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[B-180010]

Arbitration—Negotiated Agreement—Agency Regulations—Incorporated by Reference

Federal Labor Relations Council questions the propriety of implementing arbitration award that sustains grievance of two Community Services Administration employees for retroactive promotions and backpay. Because the record contains substantial evidence that grievants would probably have been demoted shortly after they should have been promoted—evidence which the arbitrator apparently did not consider—the award is indefinite. The matter should be remanded to the arbitrator for additional proceedings with instructions that he hear evidence on whether demotions would have occurred and, if so, on what date.

Regulations—Incorporated by Reference in Negotiated Agreement—Agency Interpretation *v.* Plain Language of Regulations

When agency regulations are incorporated by reference in negotiated agreement, arbitrator should accord great deference to agency interpretation of regulations it has promulgated. However, where regulations are plain on their face, no interpretation is required and the arbitrator was correct in rejecting agency interpretation at variance with the plain language of regulations.

In the matter of an arbitration award of retroactive promotions to two employees, November 4, 1975:

This action involves a request for an advance decision from the Federal Labor Relations Council (FLRC) as to the legality of two retroactive promotions with backpay awarded by an arbitrator in the matter of *Community Services Administration and American Federation of Government Employees, Local Union No. 2649* (Rohman, Arbitrator), FLRC No. 74A-29. The case is before the Council as a result of a petition for review filed by the agency alleging that the award violates applicable laws and regulations. The name of the agency was officially changed from the Office of Economic Opportunity (OEO) to the Community Services Administration during the pendency of the proceedings in this case.

On September 12, 1973, recommendations for promotion to grade GS-13 of Mr. Frank Gallardo and Mr. Roy Brooks, the grievants in this case, were submitted by proper authority to the regional personnel office of the agency. That office reviewed the recommendations to discover whether the grievants satisfied the criteria for promotion to the higher grade and determined that both men fulfilled the eligibility requirements. The recommendations were then forwarded to the regional director for approval. No action was taken by the regional director and the two grievants were not promoted. On September 27, 1973, the union filed a grievance on behalf of numerous employees alleging that the agency had violated various sections of the collective-bargaining agreement. Many of the differences were settled by the parties, but the grievances of Messrs. Gallardo and Brooks proceeded to arbitration.

The arbitrator, on April 3, 1974, found that the agency's failure to comply with its own regulation (incorporated by reference into the negotiated agreement) requiring an 8-day time frame for processing promotion recommendations, was a violation of the negotiated agreement. He therefore sustained the grievance and ordered retroactive promotions and retroactive pay for both grievants from September 23, 1973.

In 54 Comp. Gen. 403 (1974) this Office considered a request from the Office of Economic Opportunity involving the same agreement, and the same regulation. We there stated our view that the arbitrator's authority to interpret the provisions of a collective-bargaining agreement under section 13 of Executive Order 11491, 3 C.F.R. p. 254, extends to the interpretation of the agency's regulations when they have been incorporated by reference into the agreement. We added, however, that the arbitrator's views did not necessarily take precedence over the agency's own interpretation which generally should be accorded great deference. Nevertheless, since OEO had not taken an exception to the arbitrator's interpretation to the Federal Labor Relations Council under Executive Order 11491, we presumed its acquiescence with the arbitrator's findings and interpretations. And for the three employees involved therein, we held that OEO could legally implement the arbitrator's award of backpay.

In the present case, the OEO, now the Community Services Administration, filed a timely petition with the Federal Labor Relations Council for review of the arbitrator's award. The Council has accepted the petition and is considering the issue raised prior to rendering a decision on the award.

Article 2, section 2, of the collective-bargaining agreement provides that the parties will abide by: "all Federal laws, applicable state laws, regulations of the Employer, and this agreement, in matters relating to the employment of employees covered by this agreement." Hence, the negotiated agreement incorporated by reference the existing agency regulations, including OEO Staff Manual 250–2, which set forth the time frames for personnel actions as follows:

> To expedite the processing of Standard Form 52 through the various steps, the following time frames have been established. They are applicable only if the request follows a routine schedule. This means that all necessary forms, documents and additional memoranda are properly signed and received in Personnel with the request and that no changes be made by the requesting office.

The various kinds of routine personnel actions are allotted specific time frames in which they are to be processed. Recommendations for promotions are to be processed in 8 days. The union's grievance is predicated upon the failure of the agency to abide by the aforementioned time frame.

The agency contended at the arbitration proceeding and in its review petition that the above-quoted regulation by its terms applied only to routine personnel actions. It argued that the October 1973 reorganization and the study that preceded it served to remove the promotion actions here in question from the routine category.

The issue involved in this case, then, is whether these promotion actions were routine within the meaning of the regulation.

It is a general principle of administrative law that an agency's construction and interpretation of its own regulations will generally be accorded great deference by a court or reviewing authority. *Udall* v. *Tallman*, 380 U.S. 1 (1964); *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410 (1944). Accordingly, we think that arbitrators must accord great weight to an agency's interpretation of its own regulations, notwithstanding the fact that such regulations have been incorporated by reference in a negotiated agreement. However, it is also a general principle of law that where the language of a statute or a regulation is plain on its face and its meaning is clear, there is no room for interpretation or construction by the reviewing authority. *Shea* v. *Vialpando*, 416 U.S. 251 (1974); *Lewis, Trustee* v. *United States*, 92 U.S. 618 (1875); *United States* v. *Turner*, 246 F.2d 228 (1957).

In the present case, the arbitrator found that the above-quoted regulation regarding time frames for personnel actions was plain on its face. He points out that the sentence, "[t]hey are applicable only if the request follows a routine schedule" is followed by a clear and explicit definition of what "routine schedule" means, to wit: "that all necessary forms, documents and additional memoranda are properly signed and received in Personnel with the request." We agree with the arbitrator that the regulation in question is plain on its face and does not require interpretation or construction as to the meaning of "routine schedule;" such meaning having been already supplied by the self-contained definition. Thus, the agency's attempt to give the term "routine schedule" a meaning at variance with the definition in the regulation must necessarily fail.

In our recent cases we have held that a violation of a mandatory provision in a negotiated agreement which causes an employee to lose pay, allowances, or differentials is as much an unjustified or unwarranted personnel action as is an improper suspension, furlough without pay, demotion or reduction in pay, provided the provision was properly included in the agreement. 54 Comp. Gen. 312 (1974), 54 *id.* 403 (1974), 54 *id.* 435 (1974), and 54 *id.* 538 (1974). Thus the Back Pay Act of 1966, 5 U.S. Code § 5596 (1970), is the appropriate statutory authority for compensating the employee for pay, allowances, or

differentials he would have received, but for the violation of the negotiated agreement.

Before any monetary payment may be made under the provisions of 5 U.S.C. § 5596 (1970), there must be a determination not only that an employee has undergone an unjustified or unwarranted personnel action, but also that such action directly resulted in a withdrawal of pay, allowances, or differentials, as defined in applicable civil service regulations. Although every personnel action which directly affects an employee and is determined to be a violation of the negotiated agreement may also be considered to be an unjustified or unwarranted personnel action, the remedies under the Back Pay Act are not available unless it is also established that, but for the wrongful action, the withdrawal of pay, allowances, or differentials would not have occurred. 54 Comp. Gen. 760 (1975).

In light of the foregoing, it is the obligation of the arbitrator not only to find that the negotiated agreement has been violated by agency action or inaction and that thereby the grievants underwent an unjustified personnel action, but also to find that such improper action directly caused the grievants to suffer a loss or reduction in pay, allowances, or differentials.

In the present case, the arbitrator has found that the grievant's promotion recommendations were not processed within the required time frame. The arbitrator stated on the record that "[t]he Employer concedes that the promotions would have taken effect * * *." Also, the arbitrator found that this improper personnel action violated the negotiated collective-bargaining agreement.

Although the award states only that the grievance is sustained, we assume that the arbitrator intended to incorporate by reference in his award the second paragraph of page 2 of his decision, which reads as follows:

> In the event the grievance is sustained, the remedy as requested by the Union should provide for retroactive promotion for both grievants, as well as retroactive pay from September 23, 1973.

From the foregoing it appears that the arbitrator intended to award the grievants retroactive promotions to grade GS–13 with an effective date of September 23, 1973. In the usual case such an award would be sufficiently definite to permit its implementation, inasmuch as the entitlement to a promotion is deemed to continue in the absence of evidence to the contrary. However, in the present case we find substantial evidence to show that the two employees' entitlement to their grade GS–13 promotions would have been terminated shortly after they were received as a result of a reorganization in the regional office. The arbitrator expressed recognition of this fact on page 10 of his decision when he stated:

The fact that the reorganization determined that vacancies no longer existed at the higher grade level is a condition subsequent which did not affect the processing of the recommendations within the eight day time frame.

The agency's petition to the Federal Labor Relations Council for review of the arbitration award states, at page 4, that the reorganization became effective October 28, 1973, and the positions held by the two grievants were abolished. Accordingly, the agency concludes that if the arbitrator's award is allowed to stand and the agency is required to effect promotions as of September 23, 1973, it would also be required by the Position Classification Act (5 U.S.C. 5101 *et seq.*) to take simultaneous action demoting them as of October 27, 1973.

The record before us does not contain evidence as to what rights, if any, these two employees may have had to retain their higher grades beyond the date on which the positions to which they should have been promoted were abolished as a result of the reorganization. Reduction-in-force procedures contained in 5 C.F.R., Part 351 (1972), are applicable to demotions that are required because of reorganizations. The application of these procedures to the employees here involved might have permitted them to have retained their higher grades beyond the October 27, 1973 date and might have allowed them to avoid demotion altogether. Therefore, the evidence in the present record is insufficient to show if and when such demotions would have occurred.

Hence, we are of the opinion that the arbitrator's award is too indefinite to permit implementation, inasmuch as the record contains substantial evidence that the grievants may have been demoted. Where an award is too indefinite to implement, such as here, the reviewing authority should, if feasible, resubmit the defective award to the arbitrator for appropriate corrective action. *Enterprize Wheel and Car Corp.* v. *United Steelworkers*, 269 F.2d 327 (4th Cir. 1959), approved in part 363 U.S. 593 (1960), *National Brotherhood Packinghouse and Dairy Workers Local No. 52* v. *Western Iowa Pork Company Inc.*, 247 F. Supp. 663 (1965), affirmed 366 F.2d 275 (8th Cir. 1966).

In view of these facts, the arbitrator has an obligation to establish a termination date, as well as an effective date, of the grievants' entitlement to grade GS–13 pay. We are of the opinion that the arbitrator's award must conform to the evidence in the record as to what the grivants' entitlements should have been, but for the unjustified and unwarranted personnel actions. Therefore, the award should be remanded to the arbitrator for further proceedings with instructions that he hear evidence on whether the grievants would have been demoted and if so, to fashion an award setting a definite date of demotion.

[B-183292]

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

Since determinations of technical acceptability are within discretion of procuring agency, in absence of clear evidence that agency acted arbitrarily, and record in this case is devoid of any evidence which would justify our Office concluding that technical evaluations were without reasonable basis, there is no basis to take exception to awards.

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

Where solicitation clearly provided for only one award in particular region, while multiple awards were provided for in other regions, protest against provisions for only one award filed after closing date for receipt of proposals was untimely.

Contracts—Negotiation—Evaluation Factors—Price Elements for Consideration

Contention that price was given undue weight is not supported where evaluation provision stated that award would be made on basis of lowest price of three highest technically acceptable proposals.

Contracts—Negotiation—Requests for Proposals—Acceptance Time Limitation

Contracting officer may allow an offeror to waive expiration of proposal acceptance period and make valid award thereunder.

Contracts—Negotiation—Competition—Changes in Price, Specifications, etc.—Relative Price Position Not Affected

Although offerors selected for award were afforded opportunity to revise total price to receive award for reduced scope of work, failure of agency to conduct discussions with other offerors within competitive range does not provide basis for General Accounting Office to take exception to awards as unit prices for reduced work were not revised and, therefore, relative price position of offerors would not have been affected by revision of total price. 49 Comp. Gen. 402, overruled.

Contracts—Negotiation—Changes, etc.—Procurement No Longer Needed

Government need not make award initially contemplated under solicitation where it is determined reduction in available funds requires commensurate reduction in scope of work.

Contracts—Negotiation—Competition—Competitive Range Formula—Selection Basis

Determination of competitive range on basis of three highest technically evaluated proposals without consideration of price and relative weight *vis-a-vis* technical is improper since competitive range should be determined from array of scores of all proposals submitted and with regard to price. Although award will not be disturbed, agency is advised to preclude recurrence of such deficiency in future procurements. 49 Comp. Gen. 402, overruled.

In the matter of Donald N. Humphries & Associates; Master Tax, Inc.; Innocept, Inc., November 4, 1975:

The Small Business Administration (SBA) issued request for proposals (RFP) RFP–SBA–406–MA–75–1 on October 7, 1974. The solicitation, a 100-percent small business set-aside, requested proposals to render management and technical assistance to individuals or enterprises eligible under Section 402 of the Economic Opportunity Act (42 U.S. Code § 2906(b)). Offerors could only submit proposals in the regions where the offeror had an office physically located within the SBA region where the work was to be performed. For performance the country was divided into 10 regions which were further subdivided into areas within each region.

The proposals were evaluated on a point system pursuant to the following factors:

	Maximum Points
1. Quality, experience and capability of staff offeror intends to assign to this project	50
2. Previous experience and effectiveness in performing services, indicated by prior work and demonstrated by ability to deal effectively with individuals and enterprises eligible to be served	50
	100

EVALUATION CRITERIA:

1. *QUALITY, EXPERIENCE AND CAPABILITY OF STAFF OFFEROR INTENDS TO ASSIGN TO THIS PROJECT.*
   The proposal will present in detail the staffing offeror will assign to the project. This will include biographical data on professionals. The biographical data on the proposed Project Director (PART VIII) should include information as to his experience in developing and supervising subcontractors.
2. *PREVIOUS EXPERIENCE AND EFFECTIVENESS IN PERFORMING SERVICES.*
   Offeror must list: (A) Roster of clients presently being served; (B) List of clients served in the immediate prior year with specific examples of work performed and the results of this service. Offeror should narrate business history, with emphasis on dealings with small firms.
   For both (A) and (B) offeror should narrate experience with business concerns owned and controlled or operated by minorities and disadvantaged persons, i.e., low income individuals—particularly those located in in urban or rural areas with high unemployment.

The Special Instructions included in the solicitation to all offerors stated on page 9 thereof that:

> Evaluation of a proposal shall be based on the evaluation criteria as set forth herein. All proposals shall be evaluated numerically according to the stated 100 point scoring system. Prior to consideration of *price* as a determining factor, the proposal *must* have received a numerical score placing it amongst the *top three eligible proposals* (after internal SBA check of offeror's stated qualifications has been conducted). At this time *only*, will price be considered. Awards based on initial proposals without discussion of such proposals will be made on the basis of the lowest price among the three highest evaluated proposals, for each area.

Protests have been filed with our Office against the awards which were made in two of the regions.

Donald N. Humphries (Humphries) protests the award to Craven, Weishaar, Wooldridge & Dooley for Region VII on the bases that (1) the SBA in awarding the contract did not fully comply with the evaluation criteria set out in the RFP, (2) only one contract was awarded in Region VII, which is contrary to multiple awards being made in other regions, and (3) since price was not considered as a major factor in making awards of similar contracts in the past it should not have been so considered here.

The record shows that Humphries' proposal received an evaluation score of 62.7, or fifth lowest for Region VII. The three responsible offerors whose proposals for that region received the highest evaluation scores were Lawrence Leiter and Company (83.3); Craven, Weishaar, Wooldridge and Dooley (66.3); and Dee Gosling and Co. (64.3). Award was made to Craven Weishaar, Wooldridge and Dooley who submitted the lowest price among the three highest evaluated proposals—not Lawrence Leiter and Company as indicated in Humphries' protest.

With regard to technical evaluations, it has been the position of this Office that such matters are within the discretion of the procuring agency in the absence of clear evidence that the agency has acted arbitrarily. 48 Comp. Gen. 314, 317–318 (1968); 51 *id.* 621 (1972); 52 *id.* 718, 724 (1973). The record shows that all proposals were independently evaluated by each member of a 3-man panel in accordance with the evaluation criteria set forth in the RFP and we do not find any irregularities or deficiencies in the evaluation. Based upon our review of the evaluation that was made we cannot conclude that there was an abuse of such discretion by the SBA.

The question of whether more than one contract was to be awarded in Region VII was a matter of administrative discretion. In this connection, the Region VII Director determined prior to issuance of the RFP that the award of one contract was adequate for the region's needs. The solicitation clearly set out that only one contract was to be awarded for Regions IV and VII, while multiple awards were to be made in other regions. Since Humphries' protest in this regard was not filed in our Office until after the closing date for receipt of proposals, it is untimely under section 20.2 of our Interim Bid Protest Procedures and Standards, in effect at the time of the filing of the protest, which provided:

> * * * Protests based upon alleged improprieties in any type of solicitation which are apparent prior to * * * the closing date for receipt of proposals shall be filed prior to * * * the closing date for receipt of proposals. 4 C.F.R. § 20.2(a) (1975)

With regard to Humphries' last point, SBA refers to several past procurements for the same services and points out that price was a factor considered in making the awards. Furthermore, we note that

the subject RFP evaluation criteria specifically provided that award would be made on the basis of the lowest priced of the three highest technically acceptable proposals. In these circumstances, we do not believe price was evaluated inconsistently with the stated criteria.

Master Tax Inc. (Master Tax) and Innocept Inc. (Innocept) protest the award of contracts for the areas in Region VI in which they submitted joint proposals. The major bases for their protest are that (1) SBA selected contractors for award based on proposals which had expired and should, therefore, have requested new proposals, (2) SBA negotiated directly with the single selected contractor for a change in requested task days and contract price without giving the other offerors an opportunity to submit new proposals based on the revised contract requirements, (3) SBA did not apply the technical evaluation criteria fairly, (4) SBA did not make an award in area 24 (New Orleans), and (5) since Innocept had indicated that it was prepared to offer lower prices if it was in contention in more than one district, the failure to discuss price deprived the Government of advantageous prices.

With regard to the first point, we have upheld the contracting officer's decision to allow an offeror to waive the expiration of its proposal acceptance period so as to make an award on the basis of the offer as submitted since the only right conferred by expiration of the acceptance period is conferred upon the offeror and the latter may waive such right and accept an award. See *Riggins & Williamson Machine Company, et al.*, 54 Comp. Gen. 783, 75–1 CPD 168 (1975).

The second contention is to the effect that since the RFP required all offers to be on an "all or none" basis, SBA's request to the selected offeror in each region to accept award for a reduced scope of work and price constituted "discussions" within the meaning of section 1–3.805–1 of the Federal Procurement Regulations (1964 ed. amend. 118). It is argued, therefore, that SBA was required to negotiate with the other qualified offerors.

SBA reports that subsequent to selection of the successful offeror for the respective regions funds available for the work were reduced and it was therefore necessary to eliminate work for several areas and reduce the estimated man-day requirements by 22 percent in the areas where award was to be made. Therefore, the offerors selected for award in the various areas were asked if they would accept award for the reduced work at the same price per task day.

The agency's position that its request to the offerors did not constitute an opening of negotiations is as follows:

> * * * The successful offerors in this case were not afforded an opportunity to revise or modify their proposals within the rationale of your decision. [51 Comp. Gen. 479, *supra.*] They were merely asked if they would accept award for the indicated reduced quantities.

We agree with the agency's position on this point. The question of what constitutes discussions has depended ultimately on whether an offeror has been afforded an opportunity to revise or modify its proposal, regardless of whether such opportunity resulted from the action initiated by the Government or the offeror. 51 Comp. Gen. 479, 481 (1972). In the instant case, the SBA merely extended an opportunity to the successful offerors to accept award for a lesser amount of work than specified in the solicitation at the offered unit price which had the effect of reducing the lowest offeror's total prices even further. Since the successful offerors were not permitted to revise their unit prices, the failure to afford other offerors within the competitive range the same opportunity was not prejudicial as it would not have affected the relative price position of the offerors. In this context, we don't believe the "discussions" with the successful offerors constituted "discussions" as that term is used in section 1–3.805–1 of the Federal Procurement Regulations (1964 ed.) and our decision cited above. Therefore, SBA's failure to conduct discussions with all offerors within the competitive range does not provide a basis for our Office to take exception to the awards. To the extent 49 Comp. Gen. 402 (1969) is inconsistent herewith, it will no longer be followed. We do not mean to imply that a reduction in the work of such magnitude as to have an effect on the competition would not require a resolicitation or new determination of competitive range. If the new reduced quantity of work would permit parties to compete—or to compete more effectively—than in the case of the quantities solicited, the procedure utilized in this procurement would not be appropriate.

Master Tax and Innocept question why no award was made for area 24 in Region VII, especially since their proposal was the lowest priced among the three highest evaluated proposals. The Government under paragraph 10(b) of the solicitation reserved the right to reject any or all offers. Even without that reservation, an offeror has no absolute right to an award merely because he has submitted the lowest proposal. *See* B–174996, May 12, 1972; 50 Comp. Gen. 50, 52 (1970). Since it was determined that the reduction in funds would not permit the awards originally contemplated it was within sound administrative discretion to reduce the scope of work and eliminate certain areas from the awards.

Finally, paragraph 10(g) of the RFP provides:

> The Government may award a contract, based on initial offers received, without discussion of such offers. Accordingly, *each initial offer should be submitted on the most favorable terms* from a price and technical standpoint which the offeror can submit to the Government. [Italic supplied.]

Accordingly, even though Innocept stated it could offer lower prices if it was in contention in more than one district, such offer was not

for consideration since it was decided to make award on the basis of the initial offers.

For the foregoing reasons, the protests are denied.

However, in considering the merits of the protests, we noted deficiencies in the solicitation. The SBA, by limiting consideration of price to the proposals which received a numerical score placing them in the top three acceptable proposals, in effect, used the score of the lowest offeror in that group as a predetermined cutoff score to determine the competitive range. The practice of using a predetermined cutoff score to establish the competitive range has been held improper. 50 Comp. Gen. 59 (1970). Rather, the competitive range should be determined by examining the array of scores from all proposals submitted, and borderline proposals should not automatically be excluded from consideration. B-176761(2), January 24, 1973. Since all offerors were under the same limitation and submitted proposals without protest, we are not taking exception to the awards. In the future, however, the SBA should determine the competitive range by examining the array of scores of all proposals submitted as outlined in B-176761(2), *supra*.

Furthermore, in its report on the Humphries' protest SBA stated that the provision of the RFP concerning evaluation of price, previously set forth herein, was included in the solicitation to comply with the admonition in B-178295, October 18, 1973, to the effect that subsequent solicitations for these services should inform offerors of the relative weights that will be accorded price and other evaluation factors. We do not believe SBA's attempt to comply with the "admonition" was successful. As stated in the cited case "each offeror has a right to know whether the procurement is intended to achieve a minimum standard at the lowest cost or whether cost is secondary to quality." While the provision used indicates that price is the determinative factor among the top 3 proposals, it improperly failed to provide for consideration of price in determining the competitive range, Federal Procurement Regulations § 1-3.805-1(a) (1964 ed.), or to apprise offerors of the relative weight of price *vis-a-vis* technical.

By separate letter we are advising the SBA that appropriate steps should be taken to preclude a recurrence of these deficiencies.

[B-181903]

Vouchers and Invoices—Travel—Expenses of International Visitors—Paid by Contract Escort

Expenses incurred by international visitors and paid for by contract escort are not reimbursable on voucher form SF 1012 since each traveler is required to sign voucher to claim reimbursement for authorized travel expenses which

he personally incurred in the performance of his official travel. However, assuming that travel authorizations have been obtained, the travel expenses may be claimed and paid on SF 1164 ("Claim for Reimbursement for Expenditures on Official Business") or SF 1034 ("Public Voucher for Purchases and Services other than Personal").

Vouchers and Invoices—Travel—Multiple-Person Travel Expenses—Use of Authorized Form—Waived or Modified

If multiple-person travel voucher would serve the purpose of paying for travel expenses incurred for foreign journalists touring the United States under arrangements with the United States Travel Service, Department of Commerce should seek approval by Administrator of General Services Administration in accordance with para. 1–11.3a of the Federal Travel Regulations.

In the matter of a multiple-person travel voucher November 6, 1975:

An authorized certifying officer of the United States Department of Commerce has requested a decision as to whether he may certify for payment a multiple person travel voucher under the circumstances stated below.

To achieve the objectives of the International Travel Act of 1961, as amended, 22 U.S. Code § 2121, *et seq.*, the United States Travel Service, Department of Commerce, conducts familiarization tours of the United States for foreign journalists. The purpose of this program is to promote the publication of travel articles which will stimulate interest in and encourage travel to the United States by foreign residents.

Initially each of the journalists in a tour group was furnished a separate travel advance and each was required to submit a travel voucher to account for expenditures. This procedure was not satisfactory because many of the foreign journalists did not communicate in English, were unfamiliar with payment requirements for services received, and experienced much difficulty in the preparation and documentation of their travel vouchers.

To correct these deficiencies, the United States Travel Service has initiated a new procedure, under which a tour guide is furnished a travel advance for all persons in the tour party and is responsible for the payment of the expenses of all persons in the party. The tour guide is under contract and is responsible for the proper preparation and documentation of a travel voucher covering the expenditures of all persons in the tour party. Since the tour guide is a stateside resident, any corrections or adjustments necessary in the travel voucher are more readily facilitated.

The travel voucher (SF 1012) in this case was prepared by Mr. Maurice C. Horn, a contract escort, and covers the expenses of a group of French journalists. The contract between the Government and Mr. Horn indicates that his travel expenses are to be allowed in accordance with the provisions of the Federal Travel Regulations with certain

exceptions, one of which provides that in the case of escort assignments with international visitors, the contractor shall be authorized a fixed per diem of no less than $25, nor more than $35. The voucher indicates that this exception has been used to authorize a flat rate per diem of $25 and to compute per diem on a whole-day basis. On the basis of the contract provisions, the Federal Travel Regulations would be applicable to Mr. Horn's travel.

The voucher appears to be in order and payable only insofar as Mr. Horn's official travel expenses are concerned. We do not feel that the expenses incurred, and paid for by Mr. Horn, for the international visitors are properly payable on the SF 1012. The voucher form, SF 1012, should not be utilized as a multiple-payment voucher since each traveler is required to sign the voucher to claim reimbursement for authorized travel expenses which he personally incurred in his performance of official travel.

The file does not include the travel authorizations for the international visitors nor does it indicate the travel expenses which they were authorized. However, it is assumed that such documents and authority can be furnished by the Department of Commerce or the United States Travel Service. On that basis, reimbursement for the travel expenses paid by Mr. Horn for the international visitors may be claimed and paid on SF 1164 ("Claim for Reimbursement for Expenditures on Official Business") or SF 1034 ("Public Voucher for Purchases and Services Other than Personal").

If a multiple voucher form would serve the purpose of paying travel expenses under the international visitors program, we recommend that the United States Travel Service seek approval from the Administrator of General Services to use such a form for future travel in accordance with paragraph 1–11.3a of the Federal Travel Regulations (FPMR 101–7, May 1973). Further, it may be possible to incorporate provisions into the contract with the interpreter/escort personnel to provide for their escort services to include payment of travel expenses of the entire visiting party and the payment for such services to be accomplished through commercial billing procedures.

The voucher for travel and transportation expenses is returned for processing in accordance with this decision.

[B–184389]

Contracts—Awards—Small Business Concerns—Size—Status Protest by Unsuccessful Bidder, etc.

Where small business size protest is received 1½ hours after award made on bid opening date, last day of fiscal year, termination of contract is recommended, since Small Business Administration (SBA) subsequently sustained protest; contracting officer has indicated that procurement would have been referred to SBA

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under standard operating procedure if received before award; and contracting officer exceeded authority in that Armed Services Procurement Regulation 1-703 (b) (5) precludes small business set-aside award prior to expiration of 5 working days after bid opening in absence of urgency determination.

Bids—Guaranties—Checks—Insufficient Amount

Bid which contained $3,000 certified check, instead of 20-percent bid guaranty of $106,092 bid, was properly rejected, since failure to submit sufficient bid bond renders bid nonresponsive.

In the matter of Coronis Carpentry Company, Inc., November 11, 1975:

Coronis Carpentry Co., Inc., has protested the award of a contract under invitation for bids (IFB) No. DAKF31-75-B-0091 by the United States Army, Fort Devens, Massachusetts, for the installation of vinyl asbestos flooring in 41 buildings. The IFB was a 100-percent small business set-aside and Coronis contends that the award was made to other than a small business and that it is the low responsive, responsible bidder.

The bid opening was June 30, 1975, at 2:30 p.m. At that time, the following bids were opened:

Mari & Sons Flooring Co	$102,891
Cut-Rate Floor Covering, Inc	106,092
H.F.M. Construction Corporation	112,742
Coronis Carpentry Co	148,484
Bromley Contracting Co., Inc	198,843
Thomas Construction Corp	205,372

At 4:15 p.m. on June 30, 1975, award was made to Mari. At 5:47 p.m. on the same day, Coronis protested the size status of Mari and H.F.M. to the contracting officer. The contracting officer treated the protest as one falling under the provisions of the Armed Services Procurement Regulation (ASPR) § 1-703(b)(1)(c) (1974 ed.) and handled it accordingly. ASPR § 1-703(b)(1)(c) reads as follows:

(c) *Action on Protests Received After Award*—A protest received by a contracting officer after award of a contract shall be forwarded to the Small Business Administration district office serving the area in which the protested concern is located with a notation thereon that award has been made. The protestant shall be notified that award has been made and that his protest has been forwarded to SBA for its consideration in future actions.

On July 23, 1975, the Small Business Administration (SBA) Regional Office, Boston, Massachusetts, found that Mari was "other than a small business" because it had failed to respond to the request for information from SBA and to establish itself as a small business.

Coronis has filed Civil Action No. 75-3357-F in the United States District Court, District of Massachusetts, against the Department of the Army and the three low bidders seeking a temporary restraining order and preliminary injunction against further performance under

the contract. We have been advised by the Army that as of October 24, 1975, the installation of flooring had been completed by Mari in 22 buildings and was partially finished in 3 buildings. On that date, the court issued a preliminary injunction enjoining Mari from starting work in any more buildings, but allowing it to finish in those buildings where the work has commenced.

The court noted in its order that a protest currently was before our Office and stated that our decision on the protest would be accorded considerable weight in the ultimate disposition of the case. Ordinarily, our Office will not render a decision on the merits of a protest where the matter is before a court of competent jurisdiction. However, this practice is subject to the exception that we will render a decision where the court expresses an interest in receiving our decision. 52 Comp. Gen. 706 (1973) and *Descomp, Inc.*, 53 Comp. Gen. 522 (1974), 74-1 CPD 44. Therefore, we will consider the protest on the merits.

Initially, Coronis protests the decision of the contracting officer that its size protest against Mari was untimely. ASPR § 1-703(b)(1) states that any bidder may question the small business status of the apparently successful bidder by filing a written protest with the contracting officer within 5 working days following bid opening. Coronis contends that it filed an oral size protest with the contracting officer at bid opening and that this protest was followed by the above-mentioned written protest received an hour and a half after the award to Mari. The filing of the oral protest is disputed by the contracting officer. However, this factual disagreement need not be resolved because even if Coronis did file an oral protest, it is without effect because ASPR § 1-703(b)(1) requires that the protest be in writing. *E. H. Morrill Company*, B-181778, October 17, 1974, 74-2 CPD 213.

The above notwithstanding, Coronis further argues that its written protest was received within 5 days of bid opening and as the contracting officer did not make the required written finding that award must be made without delay to protect the public interest under ASPR § 1-703(b)(5) (1974 ed.), the contract could not be awarded prior to the expiration of the 5-day filing period, and therefore, its protest must be considered timely.

ASPR § 1-703(b)(5) reads, in part, as follows:

> (5) *Award of Set-Aside Procurements.* Except as provided in 3-508.1 or when the contracting officer determines in writing that award must be made without delay to protect the public interest, award will not be made prior to (i) five working days after the bid opening date for procurements placed through small business restricted advertising, * * *

A review of the record before our Office shows that the contracting officer did not make the written determination as required above at the time of award.

While the Army has stated, in its report to our Office on the protest, that the award had to be made without delay to protect the public interest in order to avoid losing the fiscal year funds involved, the contracting officer's report indicates that if the size protest had been received before award no urgency determination would have been made. In that regard, the contracting officer's report stated, "If such a [size standard] protest had been received, the Procurement Division would have followed its standard operating procedure of referring the procurement to the Small Business Administration." This statement, we believe, negates the claim of urgency.

As ASPR § 1–703(b) (5) is specific and mandatory that, in the absence of an urgency determination "award will not be made" prior to 5 working days after bid opening, the contracting officer exceeded his authority in making an award prior to the expiration of the required period. Further, the size protest by Coronis was made within a few hours after bid opening and was sustained thereafter by SBA. Although the Army contends the size protest is untimely based upon ASPR § 1–703(b) (1) (c), we believe that provision reasonably contemplates a situation where the award has been made in accordance with, and not in disregard of, ASPR § 1–703(b) (5). In that regard, it is understood that the SBA considered the size protest to bear upon the immediate IFB rather than being restricted to future procurements. Accordingly, it is recommended that the contract with Mari be terminated.

Another point of protest raised by Coronis is the nonresponsiveness of the $106,092 bid of Cut-Rate, the second low bidder. The IFB in paragraph 13 required that a bid bond of 20 percent of the bid price or $3,000,000, whichever was less, be submitted with the bid. Twenty percent of the Cut-Rate bid is $21,218.40. Cut-Rate submitted a $3,000 certified check with the bid because it claims that it misread the $3,000,000 figure as $3,000. While the submission of the $3,000 check may have been caused by an inadvertent misreading of the IFB, there is still for application the principle that the failure to comply with the bid guaranty provisions requires the rejection of the bid as nonresponsive and the failure may not be waived as a minor informality. *E. Sprague, Batavia, Inc.*, B–183082, April 2, 1975, 75–1 CPD 194.

Finally, as regards the third low bidder, H.F.M. Construction Corporation, Coronis filed a size protest against that firm with the contracting officer at the same time that the size protest against Mari was filed. On July 23, 1975, the SBA Boston Regional Office ruled that H.F.M. was other than small for the purposes of this procurement for failing to submit information necessary to establish its small business status. While subsequently, on August 25, 1975, SBA ruled that

H.F.M. was a small business based on information the firm submitted after the July 23 determination, this ruling specifically stated that it was for use in future procurements and did not rescind the prior determination under IFB DAKF31-75-B-0091. Therefore, H.F.M. is ineligible for award under this solicitation.

Since Coronis would be next in line for award, our Office would have no objection if it is awarded the remaining requirements under the solicitation provided its bid is otherwise acceptable.

[B-184577]

Bids—Evaluation—Aggregate *v.* Separable Items, Prices, etc.—Base Bid Low

Where solicitation provided for insertion of bid price for entire work (basic bid) and insertion of bid prices for deductive items (alternates), and stated that evaluation of bids would be made on bases of basic bid and all alternates, it was proper to evaluate basic bid without deductive items since award was made for entire work. However, agency is advised to clarify its evaluation provision for future use.

Appropriations—Availability—Contracts—Base Bid and Deductive Items—Recording

Federal Procurement Regulations, unlike the Armed Services Procurement Regulation, impose no duty on contracting officer to record amount of funds available prior to bid opening for base bids and alternates when amount of funding is in doubt. Therefore, determination of actual available funding, and the consequential determination whether alternates, if any, will be applied, may properly be made after bid opening in case of civilian agency. However, adoption of uniform Government-wide policy is recommended.

In the matter of Sterling Engineering and Construction Company, Inc., November 11, 1975:

Sterling Engineering and Construction Co., Inc. (Sterling) has protested the contract award under invitation for bids CI 75-E103. The solicitation was issued by the Environmental Protection Agency (EPA), National Environmental Research Center, Cincinnati, Ohio, for construction of an addition to the existing structure at the EPA's National Marine Quality Laboratory, Narragansett, Rhode Island.

The bid sheet provided for the insertion of bid prices for the "basic bid (total work)" and for each of nine "alternates." Each alternate deleted various segments of the total work so that the prices submitted for these alternates were deductions from the basic bid price submitted for the total work. The record indicates that the alternates were included in the event that all basic bids submitted exceeded the funds available for the total work.

Upon the opening of bids, it was ascertained that Cumberland Construction Company, Inc. had submitted the lowest bid for the total

work in the sum of $3,680,000, and award was made to Cumberland on that basis since sufficient funds were available.

Sterling objects to the award, contending that the solicitation required that bids should have been evaluated based on the total work as reduced by all of the alternates. Sterling's bid was low on that basis. In this connection, the protester refers to language on the bid sheet stating:

> Evaluation of bids shall be made on the bases of the total price for basic bid and *all* alternates.

Notwithstanding the availability of funds to permit an award for the total work, the protester contends that an award may be made only to the bidder evaluated to be low on the basis of all nine deletions.

In our opinion, the above quoted provision could have stated more precisely that bids would be evaluated based on the work actually awarded. Therefore, we suggest that the agency clarify this provision for future use. However, even if the protester had interpreted the evaluation provision as contended, we do not see how it would have been prejudiced thereby, since its basic bid should have remained the same under either interpretation (the agency's or the protester's) of the evaluation provision.

In support of its position, Sterling refers to our decision of February 19, 1971, which is published at 50 Comp. Gen. 583. In that case the solicitation stated that while award would be made on the basis of the lowest base bid, bids also were required to be submitted for certain *additive* bid items. We held that irrespective of the provision in the solicitation regarding the methodology of selection, the lowest bidder must be measured by the total work to be awarded since any measure which incorporates more or less than the work to be contracted for in selecting the lowest bidder does not obtain the benefits of full competition. Thus, although the protester cites our prior decision in support of its protest, we think the rationale stated therein requires award on the basis of the lowest bid for the work awarded.

Sterling further argues that the estimated price range of $2,500,000–$3,000,000 was set out in the schedule of the IFB and suggests that a differing determination of available funds after bid opening may not be consistent with the integrity of the competitive bidding system.

In the course of prior protests, it has been argued that the reservation by the Government of the option to make an award on the basis of available funds at a period sometime after bid opening, and at a sum higher than anticipated at the time of bid opening, permits the manipulation of funds in a manner that may suggest favoritism. See *H. M. Byars Construction Company*, 54 Comp. Gen. 320 (1974), 74–2

CPD 233 and citations therein. As in that case, the instant protest involves a procurement to which the Federal Procurement Regulations (FPR) are applicable. The FPR, unlike the Armed Services Procurement Regulation (ASPR) 2-201(b)(xli) (1974 ed.), has no provision requiring that a contracting officer determine and record, prior to bid opening, the amount of funds available for a procurement involving base bids and alternates. To the contrary, the amount of funding available for the project may be ascertained at a time after bid opening when additional funding may become available. Such contingency may legitimately govern the extent of the work to be performed. *See* B-147061, November 13, 1961.

In the interest of establishing, to the maximum extent practicable, consistent procurement procedures between the civilian agencies and the military departments, we are recommending by letters of today to the Director, FPR Division and the Chairman, ASPR Committee that they consider adopting a uniform policy in this area.

Accordingly, the protest is denied.

[B-183639]

Bids—Qualified—Bid Nonresponsive—Stamped "Confidential"

Low bid to provide computer services which is stamped "CONFIDENTIAL" is nonresponsive since stamp restricted public disclosure of information concerning essential nature of services and product offered, as well as price, quantity and delivery terms and affords that bidder the opportunity, after bid opening, of accepting or refusing award, which is contrary to requirements of competitive bid system.

Contracts—Specifications—Restrictive—Cancellation of Invitation—Resolicitation of Procurement

Receipt of no responsive bids to invitation for bids requires resolicitation and, although protest that specifications were restrictive would ordinarily not be decided in that event, since it seems apparent that resolicitation will be essentially on same specifications and protestor has indicated it will therefore protest and record has been completely developed, protest will be considered now.

Contracts—Specifications—Restrictive—Particular Make—Salient Characteristics

Recommendation made that Federal Procurement Regulations (FPR) "Brand Name or Equal" provisions be utilized in specifying computer and software requirements since specifications should state agency's minimum needs and FPR provides for listing of salient characteristics where brand names are used; specifications for VS operating systems be modified to permit bidders with OS operating systems to demonstrate capabilities to meet agency's performance requirements; and there be reevaluation of barring computer operator priority reset to consider possible economic benefits in using it.

In the matter of the Computer Network Corporation, November 12, 1975:

The Computer Network Corporation (Comnet) has protested any award under invitation for bids (IFB) NOAA 17-75, issued by the

United States Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), to provide the Great Lakes Environmental Research Laboratory (GLERL) with access to a large scale data processing system.

The IFB was issued on March 17, 1975, after NOAA canceled its prior IFB (NOAA 3–75) because of inadequate specifications. On March 20, 1975, Comnet protested to the agency that certain requirements in the specifications unduly restricted competition in areas where the previous IFB had permitted full and free competition. By letter dated April 8, 1975, received by Comnet on April 10, 1975, the contracting officer informed Comnet that, but for one modification, the provisions of the IFB would remain unchanged and bid opening would proceed as scheduled on April 15, 1975. As a consequence of this letter, Comnet filed the instant protest with us on April 11, 1975.

Inasmuch as some of the specific points raised by Comnet relate to IFB NOAA 3–75, a brief history of the procurement is necessary. As in IFB 17–75, the canceled IFB required benchmark tests and prices. Because Comnet's benchmark #3 price appeared to be unusually low NOAA requested Comnet to verify its bid. In the process of explaining the bid and how an error occurred, Comnet noted that it had encountered problems in ascertaining whether NOAA considered its IBM 360/65 equal or superior to the IBM 370/158 stated in the IFB. It was also pointed out by Comnet that benchmark #3 could not be run as stated in the benchmark instructions. Aware that the IFB permitted either OS or VS operating systems, Comnet saw that certain uninitialized variables gave incorrect results when run without making adjustments to the program, which was not permitted by the terms of the IFB. Comnet alleged that the net effect of the foregoing was to preclude from competition firms that had OS systems. Comnet stated that it was able to correctly run benchmark #3 only because it wrote a nonstandard OS Fortran procedure that could accommodate uninitialized variables. Regardless of the foregoing, on March 11, 1975, NOAA rejected all bids and canceled IFB 3–75 on the basis that the solicitation was inadequate for failure to include evaluation criteria sufficient to determine all cost factors to the Government.

After receipt of IFB 17–75, Comnet telephoned NOAA to protest certain requirements in the IFB it believed were restrictive. This conversation was confirmed by mailgram dated March 20, 1975. The issues raised were the same as those now before this Office. IFB 17–75 requires that the offered system possess a "capability equivalent to IBM 370/158." The former IFB required that the system be "equal to or superior to IBM 370/158." Comnet contends that the requirement should be changed to "IBM 360/65 or IBM 370 or its equivalent" in order to open competition.

The main memory capacity was increased from 640 K bytes in the original IFB to 800 K bytes. Comnet contends that increase is more than necessary and favors users of VS systems. IFB 17–75 specifies "Executive programs VS and HASP," whereas either a VS or OS operating system was permissible under the previous invitation. This change is alleged to be restrictive in that it eliminates from competition firms that have an IBM 370/158 or 370/168 without VS and 20 firms with IBM 370/155's or IBM 360's. Another change from IFB 3–75 to 17–75 is the addition of a provision that "software required under IBM Time Sharing Option (TSO) * * * utilize * * * Tektronix Inc. supplied software." The provision allegedly precludes numerous firms from competing by requiring only TSO. Comnet claims that its time sharing software package, Alpha, exceeds NOAA requirements. Further, Comnet contends that the addition of a requirement for "a remote user to reset the priority of jobs previously submitted without central computer operator intervention" is restrictive in that the feature is found only in TSO. Finally, the requirement that GLERL programs requiring up to 800 K bytes of core memory in prime time be run without the intervention of a computer operator is alleged to restrict Comnet's participation in the competition because, without computer operator intervention to account for the uninitialized variables, Comnet's OS system would not be able to run the program.

By letter dated April 8, 1975, to Comnet, NOAA responded to the allegations. In essence, NOAA's response was that the specifications reflected the Government's minimum needs. This rationale constituted NOAA's response for the VS system requirement, specifying an IBM 370/158 and the requirement for 800 K bytes of memory. As for specifying TSO and Tektronix, Inc., software in IFB 17–75, and not in IFB 3–75, NOAA stated that requirement did not exist when the original IFB was issued. The need for the remote user to reset job priorities without central computer operator intervention was said to be predicated on the probability that high priority jobs will occur while the computer is processing lower priority jobs. The capability was needed to enhance the administrative and economic efficiency of GLERL. NOAA stated that the requirement was needed to promote efficiently and to negate the necessity for the Government to physically segregate programs requiring computer operator intervention from those that do not.

Notwithstanding the subsequent protest to our Office, NOAA proceeded to open the bids received. All bidders' representatives at bid

opening were apprised of the protest and that award would be withheld pending our decision. Two bids were received:

LRCC	$17,509.77
Computeristics, Inc	23,374.44

LRCC's bid was not announced at bid opening because "CONFIDENTIAL" had been stamped on relevant portions of the bid. Comnet subsequently amended its protest to contend that LRCC's bid should be rejected as nonresponsive due to the restriction on the bid.

NOAA's response to Comnet's protest is contained in the report to our Office dated May 15, 1975. Generally, the point is stressed that while certain requirements in IFB 17–75 have the effect of precluding certain firms from competing, all requirements specified in the IFB reflect the needs of the Government. NOAA states that the users of the programs to be run on the system, both resident and visiting scientists at GLERL, have training sufficient only to write software programs in the computer language to which they have become accustomed. The use of procedures or languages different than those presently used by the scientists would require substantial revisions to many software programs and retraining of personnel. NOAA states:

> [R]ewriting the software and retraining the scientists is a burden the Government is not prepared to accept because the effort would divert the scientists from their primary missions and would be expensive in both time and money.

Specifically with regard to requiring an IBM 370/158, NOAA states that the IFB only requires that the proposed system have a capability equivalent to the IBM 370/158. This requirement reflects the fact that GLERL's programs were developed during a period when it was using an IBM 370/158. Thus, it was stipulated that the system must have equivalent capabilities so that the programs can be processed without being changed. NOAA further maintains that it cannot determine prior to bid opening the equivalency of any other computer, such as the IBM 360/65 offered by Comnet. NOAA states that the initial determination whether the systems are equivalent is the bidder's responsibility. Once a bidder submits a bid predicated on the IBM 360/65 and it is subjected to the benchmarks, then NOAA will determine whether the system is equivalent.

On the matter of requiring a VS operating system, NOAA states that this requirement was inserted as a result of its experience with IFB 3–75. That is, NOAA discovered that certain of GLERL's programs could not be run on an OS system without modification to the programs. On the other hand, the VS system showed its capability to run all of the programs unchanged. As NOAA saw it, there were three alternate ways to solve the problem: (1) rewrite the program to accommodate the OS system; (2) physically separate the two types

of programs and permit computer operator intervention when necessary; and (3) leave the programs unchanged and permit VS systems only. The first two options were abandoned due to the amount of time and expense considered to be involved. In the judgment of the individuals who would be most affected by any change, the most reasonable approach was to leave the programs unchanged by requiring the VS system.

In response to Comnet's allegation that the requirement for 800 K bytes of core memory during peak operating periods was unreasonable and excessive, NOAA states that the amount was increased from the previous solicitation simply to reflect a change in the anticipated needs of GLERL. NOAA maintains that it is the intent of the Government to run programs of 800 K bytes during peak hours. This intent, in NOAA's view, is implicit in the IFB, particularly where it is estimated that benchmark #3 or its equivalent (requiring up to 800 K byte capacity), would be processed 150 times each month.

NOAA next maintains that requiring TSO and Tektronix, Inc., software is a necessary requirement:

> The requirement * * * was included to permit GLERL to utilize * * * Tektronix, Inc., * * * graphic display systems. The Tektronix software guide manual states that the terminal control system for Tektronix is implemented on the IBM system using TSO and makes no mention of any other time sharing system for an IBM computer. Since there is an interlocking relationship between the computer software, the graphics terminal software and the operating characteristics of the graphics display unit, it is the judgment of the users that proper operation of the system can be assured only if the software and recommendations of the equipment manufacturer are employed.

In defense of the requirement barring computer operator intervention for priority reset, NOAA notes that the GLERL scientists often reset job priorities. Typical of the problem envisioned if computer operator intervention is necessary for job priority reset are the possibilities that the telephone line may be busy or the terminal left unattended. Citing the fact that only high level scientists will have authority to reset job priorities, NOAA alleges that the economic loss attendant to the time lost by the scientists waiting for a clear line or for the computer operator to return to the computer line is significant in the aggregate. Conceding that the priority reset feature is available from LRCC because of modifications made to its HASP system, NOAA states that there is nothing in the IFB that precludes similar modifications by other firms.

NOAA's report attempts to refute Comnet's allegation that the IFB, when viewed as a whole, was designed to assure that LRCC will obtain the contract. NOAA states that three firms other than LRCC are known to have the necessary facilities and capabilities to compete under IFB 17–75. NOAA alleges that one firm did not bid because it did not want to be committed to the Government for such

a long period; another did not bid because it could not submit its bid timely; and the third firm (Computeristics, Inc.,) submitted a nonresponsive bid only because of an error by its computer operator in running the benchmarks.

Lastly, NOAA responded to the issue raised by LRCC's "CONFIDENTIAL" stamp in the bid. NOAA notes that the applicable Federal Procurement Regulations (FPR) do not have any specific provisions regarding the effect of submitting a bid marked "confidential." LRCC withdrew the confidential legend after bid opening. Therefore, NOAA proposes to accept LRCC's bid by permitting deletion of the stamp in accordance with FPR § 1–2.404–2(b)(5) (1964 ed. amend. 121).

Comnet commented on NOAA's report. First, Comnet, citing 53 Comp. Gen. 24 (1973), stresses that the "CONFIDENTIAL" stamp on LRCC's bid rendered it nonresponsive as of bid opening.

Second, Comnet concedes the reasonableness of the proposition that, in defining its minimum needs, NOAA may require any proposed system to have the capability of running programs currently being used by NOAA. The problem, as Comnet sees it, is that NOAA has not defined what it considers to be equivalent to an IBM 370/158. Comnet asserts that NOAA should list those features it considers essential for another system to be equivalent to the IBM 370/158 so that a firm will not be put unnecessarily to the expense of bidding and running a benchmark only to be determined unacceptable at some future time under an undefined equivalency.

The third point concerns the requirement that the system be VS. Comnet states that while it can run, using its OS system, any program which can be run on a VS system, it is precluded from submitting a bid by the VS requirement. In response to NOAA's position that specifying a VS system was preferable to the other two options (rewrite the program or physically separate those for OS and VS), Comnet maintains that there are two acceptable alternatives. Under the first option, the contractor can be required at no cost to the Government to rewrite the programs so that they can be run on an OS system. To permit this approach, the IFB requirement prohibiting any change in the NOAA benchmark must be deleted. In the second option, the bidder proposing an OS system can be required to make changes to his internal computer software so that he can run all of the programs on the OS system. Comnet states that permitting these alternative approaches will satisfy all of the legitimate needs of the Government and broaden competition.

Forth, Comnet states it is suspicious that NOAA's actual need is for 800 K bytes of core memory. However, since Comnet can meet this requirement, it "* * * will not take further issue with this particular re-

quirement." In view of this, our Office will not consider the matter of the 800 K bytes of core memory.

Fifth, Comnet suggests that the internal computer software package it employs, Alpha, can run the Tektronix software. In support of this, Comnet submitted a letter dated June 13, 1975, from Tektronix stating:

> After our discussion regarding use of PLOT/10 Terminal Control System on your time sharing system, I see no difficulties in implementing our software * * * We discussed the possible difficulties and found them to be rather minor * * *.

Sixth, Comnet discussed the reasonableness of the requirement barring computer operator priority reset. Comnet states that it can provide priority reset without computer operator intervention, but at a higher cost than with computer operator intervention. Notwithstanding this, it is Comnet's position that the requirement exceeds the minimum needs of NOAA. Comnet analogizes this requirement to the purchase of automobiles requiring that windows be opened by pushbuttons. A car that met all other requirements, but had windows that operated manually could be purchased much less expensively than one with pushbutton windows. Comnet likens NOAA's assertion regarding the economic impact of scientists having to wait to contact the computer operator to the time lost by operating windows manually instead of by pushbuttons and questions whether the premium for the feature is commensurate with the benefit.

RESPONSIVENESS OF LRCC

The public advertising statute, 41 U.S. Code § 253(b) (1970), requires that: "All bids shall be publicly opened at the time and place stated in the advertisement." We have interpreted this requirement for a public opening to mean that the bid must publicly disclose the essential nature and type of the products offered and those elements of the bid which relate to price, quantity and delivery terms. 53 Comp. Gen. 24 (1973). The purpose of public opening of bids for public contracts is to protect both the public interest and bidders against any form of fraud, favoritism or partiality and such openings should be conducted to leave no room for any suspicion of irregularity. *Page Airways, Inc., et al.*, 54 Comp. Gen. 120 (1974), 74–2 CPD 99; 48 Comp. Gen. 413 (1968).

The basis upon which a bid is submitted is determined as of the bid opening. *New England Engineering Co., Inc.*, B–184119, September 26, 1975. To allow a bidder to modify the terms of its bid after bids have been opened would be tantamount to affording the bidder a chance to submit a second bid. *S. Livingston & Son, Inc.*, 54 Comp. Gen. 593 (1975), 75–1 CPD 24. To permit a bidder to decide after bids have

opened and all prices (but its own) exposed, gives that bidder an option not afforded any other bidder, to accept or reject an award. If the bidder has submitted the low bid, it may, at its whim, choose whether to receive an award by merely refusing or permitting removal of the restrictive legend. This is contrary to requirements of the competitive bid system. 38 Comp. Gen. 532 (1959). Thus, LRCC's withdrawal of the "confidential" stamp after bid opening has no bearing on whether the bid was responsive.

Our Office has found that restrictions on the disclosure of certain types of information do not render a bid nonresponsive. See *Ace-Federal Reporters, Inc.*, 54 Comp. Gen. 340 (1974), 74–2 CPD 239, where the restricted information concerned bidder's responsibility; and 41 Comp. Gen. 510 (1962) concerning portions of descriptive literature submitted for evaluation on a restrictive basis with a bid for an off-the-shelf item which is known to industry and requires minor but obvious modification to conform to the IFB. However, where the system offered is not commercially available or a standard off-the-shelf item and the descriptive literature is necessary to disclose the essential nature and type of system offered, a restriction on the descriptive literature is a proper basis for finding the bid nonresponsive. 53 Comp. Gen., *supra*.

The stamp on LRCC's bid restricted the disclosure of price, quantity and delivery terms as well as the essential nature and type of services and product offered. Therefore, LRCC's bid is nonresponsive. This determination is not changed by FPR § 1–2.404–2(b)(5) which states:

> (b) Ordinarily, a bid shall be rejected where the bidder imposes conditions which would modify requirements of the invitation for bids or limit his liability to the Government so as to give him an advantage over other bidders. For example, bids shall be rejected in which the bidder:
>
> * * * * * * *
>
> (5) Limits rights of Government under any contract clause. However, a low bidder may be requested to delete objectionable conditions from his bid if these conditions do not go to the substance, as distinguished from the form of the bid. A condition goes to the substance of a bid where it affects price, quantity, quality, or delivery of the items offered.

This regulation is not concerned with the type of damage to the competitive system discussed above. The restriction on disclosure of information does not affect the substance of the bid *per se*, since the bid is the same whether the information is released. Therefore, removing the restrictive legend would not affect the substance of the bid. It would, however, afford the bidder "two bites at the apple," which cannot be permitted.

Thus, since the only other bid submitted on IFB 17–75 by Computeristics, Inc., has been determined nonresponsive for other reasons, the procurement will have to be resolicited. In this posture, we would not ordinarily decide the other matters raised by Comnet. However,

it seems apparent that NOAA's resolicitation will be based on essentially the same specifications and Comnet has indicated that it will submit essentially the same protest in that event. Since the record has been completely developed, we will consider the rest of the protest at this time rather than subject the parties to further delays that would result from refiling the protest at a later date.

It is clear that resolution of some of the remaining issues requires a degree of technical expertise. Since the requisite expertise is available within our Office, we are able to respond to the allegations that certain of the specifications are, in effect, technical luxuries and unduly restrict competition.

REQUIRING AN IBM 370/158 OR EQUIVALENT

The protest on this item is not against using the IBM 370/158 as the model against which an equivalent capability is to be measured. Rather, the thrust of Comnet's complaint is that there is no way from the IFB itself for a bidder to determine whether the computer system upon which it intends to bid will satisfy NOAA that it is equivalent. Comnet is requesting an objective method by which a bidder can determine, prior to incurring the expense of submitting a bid and running the benchmark, that its system will be acceptable. NOAA's response is that this type of determination is the bidder's to make on the basis of its own judgment.

When specifying in an IFB the features of a particular system which the Government requires, it is permissible to cite a particular brand name item and model number as an example. However, FPR § 1–1.307–4(b) (1964 ed. amend. 85) provides that a purchase description which cites a brand name product as an example of the item desired should set forth those salient physical, functional or other characteristics of the referenced product which are essential to the needs of the Government. Moreover, FPR § 1–1.307–6(a)(2) (1964 ed. amend. 117), prescribes the "Brand Name or Equal" clause that is required to be used when a procurement is based upon equivalency to a brand name product.

NOAA is correct when it states that the bidder must make the initial determination whether its proposed system can fulfill the Government's needs. In that connection, FPR § 1–1.307–7(a) (1964 ed. amend. 117) states:

> Bids offering products which differ from brand name products referenced in a "brand name or equal" purchase description shall be considered for award where * * * the offered products meet fully the salient characteristics requirements listed in the invitation * * *.

However, the bidder's determination whether its offered product meets the requirements should be an informed one based upon the listed

salient characteristics. We therefore recommend that the ensuing IFB conform to the requirement of FPR for brand names or equal procurements.

REQUIRING A VS OPERATING SYSTEM

The major technical feature of the VS system is that it responds to the memory requirements of the program by providing small units of memory called "pages." The VS system provides only that amount of pages required for the segment of a program then in application. VS keeps track of the pages and when the filled pages are needed they are called back to the main memory from the disc memory where they are stored.

An OS system operates by allotting a section of main memory large enough to accommodate the maximum memory need of the program. The entire capability is available while the program runs, even though the maximum memory requirement may be early in the program or disproportionately large compared to the rest of the program.

Normally, an OS system cannot provide the capabilities equivalent to a VS system because programs coded for VS contain certain programming conventions unique to VS. In this case, Comnet claims that it can program its OS system to run VS oriented programs. This capability was demonstrated when Comnet ran benchmark #3 successfully for IFB 3–75. Thus, Comnet can provide the capability required by NOAA, but not by the specified method. The question then is whether the requirement that the system be VS is based upon a valid need of the Government or is a statement only of administrative preference.

Our Office has traditionally recognized that it is the province of a procuring agency to draft specifications. However, the specifications must be a statement of the agency's minimum needs. To include more in a specification transcends our interpretation of the controlling statute (41 U.S.C. § 253 (1970)) which requires that specifications be sufficiently broad to permit maximum competition consistent with the nature of the supplies and services being procured. *See* 46 Comp. Gen. 281, 284 (1966).

NOAA is correct in asserting that all specifications, by their nature, restrict the field of competition. The salient inquiry, however, is whether the specification unduly restricts competition. We have equated the inclusion in a specification of requirements in excess of the agency's minimum needs to an undue competitive restriction. For instance, we have found as unduly restrictive the inclusion in a specification of design requirements beyond the stated performance requirements. We held that any specification is unduly restrictive which requires the use of a particular component, unless no other component

can meet the requirement equally as well. B-178508, October 23, 1973; *Charles J. Dispenza & Associates*, B-181102, 180720, August 15, 1974, 74-2 CPD 101.

NOAA has not stated that only a VS system can meet its operational requirements. Nor has NOAA maintained that the OS system cannot meet its minimum needs. Rather, it seems that Comnet has presented strong evidence that it is capable of programming its OS system to run the VS program. Comnet did successfully run benchmark #3 on IFB 3-75. Therefore, it should not be precluded from utilizing its OS system solely because NOAA prefers the VS system.

NOAA asserts that its programs would have to be rewritten so that certain programs could be run on an OS system while a VS system could run all of the programs unchanged. However, Comnet maintains that it can run all of the programs without rewriting them by making a modification to its internal software.

We are not concluding that Comnet has proved its ability to provide the requisite capability necessary to satisfy NOAA's minimum needs. Since NOAA has chosen the benchmark as the means by which to determine the capability of the proposed system, and the benchmarks are representative of the range of programs to be run, we believe that bidders should not be precluded from demonstrating their capabilities to satisfy NOAA's needs. That is not to say that NOAA is required to assume undue administrative burdens of the type it envisioned (rewriting or physically aggregating programs). If a bidder can successfully run the benchmarks on its OS system, without requiring NOAA to rewrite or modify its programs, we perceive no valid reason to restrict competition to a VS system. We are aware that this approach places a greater burden on NOAA to insure that its benchmarks are truly representative of the technical and operational features of the entire workload. However, we see this as a proper administrative action in consonance with the statutory mandate that specifications be drafted to permit full and free competition consistent with the needs of the Government. 41 U.S.C. § 253 (1970).

The immediate IFB left no room for evaluation of other than a VS approach. However, before issuing a new solicitation, NOAA might give consideration to stating the minimum requirements to reflect various approaches which might include the following approach:

(1) Ninety-percent of all programs having a core storage requirement of 500 K bytes or less be in execution within 30 minutes and the remaining 10 percent completed within 2 hours; and

(2) all programs having core requirements between 500 K and 800 K bytes be scheduled for a 1 hour period during prime time. During that period, these large programs be in execution within 10 minutes.

REQUIRING PROPRIETARY SOFTWARE

The use of trade name software packages as minimum requirements limits competition to those who have the packages. Therefore, the technical and operational requirements of the software packages should be expressed independently of the trade names. In that connection, see our discussion, *supra*, with respect to the VS operating system and IBM 370/158.

BARRING COMPUTER OPERATOR PRIORITY RESET

As in the preceding discussions, this requirement becomes unduly restrictive if it crosses the bounds of the Government's minimum need and becomes an administrative preference. We appreciate NOAA's position that the need for priority reset without computer operator intervention will promote administrative efficiency, particularly if the need for reset occurs at the end of a workday. Although NOAA asserts that the cumulative economic loss occasioned by the wait that might be encountered in reaching the computer operator would be substantial, it is conceivable that any economic detriment caused by this delay could be offset by a bidder offering the computer operator reset at a lower cost than without operator intervention. However, we are not prepared to state that this requirement is not an actual need of NOAA. We do suggest that NOAA consider the possible cost benefits of permitting computer operator intervention before excluding it.

[B-114898]

Fees—Services to Public—Inspectional Service Employees—Overhead Costs

Customs Service has authority under User Charges Statute, 31 U.S.C. 483a, to implement recommendation in General Accounting Office report that administrative overhead costs be collected from parties-in-interest who benefit by special reimbursable and overtime services of Customs officers. Various statutes which provide for reimbursement by parties-in-interest of compensation and/or expenses of Customs officers for such services generally do not preempt imposition of additional user charges under 31 U.S.C. 483a.

In the matter of user charges for administrative costs of special and overtime customs services, November 13, 1975:

In a recent report to the Secretary of the Treasury entitled "Services for Special Beneficiaries: Costs Not Being Recovered," B-114898, March 10, 1975 (GGD 75-72), our General Government Division noted that the United States Customs Service (Customs) currently provides a number of services—representing both special services provided during normal working hours and overtime services—for which it is reimbursed by the party-in-interest for the salary and/or expenses of

the officer performing the service pursuant to various statutory provisions. With one exception, discussed *infra*, Customs does not collect administrative overhead associated with these reimbursable services.

The following provisions are illustrative of Treasury's statutory authority to charge for the furnishing of special services:

19 US.C. § 1447 (1970)—reimbursement of the compensation and expenses of customs officers supervising the unloading of cargo at a location other than a port of entry.

19 U.S.C. § 1456 (1970)—reimbursement of the compensation of customs officers stationed on a vessel or vehicle proceeding between ports of entry (as well as payment or provision of subsistence).

19 U.S.C. § 1457 (1970)—reimbursement of the compensation and subsistence expenses of customs officers remaining on board a vessel or vehicle to protect revenues under specified circumstances.

19 U.S.C. § 1458 (1970)—reimbursement of the compensation of customs officers supervising the unloading of bulk cargo under an extension of time.

19 U.S.C. § 1555 (1970)—reimbursement of the compensation of customs officers appointed to supervise the receipt of merchandise into, and delivery from, bonded warehouses.

With respect to overtime services, 19 U.S. Code § 267 (1970) provides that the Secretary of the Treasury shall fix reasonable rates of extra compensation for various overtime activities of customs officers. Such extra compensation is payable by the party-in-interest under a special license or permit to an appropriate customs official who in turn shall pay it over to the customs officers and employees entitled thereto. Similarly, with certain exceptions discussed hereinafter, 19 U.S.C. § 1451 (1970) requires parties-in-interest, as a prerequisite to obtaining a special license to unload on Sundays, holidays or at night, to make a deposit or post bond for payment of the compensation and expenses of customs officers and employees in accordance with 19 U.S.C. § 267.

Our March 10, 1975, report noted that under section 501 of the Independent Offices Appropriation Act, 1952, 31 U.S.C. § 483a (1970), the so-called "User Charges Statute,"

—Government activities resulting in special benefits or privileges for individuals or organizations are to be as financially self-sustaining as possible; and

—fees are to be fair and equitable, considering direct *and indirect* costs to the Government, value to the recipient, public policy or interest served, and other pertinent facts. [Italic supplied.]

The Office of Management and Budget (OMB) (actually the predecessor Bureau of the Budget) has issued policy guidelines implementing the User Charges Statute. Circular No. A–25 (September 29, 1959).

31 U.S.C. § 483a provides in full:

It is the sense of the Congress that any work, service publication, report, document, benefit, privilege, authoriy, use, franchise, license, permit, certificate, registration or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any person (including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine, in case of any existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: *Provided*, That nothing contained in this section shall repeal or modify existing statutes prohibiting the collection, fixing the amount, or directing the disposition of any fee, charge or price: *Provided further*, That nothing contained in this section shall repeal or modify existing statutes prescribing bases for calculation of any fee, charge or price, but this proviso shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of any such fee, charge or price.

Our report identified 23 services (listed in Appendix III thereto) performed during normal working hours for which reimbursement is provided by statute. The Customs Service presently bills parties-in-interest for the full compensation and/or travel and subsistence of the officer performing the service, including both base salary and indirect labor cost but, as stated before, except for reimbursement for preclearing aircraft, Customs does not collect administrative overhead associated with these reimbursable services. The report also indicated that amounts assessed for certain services outside normal working hours, such as overtime inspection services at United States ports of entry, do not include charges for overhead.

In view of the User Charges Statute, *supra*, our report recommended, among other things, that the Secretary of the Treasury direct the Commissioner of Customs to include in the charges for reimbursable services a fair and equitable amount for administrative overhead. The report stated in this regard, pages 7–8:

An OMB official responsible for administering Circular A–25 said the Circular prescribes the collection of all administrative overhead associated with reimbursable services. Customs officials said they recognize that recovery of full costs would include administrative overhead but that statutes governing the reimbursable services do not authorize Customs to collect administrative overhead (except for reimbursement for preclearing aircraft).

Although the statutes governing reimbursable services require parties-in-interest to reimburse Customs for the compensation and expenses of officers performing these services, these statutes do not specify that the required reimbursement be the sole charge for such services or prohibit the collection of a fee for overhead expense. Therefore, we believe that 31 U.S.C. 483a (see p. 1) authorizes Customs to include administrative overhead in the billings of parties-in-interest for all reimbursable services performed during normal working hours.

The Office of Budget and Finance has recommended since 1963 that, in the absence of a formal accounting system for determining administrative overhead (as is the case with Customs), Department bureaus use a figure of 15 percent of the identified costs of providing the service. As of February 1, 1975, Customs had taken no action to include the 15-percent overhead in its charges for reimbursable services.

Customs collected about $3.1 million in fiscal year 1974 for reimbursable services performed during normal working hours. By not collecting for administrative overhead at the recommended rate of 15 percent, Customs absorbed about $460,000 that should have been passed on to parties-in-interest.

In fiscal year 1974, Customs collected $26.9 million in overtime payments for services rendered outside normal working hours. Statutes governing reimbursement for overtime vary somewhat from those governing reimbursement for services provided during regular duty hours. However, nothing in these statutes specifies that the required reimbursement be the sole charge for such services or prohibits the collection of administrative overhead. Therefore, we believe 31 U.S.C. 483a authorizes Customs to include administrative overhead in the billings of parties-in-interest for services performed outside normal working hours. Customs could have collected $4 million more in fiscal year 1974 had administrative overhead been charged at the recommended rate of 15 percent.

By letters dated May 9, 1975, to the Chairmen of the Senate and House Committees on Government Operations, the Assistant Secretary of the Treasury (Enforcement, Operations, and Tariff Affairs) responded to our recommendations, pursuant to section 236(1) of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176(1) (1970).[1] In his letter, the Assistant Secretary expressed doubt concerning the Customs Service's legal authority to implement our recommendation for inclusion of administrative overhead under the user charges here involved, and suggested that we reconsider this issue. His letter stated in part:

* * * The so-called User Charge statute, 31 U.S.C. 483a, which states the Congressional policy that services furnished to private parties shall be self-sustaining as far as possible, contains the proviso that "nothing contained in this section shall repeal or modify existing statutes prohibiting the collection, fixing the amount, or directing the disposition of any fee, charge, or price: provided further, that nothing contained in this section shall repeal or modify existing statutes prescribing bases for calculation of any fee, charge or price, but this proviso shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of any such fees, charge or price." This

[1] This provision requires that whenever the General Accounting Office makes a report which contains recommendations to the head of a Federal agency, the agency shall, within 60 days, submit a written statement of the action taken with respect to such recommendation.

language indicates that where a statute provides reimbursement by the public of a particular amount or type of expense, Customs has no authority to include other expenses. Laws which direct Customs to collect the compensation paid to a Customs officer may not be changed to include administrative expenses without a specific determination stating that the word "compensation" includes such administrative costs. The report from the General Accounting Office, in our opinion, does not constitute a binding determination to this effect, as would a decision by the Comptroller General. We are not aware of any opinion that defines the word compensation to have this meaning.

The Assistant Secretary maintained that statutory directives to collect "compensation" and/or "expenses" are not sufficient to include administrative overhead. He also expressed the view that our decision at 3 Comp. Gen. 960 (1924), holding that 19 U.S.C. § 1451, *supra*, does not authorize the collection of travel expenses as part of "compensation and expenses" thereunder, is inconsistent with the recommendation in the March 1975 report.

This decision responds to the Assistant Secretary's suggestion, in effect, that we reconsider our recommendation concerning the collection of administrative overhead and issue a formal determination on the matter.

As noted, the Assistant Secretary contends (1) that the statutes referred to, *supra*, and similar provisions requiring payments by parties-in-interest for compensation and/or expenses constitute the exclusive source of charges; and (2) that the payments specified in these statutes do not include administrative overhead. We agree that the statutory provisions in question do not expressly include administrative overhead but neither do they prohibit the charging of such costs. Moreover, we do not agree that the statutes relating to payment of specified compensation and expenses of Customs officers preempt the authority to collect additional charges under 31 U.S.C. § 483a; nor do we perceive any inconsistency between our report's recommendation to collect administrative overhead and our prior decisions.

Our decision at 3 Comp. Gen. 960 (1924), referred to by the Assistant Secretary and reaffirmed in 43 Comp. Gen. 101 (1963), held that 19 U.S.C. §§ 1451 and 267 very specifically delimit rates for "compensation and expenses" to the exclusion of travel expenses. But such decisions are clearly limited to the language and express effect of those two sections. Thus, for example, we concluded in 48 Comp. Gen. 622 (1969) that Customs regulations properly included travel expenses as an item of "compensation and expenses" payable under 19 U.S.C. § 1447, *supra*, in connection with unloading cargo outside a port of entry. We pointed out that:

Our decisions [3 Comp. Gen. 960: 43 *id.* 101] held only that the statutory provisions cited [19 U.S.C. §§ 267, 1451] did not *in and of themselves* authorize reimbursement of the travel and subsistence expenses of customs employees incident to services performed during the times specified therein. [Italic supplied.]

More fundamentally, it has consistently been our view that the provisos set forth in 31 U.S.C. § 483a preclude the imposition of additional user charges under that section only to the extent that another statute expressly or by clear design constitutes the only source of assessments for a service. Our decision at 48 Comp. Gen. 24 (1968) is especially relevant to the present matter. In that decision, we approved a proposal by the Assistant Secretary of the Treasury to require reimbursement from the airlines for costs relating to the performance of preclearance services in Canada *over and above reimbursement for extra compensation under the Customs overtime laws.* We stated in part, 48 Comp. Gen. at 26–28:

> The Assistant Secretary expresses the view that in the language of 31 U.S.C. 483a, the services provided in Canada are embraced fairly within the terms "work," "service," "benefit," "privilege," and "use," "or similar thing of value," "performed," "furnished," "provided," or "granted." He states that the head of the Federal agency is authorized by regulation "to prescribe therefor such fee, charge, or fine, if any, as he shall determine, in case none exists * * *;" and that in doing so he shall make the charge "fair and equitable taking into consideration direct and indirect cost to the Government value to the recipient, public policy or interest served and other pertinent facts." This, he feels, indicates that the charge should cover the special benefit conferred; *and he points out that although the authority contained in 31 U.S.C. 483a is subject to the proviso that its provisions do not "repeal or modify existing statutes prohibiting the collection * * * of any fee, charge, or price," there is no statute which in terms prohibits the collection of a charge for the services involved.*
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> * * * * * * *
>
> The legislative history of section 501 [31 U.S.C. § 483a] discloses that the purpose thereof is to provide authority for Government agencies to make charges for services in cases where no charge was made at the time of its enactment, and to revise charges where charges then in effect were too low, except in cases where the charge is specifically fixed by law or the law specifically provides that no charge shall be made (page 3, H. Rept. No. 384, 82d Cong., 1st Sess.).
>
> We agree with the Assistant Secretary that the language of 31 U.S.C. 483a is very broad, and that the section contemplates that those who receive the benefit of services rendered by the Government especially for them should pay the costs thereof, at least to the extent that it appears that a special benefit is conferred. In the instant case the Assistant Secretary's letter discloses that the costs (including related costs) of stationing men and performing services in Canada are considerably greater than total costs to Customs would be if all the Customs operations were performed in the United States. Also, as indicated above, the preclearance operation in Canada is essentially of advantage to the airline rather than the Bureau of Customs. Accordingly, it is our view that to the extent the costs (including employees' compensation) of the requested preclearance services in Canada are in excess of the costs that Customs would incur if all of the Customs operations involved were performed in the United States, a charge covering such excess costs would be authorized by 31 U.S.C. 483a, if fixed in accordance with the provisions of such section. [Italic supplied.]

We believe that the foregoing observations apply generally to the extra compensation and expenses statutes here involved. With certain exceptions referred to below, the reimbursements required by these statutes are not in terms exclusive. Moreover, it is clear that most of these statutes were enacted essentially for the benefit of Customs officers and employees, rather than to reimburse the Customs Service as

such for its expenses (over and above the salary and related amounts passed on to employees) incident to the furnishing of special benefits. *Cf. United States* v. *Myers*, 320 U.S. 561, 567 (1944) (addressing 19 U.S.C. § 1451). Thus we do not view such statutes, in terms of their purpose, as inconsistent with the imposition of additional charges under 31 U.S.C. § 483a which are designed to make whole the Customs service.

As noted previously, there are certain exemptions from, or limitations upon, payment by parties-in-interest of extra compensation or expenses. 49 U.S.C. § 1741(a) (1970) places a $25 maximum upon the amount payable under 19 U.S.C. § 1451 by the owner of a private vessel or aircraft in connection with arrival in or departure from the United States. 46 U.S.C. § 331 (1970) prohibits the collection of fees by customs officers for certain services. Also, 19 U.S.C. § 1451a (1970) and the proviso to 19 U.S.C. § 1451 require the United States to absorb the extra compensation payable to customs officers in specified circumstances. See with respect to the latter, 48 Comp. Gen. 262 (1968). We would construe the statutory exemptions and limitations described as precluding the imposition of additional user charges under 31 U.S.C. § 483a in the situations to which they apply. At the same time, the existence of these exceptions and limitations tends to support the conclusion that the compensation and expenses statutes are not otherwise exclusive.

For the reasons set forth above, it is our opinion that the Customs Service generally has authority to impose user charges under 31 U.S.C. § 483a, in addition to amounts payable for compensation and expenses of customs officers pursuant to the statutes discussed previously. Accordingly, we affirm the position taken in our March 1975 report that the Secretary of the Treasury has authority to direct the Customs Service to include a fair and equitable amount for administrative overhead in charges for such services, consistent, of course, with 19 U.S.C. §§ 1451 (proviso), 1451a, 46 U.S.C. § 331, and 49 U.S.C. § 1741.

Copies of this decision are being provided to the Chairmen of the Senate and House Committees on Government Operations and Appropriations.

[B-185030]

Officers and Employees—Transfers—Relocation Expenses—Dependents—Mother

Mother of Government employee who is member of employee's household is dependent parent within meaning of para. 2-1.4d, Federal Travel Regulations (FTR), for purposes of relocation allowances as she receives only social security payments, which are largely required for medical expenses, and is dependent upon daughter to maintain reasonable standard of living. Internal Revenue Service standards for dependency do not determine entitlement under the FTR.

In the matter of relocation allowances for dependent parent, November 14, 1975:

Mr. Donald E. Muldoon, an authorized certifying officer and Director of the Accounting Division at the San Francisco Regional Office of the Department of Housing and Urban Development (HUD) requests an advance decision as to whether Mrs. Lois Hay, mother of HUD employee, Ms. Kitty Hay, is a "dependent parent" within the meaning of Federal Travel Regulations (FPMR 101–7) para. 2–1.4d (May 1973), for the purposes of relocation allowances.

The record shows that Mrs. Lois Hay, mother of the employee, is 81 years old. She has lived with the employee for 2 years and is a member of the employee's household. Mrs. Hay has an income of $274 per month derived solely from social security benefits. The employee states that a large portion of the social security benefits are required for medical expenses not covered by her mother's health insurance and that her mother is unable to make a regular contribution toward her housing or food costs. These costs are estimated to be $166 per month. The employee further states that she has been precluded from claiming her mother as a dependent for purposes of an income tax exemption.

Paragraph 2–1.4d of the Federal Travel Regulations provides as follows:

> d. *Immediate family.* Any of the following named members of the employee's household at the time he reports for duty at his new permanent duty station * * *: spouse, children (including step-children and adopted children) unmarried and under 21 years of age or physically or mentally incapable of supporting themselves regardless of age, or dependent parents of the employee and of the employee's spouse.

The term "dependent" is not defined in the Federal Travel Regulations. Ordinarily an employee's parent will be considered dependent when the employee clearly shows that he provides more than one-half of the parent's support. However, in other cases, such as the present one, where the employee contributes less than one-half of the parent's support and there is doubt involved as to the parent's dependency, the case should be submitted here for decision.

We do not believe that the standards for determining qualifications for an income tax exemption should be the sole standards for determining eligibility as a dependent parent under the Federal Travel Regulations. The purpose of the Federal Travel Regulations in this regard is to assist a Government employee in the cost of relocating his or her immediate family. Also, the only persons considered members of the immediate family at the present time are the spouse, children, and parents. The purpose of an income tax dependent exemption is to enable a taxpayer to reduce his taxes because he has contributed to the support of certain persons. Furthermore, dependent exemptions may

be granted for support of persons other than members of the taxpayer's immediate family and such persons need not be relatives. Generally, a person taken as a dependent tax exemption must have a gross income of less than $750 per year and receive the majority of his support from the taxpayer. The Federal Travel Regulations do not contain income qualifications or majority support qualifications for eligibility as a member of the immediate family. In view of the above factors the percentage of the parent's income contributed by the employee would not be the decisive factor in determining dependency. Other factors, such as age and the parent's need to be housed with the employee should also be considered.

In the present case, Mrs. Lois Hay receives no income outside of her social security benefits totaling $274 per month. Also, in view of her age and medical expenses it is apparent that she would not be able to maintain a reasonable standard of living on her income alone except through the support provided by her daughter and as a member of her daughter's household. Accordingly, we hold that Mrs. Hay qualifies as a dependent parent within the meaning of paragraph 2–1.4d of the Federal Travel Regulations for purposes of relocation allowances.

[B–183706, B–184415]

Bids—Discarding All Bids—Invitation Defects

District of Columbia's cancellation of invitation after bid opening was proper upon determination that specifications for one particular item being procured overstated user's actual needs and had detrimental effect of restricting competition.

Bids—Competitive System—Preservation of System's Integrity—Invitation Canceled and Resolicited

While fact that specifications are inadequate, ambiguous or otherwise deficient is not compelling reason to cancel invitation, absent showing of prejudice, where specification is restrictive of competition and record indicates that additional firms would bid on revised specifications included in a resolicitation, cancellation is proper course of action.

Bids—Invitation for Bids—Cancellation—Erroneous

Cancellation of a subsequent invitation for bids on basis that services were no longer required was erroneous where there was in fact a continuing need for the services which was being met through a noncompetitive, informal agreement with a contractor to a Federal agency—an arrangement unauthorized by statute. Recommendation is made that District of Columbia discontinue present method of procurement and that services be procured through formal advertising or an intergovernmental agreement authorized by statute.

In the matter of Automated Datatron, Inc.; Exspeedite Blueprint Service Inc., November 17, 1975:

These protests concern the cancellation of two solicitations issued by the District of Columbia Department of General Services, Bureau of

Material Management (District), for reproduction work, blueprints, duplication and restoration services for drawings. Automated Datatron, Inc. (ADI) protests the cancellation of invitation for bids (IFB) No. 0767-AA-75-0-5-HW (0-5-HW) while Exspeedite Blueprint Service, Inc. (EBS) protests the cancellation of the subsequently issued IFB No. 0767-AA-75-1-5-HW (1-5-HW). Each has protested on a different basis, and therefore, each protest will be discussed individually.

In its initial report of June 2, 1975, to our Office the District explained as follows the origin of IFB 0-5-HW:

> During the past several years the District has been obtaining the requirements solicited under Invita-0767-AA 75-0-5-HW under U.S. Coast Guard contract CG-30011-(A)(1). Based on information received from the the Coast Guard, that at the expiration of the aforementioned contract there would be an anticipated delay in awarding a new contract, the District for the first time issued an invitation to bid for the requirements contained in 0767AA-75-0-5-HW. This was necessary to satisfy the continuing need for these services and to maintain continuity in the printing and reproduction of various construction specifications and blueprints scheduled to be advertised.
>
> The U.S. Coast Guard subsequently awarded a new contract (DOT-CG-50024-A) and by agreement the District will be utilizing this contract through the remainder of Fiscal Year 1975 at which time the District will by necessity obtain its requirements elsewhere.

IFB 0-5-HW contemplated an aggregate award of a requirements-type contract for sixteen line items for the period beginning on February 1, 1975, or as soon thereafter as award was made, through January 31, 1976. Bid opening was scheduled for February 4, 1975. Of the the 42 sources solicited, two responses were timely received with the low bid being submitted by ADI.

By letter dated January 29, 1975, which was received by the District after bid opening, Blocker Reprographics, Inc. (Blocker) protested to the District that the solicitation, as written, precluded all but two firms from participating in the procurement. Blocker contended, among its other grounds for protest, that the requirement in Item 1 that bidders provide an "opti-copy precision camera negative," was restrictive of competition since only two such pieces of equipment were in existence in the metropolitan area. In this regard, Item 1 read as follows:

> OFFSET PRINTING—PLANS: ½ size, self-cover, (white 60-lb.) 16 x 22—Self Cover, inclusive for negatives (*opti-copy precision camera negative* to provide (1) optimum quality reproduction (2) a negative of convenient file size (8½ x 11) and (3) a dylux contact proof copy (8½ x 11) at no additional cost. SAMPLE TO BE FURNISHED), plates and printing black ink, one (1) side on 60 lb. white offset. Assemble and side stitch (3 stitches) [Italic supplied.]

Award of the contract was withheld pending the resolution of the protest by the District's Contract Review Committee. In a report dated March 7, 1975, the Committee concluded that the specifications should be rewritten and the items regrouped to reflect the District's minimum

needs for the required services and, in particular, Item 1 should be eliminated from any subsequent readvertisement. On March 25, 1975, the District notified ADI and the other participating firm that their respective bids had been rejected and that the specifications were being revised. We understand that subsequent to the cancellation of IFB 0–5–HW, the District became aware that the Coast Guard had contracted with Keuffel & Esser Co. (K & E) for the same type of services and the District reverted to its prior practice of obtaining the services directly from the Coast Guard's contractor.

ADI protests the rejection of its bid on the grounds that its bid price was reasonable and accordingly, as the low responsive, responsible bidder it was entitled to award of the contract. Protester further contends that the District did not have the authority to cancel the IFB after bids were opened since the specifications as written are the same specifications that had been used in the past to satisfy the District's minimum needs and there has been no showing that the District's requirements have changed.

Subsequent to the filing of the protest, the District informed ADI and our Office that the invitation was canceled pursuant to District of Columbia Material Management Manual, Part I, § 2620.13 (1974 ed.), essentially on the basis that the requirement of Item 1, that the contractor produce negatives by use of an opti-copy precision camera, overstated the District's needs and restricted competition. We were advised by the District that in conversations with the Coast Guard's present contractor, and other potential contractors, each indicated that while it had equipment similar to the opti-copy precision camera and could in fact perform the service, it would be precluded from competing because the specifications as written would not permit the use of any other piece of equipment. While the District advances other arguments in support of its cancellation of the solicitation, for the reasons stated below we believe no useful purpose would be served in discussing those additional grounds.

The authority to cancel an invitation after bids are opened is contained in District of Columbia Material Management Manual, Part I, § 2620.13 (1974 ed.) as follows:

REJECTION OF BIDS

A. Cancellation of Invitation for Bids after Opening

1. Award Required

Preservation of the integrity of the competitive bid system dictates that, after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation. * * *

2. Exceptions

Invitation for Bids may be cancelled after opening but prior to award, and all bids rejected, where the contracting officer determines in writing that cancellation is in the best interest of the District for reasons such as the following:

a. Inadequate, ambiguous, or otherwise deficient specifications were cited in the Invitation for Bids.

As stated in *Massman Construction Co.* v. *United States*, 102 Ct. Cl. 699, 719 (1945):

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

The rejection of all bids after they have been opened tends to discourage competition because it results in making all bids public without award, which is contrary to the interests of the low bidder, and because rejection of all bids means that bidders have expended manpower and money in preparation of their bids without the possibility of acceptance. 53 Comp. Gen. 586 (1974), 74-1 CPD 68. Our Office ordinarily will not question the broad authority of the contracting officer to reject all bids and readvertise when a "compelling reason" to do so exists, 54 Comp. Gen. 145 (1974), 74-2 CPD 121. *See* 53 Comp. Gen. 586, *supra;* 52 id. 285 (1972).

With regard to the instant protest, we feel the record clearly indicates that the District's requirement for Item 1 that bidders utilize an opti-copy precision camera was restrictive of competition and that there was sufficient reason to believe that firms other than the original two bidders would bid on a resolicitation if the aforementioned requirement was omitted. In the circumstances, we conclude that a "cogent and compelling reason" existed to justify cancellation of IFB 0-5-HW.

Protest on 1-5-HW

Prior to the expiration of the Coast Guard's Fiscal Year 1975 contract with K & E under which the District was obtaining its printing and reproduction requirements, K & E advised the District of the possibility that it would not be able to utilize K & E's services if a new contract for Fiscal Year 1976 was not awarded by the Coast Guard. In view of this contingency, and in order to prevent any delay in its receiving the required services if such a new contract was not immediately forthcoming, the District issued IFB 0767-AA-75-1-5-HW with revised specifications including the elimination of Item 1 with its requirement for use of an opti-copy precision camera. However, on June 30, 1975, the Coast Guard entered into a new contract with K & E for Fiscal Year 1976, as a result of which K & E agreed to provide the District with the required services. Because the services were available from K & E, the District canceled the solicitation prior to the opening of bids pursuant to Part I, § 2620.7 (C) (1974 ed.) of the District of Columbia Material Management Manual.

In its protest, Exspeedite raises the following questions regarding the cancellation of the solicitation and the procurement of the required services from the Coast Guard's contractor:

(1) Is it legal to use an existing contract when apparently there is no provision to do so?
(2) Because of the cost factor involved in the recent bid, why isn't this bid re-opened to allow all pertinent businesses to bid and more likely than not save the District Government Money?

In regard to the first question, Exspeedite states that it was informed by the Coast Guard that while there was no provision in its contract for other agencies to utilize the services of K & E, it could not prevent the contractor from servicing the District at the contract price.

The District of Columbia Material Management Manual, Part I, § 2620.7(C) (1974 ed.) specifically provides that an invitation may be canceled before opening of bids when it is clearly in the public interest, and it cites as an example of the "public interest" a situation "* * * where there is no longer a requirement for the * * * service * * *." The District's position is that upon being advised that the services would be supplied by the Coast Guard's contractor for the fiscal year, there were no longer any services that remained for procurement and that the public interest required cancellation of the invitation.

We believe the District's reliance upon this authority is inappropriate because a continuing need for these services does exist. The cancellation of IFB 1-5-HW was motivated not by the lack of a requirement for the services but because the services were to be obtained by a noncompetitive, informal agreement with a Federal contractor.

In further support of its determination to cancel the solicitation and to use the Coast Guard's contractor, the District refers to title 1, section 1-244(j) of the District of Columbia Code (Code) (1973 ed.) which reads in pertinent part:

The Commissioner of the District of Columbia is authorized and empowered in his discretion to place orders, if he determines it to be in the best interest of the District of Columbia, with any Federal department, establishment, bureau, or office for materials supplies, equipment, work, or services of any kind that such Federal agency may be in a position to supply or be equipped to render, by contract or otherwise * * *.

Additionally, the District cites the District of Columbia Self-Government and Governmental Reorganization Act (Act), Public Law 93-198, Title VII, Part D, section 731(a) (Dec. 24, 1973) which provides in part:

For the purpose of preventing duplication of effort or for the purpose of otherwise promoting efficiency and economy, any Federal officer or agency may furnish services to the District government and any District officer or agency may furnish services to the Federal Government. Except where the terms and conditions governing the furnishing of such services are prescribed by other provisions of law, such services shall be furnished pursuant to an agreement (1) negotiated by the Federal and District authorities concerned, and (2) approved by the Director of the Federal Office of Management and Budget and by the Mayor. * * *

We do not believe either the Code or the Act provisions quoted above contemplate the informal arrangement now being used by the District to obtain these reproduction services. Title 1, section 1–244(j) of the District of Columbia Code authorizes the Commissioner to place orders for supplies or services "with any Federal department, establishment, bureau or office." However, in the instant case, no contractual agreement exists between the District and any agency of the Federal Government: the services are being performed for the District by K & E under its own informal arrangement which can be terminated at any time.

Section 731(a) of Public Law 93–198 also speaks of intergovernmental agreements, which are lacking here, and which are subject to certain approvals, which do not appear to have been obtained. Moreover, we believe section 731(a) pertains to services rendered by *employees* of the District or the Federal Government to the other entity. Although the legislative history of section 731(a) is of no material aid in the interpretation of that provision, we note that the statute applies only to services (supplies are excluded) and does not expressly mention the securing of services through contracts with private individuals or firms.

Since there is no Federal Supply Schedule in effect for these services and since the District's requirement exceeds $2,500, a noncompetitive purchase order to a supplier is precluded. See District of Columbia Material Management Manual, Part I, § 2620.22(F)(1) (c) and (d) (1974 ed.).

Therefore, the only methods available to the District for obtaining these services are an intergovernmental agreement pursuant to the authority of title 1, section 244(j) of the District of Columbia Code or section 731(a) of Public Law 93–198, or a competitive, formally advertised procurement such as IFB 1–5–HW. That solicitation was an appropriate vehicle for obtaining the reproduction services and its cancellation was erroneous. We are therefore recommending to the District that it cease procuring these services from K & E under its informal arrangement with that firm and that the District conclude an interagency agreement or formally advertise for the services as soon as is practicable.

[B–182569]

Contracts—Awards—Small Business Concerns—Self-Certification—"Good Faith" Certification

Where record indicates that contractor was or should have been aware of its affiliation with large business firm, General Accounting Office agrees with protester's contention that firm awarded total small business set-aside contract failed to self-certify its small business status in good faith pursuant to Armed Serv-

ices Procurement Regulation 1-703(b), and award was therefore improper. However, since contract has been fully performed no remedial action is possible.

Contracts—Awards—Small Business Concerns—Certifications—Effective Date

Where firm purchases assets of concern previously found by Small Business Administration (SBA) to be large business, suggestion is made that SBA consider adopting rule requiring such firm to request small business certificate prior to self-certifying status as small.

In the matter of Bancroft Cap Company, Inc.; Society Brand, Inc., November 18, 1975:

This matter concerns a protest filed by counsel for Bancroft Cap Co., Inc. (Bancroft), against the award of items 0002 and 0003 to Society Brand, Inc. (SBI), under invitation for bids (IFB) No. DSA100-75-B-0104, a total small business set-aside, issued by the Defense Personnel Support Center (DPSC), Philadelphia, Pennsylvania.

Counsel for Bancroft contends that SBI was not a small business at the time it submitted its bid or at bid opening, and, therefore, SBI submitted a nonresponsive bid, and the award was void *ab initio*. Accordingly, Bancroft submits that the award to SBI should be canceled, or, in the alternative, terminated for the convenience of the Government.

The subject invitation was issued on September 4, 1974, for supplying 172,536 Army caps. Bids were opened on September 24, 1974, and of the 16 firms solicited, bids were received from three firms. The low bid for items 0002 and 0003 was submitted by SBI, and the second low bid was submitted by Bancroft. Bancroft submitted the low bid for item 0001.

Preaward surveys were conducted on Bancroft and SBI, and, based on affirmative findings, award was made to Bancroft for item 0001 on October 24, 1974, and to SBI for items 0002 and 0003 on November 22, 1974. No questions regarding SBI's size status were raised prior to its award of a contract.

By letters dated December 2 and December 9, 1974, to our Office, Bancroft protested the award to SBI. By decision dated December 26, 1974, *Bancroft Cap Co., Inc.*, B-182569, 74-2 CPD 390, we stated that a protest which questions the small business status of another bidder is a matter for consideration by the Small Business Administration under 15 U.S. Code § 637(b)(6) (1970), rather than our Office, and SBA's determination is conclusive on the agency involved. We further stated, with regard to the contention that SBI was nonresponsible, that our Office has discontinued its practice of reviewing bid protests involving a contracting officer's affirmative determination of responsibility of a prospective contractor except for actions by procuring officials which are tantamount to fraud.

By letter dated December 30, 1974, Bancroft requested reconsideration of our decision on the basis that it was not asking our Office to determine SBI's size status, which matter had been referred to SBA by the contracting officer on December 19, 1974, but on the basis that if it was determined by SBA that SBI was other than small at the time of award, the award was void. We therefore reopened the case and developed it under our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975).

In a report to our Office on Bancroft's request for reconsideration, the contracting officer states that upon receipt of the December 2 letter from Bancroft he determined that part of Bancroft's protest was in effect a protest of the size status of SBI and as such it was untimely under Armed Services Procurement Regulation (ASPR) § 1–703(b)(1)(c) (1974 ed.), entitled "Action on Protests Received After Award," which provides:

> A protest received by a contracting officer after award of a contract shall be forwarded to the Small Business Administration district office serving the area in which the protested concern is located with a notation thereon that award has been made. The protestant shall be notified that award has been made and that his protest has been forwarded to SBA for its consideration in future actions.

The contracting officer reports that on November 23, 1974, the day following award to SBI, Bancroft sent a telegram to DPSC protesting any award to SBI on the basis that a different corporation, i.e., Society Brand Hat Company (SBHC), had submitted the bid. By letter dated November 25, 1974, the contracting officer denied Bancroft's protest stating that SBI was the original bidder on items 0002 and 0003, that SBI was in existence prior to bid opening, that its bid thus could be considered, and that award was made to it after it was found to be a responsive, responsible firm.

Bancroft contends that the award to SBI was void *ab initio* because it was based on a nonresponsive bid submitted by SBI, a large business concern, since SBI certified other than in good faith that it was a small business concern. Further, Bancroft contends that the SBI contract was void *ab initio* because it was issued to other than a "responsible prospective contractor."

The contracting officer disagrees with Bancroft's contention that the bid of SBI was nonresponsive and the resulting contract void *ab initio*. In this regard, the contracting officer refers to ASPR § 1–703(b), entitled "Representation by a Bidder or Offeror," which provides:

> Representation by a bidder or offeror that it is a small business concern shall be effective, even though questioned in accordance with the terms of this subparagraph (b), unless the SBA, in response to such question and pursuant to the procedures in (3) below, determines that the bidder or offeror in question is not a small business concern * * *. The controlling point in time for a determination concerning the size status of a questioned bidder or offeror shall be the date of award, except that no bidder or offeror shall be eligible for award as a small business concern unless he has, or unless he could have * * * in good faith represented himself as small business prior to the opening of bids * * *.

Further, the contracting officer cites ASPR § 1–703(b)(1), which provides:

> Any bidders, offeror, or any other interested party may, in connection with a contract involving a small business set aside or otherwise involving small business preferential consideration, question the small business status of any apparently successful bidder or offeror by sending a written protest to the contracting officer responsible for the particular procurement * * *. Such protest must be received by the contracting officer prior to the close of business on the fifth working day exclusive of Saturday, Sunday, and Federal Legal Holidays (hereinafter referred to as working day) after bid opening date for formally advertised and small business restricted advertised procurements * * *.

The contracting officer points out that Bancroft failed to protest the size status of SBI within 5 working days from bid opening or by October 1, 1974. Therefore, it is his position that the protest was not timely and was properly forwarded to SBA for consideration on future procurements in accordance with ASPR § 1–703(b)(1)(c). Thus, at the time of award, the contracting officer states that he acted in accord with ASPR § 1–703(b). The contracting officer refers to our decision in *Federal Contracting Company*, B–180807, May 17, 1974, 74–1 CPD 267, wherein we stated:

> We have held that in the absence of a timely protest as required by ASPR, a contracting officer has authority to accept at face value a representation by a bidder that it is a small business concern and that an award under such circumstances will not be questioned by our Office. 46 Comp. Gen. 342 (1966). Therefore, we cannot conclude that the contracting officer's actions in this case were improper. B–178856, June 26, 1973; B–173629, November 30, 1971.

The contracting officer further states that the February 13, 1975, determination by the SBA which held SBI to be other than a small business does not in any way affect the award under the subject IFB. The contracting officer's position assumes that SBI's self-certification was made in good faith.

For the reasons stated below, we believe that SBI failed to certify itself to be a small business concern in good faith and therefore the award to that firm was invalid. In view thereof, it is not necessary to consider the issue of SBI's responsibility.

Counsel for SBI contends that whether or not a bidder's self-certification as to its small business status has been made in good faith is a subjective decision which must turn on the facts of each case and that under this standard SBI's self-certification was made in good faith. Counsel for SBI states that on September 1, 1974, SBI became a separate entity from SBHC through purchase of SBHC's assets.

We believe that the record indicates that SBI was aware, or should have been aware, of the facts upon which the SBA based its February 13, 1975 determination that SBHC was other than a small business. The record also contains an earlier letter dated October 24, 1974, from the SBA verifying that SBHC was still a large business as of that date. We further believe that SBI's knowledge of its relationship

with SBHC constitutes the type of information that would place a reasonably prudent bidder on notice that it should obtain verification of its small business status from SBA prior to self-certification. *See* B–163128, April 24, 1968. The record indicates that on February 13, 1975, the SBA ruled that SBI was other than a small business on the grounds that Society Brand Incorporated is affiliated with Society Brand Hat Co., Society Brand Industries, *et al.*, and that the total employment exceeds the size standard of 500 employees. The SBA letter advising SBI of the size determination stated, in part:

> You have stated (and DCASR, St. Louis, confirms) that Society Brand Incorporated is under contract to Society Brand Hat Company since no novation agreement was executed. You share common facilities, equipment, and employees, notably Mr. J. Pott who is an officer in both firms. On September 30, 1974, Mr. Michael J. Novoson signed as President of Society Brand Incorporated in authorizing Mr. Klaus Theiss to sign for said corporation (Society Brand Incorporated). Mr. Michael J. Novoson has interests in firms other than Society Brand Incorporated. You will note that Part 121.3–8(b)(2) of SBA Rules and Regulations precludes any differential as pertains to size determinations for the purpose of Government procurement assistance.

Our Office has stated that the standard of good faith when applied to a certification as a small business is not limited to an incident of intentional misrepresentation. In this regard, we stated in 51 Comp. Gen. 595 (1972), in part:

> * * * bidders are usually in a good position to know their size status and they should not be permitted to casually or negligently utilize the self-certification process without using a high measure of prudence and care. See 41 Comp. Gen. 47, 55 (1961), and 49 *id.* 369, 376 (1969). *Cf.* B–156882, July 28, 1965. We can understand your belief that your certification was made in good faith. However, we believe that in these cases, since self-certifications usually are not questioned, bidders must be held to be a higher than usual degree of care in determining whether they are or are not small business.

Bancroft contends that SBI failed to exercise the "higher than usual degree of care" required of concerns that certify themselves as small and that SBI in fact casually or negligently utilized the self-certification procedures in the subject procurement. Bancroft also contends that SBI submitted erroneous information concerning its affiliation with Society Brand Hat Company. In this connection, Bancroft states that the evidence of record supports its position that SBI, at the time it certified itself as a small business concern for the subject procurement, knew of its relationship with SBHC, knew that SBHC was to perform on the contract if SBI received the award, and knew that SBHC was a large business and therefore ineligible to compete on the subject procurement.

The March 17, 1975, letter from the Chairman of the SBA Size Appeals Board to counsel for SBI supplements the size determination issued by the SBA Kansas City Regional Office. This letter summarizes the pertinent facts with respect to SBI's affiliation with SBHC as follows:

Specifically, SBHC and SBI are in the same or related industries or field of operation. SBI was activated to accomplish a sale of assets of SBHC to SBI. Pott, formerly an officer in SBHC, was an officer of SBI at the time of its organization. SBHC has furnished equipment and inventory to SBI, employees are considered interchangeable, and both corporations are at the same address. All contracts issued to SBHC are to be completed by SBHC as well as contracts issued to SBI during an unknown interim period. SBHC retains a demand note for the sale of the inventory to SBI, and there in a lease agreement with the Novoson Investment Trust.

On April 29, 1975, SBI applied to the SBA Kansas City Regional Office for recertification as a small business concern. On May 9, 1975, the SBA Kansas City Regional Office ruled, on SBI's petition for recertification, that SBI was still affiliated with SBHC.

The record discloses that prior to September 1, 1974, the date of the alleged sale of SBHC to SBI, the officers and directors of SBHC were also the officers and directors of SBI, with only one exception. On September 1, 1974, there was a purported sale of SBHC's assets to SBI and a sale of SBI to three former employees of SBHC. It is this alleged sale that formed the foundation of SBI's self-certification on the subject procurement. We agree with Bancroft's contention that SBI failed to exercise the "higher than usual degree of care" which we have held to be required of firms that certify themselves as small and that SBI casually or negligently utilized the self-certification procedures. We believe that a reasonably prudent bidder, in view of the circumstances of SBI's relationship with SBHC, should have been on notice that there was a serious question as to its size status which should have been resolved before certifying that it was a small business.

Moreover, the facts establish that SBI intended at the time it submitted its bid to have SBHC, a large business, manufacture the supplies to be furnished under the contract and failed to indicate this fact in its bid. SBI was under an affirmative obligation to determine from SBHC its size status prior to representing that the supplies to be furnished were to be manufactured by a small business concern.

The contracting officer states that in cases where our Office has found a bidder to have made other than a good faith self-certification as to its size status, the facts have disclosed empirical data which a bidder could use to determine whether its firm was small. See for example, 51 Comp. Gen. 595, *supra*, where the question of size status concerned the number of employees; see also 41 Comp. Gen. 47 (1961), which dealt with a situation where the bidder was aware that the SBA had taken the position that its size status was other than small. The contracting officer contends that in those situations, where there is empirical data with which to make a comparison, a higher degree of care should be placed on the bidder in determining if there in fact was other than a good faith certification. In the present case, the con-

tracting officer points out that SBI was found to be other than a small business based on the theory of affiliation with a large business. The contracting officer states that, although our Office has not distinguished these two completely different areas when deciding if a certification was made in good faith and the corresponding duty of care upon a bidder when it makes a certification, such a difference should be delineated.

The record in this case demonstrates that the question of affiliation involves complex legal and technical issues and in these situations the opportunity for abuse of the self-certification procedure appears to be greater than in other cases where objective criteria such as number of employees or annual receipts of a bidder are readily determinable from standard documents and business records. Since self-certifications usually are not questioned, we continue to believe that bidders must be held to a higher than usual degree of care in determining whether they are or are not small business. Such care is particularly important where, as here, a bidder takes over the business of a concern that it knows, or should have known, is a large business.

Under these circumstances, we agree that SBI failed to self-certify its small business status in good faith. However, since the contract has been fully performed, no remedial action is possible.

Finally, Bancroft urges the adoption of a rule requiring the new concern in this type of situation, that is, where the prospective bidder has recently purchased another company, to obtain a small business certificate from the SBA prior to self-certifying its status as small. We are bringing Bancroft's suggested rule to the attention of the SBA for its consideration.

[B-183963, B-184058, B-184065, B-184102, B-184102(2), B-184117]

Contracts—Awards—Small Business Concerns—Fair Proportion Criteria

It is policy of Congress that fair proportion of purchases and contracts be placed with small business concerns if adequate prices and reasonable competition can be expected and determination of these facts is made by contracting officer and small business representative prior to issuance of solicitation.

Contracts—Awards—To Other Than Lowest Bidder—Small Business Set-Asides

Mere fact that lower bid is submitted by large business on small business set-aside solicitation does not *per se* make award to small business, at slightly higher percentage differential, against public interest under Armed Services Procurement Regulation (ASPR) 1-706.3 since 15 U.S.C. 631 has been interpreted to mean that Government may pay premium price to small business firms on restricted procurements to implement intent of Congress.

Contracts—Protests—Unsubstantiated Allegations—Absence of Evidence in Record

Absent further evidence in record, unsubstantiated allegation that Defense Supply Agency (DSA) has improperly decided to restrict all hat procurements within SIC 2352 to small business will not be considered.

Contracts—Protests—Procedures—Bid Protest Procedures—Improprieties and Timeliness

Allegation that contracting officer's original determination to advertise solicitation on unrestricted basis should not have been reversed by DSA, first raised almost 10 weeks after issuance of amendment which reversed contracting officer's determination, is untimely and not for consideration under 4 CFR 20.2 (a) of then applicable Interim Bid Protest Procedures and Standards, which requires that such protests be filed prior to bid opening.

Bids—Competitive System—Unfair Practices Allegation

Contention raising allegedly "questionable" pattern of bidding by certain small business firms is not for consideration, since ASPR 1-111.2, *"Noncompetitive Practices,"* provides that such matters should be referred by procuring agency to Attorney General for prosecution.

Contracts—Awards—Small Business Concerns—Price Reasonableness

While provisions of Small Business Act authorize award of contracts to small business concerns at prices which may be higher than those obtainable by unrestricted competition, no basis exists upon which it may be concluded that Act was intended to *require* award of contracts to small business concerns at prices considered unreasonable by contracting agency, or that contracting agency would be prohibited from withdrawing set-aside determination where bids submitted by small business concerns were considered unreasonable.

Contracts—Awards—Small Business Concerns—Set-Asides—Withdrawal—Bid Price Excessive

Determination of unreasonableness of price of small business bid, based upon comparison with prior procurement and with Government estimates, involves no impropriety on part of contracting officer and, therefore, no legal basis exists to object to cancellation and resolicitation of procurement on unrestricted basis.

In the matter of Society Brand, Inc.; Propper International, Inc.; Waldman Manufacturing Company; Bancroft Cap Company; Rachman Manufacturing Company, Inc., November 19, 1975:

This decision involves the following five solicitations issued by the Defense Personnel Support Center (DPSC), Defense Supply Agency (DSA):

Solicitation	Issued
DSA100-75-B-1101	May 27, 1975.
DSA100-75-B-0753	February 13, 1975.
DSA100-75-B-1037	May 1, 1975.
DSA100-75-B-0966	March 27, 1975.
DSA100-75-B-0970	April 28, 1975.

Each solicitation requested bids for differing amounts of various types of military service caps. Each solicitation was a 100-percent small business set-aside.

All of the solicitations resulted in protests being filed with our office. Each protest will be discussed, in turn, below.

PROTEST ON SOLICITATION—1101

On June 16, 1975, bids were opened under solicitation—1101 and were as follows:

Propper International, Inc. (Propper)	$7.149
Society Brand, Inc. (SBI)	7.685
Bancroft Cap Company (Bancroft)	8.33
Rachman Manufacturing Co. (Rachman)	10.00
Custom Hat Corp	10.95
Waldman Manufacturing Co. (Waldman)	10.96
Sam Bonk	12.00

SBI made no representation as to its size status in its bid. Propper represented that it "is not" a small business concern. An addition to its representation was the note: "Pending Decision of SBA Size Appeals Board."

By mailgrams dated June 5, 1975, and June 17, 1975, counsel for Propper and SBI protested against an award being made to any other bidder. Both protests contended that the contracting officer had acted in an arbitrary and capricious manner in restricting this procurement to small business only. However, due to the urgent supply situation existing with respect to the service caps in question, DSA awarded the instant procurement to Bancroft. Both SBI and Propper were held to be other than small business firms at the time of submission of their bids and at the time of award. Due to the fact that the subject procurement was a 100-percent small business set-aside, the bids of Propper and SBI were deemed nonresponsive and, consequently, rejected in accordance with Armed Services Procurement Regulation (ASPR) § 1–703 (1974 ed.).

The issue of the "nonresponsiveness" of both Propper's and SBI's bids has gone unchallenged in the record before us. Therefore, we will restrict this portion of our decision to the propriety of the 100-percent set-aside.

As stated at 10 U.S. Code § 2301 (1970),

> It is the policy of Congress that a fair proportion of the purchases and contracts made under this chapter be placed with small business concerns.

15 U.S.C. § 631 (1970 ed.) of the Small Business Act states in part as follows:

> It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government be placed with small-business enterprises, . . . and to maintain and strengthen the over-all economy of the Nation.

DSA contends that these Acts of Congress, which expressly set forth the policy of the Government in awarding contracts to small business concerns, are implemented by ASPR § 1–706.5 (1974 ed.) which states, in pertinent part:

> (a)(1) Subject to the order of precedence established in 1–706.1(a), the entire amount of an individual procurement or a class of procurements, including but not limited to contracts for maintenance, repair, and construction, shall be set aside for exclusive small business participation (see 1–701.1) if the contracting officer determines that there is reasonable expectation that offers will be obtained from a sufficient number of responsible small business concerns so that awards will be made at reasonable prices. Total set-asides shall not be made unless such a reasonable expectation exists. (But see 1–706.6 as to partial set-asides.) Although past procurement history of the item or similar items is always important, it is not the only factor which should be considered in determining whether a reasonable expectation exists.

Although Propper and SBI have contended that there was an abuse of agency discretion in setting this procurement aside, alleging that no reasonable expectation of adequate competition existed on the part of DSA, DSA states that a review of the previous procurements for the subject item revealed that there was a basis upon which to determine that adequate competition could be expected from small business firms to justify a set-aside determination, despite the determination by the Small Business Administration (SBA) that SBI and Propper were other than small business firms. DSA points out that the subject item is one which historically received adequate competition from small business firms excluding SBI and Propper. Therefore, prior to the issuance of the solicitation, a joint determination was reached by the SBA and the contracting officer to restrict this procurement to small business firms. Additionally, DSA presents as evidence to substantiate the determination to restrict the procurement the fact that five bids were received from small business firms.

As concerns the reasonableness of price of the award made to Bancroft, DSA states that the award price of $8.33 per unit reflects a decrease of $0.28 per unit from the most recent prior award price on the caps in question. Moreover, the price submitted by Bancroft was considerably beneath the Government estimate of $8.97 each. ASPR § 1–706.3 (1974 ed.) entitled, "Review, Withdrawal, or Modification of Set-Asides or Set-Aside Proposals" provides in pertinent part as follows:

If, prior to award of a contract involving an individual or class set-aside, the contracting officer considers that procurement of the set-aside from a small business concern would be detrimental to the public interest (e.g. because of unreasonable price), he may withdraw a unilateral or joint set-aside determination by giving written notice to the small business specialist, and the SBA representative, if available, stating the reasons for the withdrawal.

The mere fact that a lower bid price was submitted by Propper on the solicitation does not *per se* make an award to Bancroft, at a slightly higher percentage differential, against the public interest within the meaning of ASPR § 1–706.3, *supra*. Our Office has interpreted 15 U.S.C. § 631, *et seq.*, to mean that the Government may pay a premium price to small business firms on restricted procurements to implement this policy of Congress. 53 Comp. Gen. 307 (1973); 41 *id.* 306 (1961); 31 *id.* 431 (1952). Therefore, DSA submits that in making the award to Bancroft, the contracting officer was implementing the policy of Congress, as stated in 15 U.S.C. § 644 and implemented by ASPR Part 1, § 7, in that the minor price differential between the low small business bidder and the price submitted by Propper only amounted to the recognized premium which is permissible for small business restricted procurements.

Accordingly, while the total set-aside in this case may have precluded Propper and SBI from having their bids considered for award purposes for this procurement, the fact remains that the set-aside was in accordance with ASPR § 1–706. This being the case, there is no basis for any legal objection by our Office to this set-aside based on the joint determination. *Evergreen Helicopters, Inc.*, B–183482, June 24, 1975, 75–1 CPD 382; *Sealtest Foods*, B–177587, January 15, 1974, 74–1 CPD 6.

The final issue raised by Propper and SBI under the solicitation is that there has been an improper decision by DSA to restrict all hat procurements within Standard Industrial Classification (SIC) No. 2352 to small business restricted procurements. In response, DSA states that,

* * * there has been no decision to establish a class set-aside for hat procurements under SIC 2352. At the present time, there are no small business class set-asides within SIC 2352 for any specific item. The decision as to whether a procurement should be restricted or unrestricted is made on a case by case basis prior to the issuance of each individual solicitation.

Absent further evidence in the record before us, our Office cannot conclude that any improper decision regarding a class set-aside has, in fact, been made.

In view of the foregoing, the protests of SBI and Propper under solicitation –1101 are denied.

PROTEST ON SOLICITATION -0753

Solicitation -0753 was originally issued as 50-percent unrestricted and 50-percent labor surplus area set-aside (LSA). On February 24, 1975, the SBA representative at DPSC protested to the contracting officer the decision to make the solicitation a 50-percent LSA, and recommended that the procurement be a combined Small Business/LSA. On February 25, the contracting officer denied this protest. The SBA representative, by letter dated February 26, then appealed the contracting officer's decision to the Director of Clothing and Textiles in accordance with ASPR § 1-706.3(e) (1974 ed.). The Director, by letter dated March 13, 1975, rejected the appeal. Finally, by letter of March 14, 1975, the SBA representative asked the contracting officer to suspend the procurement pending the outcome of the appeal.

After various exchanges of correspondence, by message dated April 16, 1975, DSA informed DPSC that the appeal of SBA had been sustained and the solicitation should be amended to provide for a Small Business/LSA, pursuant to ASPR § 1-706.7 (1974 ed.). On April 17, 1975, amendment -0005 was issued which formally amended the solicitation to the combined set-aside.

On May 12, 1975, bids were opened under solicitation -0753. The low bid was submitted by Propper, the second low bid being submitted by Bancroft. Propper, however, did not include a size status indication in its bid.

By letter dated May 13, 1975, counsel for Bancroft protested to DPSC the nonresponsiveness of Propper's bid. By mailgram of May 19, Propper protested the making of any award under the solicitation to any firm other than itself. However, in spite of the filing of these protests, the contracting officer discovered that an urgent supply situation existed with respect to the particular caps in question. Therefore, permission was requested, and granted, from Headquarters, DSA to make an award. Award was made to Bancroft on July 22, 1975. On July 24, 1975, the set-aside portion of the procurement was also awarded to Bancroft.

Propper has raised four issues of protest under this solicitation, the first being that the contracting officer's original determination to advertise the solicitation on an unrestricted basis was reasonable and should not have been reversed by DSA. However, the issue was first raised in Propper's June 24, 1975, letter to our Office, almost 10 weeks after the issuance of amendment -0005 which reversed the contracting officer's original determination. Pursuant to § 20.2(a) of our then applicable Interim Bid Protest Procedures and Standards, 4 C.F.R. (1974) this issue, which was readily apparent prior to bid opening had to have been filed prior to the bid opening. Propper

having failed to so file its protest causes this issue to be untimely raised and not for consideration.

The second issue raised by counsel for Propper is the alleged "questionable" pattern of bidding reflected on this and other restricted headwear procurements on bids submitted by Bancroft and certain other bidders. In rebuttal, counsel for Bancroft has fully denied this allegation. In any event, ASPR § 1–111.2 (1974 ed.), "*Noncompetitive Practices*," provides that evidence of violation of the antitrust laws (for example, collusive bidding) in advertised procurements should be referred to the Attorney General by the procuring agency involved. This is so because the interpretation and enforcement of the criminal laws of the United States are functions of the Attorney General and the Federal Courts, and it is not within our jurisdiction to determine what does or does not constitute a violation of a criminal statute. (We note, however, that Propper may directly request the Department of Justice to consider the case if it believes criminal law violations are involved.)

Next, as in solicitation –1101, counsel for Propper contends that all procurements within SIC 2352 should not be made a class set-aside for small business participation. And, as stated above, DSA states that there has been no decision to establish a class set-aside for hat procurements under SIC 2352. Again, absent further evidence in the record before us, our Office cannot conclude that any improper decision regarding a class set-aside has, in fact, been made.

The final argument presented by counsel for Propper is again similar to the argument raised under solicitation –1101, that the instant procurement should not have been set-aside for small businesses, as both inadequate competition and unreasonable prices would result. As above, DSA contends that the decision to restrict the subject procurement to small business firms was neither arbitrary nor capricious.

Relying again upon 10 U.S.C. § 2301 (1970), 15 U.S.C. § 631, and ASPR § 1–706, DSA argues that –0753 was properly set-aside as the determination to do so was based upon a reasonable expectation of obtaining adequate competition and making an award at a reasonable price. Prior to reaching the determination to set this procurement aside, DSA reviewed previous procurements for similar items and, through consultation with the SBA representative, learned that additional small business firms had expressed a serious interest in participating in the procurement. Based on these facts, DSA believes that its actions were proper.

Again, while the set-aside in this case may have precluded Propper from having its bid considered for award purposes for this procurement, the fact remains that the set-aside was in accordance with ASPR

§ 1–706. This being the case, there again is no basis for any legal objection by our Office to this set-aside.

As concerns the reasonableness of the award price to Bancroft, DSA, prior to award, performed a price analysis on the subject procurement upon which the contracting officer subsequently determined that the prices offered by Bancroft were fair and reasonable. Although there did exist a price differential between Propper and Bancroft, DSA believed that in making the award, the congressional intent of fostering small businesses would be furthered. In view of our discussion and citations above pertaining to this issue, we must agree with DSA.

Accordingly, this protest on behalf of Propper is denied.

PROTEST ON SOLICITATION –1037

Bids submitted in response to solicitation –1037 were opened on June 2, 1975, and were as follows:

Rachman	$1.84
Propper	1.049

Although the solicitation was 100-percent set-aside for small business, Propper made no representation as to its size status in its bid. Consequently, Propper's bid was held to be nonresponsive, leaving only the bid of Rachman for acceptance.

Given this situation, the contracting officer, on June 9, 1975, determined that Rachman's price was unreasonable and, therefore, solicitation –1037 was canceled in accordance with ASPR § 1–706.3(a), *supra*. The requirement was then resolicited on an unrestricted basis. The resolicitation, invitation for bids (IFB) DSA100–76–B–0025 was issued on July 22, 1975, and bids submitted thereunder were opened on August 1. The low bid submitted was Propper's, in the amount of $1.139. On September 9, 1975, award of IFB –0025 was made to Propper.

Counsel for Rachman has protested to our Office the cancellation and resolicitation of solicitation –1037. Counsel contends that the $1.84 bid of Rachman was, in fact, reasonable "in these highly inflationary times," and therefore, the decision to cancel and resolicit this procurement was arbitrary and capricious.

In response, DSA, while admitting that the intent of Congress in enacting the Small Business Act, 15 U.S.C. § 630 *et al.*, was, in part, to aid small business firms in the Government procurement process, contends that this does not mean that all other statutes and regulations should be completely disregarded during the implementation of a small business procurement. DSA specifically refers to 10 U.S.C.

§ 2305 of the Armed Services Procurement Act which states, in pertinent part, as follows:

> Awards shall be made with reasonable promptness by giving written notice to the responsible bidder whose bid conforms to the invitation and will be the most advantageous to the United States, *price* and other factors considered. [Italic supplied.]

DSA notes that although aid to small business firms in the Government procurement process is certainly one of the "other factors" cited in 10 U.S.C. § 2305, nonetheless it is more evident that price is specifically enumerated in 10 U.S.C. § 2305 as indicating to whom an award should be made. This intent of Congress that price is of paramount importance vis-a-vis the small business program is implemented by ASPR § 1–706.3 entitled, "Review, Withdrawal, or Modification of Set-Asides or Set-Aside Proposals," which provides in pertinent part as follows:

> If, prior to award of a contract involving an individual or class set-aside, the contracting officer considers that procurement of the set-aside from a small business concern would be detrimental to the public interest (*e.g., because of unreasonable price*), he may withdraw a unilateral or joint set-aside determination by giving written notice to the small business specialist, and the SBA representative, if available, stating the reasons for the withdrawal. [Italic supplied.]

Further, DSA notes that in speaking of the withdrawal of the set-aside the example given in ASPR goes directly to price. Based on the above, DSA finds it clear that when a small business set-aside is involved, the contracting officer still has an affirmative duty to seriously consider the prices at which an award can be made. The mere fact that a small business set-aside is involved does not mean that these firms should be subsidized to a point where they are completely insulated from competition from large business firms to the extent that excessive and unreasonable prices are being paid.

Our Office, in discussing this issue, stated in B–149889, November 2, 1962, that:

> While there can be no doubt that the provisions of the Small Business Act authorize the award of contracts to small business concerns at prices which may be higher than those obtainable by unrestricted competition, we are aware of no valid basis upon which it may be concluded that this act was intended to require the award of contracts to small business concerns at prices considered unreasonable by the contracting agency, or that the contracting agency would be prohibited from withdrawing a set-aside determination where the bids submitted by small business concerns were considered unreasonable. Conversely, the provisions of section 2(15) of the Small Business Act, 15 U.S.C. 644, requiring disagreements between the Small Business Administration and the contracting agency with respect to the award of contracts to small business concerns to be submitted for determination to the head of the procuring agency, would appear to clearly indicate a Congressional intention that discretion and final authority to decide whether an award should be made, even under a joint determination to set aside, was to be left in the procuring agency. It is therefore our opinion that the regulations quoted above, permitting set-aside action only where there is a reasonable expectation of sufficient competition to produce reasonable prices and providing for withdrawal of the set-aside where that expectation is not realized, are not in conflict with the Small Business Act. The withdrawal of

a set-aside, based upon a proper determination that bid prices received from small business concerns are unreasonable, therefore represents a valid exercise of the authority of a contracting agency.

See also 49 Comp. Gen. 740 (1970); B-164735, October 4, 1968; and B-164377, July 26, 1968. Therefore, while an award can be made on a small business set-aside at a price above that obtainable on the open market from large business firms, this premium price does not allow an award to be made when the contracting officer makes a determination that the only prices offered are excessive and unreasonable. Accordingly, if given this situation, the only viable alternative that remains is to cancel the solicitation and resolicit the requirements on an unrestricted basis. The question remaining for resolution then, is the propriety of the contracting officer's determination regarding the reasonableness of Rachman's price.

The contracting officer's determination that the bid price of Rachman was unreasonable was initially premised on the past price history of the items in question. The last two procurements for this item occurred in October 1974 and January 1975. On both occasions, award was made to Propper at prices of $0.965 and $1.188, respectively. Although counsel for Rachman contends that these prior prices should be disregarded since Propper is a large business, the fact remains that at the time of award of these previous contracts, Propper was, for certification purposes, a small business. The monetary difference between the last award to Propper and Rachman's bid was $0.652 each. This factor alone, contends DSA, would provide a sufficient basis upon which the contracting officer could have made a reasonable determination that the bid price of Rachman was unreasonable as to price and, therefore, should be canceled in accordance with ASPR § 2-404.1(b)(vi) (1974 ed.), which section provides for the cancellation of an invitation, after opening, where all otherwise acceptable bids are received at unreasonable prices.

Another factor utilized by the contracting officer in reaching his determination to reject Rachman's bid was a comparison of its bid price with the presolicitation estimate. The estimate in this case was $1.30 per unit or $0.54 per unit less than Rachman's bid. Again, contends DSA, this factor provides a sufficient basis for the contracting officer's finding the bid price of Rachman to be unreasonable.

The question regarding the propriety of a decision to cancel a small business set-aside and resolicit the items on an unrestricted basis has been before our Office in the past. In 37 Comp. Gen. 147 (1957), our Office upheld the withdrawal of a small business set-aside when the small business bid was approximately 10 percent higher than the previous procurement for the item. In B-158789, May 19, 1966, our Office upheld a cancellation where the price increase was 12 percent

above the previous procurement. In our opinion, each case must be resolved individually, and we believe that no arbitary cutoffs should be established to determine the reasonableness of a small business price submitted. However, in view of the almost 55-percent increase in Rachman's bid over the prior procurement, and upon comparison with the Government's estimate, we find no impropriety in the contracting officer's determination to cancel the procurement and resolicit on an unrestricted basis. *See also* B–169008, April 8, 1970.

We reach this conclusion cognizant of counsel for Rachman's argument that the contracting officer improperly utilized the "courtesy bid" submitted by Propper for comparison purposes. In view of our above opinion upholding the cancellation based upon comparison with prior procurements and the Government estimate, we find this argument unnecessary for resolution at this juncture.

Accordingly, the protest of Rachman is denied.

PROTEST ON SOLICITATION –0966

Bids submitted in response to solicitation –0966 were opened on May 27, 1975, and were as follows:

Propper	$1.345
SBI	1.54/1.50
Bancroft	1.61
Waldman	1.73
Rachman	1.955

In its submission, Propper represented that it "is not" a small business concern and that the supplies "will" be manufactured by a small business concern. An addition to its representation was the note: "Pending Decision of SBA Size Appeals Board." SBI represented that it "is not" a small business concern. Both Propper and SBI's bids were determined to be nonresponsive, since neither firm was a small business.

Given this situation, the contracting officer determined that Bancroft's price was unreasonable and, therefore, solicitation –0966 was canceled in accordance with ASPR § 1–706.3(a), *supra*. This requirement was then resolicited on an unrestricted basis. The resolicitation, IFB DSA100–76–B–0026 was issued on July 22, 1975, and bids submitted thereunder were opened on August 1. The low bid submitted was that of Propper's in the amount of $1.35. Award was made to Propper for this requirement on September 12, 1975.

Counsel for Bancroft has protested the above actions of DSA contending that the actions of the contracting officer were improper. The allegations made, the response of DSA, and the citations in support of each position are basically identical to those raised under protested

solicitation –1037. Accordingly, the only question that need be discussed and resolved is the propriety of the contracting officer's determination regarding the reasonableness of Bancroft's price.

The contracting officer's determination was initially premised upon a comparison of award prices for the prior two procurements for the subject item. The last two procurements, occurring in August and October of 1974, were both made to Propper (then classified as small business) at prices of $1.235 and $1.215, respectively. The monetary difference between the last award to Propper and Bancroft's bid was $0.395 per unit, or a 45.1-percent increase. As above, DSA contends that this factor alone would provide a sufficient basis for the contracting officer's finding the bid price of Bancroft to be unreasonable.

The contracting officer also looked at the current market conditions in reaching his determination to reject Bancroft's bid. The price estimate which the Government arrived at prior to the issuance of the original solicitation was $1.24 per unit (although DSA admits this figure was more appropriately termed a "guesstimate"). This estimate was $0.37 lower than Bancroft's bid. After bid opening, a more accurate cost estimate based on the current market conditions was performed on this item, the results of which indicated that the cost per unit should fall within a range of $1.31 to $1.36. Using this range, Bancroft's bid is still $0.25 per unit more, or on the total contract quantity, an award to Bancroft would cost the Government approximately $54,000 more than what the Government estimate of the current market cost should be. Again, DSA contends that factor alone is a sufficient basis to reject Bancroft's bid as unreasonable.

Based upon our holding regarding solicitation –1037 above, we believe that the same authorities and rationale are equally applicable here. In view of the approximately 45-percent increase in Bancroft's bid over the prior procurement, and upon comparison with the Government's revised estimate, we again find no impropriety in the contracting officer's determination to cancel the procurement and resolicit on an unrestricted basis, and accordingly the protest is denied.

PROTEST ON SOLICITATION –0970

Bids submitted in response to the fifth and final solicitation under protest –0970 were opened on May 28, 1975, and were as follows:

SBI	$2.139
Propper	2.245
Waldman	2.58
Tampa G	2.66
Rachman	2.68
Bernard	3.20
Bancroft	3.60

Neither SBI nor Propper made representation as to size status in their bids. As a result, both were held to be nonresponsive in accordance with ASPR § 1–703 and could not be considered for award. Consequently, the low responsive bid became that of Waldman at $2.58.

Given this situation, the contracting officer, on June 24, 1975, determined that Waldman's price was unreasonable and, therefore, solicitation –0970 was canceled in accordance with ASPR § 1–706.3(a). The requirement was then resolicited on an unrestricted basis. The resolicitation, IFB DSA100–76–B–0027, was issued on July 22, 1975, and bids were opened on August 1. Five bids were received as follows:

Propper	$2.345
SBI	2.43
Bancroft	2.48
Tampa G	2.54
Waldman	2.58
Rachman	2.61

Award under this resolicitation is being withheld pending the outcome of this decision.

Counsel for Waldman (the low small business bidder under –0970) has protested to our Office the cancellation and resolicitation of solicitation –0970 as being improper. As above, the allegations made, the response of DSA, and the citations in support of each position are basically identical to these raised under protested solicitations –1037 and –0966. Accordingly, the only question that need be discussed and resolved is the propriety of the contracting officer's determination regarding the reasonableness of Waldman's price.

The contracting officer's determination that the bid of Waldman was unreasonable as to price was based primarily upon a comparison of Waldman's price to that of the two prior procurements. The last procurement for this particular cap was awarded to SBI, then a small business, in the amount of $2.149. Waldman's bid price of $2.58 was approximately 20 percent higher than this previous procurement. While reasonable men may differ as regards the "reasonableness" of Waldman's price, our Office cannot find that the contracting officer acted in an arbitrary or capricious manner in view of our holding at 37 Comp. Gen. 147, *supra*. In view of this, any comparison by the contracting officer to the bids submitted by the large businesses was unnecessary, but not improper. *See* 53 Comp. Gen. 307 (1973).

Accordingly, the protest of Waldman is denied.

[B-183579]

Bids—Invitation for Bids—Line Item—Omission

Omission of one line item, which may have substantial cost impact in relation to other 53 items in invitation for bids (IFB) for acoustical ceiling work, does not constitute compelling reason to reject all bids and readvertise since other items are valid representation of Government's needs and alternate methods exist to satisfy need of omitted item.

Bids—Unbalanced—Not Automatically Precluded

Where agency receives mathematically unbalanced bids and determines that quantity estimates in IFB are valid representation of actual needs, award may be made to low bidder notwithstanding its bid is unbalanced.

In the matter of Edward B. Friel, Inc.; Free State Builders, Inc.; Michael O'Connor, Inc., November 20, 1975:

This decision concerns the General Services Administration (GSA) invitation for bids (IFB) GS-03B-49523 issued for a term contract for acoustical ceiling and associated work in the North Area buildings, Washington, D.C. Any resultant contract would cover all requirements which may arise during a 1-year term for 53 specified items. The evaluation formula contained in the IFB was based upon estimated quantity requirements weighted to reflect the expectancy that 90 percent of the work would be performed during normal Government working hours. As of bid opening on March 28, 1975, the three low evaluated bids were:

Michael O'Connor, Inc. (O'Connor)	$157,370.25
Edward B. Friel, Inc. (Friel)	197,474.00
Free State Builders, Inc. (Free State)	207,474.00

Both Friel and Free State protested to our Office on April 10, 1975, against the acceptance by GSA of O'Connor's bid alleging that it was so materially unbalanced that it did not represent the actual lowest cost to the Government. In its May 16 report to us, GSA defended the validity of the estimated quantities contained in the IFB and proposed to award the contract to O'Connor notwithstanding that the bid was unbalanced.

In its comments of May 20, 1975, submitted in response to the GSA report, Free State raised a new issue: the IFB was deficient because it omitted a line item for acoustical plaster ceiling removal. By report dated June 20, 1975, GSA responded to that matter, stating:

> After this oversight in the coverage of the prospective contract had been called to our attention, the regional office reviewed the prospective requirements for removal of that type of ceiling to ascertain the probable quantity of the item and to determine whether it would be practical to have such requirements performed by GSA's own work forces so as to permit award of the contract despite the omission.
>
> It has been concluded that the probable quantity would exceed GSA's in-house capabilities and a contract for acoustical ceiling work cannot be awarded without this particular removal item.

GSA's June 20 letter also forwarded a copy of the Findings and Determination of the contracting officer to reject all bids, cancel IFB GS–03B–49532, and resolicit the requirement. This action was predicated on Federal Procurement Regulations (FPR) § 1–2.404–1(b)(1) (1964 ed. amend. 121), which permits cancellation of an IFB when it is in the best interest of the Government because inadequate specifications are cited in the IFB.

The foregoing action prompted a protest on June 25, 1975, from O'Connor. O'Connor maintains that the new issue raised by Free State is untimely under our Bid Protest Procedures (40 *Fed. Reg.* 17979, April 24, 1975), which requires that protests based upon solicitation improprieties apparent on the face of the solicitation must be protested prior to bid opening in order to be timely filed and considered on its merits. Since the omission should have been known to Free State, as the incumbent contractor, prior to the date of bid opening, O'Connor urges that this basis of protest is untimely. Moreover, O'Connor maintains that the omission of a requirement for acoustical plaster ceiling removal is not a compelling reason to reject all bids after they have been opened and publicly exposed. O'Connor states its belief that removal of the plaster ceiling is unnecessary in virtually all of the contract work since installation of most acoustical ceiling is accomplished by "dropping" the ceiling on forms and installing the new ceiling at a lower level.

O'Connor alternatively suggests that the acoustical plaster ceiling removal be accomplished (1) under separate procurement; (2) by GSA personnel; or (3) under another of GSA's term contracts for a different area that contains a line item for acoustical ceiling plaster removal. O'Connor states that separate contracting for the services would only amount to an administrative inconvenience, and is not a compelling reason to cancel the IFB. O'Connor states that it is commonplace in the construction industry for a project to involve more than one contractor and scheduling is always accommodated by the parties. In support of its second suggestion, O'Connor notes that the GAO Building is the only building in the North Area (the subject of this contract) that is expected to require removal of acoustical plaster ceiling. Therefore, GSA's forces should be sufficient to do the work. Concerning its third suggestion, O'Connor notes that section 0110 of the IFB gives the Government "* * * THE RIGHT TO ADD TO OR DELETE FIELD OFFICES IN [THE] CONTRACT." O'Connor maintains that since this provision is in the term contract awarded for the South Area, and that contract contained a line item for removal of acoustical ceiling plaster, the GAO Building could be added to that existing contract for the South Area. Thus, GSA would

be free to award the North Area contract to O'Connor and still receive the acoustical plaster ceiling removal.

Concerning the timeliness of the issue raised by Free State, O'Connor is correct that the issue is untimely under our Bid Protest Procedures. Ordinarily, it would not be considered on its merits. However, GSA correctly notes that its exercise of its administrative discretion (to determine that it is in the best interests of the public to reject all bids and readvertise) is not subject to the timeliness constraints of our Bid Protest Procedures. Thus, at any time during our consideration of a bid protest, GSA may exercise its administrative prerogative to determine whether information before GSA, regardless of when or how that information surfaces, indicates that it is in the best interests of the public to reject all bids and readvertise. However, the information so raised may be scrutinized in our bid protest forum upon a protest to our Office (subject to our Bid Protest Procedures) that no compelling reason exists to cancel an IFB. This is precisely what has occurred here.

Generally, the discretion afforded an agency to determine that it is in the public interest to reject all bids and readvertise is limited only by the necessity that after bids have been publicly opened, a compelling reason must exist to cancel the IFB. FPR § 1-2.404-1(a) (1964 ed. amend. 121). The fact that inadequate or deficient specifications have been cited in an IFB does not *per se* require cancellation of an IFB once bids have been opened and prices exposed. 52 Comp. Gen. 285 (1972). Consideration must be given to the best interest of the Government and whether bidders have been treated fairly and equally. See *Edward B. Friel, Inc.*, 55 Comp. Gen. 231 (1975), 75-2 CPD 164.

GSA cites, in support of its action, several decisions of our Office which have upheld the propriety of a cancellation of an IFB after bid opening to revise the specifications when it is discovered that the IFB did not include all of the Government's requirements (B-170548, December 17, 1970; B-174476(1), December 7, 1971); 49 Comp. Gen. 135 (1969); or the Government's requirements differed from those expressed in the solicitation (49 Comp. Gen. 584 (1970); 47 *id.* 103 (1967)).

We find the cited decisions distinguishable from the instant case. In B-170548, *supra*, the agency canceled an IFB for lodging requirements because it omitted the requirement for providing certain meals. While the agency intended to issue one invitation for both services, through oversight it issued two IFB's, one for each service. We received a protest against the agency's proposed cancellation of the two IFB's so that one IFB for both services could be issued. We held that while we saw no valid reason why the required services would not be received as a result of two awards, we acquiesced in the cancellation because

the agency maintained that the consolidated procurement would be more cost effective in the long run. In this case, there is no allegation that cancellation and resolicitation of the entire requirement would be more cost effective.

B–174476(1), *supra*, concerned an invitation for three items of prefabricated living quarters. The claimant submitted the low bids on items 2 and 3. After bids were opened, the agency decided to materially upgrade the requirements of item 3. At that time, a local contractor who qualified as an Indian enterprise negotiated a contract under the Buy Indian Act, 25 U.S. Code § 47 (1970 ed.), with the agency (Bureau of Indian Affairs) for the housing units encompassed by item 3. Claimant was awarded only item 2 and alleged that he should be reimbursed the profit he lost that he would have made on item 3 had it been awarded. Under those circumstances, we held that the agency did not abuse its discretion to reject all bids for item 3 because of the substantial changes needed in the scope of work. In that case, the agency requirements changed after bid opening and only a single item not representing the Government's actual needs was deleted. Award was made on the remaining items since they could be performed separately. This is the thrust of O'Connor's position.

Our decision at 49 Comp. Gen. 135 (1969) involved an invitation that was canceled because the evaluation formula stated in the IFB did not provide for consideration of all cost factors (FPR § 1–2.404–1 (b)(3) (1964 ed. amend. 121)). Since that is one of the specific examples in the FPR cited as providing valid justification for canceling an IFB, we find this fact situation distinguishable also.

GSA also cites 49 Comp. Gen. 584 (1970) for the proposition that GAO will not disturb an agency determination to cancel an IFB where the Government's requirements differed from those expressed in the IFB. The IFB, as originally issued in that case, called for bids for a heat pump and air conditioning units in accordance with certain specifications and drawings. After bids were opened, the base commander directed that certain changes be made in the construction and location of some walls. The net effect was that the size of the heat pump was reduced and additional ducting required. We sustained the cancellation of that IFB on the basis that the changed specifications were so substantially different than those advertised that the bids submitted would no longer satisfy the new requirement. We believe that situation distinguishable from the present one since here the bids for all listed items will in fact satisfy the Government's needs.

Lastly, in 47 Comp. Gen., *supra*, an IFB for dredging services was canceled because it was determined that if a portion was not advertised substantial savings might accrue to the Government. We held

that the possibility of the substantial monetary savings was sufficient reason to uphold the cancellation. As in many of the foregoing cases, this case concerned the deletion of an unnecessary requirement, as opposed to the inclusion of an omitted item.

While O'Connor has offered alternate ways for GSA to satisfy its stated need for acoustical ceiling plaster removal, and GSA has proffered its view that none of those ways is practicable, we think that at least one is. Under the previous term contracts, for the North and South Areas, the GAO Building was originally in the South Area. Due to a reorganization of areas during the term of the contracts, the GAO Building was shifted to the North Area. This is permissible under the Special Conditions of the contract, section 0110, which states "THE GOVERNMENT RESERVES THE RIGHT TO ADD TO OR DELETE FIELD OFFICES IN THIS CONTRACT." Each area is divided into field offices. After the reorganization, and since the preceding North Area term contract did not have a provision for removal of acoustical ceiling plaster and the South Area contract did, removal was accomplished under the South Area contract. We perceive no impediment to GSA's doing the same under the present situation. While this method may not be as convenient as if it were included in the North Area term contract (GSA terms it "not practical"), we do not equate inconvenience with a compelling reason for cancellation. As stated in FPR § 1-2.404-1(a), *supra:*

> Preservation of the integrity of the competitive bid system dictates that, after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation. * * * As a general rule, after opening, an invitation for bids should not be cancelled and readvertised due solely to increased requirements for the items being procured. Award should be made on the initial invitation for bids and the additional quantity should be treated as a new procurement.

Note that it is preferred to treat new quantities as a separate procurement where additional quantities of the items rise after the IFB has been issued.

On August 25, GSA reported to our Office the projection that possibly 125,000 square feet of plaster may be removed under the term contract. An average of the past two contracts results in a cost estimate of $83,750. It seems to us that an estimated quantity of work of this magnitude would be sufficient to generate adequate competition for a separate procurement.

We recognize that the quantities are only estimates and carry no obligation that the estimated amounts be ordered. However, in view of the large estimated dollar amount of this single item, as compared with the totality of the 53 items advertised, in view of the possibility that prices for a resolicitation may reflect inflationary pressures; and

in view of the auction atmosphere that would be generated by a resolicitation, particularly in light of the unbalancing aspects here raised, we are not persuaded that a compelling reason exists to cancel the instant IFB. We recommend that IFB–49532 be reinstated and award made thereunder in accordance with that which follows.

We now turn to the protest basis submitted by Free State and Friel, e.g., O'Connor's low bid was so materially unbalanced that it does not represent the best offer to the Government and must be rejected. As indicated earlier, our Office has very recently had occasion to clarify our position on the issues of unbalanced bidding. In *Edward B. Friel, Inc.*, *supra*, we stated:

> B–168205(1), June 30, 1970, describes unbalanced bidding as follows:
> "* * * The term 'unbalanced' * * * is applied to bids on procurements which include a number of items as to which the actual quantities to be furnished is not fixed, in which a bidder quotes high prices on items which he believes will be required in larger quantities than those used for bid evaluation, and/or low prices on items of which he believes fewer will be called for. * * *"
>
> Our Office has recognized the two-fold aspects of unbalanced bidding. The first is a mathematical evaluation of the bid to determine whether each bid item carries its share of the cost of the work plus profit, or whether the bid is based on nominal prices for some work and enhanced prices for other work. The second aspect—material unbalancing—involves an assessment of the cost impact of a mathematically unbalanced bid. A bid is not materially unbalanced unless there is reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will not result in the lowest ultimate cost to the Government. See *Mobilease Corporation*, [54 Comp. Gen. 242 (1974), 74–2 CPD 185]. We think the controversy in this case largely involves a question of how it is determined that material unbalancing is present.
>
> We believe that, as a general rule, the inquiry into material unbalancing begins with an examination of the solicitation and its evaluation formula. The determination that a mathematically unbalanced bid has been submitted has the effect of calling into question the accuracy of the solicitation's estimate of the anticipated quantity of work and, thus, the evaluation basis upon which bids or offers are being considered for award. If, after examination, the contracting agency believes that the solicitation's estimate is a reasonably accurate representation of actual anticipated needs, then the mathematically unbalanced low bid may be accepted. See *R & R Inventory Service, Inc.*, 54 Comp. Gen. 206 (1974), 74–2 CPD 163; *Cf.* 51 Comp. Gen. 792 (1972).
>
> On the other hand, in cases where the contracting agency concludes after examination that the solicitation's estimate is not a reasonably accurate representation of actual anticipated needs, we have indicated that the solicitation should be canceled. See B–159684, October 7, 1966; B–164429, August 21, 1968.

O'Connor's bid is unbalanced. In that event, applying the above-stated rule, our inquiry concerns the validity of the estimated quantities in the IFB. GSA addressed this issue in its July 24, 1975, report to our Office as a result of Free State's assertion of May 20, 1975, that the omission of the acoustical plaster ceiling removal from the instant IFB cast doubt as to the validity of the estimated quantities. Further, Free State, as the incumbent contractor, asserts that the estimates do not reflect the actual past history of the work. In support of this argument, Free State has submitted from its records a comparison of the Government estimates for the previous North Area term contract and the actual quantities ordered under its contract.

GSA states that its estimates and evaluation formula considered the actual quantity take-off of the preceding year. In addition, it considered the experience generated during the 8 months of the existing contract, extrapolated to give 12 months projections. This extrapolation process is explained to have resulted from the fact that the IFB was necessarily prepared with sufficient lead-time to permit submission of bids, evaluation and award. Thus, the IFB was issued on February 14, 1975, or 8 months into the existing contract. To this, GSA considered when the work would probably be performed (90 percent during normal Government working hours—10 percent during other than normal Government working hours), to arrive at its evaluation formula. The effect of new buildings—J. Edgar Hoover Building, Labor Department Building, and Tax Court Building, and planned renovations to some older buildings—Justice Department Building and Federal Home Loan Bank Board, were also included in the quantity estimates. Further, activity under the previous South Area contract was considered.

On this basis, GSA asserts that if we conclude that an award should be made under the original IFB, its estimates are valid. In support of this conclusion GSA has disputed the figures submitted by Free State by submitting copies of orders issued which vary from the quantities proffered by Free State. GSA emphasizes that even if Free State's figures were correct, they were not adjusted to account for the factors described above.

We view GSA's process in determining its estimated quantity as reasonable. Free State's computations do not appear to change the basic validity of GSA's approach. Therefore, we agree with GSA that award should be made to the low responsive, responsible bidder under IFB-49532.

[B-184429]

Contractors—Responsibility—Contracting Officer's Affirmative Determination Accepted—Exceptions—Security Clearance Requirement Waived

Where it is alleged that definitive responsibility criterion—invitation for bids security clearance requirement—was waived, contracting officer's affirmative determination of responsibility is for review on merits. Determination was supported by objective evidence before contracting officer, who had received information from bidder that adequate personnel working at nearby facilities could be used to perform contract, and that predecessor contractor's qualified personnel might also be hired. General Accounting Office (GAO) has no objection to determination in view of facts of record and absence of evidence from protester demonstrating that determination lacked reasonable basis.

Contracts—Default—Performance Deficiencies—Determination—Function of Contracting Agency

Whether guard services contractor is, as protester claims, in default of contract is matter of contract administration, which is function of contracting agency, not GAO. In any event, contracting officer states that contractor beginning performance using personnel with Confidential security clearances adequately meets initial needs under contract; that necessary administrative processing to transfer Secret clearances from old to new contractor is being accomplished; and that in event Secret tests or equipment are utilized at site, contractor has capability to furnish Secret-cleared personnel.

Bids—Opening—Public—Late Bids

Advertised procurement is open and public to protect interests of both Government and bidders. Agency's position that no regulation obliged it to notify apparently successful bidder of fact that undisclosed late bid was being considered for award is not persuasive justification for declining to provide information where apparently successful bidder makes several preaward inquiries attempting to ascertain procurement status. Record does not show whether there was actual failure to furnish advice, or merely poor communication. But procurement officials should be sensitive to position of bidder and make reasonable efforts to respond to inquiries.

In the matter of the ENSEC Service Corporation, November 21, 1975:

The protest of ENSEC Service Corporation (ENSEC) presents two issues: (1) Did the Department of the Army by making an award to Advance Services, Inc. (Advance), improperly waive a requirement in invitation for bids (IFB) No. DAAG53-75-B-1920 for a "Secret" security clearance in connection with the performance of guard services?; (2) Should the Army have advised ENSEC that the Advance bid, which was submitted late, was under consideration when ENSEC made inquiries before award concerning the status of the procurement?

The IFB was issued at Fort Belvoir, Virginia, and sought bids for 1-year's guard services. Three bids were opened at the bid opening on June 18, 1975. Uffinger & Associates, Inc., submitted the low bid but was later found to be ineligible for award. ENSEC's bid price was second low.

A fourth bid—submitted by Advance—was received about 1 hour late. The contracting officer subsequently determined, however, that the bid would have been delivered on time but for mishandling by the Government. Since the Advance bid price was lower than ENSEC's, a contract was awarded to Advance on July 1, 1975, prior to ENSEC's protest.

ENSEC does not object to the Army's determination that the late Advance bid was eligible for acceptance due to Government mishandling. ENSEC contends, however, that according to documents included with the Army's report, the Army Security Officer has waived the IFB requirement for personnel with Secret clearances by allowing Advance to begin performance of the contract using personnel

with Confidential clearances. Also, ENSEC states that its former employees who were hired by Advance for the performance of the contract have not completed DD Form 48–2, "Application and Authorization For and Access to Confidential Information." ENSEC believes that the Army Security Officer had no right to waive a contract specification, and that Advance was and remains in default of its contract.

We note that DD Form 254 in the IFB established a requirement for a "Secret" security clearance in the performance of the contract. As the Army report points out, a requirement of this type relates not to bid responsiveness but to bidder responsibility. 51 Comp. Gen. 168 (1971). The Army further notes that our Office no longer reviews affirmative determinations of responsibility, absent a showing of fraud. While this is an accurate statement of the general rule (see *Central Metal Products, Incorporated*, 54 Comp. Gen. 66 (1974), 74–2 CPD 64), our Office does review affirmative determinations of responsibility where the solicitation contained definitive responsibility criteria which allegedly were not applied. See *Yardney Electric Corporation*, 54 Comp. Gen. 509 (1974), 74–2 CPD 376. Since the security clearance requirement in the present case is a definitive responsibility criterion and since ENSEC's allegations call into question whether the contracting officer adequately considered Advance's ability to perform in accordance with this requirement, the question of Advance's responsibility is properly for review by our Office.

The contracting officer states that the determination of Advance's responsibility was based upon information provided by Advance and the cognizant Army Security Office. In a letter dated June 24, 1975, responding to a request from the contracting officer, Advance stated that it had adequate personnel employed at facilities in nearby communities to meet the requirements of the contract, and also that it intended to offer employment to the predecessor contractor's qualified personnel. Also, prior to the issuance of the IFB the Army Security Office had verified that Advance was listed as having the required security clearance in the records of the Defense Contract Administration Services Region. The contracting officer states that he considered the foregoing information adequate to support an affirmative determination of responsibility.

Our Office will not object to a contracting officer's determination of responsibility unless it is shown to be without a reasonable basis. See *Leasco Information Products, Inc., et al.*, 53 Comp. Gen. 932 (1974), 74–1 CPD 314. In the present case, there was objective evidence before the contracting officer relevant to the definitive responsibility criterion. This in itself is sufficient to satisfy our Office's review standard. The relative quality of the evidence is a matter for judgment by

the contracting officer, not our Office. See *Yardney Electric Corporation, supra.* Also, we have considered the several questions raised by ENSEC concerning whether the Army could properly permit Advance representatives to visit the work site and make offers of employment to ENSEC's personnel. ENSEC has stated that this visit interfered with its business operations. We see nothing in these or ENSEC's other allegations which would demonstrate the unreasonableness of the responsibility determination and, therefore, our Office has no objection to it.

As for ENSEC's allegation that Advance is in default of its contract, in many decisions we have noted that questions as to a contractor's performance are matters pertaining to contract administration, which is a function of the contracting agency, not this Office. See, for example, *Kelly Services*, B–182071, October 8, 1974, 74–2 CPD 197. We note for the record that the contracting officer has stated that the requirement for Secret clearances was established to cover the possibility of occasional Secret equipment being used or tests being performed at the sites; that Confidential clearances would be adequate as of the time of beginning contract performance; that the necessary administrative processing of clearances from the predecessor contractor to the successor was being accomplished; and that if Secret equipment or tests are required at the site, Advance has the capability to furnish Secret-cleared personnel.

Based upon all of the foregoing circumstances, we see no basis for objection to the Army's acceptance of the Advance bid as the lowest-priced responsive bid submitted by a responsible bidder.

As for the second issue involved in the protest, ENSEC has stated that after bid opening and prior to award it had "continual" telephone conversations with the contracting officer's representative concerning the apparent low bidder (Uffinger). ENSEC states it was never advised that a late bid was being considered for award, and that this conduct by the Army prejudiced its ability to seek administrative relief prior to award of the contract.

The Army's report disputes several of ENSEC's factual allegations, stating, for instance, that on June 27, 1975—the date it was decided that the late Advance bid could be accepted—the contracting officer's representative did not discuss the procurement with ENSEC on the telephone because he was not available when ENSEC placed either of its calls on that date. It is stated that the person to whom ENSEC spoke had no knowledge of the present procurement.

We do not view the factual conflicts in the record as being particularly important. What is significant is the contracting officer's con-

clusion that there was no obligation under the circumstances to notify other bidders that a late bid was being considered for acceptance. In this regard, the contracting officer states that, under Armed Services Procurement Regulation (ASPR) § 2-303.2 (1974 ed.), the only obligation is to notify a late bidder in the event that its bid cannot be accepted.

The procedures for formal advertising established by 10 U.S. Code § 2305 (1970) are by their nature open and public. Among the purposes to be served by these procedures is the protection both of the public interest and the rights of bidders competing for the Government's business. See, in this regard, 48 Comp. Gen. 413, 414–415 (1968), where we stated as follows in regard to bid openings:

> * * * The purpose of public opening of bids for public contracts is to protect both the public interest and the bidders against any form of fraud or favoritism or partiality or complicity, and such openings should as far as possible be conducted so as to leave no ground even for suspicion of any irregularity.

Similarly, in a recent decision (*Edward B. Friel, Inc.*, 55 Comp. Gen. 231 (1975), 75-2 CPD 164), we objected to a bid evaluation method which had the effect of introducing into the procurement new evaluation factors as to which unsuccessful bidders had not had an opportunity to compete. One reason for our objection was that in the absence of any protests, bidders conceivably could be unaware of the changes introduced into the evaluation.

We believe that such concerns logically apply to the treatment of late bids and the right of bidders to obtain information concerning changes in the procurement situation. The fact that ASPR does not specifically provide for notice to bidders of a late bid being considered for award is not, in our view, a persuasive justification for failing to provide such information to a bidder apparently in line for award who has attempted several times to ascertain the status of the procurement. The facts in this case are not sufficiently clear to determine whether there was any actual failure by the contracting officials to properly respond to ENSEC's inquiries. There may simply have been poor communication between the parties. Moreover, since ENSEC's protest has been found to be without merit, we can see no prejudice to the protester in this regard. Nonetheless, this would appear to be a situation in which responsible procurement officials should be sensitive to the position of the inquiring bidder and should reasonably respond to inquiries of this type "* * * in order that [bidders'] confidence in the integrity of the procurement process may be furthered." *Federal Leasing, Inc., et al.*, 54 Comp. Gen. 872, 888 (1975), 75-1 CPD 236.

In view of the foregoing, ENSEC's protest is denied.

[B-182213]

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

Responding to prior General Accounting Office decision, agency furnishes rational support for bare conclusions reached by third evaluator (whose views prompted source selection) in conflict with technical evaluation committee's views. Committee evaluated and scored only original proposals but not additional information resulting from negotiations considered by third evaluator which reduced technical evaluation difference of technical committee in favor of protester. Additional information from lower cost awardee responded satisfactorily to technical problem raised by agency which, in large measure, accounted for technical evaluation difference between proposals. 54 Comp. Gen. 896, modified.

In the matter of Tracor Jitco, Inc., November 24, 1975:

This case involves further development and consideration of a bid protest by Tracor Jitco, Inc. (Tracor), against the award of a cost-reimbursement type contract to Southwest Research Institute (Southwest), by the National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT), on April 19, 1974.

Tracor's protest, considered in our decision *Tracor Jitco, Inc.*, 54. Comp. Gen. 896 (1975), 75-1 CPD 253, questioned the rationale for the award to Southwest. Tracor asserted that it should have received the award because its higher rated technical proposal represented greater value than Southwest's lower cost offer.

The following excerpt from our decision relates significant matters leading to the protested award:

> Both the Chairman of the Evaluation Committee (Evaluator 1) and the Associate Administrator for Research and Development (Evaluator 2) concluded that Tracor's proposal (which was about 5.6 percent higher in technical score (826 vs. 782) and 5.1 percent higher in estimated cost ($253,800 vs. $241,440) than Southwest's proposal) represented the "greatest chances of success of any of the proposals submitted." By contrast, the Southwest proposal, although judged acceptable, was considered "not as innovative" as the Tracor proposal.
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> * * * * * * *
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> We note that the analysis does not expressly or implicitly consider the innovative aspects of Tracor's proposal to be "unneeded" capabilities or evidence of "gold-plating."
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> * * * [T]he Administration's Associate Administrator for Administration (Evaluator 3) * * * decided that the proposals were essentially equal in technical merit and recommended that Southwest receive award "as their proposal represents the best dollar value procurement." The Associate Administrator's recommendation was forwarded by memo dated June 28, 1974, through the Assistant Secretary for Administration to the Secretary, * * * it is clear that the conclusions of the Associate Administrator for Administration prompted the ultimate award to Southwest in December 1974. The award was made, we assume, at the cost ($253,800) finally proposed by Southwest. The cost compares to a Government estimated cost for the work of $271,676.

We went on to note that complaints similar to Tracor's, questioning agency decisions in weighing cost/technical "trade-offs," have been considered by our Office in recent years. Uniformly, we had 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 offers showed that the higher-scored proposal was technically superior. See cases cited in *Tracor Jitco, Inc., supra.* We further noted that we have upheld awards to offerors submitting less costly, albeit lower-scored technical proposals on a finding that the point score and technical narrative did not indicate superiority in the higher ranked proposal. Also "our practice of deferring to the agency involved in cost/technical trade-off 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."

Based on the record then before us, we determined that the finding of Evaluator 3 (to wit: the subject proposals were "essentially equal") was in conflict with the views of Evaluators 1 and 2. The record contained factual development reasonably showing the superiority of Tracor's proposal in the cases of Evaluators 1 and 2, but contained only the bare conclusions in the case of Evaluator 3, i.e., that the proposals were technically equal, that the differences were insubstantial, and that the two offers assured an "equal chance of program success."

Because we did not have any indication of the reasoning underlying the conclusions reached by Evaluator 3, we were unable, on the basis of the record then before us, to conclude that the conclusions of Evaluator 3 were rationally justified, although we noted the possibility thereof.

We determined that, if the conclusions advanced by Evaluator 3 were to be rationally supported, the award to Southwest could be justified within our cited precedents. If not, Tracor's proposal would possess an uncontroverted superior rating and the only other basis for justifying award to Southwest would be offsetting cost savings in the Southwest proposal as suggested by a cost projection of the offeror's proposed costs. In the event that no such cost projection was made, we suggested, in connection with our ultimate recommendation set forth below, that cost factors inherent in each offer be evaluated to determine the reasonableness and realism of costs under the technical approaches proposed by each offeror.

We recommended that the Secretary of Transportation:

* * * ascertain the reasons Evaluator 3 had for reaching the bare conclusions involved, with specific reference to the conclusion that the proposals were technically equal, notwithstanding the implicit findings of Evaluators 1 and 2 that Tracor's proposal was technically superior. If the Secretary's investigation shows that the bare conclusions reached are not rationally supported, we are further recommending that action be taken to terminate for convenience Southwest's contract and to award the study to Tracors provided: (1) the cost savings involved with an award to Southwest are, upon further reflection and consideration of our above-expressed analysis, considered insubstantial; (2)

Tracor agrees to accept award on the terms and conditions it finally proposed; and (3) Tracor agrees to meet any congressionally-imposed deadlines for completion of the study.

In response to our decision, the Assistant Secretary for Administration, DOT, provided us with two reports containing information pertinent to the reasons behind the conclusions reached by Evaluator 3. As discussed in the reports, "the scoring and narrative summary [of Evaluators 1 and 2] were based upon the proposals as originally submitted and * * * subsequent negotiations resulted in additional information from both Southwest and Tracor Jitco [considered by Evaluator 3 and furnished our Office with one of the Assistant Administrator's reports] * * *. (Although) rescoring was not accomplished based upon the additional information, * * * it did reduce whatever were the initial differences between the two proposals."

We have examined both the original proposals and the additional information submitted by Southwest and Tracor to determine if a rational basis existed for the conclusions of Evaluator 3. As noted *supra*, Evaluators 1 and 2 characterized Southwest's proposal as "not as innovative as the Tracor Jitco proposal." With respect to Tracor's proposal, they also stated: "Substantial innovation was presented by their proposal in both the mechanical and electrical areas of the RFP requirements such as the tire locating and instrument centering mechanism (auto-centering)." The evaluators stated further that the Southwest proposal had no detailed design for an auto-centering system.

From the above, we conclude that a major reason for Tracor's proposal being judged "more innovative" and by inference thereby "having a greater chance of success" was Tracor's inclusion of a provision for an auto-centering device in its original proposal and the lack of such provision in Southwest's original proposal.

Concerned about the lack of a provision for an auto-centering device in Southwest's original proposal, DOT informally queried Southwest on this point. Southwest responded to the DOT question with "additional information."

In responding to DOT, Southwest outlined its approach to the auto-centering problem. The information may be proprietary and, therefore, we will not disclose the technical aspects of Southwest's response. However, we can say that Southwest stated that the development phases of the contract would provide information upon which to base any detailed designs for an auto-centering system. Southwest did contemplate the eventual use of such a system and included a "symbolic representation" thereof with the additional information. Our technical evaluation of this aspect of the Southwest proposal indicates that this information responded satisfactorily to the auto-centering mechanism problem raised by DOT.

The lack of a design for an auto-centering mechanism, in large measure, accounted for the characterization of the Southwest proposal as "not as innovative" as Tracor's. Therefore, we conclude that the response by Southwest in the negotiations would rationally support the conclusions reached by Evaluator 3 that the gap existing between the proposals was narrowed. As such, we believe the award to Southwest is justified within the framework of our prior decision and Tracor's bid protest is denied.

Furthermore, we note that the Assistant Administrator also provided us with information relative to the cost analysis upon which the realism and reasonableness of Southwest's cost proposal was based, as we requested in our earlier decision. The analysis included (1) comparability of proposed costs with cost elements of the Government's estimates; (2) comparability of proposed costs with cost elements of Tracor's offer; (3) review of the proposed amount and application of man-hours of both proposals; (4) consideration of the proposed, priced bill of materials submitted by Southwest; and (5) consideration of the similarity of Southwest's proposed indirect cost rates with indirect cost rates of current DOT contracts with Southwest. In view of this explanation, we have no further objection to this aspect of the evaluation.

In closing, we relate with approval the following portion from one of the reports to our Office from the Assistant Administrator:

> Various aspects of our selection and pre-award process, in this case, could have been improved with better records of actions. I intend to examine the current file documentation practices in NHTSA to determine what corrective action needs to be taken if any.

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[B–183535]

Contracts—Termination—Convenience of Government—Administrative Determinations—Finality

While termination of contract for convenience of Government is matter of administrative discretion not reviewable by General Accounting Office (GAO), review of procedures leading to award of contract is within GAO jurisdiction.

Contracts—Negotiation—Awards—Small Business Concerns—Erroneous Award—*Ab Initio v.* Voidable

Where small business size status protest was timely filed with contracting officer within 5 days after notification of successful offeror, but after award, Small Business Administration (SBA) determination that protested offeror was not small at time of award does not result in contract awarded being void *ab initio*, but merely void at option of Government, thereby precluding effective size protest. To remedy this anomaly, it is recommended that Federal Procurement Regulations be revised to require that identity of successful offeror be revealed prior to award.

Contracts—Awards—Small Business Concerns—Size—Obvious Error—Contracting Officer's Duty to Question

Contract awarded on basis of offeror's good faith certification that it is small, which status is determined erroneous by SBA, is voidable and may be terminated for convenience in discretion of agency where, as here, it is determined contracting officer should have questioned size status prior to award.

Contracts—Termination—Convenience of Government—Administrative Determinations—Valid—Absent Bad Faith or Abuse of Discretion

Although determination to terminate contract for convenience of Government rests with agency concerned and not with GAO, it is noted that court has held that in absence of bad faith or clear abuse of discretion such termination is valid and no such showing is made here.

In the matter of Service Industries, Inc.; Merchants Building Maintenance Company, November 24, 1975:

This decision involves a protest by Service Industries, Inc. (Service) against the award of contract No. GS–09B–0–1623 to Merchants Building Maintenance Company (Merchants) and a protest by Merchants against the subsequent termination of that contract, awarded pursuant to request for proposals (RFP) No. PBS–BMD–74–64(N), issued by the General Services Administration (GSA), Public Buildings Service, Buildings Management Division, for cleaning services at the Federal Building in Los Angeles.

The solicitation, issued on April 3, 1974, was a total small business set-aside. Proposals were to be received, as amended, by 4:15 p.m. on May 6, 1974. Merchants' proposal, dated May 4, 1974, contained a certification that it was a small business concern. In its best and final offer dated January 11, 1975, Merchants again certified that it was a small business having an average of less than $3 million in sales for the preceding 3 years.

Merchants, being the low offeror, was awarded the contract on February 19, 1975, with performance of the contract to begin on March 17, 1975, and to continue for 1 year, with two 1-year options. All unsuccessful offerors were notified by letter dated March 4, 1975, that the award had been made to Merchants.

On March 10, 1975, the contracting officer received a telephone call from Service informing her that Merchants was not a small business. On March 11, 1975, Service sent a telegraphic communication to the contracting officer, received on March 12, 1975, again questioning the size status of Merchants. On March 13, 1975, the protest was referred to the Small Business Administration (SBA). SBA responded on March 18, 1975, by stating that the protest was untimely. GSA further requested that SBA determine the size status of Merchants for use in future procurements. By letter dated March 20, 1975, GSA

advised Service that the protest had been referred to SBA but that any decision by SBA would not disturb the award to Merchants since the protest was received after award. On March 19, 1975, Service protested the award to our Office. By letter dated March 27, 1975, SBA advised Merchants that is was not a small business when it submitted an offer on solicitations having a size standard of $3 million in sales for 3 years. In addition, SBA concluded that while Merchants apparently was a small business at the time of submission of its proposal in May 1974, by the time of award in early 1975 it had become large by inclusion of its 1974 fiscal year sales in its total sales.

GSA subsequently advised Merchants that its contract, which contained options for two additional years of cleaning services, would not be extended beyond the initial 1-year period. This determination was based upon GSA's conclusion that information as to sales submitted with its offer should have caused the contracting officer to question the veracity of Merchants' self-certification and to refer the question of its size status to SBA pursuant to section 1–1.703–1(b) of the Federal Procurement Regulations (FPR) (1964 ed. amend. 106). By letter dated May 2, 1975, Merchants was informed that GSA contract No. GS–09B–0–1623 would be terminated for the convenience of the Government effective June 20, 1975.

Based upon the termination notice sent to Merchants by GSA, Service withdrew its protest by mailgram dated June 13, 1975, provided that the cancellation date of June 20 remained in effect. GSA by letter dated June 13, 1975, notified Merchants that the notice of termination had been modified to change the effective date to August 18, 1975. This superseded the May 2 notice of termination. By mailgram dated June 18, 1975, Service reinstated its protest after being informed by GSA of the termination date extension. On July 30, 1975, our Office received notification from GSA that it had made a determination to make an award prior to a final disposition of the protest by us. For reasons unknown an award was never made. By letter dated August 6, 1975, GSA again modified its earlier notice of termination and extended the termination date to October 17, 1975. Our Office was notified on October 14, 1975, that GSA is in the process of extending the termination date to March 16, 1976, while reserving the right to terminate the contract at any time after 30 days' notice to the contractor.

On June 6, 1975, in a letter to our Office, counsel for Merchants protested GSA's decision to terminate the contract. Counsel for Merchants contends that (1) our Office has jurisdiction to consider a protest against a termination for convenience of a contract; (2) the self-certification submitted by Merchants with its offer on May 6, 1974, indicates that it was a small business; (3) GSA has erroneously and

in abuse of its discretion terminated Merchants' contract; and (4) the protest of Service is untimely and not for consideration by our Office. Counsel for Merchants asserts that although Merchants was determined to be a large business by the SBA, it was, in fact, a small business at the time it submitted its offer in May 1974 and properly so certified. Furthermore, it is alleged that had the contracting officer questioned Merchants' size status she would have confirmed the validity of its self-certification and small business status. Therefore, it is argued that there was no basis for termination of its contract.

With regard to counsel's contention that our Office has jurisdiction to review Merchants' protest against termination of its contract, it is generally recognized that "* * * the determination whether a contract should be terminated for the convenience of the Government is a matter of administrative decision which does not rest with our Office." 47 Comp. Gen. 1, 3 (1967); *E. Walters & Company, Inc., Dynamit Nobel A G, Nico Pyrotechnik K G*, B–180381, May 3, 1974, 74–1 CPD 226. Therefore, we do not believe it would be appropriate for us to review the validity of the termination *per se*. However, it is appropriate for our Office to review the validity of the procedures leading to the award of the contract to Merchants.

Under FPR § 1–1.703–1 (1964 ed. amend. 106), a contracting officer is required to accept at face value for the particular procurement involved a certification by the bidder or offeror that it is a small business concern unless a written protest is received from another bidder concerning the size status of the apparently successful bidder or offeror or the contracting officer questions the small business status of the bidder or offeror and submits the question to the SBA for determination. Under § 1–1.703–2(b) (1964 ed. amend. 134) of the regulations a size protest by a bidder or offeror, in order to apply to the procurement in question, must be submitted to the contracting officer prior to the fifth day, exclusive of Saturdays, Sundays and legal holidays, after bid opening or closing date for receipt of proposals, except that in negotiated procurements the protest is timely if filed within 5 working days after notification of the identity of the offeror being protested. The contracting officer may at any time after bid or proposal opening question the small business status of any bidder or offeror for the purpose of a particular procurement by filing a written protest with the SBA district office in which the principal office of the protested concern is located. A protest by a contracting officer shall be timely for the purpose of the procurement in question whether filed before or after award. FPR § 1–1.703–2(b), *supra*.

Since this was a negotiated procurement and the identity of the offerors was unknown to each other until after award, it was a prac-

tical impossibility for any offeror to protest the size status of any other offeror prior to award. As previously indicated, all unsuccessful offerors were notified by letter dated March 4, 1975, that award had been made to Merchants. It appears from the record that Service received this notification on March 10 and its written protest was received by the agency on March 12. Therefore, it appears that its protest was timely and applicable to this procurement under the above regulation notwithstanding SBA's contrary conclusion.

Pursuant to 15 U.S. Code § 637(b)(6) (1970), the SBA is empowered to determine a business concern's size status for procurement purposes. Offices of the Government having procurement powers must accept as conclusive any determination reached by SBA as to which concerns are to be designated as small business. In discharge of this responsibility, SBA has promulgated regulations which have the force and effect of law (*Otis Steel Products Corporation* v. *United States*, 161 Ct. Cl. 694 (1963)), found at part 121 of chapter I of the Code of Federal Regulations, title 13 (1974). Such size determinations are final unless appealed in the manner provided in section 121.3-6. Furthermore, FPR § 1-1.703-1(b), *supra*, provides that the controlling point in time for a determination of size status shall be the date of award. Since the SBA has determined that Merchants was a large business at the time of award, this is binding on GSA.

It has long been the position of our Office that a contract awarded on the basis of a bidder's good-faith certification that it is a small business concern, which status is subsequently determined to be erroneous, is not void *ad initio* but is voidable at the option of the Government. 49 Comp. Gen. 369, 375 (1969); 41 *id.* 252 (1961). When Merchants submitted its offer in May 1974, it also submitted its 1973 annual report which showed net sales for the fiscal years ending June 30, 1973, and June 30, 1972, were $3,795,365 and $2,595,426, respectively. Such information, according to GSA, should have caused the contracting officer to question the size status of Merchants prior to making an award in February 1975. In view thereof, and since Merchants was other than a small business concern at the time of award, GSA has determined that the contract should be terminated.

As noted previously, the determination whether a contract should be terminated for convenience is a matter of administrative discretion which does not rest with our Office. 47 Comp. Gen. 1, *supra*. In this connection, however, we note that the Court of Claims held in *National Factors, Inc., and The Douglas Corporation* v. *United States*, No. 93-63, March 20, 1974, that "The termination of a contract for the convenience of the government is valid only in the absence of bad faith or a clear abuse of discretion." See *E. Walters and Company, In-*

corporated, B–180381, June 20, 1974, 74–1 CPD 337. We fail to see any showing of abuse of discretion or bad faith in connection with GSA's determination to terminate the contract.

Accordingly, there is no basis for our Office to question GSA's determination to terminate the contract.

However, we believe this case demonstrates a need for revision of § 1–1.703–2(b) of the FPR. As noted above, in a negotiated procurement the regulation provides that a size protest received within 5 days after notification of the identity of the offeror being protested is timely. However, the subsequent determination by SBA that the protested offeror is other than small does not result in the awarded contract being void *ab initio*, but merely voidable at the option of the Government. Unlike formal advertising, there is no public opening of offers. Therefore, the identity of offerors is not revealed until after award and an effective size protest is precluded. To avoid this anomalous situation, Armed Services Procurement Regulation § 3–508.2(b) (1974 ed.) provides, with certain exceptions, that in negotiated procurements the contracting officer shall inform each unsuccessful offeror by written notice of the name of the successful offeror prior to award. By separate letter of this date we are bringing this matter to the attention of the Director of the Federal Procurement Regulations Division.

In addition, we believe there is a question as to whether this procurement was properly negotiated rather than formally advertised. Although GSA has cited 41 U.S.C. § 252(c)(10) (1970) as authority for negotiating, it would appear that the specifications were adequate for formal advertising. However, since this was not an issue raised or addressed by the parties to the protest, and since this question is actively under consideration in connection with another protest before our Office, it will not be decided herein.

[B–184585]

Pay—Active Duty—Reservists—Period of Litigation—Pay Subject to Deduction for Civilian Earnings

An enlisted member of the United States Naval Reserve who after being ordered to active duty filed a petition for habeas corpus on grounds that he was not a member and was determined by Federal court order to have been lawfully enlisted and in a military status is entitled to pay and allowances during the litigation, regardless of whether he performs military duties. However, settlement of the member's claim for such pay and allowances is subject to a deduction of gross civilian earnings when he performed no meaningful or useful services for the United States Government during the period.

In the matter of pay and allowances upon determination of status by court order, November 25, 1975:

This action is in response to letter dated June 13, 1975 (file reference LM:1h 7240 Ser: 443), with enclosures, from H. G. Abajian, Navy Finance Office, Long Beach, California, requesting an advance decision, regarding the entitlement of a seaman recruit to active duty pay and allowances for the period September 3, 1974, to March 4, 1975, in the circumstances described. The request was forwarded to this Office by the Office of the Comptroller of the Navy and has been assigned submission number DO–N–1239 by the Department of Defense Military Pay and Allowance Committee.

The record shows that the member was ordered to report for active duty by Active Duty For Training Order, Serial No. 0035–03–64–11, dated February 27, 1973, issued by the Navy-Marine Corps Reserve Center, Los Angeles, California, to report to the Commanding Officer, Recruit Training Center, San Diego, California, on March 14, 1973, for 109 days of active duty for training. The submission states that the member failed to report as ordered and was declared a deserter on April 13, 1973. He was apprehended and released to military control on July 17, 1973. A Special Court Martial, convened in September 1973, found him not guilty of unauthorized absence from March 14, 1973, through July 16, 1973. However, while awaiting that disposition, the member further absented himself without authority during the periods October 1, 1973, to October 24, 1973, and November 5, 1973, to August 26, 1974, each time being apprehended and returned to military control.

On September 3, 1974, the member filed a petition in the United States District Court for the Central District of California (No. CV–74–2557–LTL(P)), for a writ of habeas corpus directed to the naval officer having custody and control of him in which he sought a determination that he was not and never had been a service member and that he was not within the jurisdiction of the United States Navy. He also sought his release and discharge and an order restraining the Navy from sending him outside the territorial limits of the Central District of California or taking any adverse action against him. The District Court issued an order setting the matter for hearing on September 24, 1974, and restrained the Navy from sending the member outside the district, or from taking any adverse action against him. On February 20, 1975, the court issued an order dismissing the petition for habeas corpus, finding that the member was lawfully enlisted into the United States Naval Reserve and bound by the documents signed in connection with that enlistment.

Since the member had received no recruit training and was required to remain within the jurisdiction of the court, he was verbally instructed to remain at home, to continue his civilian employment, and to muster daily by telephone with the Legal Office, Naval Support Activity, Long Beach, California, from September 3, 1974, to March 4, 1975. During this period he was employed by Alarm Clock Corporation, Los Angeles, California, and earned $4,207.60. On March 5, 1975, he voluntarily returned to military jurisdiction. He has been paid his pay and allowances for the period July 17, 1973, through September 2, 1974, less periods of unauthorized absences. The following questions are presented for decision:

a. Is the member entitled to pay and allowances for the period September 3, 1974, through March 4, 1975?

b. If the answer to question a is in the affirmative, should the amount of the member's civilian earnings during the period be deducted from the entitlement?

A service member is entitled to basic pay while he occupies a military status, regardless of whether he actually performs military duties. *Walsh* v. *United States*, 43 Ct. Cl. 225 (1908); *White* v. *United States*, 72 Ct. Cl. 459 (1931); *Dickenson* v. *United States*, 163 Ct. Cl. 512 (1963); and *Bell* v. *United States*, 366 U.S. 393 (1961). *See also* 43 Comp. Gen. 293, 297 (1963); and B–183625, August 20, 1975.

On the record, the District Court has determined that the member's entry on active duty in the United States Navy was proper and that he was bound by their requirements. Although command interpretation of the initial court order enabled the member to remain at home and continue his civilian employment, he continued his status as a serviceman by mustering daily. Therefore, by establishing the status of the member at the time he filed his habeas corpus petition, the court continued the member's active duty status from September 3, 1974, through March 4, 1975, thus, entitling him to pay and allowances for the period. Question a is answered accordingly.

Since its opinion in *Borak* v. *United States*, 110 Ct. Cl. 236, *cert. denied*, 335 U.S. 821, *rehearing denied*, 335 U.S. 864 (1948), the Court of Claims has permitted deductions of outside civilian earnings from recoveries of civilian and military pay. See *Motto* v. *United States*, 175 Ct. Cl. 862 (1966) and cases cited.

In those cases the employees and members concerned were improperly separated and later restored to duty status. The court held that they were entitled to pay for the period of erroneous separation but that the Government's liability was subject to reduction in the amount of interim earnings from civilian employment. Here, the member contended that he was not properly enlisted and under a court

order remained in his civilian status pending a determination of the case. Upon a holding of the court that the enlistment and order to active duty were proper the member's status on active duty was established and he became entitled to pay for the period as indicated above.

In this case as in the numerous Court of Claims decisions cited, the member concerned was not required to perform military duties pending a judicial determination of his military status. Since this situation seems to be similar to the situation involved in the court cases so far as is relevant to backpay entitlement we believe that the member's civilian earnings for the period in question may be used to reduce the amount due him as military pay.

Therefore, in answer to question b, it is our view that payment to the member for pay and allowances for the period September 3, 1974, through March 4, 1975, would be subject to a deduction of the member's gross civilian earnings.

[B-142753]

Leaves of Absence—Administrative Leave—Rest Periods—After Overseas Travel

The granting of administrative leave to an employee for acclimatization rest after he completed a full day of duty and traveled over 7 hours by air on return from Guam after crossing the international date line is a proper exercise of administrative authority. This is so since the Civil Service Commission has not issued general regulations covering the granting of administrative leave and, therefore, each agency, under the general guidance of the decisions of the Comptroller General, which are discussed in the applicable FPM Supplement, has the responsibility for determining the situations in which excusing employees from work without charge to leave is appropriate.

In the matter of administrative leave, November 26, 1975:

This action concerns a request by the Director, Accounting Division, Region IX, Department of Housing and Urban Development (HUD), for a decision as to whether it is within HUD's authority to grant excused absence without charge to annual leave or loss of pay to an employee for acclimatization rest after he has completed a full day of duty, traveled 7 hours and 35 minutes by air on return from Guam, and crossed the international date line.

As a general rule, we render formal decisions only to heads of Departments and agencies, disbursing and certifying officers, and to claimants who have filed monetary claims with our Office. *See* 31 U.S. Code §§ 74 and 82d. However, in view of the fact that the problems involved in the instant situation are of a recurring nature, we are treating the request as if it had been submitted by the Secretary of Housing and Urban Development under the broad authority of 31 U.S.C. § 74.

The record shows that Mr. Donald G. Phillips, a HUD employee, whose official duty station was Honolulu, Hawaii, was traveling under Travel Authorization CTA #8, July 1, 1974, from Agana, Guam, to Honolulu, Hawaii. Mr. Phillips left Guam on December 6, 1974, at 11:55 p.m., after completing a full day's work. He arrived in Honolulu at 11 a.m. on December 6, 1974, having crossed the international date line while on a flight of 7 hours and 35 minutes. Mr. Phillips arrived at his residence at 12:15 p.m. The question is raised whether administrative leave may be granted to the employee after he has completed a full day of duty, traveled 7 hours and 35 minutes by air, and traveled to his residence, all on the same calendar date.

An employee in a travel status is entitled to reasonable hours of rest. However, no general rule with respect to rest periods after long air flights can be promulgated and each case must be determined on its merits. *Cf.* B-164709, August 1, 1968.

Paragraph 1-7.5e of the Federal Travel Regulations (FPMR 101-7) issued by the General Services Administration, effective May 1, 1973, provides as follows:

> *Time changes during air travel.*—When an individual travels direct between duty points which are separated by several time zones and at least one of the duty points is outside the conterminous United States, per diem entitlement is not interrupted by reason of a rest period allowed the individual en route or at destination under appropriate agency rules.

However, that regulation applies only to the payment of travel expenses and not to the granting of leave. B-171543, September 10, 1973. As the employee concerned was at his permanent duty station, Honolulu, on the day in question no further travel allowances could be paid.

The Civil Service Commission has issued no general regulations on the subject of granting excused absence to employees without charge to leave (commonly called administrative leave). However, this matter is discussed in FPM Supplement 990-2, Book 630, subchapter S11. Further, regulations on this subject which apply only to daily, hourly and piecework employees, e.g. wage board employees, which were issued under the authority of 5 U.S.C. § 6104 are contained in 5 C.F.R. § 610.301 *et seq.* In general, those regulations provide that an administrative order relieving or preventing a daily, hourly or piecework employee from working may be issued for one or more of the following reasons:

> (a) Normal operations of an establishment are interrupted by events beyond the control of management or employees;
> (b) For managerial reasons, the closing of an establishment or portions thereof is required for short periods:
> (c) It is in the public interest to relieve employees from work to participate in civil activities which the Government is interested in encouraging; or
> (d) The circumstances are such that an administrative order under paragraph (a), (b), or (c) of this section is not appropriate and the department or agency under its regulations excuses, or is authorized to excuse, without charge to leave or loss of pay, employees paid on an annual basis.

Under administrative practice and decisions of our Office similar standards are applied to salaried (General Schedule) employees. Among the various purposes for which the granting of administrative leave has been recognized either by law, Executive order, Executive policy, or decisions of our Office, are those mentioned in FPM Supplement 990–2, Book 630, subchapter S11. These include:

(1) Registering and voting
(2) Civil Defense activities
(3) Participation in military funerals
(4) Blood donations
(5) Tardiness and brief absences
(6) Taking examinations
(7) Attendance at conferences or conventions
(8) Representing employee organizations
(9) Office closings

Paragraph a of subchapter S11–5 of Book 630 contains the following general instruction with regard to the type of absence in question:

> With few exceptions, agencies determine administratively situations in which they will excuse employees from duty without charge to leave and may by administrative regulation place any limitations or restrictions they feel are needed. * * *

Thus, in the absence of statute, an agency may excuse an employee for brief periods of time without charge of leave or loss of pay at the discretion of the agency. *Cf.* 44 Comp. Gen. 643 (1965) wherein it was held that employees could only be excused from duty without charge to leave or loss of pay for a lengthy period when such absence was in connection with furthering a function of the agency.

Although the pertinent HUD regulations regarding excused absences (600–1, section 8) which were furnished our Office provide further instructions with respect to the specific circumstances in which administrative leave may be granted, they do not provide specific guidance for the situation described above.

Since the Commission has not issued general regulations covering the grant of administrative leave, each agency is responsible for determining those situations in which excusing employees from work without charge to leave is appropriate under the general guidance of the decisions of this Office as they are discussed in the applicable FPM Supplement.

In the instant case Mr. Phillips performed a full day of work, traveled 7 hours and 35 minutes during night hours, and crossed several time zones within a period of 24 hours. Since the scope of authority for the granting of time off without charge to leave in circumstances similar to those in this case is not clearly defined in law and

regulations and since the granting of administrative leave for brief periods of time is within the discretion of the agency, our Office will not question the granting of such leave in these circumstances. *See* 53 Comp. Gen. 582 (1974).

[B-164709]

Leaves of Absence—Military Personnel—Travel Time—Rest Stopover

Navy member returning from Teheran, Iran, to Washington, D.C., on temporary duty, who departs from Teheran at 5:35 a.m. and completes 7 hours of travel to Rome, Italy, on a trip requiring at least 24 hours' total travel if he is to continue on the same plane or flight, may be allowed recredit of leave and paid per diem for period of rest stopover since officer's action in utilizing stop for rest appears reasonable under the circumstances.

In the matter of rest stopover en route, November 28, 1975:

This action is in response to a request for advance decision dated September 30, 1974, from the Disbursing Officer/Director of Military Pay, Navy Regional Finance Center, Washington, D.C., concerning the claim of Commander John E. Wildman, SC, USN, 239-46-7253, for additional per diem allowance and restoration of leave charged in connection with a rest stopover taken incident to travel from Teheran, Iran, to Washington, D.C. This request has been assigned control number 75-6 by the Per Diem, Travel and Transportation Allowance Committee which forwarded it by endorsement dated February 13, 1975.

The record shows that by Bureau of Naval Personnel Order No. T-13617, dated April 8, 1974, Commander Wildman was directed to travel on or about April 10, 1974, from Washington, D.C., to Teheran, Iran, and return, for the purpose of performing temporary additional duty (TAD). The record shows that he departed from his residence in Springfield, Virginia, on April 10, and remained in Teheran until his specified duties there were completed on April 16, 1974. Commander Wildman departed from Teheran on April 17, 1974, at 5:35 a.m. on Pan American Airways flight No. 111, arriving in Rome, Italy, at 10:30 a.m., an elapsed flight time of approximately 7 hours. He remained overnight in Rome and departed for Washington the following day at 12:15 p.m. on the continuation of flight No. 111, arriving at Friendship Airport at 7:47 p.m. and arriving at his residence in Springfield at 9:30 p.m., an elapsed time of approximately 15 hours.

The Navy reconstructed Commander Wildman's return travel to depart from Teheran on April 17 on flight No. 111 and to remain on the continuation from Rome to arrive at his residence at 9:30 p.m. on April 17, which requires an actual total travel time of about 24 hours.

exclusive of time necessary to travel to the airport in Teheran. His per diem allowance for April 17 was restricted to the amount payable for a member's day of return to his permanent duty station and no allowance afforded for April 18. Also Commander Wildman was charged leave for April 18. There is no indication in Commander Wildman's TAD order of any urgency with respect to his return to his permanent duty station.

Commander Wildman in his reclaim contends that in view of his early arising (3 a.m.) to meet the departure flight from Teheran and the duration of his travel, his rest stop in Rome was reasonable and authorized and, therefore, he is entitled to additional per diem allowance for travel on April 17 and 18 and for restoration of leave charged for April 18.

Title 37, U.S. Code, section 404(a) (1970), provides that under regulations prescribed by the Secretaries concerned, a member of a uniformed service is entitled to travel and transportation allowances for travel performed under orders, away from his permanent duty station. Paragraph M4204–3a of Volume 1 of the Joint Travel Regulations, issued in furtherance of this statute, provides:

> * * * a member will not normally be expected to select a schedule which will require departure between the hours of 2400 and 0600 or arrival between the hours of 2400 and 0600. In selecting schedules, due consideration should be given to duty requirements; duty hours; availability of lodgings at points of origin, destination, or way points; onward transportation; and the personal comfort and well-being of the traveler. Rest stops at way points where there is a change in carrier or mode of transportation may be permitted provided the period of travel already performed is substantial and the exigencies of the Service permit.

In our decision of December 9, 1971 (51 Comp. Gen. 364), we considered the application of an analogous provision in Volume II, Joint Travel Regulations, relating to civilian employees of the Department of Defense. (Paragraph C1051–2.) We stated there that we interpreted the regulation as intending only to furnish guidelines for use in determining whether in a particular situation the traveler acted in a reasonable manner. In decision B–177897, March 21, 1973, we extended this interpretation to members of the uniformed services, stating as follows:

> Similarly, as to military members, each particular situation should be considered as to whether the traveler in remaining overnight before continuing his travel is acting in a reasonable and prudent manner having regard to the duty performed, the available travel and the need to be at his permanent station at a particular time.

We are of the opinion that a like standard of reasonableness is for application here. Although paragraph M4204–3a of the regulation refers to rest stops incident to a change of carrier or mode of transportation, a literal interpretation of this requirement would result in an arbitrary and unreasonable distinction focused on the means of

transportation rather than the travel performed by the member. We therefore construe this requirement not to be a limitation upon applicability of the regulation, but rather a guideline to be considered in determining the reasonableness of the member's stopover.

Commander Wildman departed from Teheran at 5:35 on the morning following completion of his TAD, and completed about 7 hours of a total of approximately 24 hours of travel by the time he arrived in Rome. In these circumstances and absent a showing of an urgent requirement for his return to his permanent duty station, it was not unreasonable for Commander Wildman to take a rest stopover in Rome.

Accordingly, additional per diem should be allowed and the leave charged for April 18, 1974, should be canceled.

[B-180010]

Classification—Reclassification—Effective Date—Date of Action by Administrative Officer

Employee's GS–12 position was reclassified administratively to GS–13, effective June 2, 1975, incident to employee's grievance related to co-workers' promotions which had become effective October 11, 1974. Reclassification of position with concomitant pay increase may not be made retroactive other than as provided in 5 CFR 511.703.

In the matter of retroactive promotion—position reclassification, November 28, 1975:

By letter dated August 25, 1975, the National Labor Relations Board (NLRB) requested our decision as to the possible retroactivity of a promotion by reclassification of an NLRB employee. The pertinent facts are stated in the letter as follows:

> Marion McCaleb, a Management Analyst under the jurisdiction of the General Counsel, upon learning that two coworkers had been promoted (reclassified) from GS–343–12 to GS–343–13 effective October 11, 1974, grieved management's failure to similarly promote her through reclassification from her position of GS–343–12 to a GS–343–13.
>
> The promotions in question are reclassifications based upon accretion of duties and not competitive actions. The General Counsel, hearing the entire grievance upon appeal, determined in part that grievant was performing GS–13 work at the time of the reclassification of the other two Management Analysts and that sufficient basis existed for concluding grievant performed GS–13 work thereafter to present.
>
> Having determined grievant was classified wrongfully at the GS–12 level, the General Counsel thereupon reclassified grievant to the GS–13 level, effective June 2, 1975. [Footnote omitted.]

The Board states that it adheres to the principle of "equal pay for substantially equal work," set forth in the Classification Act of 1949, 5 U.S. Code § 5101(1)(A) (1970). The Board believes the situation here is similar to that reported in 54 Comp. Gen. 69 (1974). In that case the agency involved had a nondiscretionary agency policy which

required that newly hired attorneys be appointed at GS–11 if they met certain criteria in the Federal Personnel Manual. Through administrative error, two employees had been appointed at GS–9, and we permitted retroactive adjustment of the appointments to GS–11 with backpay. The Board also invokes 54 Comp. Gen. 312 (1974) in which we granted a retroactive promotion with backpay to an NLRB employee pursuant to an arbitration award involving a violation of a collective-bargaining agreement. It argues that the fact that the employee here was not in a collective-bargaining unit, and therefore was subject to the agency's regular grievance system, should not preclude the payment of backpay. The Board concludes that equity and our prior decisions require a favorable result.

We are unable to agree with the position taken by the NLRB or to grant the relief requested for the following reasons.

The classification of positions in the Government is governed by the Classification Act of 1949, as amended, 5 U.S.C. §§ 5101–5115. Section 5107 of Title 5 directs each agency to classify its positions in accordance with the Civil Service Commission's published standards and, when warranted, to change a position from one class or grade to another class or grade. The Civil Service Commission is given authority under section 5110 to review the classification of positions and to require changes by a certificate which is binding on the agency and on the General Accounting Office. The Commission is empowered to prescribe regulations by section 5115.

The Commission's regulations for position classification under the Act are set out in part 511 of title 5 of the Code of Federal Regulations, and 5 C.F.R. § 511.701 (1975), states that "[t]he effective date of a classification action taken by an agency is the date the action is approved in the agency or a subsequent date specifically stated." With respect to appeals within an agency, 5 C.F.R. § 511.702 states that the effective date of a change in classification resulting from an appeal "is not earlier than the date of decision on the appeal and not later than the beginning of the fourth pay period following the date of the decision * * *." These regulations are amplified in Federal Personnel Manual chapter 511, § 7–1a, which flatly states that "[an] agency may not make the [classification] action retroactively." *See also* FPM chapter 531, § 2–7(a); *Dianish* v. *United States*, 183 Ct. Cl. 702, 707–709 (1968). The only provision for a retroactive effective date in a classification action is when there is a timely appeal from classification action which resulted in a loss of pay and on appeal the prior decision is reversed at least in part. *See* 5 C.F.R. § 511.703.

The general rule is that an employee is entitled only to the salary of the position to which actually appointed, regardless of the duties performed. Thus, in a reclassification situation, an employee who is

performing duties of a grade level higher than the position to which he is appointed is not entitled to the salary of the higher level position unless and until the position is classified to the higher grade and he is promoted to it. B–180056, May 28, 1974.

Since the NLRB's submission states that the promotion of Marion McCaleb involved herein is a reclassification based upon accretion of duties and not a competitive action, it falls squarely within the regulations of the Civil Service Commission cited above and may not be made retroactive. We have ruled that when a position once has been classified in accordance with regulations, an employee may not be promoted retroactively, even though the employing agency may subsequently reconsider its classification determination and reclassify the position upwards. B–183218, March 31, 1975; B–170500, October 29, 1970.

The cases cited by the NLRB are not in point because none of them involved the issue of position classification. The prior case involving the Board (54 Comp. Gen. 312) concerned the improper filling of a vacancy from outside the agency and did not concern classification. With respect to the Board's point about treating unit and non-unit employees equally, we point out that Executive Order 11491, governing labor-management services in the Federal service, expressly provides in section 13(a) that a negotiated grievance procedure may not cover matters for which statutory appeals procedures exist, thereby excluding position classification actions.

Accordingly, the NLRB may not retroactively adjust Marion McCaleb's promotion with packpay.

[B–183433]

Garnishment—Federal Funds—State Laws

State of Washington sought to garnish pay of Air Force civilian employee to collect child support under authority of section 459 of Public Law 93–647 by means of administrative garnishment order served on Air Force Finance Officer. Air Force refused to effect garnishment on ground that administative order was not "legal process" within meaning of statute. In light of purpose of statute and lack of any limiting language, we believe "legal process" is sufficiently broad to permit garnishment by administrative order under the Washington procedure. General Accounting Office would not object to Air Force payments under State administrative order.

In the matter of the State of Washington—garnishment of Federal employee's compensation, November 28, 1975:

This matter is before us based upon a petition submitted by the State of Washington, Department of Social and Health Services, through its Chief of the Office of Support Enforcement, requesting that the Comptroller General direct and authorize the Department of

Defense to honor a State administrative order that was served upon the Assistant Finance Officer, Fairchild Air Force Base, Washington, on January 27, 1975. The Order to Withhold and Deliver sought to garnish the wages of a civilian employee of the Air Force, under the authority of section 459 of Public Law 93-647, January 4, 1975, 88 Stat. 2337, 2357 (Social Services Amendments of 1974), 42 U.S. Code 659. The garnishment was not effected because the Air Force interpreted the term "legal process" in section 459 to mean only garnishment orders issued by a court and not administrative orders. The issue presented therefore is whether the term "legal process" in section 459 includes administrative garnishment orders.

By a Decree of Divorce rendered January 15, 1970, by the Superior Court of Washington for Spokane County, the civilian employee and his wife were divorced. Under the terms of that decree, the wife was granted care, custody, and control of the three minor children born of the marriage, and the employee was ordered to pay $50 per month for the support of each of the children during their minority. Subsequent to the submission of the initial petition, we received further information from the State of Washington which indicated that, on February 3, 1970, in the Justice Court of the State of Washington in and for the County of Spokane, the employee pleaded guilty to two counts of nonsupport, and that the total support payments made by him through April 8, 1975, were $760. At some time following the divorce—the exact date is not in the record—the former wife began collecting Aid to Families with Department Children (AFDC) from the State of Washington for the three children because of the employee's failure to make support payments.

Under the Revised Code of Washington Annotated (RCWA) 74.-20A.030, payment of AFDC for the benefit of any dependent children creates a debt due and owing to the Washington Department of Social and Health Services by the parent or parents responsible for the support of the children in an amount equal to the AFDC payments, but limited by the terms of any court order providing for such support. That section further provides that the State shall be subrogated to the rights of the children or the person having custody of the children, and the State may maintain any support action or execute any administrative remedy in order to obtain reimbursement of AFDC payments that were made. The Secretary of the Washington Department of Social and Health Services may pursue the State's rights by issuing a "Notice of Support Debt Accrued and/or Accruing" under RCWA 74.20A.040. Twenty days after the notice of debt has been served on the parent against whom the court order for support is directed, the Secretary may take action to collect the monies due by lien and foreclosure, or distraint, seizure and sale, or an "Order to Withhold and Deliver."

Under RCWA 74.20A.080 the Secretary is authorized to serve an "Order to Withhold and Deliver," on any person whom he has reason to believe is in possession of any property, including wages, of the alleged debtor. This order must also be served upon the debtor. In effect, the "Order to Withhold and Deliver," can act as an order garnishing the wages or salary of the alleged debtor. If the person served fails to comply with the "Order to Withhold and Deliver," he may be subject to civil liability, under RCWA 74.20A.100, in the form of a fine equal in amount to the support debt owed, plus interest and attorney's fees.

According to the petition and supplemental materials submitted to us, the State of Washington served the employee with a notice of debt on September 20, 1974. When he failed to either satisfy the debt or raise the appropriate defenses, the State served a "Notice to Withhold and Deliver," on the Assistant Finance Officer, Fairchild Air Force Base, Washington, on January 27, 1975. The order was "returned without action," on February 14, 1975. In the memorandum returning the order, the Chief, Accounting and Finance Branch, Fairchild Air Force Base, stated that it was the opinion of the Headquarters, United States Air Force, that the procedures followed by the State did not amount to "legal process" within the meaning of section 459 of Public Law 93–647, and hence that the Air Force had no statutory authority that would enable it to comply with the order. The memorandum further stated that, as directed by higher headquarters, only garnishments issued by appropriate courts could be honored.

Following this refusal to garnish the employee's salary, the State of Washington submitted its petition requesting that we direct the Air Force to effectuate the garnishment. We solicited the views of the Department of Defense (DOD) and the Department of Health, Education, and Welfare (HEW) regarding the issues raised by the State's petition. Those views will be discussed below, wherever appropriate.

The only authority currently available that sanctions or permits the garnishment of the salary or wages of Federal employees is section 459 of Public Law 93–647, *supra*, which provides that:

CONSENT BY THE UNITED STATES TO GARNISHMENT AND SIMILAR PROCEEDINGS FOR ENFORCEMENT OF CHILD SUPPORT AND ALIMONY OBLIGATIONS

Sec. 459. Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States (including any agency or instrumentality thereof and any wholly owned Federal corporation) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

No Federal law of garnishment is created, nor is any Federal court given jurisdiction to hear or decide garnishment cases. The only thing that section 459 does is to remove, in very limited circumstances, the previously existing bar that prevented garnishment of Federal employees' salaries. In effect, section 459 provides that, in cases where collection of child support and alimony is sought through garnishment, Federal employers and employees will be treated, under the laws of each particular state, as if they were private employers and employees. Section 459 requires that a person seeking garnishment follow the garnishment laws and procedures of the particular State, and provides that, for the limited garnishment purposes, the United States will be subject to the jurisdiction of State courts when necessary under that State's garnishment laws.

In the instant case garnishment is sought not by an individual, but by the State seeking to recover payments made under an AFDC program. To properly appreciate the relationship of the State of Washington's actions and garnishment under section 459, it is appropriate to examine the Child Support Enforcement program as it was modified by Part B of Public Law 93–647. Part B is entitled "Child Support Programs," and amends the Social Security Act by adding sections 451 through 460 (42 U.S.C. 651–660), and by making various other amendments in furtherance of the goals enunciated in the newly added sections. A reading of Part B makes it apparent that the overall goal of the amendments is to increase the collection of child support payments from absent parents who have the legal obligation and the means to make these payments. The program is not restricted to AFDC cases, or to individual non-welfare related efforts. In the same vein, there is no restriction, in section 459, on garnishment either by states proceeding under assignments of support rights, or by individuals enforcing legal obligations for support.

Part B of Public Law 93–647 added subsection (26) to section 402(a) of the Social Security Act. That subsection requires that each applicant for or recipient of AFDC assign to the State any support rights from any other person, that he or she has in their own behalf or in behalf of any other family member for whom the application is made. Section 456 of Public Law 93–647 (42 U.S.C. 656) provides, in pertinent part, that:

> (a) The support rights assigned to the State under section 402(a)(26) shall constitute an obligation owed to such State by the individual responsible for providing such support. *Such obligation shall be deemed for collection purposes to be collectible under all applicable State and local processes.*
> (1) The amount of such obligation shall be—
> (A) the amount specified in a court order which covers the assigned support rights, or * * *. [Italic supplied.]

These two sections form the functional equivalent of RCWA 74.20A.030 which, by operation of law, creates a debt due and owing to the State when AFDC payments are made. It is worth noting that the Child Support Enforcement program created by chapter 74.20A of RCWA was in existence prior to the passage of Public Law 93–647, and that, in the Senate Committee on Finance report on H.R. 17045 (which became Public Law 93–647), S. Report No. 1356, 93rd Cong., 2d Sess. (1974), at page 46, Washington is listed as one of the states with the best programs for the collection of child support. On the same page the report also stated that:

> In view of the fact that most States have not implemented in a meaningful way the provisions of present law relating to be enforcement of child support and establishment of paternity, the Committee believes that new and stronger legislative action is required in this area which will create a mechanism to require compliance with the law. The major elements of this proposal have been adapted from those States which have been the most successful in establishing effective programs of child support and establishment of paternity.

Thus, the Committee on Finance was familiar with the Washington support enforcement program, found it to be a good program, and consciously adapted portions of it when drafting Public Law 93–647.

Section 456 of Public Law 93–647 quoted above, states that a child support debt assigned to a State is "collectible under all applicable State and local processes." In the State of Washington one of the processes available is the order to withhold and deliver—an administrative garnishment process, which is enforceable against all private employers and employees. To exclude the United States Government from the coverage under this procedure, on the grounds that it does not constitute "legal process," would be to place the Government in a class separate and apart from private employers, even though section 459 states that the Government shall be treated as if it were a private person.

In its reply to our request for comments, the Department of Health, Education, and Welfare declined to characterize or define the phrase "legal process," deferring to the Department of Justice. On the other hand, the Department of Defense's reply states that "legal process" should be construed to include only process issued by a State or Federal court of competent jurisdiction. The DOD reply states that the term "legal process" is not defined in section 459 or in Public Law 93–647 as a whole, nor is it specifically defined in the legislative history, and that the term is generally understood to mean an order or other process issued by a court, citing Black's Law Dictionary 4th ed., West Publishing Co., St. Paul, Minn. 1968, p. 1370 and 72 C.J.S. Process, sec. 1.C. (1955).

However, 72 C.J.S. *Process*, sec. 1.a.(1) pp. 981–982 (1955), discusses "process" as follows:

> "Process" and "writ" or "writs" are synonymous in the sense that every writ is a process, and in a narrow sense of the term "process" is limited to judicial writs in an action, or at least to writs or writings issued from or out of a court, under the seal thereof and returnable thereto, but it is not always necessary to construe the term so strictly as to limit it to a writ issued by a court in the exercise of its ordinary jurisdiction. *The term is sometimes defined as a writ or other formal writing issued by authority of law or by some court, body, or official having authority to issue it;* and it is frequently used to designate a means, by writ or otherwise, of acquiring jurisdiction of defendant or his property, or of bringing defendant into, or compelling him to appear in, court to answer. (Footnotes omitted.) [Italic supplied.]

The administrative order used herein by the State of Washington falls within the broader definition of "process" stated above.

The next argument made by DOD is based upon the title of section 459, "Garishment and Similar Proceedings for the Enforcement of Child Support and Alimony Obligations." It is their contention that, since garnishment and similar State procedures are generally ancillary or auxiliary judicial proceedings, the Congress intended to restrict the application of the section only to judicially granted process.

We cannot agree. It is true that the remedy of garnishment is generally used to enforce or collect judgment debts and that, in the past, garnishment, and all of the equivalent but variously named procedures, were enforced and effectuated only through the courts. However, Washington and several other states have developed new procedures to meet the specific needs of collection of child support in AFDC cases, apparently in an attempt to avoid the delay generally existent in the civil courts, and to give these collection efforts a higher priority and status than they might otherwise have when mixed in with the general run of civil litigation. We understand that Virginia and Georgia have enacted procedures similar to Washington's. Our reading of the title of section 459 is that it is meant to include garnishment and similar procedures whether they are judicially enforced or enforced by newly emerging administrative procedures designed to meet changing needs.

Finally, the Defense Department contends the legislative history of section 459 indicates an intent to subject the United States only to judicial proceedings. The DOD states that the reason for prohibiting garnishment of Federal employees' wages was that the United States, as sovereign, was immune from lawsuits to which it had not consented. Therefore, DOD argues, the waiver of immunity granted by section 459 was intended to apply only to "suits" and to garnishment orders issued by courts.

Again we cannot agree. When the cases barring garnishment of Federal employees were decided, administrative procedures, such as Washington's, had not yet been developed. If they had been developed, it is probable that the courts would have held that the United States was equally immune to garnishment process from administrative bodies.

In support of its position, DOD refers to a colloquy between Representatives Ullman and Kazen on the floor of the House of Representatives during the debate on the Conference Report on H.R. 17045 (which became Public Law 93–647), in support of the proposition that section 459 was intended to apply only to court orders for garnishment. Mr. Ullman was the floor manager for the conference report. We have set out below that portion of the colloquy relied on by DOD (which has been underscored), and the surrounding exchanges, so that the discussion may be considered in context:

Mr. ULLMAN. We are talking about the situation where the United States is paying out money for child support because the man has deserted his family and has refused to live up to his responsibility under an outstanding court order to support that family.

This is a case which the gentleman referred to as runaway fathers. It seems to me that we in this Congress should begin to face up to our responsibilities.

Mr. KAZEN. Mr. Speaker, I agree with the gentleman that we should begin to do it. But I think we ought to explore this. There are many unanswered questions on procedures. Many, many times there are ex parte applications for support and the court grants it without the defendant even being in court.

Is the Federal Government going to be subject to State court orders? How is it going to be enforced? Or is that mother of the children going to have to go into Federal court?

Mr. ULLMAN. It is based on the State court order for child support. *We have provided that the Secretary can allow entry into the Federal courts in some instances only when it cannot be properly taken care of under the State court order.*

Mr. KAZEN. *In other words, what the gentleman is saying is the Federal Government going to be subject to State court orders, so far as garnishment is concerned?*

Mr. ULLMAN. *We just simply have found no better way to do it.* If a father has run away from his family and his obligations, there is the problem that we have been trying to face up to for a long time but have not, as to how we can get to that father to make him live up to his obligations.

Mr. KAZEN. I agree with the ultimate results that the gentleman wants to accomplish by the provisions of this bill. My argument is with the procedure and the inequities that are going to be coming up unless we very definitely follow a very definite type of legal procedure, which cannot be done by the enactment of this provision.

Mr. ULLMAN. The father can go back to the court, he has access to the court in a legal procedure, in order to take care of such circumstances. But this is the only provision we have been able to work out that would in any way be effective.

Mr. ST GERMAIN. Mr. Speaker, will the gentleman yield?

Mr. ULLMAN: I yield to the gentleman from Rhode Island.

Mr. ST GERMAIN. Mr. Speaker, the member of the Committee on Ways and Means just mentioned the figure of $2 billion that it is now costing for child support as a result of runaway fathers and we must return runaway fathers because alimony is included. There is no provision here which requires garnish-

ment then has to be proven that that child is being supported by some other fund, is there?

Mr. ULLMAN. The fact of the matter is——

Mr. ST GERMAIN. No. I think that statement was erroneous. Mr. Chairman.

Mr. ULLMAN. The fact of the matter is, of course, that this is a fact in almost every instance. There is nothing in the bill that says that that has to be done.

Mr. ST GERMAIN. Essentially, the mother or the wife goes into the State court and gets a judgment, and then proceeds on the judgment, on the execution of same, and proceeds with the garnishment; is that not correct?

Mr. ULLMAN. The gentleman is correct.

Mr. ST GERMAIN. And there are no other conditions precedent?

Mr. ULLMAN. The garnishment is on the basis of the court order or decision. It is on the basis of the court order or by trial by the court in the case of a father or mother failing to live up to his or her obligations.

Mr. ST GERMAIN. That is right. Or with alimony?

Mr. ULLMAN. That is right, with alimony.

Mr. ECKHARDT. Mr. Speaker, will the gentleman yield?

Mr. ULLMAN. I yield to the gentleman from Texas.

Mr. ECKHARDT. Mr. Speaker, I wish to pursue briefly the question which the gentleman from Texas (Mr. Kazen) raised.

In Texas, we do not have garnishment of wages, so this would be ingraining the Federal law on existing State law. Under circumstances like that I would think the case would be removable to the Federal court as a matter of right.

Is that what the gentleman feels would result? Can these cases all be removed to Federal courts?

Mr. ULLMAN. No. The garnishment provision places the U.S. Government in the same position as a private employer. Nonsupport cases can be certified to the Federal courts only by the Secretary of HEW who must find that use of the Federal courts is the only reasonable way to enforce a court order. In the situation the gentleman cites, there would be no court order on which to base such a finding. Cong. Rec., Vol. 120, No. 180, p. H 12586 (December 20, 1974).

When this portion of the House debate is reviewed, it appears that the term "court order" is used in two contexts. First and predominantly, it describes an order issued by a State court requiring an individual to pay child support or alimony. Secondarily, the term is used to refer to orders issued in garnishment proceedings. In the absence of any evidence of intent to exclude administrative orders from the scope of section 459, we do not believe that the failure to mention administrative garnishment procedures during the floor debate is fatal to the broader definition of "legal process."

We also requested that DOD and HEW provide us with their views regarding the relationship of garnishment under section 459 and the remainder of the support enforcement program under Public Law 93-647. In the opinion of HEW, nothing in section 459 would preclude the State of Washington from using section 459, "* * * if it could otherwise enforce a subrogated right to such payments were * * * in the private sector." The response of DOD acknowledged that a State could use the section 459 garnishment procedure to collect assigned or subrogated support payments. We believe that that is the correct reading of the statute. As noted above, section 456 of Public Law

93–647 states that assigned support rights shall be collectible "under all applicable State and local processes." Certainly garnishment, whether judicially or administratively handled, is a procedure that is available in most states for collection purposes.

In summary, it is clear that the general intent of Part B of Public Law 93–647 is to maximize the collection of child support payments from absent parents and that garnishment under section 459 provides one means toward accomplishing that goal. The questioned phrase "legal process" as used in section 459 is not defined either in that section, in the remainder of the Act, or in the legislative history. We conclude that the phrase itself has no single, fixed, intrinsic meaning, and that its meaning can be found only by reviewing the entire Act and legislative history.

Since the purpose of section 459 is to facilitate the general purpose of the Act to aid the enforcement of child support and alimony obligations against absent parents by making the wages of Federal employees subject to legal process as if the United States were a private person, and since the Congress used the term "legal process" rather than "judicial process," we interpret "legal process" as used in section 459 to include both judicial orders and administrative orders authorized or sanctioned by statute. We find nothing in Public Law 93–647 or its history to show that the narrow definition of "process issued by a court" is the appropriate definition.

We believe that the favorable comments concerning the support enforcement program devised by the State of Washington contained in the Report of the Senate Committee on Finance are strong indicia that the Congress did not intend to bar Washington from using administrative process for garnishment when Federal employees fail to pay child support. The narrow definition of "legal process" would make section 459 internally inconsistent in that the section mandates that the United States be treated as if it were a private person, but the elimination of the use of administrative garnishment against Federal employees would be treating the United States differently than private persons since administrative garnishment orders in Washington are enforceable against private persons.

The United States Postal Service has reached the same conclusion with respect to postal employees. By letter dated May 27, 1975, from the Regional Counsel, Western Region, of the United States Postal Service, to the Office of Support Enforcement, Department of Social and Health Services, State of Washington, the Postal Service states that it will honor Orders to Withhold and Deliver that are served

upon it by the State. The letter states that such orders issued by the department under the Revised Code of Washington "constitute legal process as specified in Section 459 of Title IV of the Social Security Act as amended by Public Law 93–647 so as to require the compliance of the United States Postal Service with such orders and assignments. * * *"

In its report, the Defense Department also refers to the case of *Daniel J. Dixon, et al.* v. *Sidney E. Smith*, Civil Action No. 81772–C2 (Western District of Washington). The Department's understanding was that the court had declared RCWA 74.20A.080, authorizing the use of the Order to Withhold and Deliver, to be "inoperable." We have reviewed copies of the district court's judgment as well as the memorandum on appeal issued by the United States Court of Appeals for the Ninth Circuit, No. 73–3246, June 5, 1975. The District Court's Judgment makes it clear that the procedure under attack was one created by a statute which was amended in 1973, and the only portion of that statute that was under attack was the procedure for determining the amount of support payable when there was no existing court order requiring support. On appeal, the Court of Appeals remanded the case to the District Court for further proceedings, primarily for a determination as to the appropriateness of convening a three judge court pursuant to 28 U.S.C. §§ 2281 and 2284 (1970).

The court's ruling does not apply to the procedure followed in this employee's case, since in his case, there is an existing court order requiring support. Nothing in either decision invalidates the procedure used here.

Accordingly, we believe that the Air Force is authorized to honor the Order to Withhold and Deliver with respect to the employee and we would raise no legal objection to the garnishment of his salary under the above circumstances, provided that all of the procedural requirements of the State statute have been satisfied.

[B–183536]

Officers and Employees—Transfers—Relocation Expenses—House Trailers, Mobile Homes, etc.—Separate Shipment of Household Effects for Part of Distance—Reimbursement Limitation

Incident to transfer to Alaska, employee transported mobile home from Keyser, West Virginia, to Seattle, Washington, where it was determined that it did not meet Alaskan specifications. Employee stored trailer in Seattle and completed shipment of household goods to Alaska on Government Bill of Lading (GBL). Regarding reimbursement for transportation of mobile home, rule in 39 Comp. Gen. 40 is applicable. Credit should be allowed under Federal Travel Regula-

tions para. 2–7.3a for shipment of mobile home from Keyser to Seattle. Employee is not entitled to further allowance under authorization for shipment of household goods on GBL. Total payment under both authorizations may not exceed cost which would have been incurred by Government had either method been used for entire distance.

In the matter of reimbursement for transportation of mobile home, November 28, 1975:

This action is in response to a request for an advance decision by Mr. M. E. Shields, Disbursing Officer, Corps of Engineers, Department of the Army. The request was forwarded by the Per Diem, Travel, and Transportation Allowance Committee, which assigned it PDTATAC Control No. 75–10.

The record indicates that Mr. Mitchell R. Miller, an employee of the Corps of Engineers, was issued PCS Travel Order No. FY 75–723, dated October 17, 1974, authorizing his transfer from Keyser, West Virginia, to Fairbanks, Alaska. The orders authorized transportation of a mobile home from Keyser to Fairbanks for use as a residence. Prior to the shipment of the mobile home, Mr. Miller contacted the manufacturer of the mobile home in order to ascertain whether it met the specifications required by the state of Alaska for mobile homes. The manufacturer apparently assured Mr. Miller that the mobile home did meet such specifications. However, when the mobile home reached Seattle, Washington, it was denied shipment to Alaska on the basis that it did not meet Alaskan specifications.

Mr. Miller's travel orders were then amended canceling transportation of the mobile home from Seattle to Fairbanks and, in lieu thereof, authorizing transportation of household effects from Seattle to Fairbanks, in addition to authorizing 60 days temporary storage. His household effects were shipped on a Government Bill of Lading (GBL) from Seattle to Fairbanks. The mobile home was placed in storage in Seattle and Mr. Miller is now in the process of selling it.

The disbursing officer suggests that Mr. Miller is entitled to reimbursement for the transportation of his mobile home on the basis of the cost the Government would have incurred to move his household effects from his old duty station in Keyser to his new duty station in Fairbanks, less the value of the GBL issued to move his household effects from Seattle to Fairbanks. The Per Diem, Travel, and Transportation Committee suggests that the rule in 39 Comp. Gen. 40 (1959) is for application. That decision stands for the principle that, quoting from the syllabus:

While a travel authorization which would provide for the transportation of household effects, or in lieu thereof the transportation of a house trailer, would be within administrative discretion, only one method for the entire distance

should be used rather than a combination of the two for different portions of the distance but, if because of conditions beyond the control of the employee and if acceptable to the administrative office the use of both methods is required, allowance under the separate authorization for the respective portions of the distance may be paid, but the total payment may not exceed the cost which would have been incurred had either of the methods been used for the entire distance.

The provisions pertaining to eligibility for transportation of an employee's mobile home are set out at Federal Travel Regulations (FMPR 101–7) para. 2–7.1a (May 1973), which provides:

An employee who is entitled to transportation of his household goods under these regulations shall, in lieu of such transportation, be entitled to an allowance, as provided in this part, for the transportation of a mobile home for use as a residence. In order to be eligible for the allowance, the employee shall certify in a manner prescribed by the head of the agency that the mobile home is for use as a residence for the employee and/or his immediate family at the destination. If an employee is not eligible to receive an allowance for movement of his mobile home, he may be eligible to receive an allowance based on the transportation of his household goods under the provisions of 2–8.

With respect to the required certification of use as a residence we note that the file does not contain such a certification. We assume that Mr. Miller has properly completed one since he was authorized transporation of his mobile home. Furthermore, Mr. Miller did not utilize the mobile home as a residence at his new duty station. However, we are of the opinion that this does not defeat his entitlement under the circumstances presented by this case.

We have previously ruled in similar cases that, absent any negligence or intentional wrongdoing on the part of an employee to subvert his certification of use as a residence, we would not object to reimbursement of transportation of a mobile home. B–168123, December 9, 1969. In that case the employee was prevented from utilizing the mobile home as a residence due to its being damaged in transit. In the instant case, the employee's inability to utilize the mobile home as a residence was also due to circumstances beyond his control and not due to negligence. Here, despite Mr. Miller's attempts to ensure that his mobile home would meet Alaskan specifications, the mobile home was not permitted to enter Alaska because it did not meet the specifications establishing minimum standards for suitability for Alaskan conditions.

Regarding the computation of allowable expenses for transportation of Mr. Miller's mobile home, we stated in 39 Comp. Gen. 40, *supra*, that where two authorizations are used for different portions of the trip the "allowance under the separate authorizations for the respective portions may be made in accordance with the applicable regulations." We added that "[t]he total payment in such cases should not

exceed the cost which would have been incurred by the Government had either of the authorities been used for the entire distance." 39 Comp. Gen. 40, 42.

We agree with the Per Diem, Travel, and Transportation Committee that the above rule is applicable in this case. Therefore, the computation of Mr. Miller's entitlement under the authorization by which his mobile home was transported from Keyser, West Virginia, to Seattle, Washington, should be made in accordance with FTR para. 2–7.3a. Accordingly, Mr. Miller's entitlement is limited to the cost of transporting his mobile home by commercial carrier from Keyser to Seattle.

Since a GBL was issued for the transportation of his household goods from Seattle to Fairbanks, Mr. Miller is not entitled to any further allowance with regard to that portion of the shipment. However, the total payment for both portions of the transportation may not exceed the cost which would have been incurred by the Government had either of the methods been used for the entire distance.

Although the voucher accompanying the submission contains other items for reimbursement, including subsistence while occupying temporary quarters and miscellaneous expense, we are not ruling on those portions of the voucher since no legal questions were presented with regard thereto.

The voucher with supporting documents is returned and should be processed in accordance with the above.

[B–184403]

Contracts—Negotiation—Awards—Multiple—Number

Where under terms of request for proposals (RFP) Government reserved right to make any number of awards, such reservation can only be regarded as also reserving to Government its right to make more than three awards even though it later indicated that its contemplation was to make maximum of three awards. While offerors were led to believe, because of confusing and misleading language in RFP, that three awards would be made, harm to competitive system generated by agency's action does not necessitate recommending that corrective action be taken.

Contracts—Termination—Convenience of Government—Contractor Mislead

Since contractor awarded 5,000 units was reasonably led to believe that three awards, each of 10,000 units, would be made, contractor should be afforded opportunity to have its contract terminated for convenience if contractor so desires.

Contracts—Negotiation—Requests for Proposals—Construction—Inconsistent Provisions

In interpreting seemingly inconsistent provisions of RFP it is incumbent upon General Accounting Office to attempt to read provisions together.

In the matter of Lite Industries, Inc., November 28, 1975:

Request for proposals (RFP) No. DSA100-75-R-0830 was issued on February 21, 1975, seeking offers for item 0001—15,000 each sleeping bags, intermediate cold—and item 0002—15,000 each sleeping bags, extreme cold. The RFP was restricted to 100-percent participation by small business firms under the authority of 10 U.S. Code § 2304(a) (1) (1970). Section "B" of the RFP stated that:

This is a production test procurement and is for the purpose of determining whether the SLEEPING BAG, INTERMEDIATE COLD TYPE I; SLEEPING BAG, EXTREME COLD, TYPE II being procured herein can be economically manufactured in quantity production in accordance with accepted production practices and the requirement of MIL-S-43880.

Of the 36 firms solicited, offers were received from six. Oral discussions were initiated with the objective of insuring that all offerors fully understood the technical requirements and the exploration of cost areas. A request for best and final offers was issued to the six offerors on April 24, 1975, with a closing date of May 1, 1975. While preaward surveys of the apparently successful offerors (including Lite) were being conducted, it appeared that, due to unavailability of funds, awards could not be made until July 1, 1975. As a result of the funding problem and a change in the required delivery schedule, negotiations were reopened on June 6, 1975, with all the firms initially solicited. A June 9, 1975, telegram requested best and final offers in accordance with the revised delivery schedule by June 11, 1975. That telegram also indicated that "The Government intends to award a maximum of three contracts for a quantity of 5,000 each of both Type I and Type II, for a total quantity of 10,000 each * * *."

This intention was arrived at after an examination of the proposals submitted up to June 6, 1975, revealed that this would result in the lowest cost to the Government. It should be noted that the RFP, section B30.86, clause 2, contained the following provisions:

The Government reserves the right, wherever feasible, to make a minimum of three (3) awards in order to insure successful completion of the production test whereby no one firm or its subsidiaries and affiliates will be awarded more than one contract. However, any number of awards may be made if determined to be in the best interest of the Government. Bidders are requested not to indicate any minimum quantities in excess of *5,000 EA OF EACH ITEM*

And, paragraph 10(c) of Standard Form (SF) 33A (incorporated into the RFP by reference) states:

(c) The Government may accept any item or group of items of any offer, unless the offeror qualifies his offer by specific limitations. UNLESS OTHERWISE PROVIDED IN THE SCHEDULE, OFFERS MAY BE SUBMITTED FOR ANY QUANTITIES LESS THAN THOSE SPECIFIED; AND THE GOVERNMENT RESERVES THE RIGHT TO MAKE AN AWARD ON ANY ITEM FOR A QUANTITY LESS THAN THE QUANTITY OFFERED AT THE UNIT PRICES OFFERED UNLESS THE OFFEROR SPECIFIES OTHERWISE IN HIS OFFER.

Seven offers (with apparently only Kings Point having revised its prices at the final closing) were received on June 11, with unit prices as follows:

OFFERORS	ITEM 0001	ITEM 0002	FOB
Lite Industries	$61.59	$80.51	O
	62.59	82.51	D
Hunter Outdoor	84.88	98.88	D
KPB	75.90	88.42	D
LaCrosse	62.84	75.53	D
North Face	61.28	74.43	O
	62.26	75.41	D
Kings Point	64.75	78.88	O
	65.20	79.48	D
M. Rose	71.78	84.53	D

The Agency report states that:

An evaluation of final prices revealed that, in order to realize the optimum situation of having 5,000 units of each item manufactured by three firms,* awards as follows would result in the lowest overall cost to the Government:

OFFEROR	ITEM 0001		ITEM 0002		
	Price	Quantity	Price	Quantity	Total
Lite	$61.59	5,000			$307,950
LaCrosse	62.84	5,000	$75.53	5,000	691,850
North Face	61.28	5,000	74.43	5,000	678,550
Kings Point			78.88	5,000	394,400

Consequently, a total of *four* awards was made to the above firms for the quantities indicated.

The protester argues that (1) the Government's telegram of June 9 represented a definite commitment by the Government to make a maximum of three awards, i.e., at a total of 10,000 units per award, and this fact was reinforced by "numerous informal discussions with the procurement personnel" and by the plant survey conducted on Lite which was solely on the basis of a proposed award of 10,000 sleeping bags, and (2) since its combined prices for both type I and type II sleeping bags were lower than those submitted by Kings Point Mfg. Co., Inc., Lite should have been awarded 5,000 type II bags as well as 5,000 type I bags.

We believe that it is incumbent upon us in interpreting the RFP, including the June 9 telegram, to attempt, if possible, to read the three provisions relating to award together (i.e., paragraph 10 of SF 33A, clause 2 of section B30.86 and the June 9 telegram).

The agency's position is that the June 9 telegram merely expressed "the intention of making three awards;" however, it also argues that

*We can only construe this statement to be in error since four awards were made and the words "at least" should have been inserted before the word "three."

both by the terms of clause 2 of section B30.86 and paragraph 10 of SF 33A the Government was not obligated to award any set number of contracts. Also, the agency notes that at no time during oral discussions was any offeror advised that no more than three awards would be made and that if Lite intended to impose any quantity limitations (i.e., accept award only if 5,000 type I and 5,000 type II were awarded), it should have done so in accordance with paragraph 10 of SF 33A.

In examining paragraph 10(c) of SF 33A, we agree that by itself that provision allows the Government to make any number of awards. Consonant with this interpretation is the sentence in clause 2 of section B30.86 which states that "* * * any number of awards may be made if determined to be in the best interest of the Government." However, if this is in fact what the RFP *contemplated*, there would then seem to be no reason or need for the first sentence of clause 2 of section B30.86 to reserve any rights to the Government to make a minimum of three awards, for the Government already had reserved the right to make *any* number of awards.

The interpretation of clause 2 of section B30.86 itself is significant since it embodies the essence of the conflicting award terms. First, we believe that the clause by itself gave the Government the right to award three or more contracts wherever this was feasible. Moreover, consistent with this view, since the clause also requested offerors not to indicate minimum quantities in excess of 5,000 for each of the two items, it is clear that by doing so the Government contemplated making as many as six or even more awards (i.e., awards each at 5,000 units or less for a total of 30,000 units). When viewed in this light the Government's reservation of a right to make any number of awards can only be regarded as also reserving to the Government its right to make *fewer* than three awards. Thus, the Government had the right to award any number of contracts but contemplated awarding three or more.

The June 9 telegram, in our view, only constituted a revision of the Government's *contemplation* as to the upper limit of the number of awards because of the pricing of the proposals before it at that time. It did not diminish in any way the *right* reserved to the Government to where feasible make a minimum of three awards or, in accordance with our interpretation of other portions of clause 2 of section B30.86, to make fewer than three awards. Nor did it modify the specific request that offerors not indicate minimums in excess of 5,000 units of each item. Rather, the June 9 telegram clarified the ramifications of the above request in that no longer would the possibility of four, five,

six or more awards be *contemplated* by the Government but rather only three, and each of these awards would be for 5,000 type I; 5,000 type II—10,000 total.

Nevertheless, while the Government may have retained the right to award more than three contracts, we believe that its clear declaration that it intended to award only three was confusing, misleading, and exhibited less than sound procurement practices. However, even though Lite may have relied on the June 9 telegram, the earlier plant survey and perhaps even informal discussions with procurement officials, the fact remains that the Government did have the right to make more than three awards. Thus, while the Agency's actions were questionable, we do not believe that the harm to the competitive system generated by such actions necessitates our recommending termination for convenience of Kings Point's contract as suggested by Lite. In this regard, we note that not every harm generated by an agency's irregular procurement procedures necessitates our disturbing an award.

Also, since the Government did have the right to make more than three awards, the Agency's decision to award four contracts did in fact result in the lowest cost to the Government.

However, since we believe that Lite was reasonably led to believe that three awards, each for 10,000 units, would be made, we feel that Lite should be afforded the opportunity to have the contract awarded for 5,000 units terminated for the convenience of the Government if Lite so desires.

We are, therefore, by letter of today advising Defense Supply Agency of (a) our conclusion that in the course of the instant procurement it exhibited less than sound procurement procedures, (b) that in the future it must take greater care so as not to mislead offerors with nonbinding declarations of governmental intent, and (c) our feeling that Lite should be afforded the option of having its contract terminated for convenience.

[B–185037]

Husband and Wife—Marriage Validity—Six Months' Death Gratuity Purposes

Where claimant obtained Mexican divorce from prior spouse, subsequently married member in California and claims death gratuity as his surviving spouse, the legality of marital status of deceased and claimant is too doubtful for payment of death gratuity in the absence of declaratory decree from a court of competent jurisdiction in the United States recognizing validity of Mexican divorce so that any impediment to the validity of claimant's marriage to the member arising out of the divorce proceedings may be removed.

Decedents' Estates—Pay, etc., Due Military Personnel—Beneficiary Designations—Relationship Unnecessary

Where claimant obtained Mexican divorce from prior spouse and subsequently married deceased member, the fact that the Coast Guard paid her the member's unpaid pay and allowances as a designated beneficiary under clause (1) of 10 U.S.C. 2771(a) does not estop the Government from challenging the validity of the marriage since such payment was neither determinative of the question of her marital status nor was such question even in issue.

Gratuities—Six Months' Death—Claim—Denied

Denial of claim for six months' death gratuity under 10 U.S.C. 1477 does not constitute a taking of the member's property without due process since the amount in question is not the property of the deceased member but rather a gratuity payable out of Federal funds specifically authorized by law.

In the matter of a Petty Officer, U.S. Coast Guard, deceased, November 28, 1975:

This action is in response to a letter dated September 9, 1975, with enclosures, from C. Philip Nichols, Jr., Esq., on behalf of Peggy Lee Hamilton, concerning her entitlement to receive payment of the six months' death gratuity in the case of the late Petty Officer William E. Hamilton, USCG, 396 364, who died on July 23, 1974.

This matter was the subject of a settlement by our Transportation and Claims Division which disallowed the claim for the reason that since the claimant's marriage to the member was preceded by a Mexican divorce which had not been recognized by a court of competent jurisdiction in the United States, her marital status to the member was too doubtful to justify payment of the death gratuity.

In his letter, Mr. Nichols questions the propriety of such a ruling. He contends that since the Coast Guard paid the member's unpaid pay and allowances to her, the Government is estopped from challenging the validity of her marriage to the member. He contends further that the denial of her claim constitutes a taking of the member's property without due process.

The law governing final settlement and distribution of the unpaid pay and allowances of deceased members is contained in 10 U.S. Code 2771. Subsection (a) of that section provides in part that the amount shall be paid to the person highest on the following list living on the date of the member's death:

(1) Beneficiary designated by him in writing to receive such amount * * *.
(2) Surviving spouse.

Under the language of the before-quoted provisions, a member is permitted to designate the person or persons to receive the pay and allowances due him at the date of his death, without regard to consideration of family or dependency relationships.

The record shows that on August 29, 1973, the member executed a "Record of Emergency Data" wherein he specifically designated Peggy Lee Hamilton as his beneficiary to receive 100 percent of his unpaid pay and allowances in the event of his death. Thus, since the claimant, Peggy Lee Hamilton, was fully qualified under clause (1) of 10 U.S.C. 2771(a) and received payment on that basis, such payment to her was neither determinative of the question of her marital status nor was such question even in issue.

As to the contention that a denial of Peggy Lee Hamilton's claim to the six months' death gratuity constitutes a taking of the member's property without due process, the amount in question is not the property of the member. Rather, it is a gratuity payable out of Federal funds as specifically authorized by law.

An individual's right to receive such gratuity in the case of a deceased member of an armed force is contained in the provisions of 10 U.S.C. 1477, which provides in pertinent part:

> (a) A death gratuity payable upon the death of a person covered by section 1475 or 1476 of this title shall be paid to or for the living survivor highest on the following list:
> (1) His surviving spouse.
> (2) His children * * *.
> (3) If designated by him, any one or more of the following persons:
> (A) His parents * * *.

The legislative history of that section shows that its purpose is to provide a readjustment benefit to those persons surviving a member who were dependent upon him, in order to enable them to resettle in civilian circumstances during the transitional period immediately following the member's death. However, proof of dependency alone is insufficient to qualify a person to receive the payment. Such dependency may only be recognized if the person claiming that dependency relationship is one of the classes authorized in that section. Therefore, in order for the claimant, Peggy Lee Hamilton, to be entitled to payment of the death gratuity in this case, it is necessary that she qualify as the member's surviving spouse.

The file shows that the claimant who had been previously married and divorced in California, married Tommy Eugene Hammond in California on April 8, 1973, and obtained a divorce from him on May 31, 1973, in the judicial district of Ocampo, State of Tlaxcala, Republic of Mexico. Following the issuance of the final divorce decree, the claimant married the member, William Edward Hamilton, in Long Beach, California, on July 13, 1973.

It is well established that unless a foreign court granting a divorce had jurisdiction over the subject matter of the divorce by reason of *bona fide* residence or domicile there of at least one of the parties,

its decree of divorce will not, under the rules of international comity, be recognized in one of the states of the United States, even though the laws of such country do not make residence or domicile a condition precedent to its courts taking jurisdiction. Anotation, 143 A.L.R. 1312.

While there is authority for the view that an individual who is divorced by a foreign decree and who thereafter remarries, thus accepting the benefits of the foreign divorce decree, is estopped to deny the validity of the divorce, the Federal Government is not estopped from challenging the validity of such divorce decree when its interests might be adversely affected. *See* 25 Comp. Gen. 821 (1946) and 36 *id.* 121 (1956). Thus, as a general rule, we have held that where the validity of a subsequent marriage is dependent upon dissolution of the prior marriage by a divorce decree of a Mexican court and such divorce has not been recognized by a court of competent jurisdiction in the United States, the marital status of the parties is considered to be of too doubtful legality for this Office to approve payment of any funds predicated on such marital relationship. *See generally* 47 Comp. Gen. 286 (1967), as modified by 49 Comp. Gen. 833 (1970).

It appears from the file that the claimant who was domiciled in California prior to her Mexican divorce immediately returned to California thereafter and married the member. It would therefore appear that the claimant was only a temporary resident in Mexico and did not establish a *bona fide* domicile in that country.

In addition to the question of domicile, it appears that the divorce decree issued may be considered irregular on its face. The decree states that the parties "have been separated for six consecutive months," yet it is specifically recognized elsewhere in that document that the parties were married April 8, 1973, and were being divorced on May 31, 1973—a period of time considerably less than 6 months.

In view of the foregoing, substantial doubt exists as to the marital status of the claimant and the member at the time of his death. Therefore, it must be concluded that in the absence of a declaratory decree from a court of competent jurisdiction in the United States recognizing the validity of the claimant's Mexican divorce so that any impediment to the validity of her marriage to the member arising out of the divorce proceedings may be removed, the claimant may not be recognized as the deceased member's surviving spouse for the purpose of entitlement to payment of the six months' death gratuity.

Accordingly, the action taken by our Transportation and Claims Division is sustained.

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