shall fix per diem for employees partly on the basis of the average amount the traveler pays for lodgings. To such an amount (i.e., the average of amounts paid for lodging while traveling on official business during the period covered by the voucher) shall be added a suitable allowance for meals and miscellaneous expenses. The resulting amount rounded to the next whole dollar, if the result is not in excess of the maximum per diem, shall be the per diem rate to be applied to the traveler's reimbursement in accordance with the applicable provisions of this part. If the result is more than the maximum per diem allowable, the maximum shall be the per diem allowed. No minimum allowance is authorized for lodging since those allowances are based on actual lodging expenses. Receipts for lodging costs may be required at the discretion of each agency; however, employees are required to state on their vouchers that per diem claimed is based on the average cost to him for lodging while on official travel within the conterminous United States during the period covered by the voucher. An agency may determine that the lodgings-plus system as prescribed herein is not appropriate in given circumstances as when quarters or meals, or both, are provided at no cost or at a nominal cost by the Government or when for some other reason the subsistence costs which will be incurred by the employee may be accurately estimated in advance. In such cases a specific per diem rate may be established and reductions made in accordance with this part provided the exception from the lodgings-plus method is authorized in writing by an appropriate official of the agency involved.

Our holding at 52 Comp. Gen. 78, *supra*, did not involve payment of a per diem allowance under the above-quoted authority. Rather, it involved the payment of a temporary quarters allowance incident to an employee's permanent change of station. Pointing out that the applicable regulation provided for payment of a temporary quarters allowance based upon actual receipts, we stated:

We point out that in the past we have allowed reimbursement for charges for temporary quarters and subsistence supplied by relatives where the charges have appeared reasonable; that is, where they have been considerably less than motel or restaurant charges. It does not seem reasonable or necessary to us for employees to agree to pay relatives the same amounts they would have to pay for lodging in motels or meals in restaurants or to base such payments to relatives upon maximum amounts which are reimbursable under the regulations. Of course, what is reasonable depends on the circumstances of each case. The number of individuals involved, whether the relative had to hire extra help to provide lodging and meals, the extra work performed by the relative and possibly other factors would be for consideration. In the claims here involved as well as similar claims we believe the employees should be required to support their claims by furnishing such information in order to permit determinations of reasonableness.

The above rule, which has been applied in B–180623, August 14, 1974, and B–182135, November 7, 1974, is dictated by the language of paragraph 2–5.4 of the FTR which, in part, limits reimbursement for occupancy of temporary quarters to subsistence expenses actually incurred.

We believe that the principles expressed in 52 Comp. Gen. 78, *supra*, are generally applicable to the determination of a per diem rate for other than temporary quarters subsistence expenses. However, the language of paragraph 1–7.3 of the FTR, quoted above, and the language of that regulation as revised effective May 19, 1975, permit the establishment of a "specific per diem allowance" upon an administrative determination that the lodgings-plus system is inappropriate to a given set of circumstances.

We have recognized that the lodgings-plus system may well be inappropriate in the situation where an employee occupies a trailer or other recreational vehicle in lieu of commercial facilities while on a temporary duty assignment. In such cases we have held that it would be appropriate for the agency involved to establish a specific per diem rate to be paid in connection with the employee's occupancy of a mobile home or similar accommodation. B–175322, April 28, 1972, and B–178310, June 6, 1973.

In line with the cited cases we believe it would be appropriate for DSA, as well as other agencies, to establish a specific per diem rate when it is known in advance that employees will not use commercial facilities but stay with friends or relatives. We do not, however, agree with DSA's suggestion that the per diem rate payable should be based on the lowest amount charged for suitable commercial accommodations in the area, even where the agency is justified in establishing a specific per diem rate under 1–7.3c of the FTR. As was stated in 52 Comp. Gen. 78, *supra*, it is neither necessary nor reasonable for an employee to pay commercial rates to friends or relatives for lodgings or meals. In our opinion, a reasonable basis for reimbursing friends or relatives for the use of noncommercial lodgings or meals would be an amount considerably less than motel or restaurant charges.

In view of the above Mr. Foltz may not be paid a per diem allowance based on the $14 daily amount claimed as lodging expenses inasmuch as that rate appears to have been designed to assure his recovery of a maximum per diem allowance and inasmuch as he has provided no information indicating that the $14 amount bears any relation to the additional expense incurred by his son's neighbor as a result of his stay. The agency should request Mr. Foltz to supply additional information which will permit it to make a determination of a reasonable lodging cost for the purpose of computing the per diem allowance in accordance with the guidelines in 52 Comp. Gen. 78. In order to

facilitate the processing of claims for per diem in the future, DSA may issue regulations under FTR § 1-7.3c providing for establishment of specific per diem rates in situations where employees will lodge with friends or relatives.

[B-184203]

Contracts—Negotiation—Evaluation Factors—Method of Evaluation—Defective

Where agency did not discuss certain areas in proposals simply because they were considered "weaknesses," in that they received less than maximum number of evaluation points, as opposed to "deficiencies," which would not satisfy Government's requirements, and agency also changed award evaluation cost factors without communicating information to offerors, it is recommended that option in contract not be exercised and that requirement for option years be resolicited.

In the matter of the Dynalectron Corporation, March 10, 1976:

Request for proposals (RFP) No. DAAGO8-75-R-0006, issued September 18, 1974, by the Sacramento Army Depot, Sacramento, California, solicited offers to perform technical and engineering services at Fort Hood, Texas, on a cost-plus-award-fee basis for 1 year with an option for 2 additional years. Twelve offers were received. Five were determined to be within the competitive range. Discussions were held with the offerors who submitted the latter offers. They were provided until May 5, 1975, to submit best and final offers which were thereafter evaluated. By letter of May 27, 1975, the four unsuccessful offerors in the competitive range were notified that an award had been made to Raytheon Service Company (Raytheon) commencing as of that date. By telegram of May 29, 1975, Dynalectron Corporation (Dynalectron) submitted questions to the Sacramento Army Depot regarding the evaluation of offers. Following the Army's reply on June 4, 1975, Dynalectron protested the award to our Office.

Dynalectron essentially protests on five grounds: (1) the Government's statements and failure to point out alleged deficiencies to Dynalectron during the negotiations led Dynalectron into not making modifications of its technical proposal; (2) oral amendments were made to the work description provisions of the RFP; (3) the evaluation board evaluated work standards not specifically identified in the RFP; (4) considering the closeness of the technical scores of Dynalectron and the awardee, the award to Raytheon at a substantially higher cost was improper; and (5) the Government changed the basis for evaluation of cost proposals during the course of evaluation without informing all offerors.

By letter of April 8, 1975, the Army advised Dynalectron that its proposal was within the competitive range and that there were certain enumerated deficiencies in its proposal which were being brought to

its attention to provide an opportunity for revision. Dynalectron asserts that subsequent to the receipt of the letter but prior to the last oral discussion with the Army, it received a telephone call from the Army contract negotiator who related that it was the Government's intention to try to bring each offeror up to 100 percent technically so that cost could be the controlling factor for award and that, if Dynalectron would respond to all deficiencies noted by the Government, it was anticipated that the award would be determined on an overall cost basis. A similar assertion has been made by Aeronutronic Ford Corporation (previously Philco Worldwide Services, Inc.), another offeror in the competitive range.

Dynalectron argues, however, that the following alleged deficiencies in its proposal were never discussed during negotiations:

Area	Basis for conclusion that area was deficient
1. Console operations	June debriefing
2. Calibration services	June debriefing
3. Reliance upon subcontracting to meet technical requirements	In scoring Dynaelectron received 50 percent of possible 100 percent
4. Identification of specific potential problems	Dynalectron received 60 percent out of possible 100 percent
5. Recent experience in furnishing parallel technical services	Dynalectron received 60 percent out of possible 100 percent

Dynalectron notes that in the final evaluation total score there was only a 3.88 difference between its offer and the successful offer and that the three latter deficiencies were responsible for 2.21 points of the difference.

Dynalectron also states that those offerors which the agency indicated had a relatively large number of deficiencies and matters determined to require additional consideration and/or explanation received the highest technical scores in the initial evaluation. The protester concludes that certain offerors may have been given more attention in resolving "deficiencies" than other offerors.

In response to these allegations, the contracting officer stated:

* * * The Government team * * * at no time stated that the Government would bring all offerors to 100% technically so that award could be made solely on the basis of cost as alleged by Protester. The Government did state its desire to give offerors the best possible understanding of the requirements of the RFP so that offerors, through their own efforts, would have the maximum opportunity to bring their proposals to 100% technically, in which case award could be made on the basis of cost alone. * * *

The contracting officer also stated that the Army did not attempt to discuss all areas where offerors received less than the maximum number of points (situations which the Army defines as weaknesses) and that only deficiencies in proposals as defined in the Armed Services Procurement Regulation (ASPR) were discussed. ASPR § 3-805.3(a) (1974 ed.) states "A deficiency is * * * that part of an offeror's proposal which would not satisfy the Government's requirements."

In 10 U.S. Code § 2304(g) (1970), it is stated in pertinent part that:

> * * * written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price, and other factors considered * * *.

We have held that the discussions must be meaningful. *Raytheon Company*, 54 Comp. Gen. 169, 177 (1974), 74-2 CPD 137; and 51 *id.* 431 (1972). Further, in 50 Comp. Gen. 117, 123 (1970), it was stated:

> * * * When negotiations are conducted the fact that initial proposals may be rated as acceptable does not invalidate the necessity for discussions of their *weaknesses, excesses or deficiencies* in order that the contracting officer may obtain that contract which is most advantageous to the Government. We have stated that discussions of this nature should be conducted whenever it is essential to obtain information necessary to evaluate a proposal or to enable the offeror to upgrade the proposal. * * * [Italic supplied.]

However, that is not to say that all inferior aspects of technical proposals can be related to offerors during discussions. As we stated in 51 Comp. Gen. 621, 622 (1972):

> * * * Any discussion with competing offerors raises the question as to how to avoid unfairness and unequal treatment. *Obviously, disclosure to other proposers of one proposer's innovative or ingenious solution to a problem is unfair.* We agree that such "transfusion" should be avoided. *It is also unfair, we think, to help one proposer through successive rounds of discussions to bring his original inadequate proposal up to the level of other adequate proposals by pointing out those weaknesses which were the result of his own lack of diligence, competence, or inventiveness in preparing his proposal.*
>
> * * * *We think certain weaknesses, inadequacies, or deficiencies in proposals can be discussed without being unfair to other proposers.* There well may be instances where it becomes apparent during the course of negotiations that *one or more proposers have reasonably placed emphasis on some aspect of the procurement different from that intended by the solicitation.* Unless this difference in the meaning given the solicitation is removed, the proposers are not competing on the same basis. *Likewise, if a proposal is deemed weak because it fails to include substantiation for a proposed approach or solution, we believe the proposer should be given the opportunity, time permitting, to furnish such substantiation.* * * * [Italic supplied.]

In this regard, a number of decisions have echoed the view that the question of whether a given inadequacy must be discussed is determined by the nature of the inadequacy and the impact that its disclosure would have on the competitive process. See, e.g., *Raytheon Company*, 54 Comp. Gen. 169 (1974), 74-2 CPD 137; 52 *id.* 870 (1973); *Dorsett Electronics Division, LaBarge, Inc.*, B-178989, March 6, 1974, 74-1 CPD 120; *Bellmore Johnson Tool Company*, B-179030, January 24, 1974, 74-1 CPD 26. Furthermore, we have held that a decision not to conduct technical discussions in a given case should be given close

scrutiny specifically for the reason that there may be instances where certain weaknesses or deficiencies in proposals could be discussed without risk of technical transfusion or the divulgence of other offerors' proprietary concepts. 52 Comp. Gen., *supra; Bellmore Johnson Tool Company, supra.*

Thus, an agency cannot limit its duty to conduct meaningful discussions merely by labeling some areas "weaknesses." Accordingly, it was erroneous for the Army not to discuss certain areas simply because of "weaknesses." Since the Army's failure to point out "weaknesses" was a fundamental deficiency in the discussion process, any number of offerors may have been prejudiced by not having had an opportunity to explain or improve the "weaknesses" in their proposals. In this regard, we note that there was only a 5.36 spread between the successful offeror and the last of the five offerors in the competitive range in the final evaluation total score, the range of scores being 95.39, 94.12, 92.17, 91.51 and 90.03.

Further, we find that there was a change in the RFP award evaluation factors which was not communicated to all offerors. The Army changed the basis for the evaluation of cost. RFP section D–4.1.d. provided for evaluation of cost as follows:

> Cost. (15 points total, 5 points each element)
> (1) Realistic costing of all cost elements (labor, materiels, direct cost, indirect costs, etc.).
> (2) Completeness and validity of submitted cost data.
> (3) Contractor's past cost performance.

Section "D" was modified by amendment 0002 which provided as follows:

> All numerical weighting points (in parens) which follow the categories of evaluation in D–4.1.b, c, and d are hereby deleted. Offerors are cautioned to disregard the numerical weighting points of evaluation as they originally appeared in the solicitation as the actual numerical weights used in evaluation may differ from those.

However, by letter of August 4, 1975, Dynalectron was advised that cost proposals received weighted points in the following three areas:

(1) Bottom line price (maximum 10 points)
(2) Fee (maximum 2.5 points)
(3) Fee risk (maximum 2.5 points)

In the memo for record, evaluation of cost portion of best and final offers, bottom line price is referred to as reasonableness.

Dynalectron argues that the latter criteria conflict with those set forth in the RFP. The Army, however, states that in so arguing Dynalectron indicates a misunderstanding of the evaluation procedure. The Army's position is as follows:

> * * * As stated in the RFP, *cost areas were evaluated as follows:*
> a. *Realistic costing of all cost elements:* Audits were obtained on all competitive offers to determine that the rates bid conformed to their current or projected acceptable rates. Rates which were not accepted by DCAA were made the subject

of negotiations. Dynalectron's G&A rate was questioned, and the .3% for I.R.&D. was specifically discussed (see Attachment 11 to Administrative Report).

b. *Completeness and validity of cost data:* All offers were, in addition to audit, reviewed by the Price Analyst to insure that all required data were present.

c. *Contractor's past cost performance:* Pre-award surveys were obtained on all competitive offerors.

Within these areas, however, it was necessary to give consideration to the individual prices and to determine the significance of the differences in prices bid. To accomplish this, prior to the initial closing date for offers, weighted criteria were established and applied equitably and consistently throughout the procurement. These were: bottom-line (10 points), fee (2.5 points), and fee risk (2.5 points). ASPR 3-501(b)(3) Section D(i) precludes Contracting Officer from disclosing these weightings to offerors. The fact that offerors were not aware of these specific criteria is immaterial since their prices were determined by conformance to realistic costing standards, and all were informed during negotiations that the Government would let the "competitive atmosphere" determine the fees rather than to negotiate them. These criteria were established prior to first closing to determine the ratio of technical weight to cost weight (17.3) and to assure that the evaluation and the final management decision were completely objective. [Italic supplied.]

The ASPR section referenced in the quotation deals with the preparation of requests for proposals. While we agree that ASPR § 3–501 (b) (3) Sec. D(i) (1974 ed.) does state that numerical weights, which may be employed in the evaluation of proposals, shall not be disclosed in solicitations, that does not give an agency the right to correct an error relating to the inclusion of numerical weights by also changing the evaluation criteria without communicating that to the offerors. It is true that the cost factor was worth 15 points out of 100 both under the RFP as originally written and as the proposals were evaluated. However, while the total points assigned the factor remained the same, it appears that the Army without notice to any offeror changed the cost subfactors and in doing so affected the way in which offerors could achieve a maximum score. The fact that offerors were not apprised of the change in cost subfactors was not "immaterial" as the Army characterizes it. If offerors knew that cost subfactors different than those stated in the RFP were going to be employed, it may be that their price proposals would have been adjusted to accommodate for such subfactors. It is difficult to conclude whether this would have been award determinative. However, it does cast doubt on the evaluation process. Our Office has held that where a point evaluation formula is used in the evaluation of offers, sound procurement policy dictates that offerors be informed of those factors and the relative weights or importance to be attached to each factor. *Frequency Engineering Laboratories*, B–181409, October 16, 1974, 74–2 CPD 208; 50 Comp. Gen. 788, 792 (1971); 49 *id.* 229 (1969). As a corollary, whenever the evaluation factors or their relative weights are changed, the RFP must be amended so that all offerors have the opportunity to submit a proposal based on the ultimate factors upon which award will be made. See *Bell Aerospace Company*, 55 Comp. Gen. 244 (1975), 75–2 CPD 168. See also *AEL Service Corporation*, 53 Comp. Gen. 800, 804 (1974),

74-1 CPD 217. Here, the relevant cost subfactors used in the evaluation differed from those set out in the RFP.

In view of the foregoing, we recommend that the option in the contract not be exercised and that the requirement for the option years be resolicited. It is therefore unnecessary for us to consider the other aspects of the Dynalectron protest. Also, in view of the recommendation, it is unnecessary to consider the question of entitlement to proposal preparation costs raised by Dynalectron.

Since our decision contains a recommendation for corrective action, we have furnished a copy 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 agency to the Committees on Government Operations and Appropriations concerning the action taken with respect to our recommendation.

[B-184263]

Contracts—Options—Not To Be Exercised—Janitorial Services

Since negotiating rationale employed by General Services Administration (GSA) is same as was cited in *Nationwide Building Maintenance, Inc.*, 55 Comp. Gen. 693, where it was found that GSA had no legal basis to negotiate janitorial services procurements, and since award has been made, option should not be exercised and any future requirement for services should be formally advertised.

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

Where GSA improperly incorporated in contract old Service Contract Act DOL Wage Determination, which was revised with GSA's knowledge prior to award selection and over a month prior to award, and contract was soon modified to reflect revised wage determination, GSA's actions were tantamount to awarding contract different from that called for in request for proposals (RFP). Moreover, GSA failed to comply with DOL regulations in not submitting SF-98 to DOL both when it extended incumbent's contract and not less than 30 days prior to proposed award, despite extended period between closing date for proposals and award.

Contracts—Negotiation—Changes, etc.—Reopening Negotiations—Wage Determination Change

GSA's failure to reopen negotiations to incorporate in RFP Service Contract Act DOL Wage Determination was not justified on basis of GSA's assumption that revision would have equal effect on all offerors, would not affect relative standing of offerors, and would be impractical since successful offeror had been announced, as such assumptions are speculative and award under circumstances on basis of superseded wage determination is contrary to principles of competitive procurement system.

Contracts—Negotiation—Evaluation Factors—Additional Factors—Not in Request for Proposals

Since disclosure of relative weights of evaluation factors is essential requirement of procurement, GSA erred in failing to communicate to offerors material

changes in evaluation scheme from that designated in RFP so offerors would not be misled by RFP's provisions.

In the matter of the Minjares Building Maintenance Company, March 10, 1976:

BACKGROUND

The General Services Administration (GSA) issued request for proposals (RFP) PBS-BMD-74-36(N) on March 29, 1974, to provide janitorial services under a cost-plus-award-fee contract at the Internal Revenue Service (IRS) Center, Fresno, California. The procurement was a 100-percent small business set-aside, with the closing date for receipt of proposals set for April 29, 1974.

The RFP included Department of Labor (DOL) Wage Determination 67-173, Revision 9, dated March 27, 1974, as required by the Service Contract Act of 1965, 41 U.S. Code § 351 (1970) and Federal Procurement Regulations (FPR) § 1-12.905-1(c) (1964 ed. amend. 50). The wage determination set forth the minimum prevailing wage for janitorial service employees in the Fresno area as $2.65 per hour. A contractor is required to pay the minimum wage and furnish the fringe benefits set forth in the wage determination to its covered employees.

After the receipt of proposals under the RFP, GSA found it had to revise its requirements and amend the RFP. The closing date for receipt of proposals was eventually rescheduled to October 15, 1974. The four highest rated proposals submitted at that time received the following scores:

Offeror	Technical Score	Cost and Fee
Diamond Janitorial Service and Supply Co. (Diamond)	76.8	$350,189
U.S. Eagle, Inc.	66.2	365,519
Executive Suite Service, Inc.	63.2	473,610
Minjares Building Maintenance Company (Minjares)	62.2	409,228

On June 9, 1975, the GSA Source Selection Board recommended to the contracting officer that award be made on an initial proposal basis to Diamond.

GSA has stated that as late as June 2, 1975, it asked DOL about the possibility of a new wage determination. GSA states that it was advised that Revision 9 of Wage Determination 67-173 would be applicable until December 1975. Nevertheless, on June 3, 1975, in response to DOL's request, GSA submitted a Standard Form 98 (SF-98), "Notice of Intention to Make a Service Contract and Response to Notice," notifying DOL of its intention to enter into negotia-

tions for a service contract on June 16, 1975. On June 10 and June 11, 1975, GSA contacted DOL but was apparently given no information regarding the continuing validity of Revision 9. However, on June 12, 1975, GSA was advised by DOL that a new revision to Wage Determination 67–173 (Revision 10) had been issued. Revision 10 was issued effective June 12, 1975, and set a minimum prevailing rate of $3 per hour. DOL sent GSA Revision 10 on June 19, 1975, where it was received on June 22, 1975.

On June 13, 1975, GSA decided to make an immediate award to Diamond based on the old wage rates because approximately 10 days would pass before the revised wage determination was received by GSA, and since the existing contract services for the IRS Building expired on June 30, 1975, and approximately 2 weeks were needed to phase-in a new contractor. Therefore, GSA concluded that further delay would jeopardize continuous janitorial service at the IRS Center. On that same date, GSA notified the unsuccessful offerors of the proposed award to Diamond.

Minjares was the incumbent contractor and held the contract pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a)(2) (1970). Minjares' contract had expired on June 30, 1974, but it had been extended on several occasions to June 30, 1975. On June 27, 1975, negotiations were concluded to extend the Minjares' contract to July 31, 1975.

On June 23, 1975, Minjares protested the proposed award. Its bases for protest include, among other things, that Diamond was other than a small business concern, the wrong wage determination was used in the contract awarded and the proposals were not evaluated in accordance with the evaluation criteria set forth in the RFP.

On July 3, 1975, the Small Business Administration (SBA), to which the protest concerning Diamond's size had been referred, determined that Diamond was a small business concern. Subsequently, GSA decided it did not serve the Government's best interest to again extend the Minjares' contract at significantly higher costs than Diamond's proposed estimated costs. Therefore, in view of the necessary phase-in time, the contract was awarded to Diamond on July 16, 1975, notwithstanding the pending protest. This contract incorporated Revision 9 of Wage Determination 67–173. Performance commenced under the contract on August 1, 1975.

On October 10, 1975, upon learning that GSA had incorporated Revision 9 in the Diamond contract, DOL directed GSA to incorporate Revision 10 retroactive to August 1, 1975. DOL took this position because (1) DOL's response to GSA's SF–98 was received by GSA prior to the award to Diamond; (2) GSA had not complied with DOL regulations in failing to submit SF–98 notifications for the periodic

extensions of the Minjares contract; and (3) GSA, without any explanation, failed to submit the SF–98 not less than 30 days prior to the commencement of negotiations as required by applicable DOL regulations. It was DOL's position that GSA's actions had the effect of precluding service employees at the IRS Center from receiving the wage rates and fringe benefits to which they would otherwise be entitled under the Service Contract Act. We understand that GSA has modified the contract with Diamond to incorporate Revision 10 in accordance with DOL's instructions.

LACK OF AUTHORITY TO NEGOTIATE FOR JANITORIAL SERVICES

Recently, in a decision involving a similar janitorial services procurement, we held that GSA's determination to negotiate janitorial services contracts was not rationally founded within the limits of existing law. *Nationwide Building Maintenance, Inc.*, 55 Comp. Gen. 693 (1976). Nevertheless, we recognized the difficulties that GSA has been experiencing in administering janitorial services contracts. Because of these difficulties, it was our opinion that GSA should be given time to study alternative solutions within the context of formal advertising. For that reason, we did not disturb the award but recommended that GSA not exercise any options for janitorial services requirements subsequent to June 1976 under the subject contract or under any similar outstanding negotiated janitorial services contracts. Because award has been made under the RFP protested by Minjares and because the negotiating rationale employed by GSA is the same as was cited in the *Nationwide* decision, it is recommended that the July 31, 1976, option under the Diamond contract not be exercised, and that any future requirement for the services be formally advertised in accordance with *Nationwide*, *supra*.

Our review of this procurement reveals that Minjares' protest is otherwise meritorious, and that we would have recommended that the option not be exercised in any case. However, no award for the term remaining under the protested contract can be made because of these deficiencies, since any subsequent award under the subject RFP would be contrary to the *Nationwide* holding that janitorial services requirements cannot be negotiated, and since an award for the remaining term under formal advertising procedures is not feasible at this time. See *Three D Enterprises, Inc.*, B–185745, February 20, 1976. Nevertheless, we will discuss below the meritorious bases for protest we have found because they have the effect of seriously undermining the integrity of the competitive procurement system and are generally applicable to Federal procurement. Also, Minjares' protest was com-

pletely developed under our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975), prior to the holding in *Nationwide*, *supra*.

INCORPORATION OF ERRONEOUS WAGE DETERMINATION

The situation involved in the present protest with regard to the applicability of the revised wage determination is substantially similar to that extant in *Dyneteria, Inc.*, 55 Comp. Gen. 97 (1975), 75-2 CPD 36, affirmed *Tombs & Sons, Inc.*, B-178701, November 20, 1975, 75-2 CPD 332. In *Dyneteria*, *supra*, bids were opened under an invitation for bids (IFB) for mess attendant services on April 30 1974, the same date the incumbent contractor entered into a new collective bargaining agreement (cba) with the union representing the mess attendant service employees. On May 16, 1974, a revised wage determination was issued to reflect the cba's higher wage rates. As a result of protracted negotiations between the Air Force, SBA, and the apparent successful bidder regarding the responsibility of the latter, the contract was not awarded to that bidder until August 14, 1974. The contract awarded incorporated the wage determination contained in the IFB which was applicable prior to the consummation of the cba. At DOL's insistence, on December 10, 1974, the contract was modified to reflect the revised wage determination retroactive to the contract's commencement date. Under the circumstances, we found that the mess attendant services requirement should have been resolicited when the Air Force was informed of the applicability of a new wage determination. We reached this conclusion because the Air Force's actions were tantamount to awarding a contract different from the one advertised and a contractor should not be selected on a different basis than that under which it must perform the contract.

Although *Dyneteria*, *supra*, involved a formally advertised rather than a negotiated procurement, it is a basic principle of competitive procurements that all offerors be afforded the opportunity to compete on an equal basis. Bidders or offerors are not competing on an equal basis where they compete to solicitation specifications and requirements which are not reflective of what is to be required under the contract or where the contract is awarded with the intent or likelihood of changing specifications after award. *See* 37 Comp. Gen. 520 (1958); 46 *id* 281 (1966); *A & J Manufacturing Company*, 53 Comp. Gen. 838 (1974), 74-1 CPD 240; *Illinois Equal Employment Opportunity Regulations for Public Contracts*, 54 Comp. Gen. 6 (1974), 74-2 CPD 1. Therefore, the principles enunciated in *Dyneteria*, *supra*, are equally applicable to negotiated procurements. See *Management Services Incorporated*, 55 Comp. Gen. 715 (1976).

Pursuant to its authority under the Service Contract Act, DOL found that GSA acted erroneously in failing to include the June 12, 1975, wage determination (Revision 10) in the contract awarded. GSA has modified the contract to remedy this defect retroactive to the beginning of the contract period. Therefore, in view of (1) GSA's knowledge of Revision 10 prior to formalizing its award selection on June 13, 1975; (2) the extended period between the closing date for receipt of proposals and the award date (October 15, 1974, to July 16, 1975); (3) the extended period from the prior wage determination to when the award was made (March 27, 1974, to July 16, 1975); (4) GSA's failure to comply with the requirements in 29 C.F.R. §§ 4.4, 4.143, 4.145 (1974) to submit SF-98's for the periodic extensions of the Minjares' contract; (5) GSA's failure, without any explanation of exceptional circumstances, to follow the requirement in 29 C.F.R. § 4.4 (1974) and FPR § 1-12.905-3 (1964 ed. amend. 53) to submit a SF-98 not less than 30 days prior to when GSA proposed to complete award negotiations under the RFP; (6) the period in excess of a month prior to award when GSA knew that a higher wage determination was applicable (June 12, 1975, to July 16, 1975); and (7) the modification of the contract retroactive to its commencement date to reflect the proper wage determination, we believe GSA's actions are tantamount to awarding a contract different from that called for in the RFP. *Tombs & Sons, Inc., supra.* GSA should have reopened negotiations when it was informed that a revised determination was applicable, so that all offerors could have the opportunity to revise their proposals to be reflective of the Government's actual requirements regarding service employees' wage rates.

GSA has asserted that Revision 10 of Wage Determination 67-173 would have an equal effect on the offerors. However, as we stated in *Dyneteria, supra:*

> * * * Competition is not served by assuming that the new wage rates would affect all bids equally. It may well be that another bidder was already paying wages at or above those in the new determination so that his prices would not have increased at all. Thus, it is possible that the contract as amended no longer represents the most favorable prices to the Government. Speculation as to the effect of a change in the specifications, including a new wage determination, is dangerous and should be avoided where possible. See B-177317, [December 29, 1972]. The proper way to determine such effect is to compete the procurement under the new rates.

Similarly, GSA has stated that it believed it was unlikely that the inclusion of Revision 10 would have any effect on the relative standing of the offerors. In this regard, we stated in B-177317, *supra:*

> * * * It has been our position that the order of bidders should be based on prices computed using the wage rates which will actually prevail. It is normally not proper to arrive at prices under new wage rates by extrapolating from the prices submitted under the old rates. * * *

Also, see *Management Services, Incorporated, supra.* Moreover, GSA did not make any empirical study which clearly demonstrated that the revised wage determination would not affect the award selection. Contrast B–177317, *supra*, and 52 Comp. Gen. 686 (1973).

GSA also notes that since it notified offerors of the award selection on June 13, 1975, this had the effect of informing the offerors of their relative standing. GSA states that this made it impractical to reopen negotiations on the basis of the revised wage determination. However, GSA knew a new wage determination was applicable prior to announcing its award selection. Moreover, we stated in response to a similar argument in *Tombs & Sons, Inc., supra:*

> The Air Force fears that to have amended the IFB and called for new bids would have encouraged an "auction" atmosphere. There is another consideration present which we believe is to be of greater significance: the requirement that the contract be awarded in the form advertised to the low responsive and responsible bidder. This requirement relates not only to the equality of the bidding, but to the ultimate determination of lowest price. Of course, to reject all bids and cancel an IFB after bids have been opened tends to inhibit and prejudice competition in that bidders have expended time and money to prepare bids without a prospect of receiving an award. On the other hand, we are greatly concerned that the integrity of the competitive bid system be maintained by conducting procurements in accordance with applicable statutes and implementing regulations. The possibility that a contract may not reflect true competition on the basis of actual performance has a greater effect on the overall integrity of the competitive bid system than the fear of an auction atmosphere necessitated by an action taken to assure full equality of competition.

We believe the foregoing discussion is also applicable to the present RFP. The possibility that the contract may not reflect true competition by offerors on an equal basis has a more harmful effect on the overall integrity of the competitive procurement system than the premature disclosure of the apparent successful offeror.

GSA also contends that the time exigency problems caused by the Minjares' contract's impending expiration on June 30, 1975, made it impractical to reopen negotiations. However, this problem was caused by GSA's failure to comply with applicable DOL regulations by not submitting SF–98's when it periodically extended the Minjares' contract and by failing to submit the SF–98 not less than 30 days prior to its proposed award date. Also, it appears that GSA made no effort to ascertain whether it could extend the Minjares' contract when it received notification of the revised wage determination. GSA had no previous reluctance to extend the Minjares' 8(a) contract, and it extended the Minjares' contract again upon receipt of the protest.

GSA has cited FPR § 1–12.905–4(a) (1964 ed. amend. 53) in support of the award incorporating the old wage determination. This regulation provides in pertinent part that revisions to wage determinations received later than 10 days before the opening of bids shall not be effective on the particular contract except where the Federal

agency finds that a reasonable time is available in which to notify bidders of the revision.

By its own terms this regulation is not applicable to negotiated procurements, notwithstanding GSA's attempt to analogize this provision to the similar provision in Armed Services Procurement Regulation § 12–1005.3 (1975 ed.), which is applicable to negotiated procurements. Even if such a provision were applicable in this case, GSA could not rely upon it to excuse itself from reopening negotiations in view of the factors listed above which made this award tantamount to awarding a contract different from that called for in the RFP. Most notable among these factors in this regard are the extended period from the closing date for receipt of proposals to the award date and GSA's failure to furnish a SF–98 notification to DOL not less than 30 days prior to the commencement of negotiations as required by applicable regulations.

PROPOSAL EVALUATION ON DIFFERENT BASIS THAN IN RFP

GSA also erred in evaluating the proposals on a different basis than that designated in the RFP without informing the offerers of the material changes made in the evaluation scheme.

The RFP listed the major factors to be considered in the proposal evaluation in descending order of importance as follows:

a. *Organization and Plan of Operation*
   (1) Organizational structure, the comprehensiveness and the detail of the operating plan, and the subcontracting plan.
   (2) Labor mix and wage reasonableness.
   (3) Labor relations plan.
   (4) Phase-in Plan comprehensiveness and detail.
b. *Cost Factors and Fee Data*
c. *Company Resources, Experience and Past Performance*
d. *Degree of Responsiveness to Proposal Instructions*
e. *Key Personnel*

GSA apparently completely revised the RFP's evaluation scheme sometime after the RFP's issuance. However, it did not issue an amendment to the RFP informing the offerors of the material changes made. The actual factors used in the evaluation of the proposals and their relative weights are as follows:

Responsiveness to Proposal Instructions	10%
Management/Organization	30%
Resources	30%
Cost Factors	30%
Fee Data	10%

Although GSA has termed the changes in the evaluation scheme "slight" and "more a matter of form than substance," we cannot agree

on the basis of the record. Under the revised evaluation scheme, more weight was given to the cost factors and fee data criterion than indicated in the RFP. Also, it would appear that the relative importance of the organization evaluation factor was deemphasized. We do not know what consideration or weight was actually accorded the key personnel criterion or to the offerors' experience and past performance. Although it would be speculative to find that the change in the evaluation scheme affected the award selection, we believe it cannot be concluded, with certainty, that it could not have had such an effect had offerors been given an opportunity to revise their proposals to respond to the true evaluation scheme.

We have on many occasions held that offerors must be advised of the relative importance of technical, price and other evaluation factors in relation to each other. See *Signatron, Inc.*, 54 Comp. Gen. 530 (1974), 74-2 CPD 386, and decisions cited therein. The reason for this rule is to provide all offerors with the information necessary to properly prepare their proposals. Since the disclosure of the relative weights of the evaluation factors is an essential requirement of a procurement, a material change from the evaluation scheme indicated in the RFP should be communicated to the offerors so they will not be misled by the RFP's provisions and can properly prepare their proposals. Therefore, GSA should have duly informed the offerors of the factors in the new evaluation scheme and their relative importance to one another. *See* FPR §§ 1-3.802(c) (1964 ed. amend. 118), 1-3.805-1(d) (1964 ed.); B-166779(2), August 1, 1969; 50 Comp. Gen. 637 (1972); *Willamette-Western Corporation*, 54 Comp. Gen. 375 (1974), 74-2 CPD 259; *Union Carbide Corporation*, 55 Comp. Gen. 802 (1976). We note that this procurement deficiency would not have occurred if the janitorial services requirement was formally advertised rather than negotiated.

As indicated above, it is recommended that GSA not exercise the July 31, 1976, option, and that it formally advertise its future requirements for janitorial services for the IRS Center in accordance with *Nationwide, supra*. In addition, we are bringing the serious procurement deficiencies we have found to the attention of the Administrator of General Services Administration.

[B-184595]

Justice Department—Immigration and Naturalization Service—Repair and Maintenance of International Boundary Fences

Appropriation of Immigration and Naturalization Service (INS) may be used to repair International Boundary fences on private property if expenditures and improvements are necessary for effective accomplishment of purposes of Service's

appropriation, are in reasonable amounts, are made for the principal benefit of the United States and the interests of the Government are fully protected.

Appropriations—Availability—Items Necessary in Enforcement of Immigration Laws

INS's "necessary expenses" appropriation is available to repair boundary fences under jurisdiction of other Federal agencies provided INS determines expenditure is necessary to enforcement of immigration laws and other agencies do not intend to make repairs as promptly as necessary to deter unlawful immigration. Rule that where appropriation is made for particular object, it confers authority to incur expenses which are necessary, proper, or incident thereto, unless there is another appropriation that makes more specific provision therefor, is inapplicable since there is no specific appropriation for repair of boundary fences.

In the matter of repair and maintenance of International Boundary fences—Immigration and Naturalization Service, March 10, 1976:

Reference is made to a letter from the Assistant Attorney General for Administration, Department of Justice, requesting a decision as to whether Immigration and Naturalization Service's (INS) appropriations are available for repairs and maintenance of International Boundary fences under the jurisdiction of other Government agencies or belonging to interests other than the Federal Government.

In his letter the Assistant Attorney General states in pertinent part:

> Section 103(a) of the Immigration and Nationality Act (8 U.S.C. 1103), confers upon the Attorney General the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens. * * *
>
> The fences in question are located at El Paso, Texas. The Bureau of Reclamation and the International Boundary and Water Commission, United States and Mexico, are the holding agencies for some of the fences. Other fences are owned by the city of El Paso and by a railroad company; and the Immigration and Naturalization Service is the holding agency for the balance thereof. These fences are constantly being cut by persons seeking illegally to enter the United States. Repairs are made on a continuing basis by this Service to the fences under its jurisdiction. However, no urgency for prompt repair of other fences appears to exist for the holding agencies or owners thereof; but for purposes of determining illegal entries into the United States, prompt repairs are necessary.

The relevant appropriations, "Salaries and Expenses, Immigration and Naturalization Service, 1975" are contained in the Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation Act, 1975 (pages 7 and 8 of Public Law 93–493, approved October 5, 1974, 88 Stat. 1193, 1194), which provides in pertinent part:

> For expenses, not otherwise provided for, necessary for the administration and enforcement of the laws relating to immigration, and alien registration, * * * acquisition of land as sites for enforcement fence and construction incident to such fence * * *.

This provision is also contained in INS' 1976 appropriations, Public Law 94–121, 89 Stat. 611, approved October 21, 1975.

The Assistant Attorney General states that INS has determined that prompt repairs to the International Boundary fences are necessary for the enforcement of immigration laws but that other Federal agencies

and non-Federal owners of the fences in question do not regard the making of such repairs as a matter of urgency. For this reason, INS seeks to use its own "Salaries and Expenses" appropriation for the repairs to the fences. INS' rationale is that prompt repairs to all International Boundary fences would serve to deter the entry of illegal aliens, the purpose of the appropriation for the Immigration and Naturalization Service (INS). Hence, this expenditure by INS would be of primary benefit to the United States by reducing the number of such entries.

The Assistant Attorney General's first question is whether expending INS funds to repair privately owned fences would conflict with the general rule that appropriated funds cannot be used for permanent improvements on private property in the absence of express statutory authority. *See, e.g.*, 19 Comp. Gen. 528 (1940), 42 *id.* 480 (1963) and 53 *id.* 351 (1973). This rule is one of policy, not positive law, and requires a review of the facts and circumstances of each particular case.

INS, as noted above, has specific authority in its appropriations to expend its funds to acquire privately owned land as sites for boundary fences and for construction incident thereto. This authority, first appearing in the Department of Justice Appropriation Act, 1961, Public Law 86–678, August 31, 1960, 74 Stat. 555, was principally enacted to allow the erection of such fences where the owner of the property had not and was not planning to install a fence along the border.

"Acquire" is defined as gaining by any means or getting as one's own. Webster's New International Dictionary, 2d Ed. Unabridged (1950). In our view the statutory authority for "acquisition of land as sites for enforcement fence" is not restricted to the purchase of property in fee simple. To protect the Government's interest in its expenditures, INS must, however, gain substantial control over the land on which it plans either to erect or to repair fences. Such control might be obtained through, for example, an easement or a lease lasting through the useful life of the fence.

We note that the erection of a fence along the boundary of privately owned property might tend to increase the value of that property, whether the Federal Government has purchased the narrow strip on which the fence is located or has obtained a lesser degree of control over that strip. Hence, we believe that the framework of the subject provision in INS' appropriation act provides sufficient authority for INS to make permanent improvements to private property by way of repairing existing fences provided INS fully protects the Government's interest in the fences by acquiring sufficient title and control thereover.

The Assistant Attorney General also asks whether use of funds from the subject appropriation for repair and maintenance of International

Boundary fences under the jurisdiction of other Government agencies would be—

> * * * in conflict with the rule that, where an appropriation is made for a particular object, by implication it confers authority to incur expenses which are necessary or proper or incident to the proper execution of the object unless there is another appropriation which makes more specific provision for such expenditures? See 6 Comp. Gen. 621; 29 *id.* 421.

While the appropriations (for "necessary expenses") of the agencies in control of the fences here involved would be available to repair such fences, such appropriations would not be considered as making "specific provisions" for the repair of such fences within the meaning of the rule of statutory construction cited by the Assistant Attorney General. Further, we are not aware of any other appropriation that makes more specific provision for such expenditures. Thus, the above-cited rule would not preclude INS from expending its appropriation for "necessary expenses" to repair fences under the control or jurisdiction of other Federal agencies, if INS determines that such expenditures are necessary for the enforcement of the immigration laws and that the agencies in control of the fences do not intend to make repairs as promptly as INS feels is necessary to deter unlawful entry.

If consistent with the guidelines set forth above, this Office will not need to review each individual proposed action which may arise in the future.

[B-183947]

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

Although protest against validity of scrap and waste factors contained in request for proposals (RFP) filed after closing date for receipt of best and final offers is untimely under our bid protest procedures then in effect, protest will be considered on merits since it raises issue significant to procurement practices or procedures in that allegation relates to basic principle of competitive system.

Contractors—Incumbent—Competitive Advantage—Allegation Denied

Protest based upon contention that incumbent contractor and awardee under subject procurement knowingly submitted production plan containing incorrect and misleading data, which was incorporated into RFP, to gain competitive advantage over other offerors is denied since two separate agency audits show that data used was substantially correct. However, agency advised that verification of such data should be made prior to inclusion in solicitation rather than after protest as in instant case.

Contracts—Negotiation—Offers or Proposals—Preparation—Costs

Since, contrary to protester's contention, quantity estimates in RFP were not substantially overstated, there is no evidence that other offeror knew protester's original price before it submitted best and final offer and determination not to obtain cost and pricing DD Form 633 was in accordance with regulations, claim for proposal preparation costs will not be considered.

In the matter of Inflated Products Company, Inc., March 11, 1976:

This is a protest by Inflated Products Company, Inc. (IPI), against the award of a contract to the Brunswick Corporation (Brunswick), under request for proposals (RFP) No. DAAK01-75-R-2048, issued by the Department of the Army, Troop Support Command (TROSCOM), St. Louis, Missouri. The RFP called for offers on quantities of camouflage screening support systems, camouflage screening systems (lightweight, radar scattering), and camouflage screening systems (lightweight, radar transparent).

The RFP was amended five times; however, only amendment No. 0002 dated January 22, 1975, is pertinent to this protest. Amendment No. 0002 advised that the modified Production Plan included in the RFP was "for informational purposes only" and it also revised the Bill of Material, Table XIII of the Production Plan. The Production Plan had been developed by Brunswick, the incumbent contractor, based on production data experience in producing the radar camouflage modules prior to the issuance of the RFP. Amendment No. 0002 also required each offeror to submit its own production plan in order to determine how Government-furnished property as provided for in the RFP would be utilized. Only two firms, IPI and Brunswick, submitted offers. The proposal submitted by IPI was low with a total price of $43,356,320.24, f.o.b. destination. Brunswick's offer was $45,876,385, f.o.b. origin. The transportation costs for the Brunswick proposal were estimated at $389,249. After review and evaluation of initial proposals, oral discussions were conducted with IPI and Brunswick throughout the period of February 25, 1975, through April 28, 1975. This also included discussions during the preaward survey of IPI from April 6-11, 1975. The discussions with IPI included consideration of allegations that the color coating scrap allowances as included in the RFP Production Plan were incorrect and misleading. On May 5, 1975, IPI's final offer of $42,750,845.60, f.o.b. destination, and Brunswick's final offer of $38,792,133.22, f.o.b. destination, were received.

On May 9, 1975, the contracting officer received a telegram from IPI protesting the award of the contract and contending that the scrap and waste factors included in the RFP Production Plan were grossly overstated and purposely misleading. A similar protest was received in our Office on May 22, 1975. Award was made to Brunswick on June 20, 1975, pursuant to Armed Services Procurement Regulation (ASPR) § 2-407.8(b)(ii) (1974 ed.).

It is the contention of the procuring activity that the protest is untimely and, therefore, not for consideration on the merits.

Section 20.2(a) of our Interim Bid Protest Procedures and Standards (Procedures), 4 C.F.R. part 20 (1974), then in effect, provided

in pertinent part that: "Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of proposals shall be filed prior to bid opening or the closing date for receipt of proposals." The scrap rate which IPI is protesting was included in the RFP when it was issued on November 13, 1974, and was also the subject of negotiations with IPI during its preaward survey. In order to be timely, the protest should have been filed prior to the date for receipt of best and final offers, which was May 5, 1975, and was not filed until thereafter.

However, counsel for the protester argues that if the protest is in fact untimely, it should be considered under one of the exceptions to the timeliness rule as provided for in section 20.2(b) of our Interim Bid Protest Procedures, *supra*, namely that it is a significant issue. In this connection, IPI contends that because the agency pointed out during negotiations that its scrap and waste factors were substantially below those in the RFP Production Plan it placed great emphasis upon the RFP estimates, which were grossly overstated and misleading, and that reliance upon the estimates resulted in an overstatement of its offer by more than $4 million.

Section 20.2(b) provides that the Comptroller General, for good cause shown, or where he determines that a protest raises issues significant to procurement practices or procedures, may consider any protest which is not filed timely. As to what constitutes a significant issue, we stated in *Fairchild Industries, Inc.*, B-184655, October 30, 1975, 75-2 CPD 264:

> * * * "Issues significant to procurement practices or procedures" refers to the presence of a principle of widespread interest and not necessarily to the sum of money involved. 52 Comp. Gen. 20, 23 (1972). There have been instances in which our Office has determined that although a protest was filed untimely, the issue presented was significant to the entire procurement community and therefore was considered on the merits. See, for example, *Fiber Materials, Inc.*, 54 Comp. Gen. 735 (1975), 75-1 CPD 142, where in a research and development procurement individually tailored statements of work for the two offerors in the competitive range precluded one offeror from competing on an equal basis, contrary to the basic principles of the law and regulations governing the conduct of procurements; *Willamette-Western Corporation; Pacific Towboat & Salvage Co.*, 54 Comp. Gen. 375 (1974), 74-2 CPD 259, where the release of a draft request for proposals to the incumbent contractor 5 months before other competitors received the official RFP resulted in partiality toward the incumbent to the prejudice of competitors, contrary to the concept implicit in negotiated procurements and statutory requirement for maximum competition; and 52 Comp. Gen. 905 (1973), where pursuant to the invitation for bids the addition of a $1,000 evaluation factor (which equaled nearly 50 percent of the evaluated price) penalized all potential suppliers except the incumbent contractor, thereby precluding effective competition.

Since IPI's allegation is to the effect that it was precluded from competing on an equal basis through purposefully grossly misleading information in the RFP, we believe the issue is significant to procurement practices and procedures within the rationale of the above cases. Therefore, the protest will be considered on the merits.

In addition to counsel's contentions that the scrap and waste factors were incorrect, he also argues that the amount of sheet molding compound (SMC) stated to be 111 pounds per module in the Production Plan was incorrect and that the correct amount was actually slightly greater than 25 pounds per module. According to counsel the scrap and wastage factor was approximately 8 percent rather than the 57 percent stated in the Production Plan. This difference would have amounted to a difference in price of $320,550. The difference in price between the weight of SMC in the Production Plan and IPI's weight of SMC amounted to $4,061,232.

The following facts are relevant to the development and accuracy of the Production Plan included in the RFP. On April 6, 1972, the Government awarded a Manufacturing Methods and Techniques (MM&T) contract to Brunswick for the design and development of a manufacturing system for the fabrication of lightweight synthetic camouflage screening systems.

A significant piece of the data developed under the contract was the production plan upon which the protested RFP is based. The initial plan, accepted by the Government in 1972, called for 85.4 linear yards of cerex (also known as base cloth to which is added stainless steel fibers, the source of the screen's radar properties) to produce 53.6 linear yards of camouflage screen. This plan did not require a test after color coating (addition of colored vinyl coatings to the cerex to achieve visual and infrared camouflage characteristics), since it was not known at the time what effect the color coating would have on the radar properties of the cloth. It was not until August 1973 that it was determined that a test after color coating should be performed.

In February 1974, the Government issued change order No. P00005 that required testing after color coating. At that time, it was the opinion of both the Government and the contractor that the amount of scrap generated by the test would increase the cerex usage from 85 linear yards to approximately 93 linear yards. However, during factfinding and negotiations of the change and documented actual usage, the amount of cerex was changed to 101.3 linear yards.

As stated in a memorandum from the Mobility Equipment Research & Development Center (MERDC) dated August 22, 1975, the basis of the Government's settlement of the change from testing after color coating was an audit and examination of the contractor's records of cerex usage. Quantities of faulty cerex were returned to the vendor and were deleted from the audit.

The MERDC memorandum further stated that the amount of cerex used in the add-on quantities was established with the data used in settling the change for testing after color coating. The scrap determination for the settlement of the test after the color coating changes

was based on actual cerex usage during a portion of the production of the radar screens and also the results of an audit of cerex usage since the further completion of 58,600 radar screens. The results of the audit contained in a letter from MERDC dated May 20, 1975, stated:

> Verification has been accomplished for the scrap and waste factors for cloth * * *. The results of the review are as follows:
> a. For the total quantity of 58,600 modules, the amount of Cerex which was required was 5,887,183 linear yards. This is equal to 100.46 linear yards versus 101.3 linear yards that is in the bill of material of ECP 74HE1699.
> * * * * * * *
> c. The referenced ECP had a total scrap and waste factor of 57.6% for the Cerex. The total scrap and waste experienced for the contracts was 79% which is a much higher rate.
> * * * * * * *
> Therefore, the total usage of cloth for the 58,600 is very close to the usage in the updated production plan and the scrap and waste factor of 57.6% is wrong for the updated usage and should have been corrected to 80%. The actual scrap factor for cloth was 79% as stated above.

By letter dated June 24, 1975, counsel states that IPI learned from the Haysite Corporation (Haysite) and the Ferro Corporation (Ferro), both suppliers of SMC material to Brunswick under the earlier contract, that the quantities of SMC may have been overstated by 4 or 5 to 1 in the Production Plan.

SMC was used by Brunswick to make the batten spreader component of the radar module. The batten spreader was the support system to which color coated cloth was attached. At the beginning of a limited production contract in 1973, batten spreaders were manufactured from chopped fiber glass and a polyester resin sheet molding compound (SMC). The SMC was procured by Brunswick from Haysite. In February 1974, the Government directed Brunswick to stop manufacturing the batten spreaders because of failures during testing. To correct the failures a new spreader was designed which consisted of a hybrid material of chopped and woven roven fiber glass mat and die cut in one piece.

A significant increase in material usage occured when it was determined that batten spreaders molded in more than one piece could not meet the loading requirements during testing. Additional scrap losses were incurred due to increased quality requirements. MERDC physically measured the scrap due to die cutting which is the majority of the loss. MERDC has advised that there is only a 37-percent yield of good batten spreader material out of the die cutting operations.

The original usage rate for SMC was 24.2 pounds per module. However, due to design change to strengthen the batten spreader engineering change proposal (ECP) No. 74HE1699 increased the amount to 111 pounds per module. This is the amount used in the Production Plan as contained in the RFP.

During 1973, Brunswick decided to invest in facilities to manufacture SMC "in-house" rather than rely on its suppliers. Due to this capability to manufacture SMC and the design changes in the batten spreader, neither Haysite nor Ferro was apprised of the changes in either material quantity or the construction method required to produce the redesigned batten spreader. Thus, any information given to IPI by Brunswick's former suppliers regarding the quantity of SMC previously used by Brunswick was outdated due to the engineering changes in the batten spreader.

It is clear from the foregoing that the estimates included in the Production Plan were substantially correct. Further, amendment 0002 specifically stated that the information contained in the Production Plan was for informational purposes only. The information was merely to be used as a guideline for the offerors when submitting their offers. It is also noted that apparently the scrap and waste factors would vary depending on the type of production method used. However, the RFP did not require the use of any particular method. This may account for IPI's indication to Government personnel during the preaward survey that it was 96 percent certain that the scrap and waste factor used in its initial proposal was more accurate than Brunswick's. In any event, having exercised its own judgment, IPI submitted a best and final offer using the figures in the Production Plan. Based on our review of the record, we cannot conclude that Brunswick gained an undue competitive advantage or that IPI was improperly misled. The only advantage enjoyed by Brunswick was that of previous experience. In this regard, we have long recognized that certain firms may enjoy a competitive advantage by virtue of their own incumbency. See *Houston Films, Inc.*, B–184402, December 22, 1975, 75–2 CPD 404.

It is our view, however, that where the Government designates an incumbent contractor to furnish data that may be relied on by other bidders or offerors, the Government should exercise the highest standard of care as to the correctness of that data. The Government has the duty to assure, to the extent possible, that the data submitted is in fact correct. While in the present case an audit by MERDC, after the protest, proved that the data included in the Production Plan was substantially correct, such verification should have been made prior to its inclusion in the RFP. By letter dated today we are recommending to the Secretary of the Army that in the future data supplied by an incumbent contractor be verified prior to its inclusion in a solicitation.

Counsel has protested that the contracting officer was arbitrary and capricious when he failed to require that DD Form 633 (Contract Pricing Proposal) be submitted with best and final offers. The contracting agency has indicated that although cost and pricing data on

DD form 633 was obtained with the original offers, it was not requested with best and final offers because the competitive situation was considered to meet the requirements of ASPR § 3-807.1(b)(1)(a): (i) two responsible offerors (ii) who can satisfy the Government's requirements (iii) independently contend for a contract to be awarded to the responsive and responsible offeror submitting the lowest evaluated price (iv) by submitting offers responsive to the requirements of the solicitation. Since the determination not to obtain DD form 633 in the circumstances appears to have been in accordance with the regulations, it was proper. B-173523, December 18, 1971.

Counsel has also alleged that perhaps Brunswick was informed of IPI's offer based on the fact that the contracting officer did not request best and final offers until after it was known that IPI was responsible.

There is no evidence of record that Brunswick knew IPI's initial offer. Negotiations and the preaward survey were conducted simultaneously to conserve time in making an award. An unsubstantiated allegation that prices may have been disclosed, even coupled with an opportunity for such conduct, is not sufficient to require an affirmative conclusion. *Datawest Corporation*, B-180919, January 13, 1975, 75-1 CPD 14. While it is true, as counsel contends, that Brunswick did reduce its offer considerably after IPI was found to be responsible, there is nothing in the record that establishes that the former was related to the latter.

Finally, counsel argues that in the event our Office allows the protested procurement to stand, IPI be awarded proposal preparation costs. Since the record does not show that the procuring activity acted in an arbitrary or capricious manner, IPI's claim for proposal preparation costs will not be considered. See *T&H Company*, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345.

In view of the foregoing, the protest is denied.

[B-184333]

Contracts—Negotiation—Cost Accounting Standards Requirements—Catalog or Market Price Exemption—Mandatory

Catalog or market price exemption from requirement of Cost Accounting Standards Act is mandatory exemption rather than discretionary with contracting agency. Therefore cost accounting standards (CAS) requirements should not be imposed on contractor whenever catalog or market price exemption is determined to exist.

Contracts—Negotiation—Cost Accounting Standards Requirements—Catalog or Market Price Exemption—Request and Justification—Offeror's Responsibility

It is the offeror's responsibility to request and to provide justification for a catalog or market price exemption from CAS requirements. However, the contract-

ing agency must make the deterination whether the exemption applies in the particular case.

Contracts—Negotiation—Competition—Adequacy—Application of Cost Accounting Standards Requirements

A negotiated price may be based on adequate price competition and at the same time be qualified for exemption from CAS requirements as catalog or market price.

Contracts—Negotiation—Cost Accounting Standards Requirements—Catalog or Market Price Exemption—Effect of Adequate Price Competition

Where low offeror claimed exemption from CAS on ground that its offered prices were based upon its established catalog or market prices, exemption should not have been denied solely because adequate price competition was obtained by agency. Recommendation is made that agency review claim and if basis for exemption existed then consideration be given to termination for convenience of contract awarded to second low offeror and award of terminated quantities to low offeror.

In the matter of the Gulf Oil Trading Company, March 11, 1976:

Gulf Oil Trading Company has protested the determination that its offer in response to request for proposals DSA600-75-R-0292, issued by the Defense Supply Agency, was unacceptable because Gulf refused to be subject to the cost accounting standards (CAS) provision contained in the solicitation. Gulf contends that it was exempt from the CAS provision because its prices were based upon its established catalog or market prices.

This procurement contemplated indefinite quantity contracts for the supply of 28 line items representing an estimated 3,211,000 barrels of distillate and residual bunkers (ship's fuel) for certain ports in the continental United States and the Canal Zone. Under protest are awards for two of these items which together comprise the delivery of an estimate 900,000 barrels of ship's bunkers (No. 6 Fuel Oil) for Balboa and Cristobal, C.Z. The protested items were the only ones for which competitive offers were received and the low offeror (Gulf) refused to accept the CAS clause.

The requirement for the CAS provision stems from 50 U.S. Code App. 2168 (1970), Public Law 91-379, through which was created the Cost Accounting Standards Board, which board was authorized to promulgate cost accounting standards for:

> * * * all negotiated crime contract and subcontract national defense procurements with the United States in excess of $100,000, other than contracts or subcontracts where the price negotiated is based on (1) established catalog or market prices of commercial items sold in substantial quantities to the general public, or (2) prices set by law or regulation.

Throughout the negotiating phase of this procurement, Gulf offered prices which were somewhat lower than the prices posted in its "Inter-

national Marine Fuel Oil Price Schedule," but with economic price adjustment provisions tied to the fluctuations in its posted prices. Gulf contended that although its prices were not identical with its posted prices, they were still based on the posted prices, and therefore it was entitled to a statutory exemption from the CAS requirement. Gulf submitted to DSA documentation to justify the exemption.

The DSA contracting officer noted, however, that while the CAS act contains the catalog or market price exemption, the act does not provide for an exemption where the price is based on adequate price competition. Since the DSA contracting officer considered that the prices offered by Gulf and by the one other offeror (Exxon International Company) had been obtained through competition, he sought guidance from higher authority within the agency whether Gulf was entitled to the catalog or market price exemption. He was advised that "the CAS will apply if the price negotiated is based on adequate price competition regardless of the possible existence of an established catalog or market price for the item." In view of Gulf's refusal to accept CAS, the contracting officer by letter of June 23, 1975, notified Gulf of the determination to award the items to Exxon. A protest to this Office followed. Thereafter, on July 8, 1975, DSA awarded the items to Exxon pursuant to Armed Services Procurement Regulation (ASPR) 2-407.8(b)(3), because of urgency.

In its initial submission of September 2, 1975, to this Office, DSA argued the position that "if adequate price competition exists and is relied on by the contracting officer to determine the award price, the resulting contract award is based on competition even though the low offeror may have based its offer on its catalog price or on a market price." In addition, DSA argued that "even if the contracting officer could have found, on the basis of facts in this case, that the award price was based on an established catalog or market price, he was not required to do so and his decision was not an abuse of discretion."

Subsequently, however, in a report dated October 24, 1975, DSA "summarize[d]" the issues raised in the Gulf protest to be as follows:

a. Who initiates an exemption from P.L. 91-379? We believe that the Government should normally apply the cost accounting standards as a matter of policy to implement the statute. If an exemption is requested, it should be initiated and justified by the offeror. Certainly this must be the case when an exemption is claimed on the basis of catalog or market price and only the offeror possesses the information necessary to demonstrate that the item or service has an established catalog or market price at which it is sold in substantial quantities to the general public.

b. Who makes the determination whether the price negotiated is based on an established catalog or market price? We believe the Government makes this decision—not the offeror.

c. Related to b. above, is this a permissive or mandatory exemption if the price negotiated is based on a catalog or market price? We note that the exemption language in P.L. 91-379 is worded differently from the parallel exemptions in P.L. 87-653. [Truth in Negotiations Act, 10 U.S.C. 2306(b) (1970 Ed.)] This

may indicate a congressional intent to treat the P.L. 91-379 exemption as a matter of right rather than discretion of the Government.

* * * * * * *

d. The fourth issue for your consideration is whether the Government can find that the price negotiated is based upon adequate price competition and still permit an exemption from the cost accounting standards because it may also be demonstrated, in some manner, that the price negotiated is, or is based upon, an established catalog or market price. First, it should be noted that when the criteria for pricing on the basis of price competition are present, the contracting officer would normally not seek a different basis (i.e., established catalog or market price) for pricing. Pricing would logically be conducted on the basis of adequate price competition. *However, it is conceivable that the Government could view an award price as negotiated on the basis of adequate price competition (i.e., award is to the low offeror when two or more offers are submitted and the criteria of ASPR 3-807.1(b)(1) are satisfied) while the offeror could contend that his offer is based upon an established catalog or market price. Accordingly, in such a situation, in the absence of an objection by your Office, this agency will, in appropriate circumstances, grant a catalog or market price exemption from the requirements of P.L. 91-379, provided:*

(1) The offeror identifies in his proposal, including any changes in his offered price, that his offered price is based upon an established catalog or market price rather than from the stimulus of competition which may be present in the particular procurement;

(2) The offeror completes a DD Form 633-7 (Claim for Exemption from Submission of Certified Cost or Pricing Data) or otherwise furnishes necessary information in accordance with ASPR 3-807.3(j); and

(3) The criteria set forth in ASPR 3-807.1(b)(2) can be satisfied. [Italic supplied.]

Nevertheless, DSA reaffirmed its position that, "had the award been made to Gulf, the price negotiated would have been considered to have been based on adequate price competition * * *" and therefore "* * * this protest should be denied."

In paragraph c. above, of its October 24, 1975, report, DSA suggests that the catalog or market price exemption from the CAS requirements may be mandatory rather than permissive. We agree with this DSA position. Unlike the wording of Public Law 87-653, which provides that the requirements of that act *need not be applied* in certain cases, *see* 10 U.S.C. 2306(f) (1970), the language of 50 U.S.C. App. 2168 (1970) gives no indication of a congressional intent to allow for agency discretion as to whether to grant the exemption where the basis for an exemption exists. In the "Detailed Explanation" included in the *Statement of the Managers on the Part of the House*, H.R. Report No. 91-13861, 91st Cong., 2d Sess. 6 (1970), it is stated that cost accounting

* * * *standards would not be applied* to

* * * * * * *

(2) negotiated contracts where prices are established by catalog or market price of commercial items sold in substantial quantities to the general public;

Furthermore, upon submitting the conference report to the House of Representatives, Representative Patman observed:

* * * it is important to point out that, while the conference report would permit the newly created Cost Accounting Standards Board to develop and promulgate cost accounting standards designed to achieve uniformity and consistency

in cost accounting for defense contractors and subcontractors in connection with negotiated contracts, two important safeguards are provided against arbitrary and overly cumbersome administration of these provisions.

One is that certain types of contracts, such [as] a contract of $100,000 or less, contracts where prices are established on the basis of catalog or market price for standard commercial items sold in substantial quantities to the general public and contracts for utility services the rates of which are established by law or regulation, *are exempted* from the coverage of the act. [Italic supplied.] 116 Cong. Rec. 28799 (1970).

Therefore, we believe that the CAS requirements should not be imposed whenever the basis for a catalog or market price exemption is determined to exist.

We also agree with DSA that it is the offeror's responsibility to initiate and justify the catalog or market price exemption. As DSA points out, only the offeror possesses the information necessary to demonstrate that the item has an established catalog or market price at which it is sold in substantial quantities to the general public. Furthermore, the contracting agency, not the offeror, must make the determination whether the exemption applies in the particular case.

Finally, we believe that a price may be based on adequate price competition and at the same time be qualified for exemption from CAS as a catalog or market price. A review of the legislative history of the CAS Act indicates to us that the statutory exemption is to be applied regardless of whether the Government uses competitive procedures to negotiate the award price. Indeed, DSA recognizes the possibility that the Government could view an award price as negotiated on the basis of adequate price competition, while the offeror might be able to demonstrate that the price is based upon an established catalog or market price. DSA also recognizes, however, that in such a situation the agency will be required to determine whether the offeror's price is based upon its catalog or market price rather than derived from the stimulus of competition which may be present in the particular case. In this connection, we have no objection to the standards DSA intends to use in the future in determining whether to grant the catalog or market price exemption. (See paragraph d. of DSA's October 24, 1975 letter, quoted above.)

In this case, however, we find no indication that DSA ever determined whether Gulf's prices for the disputed items were based on established catalog or market prices. The record does indicate that DSA questioned whether Gulf's final prices were based on its established catalog or market prices. However, due to DSA's belief that the presence of competition precluded the catalog or market price exemption, the contracting officer did not resolve whether Gulf's prices qualified for the exemption.

Therefore, we recommend that DSA should review Gulf's claim for an exemption, in accordance with the standards set out above, in order to determine if Gulf's final prices qualified for the statutory exemp-

tion. If DSA determines that the basis for an exemption existed, we recommend that a partial termination for convenience be considered consistent with the urgent needs and overall best interests of the Government and that award be made to Gulf of any quantities which remain after the termination. We request that DSA take immediate action to determine the feasibility of a partial termination and that it report to us its findings and any actions taken pursuant to this decision as soon as possible.

[B-184729]

Transportation—Dependents—Alternate Locations—Renewal Agreement Travel

When dependents of an employee are not permitted to accompany him to a post of duty outside the continental United States, or in Hawaii or Alaska, and are transported to an alternate location under the authority of 5 U.S.C. 5725, the employee is entitled to transportation expenses for those dependents incident to his own entitlement to renewal agreement travel under 5 U.S.C. 5728(a) based on the cost of travel between the alternate location and the employee's place of actual residence at the time of appointment or transfer to the post of duty.

In the matter of dependents—renewal agreement travel, March 12, 1976:

The Assistant Secretary of the Air Force, Manpower and Reserve Affairs, as a member of the Per Diem, Travel and Transportation Allowance Committee, has requested an opinion concerning the renewal agreement travel entitlement of employees' dependents who are located at a place other than the employees' duty station (hereinafter referred to as their alternate location) under the authority of 5 U.S. Code § 5725 (1970).

We are told that the Air Force has certain employees whose permanent duty stations are at various remote sites in Alaska. As dependents are not permitted to accompany the employees to those remote sites, they are instead authorized transportation to alternate locations under the following authority contained at 5 U.S.C. § 5725 (1970):

§ 5725. Transportation expenses; employees assigned to danger areas.

(a) When an employee of the United States is on duty, or is transferred or assigned to duty, at a place designated by the head of the agency concerned as inside a zone—

(1) from which his immediate family should be evacuated; or

(2) to which they are not permitted to accompany him;

because of military or other reasons which create imminent danger to life or property, or adverse living conditions which seriously affect the health, safety, or accommodations of the immediate family. Government funds may be used to transport his immediate family and household goods and personal effects, under regulations prescribed by the head of the agency, to a location designated by the employee. When circumstances prevent the employee from designating a location, or it is administratively impracticable to determine his intent, the immediate family may designate the location. When the designated location is inside a zone

to which movement of families is prohibited under this subsection, the employee or his immediate family may designate an alternate location.

(b) When the employee is assigned to a duty station from which his immediate family is not excluded by the restrictions in subsection (a) of this section, Government funds may be used to transport his immediate family and household goods and personal effects from the designated or alternate location to the duty station.

While 5 U.S.C. § 5725(b) (1970), above, authorizes dependents to rejoin the employee when the latter is assigned to a duty station from which his immediate family is not excluded, it does not specifically address the subject of dependents' transportation for the purpose of joining the employee to take home leave pursuant to his execution of a renewal agreement.

In view of the foregoing and in the absence of specific statutory or regulatory authority, the following questions are submitted for an advance decision:

(a) Incident to the renewal agreement travel of an employee from a restricted station (from which dependents are excluded) and whose dependents are residing at an alternate location, may transportation be furnished the dependents at Government expense from their alternate location to the employee's place of actual residence and return to the alternate location?

(b) If the answer to question (a) is in the negative, what is the measure of entitlement in regard to travel of the dependents at Government expense?

Round-trip transportation for employees and their dependents in connection with home leave is authorized by 5 U.S.C. § 5728(a) (1970), the language of which provides for travel of the employee and his immediate family "from his post of duty outside the continental United States to the place of his actual residence at the time of appointment or transfer to the post of duty." Subsection 5728(a) provides in its entirety as follows:

§ 5728. Travel and transportation expenses; vacation leave.

(a) Under such regulations as the President may prescribe, an agency shall pay from its appropriations the expenses of round-trip travel of an employee, and the transportation of his immediate family, but not household goods, from his post of duty outside the continental United States to the place of his actual residence at the time of appointment or transfer to the post of duty, after he has satisfactorily completed an agreed period of service outside the continental United States and is returning to his actual place of residence to take leave before serving another tour of duty at the same or another post of duty outside the continental United States under a new written agreement made before departing from the post of duty.

The Air Force points out that a reading of the two above-quoted authorities leaves unresolved the question of whether dependents assigned to an alternate location under 5 U.S.C. § 5725 (1970) are entitled to transportation in connection with an employee's renewal agreement travel inasmuch as they are unable to comply with the requirements of 5 U.S.C. § 5728(a) (1970) that their travel originate from the employee's post of duty. Nonetheless, that Department is of the opinion that such dependents should be regarded as entitled to round-trip renewal agreement transportation originating and termi-

nating at the alternate location, given the authority of 5 U.S.C. § 5725 (1970) for initially locating them at and ultimately returning them from that location.

At the time the language of 5 U.S.C. § 5725 (1970), authorizing transportation of dependents to an alternate location, was adopted as section 1 of Public Law 81–830, 64 Stat. 985, September 23, 1950 (5 U.S.C. 73b–1), there was no provision for round-trip transportation for any employee or his dependents for home leave purposes. Hence, the legislative history of 5 U.S.C. § 5725 (1970) is understandably silent on the subject. Four years later Public Law 83–737, 68 Stat. 1008, August 31, 1954 (5 U.S.C. 73b–3), was enacted and for the first time provisions were made for returning an employee stationed outside the continental United States, including one stationed in Alaska, and his dependents to their actual place of residence at time of appointment upon the employee's completion of an agreed period of service.

In the legislative hearings and reports that preceded enactment of Public Law 83–737 there is no allusion made to the matter of the renewal agreement travel entitlement of the relatively small class of dependents residing at alternate locations under the authority of 5 U.S.C. § 5725 (1970). Rather, the legislative preoccupation was with the inefficiencies and inequities of the situation that theretofore had pertained with respect to an employee's arrangements for taking home leave. Prior to enactment of Public Law 83–737 the law provided for transportation of an employee and his dependents to their place of actual residence only upon the employee's separation from the service. See S. Report No. 1944, 83d Cong., 2d Sess. 2 (1954), and H.R. Report No. 2096, 83d Cong., 2d Sess. 3 (1954).

A discussion of the method by which, prior to enactment of Public Law 83–737, an employee could obtain return transportation to his actual residence for himself and his dependents is provided in the following excerpt from the Statement by Robert M. Mangan, Office of Civilian Personnel, Department of the Army, appearing at the Hearings on H.R. 179, Before a Subcommittee of the Committee on Government Operations, House of Representatives, 83d Cong., 2d Sess. 13 and 14 (1954):

> Since an employee may return to the continental United States only for absolute separation, he must resign his position in order to return home, even though he may fully intend to perform another period of service in the same overseas area. This involves a sizable administrative burden because the paper processes of separation, final salary payment, tax adjustments on lump-sum leave payment, reappointment, security clearances, and so forth, must be followed. In addition, in Hawaii, Puerto Rico, and the Canal Zone, permanent civil-service employees who return to the continental United States lose their permanent retention rights. This occurs because separation is required, and the Supplemental Appropriation Act, 1952, as amended (the Whitten amendment), prohibits permanent reinstatement.
>
> * * * * * * *

Household goods and personal effects are returned to the continental United States even though the employee plans to reenter employment after his home visit. In many cases, experienced and valuable employees are lost from Government employment as a result of these requirements, and the departments must then resort to recruitment, transportation, and orientation of new persons—at greatly increased expense to the Government. The resultant costs of recruiting new employees, and in most instances costs of shipment of household goods from some point in the continental United States to the overseas post, must again be paid.

There is neither logic nor economy in this practice. It is a gross understatement to say that the Department would normally much prefer to grant a period of leave for return to the United States and to pay the travel attendant thereto.

In enacting Public Law 83–737, Congress sought to eliminate the administrative burden and personal inconvenience to the employee of requiring him to resign his position abroad in order to obtain Government transportation for himself and his family to return to the place of his actual residence in order to take leave. It was felt that the language of that statute would, in addition, help the Government to retain in its overseas employment those experienced individuals who would willingly remain overseas if occasionally allowed to return for visits with family and friends. Because Public Law 83–737 is remedial in nature, its provisions have been liberally interpreted to effectuate the congressional purpose.

While 5 U.S.C. § 5728(a) authorizes payment of the expense of transporting an employee and his dependents "to the place of his actual residence at the time of appointment or transfer to the post of duty, "upon the employee's completion of an agreed tour of duty, the regulations implementing this provision in fact permit an employee and his dependents to travel to an alternate destination, limiting the amount of their entitlement based on travel to the place of actual residence. Federal Travel Regulations (FPMR 101–7) para. 2–1.5h (2) (c) (May 1973) thus provides for travel to an alternate destination as follows:

c. *Alternate destination.* An employee and his family may travel to a location in the United States, its territories or possessions, Puerto Rico, the Canal Zone, or another country in which the place of actual residence is located other than the location of the place of actual residence; however, an employee whose actual residence is in the United States must spend a substantial amount of time in the United States, its territories or possessions, Puerto Rico, or the Canal Zone incident to travel under 2–1.5h to be entitled to the allowance authorized. The amount allowed for travel and transportation expenses when travel is to an alternate location shall not exceed the amount which would have been allowed for travel over a usually traveled route from the post of duty to the place of actual residence and for return to the same or a different post of duty outside the conterminous United States as the case may be.

Legislation similar to 5 U.S.C. § 5728(a) (1970) but applicable to officers and employees of the Foreign Service has likewise been viewed as subject to liberal construction. Subsection 1136(2) of Title 22, of the U.S. Code (1970), provides that the Secretary of State may, under such regulations as he shall prescribe, pay "the travel expenses of the members of the family of an officer or employee of the

Service when * * * accompanying him on authorized home leave." This language would appear to authorize payment of travel expenses only where the employee is physically accompanied by his dependents. Yet, in B-164442, June 12, 1968, we recognized that it is not always possible for the employee and his dependents to travel together. That decision involved the home leave travel entitlement of a Foreign Service employee who had designated Arlington, Virginia, as the safehaven addres of his dependents who were not permited to reside with him in Saigon. We there indicated that the employee was entitled to home leave travel expenses for his dependents based on the cost of their transportation from the safehaven location to the place to which they were entitled to travel for the purpose of taking home leave.

We believe that the situation of dependents residing at an alternate location under authority of 5 U.S.C. § 5725 (1970) warrants a similarly liberal construction of the round-trip renewal agreement travel authority of 5 U.S.C. § 5728(a) (1970). An employee stationed at a remote or other location from which his dependents are excluded has as great a need as any employee assigned abroad to return to his place of residence or other destination in order to take leave to which he is entitled. An employee in this situation, however, has an especially great need to be reunited with his family during such leave period. Were transportation for his dependents from their alternate location not authorized by 5 U.S.C. § 5728(a), such employee would be required to separate or transfer to a less rigorous post of duty to obtain Government-financed transportation for his family. In the case of an employee who is willing to be located at an undersirable post of duty for which recruitment is difficult and who is willing to be separated from his family for long periods, the absurdity of requiring his severance of Government employment in order to be reunited with his family is obvious. The reasons that supported enactment of Public Law 83-737 even more strongly commend its interpretation to cover the case in question. For this reason we find that an employee whose dependents reside at an alternate location under authority of 5 U.S.C. § 5725 (1970) is entitled to round-trip transportation for those dependents incident to his own renewal agreement travel notwithstanding that their point of departure and return is that alternate location rather than the employee's post of duty.

In such cases, the amount of entitlement for dependent travel is not limited on the basis of the cost of travel from the employee's post of duty to his place of actual residence, but rather is limited to the cost of travel from the alternate location to the place of actual residence. We recognize that there will be instances in which the dependents' alternate location is a greater distance from the actual

residence than is the employee's post of duty. Unlike in the situation of dependent travel, generally, 5 U.S.C. § 5725(b) does not limit the return transportation entitlement of dependents at alternate locations to the amount payable for travel from the employee's post of duty. The lack of such limitation is a recognition of the fact that the dependents' location away from the employee is not the result of the family's choice but of the Government's need for the employee's services at a place where, for reasons of health or safety or otherwise, he may not be accompanied by his family. This same consideration pertains with respect to travel for home leave purposes. The Government's needs and not the family's decision is responsible for the fact that the employee's dependents are located at a place more distant than the employee from the family's actual residence. We therefore see no basis to limit entitlement for dependents' renewal agreement travel to the amount payable in connection with travel between the employee's post of duty and place of actual residence.

Accordingly, question 1 is answered in the affirmative. In view of the affirmative answer to question 1 no answer is required for question 2.

[B-185196]

Housing—Loans—Default—Insurance Coverage—Failure To Obtain

Bank requested Federal Housing Administration (FHA) reimbursement under insurance pursuant to 12 U.S.C. 1703 for loss sustained when borrower defaulted on home improvement loan. While bank states it reported loan to FHA as required, FHA has no record that bank had applied for loan insurance and consequently bank was not billed for and did not pay the advance premium required by that statute. Further, bank had actual notice that loan is not insured until acknowledged by FHA in monthly statement and bank admittedly erred in not recognizing on timely basis omission of this loan in next monthly statement rendered by FHA. Therefore, we conclude that in absence of showing of actual negligence by FHA, loan was not insured and reimbursement would be improper.

In the matter of the Atlantic Bank of S. Jacksonville, Florida—FHA loan insurance, March 12, 1976:

Mr. B. C. Tyner, Authorized Certifying Officer, Department of Housing and Urban Development (his reference AFMI:TI:CE), has requested our decision as to the propriety of certifying a voucher presented to him to cover the claim by the Atlantic Bank of South Jacksonville, Florida (Bank) for reimbursement of $1301.80 on a loss sustained by the Bank when the payee of a property improvement loan made by the Bank defaulted. The Bank had been approved under 12 U.S. Code 1703(a) (1970) as eligible for Federal Housing Administration (FHA) insurance against losses sustained, *inter alia*, on loans

made for home improvement purposes. Upon application by the Bank to the FHA for reimbursement under the provisions of 12 U.S.C. 1703 and 24 C.F.R. 201.1 *et seq.*, the FHA denied the claim because the loan in question had not been reported to the FHA for insurance in compliance with 24 C.F.R. 201.10 and no insurance premium had ever been paid by the Bank to the FHA. The FHA therefore concluded the loan was not in an insured status.

12 U.S.C. 1703(f) (1970) states that a premium shall be charged by the FHA for insurance granted under that section. It requires also that "such premium charge shall be payable *in advance* by the financial institution and shall be paid at such time and in such manner as may be prescribed by the Secretary [of Housing and Urban Development]." [Italic supplied.] *See* 55 Comp. Gen. 658 (1976), at 661–662. 24 C.F.R. 200.174, issued under the authority of 12 U.S.C. 1703(h) (1970), states that:

> Within 31 days after the loan is made or the note is purchased from the dealer the lender submits to the Federal Housing Administration individual reports setting forth on a prescribed form the details of each transaction. This information, including the name of the borrower, the location of the property, the amount of the loan advanced, the finance charges, the date of the note, and the terms of payment is the basis for computing the insurance premium which will be due and payable by the lender and is the official record of the transaction with the Administration. This report results in the automatic insurance of the loan *as soon as the required insurance premium is paid.* [Italic supplied.]

24 C.F.R. 200.175 provides further that:

> The regulations provide for an annual insurance charge based on a fractional percentage of the net proceeds of each loan reported for insurance. The lender is billed once a month on all loans reported for insurance during the previous period the receipt of which have been acknowledged by the Commissioner.

24 C.F.R. 201.10 also states, to the same effect, that:

> Loans shall be reported on the prescribed form to the Federal Housing Administration at Washington, D.C. within 31 days from the date of the note or date upon which it was purchased.

To insure a home improvement loan with the FHA, a lending institution reports the loan to the FHA on form FH–4, *Title 1 Loan Reporting Manifest.* The top of the manifest bears the legend "Notice: Loans reported hereon will not be in an insured status until they appear on your monthly statement and insurance charges paid as billed . . ." Upon receipt of the manifest listing each loan, FHA lists the loan on a monthly statement which is issued to the bank. Then the bank pays the periodic premium for the loan to FHA, and the loan enters an insured status. Reporting a loan to FHA is thus the necessary first step to FHA insurance coverage for that loan. As FHA stated in its letter of April 11, 1975, to the Bank, if a loan for which a lending institution has requested insurance does not appear on the

monthly statement, the lending institution should reapply for insurance for that loan if it still desires insurance.

In the case at hand, the note was issued on March 12, 1974, and went into default on May 15, 1974. The Bank alleges that on March 12, 1974, it reported the loan to FHA as required. However, FHA has stated that it has no record of receiving the Bank's loan insurance application. Since it had no record of the application, FHA never acknowledged the loan as insured and never billed the Bank for the appropriate premium. Although the Bank apparently collected the amount of the initial premium from the borrower, this was retained by the Bank in a special account and never forwarded to FHA. The Bank has not affirmatively established that FHA either received the Bank's report or was otherwise negligent in handling the loan application.

The Bank stated in a letter of July 25, 1975, that due to an administrative oversight it failed to notice that the loan in question was not listed on the monthly statement it received the month after it had allegedly applied for insurance for the loan in question. However, it was on actual notice from Form FH–4 that a loan will not be considered insured until it appears on that statement and the required premium is paid. Timely review would, moreover, have disclosed the nonreceipt (or failure to acknowledge) of the report by FHA. In any case the Bank's action in placing the insurance premium collected from the borrower into one of its own internal accounts where it has remained to date removes all doubt that it was aware that a basic condition for coverage—payment of the premium—had not been met.

In circumstances very similar to the instant case, we stated in B–172965, July 16, 1971, that payment of the insurance premium in advance, as required by 12 U.S.C. 1703(f), is necessary for a loan to be eligible for insurance. It is the responsibility of each lending institution to ascertain that its premiums have been paid to FHA, and to take all steps necessary for payment. *Cf. Citizens National Trust & Savings Bank of Los Angeles* v. *United States*, 270 F.2d 128, 133 (9th cir. 1959); B–180015, November 28, 1973; B–172121, April 12, 1971.

The Bank notes that 12 U.S.C. 1703(e) (1970) permits the Secretary of Housing and Urban Development to waive compliance with the regulations governing FHA loan insurance. However, neither that section nor any other statute vests authority in the Secretary to waive compliance with a statutory requirement such as the prepayment of premiums required by 12 U.S.C. 1703(f) (1970). For that reason the Secretary's waiver authority does not allow reimbursement of the Bank for its loss. *See* B–172965, supra.

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Accordingly, the voucher involved, which is being returned herewith together with the claim file to the Authorized Certifying Officer, may not be certified for payment.

[B-185868]

Contracts—Specifications—Failure To Furnish Something Required—Invitation To Bid Attachments

Bid which omitted pages of invitation for bids (IFB) is nonresponsive, notwithstanding it contained every page which required an entry, but which did not serve to incorporate by reference other material pages, and was accompanied by cover letter stating that "applicable documents" are being submitted, which was ambiguous as to whether it referred to documents of IFB as issued or to documents returned with bid, because bidder's intention to be bound by all material provisions of solicitation is unclear.

In the matter of International Signal & Control Corporation; Stewart-Warner Corporation, March 16, 1976:

The Department of the Navy, Naval Electronic Systems Command (NAVELEX), by letter dated February 6, 1976, has requested an advance decision as to whether the bid of International Signal & Control Corp. (ISC) is responsive to a solicitation.

On November 20, 1975, invitation for bids (IFB) No. N00039-75-B-0056 was issued as the second step of a two-step formally advertised procurement by NAVELEX for radio transmitters, receivers and related equipment. Bids were opened on January 8, 1976, with five bidders responding. The low bidder was ISC with a total bid of $8,763,119. The second low bidder was Stewart-Warner Corporation (S-W) which submitted a bid of $9,492,283.

When ISC submitted its bid, it included all those pages of the IFB upon which it was required to place an entry, but did not submit any of the remaining pages. However, a cover letter submitted with its bid stated in part:

> International Signal & Control Corporation (ISC) is pleased to submit herewith the original and one (1) copy of applicable documents *in complete response to subject solicitation.* [Italic supplied.]

Counsel for S-W maintains that the letter evidenced an intent that the only documents applicable to the IFB were the documents submitted by ISC and that no other documents were intended to be included in the bid either by incorporation by reference or otherwise. Counsel for ISC argues that if awarded a contract, the letter indicates that ISC would accept all the terms of the IFB. Counsel for ISC also argues that "incorporation by reference" is not a requirement in determining whether a bid is responsive.

Page 1 of the IFB, Standard Form (SF) 33, which was submitted by ISC, in block 9 under the heading "SOLICITATION," contained the following language:

> All offers are subject to the following:
>
> 1. The attached Solicitation Instructions and Conditions, SF 33–A.
> 2. The General Provisions, SF 32 _____ edition, which is attached or incorporated herein by reference.
> 3. The Schedule included below and/or attached hereto.
> 4. Such other provisions, representations, certifications, and specifications as are attached or incorporated herein by reference. (Attachments are listed in the Schedule.)

The reference to SF 32 is inapplicable since the form was not part of the IFB.

Further down the page, the "OFFER" portion of SF 33 states:

> OFFER (NOTE: *Reverse Must Also Be Fully Completed By Offeror*)
>
> In compliance with the above, the undersigned offers and agrees, if this offer is accepted within __ calendar days (60 calendar days unless a different period is inserted by the offeror) from the date for receipt of offers specified above, to furnish any or all items upon which prices are offered, at the price set opposite each item, delivered at the designated point(s), within the time specified in the Schedule.

The general rule is that where a bidder fails to return with his bid all of the documents which were part of the invitation, the bid must be submitted in such form that acceptance would create a valid and binding contract requiring the bidder to perform in accordance with all the material terms and conditions of the invitation. See *Leasco Information Products, Inc.*, 53 Comp. Gen. 932 (1974), 74-1 CPD 314.

In 49 Comp. Gen. 289 (1969), which counsel for ISC argues is indistinguishable from the present case, the bidder submitted a bid "in compliance with the above," that is, in compliance with the Solicitation Instructions and Conditions, the General Provisions, the Schedule, and such other provisions, representations, certifications and specifications as were incorporated by reference or listed in the Schedule as attachments. Also, in that decision the bid included that portion of the Schedule entitled "Composition," which identified in detail all of the various conditions, provisions, schedules, certificates and other documents comprising the terms of the contract to be awarded. In view of these facts, we held that such references in the bid clearly operated to incorporate all the invitation documents into the bid and that award to the bidder would therefore bind him to performance in full accord with the conditions set out in the referenced documents. In the instant case, similar to the situation in the cited case, the present solicitation contained a "Table of Contents" on page 3 which listed all sections comprising the bidding document. However, unlike the cited case, ISC did not return this page with its bid.

While counsel argues that incorporation by reference is not a requirement for a finding of responsiveness in decisions of our Office, it seems clear that this is the basic thread connecting many cases where pages of an IFB were omitted and the bid was nevertheless determined to be responsive. In addition to the above-cited case, *see* 49 Comp. Gen. 538 (1970); B–170044, October 15, 1970; and *Spectrolab, a Division of Textron, Inc.*, B–180008, June 12, 1974, 74–1 CPD 321. In B–170044, *supra*, the bid included SF 33 with the "Solicitation" and "Offer" clauses referred to previously; however, it failed to include pages 5 and 6 of the solicitation, which contained numerous material terms, including clauses supplementary and modifying SF 32 and SF 33A. The decision stated:

> * * * The question then arises whether there is some evidence in the Gornell bid, or language in those portions of the invitation submitted with its bid, that would incorporate the above provisions into the corporation's bid. In this connection we note that the entire invitation package consisted of 28 pages numbered in sequence. Gornell executed the "Offer" portion of the Standard Form 33 used in the solicitation, and included that form with its bid. The solicitation was specifically identified, by number and date and place of issuance, at the top of the facesheet of the form, and as being comprised of 28 pages which designated the facesheet as "Page 1 of 28." Since Gornell's bid clearly identified the complete solicitation to which it responded as consisting of 28 pages all of the 28 pages of the invitation and the clauses contained or referenced therein were, in our opinion, incorporated by specific reference in the bid documents as signed and submitted by Gornell. Such documents should therefore be considered as evidencing Gornell's intention to be bound by all of the substantive terms and conditions of the IFB. See 47 Comp. Gen. 680 (1968).

In short, it seems clear that in the above-cited case the omitted provisions were specifically incorporated by reference because Gornell completed the "Offer" portion of the facesheet of SF 33 which identified the solicitation as being comprised of 28 pages. This does not appear to be true in the present situation. While ISC completed and returned the facesheet of SF 33, including the "Offer" portion, the facesheet only indicated that it was page 1 and did not show that the solicitation consisted of 234 pages, including section "L" which was comprised of several material provisions.

Furthermore, we believe the meaning attributable to the cover letter submitted with ISC's bid is not free of ambiguity. It could be interpreted to mean that ISC's response was in complete conformance to all the terms and conditions of the IFB as issued. On the other hand, we believe it could reasonably be interpreted to mean that ISC was agreeing to be bound by only such terms and conditions as were encompassed in those documents submitted with its bid. Thus, we find no clear indication that ISC intended to be bound by all the material provisions of the solicitation. In B–172183, June 29, 1971, we stated that where a bid is subject to two reasonable interpretations, under one of which it would be responsive and under the other nonresponsive, we have consistently followed the rule that the bidder is not

permitted to explain his intended meaning after bid opening. Rather, the bid is considered nonresponsive.

In view of the foregoing, the bid is nonresponsive and not acceptable for award.

[B-177610]

Appropriations—Veterans Administration—Parking Facilities

Where General Services Administration (GSA) pursuant to 40 U.S.C. 490(j) charges Veterans Administration (VA) for parking space for use of employees, and related services, VA appropriations are available to pay such charges subject to 90 percent limitation contained in VA annual appropriations.

Property—Public—Space Assignment—Charge Assessment

Where Executive agency other than GSA provides parking space or related services to employees, or to others, agency is authorized by 40 U.S.C. 490(k) to charge occupants therefor if, but only if, rates are approved by Administrator of General Services and the Office of Management and Budget.

Fees—Parking—Disposition

Under 40 U.S.C. 490(k), fees collected by an Executive agency for space provided to "anyone" pursuant to that provision, including parking fees collected from employees, if rates therefor are approved, are generally to be credited to appropriations initially charged for such services, except that amounts collected in excess of actual costs must be remitted to the Treasury as miscellaneous receipts.

General Services Administration—Authority—Space Assignment—Parking

General Services Administration does not assert, nor does it have, authority to force agencies to accept and pay for parking space in excess of their stated needs.

In the matter of parking fees and charges for General Services Administration-provided space and services, March 17, 1976:

The Deputy Administrator of Veterans Affairs requests our decision on several questions concerning the propriety of payments to the General Services Administration (GSA) and the collection of fees from employees for parking space and services, where parking is provided at Veterans Administration (VA) facilities other than Hospitals.

The VA states that the General Services Administration is utilizing the "Standard Level User Charge" (SLUC) to assess charges for parking spaces under GSA control allocated to the VA and related services including some parking spaces provided directly to individual VA employees. The Deputy Administrator questions whether Congress contemplated "that such payments would, in effect, provide free parking to government employees" and asks whether VA can recoup parking costs by charging its employees. He also states that in some instances space has been assigned, although not requested by VA.

Four specific questions are propounded:

1. Can the Veterans Administration appropriation, without specific approval from Congress, be used to pay charges levied by the General Services Administration for employee parking?
2. If the foregoing question is answered in the affirmative, can the Veterans Administration, by virtue of the authority set out in section 210(k) of the Federal Property and Administrative Services Act of 1949, as amended, charge Veterans Administration employees for the parking spaces provided to them, notwithstanding the fact that the General Services Administration has failed to establish rates for this purpose?
3. If it is determined that the Veterans Administration is authorized to charge its employees for the parking spaces provided to them, what disposition may be made of the receipts? In other words, could these receipts be retained by the agency in an account in the nature of a parking revolving fund, returned to the appropriation from which expended, or must such receipts be deposited in the Miscellaneous Receipts Account of the United States Treasury?
4. Finally, if the agency determines that no parking spaces are needed, or spaces above a given number are not needed or required to accomplish the day-to-day operations at a particular facility (including employee parking), does the General Services Administration possess authority to allocate parking spaces to individual agency employees or to the agency in excess of the number of parking spaces deemed necessary by it; and thereafter require the agency to bear the charges for such parking spaces?

With reference to VA's first question, as indicated in our decision 52 Comp. Gen. 957, 958 (1973), one of the major purposes of the Public Buildings Amendments of 1972, Public Law 92–313, June 16, 1972, 86 Stat. 219 (40 U.S.C. 490), was the creation of the Federal Buildings Fund to finance real property management and related GSA activities. Among the sources of revenue to be paid into the fund are user charges, assessed under 40 U.S.C. § 490(j) (Supp. IV, 1974). Section 490(j) provides, *inter alia:*

The Administrator [of General Services] is authorized and directed to charge anyone furnished services, space, quarters, maintenance, repair, or other facilities (hereinafter referred to as space and services), at rates to be determined by the Administrator from time to time and provided for in regulations issued by him. Such rates and charges shall approximate commercial charges for comparable space and services.* * *

Section 609 of the act approved August 9, 1975, Public Law 94–91, 89 Stat. 459, provides in part that:

Appropriations available to any department or agency during the current fiscal year and the period of July 1, 1976, through September 30, 1976, for necessary expenses, including maintenance or operating expenses, shall also be available for payment to the General Services Administration for charges for space and services * * *.

Section 405 of the act approved October 17, 1975, Public Law 94–116, 89 Stat. 600, making appropriations for, *inter alia*, the Veterans Administration for the current fiscal year, and through September 30, 1976, further provides that:

No part of any appropriation, funds, or other authority contained in this Act shall be available for paying to the Administrator of the General Services Administration in excess of 90 per centum of the standard level user charge established pursuant to section 310(j) of the Federal Property and Administrative Services Act of 1949, as amended, for space and services.

Such a provision has been routinely included in appropriation acts since enactment of Public Law 93-381, § 506, August 21, 1974, 88 Stat. 630. This restriction was explained in the report of the House Committee on Appropriations, on the legislation enacted as Public Law 93-381, H. Report No. 93-1132, 39 (1974), as follows:

> After consideration of the budget and proposals of the General Services Administration, the Committee reached the following conclusions:
> 1. The standard level user charges established by GSA are in excess of comparable commercial rates for space and services.
> 2. A reduction of 10% in these rental charges was assessed and each appropriation act will reduce the amount allowed for such charges by that amount.

In view of the foregoing authorities, we are of the opinion that moneys appropriated for the use of the Veterans Administration for necessary expenses, including maintenance or operating expenses, for the current fiscal year and through September 30, 1976, are available for payment of 90 percent of GSA's standard level user charges for space and services, assessed pursuant to 40 U.S.C. § 490(j), including charges attributable to employee parking spaces. Accordingly, the first question submitted is answered in the affirmative.

With reference to the second question, section 490(k) of Title 40, U.S. Code (Supp. IV, 1974) provides that:

> Any executive agency, other than the General Services Administration, which provides to anyone space and services set forth in subsection (j) of this section, is authorized to charge the occupant for such space and services at rates approved by the Administrator. Moneys derived by such executive agency from such rates or fees shall be credited to the appropriation or fund initially charged for providing the service, except that amounts which are in excess of actual operating and maintenance costs of providing the service shall be credited to miscellaneous receipts unless otherwise authorized by law.

VA suggests that, notwithstanding use of the term "anyone" in this subsection, the legislative history of the Public Buildings Amendments of 1972 appears to limit its applicability to charging other Federal agencies for space, thereby precluding recoupment of parking space charges from employees. However, the VA did not cite the legislative history on which it relies, and we are not aware of any supporting materials on this point. Following several general rules of statutory construction, the term "anyone" as used in section 210(k) [40 U.S.C. § 490(k)] should be given the same meaning as in the preceding section 210(j) which deals with charges by the Administrator to "anyone" furnished space or services. The legislative history of section 210(j) indicates that the term anyone was substituted for the term eligible agency in H.R. 10488, 92nd Congress, by the House Committee on Public Works. Eligible agency was defined in the bill to include private persons and organizations. S. 1736, 92nd Congress, a similar bill authorized GSA to charge any "Federal agency, * * * Federal employee, private persons, or organization" furnished space. The conference report accompanying S. 1736 adopted the House lan-

guage, H. Report No. 92–1097. Thus it seems clear that the term "anyone" is not limited to other Federal agencies but may also include individual Federal employees or others, to whom parking privileges are accorded. *See* 52 Comp. Gen. 957, 960–961, in which we treated the statutory provisions for leasing space at SLUC rates as being equally applicable, whether the occupant is a Federal agency or private concessionaire.

Concerning VA's authority to charge employees for parking spaces notwithstanding the fact that GSA has not established rates for this purpose, 40 U.S.C. § 490(k) expressly limits charges thereunder to "rates approved by the Administrator [of General Sevices]." Moreover, GSA is authorized to adopt regulations to "carry out the provisions of the Public Buildings Amendments of 1972," to be:

> * * * coordinated with the Office of Management and Budget, *and the rates established by the Administrator of General Services pursuant to* * * * [*§§ 490 (j), (k)*] *shall be approved by the Director of the Office of Management and Budget.* Pub. L. No. 92–313, § 7, 86 Stat. 221, 40 U.S.C. § 603 note (Supp. IV, 1974) [Italic supplied.]

In our view, the foregoing provisions necessarily have the effect of making approval of rates by GSA and the Office of Management and Budget a prerequisite to an agency's imposition of charges under § 490(k). Thus, in response to the second question, 40 U.S.C. § 490(k) authorizes VA to impose charges for employee parking if, but only if, rates therefor have been approved by GSA and OMB. While VA apparently has not sought approval of rates for employee parking charges, according to a report furnished to us from GSA, it is "not inclined" at this time to approve rates for such purpose pending development of a national policy in this regard. GSA states:

> * * * Since the enactment of the 1972 amendments to the * * * [Federal Property and Administrative Services Act of 1949, 40 U.S.C. §§ 490(j), (k) (Supp. IV, 1974] the only agency request received by GSA for approval of such rates for parking was not approved by GSA following discussions with the agency and our Office of Federal Management and Policy, which has been delegated responsibility to establish a national parking policy by the Office of Management and Budget. Pending development of a national policy, GSA is not inclined * * * to approve parking rates to be assessed against individual Government employees. We believe that if such a policy is adopted it should be applied on a uniform basis, without regard to the preferences of a single agency.

If employee parking charges eventually obtain the requisite approvals, VA's third question concerning the disposition of receipts from such charges seems to be answered by the express terms of 40 U.S.C. § 490(k). This subsection states that, unless otherwise authorized by law, moneys derived from charges thereunder shall be credited to the appropriation or fund initially charged for providing the service, except that amounts in excess of actual costs shall be treated as miscellaneous receipts. We have not been referred to any statute which would supersede § 490(k) in the case of VA. Receipts credited to an

agency appropriation or fund pursuant to § 490(k) would, of course, take on the identity of that appropriation or fund and therefore become subject to its period of availability. Thus, assuming that the applicable VA appropriations would be available on a fiscal year basis, and in the absence of any specific statutory authority to the contrary, "an account in the nature of a parking revolving fund" could not be created.

The fourth question is directed to the propriety of GSA's allocation of parking spaces either to the agency or directly to individual employees for which the agency is charged although the agency feels these spaces are in excess of their needs. In response to our inquiry on this point, GSA's report stated:

> * * * It is not GSA policy to *require* agencies to accept and pay for parking spaces in any number in excess of its [sic] needs. * * * Generally, the number of parking spaces available for assignment is less than the demand for such spaces. In the event * * * the Veterans Administration believes that it is assigned parking spaces in excess of its needs, it is suggested that it contact our Public Buildings Service to discuss the matter in order that apprporiate adjustments can be made.

Note that GSA refers to employee parking spaces assigned to *and accepted by* agencies. Thus GSA does not—and, in our view, could not—assert a right to force agencies to accept and pay for parking space which they do not need. *Cf.* 52 Comp. Gen. 957, *supra*, at 961.

In this regard we note that the Administrator has provided by regulation, as follows:

> The space utilization program is designed to effect maximum efficient utilization of Government-controlled space. Space for which there is no current foreseeable need will be relinquished. Federal Property Management Regulations, § 101-17.203.
>
> GSA shall be notified by an agency occupying space assigned by GSA at least 60 days prior to the date on which the space, or portion thereof, will no longer be needed. * * * Such notification shall be in writing to the GSA regional office responsible for the geographical area in which the space is located * * *. When a portion of space is released, it must be consolidated and accessible for reassignment. * * * The appropriate GSA regional office may reassign or dispose of the space. *Id.*, § 101-17.204(a).

Accordingly, it would appear that where a Government agency occupies parking space assigned by the GSA for which there is no current or foreseeable agency need, the agency may relinquish that space by giving the notice required.

With respect to GSA's authority to allocate parking spaces directly to individual agency employees and to charge the agency therefor, we considered this question in 52 Comp. Gen. 957, *supra*, in connection with proposed regulations by GSA to implement the standard level user charge. We concluded, *inter alia*, that GSA had authority to assign parking spaces to agencies for assignment to employees, or to agency employees directly and that it could impose the SLUC in

either case. However, in neither instance may an agency be compelled to pay for a parking space which it has determined is not necessary and which it has declined to accept. *Id.*, at 960–61.

[B–184062]

Contracts—Awards—Small Business Concerns—Set-Asides—Competition Sufficiency

Although original determination to set aside procurements for shirts and trousers for small business was not in accordance with Armed Services Procurement Reg. 1–706.5(a)(1) (1974 ed.) in that it was based upon expediency rather than required reasons, since there was small business competition for procurements and prices were determined to be reasonable, there is no basis to conclude that there was not proper basis for ultimate awards.

Bids—Nonresponsive to Invitation—Large Business Bids—Small Business Set-Asides

Large business bids on small business set-aside procurements are nonresponsive and contracting officer is not required to consider bids. Moreover, 15 U.S.C. 631, *et seq.*, has been interpreted to mean that Government may pay premium price to small business firms on restrictive procurements to implement policy of Congress.

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

Time of preparing justification that set-aside is necessary to assure that fair proportion of Government procurement is placed with small business does not affect validity of award if proper basis for award exists.

Contracts—Awards—Small Business Concerns—Fair Proportion Criteria

Where contracting officer has noted that in past year number of solicitations for shirts and trousers has been issued on unrestricted basis with number of awards going to large business protester, contention of protester that set-aside in instant case comprises more than "fair proportion" of Government procurement to small business does not provide basis to conclude that there was not proper basis for ultimate awards to small business.

In the matter of J. H. Rutter Rex Manufacturing Company, Inc., March 17, 1976:

The subject bid protest concerns invitations for bids (IFB) Nos. DSA100–75–B–1114 (hereinafter 1114) and DSA100–75–B–1121 (hereinafter 1121) issued by the Defense Personnel Support Center (DPSC), Defense Supply Agency, May 19, 1975, and May 23, 1975, respectively. The issues presented are identical for both IFB's and will be treated synonymously.

J. H. Rutter Rex Manufacturing Co., Inc. (Rutter Rex), protested the award of contracts to PRB Uniforms, Inc. (PRB), and Doyle Shirt Manufacturing Corporation (Doyle) under IFB 1114 and to

Statham Garment Corporation (Statham) and Tennessee Overall Co. (Tennessee) under IFB 1121. IFB 1114, opened May 29, 1975, was a small business/labor surplus area set-aside for 900,000 men's short sleeve durable press shirts. Of the 900,000 shirts, 630,000 were set aside for small business and 270,000 set aside for small business in designated labor surplus areas. Doyle received an award of 168,000 out of the 630,000 and PRB was awarded 462,000. PRB also received the 270,000 award designated for labor surplus areas. IFB 1121, opened June 6, 1975, was a small business/labor surplus area set-aside for 900,000 pairs of durable press men's trousers. Of the 900,000 trousers, 630,000 were set aside for small business and 270,000 were set aside for small business in designated labor surplus areas. A partial award of 270,000 items has been made under IFB 1121 to Statham under the small business set-aside portion. The remaining 360,000 items of this portion of the IFB were canceled and resolicited on an unrestricted basis. The 270,000 item small business/labor set-aside portion of the solicitation was awarded to Tennessee. Although Rutter Rex was the apparent low bidder on both solicitations, its bids were determined to be nonresponsive, Rutter Rex having certified itself as being other than a small business.

Rutter Rex raises two principal arguments: (1) the small business set-asides are in violation of 10 U.S. Code § 2301 (1970) in that they comprise more than a "fair proportion" of Government procurement within the meaning of the statute in view of the size of the instant procurements, the "newness" of the items and the totality of the small business set-asides; and (2) award of contracts to the lowest small business bidders in the instant situation is detrimental to the public interest because the lowest price possible has not been obtained and the prices at which the contracts were awarded are unreasonable. Rutter Rex requests that the procurements be resolicited on an unrestricted basis.

In support of its first argument, Rutter Rex alleges DPSC had no prior experience in either manufacturing or ordering the items involved, and therefore could not make a reasonable judgment as to the degree of small business interest in the IFB's. In support of its second argument, Rutter Rex alleges that 10 U.S.C. § 2305(c) (1970) is violated by award to the lowest small business bidders because it is possible to obtain a lower bid on the basis of an unrestricted IFB.

Section 15 of the Small Business Act, 15 U.S.C. § 644 (1970), in pertinent part, provides:

> * * * small-business concerns within the meaning of this chapter shall receive any award or contract or any part thereof, and be awarded any contract for the sale of Government property, as to which it is determined by the Administration and the contracting procurement or disposal agency (1) to be in the interest of maintaining or mobilizing the Nation's full productive capacity, (2) to be in the

interest of war or national defense programs, (3) to be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government are placed with small-business concerns, or (4) to be in the interest of assuring that a fair proportion of the total sales of Government property be made to small-business concerns; * * *.

Further, 10 U.S.C. § 2301 (1970) states:

It is the policy of Congress that a fair proportion of the purchases and contracts made under this chapter [defense procurement, generally] be placed with small business concerns.

These two statutes reflect a congressional policy of aiding and protecting small business by requiring the procurement of a "fair" portion of Government supplies and services from it.

By way of implementation of this congressional policy, Armed Services Procurement Regulation (ASPR) § 1–706.1(b) (1974 ed.), in pertinent part, provided:

* * * any individual procurement or class of procurements regardless of dollar value or any appropriate part thereof, shall be set aside for the exclusive participation of small business concerns when such action is determined to be in the interest of (i) maintaining or mobilizing the Nation's full productive capacity, (ii) war or national defense programs, or (iii) assuring that a fair proportion of Government procurement is placed with small business concerns. * * *

Additionally, ASPR § 1–706.5(a)(1) (1974 ed.) provided:

* * * the entire amount of an individual procurement or a class of procurements, including but not limited to contracts for maintenance, repair, and construction, shall be set aside for exclusive small business participation (see 1–701.1) if the contracting officer determines that there is reasonable expectation that offers will be obtained from a sufficient number of responsible small business concerns so that awards will be made at reasonable prices. * * *

As noted previously, Rutter Rex contends that DPSC was unable to determine if there was a reasonable expectation of obtaining reasonable prices because of (1) the inexperience of potential small business bidders in manufacturing durable press garments and (2) the inexperience of DPSC in manufacturing or ordering durable press garments.

The DPSC contracting officer has reported that the determination to set aside the procurements for small business was based upon the fact that there were enough small businesses interested in bidding on these items to secure adequate competition at reasonable prices; that the small businesses solicited (22 on IFB 1121 and 31 on IFB 1114) had previously submitted bids on similar items or expressed interest in the instant procurements; that reasonable prices were received from small businesses in the past; that market conditions at the time of the IFB's were highly competitive; and that the only different or new factor in the subject IFB's was the requirement for durable press treatment. However, the record indicates that the decision to set aside the IFB's actually was based upon expediency rather than the reported reasons. In that connection, the contracting officer's indorsements of the SBA representative's recommendations on SBA Form 70 that the procurements be limited to small business stated:

It is the undersigned's position that this procurement should be solicited on an unrestricted basis in view of the following:

a. This buy constitutes a specification test of a new item and it cannot be determined at this point that small business has the capacity and ability to produce this item at a fair and reasonable price.

* * * * * * *

However, due to the necessity for prompt processing of this procurement and to preclude further delays involved with pursuing this matter to a decision, the procurement will be solicited on a 100% Small Business Restricted basis. * * *

The indorsement for the trouser procurement contained an additional statement:

* * * The prior buy on the Trs, Army Shade 1 resulted in two awards to large business firms. In addition, only one small business (Tennessee Overall) submitted a bid price which was within the competitive range.

The determination of the contracting officer, as reflected in the indorsements to set aside the procurements for small business, was contrary to ASPR § 1–706.5(a)(1), *supra*, which provides for a set-aside if the contracting officer determines *prior* to the set-aside "that there is [a] reasonable expectation that offers will be obtained from a sufficient number of responsible small business concerns so that awards will be made at reasonable prices." However, ASPR § 1–706.3(a) (1974 ed.) is a check against any determination to set aside a procurement for small business. That section provides for the withdrawal of a set-aside "If, prior to award of a contract involving an individual or class set-aside, the contracting officer considers that procurement of the set-aside from a small business concern would be detrimental to the public interest (e.g., because of unreasonable price)."

In this case, of the 22 concerns solicited on IFB 1121, 8 submitted bids and of the 31 solicited on IFB 1114, 11 submitted bids. Additionally, under both IFB's, price analyses were performed by DPSC as an aid in determining the reasonableness of bids received from small business bidders. Under IFB 1114, the contracting officer found that bids of both PRB and Doyle fell within the reasonable "should cost" range. Under IFB 1121, the contracting officer found that Statham's bid price was 6.6 percent higher than the "should cost" estimate. Nonetheless, the contracting officer believed that this minor increase did not necessitate a finding of price unreasonableness. This was based on a fact that was not considered in the price analyses. Both solicitations were for expanded first article contracts under which the contractor warrants that when the first article portion of the contract is complete, the specification is free of defects. Since this was different from the supply contract wherein the Government supplies and warrants the adequacy of the specifications, the contracting officer believed this added an economic risk to that ordinarily assumed by contractors. Based on these facts, the contracting officer concluded that the low bids received from the successful bidders were reasonable.

With regard to this determination, we have stated: "* * * our review in these [set-aside] protest situations is confined to whether the contracting officer acted reasonably in the circumstances and not to second-guessing the contracting officer's determination * * *." *Berlitz School of Languages*, B–184296, November 28, 1975, 75–2 CPD 350. See also *Society Brand, Inc., et al.*, 55 Comp. Gen. 475 (1975), 75–2 CPD 327. We do not find that the contracting officer acted unreasonably in determining that the bids upon which awards were made were reasonable.

With regard to Rutter Rex's second argument, 10 U.S.C. § 2305(c) (1970), in pertinent part, provides: "* * * awards shall be made * * * to the responsible bidder whose bid conforms to the invitation and will be most advantageous to the United States, price and other factors considered. * * *" Rutter Rex contends that in light of its low "courtesy" bids DPSC violated 10 U.S.C. § 2305(c), *supra*, since the Government did not obtain the lowest price possible.

As other than a small business, however, Rutter Rex was ineligible to receive an award for the subject procurements. Large business bids on small business set-aside procurements are nonresponsive and the contracting officer is therefore not required to consider such bids. *Berlitz School of Languages*, *supra*, and *Society Brand, Inc., et al.*, *supra*. Moreover, our Office has interpreted 15 U.S.C. § 631, *et seq.*, to mean that the Government may pay a premium price to small business firms on restricted procurements to implement the policy of Congress. *Society Brand, Inc., et al., supra*.

Rutter Rex also contends that the contracting officer did not make a determination before setting aside the procurements that it was necessary to assure that a fair proportion of Government procurement is placed with small business. Further, it contends the set-asides constituted more than a "fair proportion" of Government procurement. The SBA representative's recommendation that the procurements be set aside stated the determination was in accordance with section 15 of the Small Business Act (15 U.S.C. § 644, *supra*). As indicated above, section 15 includes the "fair proportion" basis for set-aside. Since the contracting officer's indorsement of the SBA recommendation did not take exception to the section 15 determination, it is reasonable to conclude that he was in agreement with that aspect. In any event, the time of preparing a justification does not affect the validity of an award if a proper basis for award existed. *Automated Systems Corporation*, B–184835, February 23, 1976. In this case, the contracting officer has reported that the decision to set aside the procurements pursuant to ASPR § 1–706.1(b)(iii) (1974 ed.) was based upon the fact that the majority of procurement dollars spent by the Depart-

ment of Defense goes to large business. Further, the contracting officer noted that "in the past year a number of solicitations for shirts and trousers have been issued on an unrestricted basis with a number of awards going to Rutter Rex on these items."

In 41 Comp. Gen. 649 (1962), a case involving a protest against the 100-percent set-aside for small business of certain IFB's issued by the General Services Administration for wooden household furniture, we reviewed the history of legislation designed to broaden the base and increase the share of small business participation in the total Government procurement program. We found that the phrase "fair proportion" or similar language appeared in several congressional enactments prior to the Small Business Act of 1953, but that it was not defined in these prior acts. We held that in determining the "fair proportion" of Government contracts to be placed with small business concerns, all contracts received by small business, whether under set-aside procurements or in unrestricted competition, should be taken into considersation and set-aside procurements may not be considered improper unless their effect is to increase awards to small business, both on set-asides and otherwise, beyond a fair proportion. We went on to find that since 99 percent of all plants in the wooden household furniture industry were small businesses, the placement of some 90 percent of Federal wooden household furniture procurements with small business did not result in giving an unfair proportion of the procurements to small business.

In B–154161, June 23, 1964, we considered a similar issue with regard to the protest against a 100-percent small business set-aside by the Veterans Administration for laundry equipment. In that case, the Veterans Administration reported to us that for laundry equipment procurements for fiscal year 1963, no procurements were set aside for small business and that 124 line items valued at $335,506 were awarded to large business and 43 line items valued at $183,405 were awarded to small business; for fiscal year 1964, 2 laundry equipment procurements were set aside for small business, 143 line items valued at $649,870 were awarded to large business and 95 line items valued at $287,358 were awarded to small business. We held that in view of the intent of the Small Business Act to broaden the base and increase the share of small business participation in the total Government procurement program, and the above data, we could not conclude that more than a fair proportion of the Veterans Administration procurements of laundry equipment was being placed with small business.

Finally, in B–151419, June 25, 1963, we again considered the "fair proportion" issue in connection with a protest against a 100-percent small business set-aside of globe valves by the Navy. We held that al-

though the particular invitation in question was totally restricted to small business, since there was no indication that the entire Government procurement of globe valves was permanently closed to large business we could not question the propriety of the total small business set-aside.

Accordingly, although the original determination to set aside the procurements was not in accordance with ASPR § 1-706.5(a)(1), supra, we are unable to conclude that there was not a proper basis for the ultimate awards. Therefore, the protest is denied.

[B-51325]

Compensation—Overtime—Firefighting—Fair Labor Standards Amendments—Computation

Federal firefighters with 72-hour tour of duty are entitled to 12 hours overtime compensation under the Fair Labor Standards Act (FLSA) in 1975. Their regular rate of pay for computing overtime is determined by dividing their total compensation by the number of hours in their tour of duty, 72, there being no basis for the divisor to be limited to the number of hours beyond which overtime must be paid, 60. Therefore, since FLSA requires overtime pay at the rate of one and one-half times regular rate of pay and firefighters have already been paid regular rate for 12 hours of overtime, extra compensation for overtime is limited to one-half their regular rate of pay.

In the matter of overtime compensation of firefighters under Fair Labor Standards Act, March 19, 1976:

This action is in response to a request from Mr. Nathan Wolkomir, President, National Federation of Federal Employees, for a decision concerning the legality of the Civil Service Commission's (CSC) computation of overtime compensation due firefighters under the provisions of the Fair Labor Standards Act.

Subsection 6(c)(1)(A) of the Fair Labor Standards Amendments of 1974, Public Law 93-259, approved April 8, 1974, 88 Stat. 60, amended section 7 of the Fair Labor Standards Act, 29 U.S. Code § 207, by extending overtime compensation benefits to firefighters as follows:

> (k) No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—
>
> (1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed 240 hours; or
>
> (2) in the case of such employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 240 hours bears to 28 days, compensation at a rate not less than one and one-half times the regular rate at which he is employed.

The above provision was effective January 1, 1975, and other subsections of section 6 of the 1974 Act provide that in each succeeding year until 1977 there shall be a reduction in the aggregate hours in tours of duty beyond which overtime is compensable.

Mr. Wolkomir takes issue with the Commission's interpretation of the above provision in two instances. Primarily, Mr. Wolkomir is concerned over CSC's definition of "regular rate." The regular rate is used to base the computation of the firefighters' overtime and is described on page 5 of Attachment 2 to Federal Personnel Manual (FPM) Letter 551–5, January 15, 1975, as follows:

> The employee's hourly "regular rate" is * * * determined by dividing the employee's total remuneration for employment in any work period by the total number of hours in the employee's tour of duty under the FLSA (all hours actually on duty including scheduled and unscheduled periods).

Mr. Wolkomir states, concerning the above computation:

> The Air Force has computed the regular rate of pay for its firefighters by dividing 72 hours (tour of duty) into the weekly salary a firefighter received prior to the passage of FLSA. It is our contention that the divisor should properly be 60 hours per week since this is the tour of duty prescribed by the Act before overtime payments begin. The CSC regulations cited above and the Air Force interpretation of them has resulted in overtime rates as low as $1.70 per hour. Several firefighters work 24 hours overtime per pay period (two weeks) and receive $35 for this duty. This is less than the minimum wage prescribed by the Fair Labor Standards Act.

Mr. Wolkomir also challenges CSC's computation of overtime once the regular rate has been determined. Mr. Wolkomir objects to the Commission's computation of overtime under the FLSA as being one-half times the regular rate. He believes that overtime should be computed at one and one-half times the regular rate.

The Department of Labor has been vested with the authority for administering the FLSA with resepct to non-Federal employees covered by the FLSA since the inception of the Act. However, since the Commission is responsible for administering the FLSA with respect to Federal employees, we requested a report from the Commission on Mr. Wolkomir's contentions. The Commission responded as follows:

> The term "regular rate" is defined by section 7(e) of the FLSA to include "all remuneration for employment paid to, or on behalf of, the employee" except for certain payments specifically excluded by paragraphs (1) through (7) of that subsection. Furthermore, regulations promulgated by the Department of Labor on overtime compensation under the FLSA in 29 C.F.R. § 778.109 state that the "regular rate" is an *hourly* rate of pay determined by dividing the employee's *total* remuneration for employment (excluding the statutory exclusions) in any workweek by the total number of hours actually worked by the employee in that workweek for which such compensation was paid. * * *
>
> As a general practice, a Federal firefighter is scheduled for a tour of duty of 72 hours per week, consisting of three, 24-hour shifts. During each 24-hour shift, the firefighter is normally in a work status for eight hours and in a standby status, which includes a designated sleep period, for the remaining 16 hours. For this extended tour-of-duty arrangement, a firefighter receives his basic rate of pay *and* premium pay on an annual basis for the standby duty—normally, 25% of his basic rate of pay—under 5 U.S.C. § 5545(c)(1).

This combined basic rate of pay plus premium pay is his total remuneration for employment for his 72-hour weekly scheduled tour of duty. Accordingly, the formula for computing a Federal firefighter's hourly "regular rate" of pay, as contained in FPM Letter 551–5, is proper, with 72 hours as the divisor.

Once the firefighter's hourly "regular rate" of pay has been so computed, he is then entitled to overtime pay for all work in excess of 240 hours in a work period of 28 consecutive days (60 hours in a seven-day work period) as provided by section 7(k) of the FLSA. Under the guidelines contained in 29 C.F.R. Part 778.325, this overtime pay is computed at one-half times the employee's "regular rate" of pay, since, as illustrated above, a Federal firefighter has already been compensated for the entire 72-hour tour of duty for each workweek through the combination of basic rate of pay and premium pay for the standby duty.

In Mr. Wolkomir's example, he cites $1.70 per hour as the overtime rate of pay for Air Force firefighters. However, since these firefighters have been compensated for all 72 hours in their weekly tour of duty at an hourly "regular rate" of $3.40, the additional compensation of $1.70 per hour, for each hour of overtime (12 in a week) provides an hourly overtime rate of $5.10 or one and one-half times their "regular rate" of pay for the extra 12 hours of work beyond 60 hours in accordance with the requirements of section 7(k) of the FLSA.

We agree with the Commission that the firefighters' regular rate of pay is to be computed by using as divisor of their total compensation the number of hours in their tour of duty, 72, as opposed to the number of hours in the tour of duty beyond which overtime must be paid, 60. The above-cited Department of Labor regulation, 29 C.F.R. § 778.109, interpreting the "regular rate" under the FLSA makes clear that the divisor to be used in determining the "regular rate" is the total number of hours worked by the employee in a given week. Thus, there is no basis to find that the divisor is limited to the number of hours beyond which overtime must be paid. Section 778.109, in pertinent part, states:

The "regular rate" under the Act is a rate per hour. The Act does not require employers to compensate employees on an hourly rate basis; their earnings may be determined on a piece rate, salary, commission or other basis, but in such case the overtime compensation due to employees must be computed on the basis of the hourly rate derived therefrom and, therefore, it is necessary to compute the regular hourly rate of such employees during each workweek * * *.

Therefore, even though firefighters may be compensated under the provisions of Title 5 of the U.S. Code for 40 hours a week at a basic rate plus 25 percent premium pay, for the purposes of the FLSA they have a regular rate of pay which is their total compensation divided by their 72-hour tour of duty.

Moreover, we find that the Commission method of computing the 12 hours of overtime pay as one-half times the firefighters' regular rate is also correct. The firefighters' regular rate of pay for FLSA purposes is their total compensation divided by 72 hours. In other words, they have been compensated for each of their 72 hours at an hourly regular rate, in this case $3.40 an hour. Since the FLSA requires that overtime hours be compensated for at one and one-half times the regular rate and since the firefighters have already received their regular rate for all hours worked including the 12 overtime hours, they are entitled to only one-half times their regular rate of pay for the 12 overtime hours.

The Department of Labor's regulation concerning the computation of overtime for private sector employees covered by the FLSA who are entitled to overtime for work over 40 hours of work a week and whose workweeks are longer than 40 hours supports the above interpretations. *See* 29 C.F.R. §778.325, which provides, in pertinent part:

> * * * If an employee whose maximum hours standard is 40 hours was hired at a fixed salary of $110 for 55 hours of work, he was entitled to a statutory overtime premium for the 15 hours in excess of 40 at the rate of $1 per hour (half time) in addition to his salary, and to statutory overtime pay of $3 per hour (time and one-half) for any hours worked in excess of 55.

As the Commission points out, the effective overtime rate for the firefighters in question is $5.10 per hour which rate is one and one-half times the regular rate of $3.40. It is evident the firefighters are being compensated at a regular rate well above the minimum wage and their overtime wages are computed in a manner consistent with prior interpretations of the FLSA made by the Department of Labor.

Accordingly, we uphold the Civil Service Commission's computation of Federal firefighters' overtime pay under the Fair Labor Standards Act.

[B-184926]

Contracts—Protests—Court Action—Dismissal of Action Without Prejudice

Where U.S. District Court denied complainant's motion for temporary restraining order to enjoin award by grantee, and complainant then had case dismissed without prejudice, court's consideration of matter did not act as adjudication on merits so as to bar General Accounting Office's assuming jurisdiction over complaint.

Regulations—Constructive Notice

Since Law Enforcement Assistance Administration Manual, which was promulgated pursuant to Omnibus Crime Control and Safe Streets Act, was not published in Federal Register, only parties with actual or constructive notice are bound by its contents and constructive knowledge exists where Manual is incorporated by reference into grant or contract.

Law Enforcement Assistance Administration—Grants-in-Aid—Guidelines—Conflict of Interest

Law Enforcement Assistance Administration (LEAA) organizational conflict of interest guideline precluding contractors who draft or develop specifications for LEAA grantee procurements from competing for those procurements, which was promulgated under LEAA rule-making authority and attached as binding condition on LEAA grants, is reasonably related to purposes of LEAA enabling legislation, since LEAA may impose reasonable conditions on its grants to assure Federal funds are extended in fiscally responsible and proper manner consistent with Federal interests, and condition is not imposed in contravention of any law.

Federal Management Circular—Policy Matters

LEAA organizational conflict of interest guideline is not inconsistent with Federal Management Circular (FMC) 74-7 Attachment 0, since provisions of

FMC 74–7–0 are matters of Executive branch policy, which do not establish legal rights and responsibilities, and Office of Federal Procurement Policy has found guideline to be acceptable implementation of FMC 74–7–0.

Regulations—Promulgation—Implementation of Grant Procurement Policy

LEAA "blanket" guideline for grantee procurements precluding contractors who develop or draft specifications for procurements from competing is reasonable exercise of LEAA discretion to implement grant procurement policy, since it was promulgated in response to congressional concern and in implementation of FMC 74–7–0 to insure bias free specifications and to prevent unfair competitive advantage by specifications' preparer.

Regulations—Conflict of Interest Guidelines—Clear Meaning

LEAA organizational conflict of interest guideline for grantee procurements, which reads: "Contractors that develop or draft specifications, requirements, statements of work and/or RFP's for a proposed procurement shall be excluded from bidding or submitting a proposal to compete for the award of such procurement" is not unenforceably vague, since terms used in guideline have clear meaning in this context.

Contracts—Specifications—Incorporation of Contractor-Developed "Requirements" Study

Where contractor of LEAA grantee developed and drafted specifications, which were substantially identical to those used in request for proposals (RFP), which also incorporated contractor-developed "requirements" study, contractor comes under LEAA organizational conflict of interest guideline, which was attached as condition to LEAA grant, was binding on grantee and precludes contractor from competing on RFP.

Contractors—Constructive Notice—Organizational Conflict of Interest Guideline of LEAA

Contractor has constructive notice of LEAA organizational conflict of interest guideline where it was contained in document incorporated by reference in contract requiring the preparation of specifications. In any case, since guideline is attached as condition to LEAA grant, it is self-executing, and grantee is bound to reject contractor's proposal if contractor fell under guideline, notwithstanding grantee's inadequate notice and contrary advice to contractor.

Regulations—Waivers—Abuse of Discretion Requirement

Contractor, precluded by LEAA organizational conflict of interest guideline from competing on LEAA grantee's procurement for which it drafted and developed specifications, has not shown that LEAA refusal to grant waiver of guideline, promulgated under LEAA rulemaking authority and binding on grantees, was for reasons so insubstantial as to constitute abuse of discretion.

Estoppel—Against Government—Not Established

Estoppel has not been established against LEAA application of organizational conflict of interest guideline for grantee procurements to prevent grantee award to offeror, who developed and drafted specifications, notwithstanding assurances given to offeror by grantee that it could compete, since grantee's assurances cannot bind LEAA and LEAA apparently was not aware of all facts showing offeror came under guideline prior to communicating this fact to grantee.

Contracts—Negotiation—Offers or Proposals—Preparation—Costs

Proposal preparation costs claim by offeror, whose award selection was not approved by LEAA because it came under LEAA organizational conflict of interest guideline imposed as limitation on grantee procurements, is denied since rejection of proposal was not arbitrary or capricious. Allocated overhead directly related to offeror's efforts to obtain waiver of LEAA guideline is not recoverable in any case.

In the matter of Planning Research Corporation Public Management Services, Inc., March 29, 1976:

INTRODUCTION

Planning Research Corporation Public Management Services, Inc. (PRC/PMS), has filed a complaint in our Office against the validity of an organizational conflict of interest guideline imposed by the Law Enforcement Assistance Administration (LEAA), United States Department of Justice, on LEAA grant supported procurements by State and local governments and against the application of the guideline to exclude PRC/PMS from competition on a procurement by the City and County of Denver, Colorado (Denver). The Denver procurement was to implement the Police Data Center, an automatic data processing (ADP) system for the Denver Police Department.

The protested organizational conflict of interest guideline is the last sentence of paragraph 49e of LEAA Guideline Manual M7100.1A, entitled "Financial Management for Planning and Action Grants," dated April 30, 1973 (Manual 7100.1A). The manual is incorporated into all LEAA grants. Paragraph 49e, as amended by Change 1, dated January 24, 1974, states:

Adequate Competition. All procurement transactions regardless of whether negotiated or advertised and without regard to dollar value shall be conducted in a manner so as to provide maximum open and free competition. The grantee should be alert to organizational conflicts of interest or noncompetitive practices among contractors which may restrict or eliminate competition or otherwise restrain trade. *Contractors that develop or draft specifications, requirements, statements of work and/or RFPs for a proposed procurement shall be excluded from bidding or submitting a proposal to compete for the award of such procurement.* [Italic supplied.]

BACKGROUND

Under the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S. Code § 3701 *et seq.* (1970), LEAA awarded grant No. 73–DF–08–0029 to the Colorado Division of Criminal Justice (Colorado) on June 29, 1973, to fund the Denver High Impact Anti-Crime Program. The Application for Grant Discretionary Funds, to which Colorado agreed in accepting the grant, stated:

(15.) *Third Party Participation.* No contract or agreement may be entered into by the grantee for execution of project activities or provision of services to a grant project (other than purchase of supplies or standard commercial or main-

tenance services) which is not incorporated in the approved proposal or approved in advance by LEAA. Any such arrangements shall provide that the grantee will retain ultimate control and responsibility for the grant project and that the contractor or subgrantee shall be bound by these grant conditions and any other requirement applicable to the grantee in the conduct of the project.

* * * * * * *

(17.) *Fiscal Regulations.* The fiscal administration of grants shall be subject to such further rules, regulations, and policies, concerning accounting and records, payments of funds, cost allowability, submission of financial reports, etc., as may be prescribed by LEAA, including those set forth in the LEAA *Financial Guide*, OMB Circulars A–21, A–87 and A–102 as well as § 15 of FPR (41 CFR § 15.000, et seq.), where applicable.

As part of the Denver High Impact Anti-Crime Program, a subgrant was awarded to Denver on May 15, 1974. The subgrant also incorporated paragraphs 15 and 17. The subgrant funded a contract for consulting services preparatory to implementing the Police Data Center project.

Request for proposals (RFP) M–15400 for a 60-day consultant study had been issued by Denver on April 12, 1974. Award was contingent on receiving LEAA funding and approval of the contractor selection by Colorado and LEAA. The statement of work for the RFP consisted of the following four tasks:

A. The identification and analysis of the operation, administration planning, evaluation and reporting requirements of the Denver Police Department to define cost effective automated data processing alternatives to support these functions.

B. Define the data exchange requirements of the Denver Police Department with other criminal justice and support agencies including their content, format, time, and other requirements and constraints.

C. Develop and recommend alternative hardware and software configurations to satisfy the requirements identified in A and B above. Consideration should be given to the existing data processing capabilities of the total criminal justice information system and/or data processing capabilities of the City and County of Denver. The criteria of establishing the order of preference should be identified and presented.

D. *Prepare procurement documentation (specifications, evaluation plans, bid lists, etc.) to implement the selection of hardware and its procurement for both purchase, lease, or combination thereof.* [Italic supplied.]

The RFP also provided:

It is the intent of this study to provide an objective analysis of the requirements of the Denver Police Department and recommendation of optimum hardware and software packages to accomplish the objectives.

To this end, the successful bidder on the study shall agree to a hardware exclusion provision of any hardware to be purchased or leased in the implementation of any program defined by the study.

PRC/PMS contends that prior to submitting its proposal it contacted Denver and asked whether the above-quoted "hardware exclusion" clause would prevent PRC/PMS from competing for the later implementation contract should PRC/PMS be awarded the study contract. PRC/PMS states that it was assured by Denver, after Denver checked with LEAA, that the exclusionary clauses applicable to the study and implementation contracts were limited to hardware manufacturers. LEAA denies consulting with Denver regarding this matter.

On June 24, 1974, after obtaining the requisite approvals, PRC/PMS

was awarded the study contract by Denver. Contract clause 26, in pertinent part, states:

Conformity to Applicable Regulations. The Client and PRC/PMS agree that they will be bound by the terms of the Omnibus Crime Control and Safe Streets Act of 1968; the Guide for Comprehensive Law Enforcement Grants and Action Grants under such Act; *the Financial Guide for Administration of Planning and Action Grants of such Act;* and any and all applicable regulations of the Law Enforcement Assistance Administration (LEAA) and implementing Colorado legislation and administrative regulations in effect at the time this Agreement is signed by the representatives of the Client and PRC/PMS. * * * [Italic supplied.]

In July 1974, PRC/PMS completed and submitted to Denver a "requirements" study to satisfy tasks A, B, and C of the study contract, and a "hardware" study to satisfy task D.

On August 30, 1974, Denver submitted a subgrant application to fund the implementation phase of the Police Data Center project. In the application, Denver again agreed to standard grant conditions 15 and 17. The funds for the project were authorized by LEAA in a grant adjustment notice dated November 19, 1974. As a special condition to the grant adjustment, LEAA, in pertinent part, provided:

5. Grantee agrees that any contract between the grantee and a group, firm, institution or individual to conduct all or any part of the work contemplated by this grant shall be subject to the competitive bid process. *This competitive bid process must be consistent with LEAA procurement guidelines* and the applicable laws and requirements of the State of Colorado. Further, *any contract resulting from this grant shall be subject to prior approval of such contract and its project budget by LEAA. No expenditure of grant funds is authorized for payment to the primary contractor until after formal approval of the contract has been received from LEAA.* * * * [Italic supplied.]

On November 20, 1974, a subgrant was awarded by Colorado to Denver incorporating special condition 5 as well as standard grant conditions 15 and 17.

On April 8, 1975, Denver issued RFP 8342 to implement the Police Data Center. PRC/PMS was on the bidders list for the procurement. The scope of work for the project, which consisted of two 18-month phases, was summarized at section A.2 of the RFP as follows:

The scope of work to be accomplished in this project is twofold for both Phase I and Phase II. Number One is to develop the systems and programs for Phase I and Phase II as outlined in this proposal and which will at the completion of this contract become the property of the City. Number Two is to furnish, install and lease with option to purchase to the City, *all* hardware necessary to implement these systems and programs for Phase I and Phase II. Bidder's Proposals will be evaluated and one prime contractor selected to have *full responsibility* of providing a *Turn Key System* for both the systems, programs and hardware.

The RFP only covered Phase I. Phase II was an option. In addition, Section B.13 of the RFP, in pertinent part, stated:

* * * Disclaimer: In the Request for Proposal for the Denver Police Department Information Requirements Analysis and Implementation Plan, there was a provision that the successful bidder could not be a hardware manufacturer. Compliance of this provision was satisfied and there are no restrictions relative to this exclusion to the list of prospective bidders for this RFP.

Many portions of the RFP were incorporated from the "hardware" report which PRC/PMS prepared under its previous contract. Also, PRC/PMS's "requirements" study report was attached to the RFP. LEAA reviewed and approved the RFP prior to its issuance.

On April 18, 1975, Denver conducted a bidders conference. PRC/PMS reports that Denver answered a question regarding PRC/PMS's eligibility to compete on this procurement in the affirmative specifically referring to section B.13 of the RFP.

By letter dated April 30, 1975, LEAA's Acting Regional Administrator advised Colorado that paragraph 49e of Manual 7100.1A was applicable to PRC/PMS for this procurement. The Acting Administrator found:

> The successful bidder for the Information Requirements Analysis and Implementation Plan was [PRC/PMS] * * *. In addition to the Implementation Plan which was distributed with the current RFP, PRC developed the hardware specifications that are contained in the RFP. These specifications were only slightly modified before issuance of the RFP.

Denver immediately requested reconsideration of this determination. On May 8, 1975, the Regional Administrator affirmed the determination. The Regional Administrator also stated that LEAA had initiated this action on the same day that it became aware of all of the facts requiring a finding that PRC/PMS fell under the organizational conflict of interest guideline.

Even though the Acting Administrator's letter informed the grantee to advise PRC/PMS of the LEAA position, neither the grantee nor subgrantee did so. However, apparently sometime prior to May 12, 1975, PRC/PMS learned of LEAA's position through the industry "grapevine." PRC/PMS confirmed this fact with Denver prior to the closing date for receipt of proposals.

On May 15, 1975, notwithstanding LEAA's advice, Denver decided to let the procurement process continue, and to accept any PRC/PMS proposal submitted. On May 19, 1975, the closing date for receipt of proposals, five proposals were received. Only the proposals of PRC/PMS and Mauchly-Wood Systems Corporation (MWSC) were found to be within a competitive range. PRC/PMS received a technical score of 221 points and MWSC received a score of 212 points. On June 25, 1975, Denver selected PRC/PMS for award. On June 26, 1975, Denver asked LEAA to approve the award selection.

Earlier, on May 27, 1975, PRC/PMS asked the LEAA Deputy General Counsel for a legal opinion as to the applicability of paragraph 49e of Manual 7100.1A. After a complete review by the Deputy General Counsel, the Regional Administrator on July 11, 1975, again found that PRC/PMS could not be considered eligible for award. LEAA also found that there were no grounds for a retroactive waiver of

paragraph 49e. Consequently, the PRC/PMS award selection was disapproved.

On July 28, 1975, PRC/PMS petitioned the LEAA Administrator to review the matter. At the direction of the LEAA Administrator, the Deputy Administrator for Administration reviewed LEAA's position. It was affirmed on August 7, 1975.

On August 22, 1975, PRC/PMS filed Civil Action No. 75–F–903 in the United States District Court for the District of Colorado. This suit, which involved the same bases for complaint as raised by PRC/PMS here, was to enjoin an award under the RFP to any firm other than PRC/PMS. On the same date, a hearing was held on PRC/PMS's motion for a temporary restraining order. The motion was denied by the court. On September 5, 1975, PRC/PMS had the action dismissed without prejudice pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure. The District Court's consideration of this matter did not act as an adjudication on the merits so as to bar our Office's assuming jurisdiction over PRC/PMS's complaint. See *Guy F. Atkinson Company, et al.*, 55 Comp. Gen. 546 (1975), 75–2 CPD 378.

Award was made to MSWC. On September 15, 1975, PRC/PMS filed here its complaint against LEAA's actions with regard to the Denver procurement. At that time, PRC/PMS also complained that the organizational conflict of interest guideline was apparently going to be applied to a LEAA funded procurement by the City of Philadelphia, Pennsylvania. However, on December 2, 1975, LEAA found that PRC/PMS was eligible to bid on the Philadelphia procurement since it did not fall under the guideline. Therefore, this portion of PRC/PMS's complaint is moot and will not be considered further.

In summary, with regard to the Denver procurement, PRC/PMS complains that (1) LEAA had no reasonable basis for the guideline, and that the guideline was in excess of LEAA's statutory authority and in conflict with Federal Management Circular 74–7 Attachment 0 (FMC 74–7–0); (2) the guideline was vague and not susceptible to clear definition; (3) the guideline was improperly applied to bar PRC/PMS from the Denver implementation procurement; (4) PRC/PMS was not given adequate notice of the possible applicability of the guideline, which was inconsistent with basic Federal procurement principles; and (5) LEAA was estopped from rejecting PRC/PMS's award selection in view of the repeated advice given to PRC/PMS that it would not be barred from competition. As relief for these allegedly improper procurement actions, PRC/PMS requests our Office to recommend (1) the elimination of the organizational conflict of interest guideline from LEAA's regulations; (2) the termination

of the present contract with MWSC and an award of the contract to PRC/PMS; (3) that the Phase II option not be implemented without competition (we understand that Denver has decided not to exercise the option); and (4) that PRC/PMS be awarded its proposal preparation costs. PRC/PMS claims $4,403 in proposal preparation costs and $8,061 of allocated overhead costs directly related to efforts to obtain a waiver of the LEAA guideline.

VALIDITY OF LEAA ORGANIZATIONAL CONFLICT OF INTEREST GUIDELINE

PRC/PMS alleges that the organizational conflict of interest guideline is an invalid requirement for the reasons which are discussed in detail below. As indicated in the Public Notice issued by our Office entitled "Review of Complaints Concerning Contracts Under Federal Grants," 40 Fed. Reg. 42406 (1975), it is not our intent in reviewing complaints against awards by Federal grantees "to interfere with the functions and responsibilities of grantor agencies in making and administering grants." However, we will review the validity of the LEAA guideline here, since it is alleged to be restrictive of free and open competition.

Authority to Issue Guideline

PRC/PMS contends that the guideline is in excess of LEAA's statutory authority, since it is not related to any purposes of the Omnibus Crime Control and Safe Streets Act of 1968, *supra*, which created LEAA. PRC/PMS also states that the legislative history reveals no congressional intent that LEAA develop such a uniquely restrictive policy governing its grantees' procurements.

Manual 7100.1A was promulgated by LEAA pursuant to section 501 of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3751 (1970), which provides:

> The Administration is authorized, after appropriate consultation with representatives of States and units of general local government, to establish such rules, regulations, and procedures as are necessary to the exercise of its functions, and are consistent with the stated purpose of this chapter.

The manual has not been published in the Federal Register. Thus, only parties with actual or constructive notice of the manual are bound by its requirements. *Dow Pump Co.* v. *United States*, 68 Ct. Cl. 175 (1929); *Turney* v. *United States*, 115 F. Supp. 457, 126 Ct. Cl. 202 (1953); *Kurz* v. *Root Company, Inc.*, ASBCA No. 17146, 74-1 BCA 10543 (1974). Contrast *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380 (1947), and *AST/Servo Systems, Inc.* v. *United States*, 449 F. 2d 789, 196 Ct. Cl. 150 (1971). As discussed in detail below, con-

structive notice exists where the manual has been incorporated by reference into a contract or grant.

such as Manual 7100.1A, the United States Supreme Court has held:

With regard to an agency's general authority to issue regulations, such as Manual 7100.1A, the United States Supreme Court has held:

> * * * Where the empowering provision of a statute states simply that the agency may "make . . . such rules and regulations as may be necessary to carry out the provisions of this Act," we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is "reasonably related to the purposes of the enabling legislation." *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 280–281 (1969). See also *American Trucking Assns.* v. *United States*, 344 U.S. 298 (1953). [Footnote omitted.]

Mourning v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1972). Further, the Supreme Court has recognized that, in order for Government agencies to properly administer congressionally created and funded programs, they must formulate policy and make rules to fill any gaps left, implicitly or explicitly, by Congress. See *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974).

The Supreme Court has also approved the propriety of a grantor agency attaching such rules as conditions to its grants in stating:

> There is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid. See *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 295 (1958); *Oklahoma* v. *Civil Service Comm'n*, 330 U.S. 127, 143 (1947).

King v. *Smith*, 392 U.S. 309, 333, f.n. 34 (1968). These conditions can be attached to grants for the purpose of insuring that certain Federal interests are protected in the expenditure of grant money, even though it may be that these interests are not otherwise directly related to the purposes of the enabling legislation authorizing the grant. See *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F. 2d 159, 171 (3rd Cir. 1971).

Our Office has recognized the propriety of imposing conditions on grantees, such as a requirement for open and competitive bidding in federally funded procurements by grantees, to help assure that Federal funds are expended in a fiscally responsible and proper manner consistent with the Federal interests. *See* 48 Comp. Gen. 326 (1968); *Illinois Equal Employment Opportunity Regulations for Public Contracts*, 54 Comp. Gen. 6 (1974), 74–2 CPD 1; *Copeland Systems, Inc.*, 55 Comp. Gen. 390 (1975), 75–2 CPD 237. Such conditions must be considered "reasonably related to the purposes" of the enabling legislation if they are not imposed in contravention of the legislation or any other Federal law. See *King* v. *Smith*, *supra; Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, *supra*. A grantee receiving Federal funds is required to meet such federally imposed requirements as a condition to receiving Federal monies. See

King v. *Smith*, *supra*; *Illinois*, *supra*. Consequently, although the Federal Government is not a party to contracts awarded by its grantees, a grantee must comply with the conditions attached to the grant in awarding federally assisted contracts. See *Illinois*, *supra*.

Paragraph 49e does not contravene any provisions of the Omnibus Crime Control and Safe Streets Act, *supra*, or any other Federal law of which we are aware. Also, as discussed in detail below, paragraph 49e is reasonably related to the Act's purposes. Although PRC/PMS has asserted that the guideline creates a fundamental imbalance in the Federal Government-grantee relationship by virtue of the Government's allegedly unwarranted intrusion into grantee source selection, LEAA has the discretion to impose reasonable conditions on its grants to assure that LEAA funded contracts are awarded in a fiscally responsible manner.

Guideline's Consistency with Federal Management Circular 74-7

FMC 74-7-0 was promulgated by the General Services Administration (GSA) pursuant to Executive Order 11717, 38 Fed. Reg. 12316 (1973). Responsibility for FMC 74-7-0 was transferred to the Office of Federal Procurement Policy (OFPP) of the Office of Management and Budget by Executive Order 11893, 41 Fed. Reg. 1040 (1976). FMC 74-7-0 is intended to provide uniform standards for use by state and local governments in establishing procedures for procurements with Federal grant funds, and to insure that materials and services are obtained under such procurements in an "effective" (e.g., fiscally responsible) manner and in compliance with provisions of applicable Federal law.

LEAA has stated that Manual 7100.1A was intended to assure sound and responsible financial management in the expenditure of LEAA grant monies. In this regard, the manual implements many of the FMC 74-7-0 provisions. In particular, LEAA promulgated paragraph 49e of the manual to implement paragraph 3b of FMC 74-7-0. Paragraph 3b reads the same as the first two sentences of paragraph 49e.

PRC/PMS asserts that paragraph 49e is inconsistent with paragraph 3b of FMC 74-7-0 because of the third sentence of paragraph 49e. PRC/PMS states that being "alert" to an organizational conflict of interest does not envision a "blanket" exclusion of bidders from competition in every case where the bidders are responsible for developing or drafting specifications, requirements, statements of work and/or RFP's for the procurement. In this regard, PRC/PMS refers to paragraph 1 of FMC 74-7-0, the last sentence of which reads:

* * * No additional requirements shall be imposed by the Federal agencies upon the grantees unless specifically required by Federal law or Executive orders.

LEAA took the position in adding the third sentence of paragraph 49e that it was not imposing an additional requirement, but rather was refining and specifically implementing the second sentence of paragraph 3b of FMC 74–7–0. LEAA has stated that if an offeror was under the exclusionary rule of the third sentence of paragraph 49e, it also would be excluded under paragraph 3b.

We regard the provisions of FMC 74–7–0 as matters of Executive branch policy, which do not establish legal rights and responsibilities, and which are not ordinarily within the decision functions of the General Accounting Office. See section 1 of Executive Order 11893, *supra;* 43 Comp. Gen. 217, 221 (1963); 53 *id.* 86, 88 (1973); *Federal Leasing, Inc.*, 54 Comp. Gen. 872 (1975), 75–1 CPD 236; *PRC Computer Center, Inc., et al.*, 55 Comp. Gen. 60, 68 (1975), 75–2 CPD 35.

PRC/PMS had protested on September 8, 1975, LEAA's implementation of paragraph 3b of FMC 74–7–0 to GSA, which at that time had the responsibility for FMC 74–7–0. In letter dated January 26, 1976, OFPP (which now has the responsibility for FMC 74–7–0) stated:

> * * * the LEAA Guideline is an acceptable implementation of FMC 74–7–0 and is not an additional requirement precluded by FMC 74–7. The type of practice prohibited by the LEAA Guideline is clearly within the intended purpose of the FMC organizational conflict of interest statement.

In view of the foregoing, we do not believe we can conclude that LEAA's guideline is inconsistent with FMC 74–7–0.

Reasonableness of Guideline

PRC/PMS contends that the "blanket" organizational conflict of interest exclusionary rule in paragraph 49e is unprecedented in the Federal Government. PRC/PMS alleges that such a broad limitation on grantee procurements lacks a reasonable basis.

PRC/PMS contends that the rule was promulgated without any consideration of its adverse effect on professional services firms, especially those firms involved in law enforcement systems. PRC/PMS explains that the relatively few professional services firms who perform the kind of work funded through LEAA grants are generally and properly involved in both the preparation of feasibility studies for and the implementation of law enforcement systems.

PRC/PMS claims the exclusion through the guideline of such professional services firms from their area of competence will reduce rather than enhance competition. PRC/PMS explains that each of these firms will have to consider carefully whether it will compete for a substantially smaller study contract and take the chance of excluding itself from competition for the much larger implementation contract. PRC/PMS asserts that this may cause the more qualified professional

services firms, which have gained exceptional experience and capability through performing implementation as well as study contracts, not to bid for the study contracts. PRC/PMS says that not only will this lessen competition for the study contracts, but also an inadequate study or poorly defined requirements for the "follow-on" implementation contract may result. PRC/PMS claims that this could cause competent firms to decline to bid on the implementation RFP because the grantee would not have a workable system defined in the solicitation and potential bidders would not know what was going to be required of them.

Also, PRC/PMS contends that if professional services firms, which perform studies, are removed from competition on implementation contracts, more hardware manufacturers may bid on the implementation contracts with the intent of supplying their own equipment, even if it does not best suit the grantee customer's needs. Also, since there would be no real incentive for professional services firms to bid on the study contracts, more hardware manufacturers may become involved, which would increase the likelihood of "real" organizational conflicts of interest as discussed below.

PRC/PMS contends that LEAA grantees will be adversely impacted by the guideline, since qualified firms with no demonstrable conflict of interest will be excluded from competition under the guideline, notwithstanding that they may be in the best position to understand the grantees' requirements under the implementation contract.

PRC/PMS also points out that such guidelines have historically only been applied to hardware manufacturers. PRC/PMS claims that hardware suppliers, by recommending their own equipment, could create a "real" organizational conflict of interest situation by developing specifications reflective of their own equipment without regard to the grantee customer's best interests. On the other hand, PRC/PMS claims that non-hardware firms do not have the same kind of incentive to bias the specifications to gain an unfair competitive advantage.

PRC/PMS specifically references Armed Services Procurement Regulation (ASPR) Appendix G (1975 ed.), one of the few organizational conflict of interest regulations applicable to Federal procurements, to support its position in this regard. These ASPR provisions, in the ordinary case, are only applied to hardware suppliers. Also, an exclusionary organizational conflict of interest clause can only be made applicable under ASPR after a complete analysis of the relative benefits and detriments of including such a limitation. *See* ASPR 1-113.2(b)(2) (1975 ed.).

PRC/PMS also contends that an organizational conflict of interest cannot be judged by a "blanket" irrebuttable presumption that contractors, who were involved in preparing the specifications or state-

ments of work, have such conflicts of interest as to justify barring them from competition. PRC/PMS claims that such conflicts can only be judged by evaluating the complete circumstances after the proposals on the implementation contract have been received to see if the specifications were really biased or if the contractor gained an *unfair* competitive advantage by virtue of writing the specifications.

In promulgating organization conflict of interest rules, the legitimate Government interests of preventing bias in study contracts and protecting against *unfair* competitive advantages of contractors who prepared the implementation contracts' specifications should be carefully balanced against the Government's legitimate interests in awarding a contract that will best serve its needs to the most qualified contractor. See *Report of the Commission on Government Procurement*, Volume 2, pp. 47–49 (1972); 51 Comp. Gen. 397 (1972); *H. J. Hansen Company*, B–181543, March 28, 1975, 75–1 CPD 187. It is a general policy of the Federal Government to allow all interested qualified firms an opportunity to participate in its procurements in order to maximize competition unless there is a clearly supportable reason for excluding a firm. See *PRC Computer Center, Inc.*, *supra*, at 81. The foregoing interests should be carefully balanced to insure the Government's best interests are served by the guideline.

Nevertheless, absent a showing of demonstrable unreasonableness or a violation of statute or regulation, the responsibility for balancing the foregoing interests and deciding whether or not to have such an organizational conflict of interest requirement is primarily a matter of grant procurement policy for resolution by the concerned agency. *See* 51 Comp. Gen. 397; *Gould Inc., Advanced Technology Group*, B–181448, October 15, 1974, 74–2 CPD 205. *Cf.* 51 Comp. Gen. 609 (1972); 53 *id.* 382 (1973); *Kenneth R. Bland*, 54 *id.* 835, 75–1 CPD 207. Included among the interests balanced by LEAA are the countervailing factors which have been advanced by PRC/PMS in support of its complaint that the guideline is unreasonable.

With the foregoing in mind, we will now discuss the reasons given by LEAA in support of its promulgation of paragraph 49e.

First, as indicated above, LEAA takes the position that the third sentence of paragraph 49e of Manual 7100.1A implements FMC 74–7–0, and is a reasonable definition of a specific instance in which such an organizational conflict of interest exists that paragraph 3b of FMC 74–7–0 would also be for application. That is to say, LEAA has found that there would *always* be an improper organizational conflict of interest if a firm, which prepared specifications, requirements, statements of work and/or RFP's for a LEAA funded procurement were allowed to compete on that procurement. As indicated

above, OFPP concurs with LEAA that this guideline is a proper implementation of FMC 74–7–0.

Second, LEAA regards this guideline as necessary to fulfill its responsibility under 31 U.S.C. § 628 (1970) by providing financial management and accountability requirements to assure that the grant funds are applied only to the purposes and objects for which they are made available.

Third, a specific impetus for imposing the guideline was congressional concern over organizational conflicts of interest in LEAA funded grantee contracts. Much of the congressional concern expressed was over possible organizational conflicts of interest involving equipment manufacturers marketing their products to LEAA grantees and the excessive use of consultants by LEAA grantees. However, considerable concern was also expressed over the propriety of consultants preparing specifications and then performing the resulting contracts for LEAA grantees. See *House Comm. on Government Operations, Block Grant Programs of the Law Enforcement Assistance Administration*, H.R. Report No. 92–1072, 92d Cong., 2d Sess. 49, 55–57 (1972). In response to the congressional concern, LEAA, on February 20, 1973, notified a congressional oversight committee of its intent, in the future, to prohibit contractors from developing specifications and then competing for an award based on those specifications.

Fourth, in 1973, LEAA was advised by the Anti-Trust Division of the Department of Justice as follows:

> * * * There is one practice prevalent in this field which we believe could have anti-competitive effects and would also appear to result in a bad procurement policy. It seems to be a general practice on the part of purchasers of this equipment to have the manufacturers or suppliers prepare the specifications. We suggest that you might be well advised to issue regulations forbidding this and requiring that the specifications be drawn by disinterested parties. Such a ruling on your part would be a healthy one from a competitive standpoint.

Even though the Anti-Trust Division opinion was primarily concerned with hardware manufacturers, LEAA could reasonably find that this concern was applicable in all cases where the contractor prepared the specifications under which it later performed a contract.

Finally, LEAA explains:

> * * * LEAA has determined that the only reasonable way to insure bias free specifications is to preclude from the competition the contractor who prepared the specifications. The LEAA organizational conflict of interest provision serves three purposes to assure open and competitive bidding in grantee procurements. First, it prevents a contractor from developing restrictive specifications, requirements, statements of work and/or RFPs.
>
> The second purpose is that LEAA wants to insure that grantees or subgrantees receive maximum benefit from the contractual award of LEAA funds. By placing a contractor in a position where he will be unable to bid on a subsequent phase of the project or program which will be based upon the work the contractor is currently performing, the objectivity of the contractor's services and advice under the contract will be assured. In addition, the contractor will not derive any benefit from explicitly or implicitly withholding any specific knowledge or

data which may be used to his advantage in the subsequent procurement phase of the project or program. Hence, there will be no conflicts with the best interests of the contractor's client.

The third purpose is to safeguard the integrity of the competitive bidding system. Paragraph 49e preserves the integrity of the competitive bidding system by precluding from bidding a contractor who may have been placed in an advantageous position by contractual performance in regard to a prior phase of the project or program. The advantageous position may be in the form of detailed prior knowledge of the requirements and/or specifications, specific knowledge of the needs and preferences of the persons who would be involved in the selection process, additional time advantage, and deterrence of participation by potential bidders by the appearance of an organizational conflict of interest. As a result, the LEAA organizational conflict of interest provision gives all companies an equal right to compete for contracts under Federal grants, prevents unjust favoritism, collusion, or fraud in the letting of contracts under Federal grants, permits competitors to compete on a common basis, and presents to the general public as well as all participants in the competitive bidding process the appearance as well as in the fact that the bidding process will be a true competition.

In support of its position that LEAA's guideline is unreasonable, PRC/PMS has cited cases, such as *Exotech Systems, Inc.*, 54 Comp. Gen. 421 (1974), 74–2 CPD 281, and *PRC Computer Center Inc.*, *supra*, wherein we found that offerors should not be excluded from competition simply on the basis of a theoretical or potential conflict of interest. These cases are not applicable here. In each of the cases cited, although a protester contended that an award represented an organizational conflict of interest, there were no applicable regulatory or RFP provisions which in any way precluded the protested contractor from receiving the award.

We have recognized the propriety of imposing organizational conflict of interest provisions under appropriate circumstances, even where there is no specific regulation providing therefor. For example, in *PRC Computer Center, Inc.*, *supra*, at 81, we recognized that an offeror could be excluded from competition because of an organizational conflict of interest if there was "a clearly supportable reason for so limiting competition." Also, in 51 Comp. Gen. 397 and *Gould*, *supra*, we recognized the validity of RFP clauses which disqualified certain firms from the competition because of "conflicts of interest * * * inherent in the program contemplated," since they had been properly and adequately justified, even though there was no regulation providing for the clauses.

Similarly, the parallel PRC/PMS seeks to draw between the LEAA guideline and our decisions which recognize the general impropriety of prequalifying offerors for a procurement, see e.g., 53 Comp. Gen. 209 (1973), is not applicable. As was recognized in 53 Comp. Gen. *supra*, prequalification of offerors can be justified if the procedures are not *unduly* restrictive and can otherwise be justified by clearly supportable reasons. *See*, *e.g.*, B–135504, May 2, 1958, involving the Army's use of Qualified Manufacturers' Lists.

While the foregoing decisions involve direct Federal procurements, we believe a grant agency has no less discretion to promulgate grant conditions precluding a bidder from competing for a grantee contract for the purpose of insuring bias-free specifications and free and open competition, so long as the conditions do not *unduly* restrict competition. It is clear that not all contractors who prepare requirements studies for LEAA funded projects are barred under the guideline for competing for "follow-on" implementing contracts. See, e.g., the LEAA funded Philadelphia procurement on which PRC/PMS can compete even though it performed a requirements study for Philadelphia.

We recognize that application of the LEAA guideline may adversely impact competition, particularly with regard to firms in the professional services industry. However, this impact must be weighed against the possible adverse impact on competition for the implementation contract if the guideline is ignored. We think the LEAA concerns already quoted are reasonable, and that the guideline is not an *undue* restriction on competition.

Also, we agree with LEAA that it would be impractical to ascertain whether a conflict of interest exists only after the offers are received on the "follow-on" procurement. Qualified firms may already have been discouraged from competing by the possible advantage obtained by the specification preparer. The incentive to bias specifications arises whenever the study contractor is eligible for the "follow-on" contract award.

We recognize that organizational conflict is treated differently and more selectively in ASPR Appendix G (1975 ed.), which has generally been applied only against hardware manufacturers and suppliers. However, for the reasons already stated, we conclude that the LEAA guideline is reasonable.

CLARITY OF LEAA GUIDELINE

PRC/PMS also contends that the third sentence of paragraph 49e is vague and not susceptible to clear definition. PRC/PMS alleges that there is nothing to show what is meant by the words "specifications," "requirements," and "statements of work," as used in the guideline. In addition, there is nothing defining "a proposed procurement," either in terms of subject matter or time, despite the fact that study and implementation phases of LEAA funded projects can take many forms. PRC/PMS contends that some definition has to be provided for these terms since they are restrictive of competition. PRC/PMS concludes that the guideline is therefore unenforceably vague.

We disagree. The terms "specifications," "requirements," "statements of work" and "RFPs" have clear and generally recognized meanings in procurement. We do not believe the term "a proposed procurement" has to be further defined. Under the LEAA guideline, the awardee of a contract for drafting or developing specifications, requirements, statements of work or RFP's will be excluded from competing for a subsequent procurement, which incorporates them as material provisions.

APPLICABILITY OF GUIDELINE TO PRC/PMS

PRC/PMS alleges that its actions under the study contract do not fall under the guideline. However, PRC/PMS's "requirements" study detailing a proposed approach to automated information system development by Denver, made to satisfy tasks A, B and C of the study contract, was totally incorporated into the implementation RFP.

More importantly, our technical review disclosed that the specifications in PRC/PMS's study, "Denver Police Data Center Hardware," drafted to satisfy task D, are substantially identical to the implementation RFP specifications.

The terms of many of the implementation RFP requirements are identical to those drafted by PRC/PMS. The bulk of the other RFP specifications are closely derived from the "hardware" study with only minor changes made. For example, the video terminals described in the two documents are virtually identical (there are some minor differences in the keyboards), even though there are a wide variety of video terminal devices on the market with variant optional features depending on the manufacturer.

There are some differences we have found between the specifications of the "hardware" study and the RFP. For example, the RFP specifically requires the direct access storage devices to be switchable and shared between the two system central processing units. The hardware study does not *specifically* so provide. Also, the RFP requires main memory to be expandible to 256,000 characters. The "hardware" study called for 128,000 characters. The foregoing differences provide Denver with increased flexibility and capacity in the ADP system. However, we do not regard the differences significant in terms of the ADP system defined by the "hardware" study specifications. Accordingly, it was reasonable to conclude that the LEAA guideline precluded PRC/PMS's participation in the implementation procurement.

In arguing against the applicability of the guideline, PRC/PMS primarily refers to the alleged lack of conceptual detail and bias in the "requirements" study. However, this does not respond to the determination that PRC/PMS developed and drafted the RFP re-

quirements in preparing the "hardware" study. Also, PRC/PMS has referred to a number of other LEAA funded procurements to indicate that LEAA acted arbitrarily and capriciously in applying the guideline in this case. However, from the evidence presented to our Office, there is no indication that any of the referenced procurements fell under the LEAA guideline.

NOTICE OF GUIDELINE

PRC/PMS also complains that it had no notice of possible exclusion from competition because of its study contract work. PRC/PMS alleges that this lack of notice to an offeror with respect to so serious a matter is inconsistent with basic principles of Federal procurement law. PRC/PMS asserts that merely incorporating LEAA's Manual 7100.1A by reference into its study contract does not give sufficient notice of the paragraph 49e exclusion.

In support of this proposition, PRC/PMS references ASPR Appendix G (1975 ed.), which provides that an offeror cannot be excluded for an organizational conflict of interest unless there is a provision in the initial study or research and development RFP notifying offerors that they may be barred from competing for the "follow-on" implementation or production contracts. *See* ASPR § 1-113.2(a) (1975 ed.). We have consistently held that the ASPR provisions are not self-executing, and may be applied only if specifically incorporated into a solicitation. *See* 48 Comp. Gen. 702 (1969); 49 *id.* 463 (1970).

Also, PRC/PMS claims the repeated assurances it was given by Denver that it would not be excluded from competition removes any constructive notice it may have had of the LEAA organizational conflict of interest requirement. These assurances include (1) the advice by Denver to PRC/PMS, prior to submission of its proposal for the study contract, that PRC/PMS would not be barred from competing on the implementation phase; (2) the inclusion of PRC/PMS on the bidders list for the implementation RFP; (3) section B.13 of the implementation RFP (quoted above) which PRC/PMS contends implied that it could compete; and (4) the statements by Denver officials at the bidders conference that PRC/PMS could compete. In addition, neither Denver nor LEAA notified PRC/PMS of LEAA's determination that PRC/PMS could not compete.

Clause 26 of the study contract (quoted above) specifically incorporated by reference LEAA Manual 7100.1A. The Courts, Boards of Contract Appeals, and our Office have consistently recognized that where a document or publication is referred to in a contract, the contractor, in legal effect, has constructive knowledge of its contents, and

actual ignorance of the contents will not avail as a defense. See *Guerini Stone Co.* v. *P. J. Carlin Construction Co.*, 240 U.S. 264 (1916); *Rehart* v. *Clark*, 448 F. 2d 170, 174 (9th Cir. 1971); *U.S. Plastic Bandage Company*, GSBCA No. 1701, 65-2 BCA 5231 (1965); 48 Comp. Gen. 689 (1969); 1 *McBride and Wachtel, Government Contracts*, § 4.100[4]; 4 *Williston on Contracts*, § 628 (3rd ed. 1961).

Therefore, PRC/PMS had constructive notice and was bound by the provision when it entered into the study contract. PRC/PMS admittedly made no effort to obtain LEAA Manual 7100.1A. In the circumstances, any contrary oral advice from Denver, while regrettable, is not legally significant.

In any case, even if PRC/PMS had not been given adequate notice of the LEAA guideline, it still would have been properly excluded from competition, since the guideline had been made a condition of the LEAA grant to Colorado. It is claer that conditions, which bind the grantee, may be incorporated by reference into the grant agreement in much the same manner as they are incorporated by reference into other contractual agreements. See *Lametti & Sons, Inc.*, 55 Comp. Gen. 413 (1975), 75-2 CPD 265. By virtue of the LEAA grant agreement, these obligatory conditions are also passed on to apply to LEAA subgrantees. See paragraphs 15 and 17 of Colorado's and Denver's Applications for Grant Discretionary Funds (quoted above); B-171019, June 3, 1975. Therefore, Denver was legally bound to follow the LEAA guideline, and reject PRC/PMS's proposal if PRC/PMS came under the guideline. *See* 42 Comp. Gen. 289, 294 (1962); *Illinois, supra.*

Also, it is the duty and responsibility of LEAA to see that a grantee complies with the conditions attached to its grants, such as the paragraph 49e guideline. *See* 42 Comp. Gen., *supra;* 52 *id.* 874 (1973); *F. J. Busse Company, Inc.*, B-180075, May 3, 1974, 74-1 CPD 225. The most practical means by which LEAA can enforce compliance with paragraph 49e (besides refusing to further fund the project) is to reserve the right to approve grantee's (and subgrantee's) proposed contract awards. See Special Condition 5 of LEAA's Grant Adjustment Notice dated November 19, 1974 (quoted above).

From the foregoing, it is clear that the LEAA organizational conflict of interest guideline (unlike ASPR Appendix G (1975 ed.)) is self-executing. That is, paragraph 49e automatically attaches to projects funded by LEAA when the circumstances described in the guideline exist. Therefore, even if an LEAA grantee fails to adequately appraise bidders of the existence of paragraph 49e, it does not preclude or relieve LEAA from asserting its duty when it reviews the contract award to assure that the grant condition is complied with. Moreover, a grantee or subgrantee must necessarily give some notice of the guide-

line to its contractors, if only by incorporation of Manual 7100.1A by reference into its contracts, because paragraph 15 of the Grant Application for Discretionary Funds (quoted above) requires grantees to "pass down" LEAA's grant conditions to its contractors. Also see *Gould*, *supra*, where an offeror was properly excluded from competition by an RFP provision in a direct Federal procurement by virtue of a previous contract, even though there was no provision in the previous contract warning it of its possible exclusion from future procurements.

Moreover, since Denver, in disbursing LEAA funds, cannot be regarded as an "agent" of LEAA, it cannot act to waive the grant condition or preclude LEAA from enforcing it. *See* 37 Comp. Gen. 85, 87 (1957), and discussion on estoppel below. Therefore, the repeated assurances by Denver to PRC/PMS that it could compete for the implementation contract did not bind LEAA.

In view of the foregoing, the lack of a specific reference in the study contract and the implementation solicitation to the fact that PRC/PMS would be excluded from competing for the implementation contract does not prevent the application of paragraph 49e to PRC/PMS.

WAIVER OF LEAA GUIDELINE

PRC/PMS also protests LEAA's refusal to waive the organizational conflict of interest guideline. As indicated above, this regulation was promulgated in implementation of section 501 of the Omnibus Crime Control and Safe Streets Act of 1968, *supra*.

"An applicant for waiver [of an agency regulation] faces a high hurdle even at the starting gate," and must show an agency's "reasons for declining to grant the waiver were so insubstantial as to render that denial an abuse of discretion." See *WAIT Radio* v. *Federal Communications Commission*, 459 F.2d 1203, 1207 (D.C. Cir. 1972), *cert. denied* 409 U.S. 1027 (1972). PRC/PMS has not presented any probative evidence which would show such an abuse of discretion, especially considering that an LEAA waiver would have affected the interests of other parties (e.g., MWSC). See *Bonita, Inc.* v. *Wirtz*, 369 F.2d 208 (D.C. Cir. 1966) and *Borough of Lansdale, Pennsylvania* v. *Federal Power Commission*, 494 F.2d 1104 (D.C. Cir. 1974), where it was found that an agency is bound to its regulations if a waiver would adversely affect another party.

ESTOPPEL

PRC/PMS has also argued that LEAA should have been estopped from refusing to allow the PRC/PMS award. Consequently, PRC/

PMS asks that the MWSC award be terminated and award be made to PRC/PMS, and, in the alternative, that PRC/PMS be awarded its proposal preparation costs. PRC/PMS bases its estoppel argument primarily on the specific advice by Denver at the bidders conference that PRC/PMS could compete.

PRC/PMS also references LEAA's review and approval of the implementation RFP containing section B.13 (quoted above). However, section B.13 only concerns the nonapplicability of the study contract's "hardware exclusion" clause, which was a completely separate requirement from paragraph 49e of LEAA Manual 7100.1A. PRC/PMS also contends that before submitting its proposal for the study contract, it was informed by Denver after consulting with LEAA that the "hardware exclusion" clause of the study contract would not preclude it from competing on the implementation phase. However, LEAA has no recollection of such consultation.

Four elements are necessary to establish an estoppel against the Federal Government. *Fink Sanitary Service, Inc.*, 53 Comp. Gen. 502 (1974), 74-1 CPD 36. These elements, set out in *United States* v. *Georgia-Pacific Company*, 421 F.2d 92, 96 (9th Cir. 1970), and *Emeco Industries, Inc.* v. *United States*, 485 F.2d 652, 202 Ct. Cl. 1006 (1973), are as follows:

1) the party to be estopped must know the facts;

2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended;

3) the latter must be ignorant of the true facts;

4) he must rely on the former's conduct to his injury.

There has been no showing that PRC/PMS relied upon any assurances or actions by responsible LEAA officials that PRC/PMS would be able to compete on the implementation procurement. Denver, upon whose assurances PRC/PMS may have detrimentally relied, is not the Government's agent, and cannot act to estop the Federal Government. *See* 37 Comp. Gen., *supra*. Therefore, the fourth necessary element to establish an estoppel has not been met. *Cf. Dumont Oscilloscope Laboratories, Inc.*, B-183434, January 15, 1976, 76-1 CPD 31.

The cases cited by PRC/PMS to support estoppel, i.e., *Manloading & Management Associates, Inc.* v. *United States*, 461 F.2d 1299, 198 Ct. Cl. 628 (1972), and *Sylvania Electric Products, Inc.* v. *United States*, 458 F.2d 994, 198 Ct. Cl. 106 (1972), are not applicable here, since they involved estoppels found against the Government because of statements made by its representatives.

Finally, LEAA apparently did not know all of the facts showing that PRC/PMS was under paragraph 49e prior to communicating

this fact to the grantee. Consequently, the first element to establish an estoppel has not been satisfied either.

Therefore, notwithstanding that PRC/PMS may have been misled by Denver, LEAA was not estopped from rejecting the proposed award to PRC/PMS, or from aproving the award to MWSC. Moreover, PRC/PMS's claim for proposal preparation costs against the Federal Government cannot be allowed under the estoppel theory.

PROPOSAL PREPARATION COSTS

Furthermore, from the foregoing, it is apparent that PRC/PMS's claim for proposal preparation costs cannot be allowed under the standards of "arbitrary and capricious action" set forth in *T&H Company*, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345, and *Keco Industries, Inc.* v. *United States*, 492 F.2d 1200, 203 Ct. Cl. 566 (1974). Consequently, we do not feel compelled to decide the question of whether a disappointed bidder on a Federal grantee procurement can recover bid or proposal preparation costs based upon the *T&H/Keco* standards. *Cf. Bell & Howell Company*, 54 Comp. Gen. 937 (1975), 75-1 CPD 273. Moreover, PRC/PMS's claim for allocated overhead directly related to its efforts to obtain a waiver of the LEAA guideline is clearly not recoverable in any case. See *T&H*, *supra*, at 1027; *Descomp, Inc.* v. *Sampson*, 377 F. Supp. 254 (D. Del. 1974).

CONCLUSION

In view of the foregoing, PRC/PMS's complaint and claims are denied. However, we believe the procedure can be improved. Incorporation of documents by reference puts a contractor on constructive notice of their contents. However, considering the significant impact of paragraph 49e, applicable RFP's should expressly and clearly include notice of its provisions.

[B-182581]

Transportation—Dependents—Military Personnel—Dislocation Allowance—Permanent Change of Station Requirement

Military members required to involuntarily relocate their households incident to base closings in Japan under Kanto Plain Consolidation Plan, without permanent changes of station, may not be paid dislocation allowance under 37 U.S.C. 407(a), nor may they be paid such allowance pursuant to 37 U.S.C. 405a since the relocations were not evacuations incident to unusual or emergency circumstances.

Transportation—Household Effects—Military Personnel—Permanent Change of Station Requirement

Military members required to relocate their households incident to base closings in Japan without permanent changes of station may not be reimbursed personal expenses incurred for purchase of rugs, drapes, curtains, and service charges for items of personal convenience not essential to the occupation of quarters. Also, reimbursement for telephone installation charges is specifically prohibited by 31 U.S.C. 679.

In the matter of dislocation allowance—PDTATAC Control No. 74–43, March 30, 1976:

This action is in response to a letter dated September 20, 1974, with enclosures (file reference ACF), from Major Alan C. Duncan, USAF, Chief, Accounting and Finance Branch, Headquarters 475th Air Base Wing (PACAF), APO San Francisco 96328, requesting an advance decision concerning payment of dislocation allowances to members stationed in Japan who were required to move from their Government housing areas incident to the Kanto Plain Consolidation Plan. This request was approved by the Per Diem, Travel and Transportation Allowance Committee and forwarded here by indorsement dated October 29, 1974, under PDTATAC Control No. 74–43.

The submission indicates that under the Kanto Plain Consolidation Plan (KPCP), with the concurrence of the United States and Japanese Governments, certain United States occupied military bases in the Kanto Plain area of Japan were closed and returned to the control of the Government of Japan. Several of these bases were being used only as housing areas, and personnel commuted daily from these housing areas to duty at other bases at which they were permanently stationed. As a result of the base closings under the KPCP, certain members changed housing areas without changing their duty stations and were, therefore, not insured permanent change of station orders.

In line with the foregoing, it is explained in a letter dated October 4, 1974, from the Assistant Deputy Chief of Staff/Comptroller, Headquarters Pacific Air Forces, that movement of personnel from Fuchu Air Station to Yokota Air Base and coincidental closure of the Kanto Mura and other Government housing complexes required over 600 military members to relocate their households. Those members stationed at Fuchu whose households were moved in connection with permanent change of station (PCS) orders could be paid a dislocation allowance (DLA). However, members not making a PCS but who were forced to move from housing complexes were not entitled to DLA, due to absence of PCS orders. The need for reimbursing various unavoidable expenses of moving incident to Government housing com-

plex closures is pointed out, and it is suggested that the most equitable solution is payment of DLA to all members involved.

In this regard the Chief, Accounting and Finance Branch, requests a decision as to whether DLA may be paid to all members who were required to move because of the housing closures and who incurred moving expenses for those moves, although they did not move pursuant to permanent change of station orders. The Assistant Deputy Chief of Staff/Comptroller recommends that those members be paid DLA pursuant to paragraph M12002, Volume 1 of the Joint Travel Regulations (1 JTR). He also recommends that, if it is determined that DLA cannot be authorized to such members, they be reimbursed from Operation and Maintenance funds "for command approved expenses incurred in connection with their carrying out orders," such approved expenses to be in amounts not greater than "eligibility under DLA." As authority for that method of reimbursement, he cites 51 Comp. Gen. 12 (1971) and 52 *id.* 69 (1972).

As representative of the foregoing, two vouchers have been transmitted with the submission covering the claimed relocation expenses of Senior Master Sergeant Edward R. Stillwell, USAF, 138–22–8055, and Staff Sergeant Michael A. Elias, USAF, 261–60–5606. Sergeant Elias claims the cost of purchase of curtains, service charges for rewiring of plugs for and installation of air-conditioners, and a charge for installation of a telephone. Sergeant Stillwell claims the costs of cleaning appliances and installation of air-conditioners, the purchase and installation of a television antenna, the cost of purchase of curtains, drapes and rugs, and a charge for telephone installation. Both members' housing was relocated incident to the KPCP but neither member's permanent duty station was changed. Presumably, the transportation of their household goods incident to the relocation was at Government expense. 1 JTR, paragraph M8309.

Section 407(a), Title 37, U.S. Code (1970) provides in pertinent part that under regulations prescribed by the Secretary concerned, a member of a uniformed service whose dependents make an authorized move "in connection with his change of permanent station" or whose dependents are "covered by section 405(a)" of Title 37, is entitled to a dislocation allowance.

Paragraph M9003–1, 1 JTR promulgated pursuant to that authority, provides that a dislocation allowance is payable to a member with dependents whenever the dependents relocate their household "in connection with a permanent change of station." Since it is clear that the relocations here involved did not take place in connection with permament changes of station, payment of DLA on that basis is precluded. *See* 47 Comp. Gen. 556 (1968).

Pursuant to 37 U.S.C. 405a (1970) and 1 JTR, paragraph M12002, a member may also be entitled to DLA when his dependents are necessarily relocated "incident to an evacuation," which must be caused by "unusual or emergency circumstances (such as war, riots, civil uprising or unrest, adverse political conditions, denial or revocation by host Government of permission to remain, national disaster, epidemics, or similar conditions of comparable magnitude)." The relocations of members from one military housing area to another under the KPCP did not, in our view, take place incident to such unusual or emergency circumstances. *Cf.* 46 Comp. Gen. 133 (1966), and 52 *id.* 69, *supra.* Thus, DLA is not payable on that basis.

In view of the above, payment of DLA is not authorized in these circumstances.

As to whether the members here involved may be reimbursed from Operation and Maintenance funds, as was indicated in the submission, in 51 Comp. Gen. 12, we authorized reimbursement to a Navy officer for the advance rental of a motel room incident to competent orders to perform temporary duty which duty was terminated early. In that case, although the member could not be paid travel per diem, we indicated that the rental of the room could be considered as part of the administrative cost of operating the member's permanent duty station and he could be reimbursed from Operation and Maintenance funds. On a similar basis in 52 Comp. Gen. 69, we authorized reimbursement to a member for expenses he incurred for relocation of his house trailer from one trailer court to another incident to an order of his base commander declaring his trailer court "off limits." Since no permanent change of station was involved, normal trailer allowances could not be paid; however, we authorized reimbursement from Operation and Maintenance funds for the transportation of the trailer and necessary expenses for materials required for new water and electric hook-ups and conversion from LP to natural gas, which were essential to occupancy of the house trailer.

The situation in the present case is similar to that in 52 Comp. Gen. 69 (house trailer) only in that the members' relocations occurred incident to the exercise of the appropriate military commanders' authority in connection with the administration of their bases. However, unlike the situation in the trailer case, above, the vouchers submitted in this case for the expenses incurred by Sergeant Stillwell and Sergeant Elias represent purely personal expenses incurred, but not mandatory for the actual habitation of new Government quarters.

With respect to the foregoing, the purchase of such personal furnishings as rugs, curtains and drapes which are (and remain) the personal property of the members are not reimbursable items. Similarly, the amounts claimed for service charges appear to be for services

performed for the personal convenience of the members and were not services essential to the occupation of the quarters, as was the case in 52 Comp. Gen. 69. Thus, such service charges are not reimbursable. This is in accord with the general position this Office has taken in other cases involving expenditure of Government funds for the purchase of furnishings for the personal use of employees. *See* 47 Comp. Gen. 657 (1968), 32 *id.* 369 (1953), 32 *id.* 229 (1952), and 3 *id.* 433 (1924), and *cf.* B–163449, March 4, 1968, and B–162320, September 18, 1967. Also, although reimbursement for a telephone installation charge was authorized in 52 Comp. Gen. 69, such authorization was inadvertent since payment of such charges is specifically prohibited by 31 U.S.C. 679 (1970). *See* 54 Comp. Gen. 661 (1975). Thus, telephone charges claimed by Sergeants Stillwell and Elias may not be reimbursed. Therefore, in this case, we do not view the representative vouchers submitted as showing any actual and necessary expenses of the type which may be reimbursed from Operation and Maintenance funds of the bases involved.

Accordingly, the vouchers submitted are not authorized for payment and are retained here.

[B–184260]

Bids—Mistakes—Withdrawal—Burden of Proof

Where bidder seeks to withdraw its bid based upon alleged error and furnishes evidence to make *prima facie* case in support of error, i.e., substantially establishes error, for Government to make award it must virtually show that no error was made or that claim of error was not made in good faith. Therefore, upon ultimate determination that bona fide error was committed, withdrawal is permissible.

Contracts—Mistakes—Errors—Of Omission—Evidence To Support

In mistake in bid cases involving errors of omission, bidder's sworn affidavit outlining nature of error, its approximate magnitude and manner in which error occurred can constitute substantial evidence thereof. This fact does not, however, detract from agency's obligation to weigh all evidence so as to determine that bona fide mistake was committed.

Bids—Mistakes—Withdrawal—Materiality *v.* Honesty of Mistake

Cases discussing withdrawal of bid due to mistake do not speak to materiality of mistake made but rather to whether mistake was honest one. Thus, where magnitude of mistake is not *de minimis* (between 1.6 percent and 3.2 percent of $11.8 million bid), withdrawal may be permitted.

Contracts—Awards—Combination of Schedules—Lowest Cost to Government

Where award on combination of schedules is contemplated, award must result in lowest cost to Government. Accordingly, where bidder, whose bid when combined with protester's bid provided lowest cost to Government, withdraws bid, it is then incumbent on agency to make award based on combination of bidders whose bids were still available for acceptance which represented lowest cost.

Contracts—Protests—Timeliness—Contract Award Notice Effect

Protest filed after agency forwarded notice of award of construction contract to low bidder must be considered as being filed after award since telegraphic notice of award constituted official award of contract.

Contracts—Mistakes—Correction—Intended Bid Price—Uncertain

Where it would have been near impossibility to ascertain intended bid price of bidder alleging mistake, and while bidder would still have been low even adding entire amount of claimed mistake, still it would not have been possible to make award to bidder for sum certain which is required by regulations.

In the matter of the S. J. Groves & Sons Company, March 30, 1976:

Invitation for bids (IFB) serial No. DACW68-75-B-0055 was issued by the Corps of Engineers, Walla Walla District, on March 27, 1975. The IFB sought bids for the construction of powerhouse extensions at three dam sites in the State of Washington as follows: schedule "A"—Little Goose Lock and Dam; schedule "B"—Lower Granite Lock and Dam; schedule "C"—Lower Monumental Lock and Dam. The IFB permitted bidders to bid on individual schedules or any combination thereof. The pertinent portion of the IFB's award section indicated that:

* * * the work will be awarded to the lowest responsible and responsive bidder by Schedule or any combination of Schedules whichever is in the best interest of the Government.

Upon bid opening, May 29, 1975, the following three bids were received:

	Valley Inland Pacific Constructors, Inc.	Groves	Guy F. Atkinson Company
Schedule A	$11, 849, 090	$14, 261, 571	$14, 887, 440
Schedule B	12, 104, 006	14, 142, 713	14, 346, 825
Schedule C	13, 458, 281	14, 524, 291	15, 113, 012
Schedules A and B		28, 450, 556	28, 351, 350
Schedules A and C		28, 582, 339	28, 706, 920
Schedules B and C		28, 468, 277	28, 540, 547
Schedules A, B and C		42, 625, 005	42, 168, 036

Valley's bid was conditioned upon the award to it of only one of the three schedules.

As can be seen from an analysis of the abstract, the apparent low awardees would be Valley for schedule "A" and Groves for schedules "B" and "C," which would have resulted in a total price of $40,317,367.

However, on June 12, 1975, Valley telephoned the Corps to assert that there were mistakes in its bid. Subsequently, on June 13, representatives of Valley presented arguments and submitted documents

to the contracting officer and his staff and requested withdrawal of the bid. One of the documents submitted was a sworn affidavit from the president of Valley which outlined the basis for its request for withdrawal. The affidavit indicated that substantial inadvertent mistakes had been made in the following nine areas: (1) drayage—electrical items; (2) power for pumps for unwatering; (3) header for unwatering; (4) handling and setting up stoplogs; (5) powerhouse crane operator; (6) storage area grading, fencing and heating; (7) extension error of bid item 49; (8) transportation of Government-furnished equipment; (9) markup on above, including taxes, bond, etc. Valley indicated that the above-noted mistakes resulted in the submission of a bid on schedule "A" which was in excess of $580,000 below the bid actually intended. Similarly, it stated that the extent of the mistakes in schedules "B" and "C" was approximately the same as those in schedule "A." The basis stated for the mistakes was that they resulted from the rush of the estimating team to complete the estimate and to submit a timely bid. As noted above, these errors were discussed in a meeting with the contracting officer on June 13, 1975. During the course of that meeting, the Corps' estimator and the president of Valley reviewed in detail all of the claimed mistakes. After this detailed examination was concluded, the contracting officer in a sworn affidavit states:

> I was presented with the results and was then satisfied that there were several mistakes in the bid and that there was no way of determining the intended bid from the bid preparation documents. At that time, I felt that I had no choice under ASPR regulations [Armed Services Procurement Regulation] but to permit a withdrawal of the bid. I instructed Mr. Gall to routinely prepare Determinations and Findings [D&F] which are required to be made in such cases.

Paragraph "d" of the D&F dated June 17, 1975, states:

> Review of the work papers clearly indicates that a bona fide mistake was made. However, since no prices were developed during the estimating process for several cost items, the intended bid cannot be accurately determined. Estimated total of mistake is $580,000 for each schedule.

Paragraph 3 of the determinations section states that the bidder will be allowed to withdraw its bid as requested. Also, on June 17, 1975, the contracting officer sent Valley a letter indicating that "Your request to have your bid withdrawn on above-referenced invitation, due to an alleged mistake in bid, has been approved."

On June 17, 1975, a conversation took place among a vice president of Groves, counsel for Groves and an attorney for the Corps during which time Groves' vice president related that in prior conversations with the president of Valley, he had indicated that contrary to the assertions made in June 12 affidavit, Valley had in fact been unable to locate any mistake in its bid. Groves was requested to prepare an affidavit summarizing the conversation of June 6 and to submit it

to the Corps for its consideration. Some time later in the day on June 17, the above-noted D&F was prepared. The conversation referenced above between Groves and the Corps was mentioned as was the information which Groves related to the Corps at that time regarding its June 6 conversation with representatives of Valley. Paragraph 2 of the contracting officer's determination states that:

> In making this determination, I have given full and complete consideration to the conversations of 1975 June 06 between the bidder [Valley] and * * * [the above-referenced vice president of Groves]. Assuming for the purpose of this determination that the matters related by * * * [the Groves vice president] are entirely true and accurate, statements made by the bidder on 1975 June 06 are not inconsistent with the bona fide existence of a mistake or mistakes in the bid of Valley Inland Pacific Constructors, Inc., which were unknown to the bidder's representatives at that time, but which were discovered at some later time.

On June 18, 1975, Groves sent a telegram to the Corps which in pertinent part argued that irrespective of the mistake in bid claim asserted by Valley on schedule "A," Groves is entitled to award of schedules "B" and "C." Groves also requested reasonable advance notice of any award under the IFB.

On June 19, at 1 p.m., P.d.t., the Corps gave telegraphic notice of award of schedules "A," "B" and "C" to Atkinson since the Corps determined that Atkinson had offered the next lowest available combination for the award of schedules "A," "B" and "C." The agency report indicates that at 2 p.m., P.d.t., Groves' attorney was informed by telephone of this decision and action. At 3:26 p.m., P.d.t., the same information was dispatched to Groves' attorney by teletype. On June 20, 1975, Groves telexed its protest to our Office where it was received at 9:59 a.m. and logged in the Office of General Counsel. The basis of Groves' protest was (a) the failure to award the IFB to Groves on schedules "B" and "C"; and (b) the Corps' improper acceptance of Valley's claim of error in permitting withdrawal of its bid (1) without clear and convincing evidence of any material error in that bid, (2) without considering all available evidence relating to the claim of error, and (3) without finding or attempting to find the amount of the mistake.

On June 25, 1975, Groves filed civil action No. C75–451V, entitled *S. J. Groves & Sons Company* v. *United States and Walla Walla District Corps of Engineers*, in the United States District Court, Western District of Washington, seeking to have the court declare that Groves was the lowest responsive, responsible bidder on schedules "B" and "C" of the IFB and that the plaintiff is entitled to the award of the contract for said schedules; and that the Corps be enjoined from taking any action pursuant to or in furtherance of an award under the IFB. Groves also moved for a temporary restraining order and a preliminary injunction. On July 3, 1975, the plaintiff's motion for preliminary

injunction was denied. However, by order of July 16, 1975, denying the plaintiff's motion for reconsideration on the question of preliminary injunction, the District Court stated:

> Upon the authority of *Wheelabrator Corporation* v. *Chafee*, 455 F.2d 1306 (D.C. Cir. 1971), and pursuant to the request of both plaintiff and defendant, the Court requests that the General Accounting Office rule upon the issues raised by plaintiff in the protest filed by it with the General Accounting Office.

It is pursuant to that request that we are issuing our decision. See section 20.10 of our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975).

With regard to mistakes in bid alleged after bid opening but prior to award it has been held that where a bidder discovers that it has made a mistake in its bid and so advises the contracting officer, the bidder is not bound by its bid, *Ruggiero* v. *United States*, 420 F.2d 709, 190 Ct. Cl. 327 (1970), and cases cited therein and, therefore, acceptance of the bid does not create a binding contract. 49 Comp. Gen. 446 (1970); B-165127, October 3, 1968. *See also* 36 Comp. Gen. 441, 444 (1956). In *United States* v. *Lipman*, 122 F.Supp. 284, 287 (E.D. Pa. 1954), the court recognized that the so-called "firm-bid rule," designed to protect the integrity of the competitive bidding system, is inapplicable if the bidder "* * * can prove that the desire to withdraw is due solely to an honest mistake and that no fraud is involved." Where the bidder seeking withdrawal alleges such an error and furnishes evidence to make a *prima facie* case in support of the error, i.e., substantially establish the error, B-157348, August 4, 1965, we have stated that for the Government to make an award to that bidder the Government must virtually undertake the burden of showing that there was no error or that the bidder's claim of error was not made in good faith. B-160536, February 13, 1967; B-158730, May 4, 1966; 36 Comp. Gen., *supra*, 444. Therefore, upon the ultimate determination that a bona fide error was committed, withdrawal is permissible. B-157348, *supra*. *See also* 52 Comp. Gen. 258, 261 (1972). Conversely, where it can be concluded that no bona fide error has been committed, withdrawal is not allowable.

As noted above, Valley indicated that a number of mistakes were made. In reviewing these errors, they appear to fall into three separate classes or types of errors, i.e., extension errors, errors in failing to properly carry forward figures from initial bid sheets to estimate recap sheets, and errors of omission from the bid sheets. We will address each of these areas in turn.

I. Extension errors.

By sworn affidavit dated June 12, 1975, the chief estimator for Valley stated that "* * * the estimate detail sheet for bid item 49 [for handling and delivery of generator parts] contains an extension error of

$15,500.00. The per ton unit of cost was mistakenly applied to crew hours ('UH') instead of tons."

The equipment cost for handling the estimated 3,500 tons of material was computed in the Valley worksheets by multiplying the cost per ton ($5) by the number of hours that the 85-foot low boy unit was estimated to have operated (400); thus, total equipment cost is shown on the worksheets as $2,000. Clearly, in computing total equipment cost, multiplying cost per ton by the anticipated number of hours would not lead to the desired figure. Rather, either cost per ton must be multiplied by the estimated number of tons or cost per hour must be multiplied by the estimated number of hours. Thus, Valley's estimator indicates that the cost per ton ($5) should have been multiplied by the estimated number of tons (3,500) to derive a proper total equipment cost of $17,500 (which is $15,500 above the amount shown in Valley's worksheets). Although the Government's estimator, contrary to Groves' assertion, does not disagree with this method of computation, in his view total equipment cost could also be achieved by multiplying the estimated cost per *hour* of using the low boy ($30) by the estimated number of hours (400) for a total equipment cost of $12,000. Therefore, while the Government's estimator derives a different figure for equipment cost, it does seem quite clear that Valley did make an error in determining the costs upon which its bid was calculated in an amount ranging from $10,000 to $15,500 for item 49. However, since Valley's worksheets indicated a cost of $62,551, while its bid on item 49 was only $56,000, it is impossible to determine what effect this computational error would have had on Valley's bid if properly computed.

II. Errors resulting from the bidder's failure to carry forward figures to the estimate sheet.

(a) Labor for Powerhouse Crane Operator

This claim of mistake is based on Valley's allegation that it failed to carry forward $47,050 regarding labor for a powerhouse crane operator in bid item 47. In this regard, Valley's worksheet No. 47–7 shows the following:

Labor	– $381,832
Labor add.	– 221,399
Equipment	– 700
Supplies	– 7,000
Permanent material	– 1,500
Subcontract	68,050
	$680,481

However, Valley's spread sheet for the item indicates:

Labor	–	$633,393	($381,832+$221,399+5%)
Equipment	–	700	
Material	–	7,000	
Material permanent	–	1,500	
Subcontract	–	—	
Total direct	–	$642,593	

Valley bid $650,000 for this item.

The worksheets for item 47 indicate that the subcontractor costs were on subitems for—

(a) Hoist equipment prior to bridge crane over units for embedded parts—not needed if crane capacity available

Labor	Labor add.	Subtotal	Subcontract
$37,856	$17,846	$55,702	$10,000

(b) Operate bridge cranes for own use and also for generator manufacturer—includes intake and draft tube gantry cranes

		Labor	Labor add.	Subcontract
15 months 325 W.D. 3/4 OE	1950 man-hours—9.10	$17,745	$8,365	
15 months 325 W.D. 3/4 EL	1950 man-hours			$37,050
Turbine electrical				21,000

The agency supplemental report thus states that "[I]t is obvious from these sheets that the bidder did intend to include $68,050.00 but failed to do so," and that the $21,000 electrical subcontractor cost listed above, which both Valley and the Government had assumed to be included elsewhere in the Valley bid, after examination was found not in fact to be included. With regard to this latter point, the Government estimator's affidavit of June 25, 1975, stated:

* * * $21,000 of the $68,050 omitted was plugged into the Sh. 47-7 under the subcontractor column for Turbine Electrical. Burke's [the electrical subcontractor] electrical quote included $32,000 for electrical work on the turbine which replaced the $21,000. Therefore the total error was reduced by $21,000 for a net error of $47,050. * * *

The agency report now states that neither the $21,000 nor the $32,000 amount quoted by the electrical subcontractor was accounted for any place in the bid. Thus, while it appears that Valley only claimed a $47,050 error, the Corps is now of the belief not only that there was an error of omission but that error was more properly $79,050 (computed as follows: $68,050 (total subcontractor costs omitted) and

$32,000–$21,000 (difference between actual turbine electrical subcontractor cost and those indicated by Valley)).

Consequently, the Corps now feels that the entire electrical subcontractor quote of $32,000 for item 47 was not included in the bid. However, in reviewing the Burke electrical quote, we have also noted that the $8,000 quoted for electrical subcontractor in item 48, shown on the initial worksheet as a subcontract cost of $4,500, was not carried forward into the bid. It therefore appears that the total extension error made by Valley with respect to the Burke quote was $40,000.

It is interesting to note that regarding an alleged omission regarding drayage *infra*, Groves points to the fact that $40,000 above the subcontractor quote was included by Valley in bid item 96. While Groves argues that this $40,000 constitutes drayage costs, the Corps speculates that the $40,000 actually is Valley's markup on the total Burke quote of $913,113, although even the Corps recognizes that this only amounts to a 4.7-percent markup which is low for a contractor such as Valley. We agree that this rate of markup is low especially where the overall markup rate for the contract is 12 percent. We feel that the $40,000 included in bid item 96 might more reasonably be the electrical contractor costs for item 47 ($32,000) and item 48 ($8,000). Such a theory would explain (1) why Valley did not initially claim an omission of the entire amount of subcontractor cost (note it only claimed subcontractor costs *other* than electrical), and (2) why Valley never has claimed an omission in item 48 for subcontractor costs.

Thus it appears that the maximum omission possible for subcontractor costs in item 47 is in fact the $47,050 initially claimed by Valley.

With specific regard to that sum, Groves argues that the bridge crane operation figures from sheet 47–4, above, indicate total direct labor costs of $26,110 as direct labor expenses *plus* $37,050 for subcontract expenses. This $37,050, it argues, would therefore duplicate cost already provided for since only one crane operator, not two, is required for the job.

The agency responds by stating that Valley intended to use the bridge crane not only for its own use in installing nonembedded parts but also for the use of the generator installer and installation of the turbine governors. Moreover, the agency indicates that Valley's worksheets demonstrate that it intended to furnish the crane's operating engineer on its own payroll but that an electrician would be furnished by the electrical subcontractor. This decision to use two men in the crane is a matter of the bidder's judgment.

Groves also argues that the $55,702 set forth on page 47–1 of Valley's worksheet for direct labor costs, hoist equipment prior to bridge crane,

was very close to the amount bid by Groves for bridge crane operation and thus may very well have included the cost of a crane operation. We agree. Moreover, we feel that Valley's direct labor cost in this area included the cost of two operators since its notations indicate two OE (operating engineers) 260 W.D. (workdays) 4,160 MH (man-hours) at $9.10 per hour. Thus, 4,160 man-hours divided by 260 workdays equals 16 man-hours per workday or two crane operators. However, Groves seems to be implying that this cost factor would cover all crane operator costs.

In this regard, the agency's supplemental report gives the following explanation.

> (2) The principal crane for installing turbine and generator parts (and for later servicing and repairs) is a *bridge crane*. This type of crane spans the width of the powerhouse just under the roof, and moves on rails placed along the top of the powerhouse walls. During the early part of the contract, the powerhouse walls would be under construction; hence the bridge crane will not be available over the new units until the powerhouse is constructed and the crane rails are extended.
>
> Valley recognized these realities. On Sheet 47–1 it provided for 12 months of crane service *before* the bridge crane becomes available (i.e., "*prior to bridge crane*"), and during installation of "*embedded parts*." of this crane service, as shown on Sheet 47–1.
>
> * * * * * * *
>
> On Sheet 47–4 Valley provided for *bridge crane* service for 15 months, for installation of *nonembedded parts*. This would be an entirely different time frame from the crane charges shown above. Valley would also use the bridge crane for service to the generator installer and installation of the turbine governors. * * *

Therefore, while sheet 47–1 provides for crane operation as does sheet 47–4, we do not agree that this was a duplication.

Groves also references the fact that sheet 47–7 of Valley's workpapers indicates for the nonembedded parts a total of 10.175 man-hours of labor would be required for each ton while on another job only 6.87 man-hours per ton (including crane operation) were used to perform a similar task. On this basis Groves argues that the crane operation subcontracting, the costs of which were allegedly omitted from Valley's bid, could have been included in Valley's direct labor. However, Groves neglects the fact that on a third job 8.21 man-hours per ton excluding crane operation were necessary and that Valley's worksheet No. 47–4 indicates that only 0.5 man-hours per ton were necessary for crane operation on nonembedded parts (less than 5 percent of the total 10.175 man-hours per ton. We do not feel, therefore, that any conclusion as to the alleged inclusion of the proposed subcontract work into direct labor can be made.

Finally, Groves argues that Valley's claim of error in omitting subcontractor costs in item 47 is refuted by a conversation held on June 6,

1975, between a Groves' vice president and the president of Valley. The June 27 affidavit of the Groves' vice president states:

> * * * On June 6, 1975, * * * [the president of Valley] and I discussed in detail the use of an overhead crane at the job site. At no time during this discussion did * * * [he] suggest that Valley may have omitted the cost of operating said crane.

The contrary affidavit of Valley's president, however, states:

> At the time of the meeting, we had not fully completed our review. Neither at the conclusion of the meeting nor at any other time during the meeting did I advise * * * [Groves' vice president] that we had not made any error or that we were satisfied with the direct costs and general expenses.

In view of these statements we can understand that Valley may not have been aware, as of June 6, of this specific mistake but this does not say that such a mistake was not made.

In sum, we believe that the Corps did have a reasonable basis upon which to conclude that Valley had made a bona fide mistake on item 47 in the amount of $47,050.

(b) Costs of Storage Area Grading, Fencing and Heating

The affidavit of Valley's chief estimator states for item 45 that "In taking these figures from the detail sheets and transposing them to the estimate recap sheet, I inadvertently did not include the general expense items of * * * storage area facilities. The estimated amount on * * * the storage area was $12,400."

As explained by the Government's estimator on sheet 45–1 of its workpapers, Valley listed $8,400 for grading and fencing for the storage facility and $4,000 for heating. The workpaper also originally indicated that the subtotal of labor, labor add., equipment and supplies equaled $98,113 and when the $12,400 in subcontract cost was added a sum total of $110,513 was obtained. However, the sheet indicates that labor cost was increased by 5 percent, bringing the new subtotal to $101,177. For some reason the $12,400 subcontractor was not, however, added to this figure and it was the figure of $101,177 that was carried forward as the total direct cost on the spread sheet. We note the spread sheet showed no entry for subcontractor costs in item 45. Valley's bid for this item was $108,000 with a unit price of $15 per ton month.

Groves argues that the most sheet 45–1 does is to establish that $12,400 in cost was not initially carried to the spread sheet. However, it first contends that this omission may have been intended and the $12,400 may have been included elsewhere in Valley's bid—such as costs for General Conditions and Yard. Secondly, it states that the Corps completely ignores the fact that while Valley's stated direct cost for item 45 was $101,177, its bid amounted to $108,000 (an increase of $6,823).

As to this last point, the Corps notes that the IFB indicates a quantity of 7,200 ton months of storage for item 45. Thus, Valley's estimated total cost for storage per unit (ton month) equaled $101,177 divided by 7,200, or $14.05/ton month. The Corps feels that as can be seen on sheet 45–1 from the unit price figure of "15" beside the bid price of $108,000, Valley merely rounded the $14.05 figure up to the next whole dollar and multiplied that by the 7,200-ton-month estimate to arrive at the price of $108,000. The Corps states "Thus it is obvious that this adjustment in the amount of $6,823.00 was not intended to cover the omitted costs of $12,400.00."

As to Groves' contention that the omission of the subcontractor costs was deliberate and the $12,400 included elsewhere in Valley's bid, presumably in the direct cost figures of General Conditions and Yard, first, the sworn affidavit of Valley's president states that the claimed errors were unintentional and, secondly, we have examined all Valley's direct labor costs in the area of General Conditions and perceive of no basis upon which to sustain Groves' allegation. Accordingly, we believe that there is a reasonable basis upon which to conclude that Valley's mistake in this area was bona fide.

III. The omission errors.
(a) Unwatering (item 114)
(1) header for unwatering

The affidavit of Valley's estimator states:

> * * * existing water relief pipes require the contractor to protect his work area from relief water discharged into the lower reaches of the draft tube. We anticipated installation of a collection header for this purpose. My review of the estimating sheets indicates that no provision is made in the bid for this header. A reasonable estimate of the cost of the header is approximately $115,000.

Groves asserts that this alleged error is based upon an omission, that is, nothing in the worksheets which would support Valley's claim, and the claim is directly refuted by the statements made to Groves by Valley on June 6, 1975, which "* * * clearly and unequivocally stated that Valley's bid included a false decking to avoid the draining water, and it did not contemplate the use of a header collection system." However, by sworn affidavit the president of Valley specifically states that during the June 6 meeting between himself and Groves' vice president:

> I told him that we had neglected to include in our bid either a header system or a false deck as a portion of the dewatering item. I further told him that after the bid we discovered this, and I was then of the opinion that a false deck approach might be cheaper, if it would work and we were required to accept the award. * * *

In view of the above, we can draw no conclusions from the June 6 conversation.

We feel that in cases involving errors of omission, typified by those here presented, a sworn affidavit outlining the nature of the error, its approximate magnitude and the manner in which the error occurred

can constitute substantial evidence thereof. *See* 52 Comp. Gen. 258, *supra*. This fact does not, however, detract from the agency's obligation to weigh all of the evidence so as to determine that a bona fide error was in fact committed.

Here we have been presented with no evidence upon which to conclude that the Valley error was not bona fide although Groves questions the magnitude of the error by stating that it had included such a header in its bid at a total of $20,000. Moreover, it argues that the Corps accepted the amount of Valley's error ($115,000) without even comparing that figure to the agency's own estimates. The record as it relates to the magnitude of the error is somewhat sketchy; needless to say, the amount of the error was probably somewhere within the range of $20,000–$115,000 although we do not feel that Groves' costs are necsesarily determinative of Valley's costs or that the precise amount can be quantified.

(2) power for pump (unwatering)

Again Valley asserts an error of omission by sworn affidavit. Moreover, we have been presented with conflicting sworn affidavits concerning alleged statements made by Valley in a June 6 conversation with Groves and again cannot therefore draw any conclusions therefrom.

Thus, the only relevant information is, first, the allegation made by Groves that the alleged omission could have been included in the bid in a variety of ways, but, of more significance, the allegation that Valley had failed to consider the salvage value of the pumps themselves in calculating its bid. In this regard, Groves states that Valley's estimate summary for unwatering, which shows three 7,500-gallon pumps at a total estimated material cost of $89,280 and six 2,500-gallon pumps at a total estimated material cost of $90,192, effectively charged off the entire cost of the pump to this job while the pumps have considerable salvage value. As Groves points out, as can be seen elsewhere in the Valley worksheets (see exhibit 5 of Government estimator's affidavit), Valley usually figured the cost of buying large items less the selling price in computing the total charge to the contract. Groves states that "[a] not unreasonable salvage figure of 50% could have produced a savings of nearly $90,000, and nearly covered the alleged cost of this entire claim of error."

The Corps states as to Groves' contention regarding the omission of salvage that "[t]his would not be a provision for the cost of electricity; merely an *offsetting error*. Assuming such error, the $90,000 salvage value offset against $110,000.00 [omission] for electricity costs would still leave an error of $20,000 — still a substantial sum."

Groves also alleges that the $110,000 error for pump power was included in the General Condition section of Valley's estimate under *Electrical*, Maintenance & Distribution, Labor, for which it believes

Valley's figure of $175,000 is "grossly excessive." The poriton of Valley's worksheets in question indicates:

Description of Work	Total Estimated Quantity	Unit Price	Total Estimated Material Cost
Electrical			
* * *			
Usage:	35 mo.	$ 500	$ 17,500
Maintenance & Distribution Labor	50 mo.	3,500	175,000
Supplies	30 mo.	200	9,000

The Corps argues that since the $175,000 figure is labeled "Labor," there is no reason to assume that it includes material such as power for the pumps. However, the Corps points out that the unit price of $3,500 per month closely approximates the labor costs for two electricians working 5 days per week (2 men×8 hours×$9.81 (minimum wage cost per contract)=$156.96, and $156.96×22 workdays per month=$3,453.12, which was rounded to $3,500/month and when multiplied by the required 50-month period equals $175,000. Thus the Corps did have a reasonable basis upon which to conclude that the $175,000 figure did not include the $110,000 omission for pump power.

Moreover, we perceive of no basis upon which to conclude that the agency's determination that Valley's $110,000 claim of error was not bona fide. However, the evidence presented would seem to indicate that an additional partially, offsetting mistake may have been made in an amount of approximately $90,000.

(3) handling and setting up stoplogs

In support of its conclusion that Valley's bid omitted $40,000 in cost for handling the stoplogs, the Corps cited (1) a memorandum dated May 24, 1975, from Mr. Lane, one of Valley's estimators, which in pertinent part states that "* * * I Presume that the hauling of the 3,540 tons of stoplogs will be included with Bid Item 114a 'Initial Unwatering,'" and (2) the fact that Valley's detail sheet No. 114 which involves bid items 114a and 114b and is headed Unwatering Facilities Furnish, Install, Operate, Maintain & Remove includes an entry for an item "Haul Gov't Conc Stoplogs" but no dollar figure is entered aside it. The Corps states that these two facts indicate that Valley intended to provide for this work in the bid and to do so in item 114a.

Groves argues that the stoplog costs could have been included in item 6 for concrete work. However, the Corps states that since the function of stoplogs is to hold water out of the area to be dewatered, stoplog cost would logically be part of unwatering (item 114). Moreover, its careful examination of bid item 6 did not indicate any bidder stoplog cost. In this regard, we have examined Valley's figures for

item 6 and do not find any indication that stoplog costs were included in that item.

Groves also asserts that since there is no worksheet to indicate the component of Valley's estimated cost there is no evidence to show that stoplog costs were omitted from item 114. We agree that in the absence of information concerning the components of the Valley bid 114, it is difficult to determine which constituent elements were considered and which were not. However, in reaching a conclusion that stoplog costs were omitted, the Corps did have before it (1) Valley's allegation of omission, (2) the memorandum and unfigured worksheets mentioned above, and significantly (3) the Valley bid itself.

In this regard, the following analysis of Valley's bid for item 114 is pertinent.

The sum of the above-noted three omissions in the area of unwatering (item 114) total $265,000. Groves argues that while Valley's bid for item 114a and b was $180,266 and the Corps' estimate was $319,000, closer analysis belies the fact that Valley's bid was low. As can be seen in Valley's adjustment worksheets, the following occurred with regard to item 114a and b:

	Initial Figures	Adjustment	New Amount	Bid Column	Adjustment	Actual Bid
114a	$ 75,000 [1]	+$36,000 [2]	$111,000 [3]	$135,269 [4]	$15,000 [4]	$150,269 [4]
114b	50,000 [1]	+59,000 [2]	109,000 [3]	30,000 [4]	0 [4]	30,000
	$125,000		$220,000			$180,269

[1] adjustment sheet and spread sheet,

[2] adjustment sheet—figures part of total $235,000 in adjustment,

[3] adjustment sheet—only,

[4] spread sheet—only,

Groves states that item 114 was not adjusted to the full amount of $220,081 which appears in the estimate summary for unwatering. If, as Groves would have us do, the entire amount of the adjustment were reflected in item 114, then Valley's bid would, we feel, have been the $220,081 shown in its worksheets. Thus, when the $265,000 in omission errors is added Valley's bid is $485,081 or $166,081 *more* than the Corps' estimate. However, if Groves is correct in its assertions noted above that Valley (1) did not include the salvage value of the unwatering pumps, thus unduly inflating its costs by $90,000, and (2) overestimated the cost of the omission of a collection header by an additional $90,000 the Valley more accurate bid should have been $305,081, or $14,000 less than the Corps' estimate.

Groves argues that the adjustment sheet shows an adjustment of $36,000 for item 114a and $59,000 for item 114b for a total adjustment of $95,000 yet only $15,000 appears in the adjustment column of the spread sheet.

Groves calculates that if the entire adjustment had been recognized then Valley's bid (without profit) would have been $262,266 (we calculate $260,269). Thus, when the $265,000 in alleged omissions is added, Valley's bid (without profit) would have been $527,266 (we calculate $525,269) as compared with the Corps' estimate. However, as noted above, if Groves is correct regarding the salvage value of the unwatering pump and overestimated cost of a collection header then by Groves' own figures Valley's bid (without profit) should have been $527,266 minus $180,000 or $347,266 (or only $28,266 above the Government estimate).

Since, by our calculation, Valley's reconstructed bid price is less than the Corps' estimate and by Groves' calculations exceeds the Corps' estimate by only $28,266, we see no basis to question the validity of the omission errors, for we note that Groves' own bid for item 114 totaled $1,280,000 or $961,000 *more* than the Corps' estimate while Atkinson bid $780,000—(*$461,000* more than the estimate).

When viewed against this background we cannot say that any of the Corps' determinations as to the bona fide nature of the three mistakes of omission Valley alleged with regard to item 114 were without a reasonable basis.

(b) Drayage

As to the omission the chief estimator for Valley states that:

> First, the estimate as bid failed to include drayage related to installation of electrical items. The contract documents provide that the Government will furnish a substantial amount of electrical materials and equipment, and require the contractor to haul, handle and warehouse these materials and equipment. The quotation from the electrical subcontractor used in our bid excluded hauling and storage of his Government furnished equipment. However, in recording this quotation, this exclusion was not noted. As a result, the quotation was carried forward into the bid without addition of the costs of drayage. We presently estimate that the costs so omitted would total approximately $45,000.

Groves refutes Valley's contention concerning drayage by stating that:

> Both Valley and Groves were using Burke Electric as a subcontractor on the electrical aspect of the work. A comparison of the bids of Valley and Groves on bid items 51 through 96 demonstrates that they are indentical, with the exception of bid items 95 and 96. Moreover the amounts bid by Valley and Groves on bid items 51 through 96, are identical to the Burke quote, except for items 95 and 96. Groves, which faced precisely the same drayage expense as Valley, added $50,000 to the quote on bid item 95. Valley added $40,000 to the Burke quote on bid item 96. *Valley's $40,000 addition of the quote on bid item 96 is totally unexplained and, we submit, was obviously made to cover the drayage expense.*
>
> Any slight degree of care in evaluating Valley's claim of error would have clearly revealed this discrepancy, and conclusively demonstrated that no mistake was made. [Italic supplied.]

However, in view of our feeling, stated above, that the $40,000 included in item 96 most probably was electrical subcontractor costs omitted from items 47 and 48 of Valley's bid, there would seem to be no basis to conclude that the $40,000 covered drayage. Moreover, we

note again the Corps' belief that the $40,000 covered contractor markup of the subcontractor's quote. While we do not agree with the Corps, the fact remains that since the $40,000 does not relate to drayage, Groves has presented and we perceive of no plausible basis to counter the assertion that a $45,000 omission for drayage was made and thus conclude that the mistake was bona fide.

(c) Transport of Government-furnished Equipment

The affidavit of Valley's chief estimator states:

> * * * the detail estimate for bid items 47, 48 and 49 assumed that the drayage equipment (truck and trailer) was included in the general equipment requirements list for the project. The general equipment lists assumed that the drayage equipment was included in the detail estimate for these bid items. As a result, the cost of the drayage equipment, approximately $125,000.00, is not included in the bid at all.

As pointed out by the Corps, Valley's worksheet 47–1 initially indicated $15,000 for equipment and $12,750 for supplies but both figures were struck out and not carried to the spread sheet. The Corps' estimator states that Valley's estimator thought these costs would be picked up in the General Conditions—Equipment Schedule, but in fact they were not.

Groves alleges that since the Corps does not agree with Valley as to the $125,000 amount allegedly omitted it "* * * develop[ed] a new error theory not even asserted by Valley in its claim."

We do not agree. It appears to us that the Corps in looking at the assertion of a $125,000 omission made a *sub silentio* determination that a bona fide $125,000 mistake had not been made but that a bona fide mistake of $27,750 ($15,000+$12,750) had in fact been made. This role of the agency is quite proper and consistent with the view expressed earlier in this decision.

Groves also argues that since Valley struck the relevant figures from its worksheets, the clear inference is that their omission was intentional. We do not disagree that a conclusion that the figures were omitted would be reasonable. However, in the usual case it would appear equally as reasonable to conclude, as did the Corps, that the costs should have been listed in the equipment schedule. This is not the usual case, for Valley's assertion of error was based on $125,000 and not on the $27,750 found by the Corps. If Valley had asserted a claim for the lower figure, since it would be just as likely that an unintentional omission in that amount was made as that the omission was intentional, we would have to conclude that a reasonable basis existed that the mistake was bona fide.

However, since Valley chose not to base its claim on the omission from sheet 47–1 but instead and, without more, alleged a mistake nearly five times greater than the 47–1 omission, we do not feel there remains equal likelihood that the mistake was unintentional as intentional. We

therefore do not believe that a reasonable basis existed to find this error to be bona fide.

In sum we have concluded that a number of bona fide errors occurred as follows:

	Amount		
Extension errors	$ 10,000–	$ 17,500	
Cost for power crane operation	47,050–	47,050	
Cost of Storage area grading, fencing and heating	12,400–	12,400	
Header for unwatering	20,000–	115,000	
Power for unwatering pumps	110,000–	110,000	
Handling and setting up stoplogs	40,000–	40,000	
Drayage	45,000–	45,000	
	$284,405	$386,950	
Salvage value of pumps	−90,450	--------	
	(1.6%) $194,450	$386,950	(3.2%)

Thus we preceive of errors in Valley's $11,849,090 bid in an amount between 1.6 and 3.2 percent of the bid price.

Groves argues that to allow withdrawal of a bid, the amount of the error should constitute a material mistake view against the bid price. It states that:

> A requirement of materiality is essential to preserve the integrity of the competitive bid system. It is apparent that in every large construction project, involving a multitude of bid items, a likelihood of mistake exists. The bidders know that, and know that favorable and unfavorable mistakes are made in making up a bid, but they nevertheless do bid, and expect to be awarded contracts in the amounts stated in the bid. If insubstantial mistakes were a basis for withdrawal of a bid, the firm bid rule (19 Comp. Gen. 761 (1940)) and the competitive bid system would be seriously undermined.

It is true that on large projects there is a possibility that some error exists in almost every proposal and that if these errors could provide a basis for withdrawal the firm-bid rule could in practice be substantially weakened. However, as stated in *Rhode Island Tool Company* v. *United States*, 128 F.Supp. 417, 418 (130 Ct. Cl. 698) (1955):

> A rather well-established rule of law seems to be that after bids have been opened the bidder cannot withdraw his bid unless he can prove that the desire to withdraw is due solely to an honest mistake and that no fraud is involved. * * * Cases cited. Accord. *Ruggerio* v. *United States, supra.*

In this context the cases discussing withdrawal do not speak to the materiality of the mistake made but rather to whether the mistake was an honest one. We do not discount the possibility of applying a *de minimis* rule; however, in view of the magnitude of the mistake involved, we do not think the *de minimis* issue arises. Therefore, withdrawal may be permitted.

Groves further contends that the Corps acted improperly in making an award to Atkinson for schedules "A," "B" and "C" without concluding that there was a mistake made by Valley on schedules "B" and "C" of its bid as well as schedule "A." Note—Valley was permitted to withdraw on all schedules, and absent the withdrawal the following bid combinations would have been lowest:

1. Valley schedule A Groves schedules B and C	$40,317,367
2. Valley schedule B Groves schedules A and C	40,686,345
3. Valley schedule C Atkinson schedules A and B	40,809,631
4. Atkinson schedules A, B and C	42,168,036

Groves argues that since the findings and conclusions of the Corps relating to Valley's claim give no reference as to what disposition was made of Valley's claim on schedules "B" and "C," the Corps did not follow its regulations in allowing Valley to withdraw on all three schedules.

In this regard, the June 12 affidavit of Valley's president indicates that "The extent of the mistakes in Schedules B and C is approximately the same [as that in Schedule A]." Moreover, we note that certain of Valley's relevant worksheets indicate that although the computation was done for the Little Goose project (schedule "A"), the costs for schedules "B" and "C" were identical, e.g., sheet 47–1 (noted above) and sheet 48. Accordingly, we see no reason upon which to conclude that no reasonable basis existed for the Corps' *sub silentio* determination that the mistakes in schedules "B" and "C" were bona fide thus allowing for withdrawal.

Groves argues that irrespective of the Valley withdrawal it is entitled to award on schedules "B" and "C." In this regard Groves cites *D & L Construction Co. & Associates* v. *United States*, 378 F.2d 680, 685 (180 Ct. Cl. 436) (1967), which holds that the relative order of bids is to be determined at the time of bid opening. As a general rule, we agree with this pronouncement and believe that, as Groves has pointed out, this is what the Corps did, i.e., a Valley-Groves' combination resulted in the lowest cost as well as the second lowest cost while other combinations were set out in order of their low cost.

However, as we have stated in the past, where awards on a combination of schedules is contemplated the award made must result in the lowest cost to the Government to carry out the mandate of 10 U.S. Code § 2305(c) (1970) which requires that award be made to the responsible bidder(s) whose bids will be most advantageous to the Government, price and other factors considered.

Accordingly, upon Valley's withdrawal, it was incumbent upon the Corps to make an award to the responsive, responsible bidder or com-

bination of bidders whose bids were still available which represented the lowest cost. In making award to Atkinson the Corps did so.

Groves lastly questions the procedural aspects of the award, the Corps' alleged failure to consider relevant evidence in making the decision on Valley's withdrawal and the Corps' failure to determine Valley's intended bid.

Groves argues that the protest was filed before award and that the Corps did not make the necessary findings in accordance with Armed Services Procurement Regulation (ASPR) § 2–407.8(b)(3) (1974 ed.) to make an award. However, as indicated above, the Corps furnished telegraphic notice of award to Atkinson on June 19, 1975, at 1 p.m. In accordance with ASPR § 2–407.1 (1974 ed.), this telegraphic notice of award constituted an official award of the contract. *See* B–176941, November 28, 1972. The cited ASPR section states in pertinent part that:

> * * * Awards shall be made by mailing or otherwise furnishing to the bidder a properly executed award document * * * or *notice* of award * * * [Italic supplied.]

Therefore, since Groves' protest was filed after the Corps forwarded notice of award to Atkinson the protest must be considered as being filed after award.

With regard to the allegation that the Corps failed to consider relevant evidence, relating to the June 6 conversation between Valley and Groves we note that the Corps' D&F specifically indicates that Groves' statements regarding the content of those conversations were considered. Moreover, both Groves' affidavit and that of Valley's on the content of the June 6 discussions were reviewed by this Office and were, to the extent possible in view of many direct conflicts, taken into consideration in reaching our conclusion on the issues raised.

Lastly, Groves notes ASPR § 2–406.3(a) (1974 ed.) which states:

> * * * if the evidence is clear and convincing both as to existence of the mistake and as to the bid actually intended, and if the bid, both as uncorrected and as corrected, is the lowest received, a determination may be made to correct the bid and not permit its withdrawal.

However, as can be seen from the lengthy analysis above, it would have been a near impossibility to ascertain the intended bid price with the degree of accuracy required by the regulation. And while it may be that Valley would have been low in any event (note even adding its claimed mistake in excess of $580,000 Valley's bid would have been low), still it would not have been possible to make award to Valley for a sum certain, which is what we believe is required by the regulations. That is, both the specific items intended to be bid and the specific prices intended to be bid must be apparent to permit a valid award to be made. *Cf.* 16 Comp. Gen. 272, 274 (1936). See, generally, *Leonard Joseph Company*, B–182303, April 18, 1975, 75–1 CPD 235.

For the reasons set forth above, Groves' protest is accordingly denied.

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Recommendation is made that options in questioned negotiated janitorial services contract, and similar outstanding janitorial services contracts, not be exercised and that GSA immediately commence study of appropriate methods and clauses for improving formal advertising procurement method for future needs of janitorial services ..... Page 693

ADVERTISING

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None of the exceptions to formal advertising (as set forth in 41 U.S.C. 252(c)(1)-(15)) expressly authorizes use of negotiations only to secure desired level of quality of janitorial services or to obtain incentive-type contract. Moreover, analysis of legislative history of Federal Property and Administrative Services Act (40 U.S.C. 471), under which questioned negotiated award of services was made, shows that Congress specifically rejected proposal to permit negotiation to secure desired level of quality of supplies or services 693

Since negotiating rationale employed by GSA is same as was cited in *Nationwide Building Maintenance, Inc.*, 55 Comp. Gen. 693, where it was found that GSA had no legal basis to negotiate janitorial services procurements, and since award has been made, option should not be exercised and any future requirement for services should be formally advertised 864

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Examination costs
Accredited rural appraisers

Exams not integral part of course of instruction are not within definition of "training" in 5 U.S.C. 4101(4). Therefore, Govt. reimbursement of costs of exam leading to certification of Govt. employee as accredited rural appraiser is not permitted by terms of Govt. Employees' Training Act, 5 U.S.C. 4101–4118..... 759

APPROPRIATIONS—Continued
Availability—Continued
Expenses incident to specific purpose
Necessary expenses Page

Where handicapped employee selected to be honored under Govt. Employees Incentive Awards Program is unable to travel unattended because of his particular handicap and would otherwise be unable to attend award ceremony, travel expenses for attendant to accompany him in traveling to and from award ceremony may be paid by employing agency as "necessary expense" for honorary recognition of that particular employee under 5 U.S.C. 4503. 54 Comp. Gen. 1054, distinguished..... 800

Appropriation of INS may be used to repair International Boundary fences on private property if expenditures and improvements are necessary for effective accomplishment of purposes of Service's appropriation, are in reasonable amounts, are made for principal benefit of U.S. and interests of Govt. are fully protected..... 872

Furnishings for personal use
Military members. (*See* **APPROPRIATIONS, Availability, Personal furnishings for military members**)
Items necessary in enforcement of immigration laws

INS's "necessary expenses" appropriation is available to repair boundary fences under jurisdiction of other Federal agencies provided INS determines expenditure is necessary to enforcement of immigration laws and other agencies do not intend to make repairs as promptly as necessary to deter unlawful immigration. Rule that where appropriation is made for particular object, it confers authority to incur expenses which are necessary, proper, or incident thereto, unless there is another appropriation that makes more specific provision therefor, is inapplicable since there is no specific appropriation for repair of boundary fences... 872

Necessary expenses. (*See* **APPROPRIATIONS, Availability, Expenses incident to specific purposes, Necessary expenses**)
Parking space

Where GSA pursuant to 40 U.S.C. 490(j) charges VA for parking space for use of employees, and related services, VA appropriations are available to pay such charges subject to 90 percent limitation contained in VA annual appropriations..... 897

Personal furnishings for military members
Rugs, curtains, drapes, etc.

Military members required to relocate their households incident to base closings in Japan without permanent changes of station may not be reimbursed personal expenses incurred for purchase of rugs, drapes, curtains, and service charges for items of personal convenience not essential to the occupation of quarters. Also, reimbursement for telephone installation charges is specifically prohibited by 31 U.S.C. 679... 932

Refund of fines paid to IRS
Violation of wagering tax

Refund by IRS of fine paid pursuant to conviction for violation of wagering tax statutes, which refund was ordered in connection with subsequent vacation of judgment, should be charged against account 20X0903 (Refunding Internal Revenue Collections) rather than account 20X1807 (Refund of Moneys Erroneously Received and Covered), since initial receipt of fine by IRS was apparently treated as internal revenue collection, and account 20X1807 is available only when refund is not properly chargeable to any other appropriation..... 625

APPROPRIATIONS—Continued
Availability—Continued
Travel and transportation expenses of State officials
Environmental Protection Agency Page
Decision B–166506, July 15, 1975, holding payment by EPA of transportation and lodging expenses of State officials attending National Solid Waste Management Association Convention is prohibited by 31 U.S.C. 551, unless otherwise authorized by statute, is affirmed. Provision of Administrative Expenses Act (5 U.S.C. 5703(c)), permitting payment of such expenses for persons serving Govt. without compensation does not provide necessary exception to 31 U.S.C. 551 since attendees at conference are not providing direct service to Govt. and are therefore not covered by 5 U.S.C. 5703(c) ---- 750
Defense Department
Contracts
Absence of statutory restrictions
Allocation of Navy appropriation for DLGN nuclear powered guided missile frigate program between DLGN 41 and DLGN 42, which was based on Navy's budget request and contained in committee reports to 1975 Defense Dept. Appropriation Act, is not legally binding on Navy since it was not specified in Appropriation Act itself ---- 812
Deficiencies
Antideficiency Act
Contract options
Where exercise of contract option required Navy to furnish various items of Govt. furnished property (GFP), but contract clause authorized Navy to unilaterally delete items of GFP and make necessary equitable adjustment, full value of unobligated and undelivered GFP should not be considered "obligation" as of time of option exercise for purposes of assessing violation of 31 U.S.C. 665 or 41 U.S.C. 11. Exercise of DLGN 41 contract option did not violate these statutes since recorded obligations and other binding commitment did not exceed available appropriations ---- 812
Full funding *v.* requirements of Antideficiency Act
"Full funding" of military procurement programs is not statutory requirement, and deviation from full funding does not necessarily or automatically indicate violation of 31 U.S.C. 665 or 41 U.S.C. 11 ---- 812
Violations
Contracts
Modification
Army proposal to modify contracts executed in violation of Antideficiency Act, to make Govt.'s obligation to pay subject to future availability of funds, but under which Govt. would continue to accept benefits, is of dubious validity as means of mitigating effects of Antideficiency Act violation, since contractors might recover under contracts or on *quantum meruit* theory even if appropriation was not subsequently made available by Congress. Moreover, proposal may prejudice congressional options by requiring Congress to fully appropriate for continued performance or allow Army to receive benefits at expense of contractors ---- 768

APPROPRIATIONS—Continued
Deficiencies—Continued
To liquidate obligations incurred Page
Army proposal to enter into contract modification providing for no cost stop work order, for partially performed contracts executed in violation of Antideficiency Act, would freeze Government liability at amount already due, unless supplemental appropriation is enacted. We perceive no legal objection to proposal since it would maintain status quo and reserve to Congress maximum flexibility in deciding whether to make deficiency appropriation in amount necessary to liquidate actual obligations already incurred or to permit Army to realize full contract benefits by making appropriation greater than actual existing deficiency 768
Fiscal year
Prior year contracts charged to current appropriations. (*See* **APPROPRIATIONS, Obligations, Contracts, Prior year**)
Limitations
National Sea Grant College and Program Act
Sec. 204(d)(2) of National Sea Grant College and Program Act of 1966, which prohibits Federal funding for purchase or rental of land, or purchase, rental, construction, preservation or repair of building, dock or vessel applies only to Federal grant payments for direct costs for listed categories. This section does not prohibit payments computed by using standard indirect overhead cost rates, even though such rates may include factors technically attributable to prohibited categories 652
Obligation
Contracts
Prior year
Charged to current appropriations
Army proposal to complete prior year contracts executed in violation of Antideficiency Act by applying current year funds is improper in light of longstanding rule that, except as otherwise provided by law, expenditures attributable to contracts made under particular appropriations remain chargeable to those appropriations 768
Prohibitions. (*See* **APPROPRIATIONS, Restrictions**)
Restrictions
"Follow ship"
Proviso in Appropriation Act requires DLGN 41 to be "follow ship" of DLGN 38 class. Proviso is not violated since DLGN 41 has same basic characteristics as prior ships of that class, notwithstanding nonincorporation of series of modifications and absent showing that unincorporated modifications would significantly alter those characteristics 812
Veterans Administration
Parking facilities
Where GSA pursuant to 40 U.S.C. 490(j) charges VA for parking space for use of employees, and related services, VA appropriations are available to pay such charges subject to 90 percent limitation contained in VA annual appropriations 897

ARBITRATION
Award
Overtime and time not worked
Implementation by agency
Back Pay Act Page

Federal Labor Relations Council requests decision on legality of arbitration award of backpay to 54 shipyard employees for overtime and time not worked. The arbitrator found that Shipyard changed basic workweek of employees without complying with consultation requirements of negotiated agreement. However, because arbitrator did not find that but for failure of Shipyard to consult with union, change in basic workweek would not have occurred, award does not satisfy criteria of Back Pay Act, 5 U.S.C. 5596 and, therefore, it may not be implemented ---- 629

ASSIGNMENT OF CLAIMS (*See* **CLAIMS, Assignments**)

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

AWARDS
Honor
Travel expenses to attend award ceremonies
Attendants for handicapped award recipients

Where handicapped employee selected to be honored under Govt. Employees Incentive Awards Program is unable to travel unattended because of his particular handicap and would otherwise be unable to attend award ceremony, travel expenses for attendant to accompany him in traveling to and from award ceremony may be paid by employing agency as "necessary expense" for honorary recognition of that particular employee under 5 U.S.C. 4503. 54 Comp. Gen. 1054, distinguished ---- 800

BIDDERS
Inquiries
Duty to inquire
Existence of patent discrepancy in invitation

Late bidder acted unreasonably in assuming that bid opening under IFB, which designated bid opening time as either ".30 PM" or "30 PM," would occur at 3 p.m. (actual bid opening was at 1:30 p.m.), and had duty to inquire of agency regarding patent discrepancy, even though agency improperly failed to notify bidder of bid opening time discrepancy when agency was made aware of it. Rule under which IFB's terms would be interpreted against Govt. as IFB drafter has no application where such a patent discrepancy exists ---- 735

BIDS
Ambiguous
Two possible interpretations
Both reasonable

Bid which omitted pages of IFB is nonresponsive, notwithstanding it contained every page which required an entry, but which did not serve to incorporate by reference other material pages, and was accompanied by cover letter stating that "applicable documents" are being submitted, which was ambiguous as to whether it referred to documents of IFB as issued or to documents returned with bid, because bidder's intention to be bound by all material provisions of solicitation is unclear ---- 894

BIDS—Continued

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

Competitive system

"Buy American Act" Page

Proposed award of school design contract to Indian school board under title I, Public Law 93-638—"Indian Self-Determination Act"—is not objectionable, provided requirements of act and its regulations are satisfied. Act provides contracting authority covering broad range of Indian programs and independent of contracting laws and regulations ordinarily applicable to Interior Department, including Brooks Bill architect-engineer selection procedure (40 U.S.C. 541, *et seq.*, and FPR subpart 1-4.10). Therefore, protest by architectural firm competing in Brooks Bill procurement initiated prior to school board's application for contract under P.L. 93-638 is denied..... 765

Preservation of system's integrity

Bidder, who submitted bid 30 minutes after 1:30 p.m. bid opening because it unreasonably interpreted IFB bid opening time designation of either ".30 PM" or "30 PM" as 3 p.m., and did not inquire as to correct bid opening time, may not have its late bid considered, despite substantial contribution to bid lateness of defective IFB and Government's improper failure to notify bidders of correct bid opening time, because bidder caused own lateness and integrity of competitive bid system may be jeopardized if late bid is considered since other bids had been publicly opened..... 735

Small business awards

Any situation which could reasonably be construed as being one in which procuring agency advocates use of size standard differing from that then applicable under SBA regulation would amount to encroachment whether intentional or unintentional on SBA's exclusive jurisdiction. Thus, where, as here, applicable SBA regulations were changed 7 days prior to bid opening and IFB can reasonably be construed as setting forth size standard differing from SBA's, encroachment has occurred and impact of encroachment on competition must be analyzed..... 617

Superior advantage of some bidders

"Win" program

Protests against award of contracts because possible competitive advantages may accrue to competitors availing themselves of "WIN" program (providing for limited wage rate reimbursement and tax benefits for hiring and training of welfare recipients) are denied since matter is conjectural and any competitive advantages would not result from preferential or unfair treatment by Govt. While possible ramification of WIN program might be inconsistent with one purpose of Service Contract Act of 1965, program is not contrary to any provision of Act..... 656

Cover letter. (*See* **BIDS, Letter accompanying bid**)

BIDS—Continued
Discarding all bids
Reinstatement
Low responsive bidder under canceled invitation Page
Solicitation provision requiring bid bond in amount of 20 percent of "bid," when read in context of entire bid package, may not reasonably be interpreted as applicable to monthly rather than annual bid total for 1-year contract, even though bid schedule called for monthly bid prices. Therefore, notwithstanding low bidder's erroneous interpretation of bid guarantee provision, agency's determination to resolicit bids under corrected specification is not justified and low bid is nonresponsive 798
Errors. (*See* **BIDS, Mistakes**)
Invitation for bids
Bid opening time
Error
Contracting officer acted unreasonably and in contravention of ASPR 2-208 in failing to at least telephonically notify five firms on bidders' list of correct bid opening time when he was made aware of patent error in IFB, which designated bid opening time as either ".30 PM" or "30 PM," even though DD Form 1707 included in solicitation package but not incorporated in IFB indicated correct bid opening time of 1:30 p.m. Contracting officer should not merely presume that reasonable bidders would inquire as to correct bid opening time under such circumstances 735
Cancellation
After bid opening
Although IFB was patently defective in indicating bid opening time and contracting officer improperly failed to inform bidders of correct bid opening time when he was made aware of IFB discrepancy prior to bid opening, no compelling reason exists to cancel IFB after bid opening and resolicit requirement since late bidder contributed to own lateness by failing to inquire regarding patent deficiency and there is adequate competition, a reasonable price and absence of any indication of prejudice to other bidders 735
Clauses
Grandfather
Question regarding propriety of IFB's failure to reference applicable SBA "Grandfather" clause (used in determing small business size status) effective 7 days prior to bid opening, where IFB indicated different dollar threshold for small business standard, is significant issue under Bid Protest Procedures 617
Defective
Size standards
Where change to SBA's small business size standard was published in Fed. Reg. prior to bid opening, all parties are held to be on constructive notice, even procuring agency, especially where material should have caused it to take action to amend IFB's stated size standards. Agency's unintentional failure to bring its IFB size standard into line with SBA's could have had substantial adverse effect on competition and in this regard IFB was defective. However, even if contract awarded had not been substantially performed, harm to competitive system generated by agency's inadvertence may not have necessitated GAO recommendation for termination 617

BIDS—Continued
Late
Acceptance
Prejudicial to other bidders Page

Bidder, who submitted bid 30 minutes after 1:30 p.m. bid opening because it unreasonably interpreted IFB bid opening time designation of either ".30 PM" or "30 PM" as 3 p.m., and did not inquire as to correct bid opening time, may not have its late bid considered, despite substantial contribution to bid lateness of defective IFB and Government's improper failure to notify bidders of correct bid opening time, because bidder caused own lateness and integrity of competitive bid system may be jeopardized if late bid is considered since other bids had been publicly opened---------- 735

Disposition

Although protest, insofar as it concerns IFB discrepancy in designating correct bid opening time, is untimely under Bid Protest Procedures, since it was not filed prior to bid opening, balance of protest, i.e., contention that protester's bid should not have been rejected as late, is timely because protester filed within 10 working days after it became aware of basis for protest---------- 735

Time ambiguity

Late bidder acted unreasonably in assuming that bid opening under IFB, which designated bid opening time as either ".30 PM" or "30 PM," would occur at 3 p.m. (actual bid opening was at 1:30 p.m.), and had duty to inquire of agency regarding patent discrepancy, even though agency improperly failed to notify bidder of bid opening time discrepancy when agency was made aware of it. Rule under which IFB's terms would be interpreted against Govt. as IFB drafter has no application where such a patent discrepancy exists---------- 735

Letter accompanying bid
Ambiguous

Bid which omitted pages of IFB is nonresponsive, notwithstanding it contained every page which required an entry, but which did not serve to incorporate by reference other material pages, and was accompanied by cover letter stating that "applicable documents" are being submitted, which was ambiguous as to whether if referred to documents of IFB as issued or to documents returned with bid, because bidder's intention to be bound by all material provisions of solicitation is unclear---------- 894

Mistakes
Recalculation of bid
Correction *v.* withdrawal

Contracting officer's determination that bidder alleging mistake should be permitted to withdraw but not to correct its bid was proper where correction would increase price on item of work from $97,079 to $223,440, thus bringing total bid to within $5,000 of second low bid in $670,000 procurement---------- 742

BIDS—Continued
Mistakes—Continued
Withdrawal
Burden of proof Page
Where bidder seeks to withdraw its bid based upon alleged error and furnishes evidence to make *prime facie* case in support of error, i.e., substantially establishes error, for Govt. to make award it must virtually show that no error was made or that claim of error was not made in good faith. Therefore, upon ultimate determination that bona fide error was committed, withdrawal is permissible 936
Materiality *v.* honesty of mistake
Cases discussing withdrawal of bid due to mistake do not speak to materiality of mistake made but rather to whether mistake was honest one. Thus, where magnitude of mistake is not *de minimis* (between 1.6 percent and 3.2 percent of $11.8 million bid), withdrawal may be permitted 936
Negotiated procurement. (*See* **CONTRACTS, Negotiation**)
Nonresponsive to invitation
Large business bids
Small business set-asides
Large business bids on small business set-aside procurements are nonresponsive and contracting officer is not required to consider bids. Moreover, 15 U.S.C. 631, *et seq.*, has been interpreted to mean that Govt. may pay premium price to small business firms on restrictive procurements to implement policy of Congress 902
Prices
Below cost
Because of GSA's widespread difficulties with deficient performance on formally advertised janitorial services contracts, GSA's possible misunderstanding of the decisions of GAO as applied to "below cost" bidding, and GAO opinion that GSA should be given time to study alternative solutions to difficulties, termination of protested award is not recommended 693
Protests. (*See* **CONTRACTS, Protests**)

BONDS
Bid
Deficiencies
Amount
Monthly percentage on 12-month contract
Solicitation provision requring bid bond in amount of 20 percent of "bid," when read in context of entire bid package, may not reasonably be interpreted as applicable to monthly rather than annual bid total for 1-year contract, even though bid schedule called for monthly bid prices. Therefore, notwithstanding low bidder's erroneous interpretation of bid guarantee provision, agency's determination to resolicit bids under corrected specification is not justified and low bid is nonresponsive 798

BUY INDIAN ACT (*See* **BIDS, Competitive system, "Buy Indian Act"**)
CERTIFYING OFFICERS
Submission to Comptroller General
Advance decisions
How requests should be addressed Page
Certifying officers should address requests for advance decisions under provisions of 31 U.S.C. 82d to the Comptroller General of the United States, Washington, D.C. 20548 ---- 645
Voucher accompaniment
Although, normally, the Comptroller General of the U.S. GAO would not render decision to question of law submitted by certifying officer unaccompanied by voucher as required by 31 U.S.C. 82d, statutory authority under which GAO renders decisions to certifying officers, since question submitted is general in nature and will be recurring one, reply to question raised is addressed to head of agency under broad authority contained in 31 U.S.C. 74, pursuant to which GAO may provide decisions to heads of departments on any question involved in payments which may be made by that department ---- 652
CLAIMS
Assignments
Contracts
Validity of assignment
Bank claiming balance due under contract on basis of assignment from contractor does not have valid claim against Govt., since assignment was not made pursuant to Assignment of Claims Act, 31 U.S.C. 203 and 41 U.S.C. 15. Distribution of contract balance, withheld to cover Davis-Bacon underpayments, is authorized. But due to lapse of time since violations occurred and bankruptcy of contractor, debarment is not warranted ---- 744
Mobile home insurance
Set-off
Past due *v.* future premiums
Timely payment by insured lender of premiums for mobile home loan insurance under sec. 2, title I, of National Housing Act, as amended, 12 U.S.C.A. 1703—which requires payment of premiums "in advance"—is prerequisite to continued insurance coverage. There is no basis for implication, underlying HUD proposal to set off against insurance claims past due and future premiums of delinquent lending institution, that insurance coverage is unaffected by nonpayment of premiums ---- 658
Claims under mobile home loan insurance pursuant to 12 U.S.C.A. 1703 by lending institution presently delinquent in insurance premium payments may be allowed if default on loan occurred while premium payments were current, but cannot be allowed if default occurred or was imminent after premium payments became delinquent. Past due premium charges may be set off against allowable claims, if lender agrees to such setoff. Alternatively, remaining insurance coverage may be canceled. In no event is set-off of future premium charges appropriate. GAO recommends, pursuant to 31 U.S.C.A. 1176, that HUD regulations be amended in terms of foregoing issues and conclusions ---- 658

COMPENSATION

Overtime

Actual work requirement

Exception

Back pay arbitration award Page

Federal Labor Relations Council requests decision on legality of arbitration award of backpay to 54 shipyard employees for overtime and time not worked. The arbitrator found that Shipyard changed basic workweek of employees without complying with consultation requirements of negotiated agreement. However, because arbitrator did not find that but for failure of Shipyard to consult with union, change in basic workweek would not have occurred, award does not satisfy criteria of Back Pay Act, 5 U.S.C. 5596 and, therefore, it may not be implemented 629

Firefighting

Fair Labor Standards Amendments

Computation

Federal firefighters with 72-hour tour of duty are entitled to 12 hours overtime compensation under FLSA in 1975. Their regular rate of pay for computing overtime is determined by dividing their total compensation by number of hours in their tour of duty, 72, there being no basis for the divisor to be limited to number of hours beyond which overtime must be paid, 60. Therefore, since FLSA requires overtime pay at rate of one and one-half times regular rate of pay and firefighters have already been paid regular rate for 12 hours of overtime, extra compensation for overtime is limited to one-half their regular rate of pay 908

Promotions

Temporary

Detailed employees

Retroactive application

Decision of Dec. 5, 1975, 55 Comp. Gen. 539, entitling otherwise qualified employee to temporary promotion on 121st day of detail to higher grade position when prior approval of extension of detail beyond 120 days has not been obtained from Civil Service Commission will be applied retrospectively to extent permitted by 6-year statute of of limitations applicable to GAO 785

Retroactive

Employee was advised prior to detail action that, if she so elected, she could be promoted temporarily but would not receive per diem while at temporary duty station. She elected to receive per diem in lieu of temporary promotion. Although temporary promotion was discretionary, agency had no right to require employee to make such choice. Since agency states that employee would have been promoted but for the improper action, unjustified or unwarranted personnel action occurred and retroactive promotion with backpay for period of detail may be made 836

CONTRACTING OFFICERS

Responsibility

Bid opening time

Error detection duty Page

Contracting officer acted unreasonably and in contravention of ASPR 2–208 in failing to at least telephonically notify five firms on bidders' list of correct bid opening time when he was made aware of patent error in IFB, which designated bid opening time as either ".30 PM" or "30 PM," even though DD Form 1707 included in solicitation package but not incorporated in IFB indicated correct bid opening time of 1:30 p.m. Contracting officer should not merely presume that reasonable bidders would inquire as to correct bid opening time under such circumstances 735

CONTRACTORS

Conflicts of interest

Avoidance

Where contractor of LEAA grantee developed and drafted specifications, which were substantially identical to those used in RFP, which also incorporated contractor-developed "requirements" study, contractor comes under LEAA organizational conflict of interest guideline, which was attached as condition to LEAA grant, was binding on grantee and precludes contractor from competing on RFP 911

Waiver of guidelines

Contractor, precluded by LEAA organizational conflict of interest guideline from competing on LEAA grantee's procurement for which it drafted and developed specifications, has not shown that LEAA refusal to grant waiver of guideline, promulgated under LEAA rule-making authority and binding on grantees, was for reasons so insubstantial as to constitute abuse of discretion 911

Constructive notice

Organizational conflict of interest guideline of LEAA

Contractor has constructive notice of LEAA organizational conflict of interest guideline where it was contained in document incorporated by reference in contract requiring the preparation of specifications. In any case, since guideline is attached as condition to LEAA grant, it is self-executing, and grantee is bound to reject contractor's proposal if contractor fell under guideline, notwithstanding grantee's inadequate notice and contrary advice to contractor 911

Defense financing

Interest on borrowings

Failure of procuring activity to inform competing offeror in negotiated procurement for fixed-price contract that Govt. would directly reimburse contractor for interest on borrowings to finance plant expansion when reimbursement is prohibited by agency procurement regulation denied such offeror opportunity to compete on equal basis 802

CONTRACTORS—Continued
Government civilian and military personnel
Prohibition Page
Expenses of renting boat and equipment from Govt. employee for purpose of performing acoustical measurements are not reimbursable as travel expenses. Equipment should have been obtained by procurement means with due regard to section 1–1.302–3 of Fed. Procurement Regs. and public policy prohibiting Govt. from contracting with its employees except for most cogent of reasons as where Govt.'s needs cannot otherwise reasonably be met. Payment may, however, be made on *quantum meruit* basis insofar as receipt of goods and services has been ratified by authorized official ---- 681
Incumbent
Competitive advantage
Allegation denied
Protest based upon contention that incumbent contractor and awardee under subject procurement knowingly submitted production plan containing incorrect and misleading data, which was incorporated into RFP, to gain competitive advantage over other offerors is denied since two separate agency audits show that data used was substantially correct. However, agency advised that verification of such data should be made prior to inclusion in solicitation rather than after protest as in instant case ---- 875
Successors
Service Contract Act of 1965
Selected offeror would be successor contractor under Service Contract Act and proposes to hire substantial number of incumbent union workers but also to replace percentage of senior union workers with apprentices. In view of indication of labor unrest resulting therefrom, source selection official should ascertain if risk of possible labor unrest was properly assessed by evaluation board ---- 715

CONTRACTS
Architect, engineering, etc., services
Procurement practices
Bureau of Indian Affairs
Proposed award of school design contract to Indian school board under title I, Public Law 93–638—"Indian Self-Determination Act"—is not objectionable, provided requirements of act and its regulations are satisfied. Act provides contracting authority covering broad range of Indian programs and independent of contracting laws and regulations ordinarily applicable to Interior Department, including Brooks Bill architect-engineer selection procedure (40 U.S.C. 541, *et seq.*, and FPR subpart 1–4.10). Therefore, protest by architectural firm competing in Brooks Bill procurement initiated prior to school board's application for contract under P.L. 93–638 is denied ---- 765

CONTRACTS—Continued
Awards
Combination of schedules
Lowest cost to Government
Page

Where award on combination of schedules is contemplated, award must result in lowest cost to Govt. Accordingly, where bidder, whose bid when combined with protester's bid provided lowest cost to Govt., withdraws bid, it is then incumbent on agency to make award based on combination of bidders whose bids were still available for acceptance which represented lowest cost 936

Notice
Form of notice
Telegram

Protest filed after agency forwarded notice of award of construction contract to low bidder must be considered as being filed after award since telegraphic notice of award constituted official award of contract .. 936

Small business concerns
Fair proportion criteria

Where contracting officer has noted that in past year number of solicitations for shirts and trousers has been issued on unrestricted basis with number of awards going to large business protester, contention of protester that set-aside in instant case comprises more than "fair proportion" of Govt. procurement to small business does not provide basis to conclude that there was not proper basis for ultimate awards to small business 902

Set-asides
Competition sufficiency

Although original determination to set aside procurements for shirts and trousers for small business was not in accordance with ASPR 1–706.5(a)(1) (1974 ed.) in that it was based upon expediency rather than required reasons, since there was small business competition for procurements and prices were determined to be reasonable, there is no basis to conclude that there was not proper basis for ultimate awards 902

Department of Defense procurements
Emergency preparedness planning program

Although withdrawal of total small business set-aside pursuant to ASPR 1–706.1(e)(ii) prior to bid opening, where large business "planned producer" achieved status on same date solicitation containing set-aside was issued, is not required, contracting officer, exercising reasonable discretion, can find sufficient detriment to public interest to justify withdrawing set-aside solely for reason that "planned producer" wants to bid, in view of specificity of ASPR 1–706.1(e)(ii) proscription and criticalness of DOD emergency preparedness planning program. Therefore, recommendation is made that contracting officer consider exercising discretion in view of various special factors 703

CONTRACTS—Continued
Awards—Continued
Small business concerns—Continued
Set-asides—Continued
Justification Page

Time of preparing justification that set-aside is necessary to assure that fair proportion of Govt. procurement is placed with small business does not affect validity of award if proper basis for award exists 902

Large business bids nonresponsive

Large business bids on small business set-aside procurements are nonresponsive and contracting officer is not required to consider bids. Moreover, 15 U.S.C. 631, *et seq.*, has been interpreted to mean that Govt. may pay premium price to small business firms on restrictive procurements to implement policy of Congress 902

Limitation

Planned producer

ASPR 1-706.1(e)(ii), which prohibits total small business set-asides where large business "planned producer" of "planned" item under DOD emergency preparedness mobilization planning program desires to participate in procurement, is valid limitation on making total set-asides necessary to protect legitimate DOD concern, and is not in contravention of Small Business Act and implementing regulations 703

Planned item procurements

Total small business set-aside on procurement of "planned" item under DOD emergency preparedness mobilization planning program becomes so established as to preclude applicability of ASPR 1-706.1(e)(ii), which prohibits total set-asides where large business "planned producer" desires to participate in procurement of item, on date that invitation is issued. 42 Comp. Gen. 108, modified 703

Procedures

Total small business set-aside is not required to be withdrawn, pursuant to ASPR 1-706.1(e)(ii), prior to bid opening, where "planned producer" firm of "planned" item under DOD emergency preparedness planning program only achieved that status on same date that solicitation for item was issued, since firm was not "planned producer" prior to issuance date, notwithstanding that firm had expressed interest in procurement prior to becoming "planned producer" and procuring activity solicited firm to be "planned producer" after making total set-aside determination 703

Withdrawal

Planned emergency producer

Although ASPR 1-706.3(a), which permits withdrawal of small business set-aside prior to award if found detrimental to public interest, is largely discretionary with contracting officer and SBA, contracting officer must withdraw total set-aside on procurement for "planned" item under DOD emergency preparedness mobilization planning program where solicitation containing set-aside was issued in violation of ASPR 1-706.1(e)(ii), which prohibits total set-aside where large business "planned producer" of item desires to participate in procurement, and bid opening has not occurred when contracting officer became aware of error 703

CONTRACTS—Continued
Awards—Continued
Small business concerns—Continued
Size
Change in standards Page

Any situation which could reasonably be construed as being one in which procuring agency advocates use of size standard differing from that then applicable under SBA regulation would amount to encroachment whether intentional or unintentional on SBA's exclusive jurisdiction. Thus, where, as here, applicable SBA regulations were changed 7 days prior to bid opening and IFB can reasonably be construed as setting forth size standard differing from SBA's, encroachment has occurred and impact of encroachment on competition must be analyzed..... 617

Standards used in invitation erroneous

Where change to SBA's small business size standard was published in Fed. Reg. prior to bid opening, all parties are held to be on constructive notice, even procuring agency, especially where material should have caused it to take action to amend IFB's stated size standards. Agency's unintentional failure to bring its IFB size standard into line with SBA's could have had substantial adverse effect on competition and in this regard IFB was defective. However, even if contract awarded had not been substantially performed, harm to competitive system generated by agency's inadvertence may not have necessitated GAO recommendation for termination..... 617

Sum certain
Requirement

Where it would have been near impossibility to ascertain intended bid price of bidder alleging mistake, and while bidder would still have been low even adding entire amount of claimed mistake, still it would not have been possible to make award to bidder for sum certain which is required by regulations..... 936

Cancellation
Negotiation procedures propriety

Finding that janitorial services contract was improperly negotiated does not lead to conclusion that contract must be canceled, since cancellation is reserved for contracts illegally awarded, and under rationale of Court of Claims decisions illegal award results only if it was made contrary to statutory or regulatory requirements because of some action or statement by contractor or if contractor was on direct notice that procedures being followed were violative of requirements..... 693

Cost accounting
Cost Accounting Standards Act application

Catalog or market price exemption from requirement of Cost Accounting Standards Act is mandatory exemption rather than discretionary with contracting agency. Therefore CAS requirements should not be imposed on contractor whenever catalog or market price exemption is determined to exist..... 881

CONTRACTS—Continued

Incorporation of terms by reference Page

Bid which omitted pages of IFB is nonresponsive, notwithstanding it contained every page which required an entry, but which did not serve to incorporate by reference other material pages, and was accompanied by cover letter stating that "applicable documents" are being submitted, which was ambiguous as to whether it referred to documents of IFB as issued or to documents returned with bid, because bidder's intention to be bound by all material provisions of solicitation is unclear..... 894

Contractor has constructive notice of LEAA organizational conflict of interest guideline where it was contained in document incorporated by reference in contract requiring the preparation of specifications. In any case, since guideline is attached as condition to LEAA grant, it is self-executing, and grantee is bound to reject contractor's proposal if contractor fell under guideline, notwithstanding grantee's inadequate notice and contrary advice to contractor..... 911

Indian Self-Determination Act

Bureau of Indian Affairs. (*See* **INDIAN AFFAIRS, Contracts, Bureau of Indian Affairs, Indian Self-Determination Act**)

Janitorial services

Advertising *v.* negotiation

Since question of whether negotiated award method is proper for GSA's awards of janitorial services is of widespread interest, given number of janitorial services' awards made by GSA and number of protests pending involving negotiated janitorial services' awards, protest will be considered even though untimely raised under Bid Protest Procedures..... 693

None of the exceptions to formal advertising (as set forth in 41 U.S.C. 252(c)(1)-(15)) expressly authorizes use of negotiations only to secure desired level of quality of janitorial services or to obtain incentive-type contract. Moreover, analysis of legislative history of Federal Property and Administrative Services Act (40 U.S.C. 471), under which questioned negotiated award of services was made, shows that Congress specifically rejected proposal to permit negotiation to secure desired level of quality of supplies or services..... 693

Since negotiating rationale employed by GSA is same as was cited in *Nationwide Building Maintenance, Inc.*, 55 Comp. Gen. 693, where it was found that GSA had no legal basis to negotiate janitorial services procurements, and since award has been made, option should not be exercised and any future requirement for services should be formally advertised..... 864

Labor stipulations

Davis-Bacon Act

Correction of wage schedules

Even if offeror's score for mission suitability should have been adjusted downward for its improper escalation of Davis-Bacon Act wage rates, impact on scoring would not be sufficient to make situation one where given point spread between competing proposals indicates significant superiority of one proposal over another..... 715

CONTRACTS—Continued
Labor stipulations—Continued
Davis-Bacon Act—Continued
Minimum wage determinations
Addenda not acknowledged Page

Bid which failed to acknowledge IFB amendment increasing Davis-Bacon wage rate was properly rejected as nonresponsive, since failure to acknowledge amendment was material deviation. Fact that work to be performed by craft listed in amendment (bricklayer) was not specifically required under specifications is immateriel as agency determined that, in course of contract performance, craft could be employed. However, recommendation is made that procedures be instituted to assure that wage determination modifications are reviewed to ascertain applicability to contract prior to inclusion in amendment 615

Wage underpayments
Claim priority
Underpaid workers *v.* IRS levy

Where it was determined that contractor had underpaid three employees in violation of Davis-Bacon Act, 40 U.S.C. 276a, and funds were administratively withheld from balance due on contract to cover underpayments, claims of underpaid workers have priority over later IRS levy. 46 Comp. Gen. 178, which held that IRS levy had priority over claims of underpaid employees, is modified to extent that it is inconsistent ... 744

Debarment not required

Bank claiming balance due under contract on basis of assignment from contractor does not have valid claim against Govt., since assignment was not made pursuant to Assignment of Claims Act, 31 U.S.C. 203 and 41 U.S.C. 15. Distribution of contract balance, withheld to cover Davis-Bacon underpayments, is authorized. But due to lapse of time since violations occurred and bankruptcy of contractor, debarment is not warranted 744

Minimum wages, determinations
Effect of new determination

Where GSA improperly incorporated in contract old Service Contract Act DOL Wage Determination, which was revised with GSA's knowledge prior to award selection and over a month prior to award, and contract was soon modified to reflect revised wage determination, GSA's actions were tantamount to awarding contract different from that called for in RFP. Moreover, GSA failed to comply with DOL regulations in not submitting SF-98 to DOL both when it extended incumbent's contract and not less than 30 days prior to proposed award, despite extended period between closing date for proposals and award 864

Service Contract Act of 1965
Amendments
Minimum wages, etc., determinations

Selected offeror would be successor contractor under Service Contract Act and proposes to hire substantial number of incumbent union workers but also to replace percentage of senior union workers with apprentices. In view of indication of labor unrest resulting therefrom, source selection official should ascertain if risk of possible labor unrest was properly assessed by evaluation board 715

CONTRACTS—Continued
Labor stipulations—Continued
Service Contract Act of 1965—Continued
Applicability of act
Data processing services Page

GAO will not object to inclusion by contracting agency of Service Contract Act provisions in solicitations for data processing services, even though U.S. District Court has ruled that Act is not applicable to such services, since Dept. of Labor (DOL), which has responsibility for administering Act, had declined to follow the decision in all other jurisdictions and has been supported in its position by cognizant congressional committee, and since there is conflict within same judicial circuit as to whether decisions by DOL regarding coverage of the Act are judicially reviewable 675

Wage underpayments
Davis-Bacon Act. (*See* **CONTRACTS, Labor stipulations, Davis-Bacon Act, Wage underpayments**)
Mistakes
Correction
Intended bid price
Uncertain

Where it would have been near impossibility to ascertain intended bid price of bidder alleging mistake, and while bidder would still have been low even adding entire amount of claimed mistake, still it would not have been possible to make award to bidder for sum certain which is required by regulations 936

Errors
Of omission
Evidence to support

In mistake in bid cases involving errors of omission, bidder's sworn affidavit outlining nature of error, its approximate magnitude and manner in which error occurred can constitute substantial evidence thereof. This fact does not, however, detract from agency's obligation to weigh all evidence so as to determine that bona fide mistake was committed 936

Modification
No cost stop work order
Effect

Army proposal to enter into contract modification providing for no cost stop work order, for partially performed contracts executed in violation of Antideficiency Act, would freeze Government liability at amount already due, unless supplemental appropriation is enacted. We perceive no legal objection to proposal since it would maintain status quo and reserve to Congress maximum flexibility in deciding whether to make deficiency appropriation in amount necessary to liquidate actual obligations already incurred or to permit Army to realize full contract benefits by making appropriation greater than actual existing deficiency 768

CONTRACTS—Continued
Modification—Continued
Obligation to pay *v.* future availability of funds Page
Army proposal to modify contracts executed in violation of Antideficiency Act, to make Govt.'s obligation to pay subject to future availability of funds, but under which Govt. would continue to accept benefits, is of dubious validity as means of mitigating effects of Antideficiency Act violation, since contractors might recover under contracts or on *quantum meruit* theory even if appropriation was not subsequently made available by Congress. Moreover, proposal may prejudice congressional options by requiring Congress to fully appropriate for continued performance or allow Army to receive benefits at expense of contractors 768
Negotiated. (*See* **CONTRACTS, Negotiation**)
Negotiation
Award under initial proposals. (*See* **CONTRACTS, Negotiation, Competition, Award under initial proposals**)
Awards
Erroneous
Improper *v.* illegal awards
Finding that janitorial services contract was improperly negotiated does not lead to conclusion that contract must be canceled, since cancellation is reserved for contracts illegally awarded, and under rationale of Court of Claims decisions illegal award results only if it was made contrary to statutory or regulatory requirements because of some action or statement by contractor or if contractor was on direct notice that procedures being followed were violative of requirements 693
Initial proposal basis
Competition sufficiency
Although doubt exists as to general appropriateness of Navy's failure to conduct discussions and making award on initial proposal basis in Navy "turnkey" family housing procurements and even though Navy's only justification of record for failing to conduct discussions was that awardee's proposal contained no major variances from RFP, Navy's failure was not unjustified or illegal in particular procurement, since offerors apparently submitted best possible offers at lowest prices, which allows inference that adequate competition existed to insure "fair and reasonable" price, and since awardee's price could be considered "fair and reasonable." 839
Prejudice alleged
Award on basis of evaluators' preference
Protest that conflict of interest existed because two evaluators of proposals were students at university whose museum was awarded contract is denied since relationship between evaluators and museum was so remote as to be practically nonexistent. Record shows that only one evaluator was part-time student at distant campus involving separate administrative entities and that museum was not involved in teaching. In fact, protester fared better overall in evaluation by this individual than with other evaluators 787

CONTRACTS—Continued
Negotiation—Continued
Awards—Continued
Prejudice alleged—Continued
Insider information Page

Contrary to protester's assertions, Navy denies that contractor received "insider information" substantially prior to closing date for receipt of proposals relating to precise evaluation criteria and numerical breakdown. Also, GAO records do not indicate that awardee was supplied this information during bid protest involving prior procurement having identical evaluation scheme ---- 839

Speculative

Where Navy RFP for "turnkey" family housing failed to disclose manner in which price would be compared to technical evaluation criteria even though price was considered, i.e., award was made to offeror having lowest price per quality point ratio, disclosure of precise evaluation formula shortly before closing date for receipt of proposals was not meaningful disclosure. However, in view of advanced state of contract and since prejudice to unsuccessful offerors was speculative, protest is denied ---- 839

Cancellation

Generally. (*See* **CONTRACTS, Cancellation**)

Changes during negotiation

Notification

Where agency did not discuss certain areas in proposals simply because they were considered "weaknesses," in that they received less than maximum number of evaluation points, as opposed to "deficiencies," which would not satisfy Govt.'s requirements, and agency also changed award evaluation cost factors without communicating information to offerors, it is recommended that option in contract not be exercised and that requirement for option years be resolicited ---- 859

Protester outside competitive range

Where contract, as negotiated, changed performance periods of solicitation, agency's failure to provide protester opportunity to submit revised proposal on basis of changed requirements was not necessary since protester was not considered to be in competitive range and changes are not directly related to reasons for rejecting protester's proposal. In absence of directly applicable FPR provision, ASPR 3-805.4(b) is followed for guidance ---- 787

Changes, etc.

Reopening negotiations

Wage determination change

GSA's failure to reopen negotiations to incorporate in RFP Service Contract Act DOL Wage Determination was not justified on basis of GSA's assumption that revision would have equal effect on all offerors, would not effect relative standing of offerors, and would be impractical since successful offeror had been announced, as such assumptions are speculative and award under circumstances on basis of superseded wage determination is contrary to principles of competitive procurement system ---- 864

CONTRACTS—Continued
Negotiation—Continued
Competition
Adequacy
Application of cost accounting standards requirements Page

A negotiated price may be based on adequate price competition and at the same time be qualified for exemption from CAS requirements as catalog or market price ---- 881

Award under initial proposals

Award may be made on initial proposal basis without discussions with offerors in competitive range to offeror who proposed higher fixed price, than other presumably acceptable offeror under Navy "turnkey" family housing procurement, since winning offeror, who received lowest dollar per quality point ratio, had "lowest evaluated price" under ASPR 3-807.1(b)(1) (1974 ed.). Language "lowest evaluated price" should be defined to include all factors involved in award selection. B-170750(2), February 22, 1971, modified ---- 839

Competitive range formula
Technical acceptability

Proposal may be found outside of competitive range on basis of technical unacceptability without consideration of cost ---- 787

Where Govt.'s statement of work is broad and general, proposal was nevertheless properly considered outside competitive range since, consistent with evaluation factors listed in solicitation, protester's technical proposal was considered to be so deficient as to be wholly unacceptable. Question whether Govt. unfairly construed its work statement too narrowly may not be judged solely from work statement but must be determined in light of solicitation's evaluation factors ---- 787

Discussion with all offerors requirement
Failure to discuss
Not unjustified or illegal

Although doubt exists as to general appropriateness of Navy's failure to conduct discussions and making award on initial proposal basis in Navy "turnkey" family housing procurements and even though Navy's only justification of record for failing to conduct discussions was that awardee's proposal contained no major variances from RFP, Navy's failure was not unjustified or illegal in particular procurement, since offerors apparently submitted best possible offers at lowest prices, which allows inference that adequate competition existed to insure "fair and reasonable" price, and since awardee's price could be considered "fair and reasonable." ---- 839

Where substantial technical uncertainties exist in initial proposals, discussions should be conducted with offerors in competitive range and award should not be made on initial proposal basis because "adequate price competition" cannot be found to exist under such circumstances. However, proposal of awardee in present Navy "turnkey" family housing procurement, who received award on initial proposal basis, substantially complied with RFP requirements. Therefore, Navy's failure to conduct discussions was not unjustified or illegal ---- 839

CONTRACTS—Continued
Negotiation—Continued
Competition—Continued
Discussion with all offerors requirement—Continued
Technical transfusion or leveling Page
Although technical "transfusion" of one offeror's unique or innovative idea to other offerors is prohibited, offeror's request for direct reimbursement by Govt. of its interest expense is not such a unique or innovative idea, but is suggestion for departure from procurement "ground rules" which, if accepted by agency, must be communicated to all competing offerors 802
What constitutes discussion
GSA did not conduct meaningful negotiation with unsuccessful, albeit competitive-range, offeror, since it did not explore purported deficiency in phase-in costs 693
Written or oral negotiations
Appropriateness of Navy's failure to conduct discussions with offerors within competitive range in fixed price "turnkey" family housing procurements and its award on initial proposal basis is questionable, in view of many varied acceptable approaches of meeting "turnkey" projects' performance-type specifications, since fact that offeror is highest rate does not mean it is offering such "fair and reasonable" price that oral or written discussions would not be required, even if there are several competitive offerors 839
Equal bidding basis for all offerors
Denied
Failure of procuring activity to inform competing offeror in negotiated procurement for fixed-price contract that Govt. would directly reimburse contractor for interest on borrowings to finance plant expansion when reimbursement is prohibited by agency procurement regulation denied such offeror opportunity to compete on equal basis 802
Preservation of system's integrity
GSA's failure to reopen negotiations to incorporate in RFP Service Contract Act DOL Wage Determination was not justified on basis of GSA's assumption that revision would have equal effect on all offerors, would not effect relative standing of offerors, and would be impractical since successful offeror had been announced, as such assumptions are speculative and award under circumstances on basis of superseded wage determination is contrary to principles of competitive procurement system 864
Propriety
Method of conducting negotiations
In negotiated procurement accomplished under NASA Procurement Directive 70–15 which limits agency in discussing deficiencies in offerors' proposals during written or oral discussions, no harm to protester's competitive position is found even though other offeror was advised of deficiency during multiple "final negotiations," since NASA could properly have made necessary Davis-Bacon Act wage cost adjustments to offeror's proposal. Comment is made that this practice seems inconsistent with limitations imposed by procurement directive 715

CONTRACTS—Continued
Negotiation—Continued
Cost accounting standards requirements
Catalog or market price exemption
Effect of adequate price competition Page

A negotiated price may be based on adequate price competition and at same time be qualified for exemption from CAS requirements as catalog or market price 881

Where low offeror claimed exemption from CAS on ground that its offered prices were based upon its established catalog or market prices, exemption should not have been denied solely because adequate price competition was obtained by agency. Recommendation is made that agency review claim and if basis for exemption existed then consideration be given to termination for convenience of contract awarded to second low offeror and award of terminated quantities to low offeror 881

Mandatory

Catalog or market price exemption from requirement of Cost Accounting Standards Act is mandatory exemption rather than discretionary with contracting agency. Therefore CAS requirements should not be imposed on contractor whenever catalog or market price exemption is determined to exist 881

Request and justification
Offeror's responsibility

It is the offeror's responsibility to request and to provide justification for catalog or market price exemption from CAS requirements. However, contracting agency must make determination whether exemption applies in the particular case 881

Cost, etc., data
Adequate competition effect

Protest against alleged action of contracting personnel in orally amending RFP so that only protester was required to use standard cost and pricing form different than all other competitors on day before closing date for receipt of proposals, submitted within 10 days of notification of reasons why agency would not consider proposal, is timely notwithstanding that action occurred before closing date for receipt of proposals since it was not impropriety apparent on face of solicitation. See 40 Fed. Reg. 17979, April 24, 1975 754

Evaluation factors changed

Where agency did not discuss certain areas in proposals simply because they were considered "weaknesses," in that they received less than maximum number of evaluation points, as opposed to "deficiencies," which would not satisfy Govt.'s requirements, and agency also changed award evaluation cost factors without communicating information to offerors, it is recommended that option in contract not be exercised and that requirement for option years be resolicited 859

Form for submission

Protester is not justified in relying on oral statements of contracting personnel prior to closing date for receipt of proposals, which would have changed standard cost and pricing data form specified in RFP. Oral representation one day prior to closing date for receipt of proposals without confirmation in writing does not constitute amendment of RFP. 754

CONTRACTS—Continued
Negotiation—Continued
Cost, etc., data—Continued
"Realism" of cost Page

Where cost realism analysis of competing proposals was based, in part, on collective bargaining agreement in effect at time of evaluation escalated over proposed contract period, but thereafter new collective bargaining agreement is negotiated and becomes effective, more appropriate and precise analysis is now both possible and in order in light of definitization of new applicable wages---------- 715

Reasonableness of proposed cost

Although there were shortcomings and omissions in proposal of awardee under Navy negotiated fixed price "turnkey" family housing procurement and relatively minor inconsistencies and errors in technical evaluation of protester's and awardee's proposal, determination by Navy, in its broad discretion, that awardee had highest technically evaluated proposal had reasonable basis, and initial proposal award based upon lowest dollar per technical quality point ratio to awardee, who had higher priced, higher technically rated proposal, was reasonable despite protester's over $600,000 lower offered price---------- 839

Although doubt exists as to general appropriateness of Navy's failure to conduct discussions and making award on initial proposal basis in Navy "turnkey" family housing procurements and even though Navy's only justification of record for failing to conduct discussions was that awardee's proposal contained no major variances from RFP, Navy's failure was not unjustified or illegal in particular procurement, since offerors apparently submitted best possible offers at lowest prices, which allows inference that adequate competition existed to insure "fair and reasonable" price, and since awardee's price could be considered "fair and reasonable."---------- 839

Verification

Since, contrary to protester's contention, quantity estimates in RFP were not substantially overstated, there is no evidence that other offeror knew protester's original price before it submitted best and final offer and determination not to obtain cost and pricing DD form 633 was in accordance with regulations, claim for proposal preparation costs will not be considered---------- 875

Disclosure of price, etc.

Auction technique prohibition

Contracting officer properly did not seek clarification of revised best and final offer which appeared to be inconsistent with offer previously submitted and with requirements of solicitation, since matter went to heart of promised performance and could only be resolved by reopening negotiations with all offerors in competitive range, and reopening of negotiations after submission of second best and final offers was deemed not to be in best interests of Govt---------- 636

CONTRACTS—Continued
Negotiation—Continued
Discussion requirement
Page
Competition. (*See* CONTRACTS, Negotiation, Competition, Discussion with all offerors requirement)
Evaluation factors
Additional factors
Not in request for proposals
Since disclosure of relative weights of evaluation factors is essential requirement of procurement, GSA erred in failing to communicate to offerors material changes in evaluation scheme from that designated in RFP so offerors would not be misled by RFP's provisions 864
Areas of evaluation
Allegations were filed after receipt of best and final offers that RFP was deficient for failure to disclose (1) numerical values assigned to mission suitability factors, and (2) relative importance of cost or "other factors" to mission suitability; and failure to include incumbent contractor closeout costs are untimely since they relate to deficiencies apparent before date set for receipt of initial proposals. Argument that protester did not read RFP as making cost independent evaluation factor is rejected since evaluation section clearly indicates three distinct major areas of evaluation—mission suitability, cost, and other factors 715
Commonality features of prior contracts
Contrary to protester's assertions, Navy denies that contractor received "insider information" substantially prior to closing date for receipt of proposals relating to precise evaluation criteria and numerical breakdown. Also, GAO records do not indicate that awardee was supplied this information during bid protest involving prior procurement having identical evaluation scheme 839
Competitive advantage precluded
GSA's failure to reopen negotiations to incorporate in RFP Service Contract Act DOL Wage Determination was not justified on basis of GSA's assumption that revision would have equal effect on all offerors, would not effect relative standing of offerors, and would be impractical since successful offeror had been announced, as such assumptions are speculative and award under circumstances on basis of superseded wage determination is contrary to principles of competitive procurement system 864
Cost
Changed
Where agency did not discuss certain areas in proposal simply because they were considered "weaknesses," in that they received less than maximum number of evaluation points, as opposed to "deficiencies," which would not satisfy Govt.'s requirements, and agency also changed award evaluation cost factors without communicating information to offerors, it is recommended that option in contract not be exercised and that requirement for option years be resolicited 859

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Criteria Page

Award may be made on initial proposal basis without discussions with offerors in competitive range to offeror, who proposed higher fixed price than other presumably acceptable offeror under Navy "turnkey" family housing procurement, since winning offeror, who received lowest dollar per quality point ratio, had "lowest evaluated price" under ASPR 3-807.1(b)(1) (1974 ed.). Language "lowest evaluated price" should be defined to include all factors involved in award selection. B-170750(2), February 22, 1971, modified 839

Divulged and generalized

Objection to Govt.'s failure to include detailed subordinate evaluation criteria in solicitation may not be sustained where sufficient correlation exists between divulged criteria and generalized criteria in solicitation. Even though subcriterion is applied under two evaluation criteria of solicitation and may penalize offeror twice, such action is proper since it is supported by rational basis 787

Defective request for proposals provisions

Navy RFP for "turnkey" family housing, which listed major technical criteria in descending order of importance and listed and explained all subcriteria of major criteria, although subcriteria's relative weight was not disclosed, has satisfied requirement that prospective offerors be informed of broad scheme of scoring to be employed and given reasonably definite information as to degree of importance to be accorded to particular factors in relation to each other. Disclosure of precise numerical weights is not required. However, RFP is defective for failing to disclose role of price in evaluation scheme 839

Escalation
Wage rates

Even if offeror's score for mission suitability should have been adjusted downward for its improper escalation of Davis-Bacon Act wage rates, impact on scoring would not be sufficient to make situation one where given point spread between competing proposals indicates significant superiority of one proposal over another 715

Where cost realism analysis of competing proposals was based, in part, on collective bargaining agreement in effect at time of evaluation escalated over proposed contract period, but thereafter new collective bargaining agreement is negotiated and becomes effective, more appropriate and precise analysis is now both possible and in order in light of definitization of new applicable wages 715

Evaluators
Conflict of interest alleged

Protest that conflict of interest existed because two evaluators of proposals were students at university whose museum was awarded contract is denied since relationship between evaluators and museum was so remote as to be practically nonexistent. Record shows that only one evaluator was part-time student at distant campus involving separate administrative entities and that museum was not involved in teaching. In fact, protester fared better overall in evaluation by this individual than with other evaluators 787

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Factors other than price
"Successor employer doctrine" Page

Selected offeror would be successor contractor under Service Contract Act and proposes to hire substantial number of incumbent union workers but also to replace percentage of senior union workers with apprentices. In view of indication of labor unrest resulting therefrom, source selection official should ascertain if risk of possible labor unrest was properly assessed by evaluation board 715

Technical acceptability

Offerors are entitled to know whether procurement is intended to achieve minimum standard at lowest cost or whether cost is secondary to quality and mere statement that "cost and other factors" will be considered in award determination does not fully satisfy this requirement. However, basic technical deficiencies in proposal may not be attributed to agency's failure to fully emphasize importance of technical evaluation considerations 787

Proposal may be found outside of competitive range on basis of technical unacceptability without consideration of cost 787

Labor costs

In negotiated procurement accomplished under NASA Procurement Directive 70–15 which limits agency in discussing deficiencies in offerors' proposals during written or oral discussions, no harm to protester's competitive position is found even though other offeror was advised of deficiency during multiple "final negotiations," since NASA could properly have made necessary Davis-Bacon Act wage cost adjustments to offeror's proposal. Comment is made that this practice seems inconsistent with limitations imposed by procurement directive 715

Method of evaluation
Defective

Where agency did not discuss certain areas in proposals simply because they were considered "weaknesses," in that they received less than maximum number of evaluation points, as opposed to "deficiencies," which would not satisfy Govt.'s requirements, and agency also changed award evaluation cost factors without communicating information to offerors, it is recommended that option in contract not be exercised and that requirement for option years be resolicited 859

Technical proposals

Where Navy RFP for "turnkey" family housing failed to disclose manner in which price would be compared to technical evaluation criteria even though price was considered, i.e., award was made to offeror having lowest price per quality point ratio, disclosure of precise evaluation formula shortly before closing date for receipt of proposals was not meaningful disclosure. However, in view of advanced state of contract and since prejudice to unsuccessful offerors was speculative, protest is denied 839

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Performance-type specifications Page

Appropriateness of Navy's failure to conduct discussions with offerors within competitive range in fixed price "turnkey" family housing procurements and its award on initial proposal basis is questionable, in view of many varied acceptable approaches of meeting "turnkey" projects' performance-type specifications, since fact that offeror is highest rated does not mean it is offering such "fair and reasonable" price that oral or written discussions would not be required, even if there are several competitive offerors 839

Point rating
Differences significance

Since question of whether given point spread between two competing proposals as result of technical evaluation indicates significant superiority of one proposal over another is primarily within discretion of procuring agency and where point spread is 18 points out of 1,000, no basis exists to object to agency's determination that proposals were essentially equal 715

Evaluation guidelines

Even if offeror's score for mission suitability should have been adjusted downward for its improper escalation of Davis-Bacon Act wage rates, impact on scoring would not be sufficient to make situation one where given point spread between competing proposals indicates significant superiority of one proposal over another 715

Price elements for consideration

Although there were shortcomings and omissions in proposal of awardee under Navy negotiated fixed price "turnkey" family housing procurement and relatively minor inconsistencies and errors in technical evaluation of protester's and awardee's proposal, determination by Navy, in its broad discretion, that awardee had highest technically evaluated proposal had reasonable basis, and initial proposal award based upon lowest dollar per technical quality point ratio to awardee, who had higher priced, higher technically rated proposal, was reasonable despite protester's over $600,000 lower offered price 839

Proposals *v.* firm commitments

Agency erred in merely accepting, without more, offeror's proposed use of specific minority subcontractor then using this fact as significant basis for award decision. Evaluation of resources which offeror merely proposes without contractual control or commitment is "patently irrational." Agency must be reasonably assured that resources are firmly committed to offeror, especially where consideration of factor in evaluation may be determinative of award 715

Fixed-price
Adjustment
Reimbursement

Failure of procuring activity to inform competing offeror in negotiated procurement for fixed-price contract that Govt. would directly reimburse contractor for interest on borrowings to finance plant expansion when reimbursement is prohibited by agency procurement regulation denied such offeror opportunity to compete on equal basis 802

Cost data, etc. (*See* **CONTRACTS, Negotiation, Cost, etc., data**)

CONTRACTS—Continued
Negotiation—Continued
Government-furnished property
Use denied Page

Allegation that Govt. permitted successful offeror to use public research vessel in performance of contract but did not make vessel available to others is denied since record shows that assistance in obtaining vessels was not provided to any offeror and successful offeror acquired vessel in question 10 years ago under grant from entity which is unrelated to procuring agency 787

Justification

Conduct of negotiations with only firm considered to be in competitive range does not require additional D&F to support sole source award where procurement was negotiated pursuant to D&F justifying use of negotiation authority under FPR 1-3.210(a)(8) relating to procurement of studies and surveys 787

Requirement

Notwithstanding desired use of negotiated award method for given procurement or range of procurements, negotiation must be objectively justified in view of statutory preference (41 U.S.C. 252(c)) for formal advertising 693

Late proposals and quotations
Hand carried

Protester's proposal, hand-delivered after time specified as closing date for receipt of proposals, was properly not considered since it did not fall within one of exceptions in applicable late proposal clause in RFP which would permit its consideration. Protester's delay in obtaining documents until before closing date for receipt of proposals, which allegedly caused lateness of proposal, is deemed significant intervening cause of lateness 754

Level of quality

None of the exceptions to formal advertising (as set forth in 41 U.S.C. 252(c)(1)-(15)) expressly authorizes use of negotiations only to secure desired level of quality of janitorial services or to obtain incentive-type contract. Moreover, analysis of legislative history of Federal Property and Administrative Services Act (40 U.S.C. 471), under which questioned negotiated award of services was made, shows that Congress specifically rejected proposal to permit negotiation to secure desired level of quality of supplies or services 693

Offers or proposals
Best and final

Authority in FPR 1-3.805-1(a)(5) to make award on "initial proposal" basis operates only to permit acceptance of proposal exactly as initially received. Consequently, award, incorporating revised cost proposal submitted by successful offeror in response to call for "best and final" offers (which constituted negotiation), was not made under initial proposal authority 693

CONTRACTS—Continued
Negotiation—Continued
Offers or proposals—Continued
Best and final—Continued Page

Allegations were filed after receipt of best and final offers that RFP was deficient for failure to disclose (1) numerical values assigned to mission suitability factors, and (2) relative importance of cost or "other factors" to mission suitability; and failure to include incumbent contractor closeout costs are untimely since they relate to deficiencies apparent before date set for receipt of initial proposals. Argument that protester did not read RFP as making cost independent evaluation factor is rejected since evaluation section clearly indicates three distinct major areas of evaluation—mission suitability, cost, and other factors 715

Although doubt exists as to general appropriateness of Navy's failure to conduct discussions and making award on initial proposal basis in Navy "turnkey" family housing procurements and even though Navy's only justification of record for failing to conduct discussions was that awardee's proposal contained no major variances from RFP, Navy's failure was not unjustified or illegal in particular procurement, since offerors apparently submitted best possible offers at lowest prices, which allows inference that adequate competition existed to insure "fair and reasonable" price, and since awardee's price could be considered "fair and reasonable" 839

Additional rounds
Second offer technically unacceptable

Contracting officer's rejection of protester's second best and final offer as technically unacceptable was proper where cost data submitted with proposal appeared to materially change previously acceptable technical proposal and protester did not furnish adequate detailed explanation of apparent revisions 636

Contracting officer properly did not seek clarification of revised best and final offer which appeared to be inconsistent with offer previously submitted and with requirements of solicitation, since matter went to heart of promised performance and could only be resolved by reopening negotiations with all offerors in competitive range, and reopening of negotiations after submission of second best and final offers was deemed not to be in best interests of Govt 636

Discussions
Not prejudicial

In negotiated procurement accomplished under NASA Procurement Directive 70–15 which limits agency in discussing deficiencies in offerors' proposals during written or oral discussions, no harm to protester's competitive position is found even though other offeror was advised of deficiency during multiple "final negotiations," since NASA could properly have made necessary Davis-Bacon Act wage cost adjustments to offeror's proposal. Comment is made that this practice seems inconsistent with limitations imposed by procurement directive 715

Relate to responsibility

Agency's improper release to one offeror of transfer agreement between protester, another offeror, and its predecessor, which contained basis of transfer but did not contain financial or business data so as to give insight into protester's proposal, was not prejudicial since, unlike situation where either unique technical approach or price is improperly disclosed to other offerors during negotiations, matter relates to protester's responsibility 715

CONTRACTS—Continued
Negotiation—Continued
Offers or proposals—Continued
Offeror
Developer and drafter of specifications Page

Estoppel has not been established against LEAA application of organizational conflict of interest guideline for grantee procurements to prevent grantee award to offeror, who developed and drafted specifications, notwithstanding assurances given to offeror by grantee that it could compete, since grantee's assurances cannot bind LEAA and LEAA apparently was not aware of all facts showing offeror came under guideline prior to communicating this fact to grantee---------- 911

Oral
Offer and acceptance

Parties intended to be bound by agency's oral acceptance of offer to purchase rubber where past course of dealing and language of solicitation indicated that execution of written contracts was for purpose of confirming pre-existing agreement---------- 833

In absence of statute or regulation requiring that Govt. sales contracts be in writing, telephonic offer to purchase stockpile rubber followed by timely telephonic acceptance creates valid and enforceable contract---------- 833

Sole source basis
Determination and findings
Studies and surveys

Conduct of negotiations with only firm considered to be in competitive range does not require additional D&F to support sole source award where procurement was negotiated pursuant to D&F justifying use of negotiation authority under FPR 1-3.210(a)(8) relating to procurement of studies and surveys---------- 787

Preparation
Costs

Since, contrary to protester's contention, quantity estimates in RFP were not substantially overstated, there is no evidence that other offeror knew protester's original price before it submitted best and final offer and determination not to obtain cost and pricing DD form 633 was in accordance with regulations, claim for proposal preparation costs will not be considered---------- 875

Proposal preparation costs claim by offeror, whose award selection was not approved by LEAA because it came under LEAA organizational conflict of interest guideline imposed as limitation on grantee procurements, is denied since rejection of proposal was not arbitrary or capricious. Allocated overhead directly related to offeror's efforts to obtain waiver of LEAA guideline is not recoverable in any case---------- 911

Revisions
Cost

Authority in FPR 1-3.805-1(a)(5) to make award on "initial proposal" basis operates only to permit acceptance of proposal exactly as initially received. Consequently, award, incorporating revised cost proposal submitted by successful offeror in response to call for "best and final" offers (which constituted negotiation), was not made under initial proposal authority---------- 693

CONTRACTS—Continued
Negotiation—Continued
Options
Generally. (*See* **CONTRACTS, Options**)
Prices
Cost and pricing data evaluation Page
Although there were shortcomings and omissions in proposal of awardee under Navy negotiated fixed price "turnkey" family housing procurement and relatively minor inconsistencies and errors in technical evaluation of protester's and awardee's proposal, determination by Navy, in its broad discretion, that awardee had highest technically evaluated proposal had reasonable basis, and initial proposal award based upon lowest dollar per technical quality point ratio to awardee, who had higher priced, higher technically rated proposal, was reasonable despite protester's over $600,000 lower offered price 839
Pricing data. (*See* **CONTRACTS, Negotiation, Cost, etc., data**)
Protests
Generally. (*See* **CONTRACTS, Protests**)
Reopening
Not in best interests of Government
Contracting officer properly did not seek clarification of revised best and final offer which appeared to be inconsistent with offer previously submitted and with requirements of solicitation, since matter went to heart of promised performance and could only be resolved by repoening negotiations with all offerors in competitive range, and reopening of negotiations after submission of second best and final offers was deemed not to be in best interests of Govt 636
Requests for proposals
Amendment
What constitutes
Protester is not justified in relying on oral statements of contracting personnel prior to closing date for receipt of proposals, which would have changed standard cost and pricing data form specified in RFP. Oral representation one day prior to closing date for receipt of proposals without confirmation in writing does not constitute amendment of RFP. 754
Late receipt of proposal. (*See* **CONTRACTS, Negotiation, Late proposals and quotations**)
Preparation costs
Claim for proposal preparation costs is without merit since lack of good faith, arbitrariness or capriciousness must be established and no indication is apparent that proposals were not solicited and evaluated in good faith 787
Protests under
Favoritism alleged
Evidence lacking
Contrary to protester's assertions, Navy denies that contractor received "insider information" substantially prior to closing date for receipt of proposals relating to precise evaluation criteria and numerical breakdown. Also, GAO records do not indicate that awardee was supplied this information during bid protest involving prior procurement having identical evaluation scheme 839

CONTRACTS—Continued
Negotiation—Continued
Requests for proposals—Continued
Protests under—Continued
Merits Page

Merit of untimely protest concerning sufficiency of solicitation's evaluation factors is considered since arguments are interwined with other timely and related issues concerning evaluation of protester's proposal 787

Although protest against validity of scrap and waste factors contained in RFP filed after closing date for receipt of best and final offers is untimely under our bid protest procedures then in effect, protest will be considered on merits since it raises issue significant to procurement practices or procedures in that allegation relates to basic principle of competitive system 875

Timeliness

Since question of whether negotiated award method is proper for GSA's awards of janitorial services is of widespread interest, given number of janitorial services' awards made by GSA and number of protests pending involving negotiated janitorial services' awards, protest will be considered even though untimely raised under Bid Protest Procedures 693

Solicitation improprieties

Allegations were filed after receipt of best and final offers that RFP was deficient for failure to disclose (1) numerical values assigned to mission suitability factors, and (2) relative importance of cost or "other factors" to mission suitability; and failure to include incumbent contractor closeout costs are untimely since they relate to deficiencies apparent before date set for receipt of initial proposals. Argument that protester did not read RFP as making cost independent evaluation factor is rejected since evaluation section clearly indicates three distinct major areas of evaluation—mission suitability, cost, and other factors 715

Protest against alleged action of contracting personnel in orally amending RFP so that only protester was required to use standard cost and pricing form different than all other competitors on day before closing date for receipt of proposals, submitted within 10 days of notification of reasons why agency would not consider proposal, is timely notwithstanding that action occurred before closing date for receipt of proposals since it was not impropriety apparent on face of solicitation. See 40 Fed. Reg. 17979, April 24, 1975 754

Restrictive of competition

Protest based upon contention that incumbent contractor and awardee under subject procurement knowingly submitted production plan containing incorrect and misleading data, which was incorporated into RFP, to gain competitive advantage over other offerors is denied since two separate agency audits show that data used was substantially correct. However, agency advised that verification of such data should be made prior to inclusion in solicitation rather than after protest as in instant case 875

CONTRACTS—Continued
Negotiation—Continued
Requests for quotations
Testing, inspection, etc., requirements
Dual standard Page

Where request for quotations provided only for testing and inspection of product delivered under contract, failure to require preaward sample from manufacturer where such sample was required from surplus dealer creates dual standard which casts doubt on reasonableness of requirement, contrary to principles of free and open competition. However, since contract performance is completed no corrective action is available. 648

Samples
Rejection
Reasonable basis

Although offeror-protester supplied surplus items from same lot to another agency, rejection of sample submitted in connection with current procurement was not without reasonable basis where, contrary to current procurement, protester was not required to refurbish deteriorative components under prior contract 648

Time for submission

Although grounds of protest regarding procuring agency's request that protester submit preaward samples are untimely under Interim Bid Protest Procedures and Standards [4 CFR 20 (1974)], in effect when protest was filed, since samples were submitted without objection and protest was not filed until approximately 5 months later, issues are considered since they are significant to procurement procedures 648

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**)

Offer and acceptance
Oral
Written confirmation

Parties intended to be bound by agency's oral acceptance of offer to purchase rubber where past course of dealing and language of solicitation indicated that execution of written contracts was for purpose of confirming pre-existing agreement 833

Telephone
Enforceable contract

In absence of statute or regulation requiring that Govt. sales contracts be in writing, telephonic offer to purchase stockpile rubber followed by timely telephonic acceptance creates valid and enforceable contract 833

CONTRACTS—Continued

Options

Not be exercised

Janitorial services Page

Recommendation is made that options in questioned negotiated janitorial services contract, and similar outstanding janitorial services contracts, not be exercised and that GSA immediately commence study of appropriate methods and clauses for improving formal advertising procurement method for future needs of janitorial services 693

Since negotiating rationale employed by GSA is same as was cited in *Nationwide Building Maintenance, Inc.*, 55 Comp. Gen. 693, where it was found that GSA had no legal basis to negotiate janitorial services procurements, and since award has been made, option should not be exercised and any future requirement for services should be formally advertised 864

Requirements to be resolicited

Where agency did not discuss certain areas in proposals simply because they were considered "weaknesses," in that they received less than maximum number of evaluation points, as opposed to "deficiencies," which would not satisfy Govt.'s requirements, and agency also changed award evaluation cost factors without communicating information to offerors, it is recommended that option in contract not be exercised and that requirement for option years be resolicited 859

Requirements *v.* contract clause

Appropriation obligation

Where exercise of contract option required Navy to furnish various items of Govt. furnished property (GFP), but contract clause authorized Navy to unilaterally delete items of GFP and make necessary equitable adjustment, full value of unobligated and undelivered GFP should not be considered "obligation" as of time of option exercise for purposes of assessing violation of 31 U.S.C. 665 or 41 U.S.C. 11. Exercise of DLGN 41 contract option did not violate these statutes since recorded obligations and other binding commitment did not exceed available appropriations ... 812

Payments

Past due accounts

Interest

Army proposal to pay interest on amounts already due or subsequently to become due and payable under contracts executed in violation of Antideficiency Act, and for which payment has been delayed due to unavailability of funds, is improper since this would increase amount of overobligation, constituting new and additional violation of Antideficiency Act 768

Protests

Court action

Dismissal of action without prejudice

Where U.S. District Court denied complainant's motion for temporary restraining order to enjoin award by grantee, and complainant then had case dismissed without prejudice, court's consideration of matter did not act as adjudication on merits so as to bar GAO's assuming jurisdiction over complaint 911

CONTRACTS—Continued
Protests—Continued
Interested party requirement Page
Protester should be considered as interested party absent objective evidence to contrary. Mere allegation by awardee based upon its experience that protester was not eligible small business under SBA "Grandfather" clause is insufficient, considering significance of issues involved, to show protester as uninterested in protest dealing with sufficiency of notice of applicable size standard ---- 617
Nonappropriated fund activities
Since protested award of procurement pursuant to section 22(a) of Foreign Military Sales Act will not involve use of appropriated funds, matter is not subject to settlement by GAO and is dismissed ---- 674
Procedures
Bid Protest Procedures
Improprieties and timeliness
Question regarding propriety of IFB's failure to reference applicable SBA "Grandfather" clause (used in determining small business size status) effective 7 days prior to bid opening, where IFB indicated different dollar threshold for small business standard, is significant issue under Bid Protest Procedures ---- 617
Significant issues requirement
Since on many occasions questions raised by protester regarding deficiencies in negotiated solicitation have been discussed, there is no basis to conclude that issues untimely raised are of required level for consideration as significant issues ---- 715
Although protest against validity of scrap and waste factors contained in RFP filed after closing date for receipt of best and final offers is untimely under our bid protest procedures then in effect, protest will be considered on merits since it raises issue significant to procurement practices or procedures in that allegation relates to basic principle of competitive system ---- 875
Timeliness
Although protest, insofar as it concerns IFB discrepancy in designating correct bid opening time, is untimely under Bid Protest Procedures, since it was not filed prior to bid opening, balance of protest, i.e., contention that protester's bid should not have been rejected as late, is timely because protester filed within 10 working days after it became aware of basis for protest ---- 735
Contract award notice effect
Protest filed after agency forwarded notice of award of construction contract to low bidder must be considered as being filed after award since telegraphic notice of award constituted official award of contract -- 936
Negotiated contract
Since question of whether negotiated award method is proper for GSA's awards of janitorial services is of widespread interest, given number of janitorial services' awards made by GSA and number of protests pending involving negotiated janitorial services' awards, protest will be considered even though untimely raised under Bid Protest Procedures ---- 693
Merit of untimely protest concerning sufficiency of solicitation's evaluation factors is considered since arguments are intertwined with other timely and related issues concerning evaluation of protester's proposal ---- 787

CONTRACTS—Continued
Protests—Continued
Timeliness—Continued
Significant issue exception Page

Although grounds of protest regarding procuring agency's request that protester submit preaward samples are untimely under Interim Bid Protest Procedures and Standards [4 CFR 20 (1974)], in effect when protest was filed, since samples were submitted without objection and protest was not filed until approximately 5 months later, issues are considered since they are significant to procurement procedures..... 648

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Allegations were filed after receipt of best and final offers that RFP was deficient for failure to disclose (1) numerical values assigned to mission suitability factors, and (2) relative importance of cost or "other factors" to mission suitability; and failure to include incumbent contractor closeout costs are untimely since they relate to deficiencies apparent before date set for receipt of initial proposals. Argument that protester did not read RFP as making cost independent evaluation factor is rejected since evaluation section clearly indicates three distinct major areas of evaluation—mission suitability, cost, and other factors.... 715

Research and development
Government-furnished property
Use denied

Allegation that Govt. permitted successful offeror to use public research vessel in performance of contract but did not make vessel available to others is denied since record shows that assistance in obtaining vessels was not provided to any offeror and successful offeror acquired vessel in question 10 years ago under grant from entity which is unrelated to procuring agency..... 787

Technical deficiencies
Evaluation propriety

Where Govt.'s statement of work is broad and general, proposal was nevertheless properly considered outside competitive range since, consistent with evaluation factors listed in solicitation, protester's technical proposal was considered to be so deficient as to be wholly unacceptable. Question whether Govt. unfairly construed its work statement too narrowly may not be judged solely from work statement but must be determined in light of solicitation's evaluation factors..... 787

Samples
Negotiated contracts. (*See* **CONTRACTS, Negotiation, Samples**)
Service Contract Act. (*See* **CONTRACTS, Labor stipulations, Service Contract Act of 1965**)
Set-asides
Awards to small business concerns. (*See* **CONTRACTS, Awards, Small business concerns, Set-asides**)
Small business concern awards. (*See* **CONTRACTS, Awards, Small business concerns**)
Sole source procurements. (*See* **CONTRACTS, Negotiation, Sole source basis**)

CONTRACTS—Continued
Specifications
Conformability of equipment, etc., offered
Administrative determination
Negotiated procurement Page

Govt. has not unfairly changed basic accuracy requirement in solicitation for only one offeror where contract as negotiated contained original accuracy specification but merely failed to provide detailed information necessary to establish how successful offeror would in fact implement requirement. Govt. may insist on compliance with original specification. 787

Technical deficiencies
Negotiated procurement

Contracting officer's rejection of protester's second best and final offer as technically unacceptable was proper where cost data submitted with proposal appeared to materially change previously acceptable technical proposal and protester did not furnish adequate detailed explanation of apparent revisions 636

Failure to furnish something required
Addenda acknowledgment
Wage determinations

Bid which failed to acknowledge IFB amendment increasing Davis-Bacon wage rate was properly rejected as nonresponsive, since failure to acknowledge amendment was material deviation. Fact that work to be performed by craft listed in amendment (bricklayer) was not specifically required under specifications is immaterial as agency determined that, in course of contract performance, craft could be employed. However, recommendation is made that procedures be instituted to assure that wage determination modifications are reviewed to ascertain applicability to contract prior to inclusion in amendment 615

Amended specification notice not received

Failure to acknowledge material amendment to IFB which was received and acknowledged by all other bidders justifies rejection of bid even though bidder claims it was never received, so long as there was no deliberate and conscious effort on part of agency to exclude bidder from competition 615

Invitation to bid attachments

Bid which omitted pages of IFB is nonresponsive, notwithstanding it contained every page which required an entry, but which did not serve to incorporate by reference other material pages, and was accompanied by cover letter stating that "applicable documents" are being submitted, which was ambiguous as to whether it referred to documents of IFB as issued or to documents returned with bid, because bidder's intention to be bound by all material provisions of solicitation is unclear 894

Incorporation of contractor-developed "requirements" study

Where contractor of LEAA grantee developed and drafted specifications, which were substantially identical to those used in RFP, which also incorporated contractor-developed "requirements" study, contractor comes under LEAA organizational conflict of interest guideline, which was attached as condition to LEAA grant, was binding on grantee and precludes contractor from competing on RFP 911

CONTRACTS—Continued
Specifications—Continued
Incorporation of terms by reference
Conflict of interest guidelines Page
Contractor has constructive notice of LEAA organizational conflict of interest guideline where it was contained in document incorporated by reference in contract requiring the preparation of specifications. In any case, since guideline is attached as condition to LEAA grant, it is self-executing, and grantee is bound to reject contractor's proposal if contractor fell under guideline, notwithstanding grantee's inadequate notice and contrary advice to contractor 911
Invitation to bid attachments
Failure to return with bid. (*See* **CONTRACTS, Specifications, Failure to furnish something required, Invitation to bid attachments**)
Subcontractors
Minority
Firm commitment for use requirement
Agency erred in merely accepting, without more, offeror's proposed use of specific minority subcontractor then using this fact as significant basis for award decision. Evaluation of resources which offeror merely proposes without contractual control or commitment is "patently irrational." Agency must be reasonably assured that resources are firmly committed to offeror, especially where consideration of factor in evaluation may be determinative of award 715
Termination
Convenience of Government
Antideficiency Act violations
Army proposal to terminate for convenience of Govt. contracts executed in violation of Antideficiency Act is authorized since proposed termination action would mitigate consequences of Antideficiency Act violation with respect to these contracts, in that termination costs would presumably be less than obligations now attributable to contracts 768
Partial
Where low offeror claimed exemption from CAS on ground that its offered prices were based upon its established catalog or market prices, exemption should not have been denied solely because adequate price competition was obtained by agency. Recommendation is made that agency review claim and if basis for exemption existed then consideration be given to termination for convenience of contract awarded to second low offeror and award of terminated quantities to low offeror 881
Negotiation procedures propriety
Although defects in negotiation procedures would ordinarily prompt recommendation that contract be terminated, if contractor was not successful after further round of negotiations, recommendation is not made considering unusual circumstances of case 693
Because of GSA's widespread difficulties with deficient performance on formally advertised janitorial services contracts, GSA's possible misunderstanding of the decisions of GAO as applied to "below cost" bidding, and GAO opinion that GSA should be given time to study alternative solutions to difficulties, termination of protested award is not recommended 693

CONTRACTS—Continued
Types
Incentive Page
None of the exceptions to formal advertising (as set forth in 41 U.S.C. 252(c)(1)–(15)) expressly authorizes use of negotiations only to secure desired level of quality of janitorial services or to obtain incentive-type contract. Moreover, analysis of legislative history of Federal Property and Administrative Services Act (40 U.S.C. 471), under which questioned negotiated award of services was made, shows that Congress specifically rejected proposal to permit negotiation to secure desired level of quality of supplies or services 693

DEFENSE DEPARTMENT
Emergency preparedness mobilization planning program
Production Planning Schedule
Pursuant to ASPR 1-2201(d), industrial firm becomes "planned producer" of "planned" item under DOD emergency preparedness mobilization planning program when it completes and executes DD Form 1519, "Production Planning Schedule." 703

DETAILS
Extensions
Civil Service Commission approval
Air Force detailed GS-4 employee to GS-5 position for over 1 year beginning July 1, 1970, without obtaining CSC's prior approval of extension beyond 120 days. Agency's discretionary authority to retain employee on detail continues no longer than 120 days, after which agency must either have obtained Commission approval or grant employee temporary promotion. Since agency failed to obtain approval, employee is entitled to retroactive temporary promotion from 121st day of detail to its termination 785
Decision of Dec. 5, 1975, 55 Comp. Gen. 539, entitling otherwise qualified employee to temporary promotion on 121st day of detail to higher grade position when prior approval of extension of detail beyond 120 days has not been obtained from Civil Service Commission will be applied retrospectively to extent permitted by 6-year statute of limitations applicable to GAO 785
Temporary promotions
In lieu of detail
Agency's *v.* employee's choice
Employee was advised prior to detail action that, if she so elected, she could be promoted temporarily but would not receive per diem while at temporary duty station. She elected to receive per diem in lieu of temporary promotion. Although temporary promotion was discretionary, agency had no right to require employee to make such choice. Since agency states that employee would have been promoted but for the improper action, unjustified or unwarranted personnel action occurred and retroactive promotion with backpay for period of detail may be made 836

DOCUMENTS
Incorporation by reference
Contracts. (*See* **CONTRACTS, Incorporation of terms by reference**)

ENVIRONMENTAL PROTECTION AND IMPROVEMENT
Grants-in-aid
Environmental law scholarships Page
Proposed lump-sum grant by EPA to American Law Institute to provide scholarships to defray transportation, food, and lodging expenses at environmental law seminar does not violate 31 U.S.C. 551 which prohibits use of appropriated funds to pay expenses of conventions or gatherings without specific authority since expenditures of properly authorized grant funds are not subject to restrictions upon direct expenditure of appropriations 750

EQUIPMENT
Automatic Data Processing Systems
Service contracts
Applicability of Service Contract Act
GAO will not object to inclusion by contracting agency of Service Contract Act provisions in solicitations for data processing services, even though U.S. District Court has ruled that Act is not applicable to such services, since Dept. of Labor (DOL), which has responsibility for administering Act, has declined to follow the decision in all other jurisdictions and has been supported in its position by cognizant congressional committee, and since there is conflict within same judicial circuit as to whether decisions by DOL regarding coverage of the Act are judicially reviewable 675

ESTOPPEL
Against Government
Not established
Estoppel has not been established against LEAA application of organizational conflict of interest guideline for grantee procurements to prevent grantee award to offeror, who developed and drafted specifications, notwithstanding assurances given to offeror by grantee that it could compete, since grantee's assurances cannot bind LEAA and LEAA apparently was not aware of all facts showing offeror came under guideline prior to communicating this fact to grantee 911

FAIR LABOR STANDARDS ACT
Applicability
Employees of United States
Fair Labor Standards Amendments, Pub. L. 93–259
Firefighters
Overtime
Federal firefighters with 72-hour tour of duty are entitled to 12 hours overtime compensation under FLSA in 1975. Their regular rate of pay for computing overtime is determined by dividing their total compensation by number of hours in their tour of duty, 72, there being no basis for the divisor to be limited to number of hours beyond which overtime must be paid, 60. Therefore, since FLSA requires overtime pay at rate of one and one-half times regular rate of pay and firefighters have already been paid regular rate for 12 hours of overtime, extra compensation for overtime is limited to one-half their regular rate of pay 908

FAMILY ALLOWANCES
Evacuation
Requirement
Unusual or emergency circumstances Page
Military members required to involuntarily relocate their households incident to base closings in Japan under Kanto Plain Consolidation Plan, without permanent changes of station, may not be paid dislocation allowance under 37 U.S.C. 407(a), nor may they be paid such allowance pursuant to 37 U.S.C. 405a since the relocations were not evacuations incident to unusual or emergency circumstances 932

FEDERAL MANAGEMENT CIRCULAR
Policy matters
LEAA organizational conflict of interest guideline is not inconsistent with FMC 74–7 Attachment O, since provisions of FMC 74–7–0 are matters of Executive branch policy, which do not establish legal rights and responsibilities, and Office of Federal Procurement Policy has found guideline to be acceptable implementation of FMC 74–7–0 911

FEDERAL REGISTER
Effect of Publication
Since LEAA Manual, which was promulgated pursuant to Omnibus Crime Control and Safe Streets Act, was not published in Federal Register, only parties with actual or constructive notice are bound by its contents and constructive knowledge exists where Manual is incorporated by reference into grant or contract 911

FEES
Accredited rural appraisers
Examination fees, etc.
Exams not integral part of course of instruction are not within definition of "training" in 5 U.S.C. 4101(4). Therefore, Govt. reimbursement of costs of exam leading to certification of Govt. employee as accredited rural appraiser is not permitted by terms of Govt. Employees' Training Act, 5 U.S.C. 4101–4118 759
Parking
Disposition
Under 40 U.S.C. 490(k), fees collected by Executive agency for space provided to "anyone" pursuant to that provision, including parking fees collected from employees, if rates therefor are approved, are generally to be credited to appropriations initially charged for such services, except that amounts collected in excess of actual costs must be remitted to Treasury as miscellaneous receipts 897
Rates
Approval
Where Executive agency other than GSA provides parking space or related services to employees, or to others, agency is authorized by 40 U.S.C. 490(k) to charge occupants therefor if, but only if, rates are approved by Administrator of General Services and Office of Management and Budget 897

FINES
Violation of wagering tax
Refund by IRS
Appropriation chargeable Page
Refund by IRS of fine paid pursuant to conviction for violation of wagering tax statutes, which refund was ordered in connection with subsequent vacation of judgment, should be charged against account 20X0903 (Refunding Internal Revenue Collections) rather than account 20X1807 (Refund of Moneys Erroneously Received and Covered), since initial receipt of fine by IRS was apparently treated as internal revenue collection, and account 20X1807 is available only when refund is not properly chargeable to any other appropriation 625

FORMS
Department of Defense
Form 633
Contract pricing proposal
Protest based upon contention that incumbent contractor and awardee under subject procurement knowingly submitted production plan containing incorrect and misleading data, which was incorporated into RFP, to gain competitive advantage over other offerors is denied since two separate agency audits show that data used was substantially correct. However, agency advised that verification of such data should be made prior to inclusion in solicitation rather than after protest as in instant case 875
Form 1519
Production Planning Schedule
Pursuant to ASPR 1–2201(d), industrial firm becomes "planned producer" of "planned" item under DOD emergency preparedness mobilization planning program when it completes and executes DD Form 1519, "Production Planning Schedule." 703

FREEDOM OF INFORMATION ACT
Disclosure requests
Contract protester
Where protester files suit under Freedom of Information Act to obtain documents submitted by agency to GAO for *in camera* review, and requests delay of GAO decision on protest pending outcome of suit, delay of decision would be unreasonable because of indefinite delay of procurement process, severe impact on proposed awardee, and fact that delay would permit protester (incumbent contractor) to continue as holdover contractor long after new contractor (only possibly protester) should have been awarded contract 715

FUNDS
Federal grants, etc., to other than States
Applicability of Federal statutes
Appropriation, etc., restrictions
Proposed lump-sum grant by EPA to American Law Institute to provide scholarships to defray transportation, food, and lodging expenses at environmental law seminar does not violate 31 U.S.C. 551 which prohibits use of appropriated funds to pay expenses of conventions or gatherings without specific authority since expenditures of properly authorized grant funds are not subject to restrictions upon direct expenditure of appropriations 750

FUNDS—Continued
Federal grants, etc., to other than States—Continued
Educational grants
Funding
Direct *v.* indirect overhead costs Page

Sec. 204(d)(2) of National Sea Grant College and Program Act of 1966, which prohibits Federal funding for purchase or rental of land, or purchase, rental, construction, preservation or repair of building, dock or vessel applies only to Federal grant payments for direct costs for listed categories. This section does not prohibit payments computed by using standard indirect overhead cost rates, even though such rates may include factors technically attributable to prohibited categories..... 652

Nonappropriated
Contract awards
Protest status

Since protested award of procurement pursuant to section 22(a) of Foreign Military Sales Act will not involve use of appropriated funds, matter is not subject to settlement by GAO and is dismissed..... 674

GENERAL ACCOUNTING OFFICE
Contracts
Recommendation for corrective action

Bid which failed to acknowledge IFB amendment increasing Davis-Bacon wage rate was properly rejected as nonresponsive, since failure to acknowledge amendment was material deviation. Fact that work to be performed by craft listed in amendment (bricklayer) was not specifically required under specifications is immaterial as agency determined that, in course of contract performance, craft could be employed. However, recommendation is made that procedures be instituted to assure that wage determination modifications are reviewed to ascertain applicability to contract prior to inclusion in amendment..... 615

Decisions
Advance
Disbursing and certifying officers
How requests should be addressed

Certifying officers should address requests for advance decisions under provisions of 31 U.S.C. 82d to the Comptroller General of the United States, Washington, D.C. 20548..... 645

Procedure

Although, normally, the Comptroller General of the U.S. GAO would not render decision to question of law submitted by certifying officer unaccompanied by voucher as required by 31 U.S.C. 82d, statutory authority under which GAO renders decisions to certifying officers, since question submitted is general in nature and will be recurring one, reply to question raised is addressed to head of agency under broad authority contained in 31 U.S.C. 74, pursuant to which GAO may provide decisions to heads of departments on any question involved in payments which may be made by that department..... 652

GENERAL ACCOUNTING OFFICE—Continued
Jurisdiction
Contracts
Nonappropriated fund activities
Page
Since protested award of procurement pursuant to section 22(a) of Foreign Military Sales Act will not involve use of appropriated funds, matter is not subject to settlement by GAO and is dismissed 674
Protests generally. (*See* **CONTRACTS, Protests**)
Recommendations
Amended HUD regulations
Insurance premiums on loans
Claims under mobile home loan insurance pursuant to 12 U.S.C.A. 1703 by lending institution presently delinquent in insurance premium payments may be allowed if default on loan occurred while premium payments were current, but cannot be allowed if default occurred or was imminent after premium payments became delinquent. Past due premium charges may be set off against allowable claims, if lender agrees to such setoff. Alternatively, remaining insurance coverage nay be canceled. In no event is set-off of future premium charges appropriate. GAO recommends, pursuant to 31 U.S.C A. 1176, that HUD regulations be amended in terms of foregoing issues and conclusions 658
Contracts
Janitorial services
Procurement methods
Recommendation is made that options in questioned negotiated janitorial services contract, and similar outstanding janitorial services contracts, not be exercised and that GSA immediately commence study of appropriate methods and clauses for improving formal advertising procurement method for future needs of janitorial services 693
Options
Not to be exercised
Where agency did not discuss certain areas in proposals simply because they were considered "weaknesses," in that they received less than maximum number of evaluation points, as opposed to "deficiencies," which would not satisfy Govt.'s requirements, and agency also changed award evaluation cost factors without communicating information to offerors, it is recommended that option in contract not be exercised and that requirement for option years be resolicited 859
GENERAL SERVICES ADMINISTRATION
Authority
Space assignment
Parking
General Services Administration does not assert, nor does it have, authority to force agencies to accept and pay for parking space in excess of their stated needs 897
User charges
Where Executive agency other than GSA provides parking space or related services to employees, or to others, agency is authorized by 40 U.S.C. 490(k) to charge occupants therefor if, but only if, rates are approved by Administrator of General Services and Office of Management and Budget 897

GRANTS

Authority of agency to impose conditions Page

LEAA organizational conflict of interest guideline precluding contractors who draft or develop specifications for LEAA grantee procurements from competing for those procurements, which was promulgated under LEAA rule-making authority and attached as binding condition on LEAA grants, is reasonably related to purposes of LEAA enabling legislation, since LEAA may impose reasonable conditions on its grants to assure Federal funds are expended in fiscally responsible and proper manner consistent with Federal interests, and condition is not imposed in contravention of any law 911

LEAA organizational conflict of interest guideline for grantee procurements, which reads: "Contractors that develop or draft specifications, requirements, statements of work and/or RFP's for a proposed procurement shall be excluded from bidding or submitting a proposal to compete for the award of such procurement" is not unenforceably vague, since terms used in guideline have clear meaning in this context. 911

Scholarships

Environmental Protection Agency

Proposed lump-sum grant by EPA to American Law Institute to provide scholarships to defray transportation, food, and lodging expenses at environmental law seminar does not violate 31 U.S.C. 551 which prohibits use of appropriated funds to pay expenses of conventions or gatherings without specific authority since expenditures of properly authorized grant funds are not subject to restrictions upon direct expenditure of appropriations 750

To other than States. (*See* **FUNDS, Federal grants, etc., to other than States**)

HAWAII

Employees

Renewal agreement travel

Dependents

Alternate locations

When dependents of employee are not permitted to accompany him to post of duty outside continental U.S., or in Hawaii or Alaska, and are transported to alternate location under authority of 5 U.S.C. 5725, employee is entitled to transportation expenses for those dependents incident to own entitlement to renewal agreement travel under 5 U.S.C. 5728(a) based on cost of travel between alternate location and employee's place of actual residence at time of appointment or transfer to post of duty 886

HOUSING
Loans
Default
Insurance coverage
Failure to obtain Page

Bank requested FHA reimbursement under insurance pursuant to 12 U.S.C. 1703 for loss sustained when borrower defaulted on home improvement loan. While bank states it reported loan to FHA as required, FHA has no record that bank had applied for loan insurance and consequently bank was not billed for and did not pay advance premium required by that statute. Further, bank had actual notice that loan is not insured until acknowledged by FHA in monthly statement and bank admittedly erred in not recognizing on timely basis omission of this loan in next monthly statement rendered by FHA. Therefore, we conclude that in absence of showing of actual negligence by FHA, loan was not insured and reimbursement would be improper 891

"Turnkey" developers
Contracts
Negotiated procedures

Although there were shortcomings and omissions in proposal of awardee under Navy negotiated fixed price "turnkey" family housing procurement and relatively minor inconsistencies and errors in technical evaluation of protester's and awardee's proposal, determination by Navy, in its broad discretion, that awardee had highest technically evaluated proposal had reasonable basis, and initial proposal award based upon lowest dollar per technical quality point ratio to awardee, who had higher priced, higher technically rated proposal, was reasonable despite protester's over $600,000 lower offered price 839

Navy RFP for "turnkey" family housing, which listed major technical criteria in descending order of importance and listed and explained all subcriteria of major criteria, although subcriteria's relative weight was not disclosed, has satisfied requirement that prospective offerors be informed of broad scheme of scoring to be employed and given reasonably definite information as to degree of importance to be accorded to particular factors in relation to each other. Disclosure of precise numerical weights is not required. However, RFP is defective for failing to disclose role or price in evaluation scheme 839

HOUSING AND URBAN DEVELOPMENT DEPARTMENT
Defaulted loans. (*See* **HOUSING, Loans, Default**)
Loans and grants
Mobile home loan insurance
"In advance" premiums

Timely payment by insured lender of premiums for mobile home loan insurance under sec. 2, title I, of National Housing Act, as amended, 12 U.S.C.A. 1703—which requires payment of premiums "in advance"—is prerequisite to continued insurance coverage. There is no basis for implication, underlying HUD proposal to set off against insurance claims past due and future premiums of delinquent lending institution, that insurance coverage is unaffected by nonpayment of premiums 658

IMMIGRATION AND NATURALIZATION SERVICE (*See* **JUSTICE DEPARTMENT, Immigration and Naturalization Service**)

INDIAN AFFAIRS
Contracts
Bureau of Indian Affairs
Indian Self-Determination Act
Applicability of Federal contracting laws and regulations Page

Proposed award of school design contract to Indian school board under title I, Public Law 93-638—"Indian Self-Determination Act"—is not objectionable, provided requirements of act and its regulations are satisfied. Act provides contracting authority covering broad range of Indian programs and independent of contracting laws and regulations ordinarily applicable to Interior Department, including Brooks Bill architect-engineer selection procedure (40 U.S.C. 541, *et seq.*, and FPR subpart 1-4.10). Therefore, protest by architectural firm competing in Brooks Bill procurement initiated prior to school board's application for contract under P.L. 93-638 is denied ---- 765

INSURANCE
Premiums
Mobile home loan insurance

Claims under mobile home loan insurance pursuant to 12 U.S.C.A. 1703 by lending institution presently delinquent in insurance premium payments may be allowed if default on loan occurred while premium payments were current, but cannot be allowed if default occurred or was imminent after premium payments became delinquent. Past due premium charges may be set off against allowable claims, if lender agrees to such setoff. Alternatively, remaining insurance coverage may be canceled. In no event is set-off of future premium charges appropriate. GAO recommends, pursuant to 31 U.S.C.A. 1176, that HUD regulations be amended in terms of foregoing issues and conclusions---- 658

INTEREST
Contracts
Interest on investment or borrowings

Failure of procuring activity to inform competing offeror in negotiated procurement for fixed-price contract that Govt. would directly reimburse contractor for interest on borrowings to finance plant expansion when reimbursement is prohibited by agency procurement regulation denied such offeror opportunity to compete on equal basis---- 802

Although technical "transfusion" of one offeror's unique or innovative idea to other offerors is prohibited, offeror's request for direct reimbursement by Govt. of its interest expense is not such a unique or innovative idea, but is suggestion for departure from procurement "ground rules" which, if accepted by agency, must be communicated to all competing offerors---- 802

Payment delay
Contracts

Army proposal to pay interest on amounts already due or subsequently to become due and payable under contracts executed in violation of Antideficiency Act, and for which payment has been delayed due to unavailability of funds, is improper since this would increase amount of overobligation, constituting new and additional violation of Antideficiency Act---- 768

INTERNAL REVENUE SERVICE
Fines
Violation of wagering tax
Refunds
Appropriation chargeable Page

Refund by IRS of fine paid pursuant to conviction for violation of wagering tax statutes, which refund was ordered in connection with subsequent vacation of judgment, should be charged against account 20X0903 (Refunding Internal Revenue Collections) rather than account 20X1807 (Refund of Moneys Erroneously Received and Covered), since initial receipt of fine by IRS was apparently treated as internal revenue collection, and account 20X1807 is available only when refund is not properly chargeable to any other appropriation 825

IRAN
Home of selection at retirement
Military members

Member, who on retirement traveled to his home of selection in Iran with wife on American flag commercial air carrier chartered by his new employer and who had $950 included in annual statement of earnings by employer as amount paid to third party for travel expenses, is not entitled to reimbursement of air travel expenses since that travel was not performed at personal expense as required by applicable regulations .. 761

JUSTICE DEPARTMENT
Immigration and Naturalization Service
Repair and maintenance of International Boundary fences

Appropriation of INS may be used to repair International Boundary fences on private property if expenditures and improvements are necessary for effective accomplishment of purposes of Service's appropriation, are in reasonable amounts, are made for principal benefit of U.S. and interests of Govt. are fully protected 872

Law Enforcement Assistance Administration. (*See* **LAW ENFORCEMENT ASSISTANCE ADMINISTRATION**)

LABOR DEPARTMENT
Programs
"Win" *v.* Service Contract Act

Protests against award of contracts because possible competitive advantages may accrue to competitors availing themselves of "WIN" program (providing for limited wage rate reimbursement and tax benefits for hiring and training of welfare recipients) are denied since matter is conjectural and any competitive advantages would not result from preferential or unfair treatment by Govt. While possible ramification of WIN program might be inconsistent with one purpose of Service Contract Act of 1965, program is not contrary to any provision of Act .. 656

LAW ENFORCEMENT ASSISTANCE ADMINISTRATION
Grants–in–aid
Guidelines
Conflict of interest Page

LEAA organizational conflict of interest guideline precluding contractors who draft or develop specifications for LEAA grantee procurements from competing for those procurements, which was promulgated under LEAA rule-making authority and attached as binding condition on LEAA grants, is reasonably related to purposes of LEAA enabling legislation, since LEAA may impose reasonable conditions on its grants to assure Federal funds are expended in fiscally responsible and proper manner consistent with Federal interests, and condition is not imposed in contravention of any law 911

LEAVES OF ABSENCE
Administrative leave
Awaiting arrival of movers

Transferred employee seeks restoration of 8 hours annual leave charged to leave account while awaiting arrival of movers on scheduled day of travel. If agency to which employee is assigned determines that claimant delayed travel while reasonably and necessarily awaiting movers, GAO would interpose no objection if claimant was administratively excused for such time as was essential for such purpose 779

Annual
Accrual
Maximum limitation
Forfeiture due to administrative error

Employee retired effective December 31, 1974, and received temporary appointment effective Jan. 1, 1975, not to exceed June 30, 1975. Since there was no break in service, employee's annual leave balance was transferred to new appointment and he forfeited 80 hours of annual leave at end of leave year pursuant to 5 U.S.C. 6304. Agency is requested to determine whether it violated mandatory requirement to advise employee he would forfeit annual leave if he accepted temporary appointment without break in service. If such violation occurred, leave is for restoration under 5 U.S.C. 6304(d)(1)(A) 784

LICENSES
Use of sewage system
Revocable license for limited use

Perryville, Maryland, recreational park may be permitted to discharge sewage into VA sewage system if VA determines administratively that arrangement is in interest of Govt. and agreement constitutes only revocable license for limited use 688

LOANS
Government insured
Default Page
Bank's negligence, fraud or misrepresentation effect on guarantee
Bank requested FHA reimbursement under insurance pursuant to 12 U.S.C. 1703 for loss sustained when borrower defaulted on home improvement loan. While bank states it reported loan to FHA as required, FHA has no record that bank had applied for loan insurance and consequently bank was not billed for and did not pay advance premium required by that statute. Further, bank had actual notice that loan is not insured until acknowledged by FHA in monthly statement and bank admittedly erred in not recognizing on timely basis omission of this loan in next monthly statement rendered by FHA. Therefore, we conclude that in absence of showing of actual negligence by FHA, loan was not insured and reimbursement would be improper 891

MEETINGS
Travel, etc., expenses
State officials
Decision B-166506, July 15, 1975, holding payment by EPA of transportation and lodging expenses of State officials attending National Solid Waste Management Association Convention is prohibited by 31 U.S.C. 551, unless otherwise authorized by statute, is affirmed. Provision of Administrative Expenses Act (5 U.S.C. 5703(c)), permitting payment of such expenses for persons serving Govt. without compensation does not provide necessary exception to 31 U.S.C. 551 since attendees at conference are not providing direct service to Govt. and are therefore not covered by 5 U.S.C. 5703(c) 750

MILEAGE
Military personnel
Retirement
Last duty station to port of embarkation
Member, who on retirement traveled to his home of selection in Iran from Fort Hood, Texas, on American flag commercial air carrier, is not entitled to be reimbursed for transoceanic air travel since travel was not performed at personal expense. However, he is entitled to mileage allowance for himself and wife from Fort Hood to appropriate aerial port of embarkation but is limited to payment of mileage to actual port of embarkation, Dallas, Texas, since this was only travel performed at personal expense and paragraph M4151 of JTR provides that mileage is allowance payable for travel performed at personal expense 761

MILITARY PERSONNEL

Appointments. (*See* **APPOINTMENTS, Military personnel**)

Dependents

Benefits

Survivor Benefit Plan

Retirement eligibility requirement Page

Air Force officer who had over 20 years' service when he died while on active duty was not eligible for retirement under 10 U.S.C. 8911 because less than 10 years of such service was as commissioned officer. Neither was he eligible for retirement under 10 U.S.C. 8914 which applies to enlisted members since at date of death he was officer. Therefore, widow is not entitled to SBP annuity under 10 U.S.C. 1448(d) since such annuity is contingent upon member having been qualified for retired pay 854

Retired. (*See* **PAY, Retired**)

Retirement

Travel and transportation entitlement

Personal expense requirement

Member, who on retirement traveled to his home of selection in Iran with wife on American flag commercial air carrier chartered by his new employer and who had $950 included in annual statement of earnings by employer as amount paid to third party for travel expenses, is not entitled to reimbursement of air travel expenses since that travel was not performed at personal expense as required by applicable regulations. 761

Survivor Benefit Plan. (*See* **PAY, Retired, Survivor Benefit Plan**)

Telephone services

Private residences

Military members required to relocate their households incident to base closings in Japan without permanent changes of station may not be reimbursed personal expenses incurred for purchase of rugs, drapes, curtains, and service charges for items of personal convenience not essential to the occupation of quarters. Also, reimbursement for telephone installation charges is specifically prohibited by 31 U.S.C. 679 932

MISCELLANEOUS RECEIPTS

Special account *v.* miscellaneous receipts

Collections

Parking fees

Under 40 U.S.C. 490(k), fees collected by Executive agency for space provided to "anyone" pursuant to that provision, including parking fees collected from employees, if rates therefor are approved, are generally to be credited to appropriations initially charged for such services, except that amounts collected in excess of actual costs must be remitted to Treasury as miscellaneous receipts 897

MISCELLANEOUS RECEIPTS—Continued
Special account *v.* miscellaneous receipts—Continued
Fines
Violation of wagering tax — Page
Refund by IRS of fine paid pursuant to conviction for violation of wagering tax statutes, which refund was ordered in connection with subsequent vacation of judgment, should be charged against account 20X0903 (Refunding Internal Revenue Collections) rather than account 20X1807 (Refund of Moneys Erroneously Received and Covered), since initial receipt of fine by IRS was apparently treated as internal revenue collection, and account 20X1807 is available only when refund is not properly chargeable to any other appropriation 625

OFFICE OF FEDERAL PROCUREMENT POLICY
Scope of rulemaking authority
LEAA organizational conflict of interest guideline is not inconsistent with FMC 74–7 Attachment O, since provisions of FMC 74–7–0 are matters of Executive branch policy, which do not establish legal rights and responsibilities, and Office of Federal Procurement Policy has found guideline to be acceptable implementation of FMC 74–7–0 911

OFFICERS AND EMPLOYEES
Accredited rural appraisers
Examination costs
Fees and travel expenses
Exams not integral part of course of instruction are not within definition of "training" in 5 U.S.C. 4101(4). Therefore, Govt. reimbursement or costs of exam leading to certification of Govt. employee as accredited rural appraiser is not permitted by terms of Govt. Employees' Training Act, 5 U.S.C. 4101–4118 759
Administrative leave. (*See* **LEAVES OF ABSENCE**, Administrative leave)
Compensation. (*See* **COMPENSATION**)
Contracting with Government
Public policy objectionability
Exception
Expenses of renting boat and equipment from Govt. employee for purpose of performing acoustical measurements are not reimbursable as travel expenses. Equipment should have been obtained by procurement means with due regard to section 1–1.302–3 of Fed. Procurement Regs. and public policy prohibiting Govt. from contracting with its employees except for most cogent of reasons as where Govt.'s needs cannot otherwise reasonably be met. Payment may, however, be made on *quantum meruit* basis insofar as receipt of goods and services has been ratified by authorized official 681
Details. (*See* **DETAILS**)
Excusing from work
Purpose for excusing
Transferred employee seeks restoration of 8 hours annual leave charged to leave account while awaiting arrival of movers on scheduled day of travel. If agency to which employee is assigned determines that claimant delayed travel while reasonably and necessarily awaiting movers, GAO would interpose no objection if claimant was administratively excused for such time as was essential for such purpose 779

OFFICERS AND EMPLOYEES—Continued
Handicapped
Honor award recipients Page
Travel expenses for attendants to attend honor award ceremonies. (*See* **TRAVEL EXPENSES, Private parties, Attendants for handicapped honor award recipients, Travel to attend award ceremonies**)
Hours of work
Workweek changes
Violation of negotiated agreement
Federal Labor Relations Council requests decision on legality of arbitration award of backpay to 54 shipyard employees for overtime and time not worked. The arbitrator found that Shipyard changed basic workweek of employees without complying with consultation requirements of negotiated agreement. However, because arbitrator did not find that but for failure of Shipyard to consult with union, change in basic workweek would not have occurred, award does not satisfy criteria of Back Pay Act, 5 U.S.C. 5596 and, therefore, it may not be implemented.. 629
Moving expenses
Relocation of employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)
Promotions
Compensation. (*See* **COMPENSATION, Promotions**)
Temporary
Detailed employees
Air Force detailed GS-4 employee to GS-5 position for over 1 year beginning July 1, 1970, without obtaining CSC's prior approval of extension beyond 120 days. Agency's discretionary authority to retain employee on detail continues no longer than 120 days, after which agency must either have obtained Commission approval or grant employee temporary promotion. Since agency failed to obtain approval, employee is entitled to retroactive temporary promotion from 121st day of detail to its termination ---------- 785
Employee was advised prior to detail action that, if she so elected, she could be promoted temporarily but would not receive per diem while at temporary duty station. She elected to receive per diem in lieu of temporary promotion. Although temporary promotion was discretionary, agency had no right to require employee to make such choice. Since agency states that employee would have been promoted but for the improper action, unjustified or unwarranted personnel action occurred and retroactive promotion with backpay for period of detail may be made ---------- 836
Retroactive
Decision of Dec. 5, 1975, 55 Comp. Gen. 539, entitling otherwise qualified employee to temporary promotion on 121st day of detail to higher grade position when prior approaval of extension of detail beyond 120 days has not been obtained from Civil Service Commission will be applied retrospectively to extent permitted by 6-year statute of limitations applicable to GAO---------- 785

OFFICERS AND EMPLOYEES—Continued

Training

Personal *v.* Government expenses

Examination costs

Accredited rural appraisers Page

Exams not integral part of course of instruction are not within definition of "training" in 5 U.S.C. 4101(4). Therefore, Govt. reimbursement of costs of exam leading to certification of Govt. employee as accredited rural appraiser is not permitted by terms of Govt. Employees' Training Act, 5 U.S.C. 4101–4118 759

Transfers

Relocation expenses

Authorization

Not discretionary

Where transferred employee's travel authorization did not expressly provide for reimbursement of expenses in connection with purchase of residence at new duty station, orders may be amended to authorize payment of residence transaction expenses. Provision for payment of expenses in connection with purchase or sale of residence contained at 2–6.1, FPMR 101–7, contemplates uniform allowance of such expenses to transferred employees 613

Break in service

Reemployed by term appointment

Employee who was separated by RIF by NASA and employed after break in service of less than 1 month by term appointment with HEW, may be reimbursed expenses of selling house at NASA duty station since term appointment with HEW was "nontemporary appointment" and eligibility for relocation expenses arose under that section incident to RIF by NASA and employment by HEW 664

Flat fee expenses

House purchase or sale

Pro rata expense reimbursement. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses, Pro rata expense reimbursement, House purchase or sale, Flat fee expenses**)

House purchase

Insurance

Employee who purchased "owners title policy" incident to purchase of residence at new duty station as distinguished from "mortgage title policy" is precluded by section 4.2d of OMB Cir. No. A–56, revised August 17, 1971, from being reimbursed for such cost 779

Interim financing loan

Transferred employee who obtains "interim financing loan" to be used as down payment on residence at new duty station, because residence at old duty station has not yet been sold, may not be reimbursed for any expenses relating to "interim financing loan." Prohibition in 5 U.S.C 5724a, FTR and JTR, against reimbursement of any losses on sale of residence due to market conditions is sufficiently broad to proclude reimbursement here, since need for "interim financing loan" arises becausc of market conditions 679

OFFICERS AND EMPLOYEES—Continued
Transfers—Continued
Relocation expenses—Continued
House puchase—Continued
Not consummated Page

Employee who was in process of purchasing new residence incident to transfer and was prevented from completing purchase transaction by second transfer may have deposit forfeited included as miscellaneous expense allowance incident to his two transfers and he would be entitled to maximum miscellaneous expense allowance for each transfer as provided in para. 2–3.3b, FTR, not to exceed actual miscellaneous expense incurred 628

Pro rata expense reimbursement
Flat fee expenses

Where employee purchases two-family dwelling, otherwise allowable real estate expenses which are based on flat fee, without regard to purchase price, should, if reasonable, be reimbursed in toto 747

Miscellaneous expenses
House deposit forfeiture

Employee who was in process of purchasing new residence incident to transfer and was prevented from completing purchase transaction by second transfer may have deposit forfeited included as miscellaneous expense allowance incident to his two transfers and he would be entitled to maximum miscellaneous expense allowance for each transfer as provided in para. 2–3.3b, FTR, not to exceed actual miscellaneous expense incurred 628

Pro rata expense reimbursement
House purchase or sale
Two–family dwelling

Employee who purchased two-family dwelling is entitled to pro rata reimbursement of otherwise allowable real estate expenses since OMB Circular No. A–56 does not contemplate application of fixed 50 percent formula whenever employee purchases two-family dwelling. In establishing the applicable reimbursement percentage when more than 50 percent is claimed, agency should require employee to submit specific information as to space occupied by employee as residence and living quarters and, if necessary, expert opinion as to propriety of percentage claimed 747

"Settlement date" limitation on property transactions
Extension
Retirement of employee prior to residence sale

Although employee voluntarily retired from Govt. service 4 months prior to final settlement on sale of residence at old official duty station, he is entitled to reimbursement of real estate expenses where sale was completed within 2-year extended time period following date he reported for duty at new official duty station since he completed 12 months of service required by transportation agreement, and transferred employee's right to reimbursement of real estate expenses continues after date of voluntary retirement 645

OFFICERS AND EMPLOYEES—Continued
Transfers—Continued
Relocation expenses—Continued
Temporary quarters
Security deposit forfeited Page

Employee who cancels 3-month lease for temporary quarters and forfeits security deposit for breach of lease, is not entitled to reimbursement on theory that forfeited security deposit constitutes allowable subsistence expense 779

Two-family dwellings. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses, Pro rata expense reimbursement, House purchase or sale, Two-family dwelling**)

Uniform allowances

Where transferred employee's travel authorization did not expressly provide for reimbursement of expenses in connection with purchase of residence at new duty station, orders may be amended to authorize payment of residence transaction expenses. Provision for payment of expenses in connection with purchase or sale of residence contained at 2-6.1, FPMR 101-7, contemplates uniform allowance of such expenses to transferred employees 613

PARKING FACILITIES
Fees. (*See* **FEES, Parking**)
General Services Administration
Authority

General Services Administration does not assert, nor does it have, authority to force agencies to accept and pay for parking space in excess of their stated needs 897

PAY
Retired
Disability
Computation
Method
Most favorable formula

Enlisted member of Army who is eligible for voluntary retirement for over 20 years of service, and who would be entitled to 10 percent increase for act of extraordinary heroism in computation of retired pay, is entitled to such increase if he is retired for disability, since retired pay computation statute applicable to disability retirements authorizes computation of retired pay on basis of formula most favorable to member if he is otherwise entitled to compute retired pay under another provision of law 701

Extraordinary heroism

Although 10 U.S.C. 3914, which authorizes voluntary retirement with more than 20 and less than 30 years' service, provides that members so retired will be members of Army Reserve and perform involuntary active duty as prescribed by law, retirement and receipt of retired pay under that section are separate and distinct from the Reserve obligations and members retired for disability after having 20 years' service may receive retired pay computed under applicable formula even though not in Reserve 701

Most favorable formula method of computation. (*See* **PAY, Retired, Disability, Computation, Method, Most favorable formula**

PAY—Continued
Retired—Continued
Disability—Continued
Temporary retired list Page
Death prior to Senate confirmation to appointment on permanent retired list
Navy officer whose permanent grade was rear admiral (0–8) and who was serving as admiral (0–10) under 10 U.S.C. 5231, was transferred directly to temporary disability retired list (TDRL) pursuant to 10 U.S.C. 1202 and then died before Senate could confirm him on the permanent retired list as admiral (0–10) pursuant to 10 U.S.C. 5233. Regardless of grade to which he was entitled on retired list under 10 U.S.C. 1372, or other law, under Formula No. 2, 10 U.S.C. 1401, such member's retired pay while on the TDRL is to be computed on basic pay of admiral (0–10) and Survivor Benefit Plan annuity based thereon ---------- 667
Survivor Benefit Plan
Annuity deductions
Where retired member waived his retired pay to receive VA compensation but informed CSC that purpose of such waiver was to have his Civil Service annuity computed on basis of his total Federal service, we must conclude that member waived his retired pay for purposes of increasing his Civil Service annuity (pursuant to subchapter III of chapter 83 of Title 5, U.S. Code) even though Navy was not so advised until after member's death. Accordingly, his widow is not eligible for Survivor Benefit Plan annuity; however, she is entitled to all such costs remitted by member ---------- 684
Retirement eligibility requirement
Air Force officer who had over 20 years' service when he died while on active duty was not eligible for retirement under 10 U.S.C. 8911 because less than 10 years of such service was as commissioned officer. Neither was he eligible for retirement under 10 U.S.C. 8914 which applies to enlisted members since at date of death he was officer. Therefore, widow is not entitled to SBP annuity under 10 U.S.C. 1448(d) since such annuity is contingent upon member having been qualified for retired pay ---------- 854

PAYMENTS
Absence or unenforceability of contract
Quantum meruit
Approval of service, etc., if requested
Expenses of renting boat and equipment from Govt. employee for purpose of performing acoustical measurements are not reimbursable as travel expenses. Equipment should have been obtained by procurement means with due regard to section 1–1.302–3 of Fed. Procurement Regs. and public policy prohibiting Govt. from contracting with its employees except for most cogent of reasons as where Govt.'s needs cannot otherwise reasonably be met. Payment may, however, be made on *quantum meruit* basis insofar as receipt of goods and services has been ratified by authorized official ---------- 681

PROCUREMENT

Defense programs

Full funding Page

"Full funding" of military procurement programs is not statutory requirement, and deviation from full funding does not necessarily or automatically indicate violation of 31 U.S.C. 665 or 41 U.S.C. 11..... 812

Ground rules

Departure

Although technical "transfusion" of one offeror's unique or innovative idea to other offerors is prohibited, offeror's request for direct reimbursement by Govt. of its interest expense is not such a unique or innovative idea, but is suggestion for departure from procurement "ground rules" which, if accepted by agency, must be communicated to all competing offerors..... 802

PROPERTY

Private

Federal funds for repairs, etc.

Justification

Appropriation of INS may be used to repair International Boundary fences on private property if expenditures and improvements are necessary for effective accomplishment of purposes of Service's appropriation, are in reasonable amounts, are made for principal benefit of U.S. and interests of Govt. are fully protected..... 872

Repairs and improvements

International Boundary fences

INS's "necessary expenses" appropriation is available to repair boundary fences under jursidiction of other Federal agencies provided INS determines expenditure is necessary to enforcement of immigration laws and other agencies do not intend to make repairs as promptly as necessary to deter unlawful immigration. Rule that where appropriation is made for particular object, it confers authority to incur expenses which are necessary, proper, or incident thereto, unless there is another appropriation that makes more specific provision therefor, is inapplicable since there is no specific appropriation for repair of boundary fences.. 872

Public

Damage, loss, etc.

Carrier's liability

Burden of proof

Disallowance of carrier's amended claim for refund of amount administratively deducted from its account due to damage to floodlight units is sustained where carrier is liable for damage without proof of negligence unless damage is affirmatively shown to be result of one of exceptions to its liability as a common carrier, *Federated Department Stores* v. *Brinke*, 450 F.2d 1223 (5th Cir., 1971), and cases cited. Evidence on carrier's freight bill indicates extent of damage and allegations of faulty packaging without evidence that packaging was sole cause of damage will not rebut presumption of negligence by carrier..... 611

PROPERTY—Continued
Public—Continued
License
Use of sewage system Page
Perryville, Maryland, recreational park may be permitted to discharge sewage into VA sewage system if VA determines administratively that arrangement is in interest of Govt. and agreement constitutes only revocable license for limited use 688
Space assignment
Charge assessment
Where Executive agency other than GSA provides parking space or related services to employees, or to others, agency is authorized by 40 U.S.C. 490(k) to charge occupants therefor if, but only if, rates are approved by Administrator of General Services and Office of Management and Budget 897
Surplus
Disposition
Water
VA hospital which has water filtration plant currently running at half its rated capacity may sell water to town of Perryville, Maryland recreational park, if VA administratively determines plant in ordinary course of business produces excess water and sale is in Govt.'s interest .. 688

REGULATIONS
Conflict of interest guidelines
Clear meaning
LEAA organizational conflict of interest guideline for grantee procurements, which reads: "Contractors that develop or draft specifications, requirements, statements of work and/or RFP's for a proposed procurement shall be excluded from bidding or submitting a proposal to compete for the award of such procurement" is not unenforceably vague, since terms used in guideline have clear meaning in this context 911
Constructive notice
Since LEAA Manual, which was promulgated pursuant to Omnibus Crime Control and Safe Streets Act, was not published in Federal Register, only parties with actual or constructive notice are bound by its contents and constructive knowledge exists where Manual is incorporated by reference into grant or contract 911
Federal Register publication. (*See* **FEDERAL REGISTER, Effect of publication**)
Notice
Federal Register. (*See* **FEDERAL REGISTER**)
Promotion procedures
After details
Air Force detailed GS–4 employee to GS–5 position for over 1 year beginning July 1, 1970, without obtaining CSC's prior approval of extension beyond 120 days. Agency's discretionary authority to retain employee on detail continues no longer than 120 days, after which agency must either have obtained Commission approval or grant employee temporary promotion. Since agency failed to obtain approval, employee is entitled to retroactive temporary promotion from 121st day of detail to its termination 785

REGULATIONS—Continued
Promotion procedures—Continued
Discretionary
Agency's *v.* employee's choice Page
Employee was advised prior to detail action that, if she so elected, she could be promoted temporarily but would not receive per diem while at temporary duty station. She elected to receive per diem in lieu of temporary promotion. Although temporary promotion was discretionary, agency had no right to require employee to make such choice. Since agency states that employee would have been promoted but for the improper action, unjustified or unwarranted personnel action occurred and retroactive promotion with backpay for period of detail may be made 836
Promulgation
Implementation of grant procurement policy
LEAA "blanket" guideline for grantee procurements precluding contractors who develop or draft specifications for procurements from competing is reasonable exercise of LEAA discretion to implement grant procurement policy, since it was promulgated in response to congressional concern and in implementation of FMC 74–7–0 to insure bias free specifications and to prevent unfair competitive advantage by specifications' preparer 911
Recipient chargeable with knowledge
Since LEAA Manual, which was promulgated pursuant to Omnibus Crime Control and Safe Streets Act, was not published in Federal Register, only parties with actual or constructive notice are bound by its contents and constructive knowledge exists where Manual is incorporated by reference into grant or contract 911
Recommendation by General Accounting Office
Insurance premium charges
Housing and Urban Development Department
Claims under mobile home loan insurance pursuant to 12 U.S.C.A. 1703 by lending institution presently delinquent in insurance premium payments may be allowed if default on loan occurred while premium payments were current, but cannot be allowed if default occurred or was imminent after premium payments became delinquent. Past due premium charges may be set off against allowable claims, if lender agrees to such setoff. Alternatively, remaining insurance coverage may be canceled. In no event is set-off of future premium charges appropriate. GAO recommends, pursuant to 31 U.S.C.A. 1176, that HUD regulations be amended in terms of foregoing issues and conclusions 658
Waivers
Abuse of discretion requirement
Contractor, precluded by LEAA organizational conflict of interest guideline from competing on LEAA grantee's procurement for which it drafted and developed specifications, has not shown that LEAA refusal to grant waiver of guideline, promulgated under LEAA rule-making authority and binding on grantees, was for reasons so insubstantial as to constitute abuse of discretion 911

RETIREMENT
Civilian
Service credits
Military service
Waiver of retired pay Page

Where retired member waived his retired pay to receive VA compensation but informed CSC that purpose of such waiver was to have his Civil Service annuity computed on basis of his total Federal service, we must conclude that member waived his retired pay for purposes of increasing his Civil Service annuity (pursuant to subchapter III of chapter 83 of Title 5, U.S. Code) even though Navy was not so advised until after member's death. Accordingly, his widow is not eligible for Survivor Benefit Plan annuity; however, she is entitled to all such costs remitted by member 684

SALES
Surplus. (*See* **PROPERTY, Public, Surplus**)

SET-OFF
Authority
Common law right

Where it was determined that contractor had underpaid three employees in violation of Davis-Bacon Act, 40 U.S.C. 276a, and funds were administratively withheld from balance due on contract to cover underpayments, claims of underpaid workers have priority over later IRS levy. 46 Comp. Gen. 178, which held that IRS levy had priority over claims of underpaid employees, is modified to extent that it is inconsistent 744

Past due *v.* future premiums
Mobile home insurance claims

Timely payment by insured lender of premiums for mobile home loan insurance under sec. 2, title I, of National Housing Act, as amended, 12 U.S.C.A. 1703—which requires payment of premiums "in advance"—is prerequisite to continued insurance coverage. There is no basis for implication, underlying HUD proposal to set off against insurance claims past due and future premiums of delinquent lending institution, that insurance coverqge is unaffected by nonpayment of premiums 658

SMALL BUSINESS ADMINISTRATION
Authority
Small business concerns
Size standards

Any situation which could reasonably be construed as being one in which procuring agency advocates use of size standard differing from that then applicable under SBA regulation would amount to encroachment whether intentional or unintentional on SBA's exclusive jursidiction. Thus, where, as here, applicable SBA regulations were changed 7 days prior to bid opening and IFB can reasonably be construed as setting forth size standard differing from SBA's, encroachment has occurred and impact of encroachment on competition muct be analyzed 617

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

SUBSISTENCE

Per diem

Actual expenses

Determination Page

P.L. 94–22 provides express authority to reimburse employees for actual subsistence expenses for travel to high cost areas designated in travel regulations. Accordingly, agencies which believe that other localities should be so designated, should request GSA to add those localities to listing of high cost areas in Federal Travel Regs. 42 Comp. Gen. 440, distinguished 609

GAO would not object to appropriate changes that GSA might wish to make in criteria for determining when "unusual circumstances" exist to justify actual expense reimbursement to travelers. Also, GSA is not precluded by law or legislative history from modifying the Federal Travel Regs. by citing additional situations involving "unusual circumstances." 42 Comp. Gen. 440, distinguished 609

Lodgings at more than one temporary duty station

Where employee of Federal Mediation and Conciliation Service incurred dual lodging expenses on same nights, and travel order authorized reimbursement of actual subsistence expenses not to exceed $40 per day and his subsistence expenses exceeded $40 each day, reimbursement of actual subsistence expenses up to $40 each day may be made, provided appropriate agency official determines employee had no alternative but to retain lodgings at regular temporary duty post while occupying lodgings at other temporary posts 690

"Lodgings-plus" basis

Staying with friends, relatives, etc.

Employee may not be paid per diem under lodgings-plus system based on payment of $14 per night for lodging at home of son's neighbor absent information showing that $14 amount reflects additional expenses incurred by host as result of employee's stay. However, agency may issue regulations providing that, when it is known in advance that employees will lodge with friends or relatives, it may determine that lodgings-plus system is inappropriate and establish specific per diem rates under FTR para. 1–7.3c 856

Temporary duty

Per diem *v.* temporary promotion

Employee was advised prior to detail action that, if she so elected, she could be promoted temporarily but would not receive per diem while at temporary duty station. She elected to receive per diem in lieu of temporary promotion. Although temporary promotion was discretionary, agency had no right to require employee to make such choice. Since agency states that employee would have been promoted but for the improper action, unjustified or unwarranted personnel action occurred and retroactive promotion with backpay for period of detail may be made 836

TRANSPORTATION
Automobiles
Military personnel
Ferry transportation
Alaska State Ferry System Page

Incident to permenanet change of station Coast Guard member's privately owned vehicle was transported via Alaska State Ferry System from Juneau, Alaska, to Seattle, Washington, Member is entitled to such transportation at Govt. expense since "privately owned American shipping services," as used in 10 U.S.C. 2634 authorizing transportation at Govt. expense of a privately owned motor vehicle of member of armed force ordered to make permanent change of station, includes State-owned vessels 672

Dependents
Alternate locations
Renewal agreement travel

When dependents of employee are not permitted to accompany him to post of duty outside continental U.S., or in Hawaii or Alaska, and are transported to alternate location under authority of 5 U.S.C. 5725, employee is entitled to transportation expenses for those dependents incident to own entitlement to renewal agreement travel under 5 U.S.C. 5728(a) based on cost of travel between alternate location and employee's place of actual residence at time of appointment or transfer to post of duty 886

Military personnel
Dislocation allowance
Permanent change of station requirement

Military members required to involuntarily relocate their households incident to base closings in Japan under Kanto Plain Consolidation Plan, without permanent changes of station, may not be paid dislocation allowance under 37 U.S.C. 407(a), nor may they be paid such allowance pursuant to 37 U.S.C. 405a since the relocations were not evacuations incident to unusual or emergency circumstances 932

Emergency, etc., conditions. (*See* **FAMILY ALLOWANCES, Evacuation**)
Evacuation allowances. (*See* **FAMILY ALLOWANCES, Evacuation**)
Household effects
Military personnel
Permanent change of station requirement

Military members required to relocate their households incident to base closings in Japan without permanent changes of station may not be reimbursed personal expenses incurred for purchase of rugs, drapes, curtains, and service charges for items of personal convenience not essential to the occupation of quarters. Also, reimbursement for telephone installation charges is specifically prohibited by 31 U.S.C. 679 932

TRANSPORTATION—Continued
Household effects—Continued
Packing by employee
Reimbursement claim Page

Employee, whose household effects were shipped under "actual expense" method of shipment, seeks allowance for personally packing household goods. Under "actual expense" method, Govt. is shipper and authority to incur packing expenses is vested in agency. Since agency contracted with carrier to pack and transport household goods, employee who, without authority, undertakes to pack household goods does so voluntarily and is not entitled to reimbursement 779

Transfers
Successive changes

Employee was transferred from Denver to Los Angeles. Before most of his household effects were shipped to Los Angeles, he was retransferred to Sacramento, a location farther from Denver. He is entitled to mileage based on greater distance from original station to final station in determining commuted payment covering transportation of household effects. However, total reimbursement for actual successive transfers may not exceed reimbursement employee would otherwise have been entitled for each transfer individually. Further, maximum weight which may be transported incident to any one transfer at Govt. expense is subject to 11,000 pound limitation in 5 U.S.C. 5724. 48 Comp. Gen. 651, modified 634

Motor carrier shipments
Payment
Set-off

Disallowance of carrier's amended claim for refund of amount administratively deducted from its account due to damage to floodlight units is sustained where carrier is liable for damage without proof of negligence unless damage is affirmatively shown to be result of one of exceptions to its liability as a common carrier, *Federated Department Stores* v. *Brinke*, 450 F.2d 1223 (5th Cir., 1971), and cases cited. Evidence on carrier's freight bill indicates extent of damage and allegations of faulty packaging without evidence that packaging was sole cause of damage will not rebut presumption of negligence by carrier 611

TRAVEL EXPENSES
Accredited rural appraisers. (*See* **OFFICERS AND EMPLOYEES, Accredited rural appraisers, Examination costs, Fees and travel expenses**)
Actual expenses
Predetermined rates in high cost areas

P.L. 94-22 provides express authority to reimburse employees for actual subsistence expenses for travel to high cost areas designated in travel regulations. Accordingly, agencies which believe that other localities should be so designated, should request GSA to add those localities to listing of high cost areas in Federal Travel Regs. 42 Comp. Gen. 440, distinguished 609

TRAVEL EXPENSES—Continued
Actual expenses—Continued
Reimbursement basis
Criteria Page

GAO would not object to appropriate changes that GSA might wish wish to make in criteria for determining when "unusual circumstances" exist to justify actual expense reimbursement to travelers. Also, GSA is not precluded by law or legislative history from modifying the Federal Travel Regs. by citing additional situations involving "unusual circumstances." 42 Comp. Gen. 440, distinguished 609

Boats
Use of privately owned

Expenses of renting boat and equipment from Govt. employee for purpose of performing acoustical measurements are not reimbursable as travel expenses. Equipment should have been obtained by procurement means with due regard to section 1–1.302–3 of Fed. Procurement Regs. and public policy prohibiting Govt. from contracting with its employees except for most cogent of reasons as where Govt.'s needs cannot otherwise reasonably be met. Payment may, however, be made on *quantum meruit* basis insofar as receipt of goods and services has been ratified by authorized official 681

Convention, conferences, etc.
Attendees
State officials

Decision B–166506, July 15, 1975, holding payment by EPA of transportation and lodging expenses of State officials attending National Solid Waste Management Association Convention is prohibited by 31 U.S.C. 551, unless otherwise authorized by statute, is affirmed. Provision of Administrative Expenses Act (5 U.S.C. 5703(c)), permitting payment of such expenses for persons serving Govt. without compensation does not provide necessary exception to 31 U.S.C. 551 since attendees at conference are not providing direct service to Govt. and are therefore not covered by 5 U.S.C. 5703(c) 750

Military personnel
Retirement
To selected home
Personal expense requirement

Member, who on retirement traveled to his home of selection in Iran with wife on American flag commercial air carrier chartered by his new employer and who had $950 included in annual statement of earnings by employer as amount paid to third party for travel expenses, is not entitled to reimbursement of air travel expenses since that travel was not performed at personal expense as required by applicable regulations 761

TRAVEL EXPENSES—Continued
Overseas employees
Home leave
Dependents
Alternate locations Page

When dependents of employee are not permitted to accompany him to post of duty outside continental U.S., or in Hawaii or Alaska, and are transported to alternate location under authority of 5 U.S.C. 5725, employee is entitled to transportation expenses for those dependents incident to own entitlement to renewal agreement travel under 5 U.S.C. 5728(a) based on cost of travel between alternate location and employee's place of actual residence at time of appointment or transfer to post of duty 886

Private parties
Attendants for handicapped honor award recipients
Travel to attend award ceremonies

Where handicapped employee selected to be honored under Govt. Employees Incentive Awards Program is unable to travel unattended because of his particular handicap and would otherwise be unable to attend award ceremony, travel expenses for attendant to accompany him in traveling to and from award ceremony may be paid by employing agency as "necessary expense" for honorary recognition of that particular employee under 5 U.S.C. 4503. 54 Comp. Gen. 1054, distinguished 800

State officials attending conventions, conferences, etc. (*See* **TRAVEL EXPENSES, Conventions, conferences, etc., Attendees, State officials**)

VETERANS ADMINISTRATION
Appropriations. (*See* **APPROPRIATIONS, Veterans Administration**)
Parking facilities
Employees, etc.

Where GSA pursuant to 40 U.S.C. 490(j) charges VA for parking space for use of employees, and related services, VA appropriations are available to pay such charges subject to 90 percent limitation contained in VA annual appropriations 897

WAIVERS
Law Enforcement Assistance Administration guidelines
Efforts to obtain
Costs involved
Not recoverable

Proposal preparation costs claim by offeror, whose award selection was not approved by LEAA because it came under LEAA organizational conflict of interest guideline imposed as limitation on grantee procurements, is denied since rejection of proposal was not arbitrary or capricious. Allocated overhead directly related to offeror's efforts to obtain waiver of LEAA guideline is not recoverable in any case 911

Regulations. (*See* **REGULATIONS, Waivers**)

WATER

Sale

Excess or surplus Page

VA hospital which has water filtration plant currently running at half its rated capacity may sell water to town of Perryville, Maryland recreational park, if VA administratively determines plant in ordinary course of business produces excess water and sale is in Govt.'s interest. 688

WORDS AND PHRASES

Alaska State Ferry System (Alaska Marine Highway)

Incident to permanent change of station Coast Guard member's privately owned vehicle was transported via Alaska State Ferry System from Juneau, Alaska, to Seattle, Washington. Member is entitled to such transportation at Govt. expense since "privately owned American shipping services," as used in 10 U.S.C. 2634 authorizing transportation at Govt. expense of a privately owned motor vehicle of member of armed force ordered to make permanent change of station, includes State-owned vessels 672

Alternate location

Renewal agreement travel

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Bona fide mistake

In mistake in bid cases involving errors of omission, bidder's sworn affidavit outlining nature of error, its approximate magnitude and manner in which error occurred can constitute substantial evidence thereof. This fact does not, however, detract from agency's obligation to weigh all evidence so as to determine that bona fide mistake was committed 936

Di minimus

Cases discussing withdrawal of bid due to mistake do not speak to materiality of mistake made but rather to whether mistake was honest one. Thus, where magnitude of mistake is not *de minimis* (between 1.6 percent and 3.2 percent of $11.8 million bid), withdrawal may be permitted 936

Interim financing loan

Transferred employee who obtains "interim financing loan" to be used as down payment on residence at new duty station, because residence at old duty station has not yet been sold, may not be reimbursed for any expenses relating to "interim financing loan." Prohibition in 5 U.S.C. 5724a, FTR and JTR, against reimbursement of any losses on sale of residence due to market conditions is sufficiently broad to preclude reimbursement here, since need for "interim financing loan" arises because of market conditions 679

WORDS AND PHRASES—Continued

Prima facie case in support of error — Page

Where bidder seeks to withdraw its bid based upon alleged error and furnishes evidence to make *prima dacie* case in support of error, i.e., substantially establishes error, for Govt. to make award it must virtually show that no error was made or that claim of error was not made in good faith. Therefore, upon ultimate determination that bona fide error was committed, withdrawal is permissible 936

Term appointment

Employee who was separated by RIF by NASA and employed after break in service of less than 1 month by term appointment with HEW, may be reimbursed expenses of selling house at NASA duty station since term appointment with HEW was "nontemporary appointment" and eligibility for relocation expenses arose under that section incident to RIF by NASA and employment by HEW 664

"Win" Program

Protests against award of contracts because possible competitive advantages may accrue to competitors availing themselves of "WIN" program (providing for limited wage rate reimbursement and tax benefits for hiring and training of welfare recipients) are denied since matter is conjectural and any competitive advantages would not result from preferential or unfair treatment by Govt. While possible ramification of WIN program might be inconsistent with one purpose of Service Contract Act of 1965, program is not contrary to any provision of Act 656

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