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COMPTROLLER GENERAL OF THE UNITED STATES

Elmer B. Staats

DEPUTY COMPTROLLER GENERAL OF THE UNITED STATES

Robert F. Keller

GENERAL COUNSEL

Paul G. Dembling

DEPUTY GENERAL COUNSEL

Milton J. Socolar

ASSOCIATE GENERAL COUNSELS

F. Henry Barclay, Jr.

John J. Higgins

Richard R. Pierson

Paul Shnitzer

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[B–184865]

Bidders—Qualifications—Experience—Literal Requirements

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

Corporations—Officers—Newly Organized Corporation—Bidders' Experience

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

Bidders—Qualifications—Experience—Specialized, etc.

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

Contracts—Options—Not to be Exercised—Requirements to be Resolicited

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

In the matter of Haughton Elevator Division, Reliance Electric Company, May 3, 1976:

Invitation for bids (IFB) No. 664–9–76AT was issued on June 9, 1975, by the Veterans Administration (VA) Hospital, San Diego, California. The IFB sought bids on the furnishing of all labor, equipment and supplies necessary to inspect, clean, adjust and lubricate the elevators and dumbwaiter located in the hospital and to replace defective parts as specified in the contract. The period of this contract was to have been from July 1, 1975, through September 30, 1976, with the Government having the right to renew the contract for two successive 1-year periods.

The IFB states on page 16 under Special Conditions:

QUALIFICATIONS OF BIDDERS: (a) Upon request of the Government, Bidder shall be able to show evidence of his reliability, ability and experience

by furnishing (1) a list of personnel who will perform under the contract showing the length and type of experience of such personnel and (2) the names and addresses of other concerns and/or Government Agencies for which prior comparable services were rendered by the bidder. *Generally, the bidder shall have had approximately 5 years successful experience in repairing and servicing the specified equipment.* (b) Ability to meet the foregoing experience requirements and the adequacy of the information submitted will be considered by the Contracting Officer in determining the responsibility of the bidder. [Italic supplied.]

The IFB also stated on page 11 under the heading of "FURNISHING AND INSTALLING DEFECTIVE PARTS:"

* * * The following list of repair parts constitutes a level of reliability which will permit dependable operation. These parts shall be available in the San Diego area to meet emergency repair demands of the Contract. * * *

The IFB thereafter listed two full pages of parts and the quantity thereof required for each particular part.

Four responses were received to the IFB. The two lowest bids on a monthly basis were:

Reliable Elevator Corp. (Reliable) (a small business)	$3,441.00 (less one-tenth 1 percent prompt - payment discount)
Haughton Elevator Division (Haughton) (a large business)	4,170.90

Subsequent to bid opening Reliable submitted a letter dated June 27, 1975, setting forth the history and qualification of the personnel who would be assigned to the contract. That letter set forth the following information regarding Reliable's personnel:

ANDY NEUMANN

Mr. Neumann will be the man we put into your facility to service and trouble shoot your equipment. He is a graduate electrical engineer specializing in solid state circuit design. He has five years experience in the elevator industry and during this time he worked on some of the most sophisticated control equipment ever installed in an elevator system. Mr. Neumann serviced and shot trouble on the Haughton Gearless equipment located within Caesars Palace in Las Vegas. Within the same complex U.S. Elevator installed a full one hundred percent solid state job complete with Commercial Computer Control. This particular system is probably the most sophisticated elevator control system in today's market and Mr. Neumann was able to handle it without a problem.

TAKASHI SHIMIZU

Mr. Shimizu has basically the same background as Mr. Neumann and in fact was also involved with the equipment located in Caesars Palace. He also worked ten years for North American as an Electrical Engineer as well as a Design Engineer. Mr. Shimizu has worked on Haughton Gearless equipment at Loma Linda Hospital as well as Caesars Palace.

RICHARD MAXEY

Mr. Maxey is known as one of the top trouble shooters and technicians in the elevator industry. He has worked in the elevator trade for twenty seven years as a Elevator Journeyman and Chief Adjuster. He has extensive background in relay circuitry and mechanical repairs. Mr. Maxey was the man who

was used to rectify problems encountered with Haughton equipment at the Loma Linda Hospital as well as the American Cement Building.

JOHN TAYLOR

Mr. Taylor's reputation in the elevator industry is almost identical to Mr. Maxey's. He has been in the elevator trade for over twenty nine years and has worked on several Haughton jobs including but not limited to Loma Linda Hospital, American Cement Building, Disney World Hotel and the General Insurance Building. It might be well to mention that both Mr. Taylor and Mr. Maxey were involved in extensive work for the V.A. Hospitals located in San Fernando, Sawtelle, Sepulveda and Long Beach.

TONY BECHTLER

Mr. Bechtler is one of the top elevator servicemen in the area. He is an expert troubleshooter and has an enormous amount of knowledge with Haughton, Otis, Westinghouse and U.S. Elevator equipment.

On July 23, 1975, Reliable furnished the VA with a list of 30 jobs presently under contract. The list was stated as representing a cross-section of the total jobs Reliable then had.

The agency's report states that:

Prior to the contingent award to Reliable, a thorough investigation of the contractor's ability to perform under the terms of the contract was made. That investigation indicated to the Contracting Officer that Reliable Elevator was qualified and could perform satisfactorily.

Therefore, on August 12, 1975, the VA sent Reliable the following letter:

Your offer for maintenance service on elevators at this hospital in accordance with IFB 664-9-76AT for the period September 1, 1975, through September 30, 1976 has been accepted contingent on the following:

1. Physical evidence of inventory of parts available locally.
2. Copies of Purchase orders placed with Haughton for their parts indicating anticipated delivery date.
3. Andy Neumann to be assigned to our hospital and in the event he leaves your employ his replacement subject to approval by the VA.

Thereafter, to substantiate the hospital's requirement for physical inventory of parts and copies of orders placed, the contracting officer had an impartial firm verify the inventory and orders. Reliable was requested to furnish by September 9, 1975, a copy of all orders issued for parts together with an acknowledgment of the orders from the supplier confirming a firm delivery date. The contracting officer stated that in the event Reliable was unable to comply with these requirements, the Government would have no other recourse but to proceed with default action under the terms of the contract. The agency report states that:

Reliable was found to be responsible after satisfying the aforementioned inspections and requirements. As a result, award was finalized and Reliable began performance on September 1, 1975. * * *

Subsequently, Haughton filed a protest in our Office against the award to Reliable on the bases that: (1) the qualification statement submitted by Reliable did not contain proof that the company had previously successfully maintained equipment similar to that referenced

in the IFB. Moreover, Reliable's qualification statement did not describe either the type of elevators previously serviced by the personnel to be employed by Reliable or the number of years of their experience; (2) Haughton does not believe that Reliable can satisfy the IFB requirement that a specific inventory of replacement parts be maintained in the San Diego area; and (3) since Reliable was incorporated on March 11, 1975, this fact alone precludes a finding it met the experience requirement.

This Office has stated that we will not review affirmative determinations of responsibility unless the solicitation contains definitive criteria of responsibility. *Pammar Private Cab Corp.*, B-184371, December 9, 1975, 75-2 CPD 380; *Yardney Electric Corporation*, 54 Comp. Gen. 509 (1974), 74-2 CPD 376; *Data Test Corporation*, 54 Comp. Gen. 499 (1974), 74-2 CPD 365, affirmed 54 Comp. Gen. 715 (1975), 75-1 CPD 138. We believe that the requirement here that "Generally, the [successful] bidder shall have had approximately 5 years successful experience in repairing and servicing the specified equipment" is such a definitive criteria so as to allow our review. See *Yardney Electric Corporation*, *supra; Pammar Private Cab Corp.*, *supra.*

Federal Procurement Regulations (FPR) § 1-1.1203-3 (1964 ed. amend. 95) states:

> When the situation warrants, contracting officers shall develop with the assistance of technical personnel or other specialists, special standards of responsibility to be applicable to a particular procurement or class of procurements. Such special standards may be particularly desirable where a history of unsatisfactory performance has demonstrated the need for insuring the existence of unusual expertise or specialized facilities necessary for adequate contract performance. The resulting standards shall form a part of the solicitation and shall be applicable to all bidders or offerors.

In 37 Comp. Gen. 196 (1957) this Office, citing a number of decisions, stated that the award of a contract properly could be limited to a class of bidders meeting specified qualitative and quantitative experience requirements in a specialized field where the invitation so provides and where the restriction is properly determined to be in the Government's best interest. *See* 37 Comp. Gen. 420 (1957). See also *Paul R. Jackson Construction Company, Inc., and Swindell-Dressler Company*, 55 Comp. Gen. 366 (1975), 75-2 CPD 220; *Descomp, Inc.*, 53 Comp. Gen. 522 (1974), 74-1 CPD 44. *Plattsburgh Laundry and Dry Cleaning Corp.*, 54 Comp. Gen. 29 (1974), 74-2 CPD 27.

However, in 39 Comp. Gen. 173, 178 (1959), we stated:

> When, as in the present case, there appears to be reasonable ground for doubt as to a low bidder's lack of responsibility, even though the bidder may fail to meet some of the qualifications prescribed by the invitation, we believe that rejection of the low bid and award to any other bidder should be supported by a specific determination, based upon consideration of the qualifications of the particular bidder, that the low bidder was not a "responsible" bidder within the meaning of the statute. If such a determination cannot be made, the qualifications prescribed by the invitation must be regarded as unreasonably restrictive. In that

event, it would appear that the invitation should be canceled and the procurement readvertised under proper specification requirements.

This case, as properly interpreted, indicates that where a bidder is found to be responsible, even though it does not meet specified definitive criteria of responsibility set out in the IFB, the inclusion of those criteria must be deemed unduly restrictive of competition and the IFB should be canceled. B–147028, October 31, 1961. We have, however, recognized situations where no useful purpose would be served by a cancellation and resolicitation and, thus, permitted award to be made to the low responsible bidder in circumstances where the inclusion of the offending provision did not prevent any potential bidder from participating. 43 Comp. Gen. 275 (1963); B–147664, March 1, 1962; and B–144646, February 8, 1961. Further, where we have concluded that the criteria in question do not appear to be unduly restrictive, we have held that their being met is a necessary prerequisite to award under the IFB. B–160152, October 7, 1966. *See also* B–152896, February 13, 1964.

However, a review of our cases involving specified definitive criteria of responsibility indicates a number of cases have not comported with the foregoing rules. Generally, these cases have held that even though a bidder did not meet the prescribed criteria of responsibility set forth in the solicitation, a proper award could be made to that bidder provided the agency determined the bidder to be otherwise responsible. These, and other similar cases, listed below, will no longer be followed to the extent they are inconsistent with the foregoing rules: B–157149, February 16, 1966; B–155990, June 8, 1965; 53 Comp. Gen. 36, 40 (1973); 52 *id.* 647, 653 (1973); 45 *id.* 4 (1965); B–176961, January 2, 1973; B–176801, November 22, 1972; B–168589(2), February 11, 1970; B–159607, September 14, 1966; B–156999, October 1, 1965; B–154243, June 1, 1964; B–153340, March 20, 1964; B–164931, September 5, 1968; B–162321, December 21, 1967; B–155581, January 15, 1965; B–154787, September 4, 1964; and B–151580, June 4, 1963.

While we do agree that, as stated in 39 Comp. Gen., *supra*, a matter of responsibility cannot be made into a question of responsiveness by the terms of the solicitation, we do not feel that definitive criteria of responsibility specifically and purposely placed in a solicitation by an agency can be waived as the contracting officer sees fit. *Data Test Corporation, supra.* In fact, to do so would be misleading and prejudicial to other bidders which have a right to rely on the wording of the solicitation and thus to reasonably anticipate the scope of competition for award. See *Instrumentation Marketing Corporation*, B–182347, January 28, 1975, 75–1 CPD 60. If an IFB were to require 5 years of relevant experience as a prerequisite to an affirmative determination of responsibility, but an award was made to a firm with less

than that experience level, or its equivalent, participants with the specified experience may have been prejudiced in that had they realized that the competition would include firms with less experience and thus perhaps lower overhead, etc., those firms may have refrained from bidding or bid lower in an attempt to secure the award. Moreover, other firms which did not participate because of the experience requirement might also have been prejudiced.

That is, contrary to the view expressed in the cases noted above, that these criteria are no more than aid to help the contracting officer reach his conclusion that the bidder is responsible, we believe that meeting such definitive criteria of responsibility, either precisely or through equivalent experience, etc., is actually a prerequisite to an affirmative determination of responsibility. See *Pammar Private Cab Corp.*, *supra*, at page 4; B–160152, *supra*. See also *Oscar Holmes & Son, Inc.*, B–184099, October 24, 1975, 75–2 CPD 251; FPR § 1–1.1203–3, *supra*. To hold otherwise would make such criteria mere surplusage, for even under more general statements of responsibility criteria, the bidder must be found to have the ability to comply with the contract provisions. However, where special standards of responsibility, e.g., definitive criteria of responsibility, are used the agency is attempting to insure "* * * the existence of *unusual expertise* or *specialized facilities* necessary for adequate contract performance." FPR § 1–1.1203–3, *supra*. See FPR § 1–1.1203–1 (1964 ed. amend. 95). [Italic supplied.]

Therefore, we believe that definitive criteria of responsibility, which the agency has determined necessary by placing them in the solicitation, should be read as outlining a minimum standard of experience or expertise which is a prerequisite to an affirmative determination of responsibility. We recognize that there may be situations where a bidder may not have met the specific letter of such criteria but has clearly exhibited a level of achievement either equivalent to or in excess of that minimum level specified and may thus properly be deemed responsible. This is where, for example, the solicitation specifies that the successful bidder must have a given number of years of experience relative to a particular item and the bidder does not literally meet this standard but does have the requisite number of years' experience with respect to more complicated items of the same general type, wherein the same sort of expertise must be brought to bear.

With regard to the instant case, we note that while counsel for Haughton points out, and the agency report reflects, that Reliable was incorporated only on March 11, 1975, this fact alone does not provide a basis to conclude that Reliable did not meet the specific experience requirement set forth in the IFB. This Office has recognized on many occasions that the experience of corporate officials prior

to the formation of the corporation can be included when examining a corporation's overall experience level. See *Baldwin Ambulance Service, Inc.*, B–184384, December 15, 1975, 75–2 CPD 392; *Hydromatics International Corporation*, B–180669, July 29, 1974, 74–2 CPD 66; 38 Comp. Gen. 572 (1959); 36 *id.* 673 (1957). *Cf. Kan-Du Tool & Instrument Corporation*, B–183730, February 23, 1976, 76–1 CPD 121. Therefore, the mere fact that the corporation had only been in existence since early 1975 is not determinative of its ability to meet the "approximately 5 years" experience requirement.

We construe the instant experience requirement quoted above to mean that, absent unusual circumstances, a bidder must as a condition precedent to an affirmative determination of responsibility, and hence award, have approximately 5 years' successful experience in repairing and servicing *the specified equipment*, or equivalent experience.

The equipment specified in the IFB was as follows:

Electric Passenger Elevators No. P–1 through P–6, gearless traction type; with generator field control; *group automatic operation;* car leveling device, signal system power operated center opening car and hoistway doors. Manufacturer: Haughton

Electric Service Elevators No. S–1 through S–4, gearless traction; and No. S–5 geared traction type; with generator field control; *group automatic for No. S–1 through S–4 and two stop collective automatic operation for No. S–5;* car leveling device, signal system, power operated two speed car and hoistway doors. Manufacturer: Haughton

Electric Dumbwaiter No. DW–1, geared traction type; *with rheostatic control; call-send operation;* and manually operated hoistway doors and car doors. Manufacturer: Matot

As can be seen, the description indicates the specific manufacturer and type of elevators in use at the hospital. When viewed in conjunction with the IFB's experience clause, it is clear that the clause goes to experience related to the specific make and type of equipment in use rather than to more generalized experience.

It appears that on the basis of Reliable's June 27, 1975, letter, the agency made a *sub silentio* finding that Reliable had demonstrated a level of experience equivalent to or in excess of the minimum level of experience set forth in the IFB, i.e., that it had worked on more complex equipment for the requisite length of time wherein the same sort of expertise needed to perform the instant contract must have been brought to bear. This view is reinforced by the agency's letter of August 12, 1975, which imposed the condition that Reliable's Mr. Neumann, who had such experience, be specifically assigned to the hospital and that in the event he left Reliable's employ VA had to approve his replacement.

As we analyze the information contained in the June 27 letter, we believe it indicates that the people who Reliable proposed to use (1) had some experience with Haughton gearless equipment; (2) had

some experience with highly sophisticated elevator control systems; and (3) had at least 5 years of general experience in the elevator industry. The letter does not, however, indicate either the length of time or experience these people had with Haughton elevators, or with other elevators of equal or greater complexity. Therefore, in the absence of more, we do not see how the agency could reasonably have made the necessary determination that Reliable had experience equivalent to that stated in the IFB.

Furthermore, the fact that Reliable apparently did not meet the IFB's experience requirement and is presently satisfactorily performing the subject contract is not determinative of the propriety of the award to it, but rather does indicate to us that the agency did not need the experience level stated in the IFB. In this regard, the procuring agency must be very cautious in setting forth any such experience requirement and must be sure that such a requirement is, in fact, necessary in the best interest of the Government.

Where, as here, the IFB contained such an unnecessary requirement, the criteria must be construed as being unduly restrictive of competition and the IFB should have been canceled before award since we believe that both bidders which participated in the procurement, and those which did not, may have been prejudiced by the inclusion of restrictions that were unnecessary and which the agency apparently did not intend to rigidly enforce. *Cf. Instrumentation Marketing Corporation, supra.* Had Haughton known that the 5-year experience criterion was not a requirement to be enforced it may have bid lower in view of the anticipated competition, and other firms may have participated which did not do so because of the misleading statement of the responsibility criteria. *See Instrumentation Marketing Corporation, supra.*

We did state in Edward B. Friel, Inc., 55 Comp. Gen. 231, 237 (1975), 75-2 CPD 164, that "The fact that the terms of an IFB are deficient in some way does not necessarily justify cancellation after bids have been opened and bidders' prices exposed." See *Joy Manufacturing Company*, 54 Comp. Gen. 237 (1974), 74-2 CPD 183. However, in determining if such a cogent and compelling reason exists to justify cancellation two factors must be examined: (1) whether the best interest of the Government would be served by making an award under the subject solicitation, and (2) whether bidders would be treated in an unfair and unequal manner if such an award were made. Here, as noted above, we believe that the IFB was both misleading and unduly restrictive of competition to the prejudice of others in that it indicated that consideration would be limited to bidders having a minimum of approximately 5 years' experience when in fact no such level of experience was needed. Accordingly, a cogent and compelling reason did exist and the IFB should have been canceled.

In view of our conclusion that the solicitation was defective and thus resulted in an improper award, we recommend that the VA not exercise the existing options under Reliable's contract but rather resolicit its need for elevator repair services based upon a proper statement of its actual needs.

In this regard, we note that the experience clause in the instant IFB was somewhat unclear and could have been drafted more precisely. We believe that it is incongruous for the expression of an IFB experience clause to, on the one hand, utilize broad terms such as "generally" and "approximately" and, on the other hand, to make the meeting of these rather broadly stated criteria mandatory, i.e., "* * * the bidded *shall* have etc." We believe that in the future if the VA chooses to utilize such an experience clause, it should avoid similar incongruities and make its requirements clear and precise as to the experience level required.

In view of our recommendation that VA not exercise any option of Reliable's contract, we see no need to discuss Haughton's additional arguments.

[B-184936]

Donations—Acceptance—Agriculture Department—Forest Service—Purpose of Bequest

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

Funds—Private Donations—Income From Bequest—Use—Unspecified Purposes

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

In the matter of the Forest Products Laboratory agreement with University of Wisconsin, May 3, 1976:

A certifying officer of the Forest Products Laboratory (FPL), Forest Service, United States Department of Agriculture (USDA), requested an advance decision as to whether a voucher in the amount of $357,646.58 may be certified for payment to the University of Wisconsin Foundation.

In June 1972, the FPL was advised that it had been designated as a beneficiary of the estate of the late Clark C. Heritage of Tacoma,

Washington. After consultations between the Office of the General Counsel, USDA, and the Treasury Department, it was determined that the FPL could accept and use the proceeds of the bequest under section 581a–1 of 16 U.S. Code (1970) which states:

> On and after August 31, 1951, funds may be received from any State, other political subdivision, organization, *or individual for the purpose of establishing or operating any forest research facility located within the United States, its Territories, or possessions.* [Italic supplied.]

We agree with this determination, but note that the purposes for which the bequest could be accepted and used are those set forth in the underscored portion of the section only.

When the proceeds of the estate were distributed, the Forest Products Laboratory's share of $357,646.58 was deposited in the Treasury as an available trust fund receipt in appropriation 128028, pursuant to 31 U.S.C. § 725S(a)(13) (1970). Such funds are not permitted to draw interest.

In his will, Mr. Heritage left no instructions or information as to the use he intended for his bequest. However, after consulting with his friends and business associates, the FPL determined that the wishes of Mr. Heritage could best be carried out by entering into a cooperative arrangement with the University of Wisconsin Foundation "to strengthen the synergistic relationships between the Forest Products Laboratory, the University of Wisconsin, and the wood industry." (Second "whereas" clause of proposed cooperative agreement.) The primary function of the FPL is the conduct of experiments, investigations, and tests with respect to the utilization and preservation of wood and other forest products. *See* 32 Comp. Gen. 339, 341 (1953). The FPL (of which Mr. Heritage was a former employee) was established to work in cooperation with the University of Wisconsin.

The proposed cooperative agreement provides for the FPL to turn over the bequest to the Foundation, which would be authorized to invest and administer the funds. Income from the investments would then be used to finance a number of programs specified in the agreement, only one of which appears to be directly related to the only permissible purpose for which the FPL could accept the bequest—"establishing or operating a[ny] forest research facility * * *," 16 U.S.C. 581a–1, *supra*. Specifically, paragraph 2 of the proposed agreement provides as follows:

> Said activities, projects, or programs may include scholarships, fellowships, stipends for visiting lecturers, assistance with research projects, travel grants, etc. However, such support shall not be limited to these enumerated purposes but shall include any other activities which promote improved utilization of wood and wood fiber products. Particular importance is attached to exchanges of specialists and to periodic special seminars and symposia.

The overall goal of the above enumerated activities is stated to be the promotion of improved utilization of wood and wood fiber products. If these purposes no longer exist, paragraph 10 permits the Foundation to used the funds "for other uses as close to the original purpose as expressed herein as it can at such time devise."

As stated above, under 16 U.S.C. § 581a–1, *supra*, it is clear that the FPL can accept and use the proceeds of the Heritage bequest to establish and operate a forest research facility. It could do so directly, or, in view of its additional authority under 16 U.S.C. § 582a–1, it could enter into cooperative agreements with the University of Wisconsin to establish and operate a forestry research facility for the FPL. However, there is no legal authority for the FPL to accept the bequest and use it directly or indirectly for any other purpose.

In this connection, it should be noted that the purposes for which the FPL can enter into cooperative agreements under 16 U.S.C. 582a–1 with State institutions, using appropriated funds, are broader in scope than the purposes for which it may accept and use a bequest or any other donation under 16 U.S.C. 581a–1. Conceivably, the seminars, scholarships, etc., enumerated in the agreement could be viewed as "encouraging and assisting" States to carry out programs of research, and would be quite proper under 16 U.S.C. 582a–1 if supported with appropriated funds. However, there appears to be no authority to use donated funds for anything other than "establishing or operating" a forest research facility, under 16 U.S.C. 581a–1, and the relationship of seminars and scholarships to establishment or operation of such facilities appears to be rather remote. It is axiomatic that an agency cannot do indirectly what it is not permitted to do directly. The FPL cannot broaden the purposes for which it could itself use the bequeathed funds by simply passing them on to another body through contract or other arrangements.

For the same reasons, the FPL cannot turn over to the Foundation the bequeathed funds for the purpose of investing them, since clearly the FPL would not be authorized to use the funds for that purpose directly. It is true that under some circumstances, we have held that custodians of a trust fund may make expenditures necessary to carry out the purposes of the trust without regard to general regulatory and prohibitory statutes applicable to public funds. *Cf.* 16 Comp. Gen. 650 (1937); 36 *id.* 771 (1957). In each of those cases, however, the trustee was faced with a conflict between specific terms and conditions laid down by the creator of the trust and the above-mentioned statutes. In the instant case, notwithstanding the firm conviction of the testator's past associates that the testator would not have wanted his money held in a non-interest bearing account (See, e.g., letter of May 14, 1975 from

the Director, Central Research and Development Weyerhaeuser Company), the testator laid down no terms and conditions whatsoever. Thus there are no conflicts between trust terms and statutory provisions to be resolved and the agency remains bound by the limits of its own statutory authority.

The certifying officer also asks whether it is:

> permissible for the Forest Products Laboratory to enter into a cooperative agreement providing for the advancement of funds but not containing provisions for the recovery of the unused balance of the advance should the Laboratory become dissatisfied with the arrangement and wish to terminate this agreement.

Paragraph 10 of the agreement provides:

> It is expected that this agreement will continue in its present form as long as the Forest Products Laboratory pursues its primary assignment of advancing the efficient use of timber as an engineering and industrial raw material. Should the purposes for which the Fund is instituted cease to exist, then the Foundation may devote the Fund for other uses as close to the original purposes as expressed herein as it can at such a time devise.

As previously stated, this particular agreement is invalid because it contemplates the grant of donated funds for unauthorized purposes. We assume, however, that the question was meant to apply to all such provisions in cooperative agreements, regardless of the source of the funds. Even if the funds were appropriated for the purposes specified elsewhere in the agreement, a provision which allows the grantee to expend funds for other than these purposes at some future time—that is, for unspecified purposes of its own devising—would be improper. *Cf.* 31 U.S.C. 628 (1970).

For the above reasons, the voucher may not be certified for payment to the University of Wisconsin Foundation under the terms of the proposed cooperative agreement.

[B-180010]

Arbitration—Award—Retroactive Promotion With Backpay—Nonexistent Position

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

In the matter of Willie W. Cunningham—arbitrator's award of retroactive promotion and backpay, May 4, 1976:

This action involves the request of December 16, 1975, by the Federal Labor Relations Council (FLRC) for an advance decision as to the legality of a retroactive promotion with backpay awarded by an arbi-

trator in the matter of *Naval Ordnance Station, Louisville, Kentucky and Local Lodge No. 830, International Association of Machinists and Aerospace Workers* (Thomson, Arbitrator), FLRC No. 75A–91. The case is before the Federal Labor Relations Council as a result of a petition for review filed by the agency alleging that the award violates applicable laws and regulations.

The grievant in this case, Ms. Willie W. Cunningham, had been employed by the Naval Ordnance Station in the position of Mail Clerk, GS–305–03, since 1970, and, since at least July 1974, she had been spending part of her time performing duties as a Bindery Helper at the specific request of her supervisor. The grievant apparently informally discussed with her supervisor the possibility of a higher job classification and higher pay, and on November 27, 1974, she formally requested a promotion to the position of Helper, Bindery Worker. This request was denied and she filed a grievance on December 19, 1974, requesting a promotion to the position of Helper, Bindery, effective September 29, 1974. The agency, on December 9, 1974, officially classified the position of Helper (Bindery), WP–4404–04, and the position description stated that 70 percent of the typical work performed in the position would involve bindery work and 30 percent would involve mail distribution. Ms. Cunningham was given a temporary promotion to this position on December 22, 1974, and was permanently promoted to the position on February 16, 1975.

The arbitrator, on July 7, 1975, found that under the negotiated agreement the agency was required to temporarily promote an employee assigned to and performing duties of a higher graded position (under certain time conditions). He further found that the agency had to promptly establish, classify, and announce the new position to which it had already assigned the duties thereof to the grievant, and he, therefore, sustained the grievance. The award required the temporary promotion of Ms. Cunningham with higher pay during the period of September 29 through December 21, 1974, although the position had not been officially classified until December 9, 1974.

The Department of the Navy filed a timely petition with the Federal Labor Relations Council for review of the arbitrator's award. The FLRC has accepted the petition and has requested our decision as to whether the arbitrator's award of retroactive promotion and backpay violates applicable laws and regulations.

The agency contends that there was no officially graded position or vacancy in existence prior to December 9, 1974, and that therefore, a temporary promotion could not be effected prior to that date. It argues that the provision in the negotiated agreement requiring temporary promotions (under certain conditions) is "inoperative" unless a posi-

tion exists which has been classified by a classification or job grading authority. It cites several decisions of our Office regarding retroactive promotions in which the agency states the existence of a position or vacancy was implicit.

The union contends that the arbitrator found an implicit nondiscretionary obligation on the part of the agency to either classify the position "within the contractual time frame" or withdraw the higher level duties, and that without this obligation the agency could assign new duties and withhold higher compensation "for a never ending period." It also challenges the factual determination that the position Helper (Bindery) was not classified.

The exception to the arbitrator's award relating to the facts will not be ruled upon by this Office. We shall limit our consideration to the propriety of implementing the award in question based on the facts as found by the arbitrator that the position had not been classified prior to December 9, 1974.

The negotiated agreement between the union and the agency provides, in Article 15, Section 9, that temporary promotions are to be utilized in situations requiring the temporary service of an employee in a higher graded position. That section provides further that if the assignment to the higher level position is for a period of 15 days or more the employee shall be promoted not later than the second pay period from the date of the assignment. The agreement provides further, in pertinent part:

ARTICLE 18

Changes in Job Descriptions and Requirements

JOB DESCRIPTION POLICY

Section 1.

The Wage and Classification Program shall be administered within the guidelines issued and authority delegated by the Civil Service Commission and higher Navy authority.

JOB DESCRIPTION CHANGES

Section 2.

a. Job and position descriptions are written to accurately describe the major duties and responsibilities of the incumbent. These descriptions are then classified by the Civilian Personnel Department to determine rate, title, pay level, and qualifications requirements. Modifications to job descriptions are required to describe changes in work assignments and the current state of the art as technological advances are made.

b. In any case where action is proposed to modify the position or job description of any employee in the bargaining unit for any reason, and such change may affect the rating, title, pay level, or qualification requirements for the job or position, it is agreed that the proposed changes will be discussed with the employee(s) concerned prior to the effective date of the change. Such changes will not be made to evade the merit promotion principles or any other condition negotiated in this Agreement. In any discussion pertaining to such changes, the employee(s) concerned may be accompanied by his Steward.

JOB DESCRIPTION REVIEWS AND APPEALS

Section 3.

a. Any employee in the unit who feels that his job or position is improperly rated or classified, shall have the right to request his supervisor to have his job rating or position classification reviewed.

c. If the supervisor and the employee cannot reach a mutual agreement, the employee may file a classification or rating appeal, or the supervisor may request a Wage and Classification Specialist from the Industrial Relations Department to conduct an audit of the employee's regular work assignment.

e. If the employee is not satisfied with the Wage and Classification Specialist's decision, he may file a classification appeal.

CLASSIFICATION INEQUITIES

Section 4.

a. All employees in the bargaining unit shall be freely and fully provided the opportunity to appeal what they consider to be inequities in their existing grade or rating or any proposed downgrading. * * *

The arbitrator found that the grievant was performing the work of a higher level position and could not be "denied the benefits thereof owing to the Company's (agency's) lack of diligence in classifying the position." The arbitrator stated that only by prompt classification would the promotion process of Article 15 not be impaired. However, Article 18 of the negotiated agreement does not appear to impose any time deadlines on the agency for classifying positions. In this connection, it is noted that classification of positions is basically a matter within the jurisdiction of the employing agency and the Civil Service Commission. 5 U.S. Code 5107 (1970) and 5346 (Supp. IV, 1974).

Classification of positions is within the discretion of the agency, subject to requests for review and appeals by employees. See Article 18, Section 3 of the negotiated agreement; 5 C.F.R. 511.601 *et seq.*, and 532.701 *et seq.* (1975). In this connection, the arbitrator stated that only by prompt classification could the promotion process provided under the negotiated agreement not be impaired. However, as the arbitrator recognized, this case involves promotion to a new position which had not been classified at the time the grievant began to perform the duties thereof. It does not involve assignment to an established higher grade position. The provisions of Article 15 of the agreement (concerning promotions) were not involved. Rather the case concerned the provisions of Article 18 which recognized that the matter of the job description was subject to the classification review and appeal process set forth in civil service regulations.

As noted in 55 Comp. Gen. 515 (1975), the Civil Service Commission's regulations for position classification provide that the effective date of a classification action taken by an agency or a classification action resulting from an employee's appeal is the date the action is approved or the appeal is decided or a date subsequent to that date. See C.F.R. 511.701 *et seq.*, and 532.701 *et seq.* (1975). Absent any indication

that the grievant's position was illegally or intentionally misclassified, there is no authority to allow a retroactive promotion with backpay on the ground that there was an erroneous classification decision. 52 Comp. Gen. 631 (1973); 50 *id.* 581 (1971); and B–173831, September 3, 1971. Therefore, until the position was classified upward and she was promoted, the grievant was not entitled to the pay of the higher graded position. *Dianish et al.* v. *United States*, 183 Ct. Cl. 702 (1968). In this connection we point out that the above rule concerning classification actions has recently been confirmed by the Supreme Court of the United States in *United States* v. *Testan et al.*, 44 U.S.L.W. 4245, decided March 2, 1976.

Accordingly, it is our conclusion that the arbitrator's award may not be implemented.

[B–185715]

Contracts—Negotiation—Disclosure of Price, etc.—Auction Technique Prohibition

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

Contracts—Negotiation—Prices—Reasonableness

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

Contracts—Negotiation—Disclosure of Price, etc.—Inadvertent

Where information in initial proposal has been improperly disclosed and award cannot be made on basis of initial proposals, conduct of negotiations and submission of best and final offers should be undertaken in such manner as to place offerors in relatively equal competitive positions and to eliminate, insofar as possible, unfair competitive advantage which any offeror may have obtained through improper disclosure of proposal information.

Contracts—Negotiation—Offers or Proposals—Best and Final—Additional Rounds

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

In the matter of T M Systems, Inc., May 4, 1976:

T M Systems, Inc. (TM), has protested to our Office against the proposed award of a contract to Vogue Instrument Corporation (Vogue) by the Naval Regional Procurement Office, Philadelphia, Pennsylvania, under request for proposals (RFP) No. N00140-76-R-0503.

Background

On December 10, 1975, TM and Vogue submitted initial proposals priced as follows:

	Total Price
TM	$198,000.00
Vogue	212,832.70

Both offers were considered acceptable and price was the determining factor for award in this procurement. On December 11, 1975, the contracting officer erroneously released TM's unit and total prices to Vogue. There is no indication that this action was anything other than a good-faith error on the contracting officer's part.

Shortly after disclosure of TM's prices, Vogue alleged that it had made a pricing mistake in its proposal and requested that its price be corrected to an amount lower than TM's initial price. Vogue stated that its allegation of a pricing mistake was entirely unrelated to the disclosure of TM's prices. It does not appear from the record that the contracting officer made any determination whether Vogue's allegation was correct. Instead, the contracting officer considered what action to take in the procurement in light of the erroneous disclosure of TM's prices.

The contracting officer recognized that the disclosure of TM's prices created a serious problem, because it gave Vogue a significant competitive advantage. He analyzed the situation as follows:

> All available alternatives as to how to proceed with the procurement were given exhaustive consideration. The alternative of awarding on the basis of the most favorable initial offer pursuant to ASPR 3-805.1(a)(v) was examined. However, this alternative required a clear demonstration that the initial offer represented a fair and reasonable price. In this case, the most favorable initial offer [$198,000.00] was much higher than the Government estimate [$134,602.00]. Furthermore, TM, the company submitting the most favorable initial offer, had advised the Contracting Officer that the initial offer was based on estimates which were too high when compared with actual quotes from prospective subcontractors and suppliers. Also, the other offeror had submitted a revised offer which was * * * lower than the most favorable initial offer. Therefore, there was no basis for concluding that acceptance of the most favorable initial offer would result in a fair and reasonable price.
>
> The second alternative examined was that of going forward with negotiations, but precluding any further participation on the part of Vogue, the recipient of a competitive advantage. This would have resulted in negotiating exclusively with TM. The use of this alternative is inconsistent with ASPR [1-300.1] which requires full and free competition.

The third alternative considered was that of making full disclosure of the prices submitted by both offerors in their initial offers in order to overcome the competitive advantage possessed by Vogue. A disclosure of the prices would involve an element of the auction technique. ASPR 3-805.3(c) does not permit the use of auction techniques in pricing contracts.

The contracting officer reasoned that although none of the alternatives was fully in compliance with the Armed Services Procurement Regulation (ASPR), the third alternative was the most logical. By letters dated December 31, 1975, TM and Vogue were informed of the Navy's intention to solicit best and final offers. These letters also advised the parties of TM's and Vogue's unit and total prices. TM advised the Navy that it would submit a best and final offer, but that this action was without prejudice to its protest to our Office, which it filed on January 14, 1976.

The Navy has not publicly disclosed the amount of the best and final offered prices, except to indicate that both best and final offers were approximately 10 percent less than the lowest initial price proposal (i.e., 10 percent less than $198,000, or about $178,000). Vogue's best and final price was lower than TM's. No award has been made.

Also, we have been advised that on April 5, 1976, TM filed an action in the U.S. District Court in Connecticut, seeking a temporary restraining order. Apparently, the order was sought to preclude an award to Vogue prior to our decision, or subsequent to any decision of our Office adverse to the protester. We understand that the court, in connection with the hearing on the temporary restraining order, indicated its interest in receiving our decision in this matter. Accordingly, we will consider the protest on the merits. See *Dynalectron Corporation et al.*, 54 Comp. Gen. 1009 (1975), 75-1 CPD 341, and decisions cited therein.

Award on Basis of Initial Proposals

Several of our decisions indicate that where initial proposals are received and pricing or technical information in the proposals is improperly disclosed, the contracting agency should make an award, if possible, on the basis of the initial proposals. See *RCA Corporation*, 53 Comp. Gen. 780 (1974), 74-1 CPD 197; *Cf.* 53 Comp. Gen. 253, 258 (1973). The reason is that to conduct negotiations and obtain revised proposals may constitute a prohibited auction.

However, making an award on the basis of the initial proposals—an exception to the general requirement that written or oral discussions be conducted—is permissible only in certain limited circumstances. *See* ASPR § 3-805.1(a) (1975 ed.). ASPR § 3-805.1(a)(v) provides that an award on an initial proposal basis may be made where it can be clearly demonstrated from the existence of adequate compe-

tition or accurate prior cost experience that a fair and reasonable price would result.

In the present case, the most favorable initial proposal ($198,000) was 47 percent in excess of the Government estimate ($134,602). In light of this fact alone, we see no basis to object to the contracting officer's determination that a fair and reasonable price would not be obtained by making an award on the basis of the initial proposals.

TM argues that the Navy's $134,602 estimate is unrealistic, as evidenced by the fact that the estimate left one of the items (the technical data package) uncosted. TM points out that its price for this item was $10,000 and Vogue's price was $29,808. We are unpersuaded by this argument. Even assuming that the technical data package should be costed at the average of the two quoted prices (i.e., $19,904), making the Navy estimate $154,506, TM's initial proposal price is still 28 percent in excess of the estimate.

TM next contends that the estimate is unrealistic because the Navy is prepared to accept Vogue's best and final offer (about $178,000) as representing a reasonable price. Accepting, again, $154,506 as a better estimate of the Government's requirements, we do not believe that a proposed contract price of about $178,000 (a 15–percent overage) convincingly shows that the estimate is erroneous, particularly in light of the fact that the $178,000 price results from a request for best and final offers rather than the submission of initial proposals.

In view of the foregoing, we see no basis to recommend that award be made on the basis of the initial proposals in the present case.

Request for Best and Final Offers

TM's second argument is that the Navy's request for best and final offers created an auction, which, the protester points out, is strictly prohibited by ASPR § 3–805.3(c) (1975 ed.). TM believes that the Navy should have excluded Vogue from the competition and negotiated solely with it.

TM primarly relies on 50 Comp. Gen. 222 (1970) (cited by the protester as B–170093, September 28, 1970). In that decision, we stated that because vital information concerning the successful proposal had been revealed to the protester, the contracting officer could not have entertained any further modifications to the protester's proposal, since this would compromise the integrity of the Federal procurement system by allowing an auction to be held.

We note that 50 Comp. Gen. 222 involved a factual situation dissimilar to the present case—i.e., the "inside" information had been revealed to the protester with the implicit understanding that negotiations were closed and its proposal was no longer in line for award. We

do not believe 50 Comp. Gen. 222 must be read as establishing a general rule that an offeror which obtains improperly disclosed information must always be excluded from further competition. Compare, in this regard, B–174550, December 1, 1971. In that case, certain information had been improperly disclosed to one of the offerors. We held that the offeror's continued participation in the competition could be permitted, provided that it acquiesced in the disclosure of its proposal configuration to each of the other offerors. In the present case, Vogue has acquiesced in the Navy's release of its prices to TM prior to the receipt of best and final offers.

There is also for noting *The Franklin Institute*, 55 Comp. Gen. 280 (1975), 75–2 CPD 194 (cited by the parties as B–182560, September 26, 1975). There, we pointed out that information which had been improperly disclosed should not be allowed to accrue to the protester's possible competitive advantage. Our decision went on to state:

> * * * We are, however, mindful of the need to maximize competition and to give all interested parties an opportunity to compete for the contract. Where circumstances permit, we have favored eliminating an undue advantage to one bidder—because he was improperly provided information not available to other bidders—by resoliciting with information needed to compete intelligently made available to all interested parties. * * *
>
> We think it is desirable, where it can be done without compromising the Government's needs, to eliminate in this manner any improper advantage which may have been gained by a competitor, since the advantage is thereby eliminated without reducing competition. * * *

Consistent with B–174550 and *The Franklin Institute*, *supra*, we believe the Navy's basic approach in the present case—in releasing to each offeror the other's prices, and thereby attempting insofar as possible to eliminate any unfair competitive advantage—is not subject to objection. *Cf.* 53 Comp. Gen. 253, *supra.* It is also pertinent that exclusion of Vogue from the competition would leave TM as the only remaining offeror. While TM alleges that submission and analysis of cost or pricing data could assure the Navy that a reasonable price would be obtained, we are reluctant to recommend the exclusion of Vogue and thereby create a sole-source procurement. We are unaware of any precedent, nor has any been cited by TM, which would support this resolution of the case.

TM additionally contends that an award cannot be made by accepting Vogue's best and final offer because the resulting contract would be void. TM's argument is that ASPR § 3–805.3(c), *supra*, prohibits auctions; that ASPR has the force and effect of law; and that, under the standards described in 52 Comp. Gen. 215 (1972), an award in these circumstances would be a knowing violation of the regulations. Therefore, the award would not be merely improper and voidable, but plainly illegal, i.e., void *ab initio*.

We note that while ASPR prohibits auctions, it does not describe any legal penalties or consequences attaching to an award resulting from an auction. While our Office does not sanction the disclosure of information which would give any offeror an unfair competitive advantage, we have also stated that we see nothing inherently illegal in the conduct of an auction in a negotiated procurement. *See* 48 Comp. Gen. 536, 541 (1969). *See also* 53 Comp. Gen. 253, *supra*, where we declined to hold that an award resulting from an auction was either improper or illegal. We see no merit in TM's argument. We believe that an award following the recommendation described *infra* will be legal and proper.

Conclusion and Recommendation

Two additional points raised by TM must be considered. First, the protester points out that, at the time the Navy requested it to submit a best and final offer in early January 1976, it was not informed that Vogue had alleged a pricing mistake in its initial proposal and had requested that its initial proposal price be corrected downward to an amount lower than TM's initial price. As far as TM knew, Vogue had only submitted an initial offer, priced at $212,832.70. Second, TM also complains of the disparity between the time Vogue learned of TM's prices (December 11, 1975) and the time it learned of Vogue's prices (January 5, 1976). Since best and final offers were due January 14, 1976, for both offerors, TM alleges that it was at a disadvantage under these circumstances.

While we are sympathetic to TM's complaint that Vogue had a greater amount of time to prepare its best and final offer, we believe that some inequality of this kind is unavoidable. A more important consideration is TM's contention regarding Vogue's mistake in proposal claim. As indicated previously, where best and final offers are sought in a case of this kind, the contracting agency must attempt to equalize the competition and to eliminate insofar as possible any offeror's unfair competitive advantage. We believe the Navy's failure to advise TM of Vogue's mistake in proposal claim did place TM in a less than equal competitive position. This conclusion does not depend on Vogue's motivation for alleging a pricing mistake in its proposal, whether the mistake could be substantiated, or whether the allegation of mistake should have been rejected as a late modification to Vogue's initial proposal. The salient fact is simply that Vogue indicated its willingness to accept an award at a price below its initial proposal price and TM's initial proposal price—and that TM, in preparing its

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best and final offer, was unaware of this fact. We believe this is a sufficient degree of inequality in the competition to warrant corrective action.

Accordingly, we recommend that the Navy proceed as follows in the procurement. The release of Vogue's mistake in proposal claim (enclosure 4 to the Navy's report) should be made a condition of Vogue's continued participation in the procurement. That is, the Navy should advise Vogue that it intends to release this information to TM; if Vogue is unwilling to promptly agree to this, its proposal should be eliminated from consideration, and an award made to TM based on its best and final offer of January 14, 1976.

If Vogue agrees to the release of its mistake in proposal claim, this information should be provided to TM. The Navy should then, after a reasonably brief interval, obtain one additional round of best and final offers from both offerors and proceed with an award.

The objective of our recommendation is to attempt to place the offerors in the relatively equal competitive positions they should have occupied prior to the submission of best and final offers on January 14, 1976. Accordingly, we do not believe it is either necessary or desirable to disclose to the offerors the prices or any other information contained in their best and final offers submitted on January 14, 1976.

We understand that the Navy has an urgent requirement for the supplies being procured here. However, we think the foregoing recommendation can be carried out without any undue delay. Both offerors are well apprised of the overall procurement situation. It should be possible to carry out the recommendation and make an award within a matter of days.

By letter of today, we are advising the Secretary of the Navy of our recommendation.

To the extent indicated above, the protest is sustained.

[B-183004]

Transportation—Automobiles—Military Personnel—Ferry Transportation—English Channel

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

Travel Expenses—Military Personnel—Temporary Duty—Hovercraft Crossing of English Channel

Although there is no authority in current regulations under which full fare (including that part attributable to transportation of the automobile) for Hovercraft crossing of the English Channel may be paid incident to temporary duty travel of military personnel, it does not appear that payment of such full fare would be objectionable under appropriate regulations if travel by automobile, including transoceanic ferry service, is specifically authorized as advantageous to the Government since the transportation of the automobile may be considered as incident to authorized travel of the member in appropriate circumstances.

In the matter of Captain Earle W. Sapp, USN, May 5, 1976:

This action is in response to a request for an advance decision from the Disbursing Officer, United States Naval Activities, United Kingdom, Box 96, FPO, New York, concerning the propriety of making payment on a voucher in the amount of $68.14, representing reimbursement to a member of expenses incurred for transporting his privately owned vehicle across the English Channel. This matter was forwarded here by the Per Diem, Travel and Transportation Allowance Committee by endorsement dated January 7, 1975, and has been assigned PDTATAC Control No. 75-1.

The submission states that the member, Captain Earle W. Sapp, USN, was issued temporary additional duty orders, dated March 28, 1974, for the purpose of authorizing his attendance at the International Computing Conference in Zurich, Switzerland, from April 9, 1974, through April 11, 1974. Those orders by reference to item 22 on the reverse thereof authorized "travel via POV with reimbursement seven cents per mile for official distance traveled, such mode of travel considered more advantageous to government." Other items of authorization on the reverse of the travel order as made applicable to this travel included travel by Government and commercial transportation.

Following his return, the member was apparently paid all travel and per diem costs for the ordered travel except for part of the Hovercraft fare which was attributed to ferrying his POV from Dover, England, to Calais, France, and return. Captain Sapp has now requested reimbursement for $68.14, the amount of Hovercraft fare disallowed as the cost of transportation for his POV across the English Channel.

The submission points out that in our decision B-140560, March 8, 1961 (40 Comp. Gen. 497), we held that ferry travel across the English Channel is to be considered as transoceanic travel for the purpose of reimbursing a member for such travel. However, it was noted that the decision excluded charges for *shipment* of a POV on foreign vessels across the Channel.

Section 404 of Title 37, U.S. Code (1970), provides in part that under regulations prescribed by the Secretaries concerned, a member of a uniformed service shall be entitled to receive allowances for travel performed under competent orders when away from his designated post of duty. In this connection, paragraph M4251 of the Joint Travel Regulations provides:

> Temporary duty transportation allowances for land travel will be as prescribed in par. M4203. Temporary duty transportation allowances for transoceanic travel performed at the member's own expense will be as prescribed in par. M4159-5. * * *

Subparagraph M4203-3b of those regulations in effect at the time travel was performed stated the policy of the uniformed services to authorize members to travel by POV whenever such mode of transportation was acceptable to the member and determined to be more advantageous to the Government and provided for reimbursement for land travel at a rate of 7 cents per mile.

This allowance constitutes a commutation of all expenses incurred for land travel. Under normal circumstances, bridge tolls and ferry fares are included in the monetary allowance and are not a separate reimbursable expense. However, that alowance does not cover transoceanic travel incident to temporary duty or permanent change of station travel.

In our decision 40 Comp. Gen. 497, *supra*, we were concerned with the nature of the ferry fare incurred incident to personal and dependent travel across the English Channel. In arriving at the conclusion that certain expenses attendant to such travel are separately reimbursable, we stated:

> Generally, our decisions holding that members of the uniformed services traveling on a mileage basis are not entitled to reimbursement of ferry fares have related to the fares ordinarily encountered at a comparatively nominal cost in automobile travel on the public highways for transportation over relatively narrow water obstructions in the normal highway system. However, we consistently have held that, because of the distance involved and the transoceanic nature of the travel, fares for cross channel travel are reimbursable as transoceanic travel under the statutes authorizing travel and transportation allowances for the uniformed services. * * *

In 49 Comp. Gen. 416 (1970), we considered the question as to the propriety of reimbursing a member for certain expenses incurred for the transportation across the English Channel via Hovercraft. We held therein that where the tariff charge is imposed only for transporting a motor vehicle and not imposed on the driver or passengers, such expenses may not be reimbursed on the basis of applying a percentage of the vehicle fare to the driver and passengers.

The transportation involved is thus considered both transoceanic service and ferry service and the fares charged include the cost of transporting both vehicle and passengers. As transoceanic travel the mileage rate is not applicable and payment by the Government of the

fare is subject to various rules based upon actual costs. In that connection we held in 53 Comp. Gen. 131 (1973) that the cost of the transoceanic ferry between Nova Scotia and Newfoundland, Canada, could be divided into the fare applicable to individual travel and the cost of shipment of the vehicle. However, in 49 Comp. Gen. 416, where the applicable tariff provided for transportation of a vehicle with up to six passengers at a flat rate, the total cost was held to be a charge for transportation of the vehicle. Under that decision, unless the Hovercraft fares in this case were assessed on a different basis than they were a few years previously, it would appear that Captain Sapp should not have been reimbursed part of the fare as is indicated by the submission.

However, we have reviewed the conclusion in 49 Comp. Gen. 416 and now feel that, whatever the formula used by the transportation company to assess fares, when ferry service is used it is not unreasonable to attribute a part of that fare to the transportation of the individual traveler. Therefore, if the allocation of the fare to Captain Sapp's travel was reasonable, we will not now question that reimbursement. So far as 49 Comp. Gen. 416, *supra*, is inconsistent with the above, it will no longer be followed.

Under current law and regulations, therefore, a member of the uniformed services may be entitled to reimbursement of ferry fares for use of so-called transoceanic ferry to the extent that such fares may reasonably be attributed to transportation of the individuals involved. We do not find that current regulations as they have been interpreted in our decisions authorize payment of such fares to the extent that they may be attributable to transportation of POV's.

Accordingly, Captain Sapp's voucher for the balance of the round-trip fare covering the transportation of his POV across the English Channel may not be paid.

The above decision is not to be interpreted as holding that transoceanic ferry fares in full (such as English Channel ferry fares) might not be considered as incident to the travel of the member when performing temporary duty travel under specific travel orders issued under appropriate regulations. Thus, if Volume 1 of the Joint Travel Regulations were amended to provide for the use of transoceanic ferry at Government expense where specifically authorized as more advantageous to the Government in the temporary duty order, payment of the full ferry fare, including any part which might be attributable to automobile transportation, might reasonably be considered as incidental to the member's authorized temporary duty travel.

[B-185591]

Books and Periodicals—Appropriation Availability—Expenses Incident to Specific Purposes—Necessary Expenses

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

In the matter of a subscription to periodical, May 5, 1976:

This decision responds to a request by Ms. Anne C. Hansen, an authorized Certifying Officer of the Mining Enforcement and Safety Administration (MESA), Department of the Interior, concerning the propriety of payment of $11 for 1 year's subscription to the Federal Employees News Digest, which was requisitioned by a MESA employee.

Citing our decision in 21 Comp. Gen. 339 (1941), the Certifying Officer requests our determination, whether:

> * * * it is appropriate to pay for this periodical or like newspapers or periodicals which do not appear to be indispensable for the accomplishment of the mission of the Mining Enforcement and Safety Administration.

In the case cited, we held that purchase of certain publications was appropriate only where it was administratively determined that their acquisition was "indispensable—as distinguished from merely desirable or helpful—to the accomplishment of the purposes" for which a specific appropriation was made. *Id.*, 341.

However, our 1941 decision was based on section 3 of the Act of March 15, 1898, 30 Stat. 316, which provided:

> That hereafter law books, books of reference, and periodicals for use of any Executive Department, or other Government establishment * * * at the seat of Government shall not be purchased or paid for from any appropriation made for contingent expenses or for any specific or general purpose unless such purchase is authorized and payment therefor specifically provided in the law granting the appropriation.

This statutory provision was repealed in 1946, and 21 Comp. Gen. 339 is no longer for application. The current rule with respect to periodical subscriptions is the same as that governing proposed uses of appropriated funds generally, *i.e.*, their purchase must only be justified as a "necessary expense" of the agency. *See* 39 Comp. Gen. 320 (1959); 27 *id.* 746, 747 (1948).

Accordingly, the instant voucher (which is returned herewith to the Certifying Officer) may be paid, if otherwise correct, upon administrative determination that a subscription to the Federal Employees News Digest is necessary in carrying out MESA's functions. See generally, 51 Comp. Gen. 797 (1972); B-172556, December 29, 1971; B-171856, March 3, 1971.

[B-133322]

Compensation—Increases—Cost-of-Living Adjustments—Maximum Limitation

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

Courts—Magistrates—Compensation—Increases—Cost-of-Living Adjustments

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

In the matter of cost-of-living adjustment for certain judicial officers—maximum salary, May 6, 1976:

This matter involves requests from Rowland F. Kirks, Director, Administrative Office of the United States Courts, by letters of October 9 and 16, 1975, for an advance decision concerning the authority of that office to provide cost-of-living increases to certain judicial officers.

First, he asks whether the Executive Salary Cost-of-Living Adjustment Act, Public Law 94–82, August 9, 1975, 89 Stat. 419 (5 U.S. Code 5312 note), may be applied to adjust the compensation of part-time United States magistrates including combination clerk-magistrates and combination referees in bankruptcy-magistrates appointed under 28 U.S.C. § 631 (1970), and citizen jury commissioners appointed under 28 U.S.C. § 1863(b)(1) who are serving at the otherwise applicable maximum rate of compensation.

Section 205 of Public Law 94–82 amends various provisions of Titles 11 and 28 of the United States Code to provide a cost-of-living adjustment to the salaries of certain judicial officers. Section 205(a)(1) adds a new section 461 to Chapter 21 of Title 28, U.S. Code, which provides for adjustments in certain salaries, as follows:

(a) Effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under section 5305 of title 5 in the rates of pay under the General Schedule * * * *each salary rate which is subject to adjustment under this section shall be adjusted* by an amount, rounded to the nearest multiple of $100 (or if midway between multiples of $100, to the next higher multiple of $100) equal to the percentage of such salary rate which corresponds to the overall average percentage (as set forth in the report transmitted to the Congress under such sec-

tion 5305) of the adjustments in the rates of pay under such Schedule. * * * [Italic supplied.]

The Director states that the language underscored above is ambiguous inasmuch as the section does not expressly identify or otherwise explain which salaries are "subject to adjustment under this section." Therefore, the Director believes it may be possible to apply the general salary adjustment provisions of 28 U.S.C. § 461(a), *supra*, to provide cost-of-living adjustments to the salaries of all or most judicial officers appointed under the provisions of Title 28. However, he recognizes that section 461 could be construed to apply only to those salary provisions which incorporate section 461 by specific reference. Such a construction would exclude part-time magistrates and citizen jury commissioners. He also suggests a third construction to the effect that part-time magistrates were intended to be left under the adjustment provisions of 5 U.S.C. § 5307. If so, he inquires whether the $15,000 maximum may be exceeded by virtue of § 5307.

The intent of Congress is controlling in reading any statute and the plain and obvious meaning is the safest interpretation and the one that most clearly expresses legislative intent. *National Forest Preservation Group* v. *Volpe*, 352 F. Supp. 123, 126 (1970). A review of section 205 of Public Law 94–82 indicates that the language of the statute clearly identifies "each salary rate which is subject to adjustment under this section." Subsection (b) of section 205 enumerates eight classes of judicial officers whose salaries are to be adjusted by section 461 of Title 28, U.S. Code. For each such class, section 205(b) amends the relevant section of the United States Code which provides for the compensation to be received by the members of the class, and in each case the amendment specifically incorporates the adjustment provisions of 28 U.S.C. § 461. Thus, the "certain salaries" and "each salary rate which is subject to adjustment under this section * * *" referred to in the title and text of 28 U.S.C. § 461 are identified.

Moreover, we are of the opinion that the rule of statutory construction, *expressio unius est exclusio alterius* (the enumeration of certain things in a statute implies the exclusion of all others), should be applied in interpreting section 205. Therefore, where a statute such as the one under consideration enumerates the persons affected, it should be construed as excluding from its effect all those not expressly mentioned. *Continental Casualty Co.* v. *United States*, 314 U.S. 527 (1941), *McDonald* v. *Board of Election Commissioners of Chicago*, 277 F. Supp. 14 (1967), *United States* v. *Aguino*, 338 F. Supp. 1080 (1972).

We, therefore, conclude that the salary adjustment provisions of 28 U.S.C. § 461, *supra*, may be applied only to those judicial officers expressly mentioned in section 205 of Public Law 94–82. Since full–time and part-time United States magistrates and citizen jury commis-

sioners are not mentioned therein, they are not covered by the salary adjustment provisions of 28 U.S.C. § 461.

Also, the language of 28 U.S.C. § 461(a) states "* * * each salary rate * * * shall be adjusted * * *." The United States Supreme Court has held that normally the word "shall" should be construed as a command. *Escoe* v. *Zerbst*, 295 U.S. 495 (1935), *Boyden* v. *Commissioner of Patents*, 441 F. 2d 1041 (1971). Therefore we conclude that section 461(a) requires a mandatory adjustment.

However, even though part-time magistrates and citizen jury commissioners are not covered by 28 U.S.C. § 461, we believe that their salaries may be adjusted administratively under 5 U.S.C. § 5307. We further believe that the $15,000 per annum maximum salary limitation prescribed in 28 U.S.C. § 634(a) (Supp. III, 1973) for part-time magistrates and the $50 per day maximum compensation prescribed in 28 U.S.C. § 1863(b)(1) (1970) for citizen jury commissioners may be exceeded by virtue of the salary adjustment provisions of 5 U.S.C. § 5307 (1970) which provides in pertinent part as follows:

§ 5307. Pay fixed by administrative action.
(a) Notwithstanding section 665 of title 31—
(1) the rates of pay of—
(A) employees in the legislative, executive, and judicial branches of the Government of the United States * * * whose rates of pay are fixed by administrative action under law and are not otherwise adjusted under this subchapter * * *
(2) any minimum or maximum rate of pay * * * and any monetary limitation on or monetary allowance for pay, applicable to employees described in subparagraphs (A), (B), and (C) of paragraph (1) of this subsection; may be adjusted, by the appropriate authority concerned, effective at the beginning of the first applicable pay period commencing on or after the day on which a pay adjustment becomes effective under section 5305 of this title, by whichever of the following methods the appropriate authority concerned considers appropriate—
* * * * * * *
(iii) in the case of minimum or maximum rates of pay, or monetary limitations of allowances with respect to pay, by an amount rounded to the nearest $100 and computed on the basis of a percentage equal or equivalent, insofar as practicable and with such variations as may be appropriate, to the percentage of the pay adjustment provided under section 5305 of this title.
(b) An adjustment under subsection (a) of this section in rates of pay, minimum or maximum rates of pay, and monetary limitations or allowances with respect to pay, shall be made in such manner as the appropriate authority concerned considers appropriate.

The above-quoted statute thus provides discretionary authority to adjust the minimum or maximum rates of pay of employees of the judicial branch, whose pay is fixed by administrative action by an amount rounded to the nearest $100 and computed on the basis of a percentage equal or equivalent, insofar as practicable and with such variations as may be appropriate, to the percentage of the pay adjustment provided under 5 U.S.C. § 5305 (1970). See U.S. Code Cong. and Ad. News p. 5925 (1970). Inasmuch as the pay of part-time magis-

trates and citizen jury commisisoners is fixed by administrative action under 28 U.S.C. § 633(b) and 28 U.S.C. § 1863(b)(1), respectively, we are of the opinion that the maximum statutory rates of pay of these officials may be adjusted pursuant to the provisions of 5 U.S.C. § 5307, *supra*, so that the maximum rates of pay set forth in the applicable statutes may be exceeded.

Adjustments of minimum and maximum pay ceilings should be computed in accordance with 5 U.S.C. § 5307(a)(iii), which contemplates adjustment of the *annual* salary rates of employees involved inasmuch as the aforementioned statute requires that the amount of the pay adjustment be rounded to the nearest $100. Thus in computing the adjustment for citizen jury commissioners, whose maximum compensation is set at $50 per day under 28 U.S.C. § 1863(b), it will be necessary to assume an annual rate of basic pay based on 52 basic administrative workweeks of 40 hours divided into five 8-hour days as set forth in 5 U.S.C. § 5504(b) and 5 U.S.C. § 6101. Therefore the assumed initial maximum annual rate of basic pay for citizen jury commissioners would be $13,000. After the annual adjustment is computed, a per diem adjustment increment should be determined and added to the $50 per day maximum statutory compensation for the initial adjustment.

Finally, the Director states that at the time of the prior cost-of-living adjustment, the Administrative Office understood that 5 U.S.C. § 5307 did not allow the statutory maximum salary to be exceeded, and he asks whether it is necessary to redetermine such adjustment. We do not think so. Clearly, the language of section 5307 is discretionary and not mandatory. See U.S. Code Cong. and Ad. News 5925 (1970). Since a decision was made at the time of the last cost-of-living increase not to grant it to these officials, regardless of the reasons therefor, we believe it would be inappropriate to reverse that decision retroactively at this time.

On the other hand, 5 U.S.C. § 5307 provides authority to make administrative adjustments retroactively effective to the date authorized for adjustments under statutory pay systems. 51 Comp. Gen. 709 (1972). Hence it is clearly within the discretion of the appropirate officials to grant an adjustment under section 5307 retroactive to October 1, 1975, the effective date of the cost-of-living increase that led the Director to seek our opinion on these questions.

[B-184605]

Travel Expenses—Temporary Duty—Ambulance Services

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

In the matter of Robert J. Bartosch—temporary duty—ambulance service, May 6, 1976:

By letter of July 17, 1975, Ms. June S. Long, an authorized certifying officer for the Federal Home Loan Bank Board, submitted for advance decision a voucher for Robert J. Bartosch in the amount of $40 representing ambulance expenses including cost of paramedics, incurred on March 27, 1975. The record shows that when he was at his temporary duty station, Mr. Bartosch lost consciousness during a high-blood-pressure seizure and was taken to the hospital in an ambulance.

As indicated in the request for a decision we held in 40 Comp. Gen. 167 (1960) that an employee who became ill at a temporary duty station and whose return by ambulance to his permanent duty station was authorized or approved could be reimbursed for such expense under the applicable regulations—currently Federal Travel Regulations (FPMR 101–7) para. 1–2.4 (May 1973). With respect to ambulance expenses to hospital at a temporary duty station, however, we are unaware of any regulations which provide for reimbursement of such expense. In this connection see B–160272, November 14, 1966, which holds that ambulance service charges would not be paid if they were incurred at headquarters under circumstances similar to the case of Mr. Bartosch on temporary duty. In general, for a presentation of the authorization of payment of medical expenses, including related travel expenses, which are incurred primarily for the benefit of the Government, see 49 Comp. Gen. 794 (1970) and 47 *id.* 54 (1967).

Accordingly, the voucher which is returned may not be certified for payment.

[B–133001]

President—Authority—Protection of American Lives and Property Abroad

President possesses some unilateral constitutional power to protect lives and property of Americans abroad, even in absence of specific congressional authorization. Courts have sustained or alluded to such authority and its exercise has considerable historical support. Language of War Powers Resolution as whole indicates it was not meant to directly restrict President's power, its basic purpose being to involve Congress in decision-making process of future wars. Thus War Powers Resolution in effect neither initially precludes nor sanctions military initiatives by the President for these purposes.

Appropriations—Availability—Bombing Incident to Rescue Operation

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

Appropriations—Limitation—Combat Activities in Southeast Asia

Seven funding limitation statutes prohibit use of appropriated funds for combat activity in Indochina. While legislative history of seven acts is not entirely clear respecting President's rescue power, there are some specific statements that such power is not restricted, and the overall intent of seven acts was to curtail bombing and offensive military action in Southeast Asia. Therefore, President's recent evacuation of Americans from Saigon did not conflict with such statutes.

Appropriations—Availability—Evacuation of Foreign Nationals

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

President—Authority—Military Personnel Utilization

Section 3 of War Powers Resolution requires the President to consult with Congress before and during introduction of U.S. Armed Forces into hostilities or situations clearly indicating imminent hostilities. Legislative history of section 3 is clear that requirement is not satisfied by token statement of actions intended to be taken. While evidence in hearings subsequent to *Mayaguez* rescue suggests President merely informed Congress of decisions already made, requirements of section 3 are not sufficiently definitive to establish violation in present circumstances.

Congress—Resolutions—War Powers

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

To the Honorable Thomas F. Eagleton, United States Senate, December 8, 1975 [released May 12, 1976]:

Your letter of May 5, 1975, requested our opinion as to the legality of the expenditure of funds involved in the recent use of United States Armed Forces to evacuate Americans and foreign nationals from South Vietnam. You asked us to consider this action in light of the absence of any specific congressional authorization, the legal impact of the War Powers Resolution, Public Law 93–148, November 7, 1973, 87 Stat. 555 (50 U.S. Code 1541 note), the statutory prohibitions against the use of appropriated funds for combat activity in Indochina (Public Law 93–437, § 839, October 8, 1974, 88 Stat. 1231; Public Law 93–238, § 741, January 2, 1974, 87 Stat. 1045; Public Law 93–189, § 30, 22 U.S.C. 2151 note; Public Law 93–155, § 806, November 16, 1973, 87 Stat. 615; Public Law 93–126, § 13, October 18, 1973, 87 Stat. 454; Public Law 93–52, § 108, July 1, 1973, 87 Stat. 134; and Public Law 93–50, § 307, July 1, 1973, 87 Stat. 129, hereinafter referred to as the seven funding limitation statutes), and the fact that Congress

did not approve legislation proposed by a House-Senate Conference to use American forces to rescue certain categories of foreign nationals. Your letter of May 21, 1975, raised additional questions concerning the rescue of the crew of the American Merchant Ship *Mayaguez* from Cambodian territory.

You state that most constitutional scholars would agree that the President does possess some unilateral constitutional power to use force to rescue Americans. It is true that the weight of authority does support this position. Historically Presidents have claimed, as an "inherent" or implied power of the Executive, the right to use U.S. Armed Forces to protect the lives and property of both Americans and foreign nationals abroad under authority vested in them by the Constitution to hold the general executive power of the United States (U.S. Constitution Art. 2, § 1, cl. 1); as Commander-in-Chief of the Army and Navy (U.S. Constitution Art. 2, § 2, cl. 1); with the consent of the Senate, to make treaties (U.S. Constitution Art. 2, § 2, cl. 2); and, the responsibility to see that the laws be faithfully executed (U.S. Constitution Art. 2, § 3, cl. 1). *See generally* The Constitution of the United States of America—Analysis and Interpretation, S. Doc. No. 92–82, 562–64, 459–64 (1972). A few instances where this authority has been exercised in the absence of any specifiic legislative provision, involving evacuation of large numbers of foreign nationals, together with U.S. citizens, include the Boxer Rebellion in China in 1900, the landing of Marines in Nicaragua in 1926, during the Congo crisis of 1964, and the Dominican Intervention of 1965.

The only direct judicial sanctioning of this authority appears to be Justice Nelson's decision in *Durand* v. *Hollins*, 8 F. Cas. 111, (No. 4186) (C.C.S.D.N.Y. 1860). This was a suit against a Navy Commander for damages caused by his forces during an action to protect U.S. citizens in Greytown, Nicaragua in 1854. Justice Nelson held that since the military action was pursuant to a valid exercise of presidential authority, the Navy Commander was not liable:

> As the executive head of the nation, the president is made the only legitimate organ of the general government, to open and carry on correspondence or negotiations with foreign nations, in matters concerning the interests of the country or of its citizens. It is to him, also, the citizens abroad must look for protection of person and of property, and for the faithful execution of the laws existing and intended for their protection. For this purpose, the whole executive power of the country is placed in his hands, under the constitution, and the laws passed in pursuance thereof; and different departments of government have been organized, through which this power may be most conveniently executed, whether by negotiation or by force—a department of state and a department of the navy.
>
> Now, as it respects the interposition of the executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the President. Acts of lawless violence, or threatened violence to the citizen or his property, cannot be anticipated and provided for; and the protection, to be effectual or of any avail, may, not unfrequently, require the most prompt and decided action. * * * *Id.* at 112.

The Supreme Court has, by dictum, also alluded to such authority. In *In Re Neagle*, 135 U.S. 1, 63–64 (1889), the Court noted that the President had certain exclusive "rights, duties and obligations growing out of the Constitution itself" which included an implied obligation to protect U.S. citizens abroad. The Court then referred to a military action to protect one Martin Koszta, a foreign national who had indicated his intent to become a naturalized U.S. citizen. And in the *Slaughterhouse Cases*, 83 U.S. 36, 79 (1872), the Supreme Court said that one of the privileges and immunities of a U.S. Citizen "is to demand the care and protection of the Federal Government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government."

In view of the above, it appears the President does have some authority to protect the lives and property of Americans abroad even in the absence of specific congressional authorization. The question then becomes whether Congress, in the War Powers Resolution, generally restricted this power *supra*, or whether any of the seven funding limitation statutes restricted the President's power in this regard.

The pertinent language in the War Powers Resolution, *supra*, which could arguably be read as restricting the President's power to rescue Americans is that of section 2(c), 50 U.S.C. 1541(c):

> The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

That section, in the words of Senator Javits, one of the primary sponsors of the legislation, is designed to—

> * * * put the President on notice as to the parameters of his authority, declare what we consider to be the Presidential powers * * * with respect to the definition of a national emergency which would entitle him to introduce our Armed Forces into hostilities or situations where imminent involvement in hostilities is clearly indicated by the circumstances. 119 Cong. Rec. 33551 (October 10, 1973).

Absent from section 2(c) as enacted is language specifically recognizing the President's power to rescue Americans as one of the situations entitling him to introduce Armed Forces into hostilities. By contrast, however, S. 440, 93d Cong., 1st Sess., the Senate version of the war powers legislation, did recognize such authority:

> In the absence of a declaration of war by the Congress, the Armed Forces of the United States may be introduced in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, only—
>
> * * * * * * *
>
> (3) to protect while evacuating citizens and nationals of the United States, as rapidly as possible, from (A) any situation on the high seas involving a direct and imminent threat to the lives of such citizens and nationals, or (B) any country in which such citizens and nationals are present with the express or tacit consent of the government of such country and are being subjected to a direct and imminent threat to their lives, either sponsored by such government

or beyond the power of such government to control; but the President shall make every effort to terminate such a threat without using the Armed Forces of the United States, and shall, where possible, obtain the consent of the government of such country before using the Armed Forces of the United States being evacuated from such country; * * *.

* * * * * * *

The grounds listed in section 2(c), read literally, are exclusive in terms of the congressional conception of the President's war powers. See also, 119 Cong. Rec., *supra*, 33558–59 (colloquy between Senators Eagleton and Javits). However, the legislative history suggests that language expressly recognizing some presidential authority to rescue Americans was omitted from section 2(c), not necessarily to negate the existence of such authority but to avoid conceding too much. Thus Senator Javits observed, *id.* at 33558:

* * * There was a very long argument [in conference] about including the concept of rescuing nationals. It was felt that whatever was specified on that score, in order to be conservative in respect of the President's power, would have to be so hedged and qualified that we were better off just not saying it, in view of the fact that it is a rather rare occurrence, and just leaving that open; and that is what we did. *Cf.*, in this regard, *id.*, 33548 (remarks of Senator Fulbright).

In any event, irrespective of the individual views expressed during the debates concerning the scope of the President's constitutional authority, it is clear that the specification of grounds in section 2(c) does not in a strict sense operate to restrict such authority. The heading of section 2 of the Resolution (50 U.S.C. 1542) is entitled "Purpose and Policy." The general understanding of such policy sections, or preambles as they are frequently known, is that they "state the reason or occasion for making a law or to explain in general terms the policy of the enactment * * *. The function of the preamble is to supply reasons and explanations and not to confer power or determine rights." 1A Sutherland's Statutory Construction, §§ 20.03,20.12 (4th ed. 1972). Furthermore, the language of the statute when considered as a whole, particularly in relation to section 8(d), which provides in effect that Public Law 93–148 (5 .S.C. 1547(d)) does not alter the constitutional authority of the President or the Congress—indicates that Congress meant section 2(c) only as a statement of policy. This interpretation is borne out by the conference committee report in its section-by-section analysis of the Resolution:

Section 2(c) is a statement of the authority of the Commander-in-Chief respecting the introduction of United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances. *Subsequent sections of the joint resolution are not dependent upon the language of this subsection, as was the case with a similar provision of the Senate bill (section 3).* H.R. Rep. No. 93–547, 8 (1973). [Italic supplied.]

By this was meant that the strictly operative provisions of the War Powers Resolution—primarily the reporting and congressional action mechanisms set forth in sections 4–7—would be triggered on the basis of a "performance test," as Senator Javits put it, *i.e.*, by what the

President actually did, putting aside for the moment any issue concerning the constitutional authority for his actions. 119 Cong. Rec., *supra.*, 33551. This point was also emphasized by Representative Zablocki, principal House sponsor of the War Powers Resolution, *id.* at 33860 (October 12, 1973):

> The position of the conferees is that if the President assumes authority which he does not have, the Congress, therefore, recognizes that he has assumed that authority. Thus, the use of U.S. Armed Forces for a particular period by the executive branch can be terminated by a concurrent resolultion of this body. That is constitutional. This is the position the conferees have taken.
>
> It is an assumption of authority on the part of the President to commit troops, and if he does not have that authority we can indeed terminate the commitment of troops by concurrent resolution. But if he does have that authority from the Constitution, we restrict the period of time he may carry out that commitment without congressional concurrence.

In sum, it is clear that the basic purpose of the War Powers Resolution was to involve Congress in the decision-making process of future hostilities or potential hostilities, including, of course, rescue operations. However, the validity of such actions is in effect left open for consideration through the congressional review procedures.

Turning next to the seven funding limitation statutes, neither the language of the acts nor their legislative histories make clear congressional intent respecting the President's power to rescue Americans abroad. Most discussion and debate occurred during consideration of the first two funding limitation statutes, Public Law 93–50 and Public Law 93–52, which expressed the prohibition in terms of "combat activities" by United States forces in or over or from off the shores of Cambodia, Laos, North Vietnam and South Vietnam. The remarks of Senator McClellan upon submission of the conference report for Public Law 93–52 indicate that these two measures were meant to be consistent with each other, and effort was taken to prevent varying interpretations. 119 Cong. Rec. 22604 (June 30, 1973).

Our examination of the legislative histories of the first two statutes does not reveal extensive discussion concerning the scope of the prohibition or its possible effect upon rescue operations. However, during debate on the legislation enacted as Public Law 93–52—the continuing resolution—the following colloquy took place between then Representative Gerald R. Ford and Representative Addabbo, House sponsor of the prohibition:

> Mr. GERALD R. FORD. * * * If this resolution becomes law, if an enemy in the Pacific takes some military action in any one of these four areas and puts in jeopardy the lives of American civilians in any one of there [sic] areas, or the lives of any U.S. military personnel in any one of these areas, until the President comes to Congress and gets consent he cannot protect these lives.
>
> I suggest that should an enemy attack us and put other American lives in jeopardy, the Commander in Chief ought to have some flexibility to protect those lives. The Addabbo amendment does not give the President that flexibility, and the gentleman from Connecticut has totally confirmed that interpretation.
>
> Mr. ADDABBO. The gentleman from Michigan is speaking of protective action. I am speaking of direct combat action by our forces. We are not amending the

Constitution here this afternoon; we are taking a congressional prerogative. The President still has, as Commander in Chief, certain war powers, and if any place in this world our forces are threatened or attacked, he can move for the moment. But we are not doing that. We are, after two cease-fire agreements in Southeast Asia, telling the President and the Department of Defense that when this Congress speaks, it means what it says, not that when it speaks, they can still determine or try to interpret what we are saying. When we say stop bombing, they say "we can still bomb." This is what we are trying to do this afternoon.

* * * * * * *

Mr. GERALD R. FORD. Mr. Speaker, it is my understanding that the gentleman from New York in his previous comment said that the President as Commander in Chief has certain constitutional military responsibilities and opportunities—I cannot remember his precise language—which would go beyond the limitation in this amendment; is that correct?

Mr. ADDABBO. His rights under the Constitution as Commander in Chief, yes. 119 Cong. Rec. 21312–13 (June 26, 1973).

While some statements in the legislative history suggest that the prohibition was not so limited, and there was certainly no clear consensus in this regard, we are inclined to accept Mr. Addabbo's view as the most direct expression on the issue that the prohibitory language does not necessarily preclude rescue operations. Moreover, Mr. Addabbo's distinction between "direct combat actions"—apparently meaning offensive operations—and protective actions finds support in the pervasive emphasis at all stages of debate upon ending the vestiges of American warfare in Southeast Asia, most specifically the bombing operations taking place at the time.

The precise language of the subsequent funding limitation statutes varies—ranging from United States "combat operations" to "involvement * * * in hostilities" to "military or paramilitary operations." The language of the funding limitations clearly appears to have become progressively more comprehensive. However, we believe that a basic distinction between offensive and defensive operations still necessarily underlies even the broadest statutory language. For example, the term "military or paramilitary operations," if taken literally, would extend to any "operation" organized, directed, or otherwise carried out by United States military forces. Thus a literal application of this language would in theory have precluded (1) a withdrawal of Americans from Vietnam by use of military forces and facilities even absent a significant likelihood of combat with any force, or (2) an evacuation of Americans involving the use, or potential use, of military force to prevent interference by the South Vietnamese alone, in advance of any threat of enemy interference. Such a literal construction seems untenable, thereby permitting resort to the legislative history. In this regard, it appears that the intended purpose and effect of such statutes was essentially to continue and reaffirm the original prohibitions. *See*, *e.g.*, H.R. Rep. No. 93–558, 44 (1973) (on Public Law 93–155); H.R. Rep. 93–664, 51 (1973) (on Public Law 93–189); H.R. Rep. No. 93–662, 227 (1973) (on Public Law 93–238). Accordingly, we believe

that Mr. Addabbo's construction is applicable as well to the funding limitation statutes.

For the reasons stated above, we believe that, as a matter of statutory interpretation, the availability of appropriations for rescue operations for Americans is not flatly precluded by the seven funding limitation statutes.

The foregoing analysis is confined to the protection and rescue of Americans abroad. As indicated in your May 5 letter, there appears to be no significant support for the concept of presidential authority to rescue foreign nationals *as such*. *See*, *e.g.*, an April 15, 1975, memorandum on this point by the Senate Office of Legislative Counsel, printed in S. Rep. No. 94–88, 14 (1975). In fact, the Executive branch apparently does not claim, at least officially, that the President has *independent* authority to rescue foreign nationals. Thus, for example, a memorandum entitled "The President's Authority to Use Armed Forces to Evacuate U.S. Citizens and Foreign Nationals From Areas of Hostility," summarizes the Executive branch view with respect to the President's constitutional authority as follows:

> The nature and basis of the President's authority was succinctly stated by President Taft in 1916, following the termination of his term in office:
>
> > "He [the President] has done this [used military force to protect Americans] under his general power as Commander in Chief. It grows not out of any specific act of Congress, but out of that obligation, inferable from the Constitution, of the Government to protect the rights of an American citizen against foreign aggression * * *." (William Howard Taft, *The President and His Power*, (1967) p. 94–95 (originally published in 1916)).
>
> This remains the position of the executive branch.*

Obviously the foregoing rationale has no application to foreign nationals. The only claim as to the latter set forth in the memorandum is that "the President's constitutional authority to rescue foreign nationals *as an incident to the evacuation of Americans* [has] significant historical support." [Italic supplied.] Moreover, the memorandum goes on to concede that "since the evacuation of Vietnamese might have raised questions beyond those applicable to an operation limited to Americans, the support and clarification of Congress was sought in the President's address to Congress on April 10, 1975."

Applying the foregoing general considerations to the matters which you raise, we turn first to the Saigon evacuation. The following sum-

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*This memorandum was submitted in connection with the recent hearings before the Subcommittee on International Security and Scientific Affairs of the House Committee on International Relations concerning the War Powers Resolution, *infra*. It is interesting to note that the passage from President Taft's book quoted in the memorandum goes on to read:

> In practice the use of the naval marines for such purpose [to rescue Americans] has become so common that their landing is treated as a mere local police measure, whereas if troops of the regular army are used for such a purpose, it seems to take on the color of an act of war.

mary of the evacuation was given by Mr. Monroe Leigh, Legal Adviser to the Department of State, on May 7, 1975:

> On April 28, following rocketing of Tan Son Nhut airfield in Saigon the President directed that congressional leaders be notified that the final phase of the evacuation of Saigon would be carried out by means of military forces within the next few hours.
>
> At 11:30 a.m. on April 29, the President met with congressional leaders at the White House, at which time there was a further briefing on the situation in Saigon.
>
> Beginning at 1:00 a.m. EDT, April 29, 1975, a force of 70 helicopters and 865 Marines evacuated, according to our count 1,373 U.S. citizens, together with approximately 5,595 South Vietnamese and 85 third country nationals. These evacuations took place from landing zones in the vicinity of the American Embassy at Saigon and the Defense Attache's Office at Tan Son Nhut airfield. A total of 630 helicopter evacuation sorties was flown. The last elements of this force were withdrawn at 7:46 p.m. EDT, on the same day. Unfortunately, two crew members of a Navy Search and Rescue helicopter were lost at sea. On the previous day, two Marines assigned to permanent guard duty at the Defense Attache's Office at the airfield were killed by rocket attacks into the refugee staging area. No other casualties are known to have occurred. Hearings on Congressional Oversight of the President's Compliance with the War Powers Resolution before the Subcommittee on International Security and Scientific Affairs of the House Committee on International Relations, 94th Cong., 1st Sess., May 7 and June 4, 1975, galley proofs, p. 9 (hereinafter referred to as Hearings).

On April 30, 1975, the President reported this operation to the Congress in accordance with section 4 of the War Powers Resolution. *Id.* at 9–10. In addition to the facts recited by Mr. Leigh, *supra*, the President's report notes that:

> * * * U.S. fighter aircraft provided protective air cover for this operation, and for the withdrawal by water of a few Americans from Can Tho, and in one instance suppressed North Vietnamese anti-aircraft artillery firing upon evacuation helicopters as they departed. The ground security forces on occasion returned fire during the course of the evacuation operation.

The President's report states that the operation was ordered "out of consideration for the safety of U.S. citizens," and "pursuant to the President's Constitutional executive power and his authority as Commander-in-Chief of U.S. Armed Forces."

Apparently you do not question the validity of the April 29 operation insofar as the evacuation of Americans is concerned. However, in your letter of May 5, you state that the ratio of Americans to foreign nationals rescued from South Vietnam (approximately 1:6) indicates that U.S. Forces were exposed to hostilities for a considerably longer period than would have been necessary to rescue American citizens alone, and that U.S. Naval vessels remained within the territorial waters of South Vietnam long after the helicopter rescue mission was completed. You also state that it has been reported that the Administration funded the Vietnam evacuation from a Defense Department contingency fund."

Mr. Leigh maintained during the May 7 hearings that the rescue of the foreign nationals was incidental to and necessary for the safe and orderly rescue of the American citizens and that it was a matter of

judgment as to whom was taken out. Hearings, at 13–15, 17. The following excerpts from the testimony of Mr. Martin Hoffmann, then General Counsel of the Department of Defense, during the May 7 hearings described the situation confronting those required to make this decision:

NATIONALITY SEGREGATION COULD HAVE TRIGGERED SEVERE DISORDER

* * * the feeling was that had we attempted at that time to separate out, the Vietnamese that were wrapped around the Americans as it were, there would have been a potential not only for rather severe disorder within the compound and within the actual areas from which the evacuation was being staged, but it might have triggered a far different reaction outside the compound and outside the embassy.

Now as the evacuation proceeded, of course Americans in Vietnam who were in the Saigon area were alerted that the final evacuation was to take place and they should go to their assembly point. These assembly points were not in either the DAO compound or the embassy at this time and there was the necessity to send out and bring these Americans back to the compound.

In addition, as had been happening previously, a certain number of Americans were turning up every day of whose presence the embassy had previously been unaware of—just walking in off the street, as a matter of fact—and it was felt that there would be a number of those who would come in signaled by the evacuation itself. As a practical matter they were coming into the DAO compound and the embassy downtown.

SOUTH VIETNAMESE FAMILIES ASSURED EVACUATION

I point this out last. There had been a number of families of South Vietnamese military officers who had been evacuated previously and they had received a commitment that they would be evacuated in the final lift. From a military point of view, I doubt that had the South Vietnamese army turned on the evacuation at that point it would have been possible to bring these Americans out without casualties.

As it was, through the ambassador's handling of the matter, in keeping the situation flowing and assuring that the evacuation zones were orderly, as it turned out he was able to get the entire American group out without a single casualty. I think a part of this was unquestionably due to the fact that he was able to maintain this flow and maintain the confidence of the South Vietnamese even to the end.

VIETNAMESE EVACUATION PLAYED ESSENTIAL ROLE IN AMERICANS SAFETY

* * * It was felt by the military individuals that the evacuation of South Vietnamese was an essential part of getting those Americans out of there, both from the point of view of extending the time to accommodate them all and keeping the evacuation flowing along. *Id.* at 21–22.

As noted, the April 29 operation is officially justified as a rescue of American citizens wherein the evacuation of Vietnamese nationals was necessarily incident to the safe and successful rescue of the Americans. Assuming the fundamental validity of this justification—which we have no basis to question—it follows, in our view, that the President must be accorded considerable operational discretion. It may well be that more Vietnamese were actually removed than a minimum necessary to protect the American evacuees and that their rescue was moti-

vated in part by moral and humanitarian considerations. However, it would be virtually impossible to determine precisely how many evacuees constituted the necessary minimum.

You point out in your letter that Congress did not approve proposed legislation to use American forces to rescue certain categories of foreign nationals. In accordance with the President's request, the "Vietnam Contingency Act of 1975," S. 1484, and the "Vietnam Humanitarian Assistance and Evacuation Act of 1975," H.R. 6096, 94th Cong., were introduced to, *inter alia*, authorize funds for the evacuation of certain Vietnamese nationals. However, conditions precipitated the evacuation before final action could be taken on these bills. The conference report on this legislation (specifically, H.R. 6096) was rejected by the House of Representatives on May 1, 1975—subsequent to the evacuation—for what appears to be a number of reasons largely unrelated to the issues here involved. See generally, Cong. Rec., May 1, 1975 (daily ed.), H3540–3551. Thus we believe that the disposition of this legislation is essentially a moot point in terms of such issues. Concerning the reasons for this legislation, Mr. Leigh's testimony at the May 7 hearing indicates that the Executive branch was seeking congressional "confirmation" that the evacuation of foreign nationals incident to the rescue of Americans was not precluded by the funding limitation statutes. In addition, there was apparently a general desire to obtain the political support of Congress for the operation. See Hearings, *supra*, at 17–19, 24. In any event, the motives of the Executive branch in requesting the legislation would not be dispositive of the instant legal issues.

You also refer to the fact that it has been reported that the Administration funded the Vietnam evacuation from a Defense Department contingency fund. In a letter dated May 16, 1975, from the Secretary of Defense to Chairman Inouye of the Subcommittee on Foreign Operations of the Senate Appropriations Committee (Cong. Rec., daily ed., May 16, 1975, S. 8537), the Secretary states that DOD used funds from regular operating accounts. In addition, he specifies what reimbursements will be requested of the Department of State. The following testimony of Mr. Hoffmann during the May 7 hearing describes the financing of Vietnamese evacuation flights by "backhaul" on military supply aricraft and otherwise prior to the April 29 operation:

> Mr. Hoffmann. The resupply efforts and the supply planes which were both charters and U.S. indigenous Air Force planes were paid out of appropriations for that purpose, the so-called Pentagon, and I believe there were some AID programs and money expended pursuant thereto. With respect to the commercial airlines, it is my information that the people that went out on commercial airlines paid their way.
>
> Mr. Solarz. So that the bulk of the Vietnamese who were evacuated prior to the final airlift on fixed wing airplanes were evacuated through a process that was

in effect incidental to the supply effort which was funded under prior authorizations?

Mr. Hoffmann. I believe there may have come a time toward the end at which there were aircraft being flown exclusively for the purpose of evacuation. Hearings, 30.

Based on investigations we have conducted to date, we have no indication that funds other than those described by DOD were used in the Vietnam evacuation.

In your letter of May 21, 1975, you ask us to determine the legality of the expenditure of funds used in the recent rescue of the American merchant ship *Mayaguez*. Your May 21 letter states in part:

* * * if the President has inherent powers to use American forces to rescue endangered American citizens, it is my view that he has no unilateral power to take offensive or punitive action which does not relate directly to the protection of the citizens to be rescued or the forces used to protect those citizens.

In this regard, I have read press accounts of the military operation employed to rescue the crew of the Mayaguez. I have heard that punitive action unrelated to the rescue itself might have been taken against Cambodia. If, for example, the bombing of Ream airport and port facilities at Sihanoukville—bombing which took place a half hour after the crew of the Mayaguez was safely aboard the Wilson—was unrelated to the need to protect U.S. forces, then the President, in my opinion, exceeded his authority under the Constitution and violated specific prohibitions against combat activity in Indochina. * * *

The following summary of pertinent aspects of the *Mayaguez* rescue operation has been extracted from the official chronology prepared by the Department of Defense (Times used are Eastern Daylight Time.) Shortly after midnight, on May 12, 1975, the vessel *Mayaguez*, while traversing a standard sealane and trade route in international waters, was fired upon, boarded, and seized by Cambodian forces. Within a few hours, United States naval vessels were moved into the area and United States reconnaissance aircraft began surveillance coverage which lasted until the end of the operation. By the end of the day, the *Mayaguez* had been moved to near Kaoh Tang Island.

Early on May 13, the Commander in Chief Pacific (CINCPAC) was directed to maintain fighter/gunship cover over the *Mayaguez* to keep it away from the Cambodian mainland and to isolate the area. During May 13 and 14, Air Force helicopters and Marine platoons were brought into the area and positioned so as to be available in the event diplomatic efforts to secure the release of the vessel and crew failed. At some point during this period, the crew members were apparently taken to the mainland. The military operation to recover the *Mayaguez* and its crew began at 3:50 p.m. on May 14, at which time the Marines were ordered to seize the *Mayaguez* and to commence a helicopter assault on Kaoh Tang Island, where it was still believed the crew members were being held. When the Marines reached the *Mayaguez* via the *USS Holt*, they found no one on board, and reported the vessel in United States control at approximately 9 p.m.

The bombing of selected targets at Ream and Kompong Som (Sihanoukville) is described in the Defense Department chronology as follows:

CINCPAC had been directed at 5:18 PM on 14 May to commence cyclic strike operations from the aircraft carrier USS CORAL SEA on military targets in the Kompong Som-Ream complex with first time on target specified at 8:45 PM to coincide with the estimated time of recapture of *Mayaguez*. The first cycle was to be armed reconnaissance with Cambodian aircraft and military watercraft as principal targets. Subsequent flights were to make maximum use of precision guided munitions to attack targets of military significance. The tactical air armed reconnaissance cycle did not expend ordnance. The second cycle struck the Ream Airfield. The runway was cratered, numerous aircraft were destroyed or damaged, and the hangars were badly damaged. The third and final cycle struck the Naval Base at Ream damaging the barracks area. Naval facilities in Kompong Som, including a POL storage area, were also struck during the cycle, damaging two warehouses in the port and scoring a direct hit on a large building in the marshalling yard. This bomb damage assessment is based on pilot reports and some photography. In all, 15 attack sorties expended munitions. Operations against the mainland terminated about midnight on 14 May.

These operations against the mainland were designed to ensure the island was not reinforced, to put pressure on the Cambodians to release the crew and to ensure the safe withdrawal of the Marine Ground Support Force.

A Cambodian broadcast at about 7:15 p.m., May 14, had indicated that the Government intended to release the vessel at some future time. No specific mention was made of the crew, however, and the broadcast was not deemed sufficiently definite to warrant a cease-fire which would risk the crew and the Marines who had already landed on Kaoh Tang Island.

At 10:23 p.m., a fishing vessel was reported approaching Kaoh Tang flying a white flag. The fishing vessel carried the *Mayaguez* crew members. The destroyer *USS Wilson* picked up the crew members and reported at about 11:15 p.m. that the entire crew was accounted for. At about midnight, the order was given to cease all offensive operations and to commence withdrawal. Activities on the morning of May 15 centered around removing the Marines from Kaoh Tang. All Marines were finally cleared from the Island by about 9:15 a.m. on May 15.

The Defense Department chronology does not give the precise times of the bombing strikes at Ream and Kompong Som. However, the nature and timing of the bombing raids was discussed in May 14-15, 1975, Hearings before the House Committee on International Relations and its Subcommittee on International Political Affairs on Seizure of the *Mayaguez*, 94th Cong., 1st sess. (Part I). The following exchanges between Committee members and Defense Department witnesses during the May 15 hearing are particularly relevant:

Colonel FINKELSTEIN. * * * At 11:15 p.m. we were sure we had the crew back. The last air strike that went into the mainland occurred within a half hour of that, sir. I don't have the exact time.

Mr. DU PONT. The air strike would have been roughly 11:45 p.m.?

Colonel FINKELSTEIN. I think that is correct, sir.

Mr. DU PONT. When was the first air strike?

Colonel FINKELSTEIN. The first air strike on the mainland occurred at about 11 p.m. Some 15 minutes or 20 minutes before we knew we had the crew. That was on the Ream Airfield.

Mr. DU PONT. So, we engaged in air strikes on the mainland for roughly 45 minutes.

Colonel FINKELSTEIN. I think that is correct, sir.

One of the problems is that in the early reporting, radio reports, this sort of thing, you really don't know what the time lag is between the actual occurrence and the report. The times I am giving you are reporting times.

Mr. DU PONT. Can you tell us roughly when the decision was made to engage in air strikes on the mainland?

Mr. MAURY. All of those decisions, sir, were made as I understand it during the course of the National Security Council meeting yesterday afternoon, which lasted approximately 3:30 p.m., I think, until approximately 6 p.m.

Mr. DU PONT. By 6 p.m. a decision had been made to retrieve the vessel, retrieve the crew, and use military force to do so, and to make strikes on the mainland in support of that.

Mr. MAURY. Yes, sir.

Mr. DU PONT. And between 6 and these other events those orders were being put into effect?

Mr. MAURY. Yes, sir. Hearings at 40–41.

Mr. BIESTER. As we went through the time sequences with respect to the white flag, the first air strike at Ream, the securing of the crew, and the last air strike, even at that time we still had marines did we not on that island under fire?

Colonel FINKELSTEIN. Sir, we had marines on that island, under fire, until approximately 9:30 this morning [May 15].

Mr. BIESTER. While those time sequences are important in terms of the crew, the air strikes had some validity in terms of the security, as you saw it, of the marines who were then under fire on the island, is that correct?

Colonel FINKELSTEIN. That is absolutely correct, sir, except maybe I would use a word other than some.

Mr. BIESTER. All right. That is fair. So the fact that there were air strikes after the crew was secured does not indicate that it was punitive in nature?

Colonel FINKELSTEIN. Absolutely, sir. *Id.* at 42–43.

Mr. GILMAN. What was the military objective in striking the mainland?

Colonel FINKELSTEIN. To preclude reinforcement of the island. To preclude launching of airstrikes against the marines. To isolate naval vessels in the area.

Mr. GILMAN. What was the military target?

Colonel FINKELSTEIN. Ream Airfield and the Kompong Som Naval Facility. There were 17 aircraft damaged or destroyed at Ream, sir, and considerable other reasonably lethal material so far as the marines on that island were concerned.

Mr. GILMAN. Were they aircraft that had potential of interfering with the operation?

Colonel FINKELSTEIN. Yes, sir, to the best of my knowledge and belief. *Id.* at 51.

We are now in the process of conducting an independent evaluation of the accuracy of both the Defense Department chronology and the statements made in the May 15 hearings. On the basis of our present information, we are not in a position to conclude that the basic *Mayaguez* operation was an invalid exercise of presidential authority to protect American citizens abroad, and that it was inconsistent with the funding limitation statutes. As discussed previously, we do believe that the President must be afforded considerable discretion in the actual conduct of such an operation. However, if the bombings here involved were punitive, *i.e.*, not reasonably related to the rescue of the

Mayaguez crew or to the protection of U.S. forces used in the rescue operation, such expenditure of funds would appear to be in contravention of the seven funding limitation statutes specifically prohibiting the use of funds for offensive combat activity in Indochina.

In your letters and in meetings with a member of your staff, we were also asked to address the issue of the extent of the President's compliance with the War Powers Resolution during the rescue missions. The following discussion will center on whether President Ford complied with the various requirements of sections 3 and 4 of the Resolution (50 U.S.C. 1543, 1544).

Section 3 requires the President to consult with Congress before and after the introduction of United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances. The legislative history of this provision was presented by Representative Seiberling during the June 4 Hearing at p. 38:

> The consultation provision in the original House bill (H.J. Res. 542) stated that "The President in every possible instance shall consult with the leadership and appropriate committees of the Congress before committing United States Armed Forces to hostilities or to situations where hostilities may be imminent * * *" In the accompanying report (H.R. Rept. 93-387) [it] was made clear that consultation was not "synonymous with merely being informed." Rather, the report said, "consultation in this provision means that a decision is pending on a problem and that Members of Congress are being asked by the President for their advice and opinions, and in appropriate circumstances their approval of action contemplated. Furthermore, for consultation to be meaningful, the President himself must participate and all information relevant to the situation must be made available." In addition, the report said, "the use of the word 'every' reflects the committee's belief that such consultation prior to the commitment of armed forces should be inclusive."
>
> HISTORY OF CONSULTATION PROVISION
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> There was no debate on this consultation provision during House consideration of House Joint Resolution 542; it was not a matter of contention. However, it appears to have been understood by all. The distinguished majority leader, Mr. O'Neill, summed up the purpose of the resolution when he said: "All this resolution asks is that Congress, the voice of the American people, be consulted prior to the commitment of U.S. Armed Forces to hostilities abroad."
>
> The Senate bill, S. 440, did not contain a consultation provision and there was no discussion of the issue in the Senate debate, but when the conferees reported the bill it contained a consultation provision almost identical to the House version, the only substantive difference being the naming of "Congress" rather than the "leadership and appropriate committees of Congress" as the ones with whom the President must consult. Now it was specifically mentioned twice in the Senate debate on the conference report.
>
> Senator Fulbright, who was managing the conference report, called the consultation provision of the compromise "the most fundamentally important of all" in the bill even though the original Senate bill had not contained any such provision.
>
> Senator Jacob Javits, one of the principal authors of the war powers resolution in the Senate, elaborated on the conference report language as to what the consultation provision meant. Javits said the provision "is to be read as maximal rather than minimal. The President is obliged by law to consult before the introduction of forces into hostilities." He went on to note that the provision made allowances for instances "of such great suddenness in which it is not possible to consult in advance."

CONSULTATIVE PROVISION SEEN AS CONSTRUCTIVE

> Again there was no debate on the consultation provision when the conference report came before the House nor was there any debate on this provision during consideration of the President's veto.
>
> As a final note, Mr. Chairman, it is interesting to note that in his veto message President Nixon singled out the consultation provision as being one of the few constructive provisions in the bill, to use his words.
>
> Mr. Chairman, I don't think the language could be any clearer, but if there is any ambiguity in the wording of the resolution, the legislative history certainly clears it up. The only instance in which Congress sanctions action without prior consultation is in what Senator Javits called an instance "of such great suddenness * * * it is not possible to consult in advance."

Section 4(a) requires the President, in the absence of a declaration of war, to report to the Congress within 48 hours the facts, legal basis, and estimated duration of any introduction of United States forces—

> (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;
>
> (2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or
>
> (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation * * *.

Section 5 establishes procedures for the submission of such reports and congressional action thereon. Subsection 5(b), 50 U.S.C. 1544(b), provides that, within 60 days after a report is submitted (or required to be submitted) pursuant to section 4(a)(1), *supra*, the President shall terminate the use of United States forces unless the Congress (1) has declared war or has enacted a specific authorization for such use of forces, (2) has extended by law the 60-day period, or (3) is physically unable to meet due to armed attack upon the United States; or unless the 60-day period is extended for not more than an additional 30 days pursuant to a presidential determination and certification as specified in subsection 5(b). Under subsection 5(c), 50 U.S.C. 1544(c), the Congress may at any time direct by concurrent resolution the removal of United States forces from hostilities outside the United States, its possessions and territories which are not supported by a declaration of war or specific statutory authorization.

The main area of disagreement concerning the section 3 consultation requirement relates to the rescue of the crew of the *Mayaguez*. In testimony during hearings on May 7th concerning consultation Mr. Leigh expressed the Administration's position that:

> * * * prior consultation with Congress is contemplated only in cases which would fall within section 4(a)(1) when armed forces have been introduced into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances. No such prior consultation is contemplated under section 3 when the action to be reported under section 4(a) fits within subparagraphs 2 and 3. Hearings, p. 7.

Since the rescue of the *Mayaguez* clearly fell within subsection 4(a)(1) of the Resolution (50 U.S.C. 1543(a)(1)), the question becomes a factual one as to the substance and timing of actions which the President considered as complying with the requirements of sec-

tion 3. Congressional intent is clear that the President is to do more than inform Congress of decisions he has already made; he is excused from prior consultation only in instances of "great suddenness;" and consultation is to be an ongoing process. There is some evidence in the June 4 hearings that the President merely informed Congress of decisions already made, even though there was sufficient time to consult in a more meaningful manner. Hearings, pp. 47–51. However, without more definitive guidelines than are present in section 3 or the legislative history of that section, we cannot say that, under the circumstances surrounding the rescue of the *Mayaguez* crew, the President failed to comply with section 3 of the War Powers Resolution.

There is no dispute that the President complied with the section 4 reporting requirements on each of the four occasions where U.S. Armed Forces were introduced in Southeast Asia (Danang sealift on April 4; Cambodia evacuation on April 12; Saigon evacuation on April 30; and rescue of the crew of the *Mayaguez* on May 15). However, in the first two reports and the last the President specified which of the subparagraphs of subsection 4(a) precipitated the introduction of the troops, whereas in the report concerning the April 30 evacuation of Saigon, the President merely referred to section 4 as a whole.

Whether Armed Forces were introduced as a result of situations described in subparagraphs (1), (2), or (3) of subsection 4(a) is relevant because of the 60-day limitation of the duration of the involvement provided by subsection 5(b), in the absence of congressional action contemplated in the rest of section 5. However, it should be noted that there is no provision in the War Powers Resolution expressly requiring the President to specify which type of situation has precipitated the involvement of the Armed Forces. Moreover, whether or not the President labels the reports under a specific subparagraph of section 4(a) is not important since the final decision of what to do with the reports and whether they initiate section 5 action is up to Congress. Accordingly, it would appear that the President complied with the reporting requirements of section 4 of the War Powers Resolution.

We trust the information presented will be of assistance to you.

[B–136530]

Transportation—Cargo Preference Act—Shipments to Chittagong, Bangladesh

LASH (Lighter Aboard Ship) services to be performed partly with privately owned United States-flag commercial vessels and partly with a foreign-flag FLASH system to deliver certain Government-sponsored cargoes to port of Chittagong in Bangladesh contravenes the 1954 Cargo Preference Act because di-

rect service to Chittagong is available by U.S.-flag breakbulk vessels and because special circumstances (here, geographic configuration of port precluding use of normal LASH unloading operations) cannot be used to circumvent the cargo preference laws.

In the matter of the interpretation of 1954 Cargo Preference Law, 46 U.S.C. 1241(b)(1) (1970), May 12, 1976:

This decision to the Secretary of Commerce responds to the request of the Assistant Secretary for Maritime Affairs for a ruling on the correctness of a legal opinion prepared by the General Counsel of the Maritime Administration.

The General Counsel held in his opinion that LASH (Lighter Aboard Ship) services to be performed partly with privately owned United States-flag commercial vessels and partly with a foreign-flag FLASH system to deliver certain Government-sponsored cargoes to the port of Chittagong in Bangladesh would not contravene section 901(b)(1) of the Merchant Marine Act, 1936, as amended, 46 U.S. Code 1241(b)(1) (1970), popularly known as the 1954 Cargo Preference Law.

LASH operations had their tentative beginnings in 1969. As described in congressional hearings in 1971, cargo transported in LASH operations is loaded into specially designed barges (lighters) and towed out to the side of the mother ship. There the barges are loaded onto the mother ship which carries them to foreign ports. Upon arrival in a foreign port, the barges are offloaded from the mother ship and towed to a destination in those foreign waters, either at the port of entry or to another point in the waters of the country of offloading. The operation is reversed for the return voyage. Hearings on H.R. 155 Before a Subcomm. of the House Comm. on Merchant Marine And Fisheries, 92d Cong. 1st Sess. 93, 106, 1971; see also *Sacramento-Yolo Port District, Petition*, 341 I.C.C. 105, 112 (1972).

The specially designed barges or lighters are about 60 feet long, 30 feet wide and 13 feet high; they are shallow draft unpowered watercraft classed by the American Bureau of Shipping for river, bay, and sound service. See section 25 of the Merchant Marine Act, 1920, as amended, 46 U.S.C. 881 (1970). They accept all cargoes: industrial or agricultural or raw materials; and the cargoes can be large-volume, low capital investment cargoes or small-volume high capital investment cargoes.

We understand that the acronym "FLASH" means "Float On/Float Off Feeder Lash Vessel." It is a new development in the handling of cargo through intermodal systems. A FLASH unit is a floating platform with ballast tanks equipped with a raked bow to facilitate towing. When it is ready for loading, the tanks are flooded and the entire vessel is lowered in the water. Gates at the stern are opened and

the LASH barges are floated inside. The ballast is evacuated and the FLASH unit rises in the water. The LASH barges then rest aboard the platform, which is towed by an ocean-going tug, presumably a foreign-flag vessel.

Central Gulf Lines, Inc. (Central Gulf) operates a US-Flag LASH service to Southeast Asia. The facts about this service as it relates to deliveries to Chittagong are recited in the General Counsel's opinion and in the Assistant Secretary's letter; they are summarized below.

Central Gulf guarantees direct delivery to Chittagong, but its mother ships, which have an overall length of 893 feet and a design draft of over 40 feet, cannot navigate the Karnaphuli River on which Chittagong is located. The bar at the mouth of the Karnaphuli varies from a low of 21 feet in low water season (February) to a high of 30 feet (July and August). Additionally, only vessels up to 580 feet in length can navigate the river. Thus, Central Gulf's vessels are forced either to utilize the open sea anchorage off the mouth of the river or to unload their barges at the nearest safe, protected anchorage and tow the barges to Chittagong.

The carrier states that this open sea anchorage is not sufficiently safe for the discharge of LASH barges, especially during the monsoon season. The nearest deepwater protected anchorage is the port of Kyaukpyu, Burma, approximately 200 miles from Chittagong. Central Gulf plans to unload the barges from its mother ships there and tow the barges to Chittagong.

LASH barges are certified only for rivers, bays, and sounds, and are not oceanworthy vessels. To tow them they must be joined together rigidly and fitted with a false bow, and there is no feasible way to do this at sea. It also would be imprudent to tow them in the open sea for any distance, especially for a 200-mile voyage in the Bay of Bengal during monsoon weather. To overcome these obstacles, Central Gulf plans to move the barges in its FLASH units.

Central Gulf recently has taken delivery of four FLASH units which were built in Japan and documented under foreign flag. Three of these units, with a capacity of eight LASH barges each, are currently employed in the Singapore region. A FLASH unit is a vessel, since the word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water. See 1 U.S.C. 3 (1970).

Chittagong and other ports in that area are served by several U.S.-flag operators, other than Central Gulf, which provide direct service to the immediate port area entirely aboard U.S.-flag breakbulk vessels. In most instances, however, they anchor their vessels in the roads and lighter some or all of their cargo on foreign-flag shallow draft vessels, before they are able to cross the river bar.

The General Counsel of the Maritime Administration takes the position that the shipping agencies may use Central Gulf's services because (1) its U.S.-flag mother ships deliver the cargo to the nearest location practical for discharge of those vessels because no U.S.-flag services are available to complete the movement, (2) the foreign-flag portion of the transportation is *de minimis* in regard to the overall voyage, (3) Central Gulf's competitors must also use foreign-flag lighterage services, although their nearest safe anchorages are less distant and (4) a requirement of U.S.-flag towage from the nearest safe anchorage, where such is unavailable, would foreclose much of this trade to the U.S. operators in contravention of the legislative purpose of the 1954 Cargo Preference Law.

We do not believe that these reasons justify an exception here to the provisions of the 1954 Cargo Preference Law.

The 1954 Cargo Preference Law, as amended, reads in pertinent part:

> Whenever the United States shall procure, contract for, or otherwise obtain for its own account, or shall furnish to or for the account of any foreign nation without provision for reimbursement, any equipment, materials, or commodities, within or without the United States, or shall advance funds or credits or guarantee the convertibility of foreign currencies in connection with the furnishing of such equipment, materials, or commodities, the appropriate agency or agencies shall take such steps as may be necessary and practicable to assure that at least 50 per centum of the gross tonnage of such equipment, materials, or commodities (computed separately for dry bulk carriers, dry cargo liners, and tankers), which may be transported on ocean vessels shall be transported on privately owned United States-flag commercial vessels, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels, in such manner as will insure a fair and reasonable participation of United States-flag commercial vessels in such cargoes by geographic areas: *Provided*, That the provisions of this subsection may be waived whenever the Congress by concurrent resolution or otherwise, or the President of the United States or the Secretary of Defense declares that an emergency exists justifying a temporary waiver of the provisions of this paragraph and so notifies the appropriate agency or agencies: *and provided further*, That the provisions of this subsection shall not apply to cargoes carried in the vessels of the Panama Canal Company. Nothing herein shall repeal or otherwise modify the provisions of section 1241—1 of this title. For purposes of this section, the term "privately owned United States-flag commercial vessels" shall not be deemed to include any vessel which, subsequent to September 21, 1961, shall have been either (a) built outside the United States, (b) rebuilt outside the United States, or (c) documented under any foreign registry, until such vessel shall have been documented under the laws of the United States for a period of three years * * *.

It seems unquestioned that the basic purpose of cargo preference legislation is to assure to privately owned United States merchant-flag vessels a substantial portion of the waterborne export and import foreign commerce which the Congress has proclaimed in repeated statutes as necessary to the maintenance of an adequate merchant fleet. S. Report No. 1584, 83d Cong., 2d Sess. 1 (1954). See, also, the declaration of policy concerning the development and maintenance of the American Merchant Marine in Section 101 of the Merchant Marine Act, 1936, as amended, 46 U.S.C. 1101 (1970).

The specific purpose of cargo preference legislation was outlined in President Kennedy's Presidential Directive, April 1962. Regarding Cargo Preference; it reads in part:

> These statutes (including, but not limited to, sec. 901(b) of the Merchant Marine Act, 1936 (46 U.S.C. 1241(b) and Public Resolution 17, 73d Cong. (15 U.S.C. 616A)), are designed to insure that U.S. Government-generated cargoes move in substantial volume on American-flag vessels. This policy, which is directed to Government-generated cargoes and which does not control commercial movements of export–import cargoes, is an important factor in maintaining the merchant fleet necessary to meet our national goals and is in accordance with the general practice of other maritime nations who move the vast majority of their government shipments in vessels of their own flag.
>
> * * * * * * *
>
> While the individual Government agencies' administration of the cargo preference statutes has been generally satisfactory, the laws' implementation has frequently run more nearly to the minimum rather than the maximum. It is, therefore, extremely important that the statutes be implemented in a manner designed to achieve fully their purpose.

S. Report No. 2286, 87th Cong., 2d Sess. 43, 44 (1962).

And the aim of the 1954 Cargo Preference Law was to codify and broaden existing law, not to derogate from it. 41 Op. Atty. Gen. 192, 196 (1954); 42 Op. Atty. Gen. No. 14, page 7 (1963). Thus, the act must be strictly construed and the existence of special circumstances cannot be used to circumvent or evade the cargo preference laws.

For example, in B–155185, November 17, 1969, we said that whether urea normally moves in commercial channels already bagged, in bulk, or in either form, the Cargo Preference Law may not be avoided through the "simple device" of either the buyer or seller choosing where, urea, the essential item being procured, is to be packaged.

In 39 Comp. Gen. 758 (1960) we held that the law could not properly be circumvented through the purchase of goods at destination rather than at the point of origin of the same goods to be moved by ocean freight.

Compare, also, 49 Comp. Gen. 755 (1970), in which we said that where service is available in United States vessels for the entire distance between ports of origin in the United States and the destination port overseas, to permit the transportation by sea of containerized military supplies in a U.S.–flag vessel for the major part of a voyage and in a foreign-flag feeder vessel for a minor part of the voyage would violate the prohibition in the 1904 Cargo Preference Act, 10 U.S.C. 2631 (1970).

Thus, the special circumstance that the geographical configuration of the port serving Chittagong precludes normal LASH unloading operations does not justify use of a foreign-flag FLASH unit for any part of the voyage when port-to-port breakbulk service is available on privately owned United States-flag commercial ocean vessels. That these vessels anchor in the roads and use foreign-flag shallow draft vessels to lighter some or all of their cargo to the shore seems imma-

terial. In contrast to barge operations, the term "lighter" refers to a short haul, generally in connection with the loading or unloading operations of vessels in harbors. De Kerchove's *International Maritime Dictionary*, 2nd ed. 1961. And in some trades it is customarily necessary for vessels to lighter the goods from or to shore. Ocean Transportation, McDowell and Gibbs (1954), page 387. Indeed, the foreign-flag lighters most probably are required by the foreign nations' cabotage laws.

We note that under the Act of September 21, 1961, Public Law 87–266, 75 Stat. 565 (46 U.S.C. 1241), which is codified as the second proviso in the 1954 Cargo Preference Law, Central Gulf could qualify the foreign-flag FLASH units as privately owned United States-flag commercial vessels entitled to a preference by documenting them under the laws of the United States for a period of 3 years.

A decision that Central Gulf cannot use the foreign-flag FLASH system with its LASH operations into Chittagong will not prevent it from competing for commercial cargoes destined to that port; nor will it prevent it from participating in the shipment of Government-sponsored cargoes to Chittagong once the 50 percent requirement in the 1954 Cargo Preference Law for shipment in United States-flag vessels is met and provided that the agency concerned, in the exercise of its administrative discretion, decides to use Central Gulf's LASH operations to ship the remaining 50 percent.

Congress has demonstrated flexibility in amending the cargo preference laws to accommodate innovative developments in intermodal shipping systems. See the Act of September 21, 1965, Public Law 89–194, 79 Stat. 823, Act of August 11, 1968, Public Law 90–474, 82 Stat. 700, and Act of November 23, 1971, Public Law 92–163, 85 Stat. 486, all of which amended section 27 of the Merchant Marine Act, 1920, 46 U.S.C. 883, commonly called the Jones Act (one of our cabotage laws). These amendatory laws permit the Secretary of the Treasury to extend reciprocal privileges to foreign-flag vessels for the carriage of empty containers and empty LASH barges and for the transfer of cargoes between LASH barges in the United States coastwise trade, so long as the containers or barges are owned or leased by the owner or operator of the foreign-flag vessels and are being transported for use in the carriage of cargo in foreign trade. Hearings on H.R. 155, Before a Subcomm. of the Senate Committee on Commerce, 92d Cong., 1st Sess. (1971). Thus, it is possible that the Congress may be receptive to granting a similar reciprocal exception to the 1954 Cargo Preference Law which would permit American LASH operators to use a foreign-flag FLASH system where geographical port conditions are similar to those at Chittagong.

In these circumstances we believe that the contemplated use of Central Gulf's LASH service as presently constituted to deliver Government-sponsored cargoes to the port of Chittagong in Bangladesh would contravene the 1954 Cargo Preference Act.

[B-185743]

Bids—Late—Hand-Carried Delay—Evidence

Despite allegation that clause included in invitation for bids as required by regulation (Armed Services Procurement Regulation 7-2002.2(c)(ii)) provides that only acceptable evidence to establish time of bid receipt at Government installation is time/date stamp of installation, all evidence relevant to time of receipt of hand-carried bid is considered since regulation applies only for consideration of late mailed and telegraphic bids, and not late hand-carried bids.

Bids—Late—Mishandling Determination—Record *v.* Time/Date Stamp

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

In the matter of Fire Trucks, Inc., May 12, 1976:

This matter concerns a protest by Fire Trucks, Inc. (FTI), against the rejection of a bid submitted on invitation for bids (IFB) F09603-76-B-0406, issued by Warner Robins Air Logistics Center, Georgia (Robins). The contracting officer rejected the bid as late under the terms of Armed Services Procurement Regulation (ASPR) § 7-2002.2, *Late Bids, Modification of Bids, or Withdrawal of Bids*, which had been incorporated into the IFB.

ASPR § 7-2002.2 states in pertinent part:

(a) Any bid received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and either:

(i) it was sent by registered or certified mail not later than the fifth calendar day prior to the date specified for the receipt of bids (e.g., a bid submitted in response to a solicitation requiring receipt of bids by the 20th of the month must have been mailed by the 15th or earlier); or,

(ii) it was sent by mail (or telegram if authorized) and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation.

* * * * * * *

(c) The only acceptable evidence to establish:

* * * * * * *

(ii) the time of receipt at the Government installation is the time/date stamp of such installation on the bid wrapper or other documentary evidence of receipt maintained by the installation.

Bid opening was scheduled for 2 p.m., December 16, 1975, and the IFB directed that hand-carried bids were to be delivered to Building

1678, Room A–4, at Robins. According to FTI, its representative hand-delivered the bid to Room A–4 of Building 1678 at approximately 1:58 p.m. on December 16. At that time, FTI states, the room was unattended. The representative searched in other rooms along the corridor and found a procurement clerk in an office across the hall. After the representative had explained the circumstances, the procurement clerk ushered him to another office, where after further explanation, a secretary stamped FTI's sealed bid with the installation's time/date stamp and returned the bid to the representative. The imprint of the time/date stamp on FTI's bid envelope shows delivery at 2 p.m., December 16, 1975. The time/date stamp used to mark FTI's bid is not an automatic timepiece but rather simply a mechanical hand stamp, manually adjustable to show the approximate time at 15-minute intervals. Parenthetically, we have informally ascertained that as a result of FTI's protest, the contracting activity at Robins has ordered automatic digital time/date stamp equipiment to replace the manual hand stamp used for this procurement.

The representative stated that he took the bid down the hall approximately 50 feet and entered the bid opening room at 2:04 p.m. At the time he entered, representatives of the two other bidders were present, as were the contracting officer and the bid opening officer, who was reading aloud one of the other two bids.

This sequence of events is, in the main, undisputed by Robins' personnel. However, three affidavits, later filed by the personnel whom the representative initially contacted (the procurement clerk, the Chief, Contract Administrative Support Branch, and the secretary who time stamped the bid), state that the representative was not discovered and the bid was not stamped until 2:07 p.m. The contracting officer states that the representative entered the bid opening room at 2:10 p.m.

The record shows that, prior to the representative's entrance into the bid opening room, the bid opening officer had stated to the representatives of the other bidders and to the contracting officer, already present in the room, "No further hand-carried bids can be accepted on IFB's F069603–76–B–0406 and 76–B–3729; however, late acceptable bids may be received in the mail." The contracting officer further states that this statement was made at 2 p.m. This is based on his having observed the time clock in the lobby of the building just prior to entering the bid opening room. This clock is used by employees to check their time of arrival at and departure from the building. According to the record, the clock was checked for accuracy on January 28, 1976, against the Robins time standard used by the Federal Aviation Ad-

ministration to regulate its flight instruments, and was found accurate. The clock had not been adjusted after the time of bid opening.

After the two bids had been read, FTI's representative tendered the bid to the contracting officer. He refused to accept the bid, explaining that it was late. The representative requested and received the opportunity to inspect the abstract reflecting the other two bids. After inspecting the abstract and recording the prices listed on it, the representative departed with the bid. On January 2, 1976, the bid was returned by FTI to the contracting officer accompanied by FTI's demand that the bid be accepted. At present, the bid remains unopened in the custody of the contracting officer. Award has been withheld pending our decision on the acceptability of FTI's bid.

FTI argues that the bid should not have been rejected as late, citing ASPR § 7–2002.2(c)(ii), *supra*, for the proposition that the only evidence acceptable to establish the date and time of receipt of a bid at the Government installation is the time shown by the time/date stamp on the bid envelope. This evidence indicates that the package arrived in time for bid opening. Since no extraneous evidence of the time of bid receipt may be considered, FTI reasons that the bid should be considered, suggesting also that the time shown by the time/date stamp determines the time of bid opening, rather than other timepieces. Finally, FTI believes that personnel should have been stationed in Room A–4, the bid depositary room.

On the other hand, Robins believes that the use of the time/date stamp as evidence should not exclude the use of other evidence such as that of the contracting officer and other involved personnel. The above-quoted "time/date stamp" ASPR provision applies only to mailed and telegraphic bids, because paragraph (a) of the provision applies only to mailed and telegraphic bids. Therefore, it would be inconsistent to apply the "time/date stamp" language in paragraph (c) to hand-carried bids.

We agree. In our view, ASPR § 7–2002.2, incorporated into the IFB, providies only for the consideration of late mailed and telegraphic bids, not late hand-carried bids. Therefore, the strict evidence requirements contained therein are not for application to the situation here.

While the regulation does not provide for the acceptability of late hand-carried bids, our Office has often considered the question of whether such bids were timely received. In so doing, we have always considered all relevant evidence in order to establish the time of receipt of a hand-carried bid. See, e.g., *Hyster Company*, 55 Comp. Gen. 267 (1975), 75–2 CPD 176; *LeChase Construction Corporation*, B–183609, July 1, 1975, 75–2 CPD 5; 51 Comp. Gen. 69 (1971). In *Free State*

Builders, Inc., B–184155, February 26, 1976, 76–1 CPD 133, our Office looked to the subsisting evidence, including but not limited to, a time/date stamp.

In considering evidence to establish the timeliness of hand–delivered bids, we have given great weight to the declaration by the bid opening officer that bid opening time has arrived. Such a declaration serves as *prima facie* evidence of the arrival of bid opening time, and unless there is a clear record to contradict this evidence, the authorized declaration serves as the criterion of lateness. See *Hyster Company*, *supra.*

In light of the above, we will now discuss whether FTI's bid was late. Our prior recitation of the facts and views of the protester and Government personnel involved is in conflict as to exactly when the FTI bid was received. However, the record contains evidence from an independent disinterested source. A letter from Delta Air Lines, Inc. (Delta) states that the flight on which the FTI representative arrived at the Macon, Georgia Airport (the nearest commercial airport to Robins) experienced a 1-hour and 5-minute mechanical delay and landed at 1:55 p.m. The contracting officer cites this letter in support of his position, noting that it is approximately 7.7 miles from the Macon Airport to Building 1678.

FTI states that the letter from Delta was incorrect and undoubtedly based on regular flight times without regard to the specific circumstances of the particular flight. FTI asserts that the pilot intentionally speeded up the plane upon learning of the representative's concern over the impending bid opening time, and that the plane landed at Macon Airport at 1:47 p.m. According to FTI, the representative arrived at Building 1678 at 1:55 p.m. and delivered FTI's bid to the bid depositary room at 1:58 p.m. While, in the ordinary case where an automatic and exact time/date stamp machine is used, FTI's version of timely bid delivery would be corroborated, we cannot ignore the imprecision of the time/date stamp used here. As mentioned above, the stamp was only a manual hand stamp, adjustable at 15-minute intervals and the secretary who did the actual stamping stated:

> On Tuesday, 16 December 1975, I was sitting at my desk in Building 1678, Room A–2, when * * * [the procurement clerk] and a gentlemen unknown to me, came to the door of my office. He was to attend the bid opening and had a bid with him. I got up and walked around my desk to meet them, and looked at the clock on the wall of my office, noting that it was approximately seven minutes after two o'clock. I asked * * * [the] Branch Chief, if I should stamp the bid in, and she said yes. I hurriedly turned the manual time/date stamp and stamped the envelope.

We do not think the time stamp convincingly establishes timely bid arrival. In addition, FTI has not satisfactorily explained away the Delta letter, which renders unlikely the representative's alleged time of arrival.

After reviewing the evidence of record, we conclude that the totality of information more reasonably supports the conclusion that the FTI bid did not arrive at the designated depositary room by 2:00 p.m. See *Porta-Kamp Manufacturing Company, Inc.*, 54 Comp. Gen. 545 (1974), 74-2 CPD 393.

FTI also argues that personnel should have been present in the bid depositary room to receive its bid. Since bid opening time had already arrived when FTI's bid was delivered, and no more bids could be accepted, there was no further need for personnel in the depositary room. As to FTI's argument that the time shown by the time/date stamp should be used, rather than the time shown by other timepieces, in determining the time of bid opening, we believe that such action would be of little use in this instance, since the stamp was only a manual hand stamp and was itself set by reference to other timepieces.

Accordingly, the bid was properly rejected as late and ineligible for award consideration.

One further matter warrants comment. Government personnel should not have returned the late bid to the representative. Rather, the late bid should have been held unopened until after award and retained with other unsuccessful bids. See ASPR § 2-303.3 (1975 ed.). In view of our conclusion above, however, we do not find it necessary to discuss what effect, if any, the return would have had on the bid's acceptability.

[B-185948]

Officers and Employees—Transfers—Relocation Expenses—Temporary Quarters—Time Limitation

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

Labor Department—Bureau of Labor Statistics—Consumer Price Index—Food Prices—Subsistence—Relocation Expenses

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

Officers and Employees—Transfers—Relocation Expenses—Subsistence Expenses—Reasonableness of Meal Costs

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

Officers and Employees—Transfers—Relocation Expenses—Temporary Quarters—Subsistence Expenses—High Cost of Living Area

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

Officers and Employees—Transfers—Relocation Expenses—Temporary Quarters—Computation of Allowable Amount—Subsistence Expenses

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

In the matter of Jesse A. Burks—claim for additional reimbursement for temporary quarters subsistence expenses, May 12, 1976:

This action concerns a request dated February 17, 1976, from Mary E. Wills, a certifying officer of the Internal Revenue Service, Department of the Treasury, as to the propriety of certifying for payment the voucher of Mr. Jesse A. Burks for reimbursement of expenses incurred in temporary quarters incident to the transfer of his official duty station from Sao Paulo, Brazil, to Washington, D.C., in July 1975.

The record indicates that Mr. Burks incurred subsistence expenses for 48 days while occupying temporary quarters in Alexandria, Virginia, in connection with his transfer. He had been granted a travel advance in the amount of $2,000 against which he claimed $1,532.71 in subsistence expenses for the first 30 days spent in temporary quarters, from July 16 through August 14, 1975. He now claims further reimbursement in the amount of $378.12 for an additional 18 days, from August 15, 1975, through September 1, 1975. The certifying officer has requested our decision (1) as to the reasonableness of the claim for grocery expenses, and (2) as to whether payment for the additional 18 days in temporary quarters may properly be certified.

Answering the second question first, the claim for an additional 18 days is predicated on the fact that Mr. Burks and his family were returning to the United States after living in Brazil for 7 years and needed the additional time to locate and occupy permanent quarters

in the Washington area. Section 5724a of Title 5, U.S. Code (1970), provides in part as follows:

> (a) Under such regulations as the President may prescribe and to the extent considered necessary and appropriate, as provided therein, appropriations or other funds available to an agency for administrative expenses are available for the reimbursement of all or part of the following expenses of an employee for whom the Government pays expenses of travel and transportation under section 5724(a) of this title:
>
> * * * * * * *
>
> (3) Subsistence expenses of the employee and his immediate family for a period of 30 days while occupying temporary quarters when the new official station is located within the United States, its territories or possessions, the Commonwealth of Puerto Rico, or the Canal Zone. The period of residence in temporary quarters may be extended for an additional 30 days when the employee moves to or from Hawaii, Alaska, the territories or possessions, the Commonwealth of Puerto Rico, or the Canal Zone. * * *

The statutory provisions cited above, and the implementing Federal Travel Regulations (FPMR 101–7) (May 1973), are clear and unambiguous. Subsistence expenses while occupying temporary quarters are limited to 30 days. Only employees who are transferred either to or from Hawaii, Alaska, the territories or possessions, the Commonwealth of Puerto Rico, or the Canal Zone may be allowed subsistence expenses for an additional 30 days. Employees who transfer to the United States from foreign countries are subject to the 30-day limitation by the express terms of FTR para. 2–5.2a. The 30-day limitation is statutory and cannot be waived. B–176078, July 14, 1972. The fact that extenuating circumstances are present, such as the nondelivery of an employee's household goods, does not entitle him to an additional period of time. B–176078, *supra;* B–167871, September 29, 1969. Nor can erroneous advice or administrative amendment of a travel authorization provide a basis for further reimbursement. B–175111, October 10, 1973.

Accordingly, the extenuating circumstance that Mr. Burks had lived in Brazil for 7 years and needed additional time in temporary quarters may not be taken into consideration. The statutory 30-day limitation is applicable to his transfer from Brazil to the United States, and it may not be extended. The voucher representing the expenses of an additional 18 days spent by Mr. Burks in temporary quarters may not be certified for payment.

With respect to the first 30-day period of temporary quarters for which the travel advance was made, the certifying officer notes that Mr. Burks claimed $582.63 for groceries in the first 10-day period, $147.38 for the second 10-day period, and $182.58 for the third 10-day period. The certifying officer states that such expenditures appear to be unreasonable, and she requests our determination of the correctness of payment.

The Federal Travel Regulations, in chapter 2, part 5, provide for the payment of the subsistence expenses of an employee and his immediate family while occupying temporary quarters when the employee is transferred to a new official station. Paragraph 2–5.4a of the FTR allows reimbursement only for actual subsistence expenses incurred, provided such expenses are incident to occupancy of temporary quarters "and are reasonable as to amount." Charges for meals are allowable, including groceries consumed during occupancy of temporary quarters.

It is the responsibility of the employing agency, in the first instance, to determine that such expenses are reasonable. Where the agency has exercised that responsibility, our Office will not substitute our judgment for that of the agency, in the absence of evidence that the agency's determination was clearly erroneous, arbitrary, or capricious. However, we have the right and the duty to review the circumstances of each case submitted to us and to make an independent determination as to the reasonableness of the claimed subsistence expenses. In this connection, the fact that the expenses claimed are within the maximum amounts specified in FTR para. 2–5.4c does not automatically entitle the employee to reimbursement. Rather, an evaluation of reasonableness must be made on the basis of the facts in each case. 52 Comp. Gen. 78 (1972). Accordingly, the amount claimed may be reduced to a reasonable sum as determined on the basis of the evidence in an individual case. Such a determination may be made on the basis of statistics and other information gathered by Government agencies regarding living costs in the relevant location.

In the present case, the employee incurred expenses for groceries in the amount of $912.59 for a 30-day period, including $425.70 spent in 1 day. Although no receipts were furnished, the employee has itemized these expenses in a pattern which indicates that the majority of his meals and those of his family were taken in rented quarters. The certifying officer indicates that these expenses are unreasonable. Therefore, we have examined publications prepared by the Bureau of Labor Statistics, Department of Labor, regarding average annual family budgets for urban areas, including Metropolitan Washington, D.C. The most recent statistics regarding urban family budgets are for autumn 1974. Selecting an intermediate budget of $15,035 per year for a four-person family, such as that of Mr. Burks, and adjusting the budget for food upward by 7.5 percent, the approximate increase in the consumer price index for food in Metropolitan Washington, D.C., for the period between autumn 1974 and July 1975, when the claimed expenses were incurred, we find that a reasonable monthly expenditure for food primarily consumed at home during July 1975 by such a family would be $328.86, or $109.62 for each of the allowable 10-day

periods. Such a monthly food budget for a family of four with a total budget of $21,725 per year would be about $413, or about $137 per 10-day period. Since the amount of $912.59 claimed for food costs is considerably in excess of the higher monthly budget of $413 derived from the Department of Labor statistics, we agree with the certifying officer's conclusion that the amount claimed is unreasonable. Therefore, Mr. Burks' allowance for subsistence expenses while occupying temporary quarters should be based on expenses for food not in excess of the higher monthly budget of $413 shown above in the absence of additional evidence that a higher amount should be used. In this connection we point out that the Department of Labor statistics are based on a budget for a family of four: a 38–year–old husband employed full-time, his non-working wife, a boy of 13, and a girl of 8. Since the statistics are based on averages, the actual expenses of a family would vary in accordance with the actual income, differences in family composition, etc. Such variances could be either up or down.

The voucher and enclosures forwarded with the submission are returned and appropriate action should be taken in accordance with the above.

[B–184825]

Contracts—Negotiation—Evaluation Factors—Point Rating—Evaluation Guidelines

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

Contracts—Negotiation—Evaluation Factors—Point Rating—Price Consideration

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

Contracts—Negotiation—Offers or Proposals—Evaluation—Conflict Between Evaluators

Where procuring activity believes one proposal is superior to another, determination made by higher echelon within agency that proposals are technically equal is not subject to objection since higher level personnel were acting within the scope of their authority for procurement involved.

Contracts—Negotiation—Evaluation Factors—Cost Realism

Agency's selection of contractor on basis of lower evaluated costs is not improper, even though evaluation section of solicitation indicates cost realism as the least important evaluation factor, since solicitation, on Standard Form 33A, indicated that price (cost quantum) would also be considered and cost or price may become

determinative factor in award selection when competing proposals are essentially equal, notwithstanding fact that other factors are of greater importance in overall evaluation scheme.

Contracts—Requirements—Estimated Amounts Basis—Best Information Available

Where agency cannot identify precise future requirements and therefore requests estimated costs on basis of hypothetical plan which includes the types of tasks and services actually required, estimated costs submitted by offerors provide adequate basis for cost comparison between competing proposals to determine probable relative cost to agency of accepting one proposal rather than another.

Contracts—Negotiation—Evaluation Factors—Cost Realism

Agency's cost evaluation of proposals is not subject to objection where agency's determination of realism of proposed costs is supported by reasonable basis, even though agency essentially relies on information contained in proposals rather than seeking independent verification of each item of proposed costs, since extent to which proposed costs will be examined is matter for agency.

Contracts—Negotiation—Offers or Proposals—Evaluation—Errors—Not Prejudicial

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

Contracting Officers—Authority—Contract Awards

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

Contracts—Negotiation—Late Proposals and Quotations—Court Interest

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

Contracts—Negotiation—Cost-Type—Fee Based on "Estimated Cost" of Order

Provision in cost-type indefinite quantity contract specifying that fee to be paid on each delivery order will be based on "costs being paid" does not render contract contrary to statutory prohibition against cost-plus-percentage-of-cost contracts since contract itself does not confer entitlement to payment and fee for actual delivery order is being based on "estimated cost" of each order.

Advertising—Services—Procurement—Delivery Type Contract

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

Contracts—Negotiation—Cost-Reimbursement Basis—Indefinite Delivery Contract

Use of cost-reimbursement provisions in indefinite delivery contract is not prohibited by regulations and record suggests that regulations were not intended to foreclose agency from awarding this type of contract.

In the matter of Grey Advertising, Inc., May 14, 1976:

Grey Advertising, Inc. (Grey), has protested against the Department of the Navy's award of a contract for recruiting advertising services to Ted Bates Advertising, Inc. (Bates). Grey's primary contention is that there was no rational basis for the Navy's award selection of Bates rather than Grey and that the award was contrary to the evaluation criteria established for the procurement. Grey further contends that the solicitation itself was defective because (1) it did not contain a sufficiently definitive statement of the Government's requirements and (2) it provided for the award of a contract type that was inconsistent with regulatory provisions governing the procurement of advertising services. In addition, Grey challenges the authority of the Navy official who signed the contract to act as a contracting officer for this procurement. Grey also suggests that the contract awarded to Bates contains an illegal cost-plus-percentage-of-cost payment provision.

The procurement was initiated on November 29, 1974, with the issuance by the Naval Regional Procurement Office (NRPO), Washington, of request for proposals (RFP) No. N00600–75–R–5279, which solicited proposals for a cost-plus-fixed-fee, indefinite delivery requirements contract for recruiting advertising supplies and services for fiscal year 1976 and two 1-year option periods. On January 15, 1975, proposals were received from (1) Grey, (2) Bates, (3) Wells, Rich, Greene, Inc., and (4) Kenyon and Eckhardt. The technical aspects of the proposals were evaluated and discussions were held with the offerors. Revised proposals were then submitted. As a result of an evaluation of the revised proposals, Wells, Rich, Greene, Inc., and Kenyon and Eckhardt were eliminated from the competitive range.

Navy evaluators then made site visits to the offices of Grey and Bates during which certain aspects of their revised proposals were discussed. Other Navy personnel evaluated the cost elements of the proposals. (Grey proposed estimated costs of $16,393,800 plus a fixed fee of $901,659, for a total of $17,295,459. Bates proposed estimated costs of $11,313,532 plus a fixed fee of $471,944 for a total of $11,795,476.) Subsequently, it was decided that Bates was also outside the competitive range and it was so notified by letter dated May 12, 1975.

A dispute then arose within the Navy as to whether award should be made to Grey. It was the opinion of NRPO and the requiring activity,

the Navy Recruiting Command (NRC), that the contract should be awarded to Grey. However, the Naval Material Command (NAVMAT), a higher echelon command within the Navy, refused NRPO's request for a business clearance to negotiate a contract with Grey. The NAVMAT business clearance officer believed that Bates and Grey had not been competing on an equal basis and that Bates had been improperly excluded from the competitive range. After various discussions among representatives of NRPO, NRC, NAVMAT, the Naval Supply Systems Command (NAVSUP), and the Navy's Office of General Counsel, it was decided to reinstate Bates in the competitive range, issue an amendment to the RFP which would equalize the competitive basis of the procurement by setting forth the Navy's dollar ($16 million) and manhour (143,000) estimates for the fiscal year requirement (it was believed that Grey, as the incumbent contractor, had been aware of that information while Bates was not), and change the type of contract to be awarded from a requirements type contract to an indefinite quantity type on a cost-plus-fixed-fee basis, with minimum and maximum ordering limitations.

Best and final offers were submitted by Grey and Bates on June 26, 1975. NRC and NRPO again requested clearance to award to Grey. Again the NAVMAT business clearance officer denied the request, this time on the basis that the Bates proposal presented "the greatest value to the Government," which was the award standard set forth in the RFP.

NRC and NRPO, however, disagreed with that conclusion. After further discussion among various Navy officials, including the Assistant Secretaries for Installations and Logistics and Manpower and Reserve Affairs, it was decided that an additional cost analysis should be performed. Subsequent to the performance of this analysis by the Deputy Chief of Naval Material, the Chief of Naval Material, through the Deputy Chief, directed award to Bates. The contract, signed by the Deputy Chief of Naval Material rather than the NRPO contracting officer, was awarded on September 2, 1975.

Grey protested to this Office on August 26, 1975, apparently after learning that the Navy was considering awarding the contract to Bates. On September 11, 1975, Grey also sought judicial relief from the United States District Court for the District of Columbia. Although the court denied Grey's motions for a temporary restraining order and preliminary injunction, it did indicate a desire for a GAO decision on the merits of the protest.

EVALUATION AND SELECTION

Section D of the RFP set forth eight evaluation factors, listed in decreasing order of importance, which would provide the basis for the

selection of a contractor. Most of the factors were related to offeror experience. For example, the first criterion measured an offeror's "demonstrated ability, based upon its past performance," to develop various creative and innovative features, while another criterion looked to the offeror's "past experience and present capabilities in dealing with target audiences akin to those which Navy recruiting advertising is directed." The eighth criterion was:

> The estimated cost to provide a wide range of manpower and services and to perform specific kinds of work as identified in cost SCHEDULE and the amount of fee the Agency will charge.

The RFP further provided that:

> Award of the contract resulting from this solicitation will be influenced by the proposal which offers the greatest value to the Government. The Government reserves the right to determine which proposal demonstrates the required competence for performing the services described herein and which proposal presents the greatest value to the Government.

The Cost Schedule referred to in the eighth evaluation criterion was included in the RFP as Attachment B and was introduced with the following remarks:

> In order for the Navy to evaluate the cost of your services, it will be necessary for you to provide your estimates of the cost of individual line items in the Navy's advertising agency budget. Because of changing requirements by Navy, cost fluctuations, and variations between existing plans and programs and those you may institute, should you be awarded the Navy advertising contract, this is, at best, a difficult procedure to implement.
>
> However, on the following pages there is provided what might be considered an advertising plan that is generally representative of the items you probably would include in your future advertising plan for Navy.
>
> Please list after each item your estimated cost to produce/place/carry out action indicated.
>
> In the matter of media placement, you can presume the total amounts given are representative of the scope of activity within that medium and should be used in computing direct labor, overhead and fee.
>
> In the case of magazine ad production, for offer preparation purposes only, presume that all illustrations will be photographs and all will be drawn from existing files with no necessity for special photo shoots for a specific ad. Also costs for magazine ads should include only work required through art and mechanicals.
>
> Wherever possible, an attempt is made to define as clearly as possible the work to be accomplished. However, because of the wide variations in details of specifications, quality standards required, etc., you will find many instances where sufficient details are lacking. In these cases please provide a figure representative of the average cost for your agency of producing/providing the materials or service indicated.
>
> You will have the opportunity to ask questions regarding specific areas during the pre-proposal conference.
>
> Keep in mind that while the following is an approximation of the key projects in a possible ad plan, you may be tasked to carry out all or any of the activities listed under the scope of work in Section F. of the Request for Proposals.

There followed a listing of several items under such headings as magazine placement, direct mail, outdoor placement, research, indirect costs, travel expenses, photo shoots, and miscellaneous. For most of the items offerors were to estimate the cost to the Navy; however, for certain items the RFP set forth the Navy's own dollar estimate. Offerors were also requested to enter total costs in spaces denominated "Total of Net

Costs," "Agency Fee" and "Grand Total." These figures were also to be entered in the RFP Schedule (Section E) under the headings "Total Estimated Cost," "Fixed Fee," and "Total Estimated Cost Plus Fixed Fee."

The technical portions of the proposals were evaluated by a Proposal Evaluation Panel (PEP) established by NRC. When the PEP completed its initial evaluation, it prepared a numerical and narrative summary of its work and presented a report to NRC's Contract Award Review Panel (CARP). The report provided the basis for questions presented to the offerors by the NRPO contract negotiator during discussions with the four offerors. Following receipt of revised proposals, the PEP was reconvened to evaluate the revised technical offers and to make a final report to the CARP.

The CARP was responsible for the review and validation of the work of the PEP. The CARP evaluated the PEP scores to validate the objectivity and accuracy of the scores and then applied predetermined weights to the scores for the seven evaluated technical criteria. The criterion weights ranged from 325 for creativity to 5 for estimated cost, with a total possible weighted score of 1,000. As a result of the CARP's application of weights to the PEP's scoring of the technical criteria, the following scores, based upon a total of 995 points, were established:

Grey	924.99
Bates	872.63
Wells, Rich and Greene, Inc	831.8
Kenyon and Eckhardt	834.74

On the basis of these scores, the CARP recommended award to Grey. So did the Commander of NRC, who had been designated the Technical Source Selection Authority for the procurement. NRPO then forwarded a request for a business clearance to NAVMAT. As indicated above, NAVMAT refused NRPO's request for clearance to negotiate a contract with Grey. Subsequently, NRPO issued an amendment to the RFP which, in addition to spelling out NRC's estimated annual dollar and manhour requirements, stated that Cost Schedule entries would be used only to determine cost realism. Grey and Bates then submitted revised best and final offers which were scored as follows:

	Grey	Bates
Technical (Factors I–VII)	919.99	872.63
Cost (Factor VIII)	3.78	5.00

The Commander of NRC and NRPO believed this point spread to be significant and recommended award to Grey on that basis. However,

NAVMAT concluded that the two offerors were relatively equal technically and that cost to the Navy should therefore be the determining factor. The cost schedule submitted with each offeror's best and final proposal indicated the following:

	Grey	Bates
Cost	$12,780,912	$12,018,160
Fee	702,950	500,000
Total	$13,483,862	$12,518,160

NAVMAT, after determining that Bates' and Grey's proposed costs as listed in their cost schedules were realistic, decided that on the basis those cost schedule figures an award to Bates would save the Navy $965,702 (the difference between $13,483,862 and $12,518,160) for the first contract year and $2,897,106 if the two 1-year options were exercised. It was this judgment, that award to Bates would be less costly than award to Grey, which ultimately resulted in the selection of Bates.

The protester challenges this selection on three grounds:

1) NAVMAT erred in determining that the point spread between Grey and Bates was not significant, particularly since NRC and not NAVMAT personnel had the technical expertise to make that determination;

2) The Navy's reliance on cost to select a contractor was contrary to the established evaluation criteria;

3) There was no rational basis for NAVMAT's determination that an award to Bates would cost the Navy less than an award to Grey, since (a) the cost schedule did not reflect actual Navy requirements and was not intended to reflect actual probable costs and (b) an examination of the Grey and Bates proposals indicates that award to Grey and not to Bates would result in less cost to the Navy.

SIGNIFICANCE OF THE POINT SCORES

Grey asserts that its proposal was clearly technically superior to the Bates proposal and that this superiority was reflected in the difference between the point scores assigned to the two proposals. In support of this assertion, Grey refers to the adjective ratings assigned to each proposal, to certain statements of NRC personnel and the NRPO contracting officer, and to the sworn deposition of one of its expert witnesses.

The adjective ratings referred to by Grey were ratings assigned to various point score ranges in the PEP evaluation scheme. For example, the "good" range encompassed 75 through 87.4 points, the "excellent" range encompassed 87.5 through 94.9 points, and the "out-

standing" range included scores of 95 and above. Grey was rated as "outstanding" in two technical evaluation categories and "excellent" in the remaining five. Bates was rated "excellent" in four categories and "good" in the other three.

The statements regarding Grey's technical superiority were generated after NAVMAT refused NRPO's first request for a business clearance to negotiate a contract with Grey. In response to NAVMAT's action, the Commander of NRC prepared a point paper dated June 10, 1975, to show that the point spread between Bates and Grey reflected an actual, significant superiority in Grey's technical proposal and that Grey's costs were reasonable. The paper stated that the PEP and CARP had evaluated Grey "as being superior in *each* of seven technical criteria" and that NRC considered the point spread between the Grey and Bates proposals to be significant. Also, in a Memorandum for the Record of the same date, the NRPO contracting officer stated that:

> * * * it is significant that the Grey proposal received a higher score in each of the seven technical criteria. This indicates a technical superiority when one considers that a carefully selected group of impartial evaluators determined Grey to be the best qualified * * *.

These views were reiterated in a July 11, 1975 NRPRO letter to NAVMAT.

Further, is the conclusion of Grey's expert witness, a former high-level Government procurement official, that the Grey and Bates proposals were not technically equal but that "there was a definite superiority on the part of Grey in the area of technical competence."

On the other hand, it was the judgment of various NAVMAT personnel that the Grey proposal was not significantly superior. NAVMAT believed that when numerical scores are used to evaluate proposals, the ultimate selection of a contractor for award should be the result of procuring agency "judgment" as to what the scores indicate and not the result of a quantum difference in point scores alone. From the statements made by NRC and NRPO, however, NAVMAT believed that those activities reached their conclusion primarily because a point scoring system was utilized under which Grey received a higher numerical score and not because Grey was superior in any meaningful way.

NAVMAT's general view of point scores is correct. We have consistently stated that "technical point ratings are useful as guides for intelligent decision-making in the procurement process, but whether a given point spread between two competing proposals indicates the significant superiority of one proposal over another depends upon the facts and circumstances of each procurement and is primarily a matter within the discretion of the procuring agency." 52 Comp. Gen. 686, 690 (1973); 52 *id.* 738, 747 (1973); *ILC Dover*, B-182104, November

29, 1974, 74–2 CPD 301; *Tracor Jitco, Inc.*, 54 Comp. Gen. 896 (1975), 75–1 CPD 253; *Management Services Incorporated*, 55 Comp. Gen. 715 (1976), 76–1 CPD 74. As we said in *Tracor Jitco, Inc., supra:*

> * * * Uniformly, we have agreed with the exercise of the administrative discretion involved—in the absence of a clear showing that the exercised discretion was not rationally founded—as to whether a given technical point spread between competitive-range offerors showed that the higher-scored proposal was technically superior. On a finding that technical superiority was shown by the point spread and accompanying technical narrative, we have upheld awards to concerns submitting superior proposals, although the awards were made at costs higher than those proposed in technically inferior proposals. 52 Comp. Gen. 358 (1972); B–171696, July 20, 1971; B–170633, May 3, 1971. Similarly, on a finding that the point score and technical narrative did not indicate superiority in the higher-ranked proposal, we have upheld awards to offerors submitting less costly, albeit lower-scored technical proposals. *See* 52 Comp. Gen. 686 (1973); 50 *id., supra.* This reflects our view that the procuring agency's evaluation of proposed costs and technical approaches are entitled to great weight since the agencies are in the best position to determine realism of costs and corresponding technical approaches. *Matter of Raytheon Company*, 54 Comp. Gen. 169 (1974); 50 *id.* 390 (1970). Our practice of deferring to the agency involved in cost/technical tradeoff judgments has been followed even when the agency official ultimately responsible for selecting the successful contractor disagreed with an assessment of technical superiority made by a working level evaluation committee. See B–173137(1), October 8, 1971. Our review of the subject award, therefore, is limited to deciding whether the record reasonably supports a conclusion that the award was rationally founded. See *Matter of Vinnell Corporation*, B–180557, October 8, 1974. 54 Comp. Gen. at 898–9.

We believe it is clear from these cases that the question of whether a difference in point scores is significant is for determination on the basis of both what that difference might mean in terms of performance and what it would cost the Government to take advantage of it. As we said in 52 Comp. Gen. 358 (1972), the "determinative element * * * [is] not the difference in technical merit scores *per se*, but the considered judgment of the procuring agency concerning the significance of that difference." 52 Comp. Gen. at 365. Thus, for example, in B–173137(1), October 8, 1971, where it was determined that two firms were technically equal despite one firm's technical point score edge of 15.8 points (on a 100 point scale), we viewed the award to the lower-scored competing firm "as evidencing a determination that the cost premium involved in making an award to [the higher-rated] firm would not be justified in light of the acceptable level of technical competence available at a somewhat lower cost." *See also* 50 Comp. Gen. 246 (1970), in which we expressed similar views in upholding award to a firm receiving a point score that was 6 points (out of 100) lower than that received by a competitor. Also, in *ILC Dover, supra*, we upheld a contracting officer's determination that a point spread of 2.75 out of 100 "was 'insufficient in the light of the substantially higher cost' associated with the protester's proposal."

On the other hand, we have upheld an award to a higher-rated (14 points out of 100) offeror with significantly higher proposed costs because we viewed the award "as reflecting a determination that the

cost premium involved was justified taking into account the significant technical superiority of [the winning offeror's] proposal. B–170181, February 22, 1971. *See also* 52 Comp. Gen. 358, *supra* (where the technically superior offeror was rated 3 points higher than a competing firm); *Riggins & Williamson Machine Company, Incorporated, et al.*, 54 Comp. Gen. 783 (1975), 75–1 CPD 783; *Planning Research Corporation*, B–182962, July 15, 1975, 75–2 CPD 37; *Bellmore Johnson Tool Company*, B–179030, January 24, 1974, 74–1 CPD 26. However, where award was made to an offeror whose technical proposal was scored about 5 percent higher than a competitor's technical proposal but whose price was approximately four-and-one-half times higher, we said the record did not indicate that the technical superiority of the one offeror "warranted an award to him at a substantially higher price" and that therefore the record did not support the conclusion that the award made was most advantageous to the Government. *Design Concepts, Inc.*, B–184658, January 23, 1976, 76–1 CPD 39.

Furthermore, while point scores, technical evaluation narratives, and adjective ratings may well be indicative of whether one proposal is technically superior to another and should therefore be considered by source selection officials, see *EPSCO, Incorporated*, B–183816, November 21, 1975, 75–2 CPD 338, we have recognized that selection officials are not bound by the recommendations made by evaluation and advisory groups. *Bell Aerospace Company*, 55 Comp. Gen. 244 (1975), 75–2 CPD 168; *Tracor Jitco, Inc., supra;* 51 Comp. Gen. 272 (1971); B–173137(1), *supra.* This is so even though it is the working level procurement officials and evaluation panel members who may normally be expected to have the technical expertise relevant to the technical evaluation of proposals. Accordingly, we have upheld source selection officials' determinations that technical proposals were essentially equal despite an evaluation point score differential of 81 out of 1000, *see* 52 Comp. Gen. 686, *supra*, and despite contracting officer recommendations that award be made to the offeror with the highest technical rating. *See* 52 Comp. Gen. 738, *supra.*

As indicated by the foregoing, source selection decision-making is vested in the "considerable range of judgment and discretion" of the selection officials, *EPSCO, Incorporated, supra*, who have a "very broad degree of discretion * * * in determining the manner and extent to which [they] will make use of technical evaluation results." *Department of Labor Day Care Parents' Association*, 54 Comp. Gen. 1035, 1040 (1975), 75–1 CPD 353. In exercising that discretion, they are subject only to the tests of rationality (see *Tracor Jitco, Inc., supra*, where we questioned the selection decision as not "rationally justified" but ultimately found in a later decision, on the basis of a subsequent

submission from the procuring agency, that the selection decision was supportable, 55 Comp. Gen. 499 (1975), 75-2 CPD 344) and consistency with established evaluation factors. See *EPSCO, Incorporated, supra.* We think the record adequately establishes that the Navy's ultimate selection of a contractor was rationally founded. The record shows that NAVMAT, in conjunction with the Navy's Office of General Counsel, closely scrutinized the Grey and Bates proposals along with NRC's and NRPO's rationale for recommending award to Grey. It was the considered opinion of NAVMAT and other high level Navy personnel that the proposals were substantially equal technically. This conclusion was based in part on their belief that the point scores alone did not automatically reflect significant technical superiority and in part on the PEP's recognition that the higher Grey score could be due to the "natural advantage" of the incumbent contractor and accompanying "judgment that either Grey * * * or * * * Bates * * * could satisfy the requirements of U.S. Navy advertising."

Although Grey correctly points out "that there is nothing illegal" about an incumbent contractor's advantages over competitors, and we have often stated that the Government is not required to equalize such advantages, see *Houston Films, Inc.*, B-184402, December 22, 1975, 75-2 CPD 404; *H. J. Hansen Company*, B-181543, March 28, 1975, 75-1 CPD 187, neither is the Government required to ignore the fact that a particular scoring differential might be due to advantages of incumbency. For example, an agency, in determining which of two competing proposals should be accepted for award, might well find it significant that one offeror's higher evaluation score results from superior ratings in evaluation categories upon which incumbency would impact rather than in other areas where the agency might find a point spread to be meaningful in indicating actual technical superiority for purposes of the particular procurement. Accordingly, we think the PEP's belief that either Bates or Grey could perform the contract satisfactorily provided an adequate basis for NAVMAT's determination that the proposals were essentially equal technically.

Furthermore, we do not believe that the validity of that determination is vitiated because it was made at the NAVMAT level rather than at the NRC and NRPO level. Although Grey makes much of the fact that the Commander of NRC was to be the Technical Source Selection Authority and later the Source Selection Authority and that the expertise to determine the NRC's recruiting advertising needs was at the NRC level, it is not improper for higher levels of authority both within the Department of Defense and civilian agencies to ultimately make source selection decisions for lower level procuring

activities. For example, in B–173137(1), *supra*, the contracting officer and Board of Awards of the U.S. Army Korea Procurement Agency recommended award to the offeror receiving the highest numerical score from two evaluation boards. However, U.S. Army Pacific, a higher echelon command which had to approve the award, did not agree with the point scores, and submitted the matter to the Assistant Secretary of the Army. The Assistant Secretary agreed with U.S. Army Pacific that award should be made to another offeror. Also, in a case similar to this one, we said the following:

> In summary, we find that although Sanders received a higher point score in the initial evaluation of technical proposals and the contracting officer recommended award to Sanders, Army procedures required that the award selection be reviewed at a higher level within the Army. As a result of this review it was determined * * * that in fact the proposals were substantially equal in technical merit. On the other hand, it was determined, based on the Army's analysis of the proposals of the two firms, that AEL's proposal was significantly more advantageous from a cost standpoint. It was the considered judgment of the reviewing evaluators * * * that an award to AEL would be in the best interests of the Government. 52 Comp. Gen. 738, 747, *supra*.

See also 53 Comp. Gen. 5 (1973), in which we upheld an award made by the Federal Aviation Administration (FAA) despite the protester's allegation that the Office of the Secretary of Transportation had unlawfully intervened in the FAA procurement by disregarding FAA's recommendation to award to a particular offeror and directing award to a competing firm. Cf. *Congress Construction Corp.* v. *United States*, 314 F. 2d 527, 161 Ct. Cl. 50 (1963).

Here, NAVMAT became involved in the procurement because of the regulatory requirement for it to grant a business clearance prior to award. See Armed Services Procurement Regulation (ASPR) §§ 1–403, 3–101(c) (1974 ed.), Navy Procurement Directives (NPD) 1–403.50 (1974), and 50 Comp. Gen. 739 (1971). NAVMAT, in the exercise of its discretionary judgment, refused to grant a business clearance for an award to Grey. As a result, award was ultimately made to Bates. We see nothing inconsistent between NAVMAT's role in this case and the normal Navy source selection process.

CONSISTENCY WITH EVALUATION CRITERIA

The original RFP established "estimated cost to provide a wide range of manpower and services and to perform specific kinds of work as identified in cost schedule and the amount of fee" as the least important evaluation factor. Amendment No. 0004 provided that the figures contained in the cost schedule "will be used only to determine cost realism." Grey argues that since the Amendment "made clear that 'Cost' was to be measured for 'realism' only, not for 'amount of cost' or 'lowest cost to the Government,'" it was improper for the Navy to

evaluate cost on a quantum basis. In addition, Grey argues that even if cost realism could be equated to low cost, the Navy's reliance on cost to select Bates was improper because it had the effect of turning the least important evaluation criterion into the most important one.

We recognize that "as a matter of sound procurement policy, * * * offerors [should] be advised of the evaluation factors to be used and the relative importance of those factors * * * [since] competition is not served if offerors are not given any idea of the relative values of technical excellence and price." See *Signatron, Inc.*, 54 Comp. Gen. 530, 535 (1974), 74–2 CPD 386, and cases cited therein. See also ASPR § 3–501(b) (Sec. D). Furthermore, once offerors are informed of the criteria against which proposals will be evaluated, it is incumbent upon the procuring activity to adhere to those criteria. See, e.g., *EPSCO, Incorporated, supra; Signatron, Inc., supra; Willamette-Western Corporation, et al*, 54 Comp. Gen. 375 (1974), 74–2 CPD 259 and cases cited therein.

Here, however, the Navy did follow its established evaluation criteria. Amendment 0004 informed offerors that "cost realism" would be of concern in evaluating cost schedule figures. While NRC's Cost and Fee Review Panel evaluated only "cost efficiency" and fee rather than cost realism (the Panel felt that cost realism was eliminated as a viable evaluation criterion by the disclosure to offerors of the Navy's cost and manhour estimates), NAVMAT, in considering the likelihood of Bates being able to perform in accordance with its proposed costs (see below), did in effect make a cost realism determination.

The establishment of cost realism as an evaluation factor, however, does not preclude consideration of cost quantum. Obviously, a determination that an offeror's proposed costs are realistic would not automatically indicate that the proposal was most advantageous to the Government with respect to cost since those realistic costs might significantly exceed what the Government would have to incur under a competing proposal which was also cost realistic. Thus, in determining which proposal offers "the greatest value to the Government" or would "be most advantageous to the Government, price and other factors considered" (see paragraph 10 of Standard Form 33A, page 13 of RFP), an agency, in considering cost, would necessarily have to take into account cost quantum as well as cost realism. See *ILC Dover, supra.* While it would be preferable for this to be explicitly indicated in the evaluation section of the solicitation, "we do not believe that the absence of such a statement in the solicitation may be interpreted to mean that price would receive no consideration in the award selection." 52 Comp. Gen. 738, 747, *supra.* In that case, the solicitation provided that cost, which was described in terms of realism, would be the least

important evaluation factor. Although one offeror was rated higher technically, it was ultimately determined that the two competing proposals were essentially equal and that the award should be made to the offeror with the lower proposed costs. We upheld the award.

Here, while we believe the Navy should have made it clearer that cost quantum was not to be excluded from consideration in the selection of an offeror for award, we note, as mentioned above, that the RFP did specify on Standard Form 33A that "price" would be considered in determining the award most advantageous to the Government, and we have previously held that this Standard Form 33A provision is sufficient to put offerors on notice that price (cost quantum) "would be a factor in the evaluation of proposals and the awarding of the contracts." 52 Comp. Gen. 161, 163 (1972). Furthermore, we find nothing in the record which indicates that either Bates or Grey was misled into believing that cost quantum would be ignored in the selection process.

With regard to Grey's second point, we cannot agree that the Navy's consideration of cost quantum in this case was precluded by the designation of cost as the least important evaluation factor, since it is well settled that where an agency regards proposals as essentially equal technically, cost or price may become the determinative consideration notwithstanding the fact that in the overall evaluation scheme cost was of less importance than other criteria. 52 Comp. Gen. 738, *supra*; 52 *id.* 161, *supra*; 50 *id.* 246, *supra*. Indeed, under 10 U.S. Code 2304(g), price must be given appropriate consideration in the award of all negotiated Government contracts.

Accordingly, we find that the selection of Bates on the basis of its lower proposed costs was not contrary to the established evaluation factors.

RATIONALITY OF THE COST DETERMINATION

The cost evaluation which resulted in the selection of Bates was predicated on RFP Cost Schedule figures submitted by the two offerors. Grey claims that the use of such figures could not provide a rational basis for determining which proposal, upon acceptance, would result in less cost to the Navy because the cost figures were related only to a "hypothetical" advertising plan and not any definitive statement of what would be required under the contract. According to Grey, neither offeror intended nor was expected to perform the contract to be awarded for the estimated cost and fixed fee submitted with the Cost Schedule. Rather, states Grey, under the indefinite quantity contract work was to be defined in individual cost-plus-fixed-fee delivery orders, with no total estimated cost and fixed fee attaching to the contract itself. Thus, asserts Grey, the Navy could not rationally select one offeror over another on the basis of lower total

estimated cost and fee because there was no such estimated cost and fee. Furthermore, it asserts that even if the cost schedule figures could be used, a proper cost analysis would have indicated that Grey, not Bates, had actually offered a lower realistic cost proposal.

It is true that the RFP did not contain a completely comprehensive statement of work. The schedule section of the RFP called for the providing of "services of competent personnel to conduct a program of paid advertising" in various media and to create and produce various types of advertising messages (such as newspaper ads, outdoor ads, radio and television spot messages, and magazine inserts) and for providing support through such things as marketing plan, research, field support, seminars, and sports promotions. These requirements were explained to some extent in accompanying specifications. However, the amount and precise nature of the required services were not specified. Instead, as indicated above, the RFP included an "Attachment B" which was denominated "Cost Schedule." This Cost Schedule set forth "what might be considered an advertising plan that is generally representative of the items [an offer] would include in [its] future advertising plan for Navy," and stated that "while the following is an approximation of the key projects in a possible ad plan, [an offeror] may be tasked to carry out all or any of the activities listed under the scope of work in [the specification section]."

We do not agree, however, that the lack of a comprehensive statement of work thereby automatically precluded an effective cost comparison of competing proposals or that offerors were not on notice that such a comparison would be made. The introduction to the Cost Schedule section of the RFP informed offerors that "In order for the Navy to evaluate the cost of your services, it will be necessary for you to provide your estimates of the cost of individual line items in the Navy's advertising agency budget" and then requested them to "list after each item [in the cost schedule] your estimated cost to produce/place carry out action indicated." Furthermore, section D provided that proposals would be evaluated on the estimated cost to provide "a wide range of manpower and services" and to perform the kind of work identified in the cost schedule. Although Amendment 0004 to the RFP advised offerors that their figures contained in the cost schedule "will be used only to determine cost realism," such a determination in itself requires an analysis and evaluation of the figures submitted, with possible substitution of Government figures for an offeror's figures found to be unrealistic. *See* 50 Comp. Gen. 390, 410 (1970); *Scott Services, Incorporated*, B–181075, October 30, 1974, 74–2 CPD 232. Thus, it was clear from the solicitation that the cost schedule would be used to evaluate costs.

Admittedly, the figures submitted in the cost schedule could not be used to determine the probable total estimated cost plus fixed fee of the contract to be awarded, since the cost schedule did not purport to include all work that would be required under the contract. The Navy itself recognized this when it informed offerors in RFP Amendment No. 0004 that the Navy's estimate for FY 1976 work orders was "$16 million excluding fee" and that the "Cost Schedule is not intended to total" that estimate. However, while reliance could not be placed on the cost schedule figures for determining the probable specific dollar cost to the Navy of accepting either the Bates or Grey proposal, we believe that the cost schedule could properly be used for making a cost comparison between competing proposals to determine the probable relative cost to the Navy of accepting one proposal rather than another. NRC's own Cost and Fee Review Panel recognized this when it stated that "The panel felt that the Cost Schedule * * * with its assumptions, placed both [offeror] agencies on an equal footing, thereby, permitting a valid comparison of estimated costs."

In this regard, we point out that when cost-type contracts are to be awarded, since all allowable costs incurred by a contractor will be reimbursed and "estimates of cost may not prove valid indicators of final actual costs," ASPR 3-803(c), the Government's evaluation is geared to a determination of the "reasonableness and realism" of proposed costs. See *Signatron, Inc., supra.* The Government's determination is in reality no more than an informed judgment of what costs would be incurred by acceptance of a particular proposal, see e.g., *Bell Aerospace Company, et al,* 54 Comp. Gen. 352, 359 (1974), 74-2 CPD 248; *PRC Computer Center, Inc., et al,* 55 Comp. Gen. 60, 78 (1975), 75-2 CPD 635, and that judgment may or may not prove to be accurate as the contract is performed. The fact that the Government's judgment proves to be inaccurate might cost the Government more than was anticipated, but would not negate either the validity of the judgment at the time it was made or the contract awarded as a result of that judgment. As we have recognized, whether submitted proposals are cost realistic "must properly be left to the administrative discretion of the contracting agencies * * * [which] must bear the major criticism for any difficulties or expenses experienced by reason of a defective cost analysis." 50 Comp. Gen. 390, 410, *supra;* 53 *id.* 240 (1973); *Raytheon Company,* 54 Comp. Gen. 169 (1974), 74-2 CPD 137; *PRC Computer Center, Inc., et al, supra.*

While ordinarily an evaluation of the probable relative cost to the Government of competing proposals would be based on a definitive statement of work, here the uncertainties of future budgeting and personnel requirements precluded the Navy from predicting its actual

recruiting advertising needs with any more specificity. Nonetheless, it appears that the cost schedule incorporated the major "key" elements of what would be required under the contract so as to permit a valid comparison of proposals on the basis of each offeror's cost schedule entries. Furthermore, it appears from the best and final offers submitted by Bates and Grey that at least two of their cost schedule entries—indirect costs and field force—were in fact based on the Navy's actual anticipated annual requirements rather than on a hypothetical requirement. Thus, we think the proposals submitted did provide the Navy with a reasonable basis for determining the probability of incurring greater total costs under one proposal rather than another.

The record shows that the Navy's ultimate cost determination was based upon an examination of cost proposals by NAVMAT's business clearance officer and upon a cost analysis performed by the Deputy Chief of Naval Material for Procurement and Production. It was the business clearance officer who first determined that acceptance of the Bates proposal would be less costly to the Navy than acceptance of the Grey proposal. In a memorandum dated July 29, 1975, that official explained his rationale for concluding that lower costs would attach to the Bates proposal. After noting that the best and final cost schedule figures indicated that Bates would cost the Government $965,702 less annually (based on a difference of $762,752 in estimated costs and $202,950 in fee) and that the cost schedule figures did "provide a basis for comparison and analysis of the offerors' cost proposals," he stated the following:

> In determining the reasonableness and realism of the offerors' cost proposals this Office first looked at the initial proposals submitted by the four offerors. Bates' initial proposal of $11,313,532 fell between two other offers of $10,684,685 and $13,741,469. Grey's initial proposal of $16,393,800 was not responsive to the RFP in that, as stated above, it was based on historical costs rather than the cost schedule upon which the other offerors were proposing.
>
> The cost schedule was structured so that it identified the costs associated with discrete tasks. NRPO Washington compiled a table which set forth the costs prepared by each offeror under the individual tasks of the cost schedule. With the exception of Grey, who was proposing on a different basis, the offerors were all considered reasonable.
>
> DD Form 633's were also received with initial proposals and reviewed by this Office together with the updated cost data accompanying the offerors' best and final offers. The Bates submission clearly documented the basis for its increase between the initial proposal and the best and final offer. The increase was primarily the result of information provided in the request for best and final offers which for the first time gave the Government's estimate of the number of hours required. This resulted in Bates increasing its estimate of the man-hours required for specific labor categories.
>
> Grey's best and final offer and the cost data submitted therewith was a substantial departure from its initial proposal. For the first time it submitted its cost proposal on the basis of the cost schedule.
>
> In the view of this Office, the best and final cost proposal submitted by Bates is considered realistic in terms of the Government's requirements as set forth in the cost schedule of the RFP and Bates' view of this Office that there is no

evidence to conclude that Grey's offer, although substantially higher in cost and fee than Bates', is not realistic also. This judgment is based upon (1) the comparison of the two proposals with those submitted by the two offerors which had earlier been dropped from the competition; (2) an analysis of the cost schedule submissions of all offerors; (3) an analysis of the cost and pricing data submitted by Bates and Grey; and (4) over years experience as the Navy Official authorized to and specifically charged with the responsibility of reviewing and approving or disapproving the business aspects of its major contracts.

Accordingly, in my judgment, both the cost and fee differences between Bates and Grey are substantial and the spread in estimated cost is real rather than apparent.

The subsequent cost analysis, referred to by NAVMAT as an "in-depth cost analysis," "confirmed the previous analyses and judgments that Bates' estimated costs plus fixed fee for the performance of the subject contract were substantially lower than those of Grey." This cost analysis was described by the Navy as follows:

Rear Admiral Evans in his analysis read and reviewed the initial cost proposals and accompanying DD Form 633's, submitted by the four original offerors. He considered the DCAA audit report conducted on Grey's initial cost proposal. Further, he had before him both Bates' and Grey's best and final offers. Finally he considered the comments made by representatives of the NRC and the NRPO's business clearance in support of Grey's cost proposal.

He started his analysis by comparing the bottom line cost estimates submitted by the four offerors in their initial proposals. With the exception of Grey, the offerors were clustered within a reasonably close range. In its best and final offer, Grey too joined the range of the other offerors. An attempt was then made to correlate the individual cost elements of the four offerors' proposals (considering Bates' and Grey's best and final offer). This did not result in any meaningful conclusions.

An attempt was then made to correlate the differences between Grey's and Bates' initial cost proposals and their best and final offers. Although Grey's estimated cost dropped substantially, as a bottom line figure as well as individual cost elements, no meaningful justification was given for the change. To the contrary. Grey commented on the sweeping reduction between its initial proposal and its best and final offer as follows:

> "Thus, our original submission was relevant to Navy's needs, and fully reflective of good value to the Navy. However, it was not a literal response to the precise specifications of the RFP. Our newest submission, contained on the following pages, is also reflective of good value, but it is based on close adherence to the RFP."

Grey also stated in its best and final offer that while its experience indicated that it would expend approximately 153,632 man-hours, it was proposing on the basis of 143,000 man-hours as "described in your instructions." Also of concern to Rear Admiral Evans was Grey's substantial reduction in the area of research. The description of this item remained unchanged from the issuance of the solicitation to contract award. Further, Grey, itself, had prepared the work statement for this area and should have been in a position to accurately estimate its cost. However, its cost estimate dropped from $375,600 to $187,189 in its best and final offer with no apparent justification.

In view of the lack of trackability of Grey's cost reductions and in light of the auditor's unfavorable comments on certain aspects of Grey's initial proposal, it was considered that neither Grey's historical costs nor its best and final offer merited sufficient credibility to serve as a benchmark for the determination of reasonable cost.

Bates, on the other hand, submitted a detailed justification for the cost increase between its initial proposal and its best and final offer, including specific identification of increases in each category of labor. Bates commented on its increase from 93,746 to 123,380 man-hours as follows:

"The above numbers are based on a 1600 hour man-year. We understand that the Navy's experience of 143,000 man-hours is based on an 1820 hour man-year. Were we to use the same figure for man-hours in a year, out total would be approximately 143,000. In any case, we believe our revised staffing will be up to:

. . . the normal work load.
. . . seasonal peak work loads.
. . . crash programs, emanating either from last-minute changes or Congressional inquiries.

"In fact, we would anticipate that at a number of times during the year our executives and our professional staff would put in many more than the ordinary number of working hours. But these people are not paid overtime, and we would not expect the Navy to pay for any extra hours they worked."

Rear Admiral Evans then turned to consideration of the individual cost elements of the two best and final offers. In this area, lead fulfillment and direct mail were particularly important since NRC had indicated that these were areas where Bates may have misunderstood the Navy's requirements. Analysis revealed, however, that Grey had a longstanding subcontractor in these areas (Chapman,) with whom it had previously been affiliated. The solicitation, however, contained no requirement that lead fulfillment or direct mail must be performed by Chapman. In these areas, Bates, having an in-house capability, indicated that it would either perform the work in-house or it would solicit competitive bids for the work. It was thus reasonable to conclude that Bates' estimated cost would be less in this area.

Also, in the area of overhead rates and direct labor, it appeared that Bates offered an advantage over Grey. It was recognized that Bates and Grey had different methods of accounting with respect to nonproductive man-hours. It was felt, however, that Bates offered a substantial savings in the area of direct labor, since they proposed to perform for 123,000 man-hours whereas Grey estimated direct labor requirements at 143,000 man-hours and indicated it might take as much as 153,632. In this regard, it was apparent from its detailed breakdown of labor that Bates understood the Navy's requirements and its estimate of man-hours was considered to be reasonable. To confirm Bates' proposed rates, Rear Admiral Evans requested a DCAA audit report which did, in fact, confirm Bates' overhead rates as reasonable. Finally, it was indisputable that Bates' fixed fee was significantly less than that offered by Grey.

Against the background of this analysis, Admiral Evans concluded that there was no reasonable basis to expect that Grey could perform the Navy recruitment advertising requirements at less than the cost estimate which it proposed. In fact, there was a concern, in view of the unsupported cost reductions and of the DCAA audit criticisms of its initial proposal, that Grey could perform at the cost estimate set forth in its best and final offer. Admiral Evans also concluded that Bates' estimated cost was reasonable and there was no evidence to indicate that they could not perform within the proposed estimated cost. As a result he determined that Bates offered the most advantageous cost and fee proposal. In making this determination, Rear Admiral Evans confirmed his previous decision and reached the same conclusion that Mr. Rule had previously reached.

Grey argues that the Navy could not rationally conclude from a comparison and analysis of proposals that Bates would cost the Navy less and that "all of the cost analysis in this procurement was * * * defective." According to Grey, the business clearance officer "looked only at the summary figures of the four original estimates and made no attempt to examine discrete items of cost," and "did not undertake any analysis of the cost and pricing data submitted by Bates and Grey which would have revealed * * * the gross disparities resulting from Bates' incorrect assumptions with regard to the cost of subcontracted activity in the areas of Direct Mail and Lead Fulfillment * * *," while Admiral Evans, in performing his cost analysis, made only a "skimpy and inadequate" analysis that was replete with errors. Grey claims

that a proper cost analysis would have shown Grey to be lower than Bates in estimated realistic cost plus fee by some $464,535. Specifically, Grey asserts that NAVMAT's cost analysis was erroneous in the following respects:

1) in finding that no meaningful justification was given by Grey for the substantial drop in estimated cost from Grey's initial proposal to its best and final;

2) in finding that Bates had lower overhead rates;

3) in concluding that Bates' estimated cost in the areas of out-of-pocket field force and travel expenses, lead fulfillment and direct mail were realistic;

4) in concluding that Bates could perform the contract with less man-hours.

We see no need to consider the first alleged error. Despite the finding of "no meaningful justification" for Grey's downward revision of estimated costs and some earlier indications that those costs would therefore not be regarded as realistic, the record shows that NAVMAT ultimately determined that Grey's proposed costs, albeit higher than Bates', were in fact realistic. Grey, of course, is not challenging the determination that its proposal was realistic; what it objects to is NAVMAT's finding that the Bates proposal, with its lower cost figures, was also realistic. It is thus the other areas where Grey alleges error that are of consequence to this protest.

In the area of overhead, Bates' proposal indicated departmental overhead rates of from 40 to 70 percent and a corporate overhead (G&A) rate of 30 percent. The Defense Contract Audit Agency (DCAA) evaluated these rates and found them to be reasonable. In his cost analysis, Admiral Evans accepted the 30 percent G&A rate and computed a composite departmental overhead rate of 46.5 percent. From Grey's proposal, Admiral Evans computed a composite departmental overhead rate of 72.6 percent and a 25 percent G&A rate.

Grey claims that Admiral Evans' analysis of overhead is erroneous in two respects. First, Grey states that Admiral Evans improperly computed Grey's G&A rate as a percentage of direct labor costs rather than as a percentage of direct labor plus departmental overhead costs. Second, Grey asserts that Bates' overhead rates can be determined only by adjusting Bates' cost figures to take into account the labor and overhead costs Bates included in the field force category in which Grey included only out-of-pocket (travel) type costs.

We agree that an error was made in the computation of Grey's G&A rate. Rather than the 25 percent computed by Admiral Evans, a proper computation based on direct labor and departmental overhead would reflect a G&A rate of 14.5 percent.

We also agree that, if overall overhead rates were to be compared, it would have been appropriate for those rates to be computed on the same basis for both offerors. Since the computation of Grey's overhead rates was based on all direct labor, the Bates overhead rates should also have been computed on that basis. As Grey points out, this would have the effect of increasing Bates' composite departmental overhead rate from 46.5 percent to 51 percent. Grey further indicates that this would also increase Bates' G&A rate from 30 percent to 31.2 percent. However, Bates clearly proposed a corporate overhead rate of 30 percent. Grey's computation of the higher rate is based on the dollar figures obtained from Bates' inclusion of travel costs in costs. Just as it was appropriate to include Bates' field force labor in indirect costs for determining overhead rates, it was also appropriate, as Grey recognized elsewhere in its submissions, to exclude these out-of-pocket travel costs from the overhead computation.

A computation based on these adjustments indicates that Bates retains a small but perceptible overhead rate advantage, as shown by the following example based on a hypothetical direct labor cost of $1 million.

	Grey		Bates	
Direct Labor	$1,000,000		$1,000,000	
Departmental Overhead	726,000	(72.6%)	510,000	(51%)
	$1,726,000		$1,510,000	
G&A	250,270	(14.5%)	453,000	(30%)
	$1,976,270		$1,963,000	

However, Grey also states that Bates and Grey used different methods of costing direct labor which precludes a direct comparison of departmental overhead rates. According to Grey, Bates included nonproductive direct labor costs in its direct labor rate, thereby excluding them from overhead, while Grey developed a labor rate which required the inclusion of nonproductive labor costs in overhead pools. This difference in accounting methods, says Grey, can cause overhead and direct labor rates to vary by some 20 percent even though actual cost remains the same. Therefore, what must be considered is not the overhead rates *per se*, but rather the actual cost to the Navy for the number of productive man-hours required to perform the contract. In this regard, Grey offers further analysis which purports to show that Bates' cost per productive man-hour is higher than Grey's and that Bates will therefore cost the Navy more in indirect costs than would Grey.

Grey's conclusion is based on the assumption that 143,000 productive man-hours will be required for Bates to perform the contract.

However, Bates proposed to perform with 123,380 hours. In its best and final offer, Bates recognized that the Navy had estimated a "need for 143,000 man-hours of agency staff time" and explained why it was proposing less. After setting forth the number of proposed hours in each departmental category, Bates stated that:

> The above numbers are based on a 1600 hour man year. We understand that the Navy's experience of 143,000 hours is based on a 1820 hour man year. Were we to use the same figure for man hours in a year, our total would be approximately 143,000. * * *

The Navy, after reviewing the proposed breakdown of hours, accepted that explanation and agreed that Bates could perform with the number of hours proposed.

Grey, however, asserts that this decision merely reflects acceptance of the "untested assertion" of an "outside bidder with no prior experience in this type of work despite the historical experience of the incumbent and the independent estimates prepared by NRC and NRPO." Grey also contends that Bates erred in assuming that the Navy's estimate of 143,000 man-hours was not "an actual productive hour estimate."

In the areas of travel and field force, Grey proposed out-of-pocket expenses of $96,000 and $84,000 respectively, while Bates proposed expenses of $24,483 and $50,400 respectively. The Navy found both sets of figures to be realistic. Grey, however, states that since Bates had no prior experience with the Navy advertising account, "there is no way that Bates can realistically predict their costs in this area" and that the Bates estimates are therefore "without any rational basis in fact." Grey suggests that the "only solid data on which to compare the Grey and Bates figures are the per diem rates and the mileage charges for private vehicles. Grey proposed a $30 per diem rate and a charge of 12 cents per mile, while Bates proposed a $55 per diem rate and a mileage charge of 14 cents. Thus, according to Grey, a realistic evaluation would show that Grey, rather than being $71,517 and $33,600 more costly than Bates in these categories, would actually be less costly by some indeterminate amount.

In the areas of direct mail and lead fulfillment, Grey proposed $1,267,229 and $998,225 respectively, while Bates proposed costs of $837,083 and $260,760. NAVMAT found that Grey's higher proposed costs stemmed from its use of a subcontractor with which it had previously been affiliated, while Bates would either perform the work in-house or solicit competitive bids for the work. Thus, explains the Navy, it was "reasonable to conclude that Bates' estimated cost would be less in this area."

Grey disputes this conclusion, asserting that Bates does not have an in-house capability in these areas and that "Bates never solicited competitive quotes and, in fact, could not have done so because it still lacked * * * understanding" of the Navy's direct mail and lead fulfillment requirements so as to be able to prepare a statement of work that would support such a competition. Grey further refers to the fact that Bates, rather than obtaining competitive quotes, has found it necessary to utilize Grey's subcontractors.

We have carefully considered Grey's arguments. While it is clear from the record in this case that the Navy neither sought to independently verify each item or category of proposed expense in the Bates and Grey proposals nor conducted the type of "in-depth" cost evaluation that has been performed in other cases, see, e.g., *Bell Aerospace Company, et al, supra; LTV Aerospace Corporation*, 55 Comp. Gen. 307 (1975), 75-2 CPD 203, we are unable to conclude that the Navy's determination that award to Bates would result in less cost to the Navy was without a rational basis.

As was pointed out above, a contracting agency's evaluation of competing cost proposals involves the exercise of informed judgment, and we "will not second-guess a cost realism determination unless it is not supported by a reasonable basis." *Management Services, Incorporated*, 55 Comp. Gen. 715, 76-1 CPD 74, *supra*. Such determinations may be reasonable even though a detailed "in-depth" analysis is not conducted. See, for example, *ILC Dover, supra*, in which we upheld the Navy's determination that an offeror's proposed costs were "fair and reasonable for the effort proposed," even though the record did not indicate that the Navy did anything more than "carefully" evaluate proposals and obtain DCAA field pricing support. On the other hand, we will not accept an agency's judgment when it is clearly unreasonable; for example, where an agency fails to normalize proposed cost differences for a certain item when it is clear that there would be a common cost per pound for that item regardless of who the contractor was, see *Lockheed Propulsion Company et al*, 53 Comp. Gen. 977, 994 (1974), 74-1 CPD 339; when the normalization is performed improperly, see *Dynalectron Corporation et al, supra;* or when an agency, without explaining the basis for its action, relies on a Government estimate to reject proposals deviating from that estimate but accepts a competing proposal which also deviates from the estimate. See *Vinnell Corporation*, B-180557, October 8, 1974, 74-2 CPD 190. In most cases, however, in view of the broad discretion vested in procurement officials to make cost realism evaluations, we will accept the agency's judgment even in cases where the record does not provide a full explanation or rationalization for cost differences between proposals. See *PRC Computer Center, Inc., et al, supra*, and cases cited therein

Here, we do not believe that the Navy's overall judgment can be regarded as unreasonable, even though that judgment may have been based in part on erroneous beliefs with respect to the effect of the computed overhead rates and the in-house capabilities of Bates for direct mail and lead fulfillment activities. For each category of cost about which Grey complains, the record indicates that the Navy could have reasonably concluded that Bates would cost the Navy less. In the area of manhours, Bates provided a breakdown of direct labor along with an explanation for the deviation from the Navy's estimate. In the area of travel and field force out-of-pocket expenses, Bates submitted a breakdown of proposed trips and the expenses associated with each. In both areas, the Navy examined the breakdown and found no reason to question the proposed costs, accepting Bates' explanation from the manhour deviation and believing that Bates need not incur the same travel expenses as Grey since "the 'number of trips' is a function of many inherent variables which differ drastically from firm to firm * * *."

In the areas of direct mail and lead fulfillment, Bates proposed costs that were approximately $430,000 and $737,000 lower than Grey's proposed costs. As stated above, the Navy accepted Bates' lower cost estimates because the Navy believed Bates would either perform in-house or competitively subcontract. Although Grey vigorously disputes the existence of any Bates in-house capability in these areas and claims that the Navy could have readily determined from Bates' proposal that Bates would subcontract for the required effort, in fact the Bates proposal was not so clear on this point. Bates did indicate, for the direct mail area, that it "would bid these items out to three or more suppliers when the specific jobs came up." However, for lead fulfillment, Bates explained how it estimated that the effort would involve 780,000 pieces of mail (remarkably close to the figure [752,348] Grey used which was based on actual previous year experience) and broke out the costs involved. No specific reference was made to subcontracting any of the work. Furthermore, it appears that NRC itself read Bates' proposal as offering to perform both direct mail and lead fulfillment in-house, since a synopsis of cost proposals prepared by NRC stated that Bates would do those specific jobs in-house.

With regard to the substantial cost savings available to Bates through competitive subcontracting as opposed to Grey's continued use of a subcontractor with which it had been affiliated, it appears that Grey is correct in asserting that Bates did not have subcontractor quotes. We also note that after award of the contract, the Navy, believing it "to be essential that there be no break in fulfillment services * * * during the period of transition" from Grey to Bates, urged

Bates to retain Grey's third tier subcontractor for lead fulfillment. We further note that Bates, with Navy approval, has sole source subcontracted with Grey's subcontractor for both direct mail and lead fulfillment for the period ending June 30, 1976, it being "Bates' intention both to evaluate the Navy direct mail program during the transition period" to determine whether to handle direct mail in-house and to conduct competitive bidding for future lead fulfillment activities. These circumstances indicate that it would have been prudent for the Navy to have examined Bates' proposal in these areas more closely to determine the likelihood of Bates' being able to immediately subcontract competitively. However, the extent to which cost proposals need be examined is within the discretionary judgment of the procuring agency and, as explained above, the fact that the agency did less than it might have or even made an outright error in judgment does not render that judgment illegal or improper.

In short, while Grey essentially takes the position that Bates' cost figures could have no validity because Bates was not experienced in handling the Navy account, the Navy, charged with evaluating proposals, came to a different conclusion. In so doing, it looked not only at the individual cost categories discussed above, but also at the range of estimated costs received from all four original offerors. It also considered the approximately $200,000 difference in fee between Bates and Grey. While the Navy's evaluation may not have been error free, termination of the resultant contract will not be required for that reason alone if the award is otherwise proper and supportable. *Bell Aerospace Company, et al, supra.* Here, despite some shortcomings in the cost evaluation, we think the record shows that the Navy's judgment that award to Bates would be less costly than an award to Grey was rationally founded. The award based on that evaluation is therefore not legally objectionable.

CONTRACTING OFFICER AUTHORITY

Grey contends that the Deputy Chief of Naval Material for Procurement and Production, who signed the contract award to Bates, was not a contracting officer of NRPO, the cognizant procurement activity, and therefore had no authority to award this contract. Consequently, argues Grey, the award is invalid.

We do not agree. ASPR § 1–201.3 defines a contracting officer as a person who by virtue of his position or by appointment is a "contracting officer * * * with the authority to enter into and administer contracts * * *." NPD § 1–405.50 states that "The Head of each Navy Procuring Activity is hereby designated a contracting officer * * *." ASPR § 1–201.14 identifies both Headquarters, NAVMAT and the

Office of the Deputy Chief of Naval Material (Procurement and Production) as procuring activities. Thus, both the Chief and Deputy Chief of Naval Material, by virtue of their positions, are NAVMAT contracting officers. NAVMAT is composed of its own headquarters and several lower echelon system commands, including NAVSUP (of which NRPO is a part). See OPNAVINST 5450.176, August 6, 1969 and NAVMATINST 5460.2A, July 28, 1975. Although Grey argues that NAVMAT does not have specific procurement cognizance over NAVSUP and NRPO because of certain NPD provisions which Grey reads as giving NAVMAT only a policymaking function, we note that one of the specific functions assigned to the Chief of Naval Material is to "Supervise and direct all functions, programs, and activities of the Naval Material Command." OPNAVINST 5450.176. This broad statement of authority, we think, necessarily encompasses the procurement operations of NAVMAT's lower echelon components. Since the Deputy Chief of Naval Material is a NAVMAT contracting officer, we find Grey's contention that the Deputy Chief had no contracting officer authority for this procurement to be without merit.

OTHER ISSUES

Grey's other contentions, regarding the alleged cost-plus-percentage-of-cost payment provision, the failure of the Navy to use the proper type of contract, and the lack of a definite work statement in the solicitation, are all untimely. Section 20.2(b)(1) of our Bid Protest Procedures provides that protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of proposals shall be filed prior to the closing date. That section further provides that "alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated therein must be protested not later than the next closing date for receipt of proposals * * *." 40 Fed. Reg. 17979 (1975). Here the alleged defects referred to in Grey's latter two contentions were apparent prior to the initial closing date, and the alleged defect regarding the payment provision was apparent after the issuance of solicitation amendment No. 0004. Grey, however, did not protest until two months after best and final offers were submitted.

Ordinarily this Office, in ruling on a protest, will not consider issues which are untimely raised. See e.g., *Baganoff Associates, Inc.*, 54 Comp. Gen. 44 (1974), 74-2 CPD 56. Here, however, the District Court has expressed an interest in our decision on Grey's protest. Although it is not clear if the court is specifically interested in these

untimely issues, we believe it would be appropirate under the circumstances to treat these issues briefly. *Dynalectron Corporation*, 54 Comp. Gen. 1009 (1975), 75–1 CPD 341.

LEGALITY OF FEE PAYMENT PROVISION

The RFP, as amended, and the contract awarded to Bates provide that "Payment of the fixed fee shall be in an amount which is in the same ratio to total fixed fee as the costs being paid, are in relation to total estimated cost * * *." Grey, in support of its claim that the Navy could not make a rational cost comparison between Grey and Bates, takes the position that there is no fixed fee for the contract. In this regard, Grey asserts that the quoted provision relates only to payment of fixed fee on invoices under a particular delivery order, and that the term "total fixed fee" refers to the fixed fee, which, along with estimated cost, Grey believes would have to be negotiated for each delivery order issued under the contract. The Navy, on the other hand, states that the "total fixed fee" refers to the total fixed fee for the contract, and that the fee for a particular delivery order will be determined in accordance with the ratio test set forth above. Grey then argues that under that interpretation, the contract would run afoul of the statutory prohibition against cost-plus-percentage-of cost contracts found in 10 U.S.C. 2306(a) (1970) because the amount of fee to which Bates would be entitled under each delivery order would be tied to "costs being paid" rather than estimated costs.

We agree with the Navy that acceptance of the Bates proposal resulted in a contract with a stated fixed fee of $500,000, and that the quoted payment provision refers to that stated total contract fee. We do not agree with Grey, however, that the quoted language therefore renders the contract illegal. On its face, the payment provision would permit the particular percentage of the total contract fee which is to be paid under a delivery order to depend upon the costs paid under the delivery order. However, the payment provision, while providing for a method of payment by the Government upon the contractor's submission of invoices, does not by itself establish the amounts to which the contractor would be entitled. Rather, contractor entitlement to payment is dependent upon definitized delivery orders which specify both the estimated cost and the fixed fee applicable to each order. In this regard, we note that the first delivery order issued under this contract provided that the fixed fee applicable to the delivery order would be based on "the estimated cost" of the order rather than the "costs being

paid" under the order. Thus, although the contract language itself may be inartfully worded, we see no basis for finding that the contract is of the cost-plus-percentage-of-cost type.

TYPE OF CONTRACT

Grey contends that the indefinite delivery type contract envisioned by the RFP and actually awarded to Bates is an improper vehicle for procuring advertising services. Grey argues, first, that ASPR provides only for procuring advertising services through the use of a basic ordering agreement (BOA) and, second, that an indefinite quantity contract can only be used for obtaining needed and recurring "commercial or modified commercial" services. Grey further argues that a indefinite delivery contract cannot include cost reimbursement provisions.

ASPR Part 8 "sets forth procedures to be followed in placing paid advertising in media for (i) military * * * personnel purposes * * *." ASPR § 4–803.6, *Placing Advertising Through Advertising Agencies*, states that:

> (a) *General.* Basic ordering agreements may be entered into with advertising agencies to provide professional advertising services. The use of an advertising agency to assist in producing and placing effective advertisement may be advisable when a significant number of advertisements is to be placed in several publications and in national media.

Although Grey asserts that this provision provides the only method of contracting for advertising services, the provision itself states only that a BOA *may* be used, and we do not believe that BOA's are required to the exclusion of all other contractual vehicles when the services of an advertising agency are to be obtained. Furthermore, ASPR § 3–410.2(c)(i) provides that supplies or services may be ordered under a BOA only if it is impracticable to obtain competition through formal advertising or negotiation. Since the Navy determined that it was practicable to compete its advertising needs, no purpose would have been served by its entering into a BOA, and it was therefore free to select the contract type "which will promote the best interests of the Government." ASPR § 3–401(a)(2).

Grey also contends that ASPR § 3–409.3, which states that an indefinite quantity contract "should be used only when the item or service is commercial or modified commercial," precludes the use of that type of contract here because the services of an advertising agency are not such services. We note, however, that "commercial item" is

defined by ASPR § 3-807.1(b)(2)b(ii) as including "both supplies and services, of a class or kind which (A) is regularly used for other than Government purposes, and (B) is sold or traded in the course of conducting normal business operations." Moreover, ASPR § 3-807.1 (b)(2)d(ii) describes "advertising or promotion" as a service normally provided "commercial purchasers." In view of the broad definition of "commercial services" and the specific mention of advertising services as those services customarily supplied to "commercial purchasers," we cannot state as a factual matter that advertising services are not encompassed by ASPR § 3-409.3. In any event, even if we were to assume otherwise, the validity of the procurement would not be affected since we have held that the use of the word "should" in this provision does not impose a mandatory requirement and does not confer any rights on offerors. B-154594, September 22, 1964 and December 18, 1964.

Finally, Grey contends that an indefinite delivery contract cannot be used when cost-reimbursement compensation is contemplated. Grey refers to ASPR § 3-409(c), which states that:

> Depending on the situation, indefinite delivery type contracts may provide for (1) firm fixed prices, (ii) price escalation, (iii) price redetermination, or (iv) prices established [pursuant to catalog or market prices, with an adjustment factor of a fixed percentage discount applicable to the price in effect on the date of each order.] * * *

and to ASPR § 3-409.4, which states that orders placed under indefinite delivery contracts:

> shall contain the following information, *consistent with the contract terms:*
>
> * * * * * * *
>
> (iii) item number, description, quantity ordered, *and contract price.* [Italic supplied.]

as impliedly precluding the use of cost reimbursement indefinite delivery contracts. According to Grey, cost type provisions cannot be used in indefinite delivery contracts because these ASPR provisions refer only to fixed price payment methods and require inclusion of price in any order placed pursuant to an indefinite delivery contract.

We would agree that it is unusual for an indefinite delivery contract to provide for anything other than fixed price compensation. However, we do not believe that ASPR § 3-409(c) may be regarded as legally proscribing the use of cost type reimbursement provisions. The language here is similar to the language of ASPR § 4-803.6, discussed above, in that it sets forth only that indefinite delivery contracts may provide for various fixed price reimbursement methods; nowhere

is there any proscription against the use of other reimbursement methods. Although there is a rule of statutory construction which holds, in effect, that the expression of specific alternatives automatically excludes other possible alternatives, that rule "is increasingly considered unreliable * * * for its stands on the faulty premise that all possible alternative or supplemental provisions were necessarily considered and rejected * * *." *National Petroleum Refiners Association* v. *Federal Trade Commission, et al*, 482 F. 2d 672, 676 (D.C. Cir. 1973), *cert. denied* 415 U.S. 951 (1974). Cf. *Jerry Fairbanks Productions*, B–181811, March 14, 1975, 75–1 CPD 154, in which we held that while it was "somewhat unusual" for a prompt payment discount to be offered on a cost-reimbursement contract, "ASPR does not prohibit consideration of offered discounts in such circumstances (although it only specifically provides for use of discount clauses in fixed price contracts. * * *)." Here there is evidence of record, in the form of ASPR Committee minutes, which indicates that ASPR § 3–409(c) does not prevent an agency from awarding indefinite delivery contracts with other than fixed price reimbursement provisions. Accordingly, we find no merit in this contention.

INDEFINITE WORK STATEMENT

Grey contends that the "RFP was defective in that no definable Statement of Work existed for the supplies and services to be provided under the Contract and therefore no basis existed for meaningful cost comparison."

This issue was essentially considered in connection with our review of the rationality of the Navy's cost determination, *supra.* As indicated, we believe that the RFP did contain a work statement that was sufficiently definite so as to permit both a proper cost comparison and an award of an indefinite quantity contract, and we see no need to consider the matter further.

CONCLUSION

The selection of Bates to provide the Navy with recruiting advertising services was the culmination of a lengthy competitive procurement. In many respects—the use of an indefinite delivery contract to procure advertising services rather than a BOA; the dispute within the Navy over which offeror should be selected for contract award;

execution of the award document by the Deputy Chief of Naval Material rather than the NRPO contracting officer; the use of a less than detailed statement of work—the procurement was unusual.

Despite these unusual aspects, however, our review of the record has disclosed no aspect of this procurement which can be regarded as contrary to law or regulation. We have found some shortcomings in the selection process—the failure to advise offerors in the evaluation section of the RFP that cost quantum as well as cost realism would be considered; the computation and evaluation of overhead rates—but the record indicates that those shortcomings were not prejudicial to Grey in the overall selection.

With regard to the cost evaluation, we have been unable to determine from the record precisely how the Navy performed an "in-depth" cost analysis. Indeed, it appears to us that the Navy could have explored the cost differences in the various cost schedule categories in greater detail with a view toward independently verifying specific cost items. However, the extent to which a procuring agency should analyze proposed costs before it is willing to rely on the realism of those costs is a matter of agency judgment, and that judgment is not subject to legal objection unless there is no rational basis for it. Accordingly, the fact that the Navy did not independently verify each element of the Bates proposal is not, by itself, fatal to the validity of the contract award. Furthermore, it appears to us that the Navy did have a rational basis for concluding that award to Bates would result in less expense to the Navy than would award to Grey.

In this regard, the record shows that, with respect to each of the cost categories questioned by the protester, the Navy had reason to believe that Bates could perform for less than Grey. The Navy does appear to have erred in believing that Bates would perform the direct mail effort in-house. The Navy also did little to verify what cost savings were available from competitive subcontracting for both direct mail and lead fulfillment as opposed to the Grey subcontracting arrangement. Nonetheless, in view of the explanations and breakdown provided by Bates in its cost proposal and the judgmental nature of the Navy's conclusions in these areas, we cannot say that the Navy acted arbitrarily in accepting the lower Bates figures for these categories. As indicated above, the award of a cost-type contract involves reliance on estimates, which themselves are no more than judgments as to what particular contract tasks should cost. It is not to be expected

that these estimates and judgments will be universally accepted or even prove to be accurate in all cases. Here, the Navy determined, in its judgment, that Bates' estimated costs were realistic. This judgment was based on Bates' explanations for its proposed costs, on the Navy's awareness of facts which suggested plausible reasons for Bates being able to perform at a lower cost than Grey, and on the relative cost figures of the four offerors.

Thus, what this source selection ultimately involved was the exercise of discretionary judgment. In exercising that judgment, the Navy's selection officials chose Bates rather than Grey. It is conceivable that other selection officials, faced with the same record, would have selected Grey. This, of course, does not render illegal or improper the judgment that was actually made. As indicated, the Navy has shown, on the record, that it had a reasonable basis for arriving at that judgment. As we have often stated, the agency's judgment in these matters "must be afforded great weight" since the "overall determination of the relative desirability and technical adequacy of proposals is primarily a function of the procuring agency, and such determination 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." *Riggins & Williamson Machine Company, Incorporated, et al*, 54 Comp. Gen. 783, *supra*, at 790. Grey, despite its challenge of the Navy's judgment, has failed to make that clear showing.

The protest is denied.

[B-166506]

Agriculture Department—Forest Service—Cooperative Agreements—National Forest Permittees

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

In the matter of the Department of Agriculture—cooperative agreements, May 26, 1976:

The Department of Agriculture (Agriculture) has requested our opinion as to "* * * whether the definition of 'work' as used in Sec-

tion 5 of the Granger-Thye Act includes the operation and maintenance of sewage collection and treatment systems, water systems, and sanitary landfills, and thus, whether the pro rata share that is for such work may be treated as cooperative deposits to be used along with appropriated funds to operate and maintain the sewage collection and treatment system."

Section 5 of the so-called Granger-Thye Act, 16 U.S. Code § 572 (1970), provides:

(a) The Secretary of Agriculture is authorized, where the public interest justifies, to cooperate with or assist public and private agencies, organizations, institutions, and persons in performing work on land in State, county, municipal, or private ownership, situated within or near a national forest, for which the administering agency, owner, or other interested party deposits in one or more payments a sufficient sum to cover the total estimated cost of the work to be done for the benefit of the depositor, for administration, protection, improvement, reforestation, and such other kinds of work as the Forest Service is authorized to do on lands of the United States: *Provided,* That the United States shall not be liable to the depositor or landowner for any damage incident to the performance of such work.

(b) Cooperation and assistance on the same basis as that authorized in subsection (a) of this section is authorized also in the performance of any such kinds of work in connection with the occupancy or use of the national forests or other lands administered by the Forest Service.

(c) Moneys deposited under this section shall be covered into the Treasury and shall constitute a special fund, which is made available until expended for payment of the cost of work performed by the Forest Service and for refunds to depositors of amounts deposited by them in excess of their share of said cost: *Provided,* That when deposits are received for a number of similar types of work on adjacent or overlapping areas, or on areas which in the aggregate are determined to cover a single work unit, they may be expended on such combined areas for the purposes for which deposited, in which event refunds to the depositors of the total amount of the excess deposits involved will be made on a proportionate basis: *Provided further,* That when so provided by written agreement payment for work undertaken pursuant to this section may be made from any Forest Service appropriation available for similar types of work, and reimbursement received from said agencies, organizations, institutions, or persons covering their proportionate share of the cost and the funds received as reimbursement shall be deposited to the credit of the Forest Service appropriation from which initially paid or to appropriations for similar purposes currently available at the time of deposit: * * *.

Agriculture states that the Forest Service, one of its agencies, has been installing and improving sewage collection and treatment systems and solid waste facilities (sanitary landfills) serving national forest lands, in furtherance of required pollution abatement programs. In a number of instances permittees occupying national forest lands also need to improve their waste disposal facilities to meet environmental quality standards. Agriculture states that section 5 of the Granger-Thye Act, *supra,* gives the Secretary of Agriculture authority to construct and develop waste disposal systems with capacity in excess of that needed by the Government, in order to serve permittees who agree

to make cooperative deposits for their proportionate share of a system. Agriculture proposes to institute a similar method of paying for the operation and maintenance work necessary to provide service to cooperating permittees. It would collect from national forest permittees their pro rata share of the expenses of operating and maintaining joint waste disposal systems, water facilities, and sanitary landfills, and would use these funds, along with its appropriations, to pay for the services. Payments by permittees would be placed in cooperative trust accounts for the period of time between their collection and their expenditure, with excess deposits being refunded to the permittees.

Some uncertainty is expressed as to the legality of the foregoing proposal in view of our decision dated October 24, 1944, reaffirmed on April 7, 1945, B–44626. This decision held, in part, that payments received from National Forest permittees as a pro rata share of the cost for garbage disposal services furnished by the Forest Service did not qualify as "contributions toward cooperative work" under 16 U.S.C. § 498 (1970),* but represented "a charge for services rendered or facilities used" to be deposited into the Treasury as miscellaneous receipts under 16 U.S.C. § 499 (1970), which provides in part:

> All money received by or on account of the Forest Service for timber, or from any other source of national-forest revenue, including moneys received from sale of products from or for the use of lands in national forests * * * shall be covered into the Treasury of the United States as a miscellaneous receipt * * *.

It should be noted that the aforementioned decision was rendered 6 years before enactment of the Granger-Thye Act and many years before enactment of other environmental protection laws, such as the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1251 *et seq.*, the Solid Waste Disposal Act, as amended, 42 U.S.C. § 3251 *et seq.*, and the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* Also, it is not completely clear from a reading of our two decisions cited above whether there was, in fact, a cooperative agreement involved. In any event, it is unnecessary to specifically resolve this question since we are satisfied that the instant proposal by Agriculture is appropriate under section 5(b) of the Granger-Thye Act.

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*This section, which has remained unchanged since 1944, provides:

> All moneys received as contributions toward cooperative work in forest investigations, or the protection and improvement of the national forests, shall be covered into the Treasury and shall constitute a special fund, which is appropriated and made available until expended, as the Secretary of Agriculture may direct, for the payment of the expenses of said investigations, protection, or improvements by the Forest Service, and for refunds to the contributors of amounts heretofore or hereafter paid in by them in excess of their share of the cost of said investigations, protection, or improvements.

The purpose of section 5(b) of the Act was explained in the applicable House and Senate Committee reports, H.R. Report No. 1189, S. Report No. 1069, 81st Cong., 1st Sess., 5 (1949), as follows:

> In connection with utilization of the land or resources of the national forests permittees sometimes are confronted with types of work for which they have neither trained personnel nor suitable equipment. In many instances the Forest Service has available supervisory personnel and appropriate equipment and could do such work, if payment therefor by the permittee could be used by the Forest Service, thus avoiding depletion of Forest Service funds. In some instances this would actually reduce the cost of Government work. Subsection (b) will authorize such collaboration with permittees.

We agree with Agriculture that construction of the waste treatment and other facilities here involved under cooperative agreements for joint use of the Forest Service and permittees constitutes cooperative work within the language and intent of section 5(b). There seems to be no reason why the same conclusion would not apply to work relating to the operation and maintenance of such facilities.

Moreover, we believe that the Act approved December 12, 1975, Public Law 94–148, 89 Stat. 804 (16 U.S.C. 565a–1), is relevant to this matter. Section 1 of Public Law 94–148, 16 U.S.C.A. § 565a–1, provides in part:

> * * * to facilitate the administration of the programs and activities of the Forest Service, the Secretary is authorized to negotiate and enter into cooperative agreements with public or private agencies, organizations, institutions, or persons to construct, operate, and maintain cooperative pollution abatement equipment and facilities, including sanitary landfills, water systems, and sewer systems; to engage in cooperative man-power and job training and development programs; to develop and publish cooperative environmental education and forest history materials; and to perform forestry protection, timber stand improvement, debris removal, and thinning of trees. The Secretary may enter into aforesaid agreements when he determines the the public interest will be benefited and that there exists a mutual interest other than monetary considerations. In such cooperative arrangements, the Secretary is authorized to advance or reimburse funds to cooperators from any Forest Service appropriation available for similar kinds of work or by furnishing or sharing materials, supplies, facilities, or equipment * * *.

According to the House Agriculture Committee report, this legislation—

> * * * is necessary to clarify and expand existing authority relating to cooperative agreements which may be entered into by the Forest Service. The bill will provide clear authority to the Forest Service to engage in cooperative activities to construct, operate, and maintain cooperative pollution abatement equipment and facilities, including sanitary landfills, water systems, and sewer systems * * *. H.R. Report No. 94–611, 1–2 (1975).

Section 3 of Public Law 94–148, 16 U.S.C.A. § 565a–3, states that this act does not limit or modify the Secretary's authority to enter into cooperative arrangements otherwise authorized by law. Thus section 5(b) of the Granger-Thye Act remains applicable in the instant case.

On the other hand, Public Law 94–148 does, in our view, reenforce the conclusion that construction, operation, and maintenance of waste treatment and related systems are an appropriate subject for cooperative agreements between the Forest Service and National Forest permittees.

Accordingly, it is our opinion that the pro rata share paid by permittees under cooperative agreements for the operation and maintenance (as well as construction) of sewage collection and treatment systems, water systems, and sanitary landfills may be treated as cooperative deposits pursuant to section 5 of the Granger-Thye Act.

[B–185265]

Bids—Late—Telegraphic Modifications—Evidence of Timely Delivery—Time/Date Stamp Inaccurate

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

Evidence—Sufficiency—To Establish Time of Receipt of Bid Modification—Time/Date Stamp Inaccurate

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

Bids—Late—Telegraphic Modifications—Mishandling by Government

Decision to consider late bid modification was proper where documentary evidence maintained by Government installation established that bid would have been timely received in bid opening room but for Government mishandling following receipt in communications center.

Bids—Ambiguous—Bid Modification—Not Prejudicial to Other Bidders

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

In the matter of the Sierra Engineering Company, May 26, 1976:

Sierra Engineering Company (Sierra) protests consideration of a late telegraphic bid modification submitted by Gentex Corporation (Gentex) which would displace Sierra as the low bidder under invitation for bids N00383–76–B–0055, issued by the Department of the

Navy, Aviation Supply Office (ASO), Philadelphia. Sierra contends that the Navy has failed to establish the time of receipt of the modification at the Government installation (the Communications Center) within the evidentiary standard of Armed Services Procurement Regulation (ASPR) § 7–2002.2(c)(ii) (1975), making it impossible to determine whether late receipt in the bid opening room was due solely to Government mishandling as required for consideration by ASPR § 7–2002.2(a)(ii). In the alternative, Sierra claims that the modification is nonresponsive because ambiguous. For the reasons which follow, we find that the Navy may consider the late modification in making award.

Bids for several sizes of helmet shell assemblies were opened at 2:00 p.m. on September 30, 1975, in the ASO bid room. Of the two bids received, Sierra was the low bidder. However, on October 1, a telegraphic modification of the Gentex bid arrived in the bid room which, if considered, would make Gentex the low bidder. Clause C–302 of the solicitation incorporates ASPR § 7–2002.2, providing for consideration of late bid modifications as follows:

> (a) Any bid [or bid modification] received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and * * *
>
> (ii) it was sent by mail (or telegram if authorized) and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation.
>
> * * * * * * *
>
> (c) The only acceptable evidence to establish:
>
> * * * * * * *
>
> (ii) the time of receipt at the Government installation is the time/date stamp of such installation on the bid wrapper or other documentary evidence of receipt maintained by the installation.

The Navy proposes to consider the Gentex modification, notwithstanding a time/date stamp indicating late receipt, based on its determination that the time/date stamp was unreliable and that "documentary evidence of receipt maintained by the installation" establishes that the modification was received at the Communications Center 35 minutes prior to bid opening and that, absent mishandling by the Government, the bid would have been timely received in the bid opening room.

The evidence relied upon by the Navy consists of a series of telegrams bearing (1) numbers affixed by Communications Center personnel to indicate the order in which these telegrams were received in the Center and (2) the times of transmission contained in the

messages. The Navy contends that this evidence reliably establishes the latest time at which the Gentex modification could have been received in the Communications Center. Specifically, the Gentex modification bears the handwritten notation, "24 ASO, indicating that it was the twenty-fourth wire received at the Communications Center on September 30 and that it was directed to the Aviation Supply Office. This notation was affixed while the messages were in a continuous strip of paper from the Telex machine. Sierra concedes that the order of receipt is as stated by the Navy. The contents of the telegram indicate that transmission was commenced at 1:00 p.m. and completed at 1:15 p.m. Since this information was part of the message sent by Gentex, it must be discarded in favor of reliable independent evidence of the time of receipt at the Communications Center. This evidence is provided by the succeeding wire which bears the notation "25 NPFC," indicating that it was the twenty-fifth message of the day and that it was intended for the Naval Publications and Forms Center. This telex was sent by Varian Associates of Beverly, Maine, and indicates a time of transmission of 1:25 p.m. We are advised that the time stated in the message, 1:25 p.m., was the time that a telex tape was prepared; that transmission of the taped message followed immediately thereafter; and that the Varian message was sent directly to the Communications Center without the interposition of the Western Union Infomaster Computer that may delay messages as a result of transmission line tie-ups.

We believe that there are sufficient indicia of reliability here to justify concluding that the Varian message was received at or just slightly after 1:25 p.m. Since the Gentex modification was received prior to commencement of the Varian transmission, that message had to have been received at the Communications Center at or before 1:25 p.m. The Navy indicates that the distance between the Communications Center and the bid opening room is approximately 100 yards and that the normal time for delivery of telex messages involving bids can be expected to take less than 35 minutes.

Sierra argues that the time/date stamp on the Gentex modification, which indicates a time of receipt of 7:51 p.m., cannot be impeached. Were the issue merely a question regarding the relative accuracy of the Navy's time/date stamp, we might agree. See *B. E. Wilson Contracting Corp.*, 55 Comp. Gen. 220 (1975), 75-2 CPD 145. However, the evidence indicates that the time/date stamp at the Communica-

tions Center failed even to confirm the chronology established by the sequential numbering system which Sierra concedes to be accurate. For example, the time stamp on wire number 14 indicates a time of receipt of 9:09 p.m., whereas the time stamp on the subsequently received telegram number 15, indicates an earlier time of receipt, 7:51 p.m. Fourteen telegrams—numbers 15 through 29—all bear the same time stamp, 7:51 p.m., notwithstanding the fact that the messages themselves indicate transmission between 11:37 a.m. and 2:42 p.m. Furthermore, the time stamp is contradicted by the time affixed to wire number 16 by the Western Union Infomaster Computer system. Finally, several of the wires are date stamped September 31, while subsequently received wires were dated September 30. While it is impossible to determine at this time why the time/date stamp was so grossly inaccurate, it is clear that its markings bear no relationship to either the time or sequence in which telegrams were received in the Communications Center on September 30.

The protester also argues that the Navy erred in relying on the contents of the telex messages in establishing the time of receipt of the Gentex wire, citing *Lambert Construction Company*, B–181794, August 29, 1974, 74–2 CPD 131. In that case, Western Union information indicating that a telegraphic bid modification was timely received was rejected in favor of a communication facility time stamp which indicated late receipt. *Lambert*, however, is distinguishable on several grounds. First, in *Lambert* the evidence indicated only that the time stamp conflicted with the Western Union information, not that the time stamp was malfunctioning as in the instant case. Second, the information supplied by Western Union was in no sense "maintained by the installation" in *Lambert*. In the instant case, the telegrams bearig the relied-upon information were within the Navy's custody even though the information contained therein was not within the Navy's control. The significance of this lack of control is mitigated here by the fact that the contents of the Varian and Gentex wires became relevant only after it was subsequently determined that the time stamp was unreliable. Thus, the need to fabricate the time of transmission could only have arisen after the opportunity to do so had passed. See *Hydro Fitting Mfg. Corp.*, 54 Comp. Gen. 999 (1975), 75–1 CPD 331, in which we held that the mailing of a confirming copy of an unreceived telegraphic bid prior to the time the protester could have known of the nonreceipt reliably established the authenticity of

the bid. In conclusion, we find that the evidence relied upon by the Navy falls within the standard of ASPR § 7–2002.2(c)(ii) and establishes that late receipt in the bid opening room was due solely to Government mishandling in identifying and processing the Gentex modification.

As an alternate basis for protest, Sierra alleges the ambiguity of the Gentex modification which states:

> Please reduce our quoted price by 21.33 dollars each for APH–6D helmets. All other details of bid remain unchanged.

The protester contends that the message fails to indicate whether the modification applies to all, or merely one, of the two types (sizes) of APH–6D helmets being purchased and that this ambiguity renders the bid nonresponsive. Gentex argues that the issue has been untimely raised under § 20.2 of our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975), since Sierra failed to allege the ambiguity until February 2, 1975, over a month after the protester had an opportunity to view a copy of the subject telex which was included in the agency report dated December 16, 1975. In that report, the Navy stated that consideration of the Gentex modification would make that company the low bidder.

It is unnecessary for our Office to decide whether the allegation of ambiguity was raised in a timely manner because, even assuming that it was, Sierra would not prevail on this issue. In *Chemical Technology, Inc.*, B–179674, April 2, 1974, 74–1 CPD 160, we upheld acceptance of a bid containing an ambiguous price term where no prejudice could result to other bidders since the bid was low under either of the two prices submitted and the contractor indicated that it intended the lower price. Likewise, in the instant protest, Gentex would be the low bidder under any of the possible interpretations suggested by the protester and Gentex indicates its intention to be bound by the interpretation yielding the lowest bid. Consequently, even assuming both the timeliness of the issue and the ambiguity of the Gentex modification, the Gentex bid, as modified, would still be eligible for award.

Accordingly, the protest is denied.

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