Decisions of The Comptroller General of the United States

VOLUME 55 Pages 301 to 426

OCTOBER 1975

UNITED STATES
GENERAL ACCOUNTING OFFICE

PCN 45300108300

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1976

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Price $1.40 (single copy); subscription price: $17.75 a year; $4.45 additional for foreign mailing.

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Cite Decisions as 55 Comp. Gen.—.

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[B-181560]

Transportation—Additional Costs—Detention Charges—Government Liability

Arrival of shipping documents in advance of actual unloading is irrelevant to issue whether United States is liable for vehicle detention charges for unloading performed in excess of 2 hours where motor carrier, with knowledge of fact that vehicles are scheduled for unloading at an ocean terminal by Military Traffic Management Command, offers to perform transportation services which include use of its vehicles at no extra charge for 2 hours for unloading.

In the matter of Ultra Special Express, October 1, 1975:

During 1975, Ultra Special Express (Ultra) presented several hundred supplemental bills or claims totaling about $875,000 for additional transportation charges consisting of detention charges allegedly incurred at the Military Ocean Terminal, Bayonne, New Jersey (MOT BY) on over 1,700 shipments moving on Government bills of lading (GBL). The transportation was performed and Ultra collected its line-haul transportation charges on the 1,700 shipments over a 3-year period, dating back to as early as 1971.

The written record submitted by the claimant consists of two papers attached to each supplemental bill or claim. They are a form entitled "Support for Undercharges," containing information on each truckload of cargo, and a copy of an unidentified form containing information whose relevance is not explained.

Our Transportation and Claims Division (TCD) assembled the payment record on three of these claims and submitted them to us. Claim No. TK-975143 covering GBL No. E-8690339 is illustrative.

The GBL shows that Ultra transported a shipment of miscellaneous cargo from Davisville, Rhode Island, to MOTBY. The original carrier bill No. 244 for line-haul charges of $141 and for accessorial charges of $9.55 (total of $150.55), was paid on March 30, 1972. A claim by supplemental bill No. 244A for additional line-haul charges of $34 was presented on February 19, 1974, and upon allowance and payment, the charges collected by the carrier were increased to $184.55. Supplemental bill No. 244B for $1,410, the claim here under consideration, was presented February 28, 1975, or about three years after the original billing, and exceeds the amount of the previous billing by about nine times.

The "Support for Undercharges" form relating to the claim is reproduced below:

SUPPORT FOR UNDERCHARGES
ULTRA SPECIAL EXPRESS
P.O. BOX 808 FREEHOLD, NEW JERSEY 07728

REFERENCE	VOUCHER NO.
	R 3981
B/L No.	E-8, 690, 339
FROM	DAVISVILLE, R.I.
COMMODITY	MISC. CARGO
AUTHORITY	I.C.C. #3

DATE PAID	CARRIER BILL NO.
4/72	244
DATE	2-17-72
TO	M.O.T. BAYONNE, N.J.
DIM	
AMOUNT CORRECT	$1594.55
AMT. PAID TO U.S.E.	184.55
AMT. DUE U.S.E.	$1410.00

CHARGES:

LINE HAUL AS BILLED:	$ 175.00
PERMITS & TOLLS AS BILLED:	9.55
*DETENTION OF EQUIPMENT:	1410.00
TOTAL	$1594.55

NOTE: PER C G DECISION #181560 DATED JAN. 29, '75

*DETENTION OF EQUIPMENT. 94 HRS. AT $15/HR:

PRELODGE NOTICE GIVEN AT M.O.T. BAYONNE

AT 11 a.m. ON 2-18-72, PERMITTED DELIVERY

AT 11 a.m. ON 2-22-72, LESS 2 HRS. FREE TIME.

The note "Per C G Decision #181560, dated Jan. 29, '75" apparently relates to a letter dated January 29, 1975, B-181560, from the Comptroller General informing Ultra that TCD had been instructed to allow

a claim for detention charges, and to withdraw a notice of overcharge, on a shipment of three truckloads of Government property that arrived for unloading at Military Ocean Terminal, c/o Grace Prudential Lines, Shed 138, Port Newark, New Jersey, when the pier was closed due to the death of a Union Vice President. Because that letter merely informed Ultra that the Comptroller General had instructed TCD to allow a claim, it has no precedential value on the question of the liability of the United States for detention charges at MOTBY presented in these claims.

The tariff authority shown, "I.C.C. #3," refers to the carrier's Section 22 Tender I.C.C. No. 3. Below are pertinent provisions of that tender:

Item 10.

I am (We are) authorized to and do hereby offer on a continuing basis to The United States Government, . . . pursuant to Section 22 of the Interstate Commerce Act, . . . the transportation services herein described, subject to the terms and conditions herein stated. * * *

Item 16. Accessorial Services

The accessorial services shown below will be furnished by the carrier on request of the shipper at the rates or charges specified in this item, which will be in addition to the rates or charges shown in items 11 and 12. Such requests must be shown on the Bill of Lading and initialed by the person requesting same. PLEASE SEE ATTACHMENT #3 OTHERWISE: Apply all rules and regulations of heavy (sic) and Specialized Carriers Tariff Bureau, Tariff 100-E, MF-I.C.C. 26 including supplements and reissues

Attachment #1. Points Service Offered

* * * * * * *

ITEM: 3 BETWEEN Military Ocean Terminal, Bayonne, New Jersey.
ITEM: 6 AND all points and places in CONNECTICUT, DELAWARE, MARYLAND, MASSACHUSETTS, NEW JERSEY, NEW YORK, PENNSYLVANIA, except Philadelphia, RHODE ISLAND, VIRGINIA, and the DISTRICT OF COLUMBIA.

Attachment #3. Exceptions and Additional Charges

* * * * * * *

Additional Charges C (condition of shipment acceptance by Carrier)
2 hours free time for loading and/or unloading will apply on all Rate Tables as foung [sic] in Attachment #2 hereof, time in excess must specify arrival and departure date and time at origin and/or destination while Carrier's Driver is at hand. Charges if any will be added to shipment cost.

The line-haul rates and minimum charges are contained in Attachment No. 2.

We begin by noting that claimants have the burden of proving their claims. See *United States* v. *New York, New Haven & Hartford RR.*, 355 U.S. 253, 262 (1957); 51 Comp. Gen. 208, 214 (1971). In a decision dated August 5, 1974, B-180733, Ultra was apprised of this legal prerequisite to its right to payment of a claim. Through publication

of section 54.9 of Title 4, Code of Federal Regulations, Ultra, as well as other carriers, is given notice that in the presentation of claims for settlement before the General Accounting Office, the claimant must establish the clear liability of the United States and the claimant's right to payment under the contract of carriage, among other things, and the factual situation disclosed by the written record.

Both carrier and shipper are bound by their stipulations of service and rates. *Southern Railway* v. *Prescott*, 240 U.S. 632, 638 (1916). Thus, the detention charges here involved cannot be collected until the terms and conditions of the carrier's detention rules and all duties imposed by law as conditions precedent to their application have been complied with. See 13 C.J.S. *Carriers*, § 336. And duties imposed by law include settled custom and usage; its evidence consists of the understanding of the parties in their contracts which are made with reference to such usage and custom. See *Strothers* v. *Lucas*, 12 Pet. 410 (1838). It seems clear that custom and usage is used to explain the meaning of words and the intentions of the parties when they have knowledge of its existence and have contracted with reference to it. *Barnard* v. *Kellogg*, 10 Wall. 383 (1870). It is established that regulations, issued pursuant to lawful authority, have the force of law. 51 Comp. Gen. 208, 210 (1971); *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, 542 (1958). And a regulation governing the publication of detention rules provides that tariffs authorizing detention of vehicles or providing charges therefor, shall clearly show their applicability. 49 C.F.R. 1307.35(a) (1971).

Another well-established rule is that any ambiguity in a tariff written by the carrier is interpreted strongly in favor of the shipper. *Indiana Harbor Belt RR.* v. *Jacob Stern & Sons*, 37 F. Supp. 690, 691 (N.D. Ill. E.D. 1941); *Chicago & Northwestern Ry.* v. *Union Packing Co.*, 326 F. Supp. 1304, 1307 (D. Neb. 1971). This was explained to Ultra in our decision of January 28, 1975, B-182110, citing *C & H Transportation Co.* v. *United States*, 436 F. 2d 480, 193 Ct. Cl. 872 (1971).

Tender I.C.C. No. 3 incorporates by reference certain provisions of Heavy & Specialized Carriers Tariff 100-E, MF-I.C.C. 26 (Tariff 100-E). Although not articulated in the record, Ultra apparently is relying on the purported significance of a "prelodge notice," referred to in the Support For Undercharges, to support its claim; according to Ultra, it starts the period of detention. But nowhere in the record is there a reference to a specific provision in Tender I.C.C. No. 3 or Tariff 100-E that would make applicable the detention charges claimed.

By following the instructions in item 16 of I.C.C. No. 3, i.e., by referring to the "accessorial services shown below," we are referred to Attachment 3, which contains a detention provision in "Additional Charges C." That provision designates unloading time in excess of two hours as an accessorial service requiring assessment of charges in addition to the line-haul rates in Attachment 2.

By the terms of item 16, before the carrier will furnish the accessorial service of allowing the consignee to use a vehicle while unloading, in excess of 2 hours, (1) a request for such service must be made; (2) the request must be noted on the bill of lading; and (3) the request must be initialed by the requesting person. Further, according to the terms of Attachment 3, (4) the arrival date and time at destination must be specified, apparently (5) in the presence of the carrier's driver.

Conditions precedent to liability of the Government for detention charges would be compliance with these tender provisions, and proof of actual detention of a vehicle after the consignee had used 2 hours for unloading. Compliance and proof of detention are totally absent from the record.

It is clear that the transportation services offered under the reduced rates contained in Attachment 2 to the tender include the consignee's control and direction of the vehicle for 2 hours for the purpose of unloading. A minimum requirement of "unloading" is actual movement of the lading. *Tennessee Carolina Trans., Inc.—Investigation*, 337 I.C.C. 542, 551 (1970). The lading cannot be moved until the consignee accepts delivery at a specified unloading point. The claimant admits that MOTBY did not permit delivery of the shipment transported on GBL No. E–8690339 until 11:00 a.m. on Tuesday, February 22, 1972. The claimant furnishes no evidence showing that the consignee appropriated the use of its vehicle in excess of the two hours that the carrier agreed was covered by the line-haul rates in Attachment 2. Detention does not begin to run until the time that the shipper undertakes an affirmative act appropriating any given vehicle to its own use. See *Chicago & Northwestern Ry. Co.* v. *Union Packing Co.*, *supra*, at 1307.

We do not see the relevancy of the date and time of a "prelodge notice" to the issue of liability for detention charges. On page 25 of Reference Text 451, "Conus Terminal Operations," U.S. Army Transportation School, Fort Eustis, Virginia, December 1972, "prelodging" is described as the process of sending transportation papers ahead of a shipment. It further explains that:

> The prelodged documents go to the freight traffic division. Therefore, the division is able to schedule arrival time of trucks daily and to preassign unloading points for each truck scheduled to arrive at the terminal. By providing an orderly flow of traffic into the terminal, the carrier is assured of prompt processing and shortened turnaround time.

Whether the documents are "prelodged" by the carrier or by the shipper has no legal significance. It is clear that under regulations and by custom known to Ultra, unloading at MOTBY is performed by prescheduling the arrival of trucks. Ultra contracted with reference to these regulations and with full knowledge of the inbound traffic flow procedures at MOTBY when it offered the reduced rate transportation services under its Tender I.C.C. No. 3.

By law, Military Traffic Management Command (MTMC), (formerly Military Traffic Management & Terminal Service), is given the responsibility to manage cargo flow of Department of Defense shipments within the United States, and to develop and maintain uniform procedures, regulations, forms and other documents for such movements. 32 Fed. Reg. 6295, 6298, April 21, 1967. In paragraph VII E.1.c of DOD Directive 5160.53, March 24, 1967, MTMC is charged with the duty of providing traffic management and terminal service incident to such movements, including control of the flow of cargo into and processing through the military ocean terminals. Under Army Regulation 55–357, traffic flow procedures into MOTBY require arrival of trucks at specified dates and times. And the Interstate Commerce Commission has observed that prearranged scheduling eliminates detention. See *Detention of Motor Vehicles—Middle Atlantic and New England Territory*, 325 I.C.C. 336, 360 (1965).

The great number of shipments covered by this and other claims (and by many others observed through our audit), indicates that Ultra has had an active relationship with MOTBY and knowledge of its receiving practices. Furthermore, on a form submitted with its claims, in bold print, is the statement, "GOVERNMENT SERVICE IS OUR ONLY PRODUCT." The Supreme Court stated in *Alcoa S.S. Co.* v. *United States*, 338 U.S. 421, 429 (1949), that an experienced carrier is charged with familiarity with procedures used by its largest customer. Also, in a letter dated September 11, 1974, to TCD, Ultra admitted that all deliveries at ocean terminals must be scheduled.

Conditions precedent to Ultra's right to detention of vehicle charges include performance of its duty imposed by law to control the arrival of its trucks at MOTBY according to prescheduled unloading date and time and performance of its stipulated duty to permit the Government, upon arrival of Ultra's scheduled vehicles at the appointed place and time, to use the vehicles for 2 hours for the purpose of unloading the vehicles' lading.

In the absence of any showing that agents of the Government appropriated the use of Ultra's vehicles in excess of 2 hours after arrival of the vehicles at the scheduled place and time for unloading, we con-

clude, as a matter of law, that Ultra has failed to establish the liability of the United States for the detention charges presented in Ultra's claims.

We today have informed TCD to disallow the claim for detention charges of $1,410 allegedly due Ultra on the shipment moving under GBL No. E-8690339 (our Claim No. TK-975143) and to disallow other similar claims.

[B-183851]

Contracts—Protests—Significant Issues Requirement—Public Policy, etc.

Protest raising issues concerning interpretation of appropriation act and "congressional intent" as public policy will be considered in this case involving selection of a Navy Air Combat Fighter (NACF), whether or not timely filed, since protest raises significant issues concerning relationship of Congress and Executive on procurement matters. Issues regarding evaluation and competition will also be considered since they are substantially intertwined with first issue and since General Accounting Office has continuing audit interest in NACF program.

Appropriations—Navy Department—Contracts—Absence of Statutory Restriction

Navy is not required as matter of law to expend funds provided in lump-sum appropriation act for a specific purpose when statute does not so require, notwithstanding language contained in Conference Report. Absence of statutory restriction raises clear inference that the Report language paralleled and complemented, but remained distinct from, actual appropriation made. Therefore, Navy selection of particular aircraft design for its Air Combat Fighter and resultant award of sustaining engineering contracts cannot be regarded as contrary to law.

Contracts—Negotiation—Awards—Contrary to Public Policy—No Basis for Allegation

While protester argues contract award by Navy should be regarded as void since it is not in accordance with public policy as expressed in congressional Conference Report, award is not contrary to statute, contract does not require any actions contrary to law, and does not represent a violation of moral or ethical standards. Therefore no basis exists to conclude that award is contrary to public policy.

Navy Department—Contracting Methods—Aircraft Procurement—Legality of Expenditures

Although protester argues that Navy did not comply with DOD reprogramming directives, those directives are based on nonstatutory agreements and do not provide a proper basis for determining the legality of expenditures.

Contracts—Negotiation—Awards—Legality

Provision in appropriation act which prohibits use of funds for presenting certain reprogramming requests cannot operate to invalidate contract awards even if awards resulted from reprogramming action since a violation of such provision cannot serve to invalidate an otherwise legal contract award.

Contracts—Specifications—Conformability of Equipment, etc., Offered—Compatibility With Existing Equipment

Protester's assertion that Navy properly could select only derivative of model selected by the Air Force is incorrect, since reasonable interpretation of request for quotations, read in context of applicable documents, indicates that Navy sought aircraft with optimum performance (within cost parameters) and with due consideration of design commonality with prior Air Force prototype program and with selected Air Force fighter.

Contracts—Negotiation—Evaluation Factors—Criteria

Protester's claim that Navy did not treat offerors on equal basis is not supported by record, which indicates that overall evaluation was conducted in accordance with established criteria and that both offerors were treated fairly.

Contracts—Negotiation—Requests for Quotations—Award Basis

Assertion that engine selected by Navy was not authorized for use with lightweight fighter is without merit, since record indicates selected engine is modified version of baseline engine listed in solicitation. Also, record indicates Navy did not improperly estimate offerors' engine modification costs.

Contracts—Negotiation—Evaluation Factors—Cost Credibility

Navy's cost evaluation of competing proposals was conducted in accordance with proper procedures and established criteria since the Navy's development of its own estimates in determining cost credibility was consistent with sound procurement practices and award of contract to higher priced offeror was not improper.

Contracts—Negotiation—Competition—Limitation on Negotiation—Propriety

Restriction of competition in Navy procurement for Air Combat Fighter (ACF) to offerors furnishing designs derived from Air Force ACF program was proper even though Navy selected derivative of design different from that chosen by Air Force, since solicitation was intended to maximize commonality of both technology and hardware between Air Force and Navy designs and Navy selection was in accordance with solicitation criteria regarding commonality.

In the matter of the LTV Aerospace Corporation, October 1, 1975:

INTRODUCTION

LTV Aerospace Corporation (LTV) has protested the selection by the Department of the Navy of the McDonnell Douglas Corporation (MDC) to develop the Navy Air Combat Fighter (NACF), which is intended to be a low cost complement to the operational F–14 fighter and a replacement for the F–4 and A–7 aircraft. The NACF has resulted from the Department of Defense (DOD) effort to turn away from the increasingly complex top-of-the-line fighter aircraft, as exemplified by the Navy F–14 and the Air Force F–15, and to seek less expensive complements to these weapon systems.

The selection of MDC followed a lengthy competition between MDC and LTV, in which both firms sought to modify aircraft origi-

nally designed for the Air Force under the Air Combat Fighter (ACF) program so that they would be suitable for aircraft carrier operation. While the Navy was evaluating the designs proposed by both offerors, the Air Force selected the F–16 for its ACF. Although LTV's designs were in varying degrees based on the F–16 design, the Navy ultimately determined that *only the MDC entry*, which was based on the F–17 design not selected by the Air Force, *was suitable for the Navy.* As a result of that determination, the Navy selected the MDC entry, designated it the F–18, and on May 2, 1975, awarded sustaining engineering contracts to MDC and also to General Electric Company (GE) (which is to develop the engines for the aircraft).

Upon announcement of the Navy's selection, LTV filed a protest with this Office, claiming that the Navy's selection was illegal, contrary to public policy, and not in accordance with the established selection criteria.

Specifically, LTV argues that the Navy selection of the F–18 violated the 1975 fiscal year DOD Appropriation Act since the F–18 is not a "derivative" of the F–16 and not common with it, requirements which LTV believes were contemplated by the act. Also, LTV contends that at the very least the selection of the F–18 must be deemed void as against public policy since the selection was contrary to the language of the Conference Report which led to the passage of the act.

With respect to the competition itself, LTV contends that MDC and LTV were not properly evaluated in the areas of commonality, engines, and cost, and that the competition itself was unduly restrictive. The relief sought by LTV is initiation of a new competition by the Navy.

The Navy denies all of LTV's allegations. It is the Navy's position that selection of the F–18 complied with both the letter and spirit of the 1975 DOD Appropriation Act, that both LTV and MDC were evaluated fairly and on the same basis, and that the F–18 is the best design for the Navy's requirements.

In considering this protest, we have carefully examined the submissions from the Navy, LTV, and MDC. Also, in view of the technical and cost arguments made in this case, we conducted an audit investigation, the results of which are reflected herein. In addition, we have considered the views expressed in two reports issued by the Library of Congress which deal with some of the points raised by the protester. It is our considered opinion that the Navy's actions were not contrary to statute or public policy and that the selection was fair and impartial and in accordance with the established selection criteria. Accordingly, for the reasons more fully discussed below, the protest is denied.

It should be noted, however, that this does not mean that the Navy is free to proceed with full-scale development of the F–18. In reaching our conclusion we have not considered the wisdom or cost effectiveness of the Navy's decision, nor have we examined the various alternatives available to the Navy. Our decision, therefore, does not encompass any broad policy questions that might be raised concerning the Navy selection. Rather, it concerns only the award of the short-term sustaining engineering contracts. Award of full-scale development contracts will depend upon congressional authorization of funds for that purpose.

PROCUREMENT HISTORY

LTV's protest can best be understood in the context of the procurement history of the NACF. The present NACF program is the result of several years of exchanges between Congress and the DOD regarding the type of aircraft considered most appropriate for future Navy use, and has evolved from earlier Navy efforts to procure needed levels of combat aircraft. Up until 1971, DOD had intended to procure an all F–14 force for the Navy. However, this plan was altered to a limited procurement of 313 F–14A aircraft (as then indicated in the 5-year defense plan) with possible future procurement. *Hearings on the Lightweight Fighter Aircraft Program Before the Defense Subcommittee of the Senate Committee on Appropriations*, 94th Cong., 1st Sess. 35 (1975) [hereinafter cited as *1975 Senate Appropriations Hearings*].

During this same time period, the Air Force was evaluating the concept of advanced prototyping of aircraft as a means to reduce defense costs and risks by demonstrating the feasibility of utilizing advanced technology before effecting large scale production. The Air Force intended to demonstrate and evaluate the technology for a small, high performance aircraft. *Hearings on Advanced Prototype Before the Senate Committee on Armed Services*, 92d Cong., 1st Sess. 23–27 (1971) [hereinafter cited as *1971 Senate Armed Services Hearings*]. Accordingly, on January 6, 1972, the Air Force issued a request for proposals to conduct a prototype development of the lightweight fighter (LWF) aircraft. (The LWF program was the predecessor to the Air Force's present ACF program, and was intended to implement the concept of a low cost and high performance aircraft, the same concept on which the NACF is based.) In February 1972 five companies responded. Northrop Corporation responded with two proposals and the following four companies responded with one each: Boeing, General Dynamics (GD), Lockheed, and LTV. Evaluation of the six proposals was completed in March 1972, with Northrop and GD announced

as the winning competitors. Lightweight fighter development contracts in the amounts of $38 million and $39.1 million for the GD YF–16 and the Northrop YF–17, respectively, were released on April 14, 1972.

While the Air Force was proceeding with the LWF program, the Navy in 1973 was evaluating various options regarding the procurement of a new aircraft. Initially, it was proposed that a prototype fly-off program between a lower cost version of the F–14 and a Naval version of the F–15 be held. This program, however, was regarded as too expensive. *1975 Senate Appropriations Hearings* at 36. Ultimately, it was decided to investigate a lighter weight, lower cost, multi-mission aircraft which could serve as a fighter to replace certain F–4 aircraft and also eventually replace the A–7 aircraft in the attack mission. *Id.* This multi-mission airplane was designated the VFAX. In June 1974, the Naval Air Systems Command (NAVAIR) released a presolicitation notice to the aerospace industry soliciting expressions of interest in and comments on the proposed VFAX development program. Industry responses were received in July 1974.

At this time, the VFAX program was meeting with some opposition in the Congress, in part because the VFAX was not tied to the Air Force prototype program. This led the House Armed Services Committee to recommend deletion from the 1975 DOD Appropriation Authorization Act of the entire $34 million requested by the Navy to initiate the development of the VFAX. However, the Senate Armed Services Committee recommended inclusion of the entire $34 million requested for the VFAX. S. Report No. 93–884, 93d Cong., 2d Sess. 95 (1974). The subsequent conference report on the bill recommended inclusion of $30 million for the VFAX, and ultimately the bill was enacted into law on August 5, 1974, as Public Law 93–365 (88 Stat. 399).

The passage of the Authorization Act did not signal the end of congressional opposition to the VFAX. When the 1975 DOD appropriation bill came before the House Appropriations Committee, the Committee recommended deletion of all funds requested for the VFAX. However, the Senate Committee on Appropriations recommended the inclusion of $20 million for the VFAX. S. Report No. 93–1104, 93d Cong., 2d Sess. 174 (1974). This difference was finally resolved by the conference committee on the bill, which also recommended an appropriation of $20 million but indicated that the funds were to be spent on a new program element which was designated the NACF:

> The Managers are in agreement on the appropriation of $20,000,000 as proposed by the Senate instead of no funding as proposed by the House for the VFAX aircraft. The conferees support the need for a lower cost alternative

fighter to complement the F–14A and replace F–4 and A–7 aircraft; however, the conferees direct that the development of this aircraft make maximum use of the Air Force Lightweight Fighter and Air Combat Fighter technology and hardware. The $20,000,000 provided is to be placed in a new program element titled "Navy Air Combat Fighter" rather than VFAX. Adaptation of the selected Air Force Air Combat Fighter to be capable of carrier operations is the prerequisite for use of the funds provided. Funds may be released to a contractor for the purpose of designing the modifications required for Navy use. Future funding is to be contingent upon the capability of the Navy to produce a derivative of the selected Air Force Air Combat Fighter design.

H.R. Report No. 93–1363, 93d Cong., 2d Sess. 27 (1974). The DOD Appropriation Act was enacted on October 8, 1974, as Public Law 93–437 (88 Stat. 1212). However, the language of the Act itself did not include any specific direction as to how the funds were to be spent. It stated only the following:

[T]he following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending June 30, 1975, for military functions administered by the Department of Defense, and for other purposes namely:

* * * * * * *

RESEARCH, DEVELOPMENT, TEST, AND EVALUATION, NAVY

For expenses necessary for basic and applied scientific research, development, test, and evalution, including maintenance, rehabilitation, lease, and operation of facilities and equipment, as authorized by law; $3,006,914,000, to remain available for obligation until June 30, 1976.

While Congress was considering the relative merits of the VFAX, NACF, and ACF programs, both the Air Force and the Navy were moving ahead on their respective programs. On September 3, 1974, the Air Force solicited full-scale development proposals for the ACF from both GD and Northrop, whose prototype aircraft had been undergoing comprehensive flight test programs. At approximately the same time, the Chief of Naval Operations released the formal VFAX Operational Requirement and directed NAVAIR to prepare an industry solicitation for VFAX Contract Definition and full-scale development. However, in view of the language in H.R. Report No. 93–1363, quoted above, DOD directed NAVAIR to limit the planned solicitation to derivatives of the LWF and ACF designs. This limitation, the Navy believed, was in accord with the Congressional guidance provided in that report. *Hearings on Department of Defense Appropriations for 1976 Before Defense Subcommittee of the House Committee on Appropriations*, 94th Cong., 1st Sess. 337 (1975) [hereinafter cited as *1975 House Appropriations Hearings*].

Since neither GD nor Northrop (the ACF competitors) had built carrier-capable aircraft, the Navy asked each contractor to develop a partnership arrangement with carrier-capable companies for the NACF procurement in accordance with Armed Services Procure-

ment Regulation (ASPR) § 4–117 (1974 ed.). After a period of discussion, MDC and Northrop entered into a teaming arrangement on October 2, 1974, with MDC as the prime contractor for the NACF effort. On that same day, GD and LTV also entered into a teaming agreement, which provided that GD would be the prime contractor to the Air Force and that LTV would be the prime contractor to the Navy for any derivative versions of the YF–16. The agreement further provided that if the YF–16 were not selected by the Air Force, then GD would be the prime contractor to the Navy for the NACF. Those contractor relationships were approved by the Navy. *1975 House Appropriations Hearings* at 338.

On October 12, 1974, the Air Force, on behalf of the Navy, issued request for quotations (RFQ) No. N00019–75–Q–0029 to the ACF contractors. The RFQ was originally designed for the VFAX. However, as issued, it solicited proposals for the design, development, test and demonstration of the NACF.

The RFQ called for a cost reimbursement type contract, incrementally funded in part, with proposals to be submitted on a cost-plus-incentive-fee basis. It indicated that proposals should be based on the incorporation of the essential characteristics of the former VFAX into the design of the NACF, and that significant emphasis would be placed on the design-to-cost method of contracting and on life cycle costing. It also advised that proposals should include a technical proposal and trade-off analysis, a test and evaluation plan, a management/capability/facility submission, a design to cost analysis, an ACF derivative analysis, a cost proposal, and an executive summary.

To support the contractor design effort called for by the RFQ, the Navy proposed to utilize approximately $12 million of the $20 million designated by the congressional conferees as available for the NACF program. By letter dated November 1, 1974, DOD so informed the Chairmen of the Senate and House Committees on Appropriations. Both Chairmen subsequently responded that their Committees had no objection to the proposed expenditures.

Preliminary responses from both LTV and MDC were submitted on December 2, 1974. Complete RFQ responses were received on January 13, 1975, and contractor technical discussions were held a few days later. LTV proposed two designs essentially based on the YF–16 model, the model 1601 and model 1600, while MDC proposed its model 267, which was essentially based on the F–17. The Navy regarded these initially proposed designs to be unacceptable for carrier use. However, both sets of designs were determined to merit further consideration as capable of being made acceptable. The Navy then entered into discussions with LTV and MDC, pointing out what it considered to be

unacceptable areas in the proposals. Discussions and proposal revisions continued into March 1975, when LTV offered an additional design it designated the model 1602.

During this period, the Air Force, on January 13, 1975, announced the selection of the General Dynamics design, redesignated as the F–16, as the Air Force ACF choice over the F–17. This decision was explained by the Secretary of Defense at a January 14, 1975, news conference as follows:

> In the case of the YF–16 selection by the Air Force, that is one of those happy circumstances in which the aircraft with a higher performance happened to provide the lower cost. * * * We have carefully reviewed the data, and, according to the Air Force data, over a 15-year life cycle, with constant 1975 dollars, the savings for the Air Force by going in the direction of the YF–16 should amount to something on the order of $1.3 million in R&D, in production costs and in life cycle costs—operation to maintenance costs. * * *

On April 4, 1975, the Navy solicited "best and final" offers from LTV and MDC. Also on that date, the original RFQ was redesignated request for proposals (RFP) No. N00019–75–R–0084 (for MDC) and RFP No. 00019–75–R–0085 (for LTV). Both RFPs were essentially the same (with certain clauses and provisions individually tailored to the proposals of the specific contractors) and essentially similar to the RFQ, except that the RFPs contemplated a letter contract and revised the contract fee arrangement from an incentive fee basis to an incentive fee/award fee basis.

"Best and final" offers were received on April 15, 1975. On May 2, 1975, the Navy announced the selection of the MDC design and the resulting award of sustaining engineering contracts to MDC ($4.4 million) and GE ($2 million), the engine developer. Both contracts were to last approximately 4 months, pending award of full-scale development contracts.

TIMELINESS OF THE PROTEST

Before reaching the merits of the protest, we must consider the Navy's assertion that the protest should be dismissed because it was untimely filed. While recognizing that the protest was filed within 5 working days of the Navy's selection announcement on May 2, 1975, the Navy considers this date to be well after the time that LTV knew or should have known the basis for its protest. The Navy's consideration (and ultimate selection) of a design other than a derivative of the F–16 is what the Navy views as the basis for LTV's protest. Since the Air Force selected the F–16 as its ACF on January 13, 1975, the Navy believes LTV was required to protest within 5 days of whenever after that date LTV knew or should have known that the NACF competition was not limited to the LTV designs. The Navy asserts that LTV should have known that the competition was not so

limited from the "clear and unambiguous statement of evaluation criteria of the RFQ," from the times in January and February when the Navy indicated its intent to continue the competition, and from the language of the April 4 request for best and final offers, which solicited offers from both contractors.

The procedures governing the timeliness of this protest are located in 4 C.F.R. § 20.2(a) (1975) (this protest was filed prior to the effective date of our new Bid Protest Procedures; *see* 40 Fed. Reg. 17979 (1975)). They provide in pertinent part as follows:

> (a) * * * Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of proposals shall be filed prior to bid opening or the closing date for receipt of proposals. In other cases, bid protests shall be filed not later than 5 days after the basis for protest is known or should have been known, whichever is earlier. * * *
> (b) The Comptroller General, for good cause shown, or where he determines that a protest raises issues significant to procurement practices or procedures, may consider any protest which is not filed timely.

We do not believe it is necessary to determine the timeliness of the issues raised by LTV, since we think it is abundantly clear that they are significant and thus proper for consideration by this Office regardless of whether they were timely raised. *Fiber Materials, Inc.*, 54 Comp. Gen. 735 (1975), 75-1 CPD 142. In our view, the protest essentially presents two distinct issues: whether the F-18 selection was in violation of a "congressional directive" and whether the F-18 award resulted from improper and unfair competition. The first issue, raising questions concerning interpretation of a Federal appropriation act and "congressional intent" as public policy, are threshold questions of widespread interest.

In addition, the second basic issue, relating to the propriety, fairness and equality of the evaluation, is substantially intertwined with the first issue since it in part involves the effect of certain legislative history on the interpretation of a solicitation's evaluation criteria. Accordingly, we deem it appropriate to consider these issues. See *Fiber Materials, Inc., supra; Ira Gelber Food Services, Inc., et al.*, 54 Comp. Gen. 809 (1975), 75-1 CPD 186. Furthermore, our continuing audit interest in the NACF program militates against our declining to consider the issues raised. *PRC Computer Center, Inc., et al.*, 55 Comp. Gen. 60 (1975), 75-2 CPD 35.

LEGALITY OF CONTRACT AWARD

LTV asserts that the Navy's actions in awarding contracts which will lead to development of the F-18 were illegal because they involved the expenditure of funds in violation of the 1975 DOD Appropriation Act. Title V of that Act, as pointed out above, appropriated for use by the Navy in excess of $3 billion for "expenses necessary for basic and

applied scientific research, development, test, and evaluation * * *." LTV argues that this statutory provision must be read in light of its legislative history, particularly the Conference Report, H.R. Report No. 93–1363, 93d Cong., 2d Sess. (1974), which was adopted by both houses of Congress when the Act was passed. See 120 *Cong. Rec.* H9446–57 (daily ed. Sept. 23, 1974) and *id.* S17445–50 (daily ed. Sept. 24, 1974). The Conference Report explicitly stated that $20 million was being provided for a Navy Combat Fighter, but that "Adaptation of the selected Air Force Air Combat Fighter to be capable of carrier operations is the prerequisite for use of the funds provided." The Report also stated that "future funding is to be contingent upon the capability of the Navy to produce a derivative of the selected Air Force Combat Fighter design."

The Navy does not dispute that the F–18 is not a derivative of the F–16 or that the language of the Conference Report precluded the expenditure of the $20 million on anything other than a derivative of the fighter aircraft design selected by the Air Force. However, it disagrees with LTV's assertion that the Act must be construed in accordance with such language. Rather, the Navy argues that the Act in question appropriates a lump sum, that it is clear and unambiguous on its face, and that under the established and traditional "budgeting and appropriation process" used by Congress and the Defense Department the law cannot be construed as incorporating any restrictions on spending authority which might appear in the Conference Report but which do not appear in the law itself. Although it admits that the congressional desire as to how a lump sum appropriation is to be spent may be indicated by legislative history, the Navy maintains that compliance with that intent when it is not manifested in the law itself is not a statutory or legal requirement, but merely a practical one dictated by an agency's need to maintain good relations with Congress in order to obtain future appropriations. The Navy states that in such situations it either complies with such nonstatutory guidance or else obtains congressional approval for deviating from it through "a mutually-developed DOD Congress working relationship referred to as 'reprogramming.'" The Navy asserts that while it did not formally reprogram in this instance, it did obtain the congressional approval.

On the other hand, LTV argues, in accordance with traditional concepts of statutory interpretation, that Title V of the Act can only mean what Congress intended it to mean and that resort to the legislative history and the Conference Report in particular is necessary to establish that intent. In this regard, LTV claims that Title V contains only broad, general language and does not indicate which projects are encompassed by the words "basic and applied scientific research, develop-

ment, test, and evaluation," how the total appropriated amount is to be apportioned among the Navy's projects, or what expenses might be "necessary."

In determining the meaning of and proper effect to be given to laws enacted by Congress, the courts and this Office generally follow traditional principles of statutory interpretation. A fundamental principle basic to the interpretation of both Federal and State laws is that all such statutes are to be construed so as to give effect to the intent of the legislature. *United States* v. *American Trucking Association, Inc.*, 310 U.S. 534 (1940); 2 A. Sutherland, *Statutory Construction* § 45.05 (Sands ed. (1973)); 38 Comp. Gen. 229 (1958). This intent may be determined from the words of the statute itself, from the "equity of the statute," from the statute's legislative history, and in a variety of other ways. See Sutherland § 45.05, *supra*. The legislative history of a statute may be examined as an aid in determining the intention of the lawmakers when the statute is not clear, see, e.g., *United States* v. *Donruss Co.*, 393 U.S. 297 (1969); 54 Comp. Gen. 453 (1974); 53 *id.* 401 (1973), or when application of the statutory language would produce an absurd or unreasonable result, *United States* v. *American Trucking Association, Inc., supra;* 46 Comp. Gen. 556 (1966), or if that legislative history provides "persuasive evidence" of what Congress intended. *Boston Sand and Gravel Company* v. *United States*, 278 U.S. 41, 48 (1928).

In construing appropriation acts, we have consistently applied these traditional statutory interpretation principles so as to give effect to the intent of Congress. In many cases, when the meaning of an appropriation act seemed clear, we resolved questions concerning the propriety of expenditures without resort to legislative history. *See* 54 Comp. Gen. 976 (1975); 53 *id.* 770 (1974); 53 *id.* 328 (1973); 52 *id.* 504 (1973); 52 *id.* 71 (1972); 51 *id.* 797 (1972); 45 *id.* 196 (1965); 34 *id.* 599 (1955); 29 *id.* 419 (1950). In other cases, we have referred to the legislative history of an appropriation act in order to properly interpret language in the act that purported to impose qualifications, requirements, or restrictions. For example, in 53 Comp. Gen. 560 (1974), we reviewed Congressional hearings and reports to determine whether a statutory provision stating that loans may be insured "as follows: * * * operating loans, $350,000,000" precluded an agency from making or issuing loans in excess of that amount. Similarly, in 49 Comp. Gen. 679 (1970), we examined the legislative history of various DOD appropriation acts to determine whether a provision in the 1969 Act precluded payment of certain tuition fees for ROTC students. *See also* 54 Comp. Gen. 944 (1975); 53 *id.* 695 (1974); 51 *id.* 631 (1972); 40 *id.* 58 (1960); 30 *id.* 665 (1960); 34 *id.* 309 (1954); 34 *id.* 199 (1954); B–178978, September 7, 1973.

LTV asserts that resort to the legislative history of the 1975 DOD Appropriation Act in this case is necessary to give effect to the intent of Congress. The objective of statutory construction, of course, whether applied to appropriation or other acts, is to ascertain legislative intent with respect to the actual statutory language employed. This necessarily assumes that statements in committee reports and other sources of legislative history are meant to address, explain, and elaborate upon the words of the statute itself. As illustrated above, we have, of course, examined legislative history for such purpose in construing restrictions or other provisions contained in an appropriation statute. At the same time, we have also recognized that, with respect to appropriations, there is a clear distinction between the imposition of statutory restrictions or conditions which are intended to be legally binding and the technique of specifying restrictions or conditions in a nonstatutory context.

In this regard, Congress has recognized that in most instances it is desirable to maintain executive flexibility to shift around funds within a particular lump-sum appropriation account so that agencies can make necessary adjustments for "unforeseen developments, changing requirements, incorrect price estimates, wage-rate adjustments, changes in the international situation, and legislation enacted subsequent to appropriations." Fisher, "Reprogramming of Funds by the Defense Department," 36 *The Journal of Politics* 77, 78 (1974). This is not to say that Congress does not expect that funds will be spent in accordance with budget estimates or in accordance with restrictions detailed in Committee reports. However, in order to preserve spending flexibility, it may choose not to impose these particular restrictions as a matter of law, but rather to leave it to the agencies to "keep faith" with the Congress. *See* Fisher, *supra*, at 82. As the Navy points out, there are practical reasons why agencies can be expected to comply with these Congressional expectations. If an agency finds it desirable or necessary to take advantage of that flexibility by deviating from what Congress had in mind in appropriating particular funds, the agency can be expected to so inform Congress through recognized and accepted practices.

On the other hand, when Congress does not intend to permit agency flexibility, but intends to impose a legally binding restriction on an agency's use of funds, it does so by means of explicit statutory language. Such explicit provisions are not uncommon and are usually found in the DOD appropriation acts. For example, section 624 of the 1970 Act, Public Law 91–171, 83 Stat. 484, approved December 29, 1969, provided that "no part of any appropriation contained in this Act shall be available for the procurement of any article of food,

clothing, cotton, woven silk * * * or wool * * * not grown * * * or produced in the United States * * *." *See* 49 Comp. Gen. 606 (1970). The 1974 Act, Public Law 93-238, 87 Stat. 1026, approved January 2, 1974, appropriated $2,651,805,000 for Navy research, test, development, and evaluation activities but provided "that no part of the appropriation contained in this Act shall be used for Full Scale Development of Project Sanguine." Even the 1975 Act, upon which LTV relies, contained several of these specific restrictions. Title III of the Act provided that "not less than $355,000,000" of the Army's operation and maintenance appropriation of $6,137,532,000 "shall be available only for the maintenance of real property facilities." Similar restrictions were placed on the Navy, Air Force, and other DOD elements. Title III also provided that "of the total amount of this appropriation made available for the alteration, overhaul, and repair of naval vessels not more than $1,130,000,000 shall be available for the performance of such work in Navy shipyards." Title VIII contained several other restrictions or prohibitions on the use of the funds appropriated by the Act. *See also* 49 Comp. Gen. 679, *supra;* 40 *id.* 58, *supra;* and 39 *id.* 665, *supra.*

Accordingly, it is our view that when Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on Federal agencies. Our position in this regard is reflected both in our decisions, *see* 17 Comp. Gen. 147 (1937); B-149163, June 27, 1962; B-164031(3), April 16, 1975, and in various communications to members of Congress. In 17 Comp. Gen. 147, *supra*, we advised the President of the Board of Commissioners of the District of Columbia that the District was not precluded by the applicable appropriation act from reclassifying administrative positions within the school system merely because of the budget estimates presented to Congress which provided the basis for the appropriation. We said that "Amounts of individual items in the estimates presented to the Congress on the basis of which a lump sum appropriation is enacted are not binding on administrative officers unless carried into the appropriation act itself." 17 Comp. Gen. 147, at 150.

Similarly, in B-149163, *supra*, we held that the Administrative Office of the United States Court could properly expend appropriated funds for rules revision purposes even though the budget estimates did not include any sum for that activity. We stated that:

> * * * in the absence of a specific limitation or prohibition in the appropriation under consideration as to the amount which may be expended for revising and improving the Federal Rules of practice and procedure, you would not be legally bound by your budget estimates or absence thereof.

If the Congress desires to restrict the availability of a particular appropriation to the several items and amounts thereof submitted in the budget estimates, such control may be effected by limiting such items in the appropriation act itself. Or, by a general provision of law, the availability of appropriations could be limited to the items and the amounts contained in the budget estimates. In the absence of such limitations an agency's lump sum appropriation is legally available to carry out the functions of the agency.

In B–164031(3), *supra*, we held that the Department of Health, Education, and Welfare was not precluded by its lump sum appropriation act from spending in excess of $9.2 million for certain research and development activities. We said that the "references in the legislative history * * * to $9.2 million for carrying out the research and development activities * * * are not statutory limits. Rather, these references are reflective of justifications by HEW and indications by the House and Senate Appropriations Committees as to how $9.2 million of the lump sum appropriation should be applied."

We have also taken this position recently in a letter and two reports to addressed members of Congress, which resulted from certain reviews of DOD spending. In a March 17, 1975, letter to the Chairman of the Subcommittee on Research and Development, Senate Committee on Armed Services, which has been reprinted at 121 *Cong. Rec.* S8148–51 (daily ed. May 14, 1975), we construed Title V of the 1975 DOD Appropriation Act, the very provision at issue in this case. We said:

Since the RDT&E appropriation is not a line-item appropriation, the amounts appropriated for each department * * * represent the only legally binding limits on RDT&E obligations except as may be otherwise specified in the appropriation act itself.

Also, in our Reports LCD–75–310 and LCD–75–315, both entitled "Legality of the Navy's Expenditures For Project Sanguine During Fiscal Year 1974" [hereinafter cited as *Project Sanguine Report*] and dated January 20, 1975, we examined a situation somewhat analogous to the instant case. DOD had requested $16,675,000 for Project Sanguine. The Senate Committee on Appropriations voted to give DOD the full amount, while the House Committee on Appropriations deleted all of it. The Conference Committee approved $8.3 million for the Project on the condition that none of the funds be used for full-scale development. The bill that was ultimately enacted into law provided a lump sum in excess of $2.6 billion for Navy RDT&E, but with the restriction, referred to above, that none of the funds could be used for full-scale development of Project Sanguine. The Navy spent in excess of $11.7 million of such 1974 year funds on the Project. After quoting from our decision at 17 Comp. Gen 147, *supra*, we said that the fact that the Conference Committee limited Project Sanguine funds to $8.3 million "cannot operate so as to insert in a statute a limitation not imposed by its terms" and that "the action of the Committee of Confer-

ence is not legally binding unless carried into the appropriation act itself."

We further point out that Congress itself has often recognized the reprogramming flexibility of Executive agencies, and we think it is at least implicit in such condition that Congress is well aware that agencies are not legally bound to follow what is expressed in Committee reports when those expressions are not explicitly carried over into the statutory language. *See, e.g.*, H.R. Report No. 408, 86th Cong., 1st Sess. 20 (1959); H.R. Report No. 1607, 87th Cong., 2d Sess. 21 (1962); *Hearings On Department of Defense Appropriations for 1971 Before Defense Subcommittee of the House Committee on Appropriations, Part 5*, 91st Cong., 2d Sess. 1114–15 (1970); see also Fisher, *supra*, particularly at 80–87. In addition, however, there is also explicit Congressional recognition of the legal effect of enacting unrestricted lump sum appropriations. Last year a report of the House Committee on Appropriations included the following statement:

> In a strictly legal sense, the Department of Defense could utilize the funds appropriated for whatever programs were included under the individual appropriation accounts, but the relationship with the Congress demands that the detailed justification which are presented in support of budget requests be followed. To do otherwise would cause Congress to lose confidence in the requests made and probably result in reduced appropriations or line item appropriation bills. H.R. Rep. No. 93–662, 93d Cong., 1st Sess. 16 (1973).

However, despite our case holdings and the sundry manifestations of Congressional understanding of the distinction between imposing spending restrictions as a matter of law and imposing them on a non-statutory, legally non-enforceable basis, LTV argues that "the process of interpretation applicable to general appropriation statutes" is no different from the process "applicable to all other statutes." LTV cites several cases for the proposition that such statutes do not give the Navy "unbridled discretion in the face of specific limitations in the legislative history."

We have carefully reviewed the cases cited by LTV; however, we do not find that our view of appropriation acts is erroneous. We note that in none of the cases cited was the court faced with the issue presented here. In *Beck* v. *Laird*, 317 F. Supp. 715 (E.D.N.Y. 1970), which LTV relies on for the statement "An appropriations act is like any other act of Congress," it is clear that the court was not talking about statutory interpretation, but about how an act becomes law. *See* 317 F. Supp. at 728. In *United States* v. *Dickerson*, 310 U.S. 554 (1940), the Court consulted the legislative history of a Public Resolution which imposed a restriction on the use of fiscal year appropriated funds to determine the proper interpretation of that restrictive provision. The case, however, involved neither a general appropriation act nor the legislative history of such an act, and was merely another case

in which a restrictive provision was construed in light of its legislative history. See cases cited, p. 13, *supra.*

In *Winston Bros. Co.* v. *United States*, 130 F. Supp. 374, 131 Ct. Cl. 245 (1955), the court relied on a statement attached to a Conference Report by the Managers of an appropriation bill from the House of Representatives to uphold an agency's allocation of funds with respect to construction work on a reclamation project. The statement indicated that the conferees agreed that the funds being appropriated, which were insufficient to fund the entire project, should be allocated for power generation purposes. Although the appropriaton act itself contained no such allocation, the agency did allocate the money in accordance with that statement. As a result, irrigation contractors experienced delay and disruption because funds were not provided for their portion of the project work.

The court, in considering the contractors' claims, upheld the Bureau's allocation, stating:

> The officials of the Bureau of Reclamation took the statement * * * as law. While it was not in the Conference Report, it said that the conferees had agreed that that was the intention of the appropriation. * * * In the circumstances it was the duty of the Bureau of Reclamation to respect the known intent of the responsible managers of the legislation. 130 F. Supp. at 377.

LTV argues that since it was the duty of the agency in *Winston Bros. Co.* to respect the known intent of the Congressional managers, it was the duty of the Navy in this case "to respect the known intent of Congress as expressed by the mandate of the Conference Report." Although the case does appear to lend some support to LTV's position, we do not believe the case may be read as establishing a general statutory duty on the part of the agency to comply with non-statutory legislative statements as to how funds should be spent since the court did not have to consider the question of whether the agency would have violated the appropriation act if the funds had not been allocated in accordance with the statement.

In *United States* v. *State Bridge Commission of Michigan*, 109 F. Supp. 690 (E.D. Mich. 1953), the court relied on the testimony given by an agency official at hearings on an appropriation bill to uphold a particular expenditure. The case involved a suit brought by the United States for recovery of certain lease payments. The Government argued that the lease was invalid because a specific appropriation for the lease payments had not been enacted. The court held against the Government after an examination of the legislative history of the agency's general appropriation revealed that Congress had increased the agency's appropriation in response to an agency request for additional funds to pay for the lease in question. On these facts, the court held only that "Congress is not required to set out with particularity each

item in an appropriation as a requisite of validity. It is enough that the appropriation be identifiable sufficiently to make clear the intent of Congress." 109 F. Supp. at 694. We think it is evident that this case concerned no more than the question of whether an expenditure for a particular activity or purpose was within the purview of the agency's general appropriation. The fact that the court resorted to legislative history, as indeed we have done to resolve questions involving both authorization and appropriation statutes, *see*, *e.g.*, 51 Comp. Gen. 245 (1971); 39 *id.* 388 (1959), does not establish that spending restrictions indicated in legislative history are binding on an agency when the resulting appropriation statute is silent as to those restrictions.

In *Morton* v. *Ruiz*, 415 U.S. 199 (1974), the Supreme Court examined in detail the legislative history of various appropriation acts to resolve the "narrow but important issue" of whether general assistance benefits are available for Indians living off, although near, a reservation. The Bureau of Indian Affairs (BIA), relying on a provision in its Indian Affairs Manual, had ruled that the respondent Indians were ineligible for assistance because they did not live on a reservation. The appropriation acts provided funds "For expenses necessary to provide education and welfare services for Indians * * * and other assistance to needy Indians * * *." The Court noted that neither the Snyder Act, which authorizes most BIA activities, nor the appropriation acts imposed any geographical restrictions on eligibility for assistance, but that BIA officials, in hearings on bills providing for BIA appropriations, had frequently stated that assistance was available for Indians who lived on or near reservations. The Court therefore concluded that BIA's appropriated funds were "intended to cover welfare services" for Indians residing "on or near" reservations, 415 U.S. at 230, and then went on to hold that BIA could not deny those benefits to the respondents since it had failed to comply with the Administrative Procedure Act in promulgating the restrictive provision in its Manual.

We fail to see how this case supports LTV's position. In essence, what the Court did was to utilize legislative history to determine whether an expenditure for a particular purpose was intended by Congress to be encompassed by a general appropriation provision, which is precisely what was done in *United States* v. *State Bridge Commission of Michigan*, *supra*. With respect to the absence of retrictive language in the statute, the Court stated while it was "not controlling, it is not irrelevant that the 'on reservations' limitation in the budget requests has never appeared in the final appropriation bills." 415 U.S. at 214. We would regard that statement as consistent with our view that Congress, when it intends to impose a legal spending restriction,

does so through specific statutory language. However, LTV, relying on the words "not controlling," asserts that this language represents explicit Supreme Court recognition that the absence of restrictive statutory language is not "controlling" in determining whether Congress intended to impose a legally enforceable limitation on spending. We do not believe that the Court's statement should be read that way. As indicated above, the *Ruiz* case involved judicial resort to legislative history to aid the court in determining whether a particular expenditure was within the purview of the applicable general appropriation act. In such a situation, of course, the absence of a specific restriction in a general appropriation act indeed is not controlling. See, e.g., in addition to *United States* v. *State Bridge Commission of Michigan*, *supra*, 53 Comp. Gen. 770, *supra;* 53 *id.* 328, *supra;* and 52 *id.* 504, *supra.* Accordingly, in view of the context of the case in which it was used and in view of the otherwise uniform interpretation of Federal appropriation acts as discussed herein, we believe the Court's language reasonably must be construed as referring only to those situations in which it must be determined whether a particular expenditure is encompassed within a general appropriation.

If anything, we think the *Ruiz* case reflects Supreme Court recognition of Executive agency flexibility to manage funds within the general framework of the applicable statutory language. Thus, Mr. Justice Blackmun, writing for the unanimous Court, stated:

> Having found that the congressional appropriation was intended to cover welfare services at least to those Indians residing "on or near" the reservation, it does not necessarily follow that the Secretary is without power to create reasonable classifications and eligibility requirements in order to allocate the limited funds available to him for this purpose. * * * Thus, if there were only enough funds appropriated to provide meaningfully for 10,000 needy Indian beneficiaries and the entire class of eligible beneficiaries numbered 20,000, it would be incumbent upon the BIA to develop an eligibility standard to deal with this problem, and the standard, if rational and proper, might leave some of the class otherwise encompassed by the appropriation without benefits. 415 U.S. at 230–31.

Finally, in *Scholder* v. *United States*, 428 F. 2d 1123 (9th Cir. 1970), *cert. denied*, 400 U.S. 942 (1970), the court considered a claim that BIA's expenditure of appropriated funds on an Indian irrigation project which included work that would benefit solely a non-Indian was unauthorized. The appropriation act merely referred to "construction, major repair, and improvement of irrigation and power systems." The court looked at both BIA's authorization act and the legislative history of the appropriation act, noted that the budget requests presented to Congress indicated that non-Indians would benefit from the irrigation projects, and concluded that Congress did not intend to preclude expenditures that would benefit non-Indians. The court stated that "If Congress had wanted to impose on the Bureau the restrictions urged by appellants, it could have done so easily." 428 F.

2d at 1129. LTV cites this case for the proposition that "reliance may be placed on the legislative history of a general appropriation act to determine the precise authority of the executive agency with respect to the expenditure of the appropriated funds." Once again, however, in *Scholder* the Court merely referred to legislative history to determine if expenditures that would benefit non-Indians were within the language of the broadly worded appropriation statute. The court did not at all consider whether an expenditure clearly within the purview of the appropriation language was nonetheless prohibited because of statements in legislative history.

We think it follows from the above discussion that, as a general proposition, there is a distinction to be made between utilizing legislative history for the purpose of illuminating the intent underlying language used in a statute and resorting to that history for the purpose of writing into the law that which is not there.

If a statute clearly authorizes the use of funds for the procurement of "military aircraft" without restriction, it must be construed to provide support for the validity of procuring any such aircraft. The fact that the legislative history makes clear that one type of military aircraft rather than another is to be acquired does not restrict the unequivocal grant of authority carried in the statute itself. To be binding as a matter of law, an intention to so restrict the legal availability of the funds provided would have to be expressed in the statute. However, if the issue is whether a particular aircraft is in fact a "military aircraft," as that term is used in the statute, resort to legislative history is required.

An accommodation has developed between the Congress and the Executive branch resulting in the appropriation process flexibility discussed above. Funds are most often appropriated in lump sums on the basis of mutual legislative and executive understandings as to their use and derive from agency budget estimates and testimony and expressions of intent in committee reports. The understandings reached generally are not engrafted upon the appropriation provisions enacted. To establish as a matter of law specific restrictions covering the detailed and complete basis upon which appropriated funds are understood to be provided would, as a practical matter, severely limit the capability of agencies to accommodate changing conditions.

As observed above, this does not mean agencies are free to ignore clearly expressed legislative history applicable to the use of appropriated funds. They ignore such expressions of intent at the peril of strained relations with the Congress. The Executive branch—as the Navy has recognized—has a practical duty to abide by such expressions. This duty, however, must be understood to fall short

of a statutory requirement giving rise to a legal infraction where there is a failure to carry out that duty.

Accordingly, for the reasons discussed above, we believe that the Conference Committee statement on which LTV relies constitutes, in effect, a "directive" which parallels and complements—but, in a strict legal sense, remains distinct from—the actual appropriation made. Therefore, it is our conclusion that the Navy's award of contracts to MDC and GE did not violate Title V of the 1975 DOD Appropriation Act and in that regard the contracts cannot be considered illegal.

PUBLIC POLICY CONSIDERATIONS

LTV also argues that the award to MDC must be considered "invalid and void" because it was contrary to "a clear public policy in favor of the utilization of one basic aircraft technology and design to fulfill the needs of both the Navy and the Air Force for a lightweight Air Combat Fighter."

We think this public policy argument is misplaced. It is true that courts have long declared contracts "to be illegal on the ground that they are contrary to public policy." 6A A. Corbin, Contracts § 1375 (1962). In some instances, such contracts call for a result which is contrary to statute. See, e.g., *Lakos* v. *Saliaris*, 116 F. 2d 440 (4th Cir. 1940). In other instances the contracts, while themselves not illegal *per se*, result from behavior which is contrary to law. *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961); *United States* v. *Acme Process Equipment Company*, 385 U.S. 138 (1966). In the *Mississippi Valley Generating Co.* case, the Supreme Court held unenforceable a Government contract resulting from behavior which was violative of a conflict of interest law. In the *Acme Process* case, the Court held that the Government could cancel a contract because of violations of the Anti-Kickback Act. In both cases the Court found that nonenforcement and cancellation were "essential to effectuating the public policy embodied" in the statutes. 364 U.S. at 563; 385 U.S. at 145.

Contracts, however, are not lightly treated as invalid. "It is a matter of public importance that good faith contracts of the United States should not be lightly invalidated," *Muschany* v. *United States*, 324 U.S. 49, 66 (1945), and such contracts will not be regarded as invalid unless they are plainly or palpably illegal. *John Reiner and Company* v. *United States*, 325 F. 2d 438, 163 Ct. Cl. 381 (1963), *cert. denied*, 377 U.S. 931 (1964); *Coastal Cargo Company, Inc.* v. *United States*, 351 F. 2d 1004, 173 Ct. Cl. 259 (1965); *Warren Bros. Roads Co.* v. *United States*, 355 F. 2d 612, 173 Ct. Cl. 714 (1965); 52 Comp. Gen. 215 (1972);

50 *id.* 679 (1971); 50 *id.* 565 (1971); 50 *id.* 390 (1970). When a contract is alleged to be illegal on public policy grounds, "there must be found definite indications in the law * * * to justify the invalidation of a contract as contrary to that policy. * * * In the absence of a plain indication of that policy through long governmental practice or statutory enactments, or of violations of obvious ethical or moral standards, [the Court will not] * * * declare contracts * * * contrary to public policy." *Muschany* v. *United States*, *supra*, at 66–67.

Here, while it is clear that the Congressional Conference Committee desired the Navy to develop a derivative of the Air Force ACF suitable for carrier operations, there was not, as discussed above, any statutory requirement or "indication" compelling the Navy to do so. Thus, unlike the situations in the *Mississippi Valley* and *Acme Process* cases, *supra*, there were no statutory violations attending the award of the contract to MDC. It is also clear that the awarded contract does not require any actions which are contrary to law, and we do not perceive any violation of moral or ethical standards. Accordingly, in view of the strong presumption in favor of the validity of contracts, we are unable to conclude that the Navy's award to MDC is void as contrary to public policy.

REPROGRAMMING

LTV next argues that even if the Navy's actions were not contrary to statute or public policy considerations, those actions cannot be upheld because the Navy did not comply with the applicable DOD Directive and Instruction on reprogramming. LTV claims that since the provisions of the directives were not followed, the Navy did not effectively reprogram its RDT&E funds and therefore was without authority to fund the MDC & GE design efforts or to award the sustaining engineering contracts.

As discussed above, the Congress has recognized the desirability of maintaining executive flexibility to shift funds within a particular appropriation account. The methods by which agencies accomplish ths have become known as reprogramming. See generally, Fisher, *supra*. Although Congress, in enacting unrestricted lump-sum appropriations, has continued to provide this reprogramming flexibility, it has also from time to time manifested a desire to subject reprogramming to closer congressional scrutiny and control. *See* Fisher, *supra*, at 79, 97. In response to this congressional desire, DOD developed a set of instructions on reprogramming. Fisher, *supra*, at 82. The current DOD instructions, DOD Directive 7250.5 and DOD Instruction 7250.10, both dated January 14, 1975, contemplate that in many instances approval of the Congressional Appropriations Committees and in some instances

the Armed Services Committees as well is a prerequisite to a reprogramming action.

The Navy believes that it complied with both the direction of Congress and with the spirit and intent of the reprogramming directives by obtaining the necessary approval from the House and Senate Appropriations Committees. In this regard, the Navy refers both to the November 1, 1974, letters, and responses thereto, sent to the Chairmen of the two Appropriations Committees (see p. 313, *supra*), and to letters sent to both Chairmen again on March 7, 1975. Those letters, written after the Air Force selected the F–16, stated that the Navy was completing "its evaluation of both firms' proposals in a fully competitive atmosphere," and that if "an acceptable design [could] be found it will be necessary to use the remainder of the present appropriation to contract with the selected firm to refine its design and sustain its engineering effort pending formal program approval to undertake full scale development in FY 1976." Once again, the Chairmen did not express any objections to the Navy's intended course of action.

LTV argues that reprogramming is a narrowly structured method for obtaining congressional approval for shifting funds within an account, and that what the Navy did here fell far short of meeting reprogramming requirements. For example, LTV points out that the Navy did not utilize the formal reprogramming form (DD Form 1415) required by DOD Instruction 7250.10 and did not even refer to reprogramming in the correspondence sent to the Committee Chairmen.

While it may be that the Navy did not literally comply with the applicable DOD directives on reprogramming, these DOD directives, unlike laws and regulations, do not provide this Office with a proper basis for determining the legality of expenditures. See *Project Sanguine Report* at 11. As previously noted, reprogramming is a nonstatutory device based on nonstatutory agreements and understandings. See Fisher, *supra*, at 79. Thus, the propriety of what the Navy did in this case is properly a matter for resolution by Congress and the Navy rather than by this Office.

LTV also argues that if what the Navy did here can be characterized as reprogramming, then the 1975 DOD Appropriation Act was violated because section 843 of that Act precludes the use of funds appropriated by the Act for preparation or presentation of a reprogramming request (with certain exceptions not relevant here). Section 843 of the Appropriation Act provides:

> No part of the Funds in this Act shall be available to prepare or present a request to the Committee on Appropriations for the reprogramming of funds, unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which reprogramming is requested has been denied by the Congress.

Section 843 may have been violated if the Navy's actions amounted to reprogramming. Even assuming—without conceding—that this is the case, since the conference language is not to be read into the statute, a violation of section 843 cannot serve to invalidate an otherwise legal contract award. See *Project Sanguine Report* at 12.

Accordingly, we are unable to object to the awards on the basis of LTV's reprogramming arguments.

THE COMPETITION

Introduction

The Navy utilized formal source selection procedures in evaluating proposals submitted by MDC and LTV and selecting a winner. For evaluation purposes, the RFQ/RFP established the equally weighted factors of performance and cost as the most important criteria. Commonality was the third most important factor. Other factors included reliability and maintainability, logistics support, development risk, lot I cost, DT&E program, management, and facilities and resources.

Rejection of the three LTV designs was based on unsatisfactory ratings in the performance area, particularly combat performance and overall carrier suitability. Although LTV does not concede the nonsuitability of its designs, it does not argue, in the context of this protest, that the Navy should have regarded one or more of its designs as acceptable. Rather, LTV argues that the competition was not fairly conducted and that it was prejudiced as a result. It also asserts that there came a point in the evaluation when the Navy was obliged by both statute and regulation to terminate the competition rather than award a contract to a firm offering an NACF design other than a derivative of the F–16.

LTV objects to the evaluation of proposals on several grounds. It argues that the LTV and MDC submissions were not evaluated on an equal basis and that MDC and LTV were not accorded equal treatment during the competition. The primary basis for LTV's argument is its belief that it was penalized by the Navy for complying with the applicable evaluation criteria while MDC was permitted to deviate from those criteria. LTV also questions whether its cost proposal was evaluated against the solicitation's criteria and in the same manner as the MDC cost proposal. Finally, LTV asserts that the Navy's conduct of this procurement resulted in a violation of the Armed Services Procurement Act, 10 U.S. Code § 2304(g) (1970) and section 3–101 of the Armed Services Procurement Regulation because the Navy improperly restricted competition.

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LTV's assertions here, as they relate to its technical proposal, essentially revolve around the RFQ/RFP evaluation criterion concerning "commonality" and a listing of equipment in the RFQ that included certain aircraft engines. LTV claims that the commonality criterion referred to commonality with the F–16 and required that the NACF be a derivative of the F–16. LTV states that it complied with this requirement but MDC did not. The thrust of LTV's position here is twofold. First, LTV states that its proposal was regarded as unsuitable by the Navy precisely because it complied with the evaluation criteria and offered designs that incorporated F–16 derivative features (LTV identifies two of these features as automatic angle of attack limiter and fly by wire control system). With regard to the engines, LTV believes that the RFQ listed four engines as acceptable and that the Navy did not properly evaluate the MDC design which proposed the use of a nonlisted engine.

Commonality

As indicated above, the third most important evaluation criterion was listed as "the proposal which demonstrates the highest degree of commonality with, and makes the maximum use of Air Lightweight Fighter and Air Combat Fighter technology and hardware." It is LTV's position that this criterion implements the statement in H.R. Report No. 93–1363 that the NACF be a carrier-suitable adaptation of the selected Air Force ACF and must therefore be read to require commonality with the F–16.

In support of its position, LTV focuses on the relationship between the RFQ/RFP commonality criterion and the Air Force's October 12, 1974, letter which accompanied the RFQ. That letter provided in pertinent part as follows:

1. The Navy is initiating a program for the development and production of a new carrier based fighter/attack aircraft weapon system to be a derivative of Air Force Lightweight Fighter program. In the House of Representatives Report No. 93.1363 of 18 September 1974, it was directed that the development of this aircraft make maximum use of the Air Force Lightweight Fighter (USAF LWF) and Air Combat Fighter (ACF) technology and hardware.

2. Enclosure (2) [the RFQ] reflects performance characteristics and other parameters of the aircraft as described in the Navy's operational requirement. Achievement of these characteristics and parameters is an important goal. Contractors should provide at least one point design of an aircraft which responds to the operational requirements as defined by the requirements specification and the desired maximum use of the USAF LWF and ACF technology and hardware. Trades should be performed which analyze the gains and penalties associated with achieving this goal. Gains may include cost and scheduled savings during development, and acquisition and lower overall life cycle costs based on commonality with the ACF Aircraft. Penalties may include failure to meet performance and specification goals, thereby reducing the potential effectiveness of the Navy aircraft. The trade studies should quantify derived benefits and identify any penalties so that the Navy can determine an acceptable balance between the two. In order to assure that all opportunities for commonality are explored, the contractors must provide a design including the same engine which they propose for use with the USAF ACF. In addition, the contractors also are requested to pro-

vide a variant which has only provisions in place of the full all weather air-to-air missile capability and identify gains and penalties associated therewith.

3. It is the Navy's intent to consider reliability, maintainability, survivability, schedule and cost along with performance and capability in accordance with the solicitation evaluation criteria in judging designs. Flexibility and tradeoffs are encountered where significant cost savings can be realized or reliability and maintainability can be enhanced. These trade-offs should be documented to the Navy. It may not be possible in the time allowed to submit a fully documented engineering development proposal. * * *

4. The new Navy aircraft is intended to replace F–4 aircraft in both the Navy and Marine Corps and eventually the A–7 in the Navy. Accordingly, the aircraft should have a capability to effectively perform long range fighter escort and strike missions into high threat areas. The aircraft must possess good carrier suitability features and be fully compatible with that environment. It must also provide a significant improvement in reliability, maintainability, and survivability over current Navy tactical aircraft. Furthermore, it must offer affordable acquisition and life cycle costs. Initial Fleet deliveries are required no later than calendar year 1981.

The letter also encouraged the ACF contractors to prepare their proposals so as to achieve "lower costs and increased commonality between the ACF and the Navy derivative" and stated that if a Navy derivative of the LWF program could be developed, it was anticipated that full-scale development of the NACF would be initiated by the Navy. Attached to the Air Force's cover letter was a document captioned "CRITERIA FOR EVALUATION AND SOURCE SELECTION." That document provided that "Proposals for Full Scale Development received in response to this solicitation will be evaluated by the Naval Air Systems Command pursuant to a formal source selection procedure. The following evaluation criteria apply, in the context of the considerations outlined in the covering letter." The document then set out criteria that were essentially the same as those contained in the attached RFQ.

LTV points out that this letter indicated that: 1) an important goal to the Navy was maximum reasonable commonality between the ACF and "the Navy derivative"; 2) at least one point design was desired which represented the maximum use of LWF and ACF technology and hardware; 3) contractors were encouraged to use imaginative approaches in achieving lower costs and increased commonality between the ACF and the Navy derivative; and 4) that full-scale development was anticipated if a derivative of the LWF program could satisfy Navy needs. LTV places considerable weight on the references to a Navy derivative of the ACF as establishing the type of aircraft desired by the Navy. It also finds significance in the statement that the evaluation criteria were to be applied "in the context of the considerations of the covering letter." LTV argues that the only reasonable reading of these documents is that the commonality criterion required that the NACF be a derivative of the ACF, and that commonality could be maximized only if measured against the F–16. In addition, LTV asserts that its interpretation was buttressed on several occasions

when it was told by DOD officials that the NACF would be a derivative of the ACF. While LTV recognizes that the F–16 was not chosen as the ACF until January 13, 1975, it argues that after that date the Navy was required to consider the F–16 as the basic NACF design.

The Navy concedes that the F–18 is not a derivative of the F–16. However, it is the Navy's position that the RFQ/RFP did not contain a requirement that the ACF be adapted for Navy use. Rather, the Navy states that the RFQ/RFP was designed to solicit the optimum lightweight fighter for the Navy that would, within the performance and cost parameters established for the NACF, maximize commonality of both technology and hardware of the LWF and ACF programs. The Navy contends that its selection of the F–18 is entirely consistent with that interpretation.

We think the Navy is correct. The language of the third criterion leaves little doubt that commonality was to be sought with both the LWF and ACF programs and, more specifically, with both the technology and hardware associated with the two programs. As noted, however, LTV argues that the criterion must be interpreted in light of the Air Force letter accompanying the RFQ which, LTV believes, would establish that commonality in this instance meant only a derivative of the F–16. We agree with LTV that the evaluation criteria should be read in connection with the accompanying Air Force letter. *Cf. Xerox Corporation*, B–180341, May 10, 1974, 74–1 CPD 242. We do not agree, however, that the letter can be reasonably read as LTV argues.

We think it is clear that the language of the letter was directed toward the overall LWF program, of which the YF–17 was a significant part, and not merely the selected F–16. For example, the initial paragraph of the letter stated that the NACF was to be a derivative of the "Air Force Lightweight Fighter Program," and characterizes the Conference Report as desiring maximum use of both LWF and ACF technology and hardware. Furthermore, the letter advised that NACF development would be initiated if a derivative of the Air Force Lightweight Fighter program was satisfactory. In addition, many of the references to "ACF" appear to refer not to the selected Air Force design (the Air Force ACF had not yet been chosen), but to the entries of each of the offerors competing for the Air Force ACF award. See, in this regard, the second paragraph of that letter, which advises "contractors * * * [to] provide a design including the same engine which they propose for use with the USAF ACF."

It is also clear from the letter that while maximum commonality was desired (and we agree that the maximum possible commonality would result in a close derivative of the Air Force selection), contrac-

tors were expected to make tradeoffs in order to satisfy cost and performance requirements. Thus, the letter specifically referred to commonality as a goal rather than a mandatory feature. In this connection, we also point out that commonality in fact was not a requirement, but rather an evaluation factor, pursuant to which proposals would be rated on the degree to which commonality (with the totality of the LWF and ACF programs) was attained. No minimum level of commonality was ever established by the RFQ/RFP or associated documents.

LTV argues that such an interpretation would not permit realization of the significant cost savings which is the very goal of the commonality objective. We think the record suggests otherwise. The Navy has pointed out that the LWF program, which ultimately resulted in the ACF program, involved "a considerable investment * * * toward studying advanced technological developments, with particular emphasis on * * * mandates for simplification and the elimination of frills. This extensive study, including testing, was reflected in the surviving F–16 and F–17 designs * * *." How this LWF technology was utilized in the F–17 is explained by MDC as follows:

> The MDC/[Northrop] teaming agreement assured that LWF prototype technology and cost saving would be incorporated in an NACF * * *. Cost benefits of $125 million flowed from the use of prior YF–17/J101 development effort and inured to the benefit of the Model 267. Moreover, because the Model 267 drew heavily from the extensive YF–17 and J101 design, development and test efforts, the F–18 NACF was able to incorporate the excellent high-lift aerodynamics of the unswept wing with leading edge extension; the outstanding handling qualities made possible through the aerodynamic configuration and the closed-loop electronic control augmentation system with mechanical backup; a new ejection seat which had already been subjected to sled tests; and the J101 (now the F404) engine with its solid development background. Consequently, the F–18 has a demonstrated technological base which substantially reduces the risks otherwise inherent in developing a new aircraft. * * *

Furthermore, the savings available through achieving commonality with technology is also indicated in the following statement in the Navy's report filed in response to the protest:

> "Commonality of hardware" between two aircraft designs would naturally be greatest if each and every component of the two models was identical—its engines, landing gear, armament, electronics, flight control systems and even rivets. "Commonality of technology," on the other hand, could be achieved even though the individual components of the two aircrafts were different. For example, their communications equipments could be different in size, operate at different frequencies and use different antennae, but their internal designs could share a "commonality of technology" because they both employed sub-miniaturized components. "Commonality of technology" could also be manifested in the use of metal parts with different shapes and sizes, but whose metallurgical properties were similar in the common technology employed in their smelting, milling, and forming operations. "Commonality of technology" produced the greatest savings in time and money in the early research and development phases of a program, whereas "commonality of hardware" has the greatest beneficial effect in reducing later production and support costs.

In addition, we note that approximately $114 million was devoted to the demonstration phase of the LWF program, with about 60 percent of that amount being spent on the YF–17. We think the Navy acted properly in attempting to utilize in its own program the technology and hardware that resulted from that expenditure.

With regard to the assertion that DOD officials led LTV to believe that its interpretation of the RFQ was correct, LTV states that it was told by the Deputy Secretary of Defense that "commonality with the Air Force plane and cost would determine the Navy's selection." LTV also claims that it was told by the Deputy Chief of Naval Operations that, in view of H.R. Report No. 93–1363, "the Navy was limited to selecting a derivative of the aircraft selected by the Air Force."

The Navy strongly denies these allegations. The Navy also advises that the meeting between the Deputy Secretary and the NACF contractors was held on October 16, 1974, *inter alia*, to answer any questions regarding the competition. It further advises that a summary of the notes of the meeting reveals that at "no time did the Deputy Secretary state or imply that the NACF must be a derivative of the selected ACF, or that performance was of lesser importance that commonality and cost, or that the evaluation criteria were other than those clearly set forth in the solicitation."

While both the Navy and LTV have submitted differing statements as to what they believe occurred at these meetings, our record does not indicate which version is correct. See *Bromley Contracting Co. Inc.*, B–180169, December 13, 1974, 74–2 CPD 336; *Phelps Protection Systems, Inc.*, B–181148, November 7, 1974, 74–2 CPD 244. We do note, however, that LTV's proposals reflected an awareness that offerors were not restricted to achieving commonality only with the F–16. For example, LTV's proposed model 1602 was so different from the F–16 that the Navy suggests that it "might more accurately be described as an entirely new aircraft design both as to airframe and engine." Also, the LTV 1600/1601 proposal contained the following statement:

> * * * One of the keys of the feasibility of a Navy derivative of the ACF is the preservation of "technological and hardware commonality" in transitioning from ACF to NFA. A successful transition process is more directly related to "technology commonality" than to "hardware commonality." The single ingredient that most directly determines the ultimate degree of program success is the validity of the technology base. If the technology base is not sound and thoroughly established early in the program, no amount of "hardware commonality" can make up for this deficiency.

In light of the above discussion it is our conclusion that the concept of "commonality" as that term was used in the RFQ/RFP clearly referred to the technology and hardware of the LWF and ACF pro-

grams and not solely to the F–16 design. With respect to the evaluation of commonality itself, our review indicates that it took into account these three aspects: (1) the extent of commonality of the offeror's model with the F–16; (2) commonality of the offeror's model with LWF hardware and technology; and (3) commonality with regard to the use of Government Furnished Equipment and Navy Ground Support Equipment. In conducting this evaluation, the Navy requested, and the offerors provided, individual commonality estimates of the respective NACF designs with their prior ACF designs. The MDC design obviously had little hardware commonality with the F–16, and the Navy reports that this was taken into consideration when it evaluated LTV far higher than MDC on this criterion. This was consistent with the provisions of the RFQ, and it thus appears that both offerors were treated equally and fairly in this regard.

Engines

LTV argues that it was also prejudiced by the Navy's alleged failure to act properly in considering the contractor's proposed engine selections. It argues that four engines (J101, F100, F101, F401) were called out by the RFQ as acceptable and that the MDC design was selected with an engine (F404) not listed in the solicitation. Furthermore, the protester believes that evaluation criterion F placed emphasis on the design which employed "demonstrated technology" and represented the "lower developmental risk against development cost and schedule milestones," and that weight was therefore to be accorded engines which were in the final development stage. LTV contends that its position is consistent with the Navy's desire to determine the optimum engine and airframe which would lead to the earliest possible operational engine. Since LTV considers the selected engine to be an untested "paper" engine, it questions the selection of the MDC design.

The Navy asserts that under the RFQ, MDC had discretion to propose whatever engine it desired and that the four engines listed in the RFQ only represented what the Navy intended to furnish as Government Furnished Equipment (GFE). Accordingly, it believes MDC did not propose an unauthorized engine. At any rate, argues Navy, the F404 engine represents only a minor modification to the J101 engine and that the change from J101 to F404 is merely a nomenclature change. Accordingly, the Navy asserts that the F404 is much more than a "paper" engine and is still considered to represent low-risk development. In this regard, the Navy points out that MDC's proposed engine is similar to LTV proposed engine in that LTV's designs also relied on growth versions of the engines listed in the

RFQ. The Navy also states that its calculations establish the F404 to be more than adequate for its designed task.

The RFQ contained a list of equipment, including the four engines referred to above, which would be GFE if used by the contractor. However, an enclosure to a supplemental Air Force letter which provided "corrections, classifications or changes" to the RFQ, under the heading "*Acceptable Engines*," stated that "The following baseline engines will be considered acceptable when modified to meet Navy requirements * * *." The engines were identified as the F100–PW–100, the F101–GE–100, the F401–PW–400A, and the J101–GE–100.

MDC proposed J101 engines. It first proposed a J101/J7A7; it subsequently proposed a J101/J7A8 engine. This latter engine was ultimately accepted by the Navy and redesignated the F404–GE–400.

Our review indicates that this F404 engine is not a new "paper" engine, but with certain modifications, is the basic J101 engine which was developed for use in the F–17. We note that the basic core elements of the J101, consisting of the compressor, combustor, and turbine, remain the same for the F404 except for some minor physical changes. The modifications that are to be made to the J101 involve a .9 inch increase in the fan diameter, the addition of a "mini-mixer," a .4 inch increase to the diameter of the low pressure turbine, a 2.4 inch increase in the diameter of the afterburner casing, and an increase of 3.1 inches in the engine's nozzle. These modifications are intended to increase the thrust available from the basic J101 which is necessitated by the increased weight of the F–18 as compared with the F–17. Since, in our view, the F404 is a modified version of the J101, we find that LTV's claim that it was prejudiced by the engine selection is without merit.

Finally, LTV believes the Navy may have improperly evaluated engine upgrading costs since the Navy allegedly estimated that modifying the J101 to the F404 would only cost $12 million while the "marinizing" cost of the F100 would be $300 million. The protester's analysis of the F404 costs, however, does not include the basic cost involved with upgrading the J101 from the YJ101, which was estimated to be approximately $264.2 million (1975 dollars). Since the Navy estimate for upgrading the F404 is thus approximately $276.2 million (1975 dollars), there appears to be no basis for questioning this evaluation.

Cost

LTV also challenges the Navy's selection on the ground that the Navy did not properly evaluate cost. LTV asserts that by choosing the F–18 the Navy acted contrary to the selection criteria because the F–18 "will be billions of dollars more costly than the rejected YF–16

derivatives" as well as more costly than the F–16 and possibly even more costly than the F–14. In addition, LTV asserts its belief that the Navy increased LTV's proposed dollar figures "to arrive at an estimated price hundreds of millions of dollars higher than LTV's estimate" without increasing MDC's figures. LTV also questions the escalation rate used by the Navy in evaluating proposals.

We recognize that the objective of this procurement was the development of a low cost fighter that would be an acceptable alternative to the F–14. However, in considering this protest it is not our function to examine the various alternatives available to the Navy or the cost effectiveness of the alternative it selected. Rather, we are concerned solely with the legality and propriety of the Navy's selection decision in view of the applicable law and regulations. Accordingly, while we have not evaluated the cost effectiveness of the Navy's selection, we have reviewed the Navy's actions to determine if the cost evaluation was conducted in accordance with proper procedures and the established selection criteria. For the reasons discussed below, we believe the Navy's cost evaluation met those standards.

The solicitation indicated that the equally weighted areas of cost and performance would be the paramount evaluation items. With regard to cost, credibility of proposed costs was listed as the primary concern. The solicitation further indicated that the evaluation would take into account all costs related to design, development and production.

In evaluating proposed costs, the Navy developed its own independent estimates for the MDC entry and each of the LTV entries. In arriving at its estimates, the Navy utilized both parametric pricing and analogous system techniques. Parametric cost estimating involves a process in which the cost of an item is estimated by relating its cost to specific physical and/or performance characteristics. The relationship is based on empirical data observed on similar items. The analogous technique relies on cost experience with analogous systems. In addition, the Navy considered each offeror's "business base and organizational structure, the anticipated higher costs of the increased reliability and maintainability requirements in the NACF program over prior aircraft programs, and those lower costs which would flow from ACF 'commonality.'"

The Navy estimates for development of the LTV designs were substantially higher than LTV's proposed costs, while the Navy estimate for the MDC entry was only slightly higher than MDC's proposed costs. Thus, while the estimated costs of the MDC design were somewhat higher than the estimated costs of each of the LTV designs, the Navy regarded the MDC proposal as the more acceptable one, particularly in view of the technical superiority of the MDC design. As

the Navy put its, "* * * while cost was of equal importance, it was not determinative due to the F–18's vast superiority in performance over all of the F–16 derivatives."

The Navy's use of estimates in this case was entirely consistent with sound procurement practices. We have repeatedly observed "that the award of cost-reimbursement contracts requires procurement personnel to exercise informed judgments as to whether submitted proposals are realistic concerning the proposed costs and technical approach involved," 50 Comp. Gen. 390, 410, *supra*, and that it is proper to use independent Government cost estimates as an aid in determining the reasonableness and realism of cost and technical approaches. *Dynalectron Corporation; Lockheed Electronics Company, Inc.*, 54 Comp. Gen. 562 (1975), 75–1 CPD 17; *Raytheon Company*, 54 *id.* 169 (1974), 74–2 CPD 137, and cases cited therein. Furthermore, although LTV suggests that the use of parametric pricing techniques is inappropriate, we have recognized that it is an acceptable method for estimating costs, see e.g., *Raytheon Company*, *supra*, and we think the decision to utilize such a technique is within the sound discretion of the procuring activity. *Raytheon Company*, *supra; Vinnell Corporation*, B–180557, October 8, 1974, 74–2 CPD 190; B–176311(1), October 26, 1973.

The fact that the MDC design was estimated to cost more than any of the LTV designs does not indicate that the Navy acted improperly in selecting the MDC proposal. Under the evaluation criteria, cost was not to be controlling, but was to be considered along with performance and certain other, less important, factors. The record here clearly establishes that the Navy considered the estimated cost differences among the proposals, but regarded the cost difference between the MDC proposal and the LTV proposals to be completely offset by the technical difference between LTV's designs and the MDC design. It is, of course, well established that agencies have the discretion to award a negotiated contract on the basis of a proposal's technical superiority notwithstanding that proposal's higher cost. 52 Comp. Gen. 198, 211 (1972); 50 *id.* 113 (1970); *Stephen J. Hall & Associates, et al.*, B–180440, B–132740, July 10, 1974, 74–2 CPD 17. (We also note that the Navy regarded each of LTV's designs to be unsuitable and could have treated LTV's proposals as unacceptable for technical reasons alone, thereby negating any requirement to consider cost. *See* 53 Comp. Gen. 1 (1973); 52 *id.* 382 (1972)). Accordingly, in light of the evaluation criteria applicable to this procurement, the Navy's selection of the higher-priced proposal was not improper.

With regard to LTV's claim that the Navy increased LTV's proposed costs, it is clear from our review that the Navy did not revise LTV's costs, but relied on its own estimates of what those costs would

actually be. As indicated above, we have no basis for challenging the Navy's estimating techniques. With regard to the escalation factors, the proposals of both offerors reflect the escalation rates used by the Air Force in evaluation of the F–16 and F–17. However, the Navy felt that those rates were too low and devised its own inflation rates. Our review indicates that the Navy applied these rates uniformly to both the MDC proposal and the LTV proposals. Thus, while the Navy's evaluation apparently resulted in higher estimated costs for the proposals than would have been computed by using Air Force rates, it is clear that both offerors were treated equivalently by the Navy in this regard and that neither offeror was prejudiced thereby.

Necessity to Recompete

LTV also argues that the Navy violated 10 U.S.C. § 2304(g) and ASPR § 3–101(b) because it did not obtain the maximum competition required by those statutory and regulatory provisions. According to LTV, "once the Navy determined that it was not going to select a derivative of the F–16 as the NACF, the Navy was no longer justified in excluding Grumman, Lockheed, Boeing, and others from competing for NACF selection * * * hence the Navy was required to cancel the NACF procurement and to resolicit the entire aerospace industry on an unrestricted basis."

The Navy argues that LTV "has no standing to raise this issue since it knowingly and fully participated in the competition and was not one of those allegedly excluded from the competition." On the substance of the LTV allegation, the Navy claims that its actions were entirely in accord with the "principles governing the competitive source selection process" as those principles are set out in *Hoffman Electronics Corp.*, 54 Comp. Gen. 1107 (1975), 75–1 CPD 395.

In that case, we reviewed the statutory requirement that agencies maximize competition in their procurements of supplies and services, noting that while such competition "is the cornerstone of the competitive system * * * restrictions of competition may be imposed when the legitimate needs of the agency so require." Furthermore, we upheld the use of dual prototype contracting and the restricting of competition for a follow-on production contract to the two prototype development contractors, since it appeared that under the circumstances the restriction was both legitimate and reasonable. See also *Bell Aerospace Company*, 55 Comp. Gen. 244 (1975). LTV does not disagree with the *Hoffman* case, and agrees that the Navy did not act improperly in initially soliciting (through the Air Force) only General Dynamics and Northrop for its NACF requirement. However, LTV argues that the continuance of this restriction was not reasonable and

legitimate because the Navy, when it decided it could not or would not select an F–16 derivative, abandoned its initial requirement for commonality.

On the Navy's first point, we might well agree that LTV is not in a position to raise this issue if its concern was directed entirely toward the exclusion of other firms from the competition. However, LTV's argument also goes to the restriction which LTV believed was imposed on it by the RFQ, as indicated by its assertion that the Navy had no "lawful justification for restricting competition and thereby denying the majority of airborne manufacturers the opportunity to compete for NACF selection *and denying LTV the opportunity to submit a design not derived from the F–16.*" [Italic supplied.] Thus, LTV essentially argues that it and the aerospace industry in general should have been given an opportunity to compete for the NACF unencumbered by any requirement to achieve commonality with another airplane.

This argument, however, is predicated on LTV's erroneous belief that the solicitation's commonality provisions limited selection to a derivative of the design selected by the Air Force. As discussed above, we have concluded that the commonality requirement was not so limited and that in fact the Navy's selection was consistent with a proper reading of the RFQ/RFP provisions. Accordingly, we find no basis for concluding that the Navy unduly restricted competition in this case.

CONCLUSION

For the various reasons discussed above, we have concluded that the Navy's actions were not illegal or improper and that therefore the protest must be denied.

As indicated in the Introduction section, the Congress has manifested significant interest in DOD's LWF/ACF programs and has closely monitored the Navy's attempts to develop a lightweight, low cost fighter that could operate effectively from aircraft carriers. The statement in the Conference Report on the 1975 DOD Appropriation Act that "future funding is to be contingent upon the capability of the Navy to produce a derivative of the selected Air Force Air Combat Fighter design" suggests that the Congress will be closely scrutinizing the Navy's choice before full-scale development funds will be provided. Thus, the ultimate determination regarding further F–18 development has yet to be made.

[B–183607]

Contracts—Specifications—Failure to Furnish Something Required—Information—Catalog Number and Manufacturer

Requirement that bidders submit manufacturer's specifications and indicate on the bid the manufacturer and catalog number of item offered is informational in

nature and failure to comply should not have required rejection of bid since procured item was not unusually complex, was adequately described in solicitation and record did not provide adequate justification for such requirement.

Contracts — Specifications — Manufacturers — Justification — Lacking

Requirement for submission of manufacturer's specifications with bid to show that product offered conforms to specification is not justified since solicitation did not advise bidders with particularity both as to extent of detail required and purpose to be served by such requirement.

Contracts—Specifications—Compliance—General *v.* Specific Statement

General statement by bidder that item offered would be fully color coded rather than a statement of compliance with one of the precise color coding methods specified by agency did not require rejection of bid since in the absence of an express exception to methods specified by agency bidder's general statement must be construed as consistent with solicitation requirements.

In the matter of the White Plains Electrical Supply Company, Inc., October 2, 1975:

White Plains Electrical Supply Co., Inc. has protested award of a contract for a definite quantity of electrical cable under Solicitation No. 200–B–4465, issued by the U.S. Department of Interior, Bureau of Reclamation. The protester argues that it was improperly declared nonresponsive because it failed to submit descriptive data called for in the invitation for bids (IFB) and asserts that the requirements for such data should have been waived as informalities or minor irregularities.

The solicitation requested bidders to indicate on the schedule the manufacturer, catalog number and price of the items bid in the blank space provided. Bidders were advised at the conclusion of the list of items in the schedule, as follows: "*IMPORTANT*: Please [see] requirements of Paragraph A–8 of the Special Conditions for submittal of data." In this connection, the solicitation provided:

A–8. *Data to be furnished by offerors.* a. The cable to be furnished shall be completely identified. Manufacturer's data shall be furnished with the manufacturer's specifications and evidence that the cable meets the Insulated Power Cable Engineers Association (IPCEA) Standards. Data, and descriptive literature are required to establish, for the purpose of offer, evaluation and award, details of the product the offeror proposed to furnish to show that the product offered conforms to the specifications.

b. Failure of the data and descriptive literature to show that the product offered conforms to the specifications and other requirements of this solicitation will require rejection of the offer. Offers will be disregarded if they are made ambiguous in any material respect by the contents of data, or descriptive literature whether such information is solicited or unsolicited. Failure to furnish the data or descriptive literature by the time specified in the solicitation will require rejection of the offer, except that if the material is transmitted by mail and is receined late, it may be considered under the provisions for considering late offers, as set forth elsewhere in this solicitation.

The justification for requiring the submission of data is explained in the statement of the Regional Procurement Officer as follows:

The control cable is required to meet the standards of the IPCEA and to have a temperature rating of 90° C. This rating is not standard for polyethylene insulated cable under Paragraph 3.9 of the Insulated Power Cable Engineers' Association (IPCEA) Standards, and literature available in this Office indicates that some manufacturers do not list this cable as being available at the 90° C temperature rating. It is considered a specialized requirement.

Because this cable is not a standard item with some manufacturers and because we are unable to determine from data available in this Office that these firms do supply this item, it is deemed necessary to require that all cable offered be completely identified. Manufacturer's data and specifications are required to establish details of the product offered to show that it conforms to the specifications.

The bid of White Plains was rejected since the bidder did not indicate the manufacturer's name and catalog number and since the descriptive literature furnished with the bid did not specifically describe one of the two specified IPCEA methods for color coding but merely provided that the cable offered would be "fully color coded."

While we need not decide here whether information regarding manufacturer and catalog number constitutes descriptive literature as defined in Federal Procurement Regulations (FPR) 1-2.202-5(a) (1964 ed.), it is reasonably clear from the solicitation that such identification was intended to be a material requirement. The Department takes the position that identification of the manufacturer and "catalog number" is a material requirement of the bid "since all manufacturers do not make a standard cable item meeting the requirements of the specifictions, * * * the quality of the product is directly related to what the required data would show." The Department, therefore, implies that in the circumstances it would not be able to ascertain the quality of the item bid without the required data. However, in our opinion, the Department's position begs the question since an unqualified bid normally is sufficient to bind the bidder provided the solicitation's specifications adequately describe the Government's actual requirements. The fact that all manufacturers may not offer standard cable with a temperature rating of 90 degrees C., in our opinion, does not detract from the adequacy of that performance characteristic which is a sufficiently detailed description of the Government's requirements and leaves nothing for the bidders to describe. Also, electrical cable does not appear to be an unusually complex item justifying the submission of descriptive literature. FPR 1-2.202-5(b). Therefore, the record does not establish that a statement of the manufacturer's name and catalog number is necessary to assure that bidders understand the requirements of the specifications. In the circumstances, the failure to furnish such information could not affect the obligation of the bidder, in the event of award, to furnish supplies acceptable to the Government. Thus, we find the requirement to list the manufacturer and catalog number to be informational in nature

and the failure to provide it should not have required rejection of the bid as nonresponsive. 49 Comp. Gen. 553 (1970).

It appears that the solicitation requirement for submission of manufacturer's specifications "to show the product offered conforms to the specifications," is subject to the same objection. Moreover, even if an acceptable product could not have been procured without descriptive literature, which does not appear to be the case, a requirement for such literature should advise bidders with particularity both as to the extent of the detail required and the purpose it is expected to serve. 46 Comp. Gen. 1, 5 (1966). In this case the record shows that the cable offered by the successful bidder was not listed in a printed catalog, and since the manufacturer's descriptive literature was unavailable, that bidder furnished excerpts from the IPCEA standards (specified by the Government) with applicable paragraphs checked for compliance. Thus, it would appear that the successful bidder merely reiterated the controlling specification and the procuring activity viewed this as satisfying the descriptive literature requirements of the solicitation. In this connection, we have consistently held that if the requirement for descriptive literature can be met by parroting back the specifications provided in the solicitation, the legitimacy of that requirement is questionable since such information would not appear to be necessary to determine the responsiveness of the bid. 46 Comp. Gen. 315, 318 (1966).

The fact that the literature submitted by White Plains stated that the cable offered would be "fully color coded" rather than specifying the precise method to be used should not have caused the rejection of the bid. In the absence of an express exception to the method specified in the solicitation, the bidder's statement that the cable would be color coded must be reasonably construed as consistent with the methods prescribed in the solicitation. *Aristo Company*, 53 Comp. Gen. 499 (1974). Also, White Plains submitted a certification with its bid stating that the supplies offered complied in every particular with the advertised specifications.

Accordingly, we believe bids should not have been rejected as nonresponsive for failure to provide data specified in paragraph A–8. Since we are advised that performance of the contract awarded has been completed we do not recommend termination action. However, the Department should take appropriate measures to insure that these deficiencies do not reoccur.

[B–183966]

Contracting Officers—Determinations—Nonresponsibility—Reasonable—Supported by Grand Jury Findings

Where validity of contracting officer's nonresponsibility determination is challenged on basis it was erroneously predicated primarily upon criminal indict-

ment which had been dismissed, such determination is nevertheless reasonable since findings of grand jury underlying indictment adequately support findings of lack of integrity, indictment was dismissed because of procedural deficiencies rather than for insufficiency of evidence, and dismissal has been appealed. Contracting officer's failure to contact prospective contractor regarding responsibility did not affect validity of determination.

In the matter of the P.T. & L. Construction Company, Inc., October 2, 1975:

Invitation for bids No. DACW51-B-0013, for the Elizabeth River Flood Control Project, was issued by the United States Army Engineer District, New York, New York on March 13, 1975. At bid opening on April 17, 1975, P.T. & L. was found to be the low bidder. However, on the basis of information developed during the course of a preaward survey, the contracting officer determined that P.T. & L. was nonresponsible for lack of business integrity and awarded a contract to the second low bidder. P.T. & L's protest to this Office followed.

In his nonresponsibility determination dated May 16, 1975, the contracting officer noted that on December 27, 1974, the New Jersey Department of Transportation had suspended P.T. & L. and its president from bidding or performing on any projects of the Department, and that such suspension was still in effect. Furthermore, he reports having learned from a Deputy Attorney General and the Director of the State Division of Criminal Justice that P.T. & L. and its president had been indicted in the State of New Jersey in November 1974 for an alleged illegal act performed by them in connection with the award of a State highway paving contract; that the substance of the illegal acts charged is that P.T. & L. arranged for the only other bidder on the contract to submit a noncompetitive bid for the payment by P.T. & L. of $180,000; that at the trial on the indictment, after completion of the State's case, the indictment was dismissed because of procedural deficiencies in the presentation of the case rather than for insufficiency of evidence; and that the State had appealed the dismissal. Therefore, the contracting officer made the following determination:

4. Based on all the above information, I find that there is substantial evidence which casts serious doubts as to the integrity of the subject contractor and that such evidence creates a strong suspicion that one or more principal officers of subject contractor committed wilful acts of fraud against the State of New Jersey in submitting a bid for a large construction project of that State. I hereby determine that subject contractor is nonresponsible within the meaning of the provisions of ASPR 1-903.1 (iv).

P.T. & L. contends that the contracting officer's determination was clearly erroneous since it was based primarily upon an indictment which had been dismissed. Furthermore, it is argued that P.T. & L.'s continued disqualification from bidding on New Jersey State highway contracts provides no basis for the contracting officer's determination since no administrative hearing was ever held with respect to such

disqualification and no findings have been made by the State with regard to P.T. & L.'s qualifications as a bidder. In this connection, it is stated that although the opportunity for a hearing was extended by the State, the disqualification was not challenged because of the paucity of available State work and because P.T. & L. was advised by counsel that a hearing could possibly prejudice the related criminal proceeding currently on appeal by the State. Finally, P.T. & L. also contends that under the applicable regulations the contracting officer's inquiry should have included contact with P.T. & L. and should not have been limited to discussions with personnel of the New Jersey Attorney General's Office. It is contended that such contact would have revealed that P.T. & L.'s disqualification by the State has "no real meaning" with respect to its responsibility and integrity.

Contracts pursuant to formal advertising are required to be awarded, under 10 U.S. Code § 2305(c), "to the responsible bidder whose bid conforms to the invitation and will be the most advantageous to the United States." In this connection, Armed Services Procurement Regulation (ASPR) § 1-902 (1974 ed.) provides that a prospective contractor must demonstrate affirmatively his responsibility and the contracting officer shall make a determination of nonresponsibility if the information bearing on the matter does not indicate clearly that the prospective contractor is responsible. In order for a prospective contractor to be determined responsible, he must have a satisfactory record of integrity. ASPR § 1-903.1 (iv) (1974 ed.).

Whether evidence of a bidder's lack of integrity is sufficient to warrant a finding in a particular case that a bidder is not responsible is a matter primarily for determination by the contracting officer of the procuring agency, and we will not substitute our judgment for that of the contracting officer unless there is no reasonable basis for his determination. 48 Comp. Gen. 769, 773 (1969); 51 *id.* 703, 709 (1972). While we do not believe that mere suspicions or allegations are sufficient evidence to support a finding of nonresponsibility, the indictment of a corporation's president for an offense enumerated in ASPR § 1-605.1 (1974 ed.) as a cause for suspension of bidders has been held to constitute an adequate basis for a determination of nonresponsibility. 51 Comp. Gen. 703, *supra;* B-179182, October 30, 1973. Under ASPR § 1-605.1(i)(A) a firm may be suspended, upon adequate evidence of the commission of fraud or a criminal offense as an incident to obtaining, or attempting to obtain, a public contract. It is clear, therefore, that an indictment of P.T. & L.'s president for the charges stated in the indictment would be sufficient to support a nonresponsibility determination.

With regard to the effect of dismissal of the indictment, it has been recognized that adequate evidence for suspension does not require the

kind of showing necessary for a successful criminal prosecution or a formal debarment, but may be likened to the probable cause necessary for an arrest, a search warrant, or a preliminary hearing. B–179182, *supra*. Since the effect of a determination of nonresponsibility for a particular procurement is of a less serious consequence than a suspension, certainly the nature of the evidence necessary to support a nonresponsibility determination need not be any greater than that required to support a suspension. In making his negative determination, the contracting officer took cognizance of the investigation and findings of the grand jury underlying the indictment, as well as information in connection therewith obtained orally from a Deputy Attorney General and the Director of the State Division of Criminal Justice. With regard to the fact that the indictment had been dismissed, he noted that it had not been dismissed for the insufficiency of the evidence but because of procedural deficiencies involving the State's presentation of the case. In addition, the contracting officer noted that dismissal of the indictment had been appealed by the State. In these circumstances, we believe there was a reasonable basis for the contracting officer concluding that "there is substantial evidence which casts serious doubt as to the integrity of the subject contractor" and, therefore, there is no basis for our Office to interfere with his determination of nonresponsibility.

Finally, we agree with P.T. & L. that ASPR 1–905.3(i) contemplates the contracting officer obtaining information from the prospective contractor regarding his responsibility. However, since it appears that such contact would have only revealed that P.T. & L. had not asked for a hearing on the State's disqualification because of the paucity of State business and to avoid prejudicing any criminal proceedings, we do not believe the failure to contact P.T. & L. affects the validity of the determination.

Accordingly, the protest is denied.

[B–184306]

Appropriations—Availability—Paperweights and Plaques

Appropriated funds may not be used to buy paperweights and walnut plaques for distribution by U.S. Army Criminal Investigation Command (USACIDC) to governmental officials and other individuals in recognition of their support for USACIDC. Plaques may, however, be purchased with appropriated funds to honor employees who died in the line of duty if the use is proper under the Government Employees Incentive Awards Act, 5 U.S.C. 4501–4506, and related regulations.

In the matter of use of U.S. Army Criminal Investigation Command (USACIDC) appropriated funds for purchase of marble paperweights and walnut plaques, October 2, 1975:

The Director of the Department of the Army Defense Supply Service–Washington (DSS–W) has requested our opinion concerning

the propriety of the procurement of marble paperweights and walnut plaques to be given to appropriate governmental officials and other individuals in recognition of their support for the United States Army Criminal Investigation Command (USACIDC). The anticipated cost of 324 paperweights is $988.20 and the cost of 50 plaques is $350.

The USACIDC asserts that the purpose of distributing these articles is to provide recognition to distinguished citizens who have made substantial contributions to the mission accomplishment of USACIDC. Coordination with law enforcement agencies outside the military, according to a justification statement from USACIDC to DSS–W, is essential, and this "mission essential cooperation" is "maintained through the vehicle of reciprocal respect manifested by attendance and participation in the social and cultural functions of the agency." Distribution of the requested tokens is asserted to be part of USACIDC's "community relations program" and "essential to the accomplishment of USACIDC mission requirements."

The purchase of such items for the requested purpose is not specifically authorized by any appropriation act or other statute. Our Office has long held that appropriated funds may be used for objects not specifically set forth in an appropriation act only if there is a direct connection between such objects and the purpose for which the appropriation was made, and if the object is essential to the carrying out of such purposes. 27 Comp. Gen. 679, 681 (1948); see 31 U.S. Code § 628 (1970). The funds sought to be charged for the expenses in question are part of the Operation and Maintenance, Army (OMA) appropriation. While distribution of paperweights and plaques may be desirable when used as described in USACIDC's justification, it would seem that, at best, it has an indirect and somewhat conjectural bearing upon the purposes for which USACIDC's appropriation was made.

Several Comptroller General decisions, cited in the submission to us from DSS–W to USACIDC questioning the validity of the requisition, have refused to validate similar claims. In 37 Comp. Gen. 360 (1957) a request to approve a voucher for Christmas cards to be distributed by the United States Information Agency (USIA) was denied. While the USIA asserted that the purpose of the cards was "to secure the recipients good will and cooperation" in carrying out the USIA's work, this Office noted that "[s]uch justification likely could be used by most Government agencies similarly to justify such expense." In 53 Comp. Gen. 770 (1974), we declined to permit certification of a voucher for ashtrays to be distributed by the Small Business Administration (SBA) to Federal procurement officials attending an SBA-

sponsored interagency meeting. There, as here, the SBA argued that the items would "serve as a continuing reminder * * * of the responsibilities of" the official's "department or agency to cooperate with SBA in pursuance of small business programs authorized by the Small Business Act, and thereby further the accomplishment of such programs." We ruled that the ashtrays that were given to the Federal officials were in the nature of personal gifts and therefore improper. Also of relevance is 45 Comp. Gen. 199 (1965) concerning the use of appropriated funds for the distribution of plaques to States by the Forest Service. There, it was similarly asserted that the "permanent recognition" was significant "in furthering Forest Service cooperation programs with States and fostering good will in Federal-State relations." The voucher was approved in that case only because payment had already been made; and we stated further:

> * * * if expenditures are administratively considered necessary or desirable for an effective carrying out of the cooperation forestry programs under cited law, the matter should be brought to the attention of the Congress for specific authority and sanction with respect to appropriations hereafter to be made. * * * *Id.* at 201.

Accordingly, we conclude that appropriated funds are not available for purchase of the paperweights and plaques under the circumstances described above.

We note an additional justification on the requisition for the plaques which explains that they will be used to provide "a memorial for CID Special Agents who lose their lives in the line of duty." An expenditure for this purpose would be proper (as would one for plaques for civilian employees who are CID agents), if it conforms to the provisions of the Government Employee Incentive Awards Act, 5 U.S.C. §§ 4501–4506 (1970) and applicable regulations. *Cf.*, 46 Comp. Gen. 662 (1967). In this regard, we note that Army Regulation 672–20 (1974), section 1–3c, provides that:

> Former employees * * *, or the estates of *deceased* employees * * * are eligible to receive awards for contributions made by such persons while employed by * * * the Department of the Army.

[B–153348]

Vehicles—Acquisition by Purchase or Transfer—For Use by Grantees

Acquisition by agencies of aircraft and passenger motor vehicles by purchase or transfer is prohibited by 31 U.S.C. 638a, unless specifically authorized by appropriation act or other law, and this prohibition applies to acquisition by transfer by Law Enforcement Assistance Administration of aircraft or passenger motor vehicles for use by grantees in their regular law enforcement functions because agency obtains custody and accountability and exception would reduce congressional control over aircraft and vehicles. See 44 Comp. Gen. 117. 43 Comp. Gen. 697, 49 Comp. Gen. 202 and B–162525, December 21, 1967, distinguished.

In the matter of transferability of passenger motor vehicles and aircraft between Federal agencies for use by grantees, October 3, 1975:

By letter of December 19, 1974, the Administrator of the Law Enforcement Assistance Administration (LEAA) requested a decision as to whether the statutory restriction on the transfer of excess motor vehicles and aircraft from one Federal agency to another (31 U.S. Code § 638a) applies where the receiving agency retains only legal title and its grantee receives the use of the property for purposes of a grant. The Administrator states that the Federal Excess Property List has included helicopters and other vehicles which are usable by State and local Government grantees for their law enforcement functions.

In brief, 31 U.S.C. § 638a (1970) prohibits Federal agencies from acquiring—by purchase, transfer, or hire—passenger motor vehicles or aircraft unless specifically authorized to do so by an appropriation act or other law. The LEAA Administrator contends that the congressional intent behind this restriction was to prevent potential abuses of property within an agency and promote greater accountability in the Government and that the intent is not frustrated by permitting grantees to utilize excess aircraft or motor vehicles for originally intended purposes. He states that aircraft or motor vehicles transferred from one Federal agency to a grantee of another agency are not acquired by the receiving agency in the sense proscribed by the statute; that the grantee pays all the costs of the transfer; and that the receiving agency is not entitled to the beneficial use of the property. He concludes that prohibiting transfers to grantees was never contemplated by 31 U.S.C. § 638a.

As support for his position, the Administrator cites 43 Comp. Gen. 697 (1964), where we held that expenditures from funds granted by the National Science Foundation for scientific research by grantees may be made without regard to the prohibition on the purchase of aircraft without specific statutory authority. Finally, the Administrator cites the Federal Property Management Regulations issued by General Services Administration (GSA) which provide, at 41 C.F.R. § 101–43.320(b), that—

> * * * Excess personal property can also be used to expand the ability of a contractor or project grantee to fulfill his mission, and shall be considered for this use wherever possible. * * *

The statutory restrictions on acquiring aircraft and motor vehicles imposed on Federal agencies by 31 U.S.C. § 638a do not contain any exception for such property acquired by an agency for use by its grantees, and we do not believe it would be appropriate to make a broad exception by decision.

It seems clear that the purpose behind section 638a of Title 31 was to give Congress some measure of control over the acquisition of passenger motor vehicles and aircraft by Federal agencies. The acquisition of such property is not barred; it is simply made subject to approval by Congress in the annual appropriation process. If an agency does not obtain authorization for acquiring motor vehicles or aircraft in its appropriation act or other law, then 31 U.S.C. § 638a becomes a prohibition on acquisition by other means. Subsection (e) of section 638a expressly makes the restriction applicable to the acquisition of aircraft or passenger motor vehicles by any agency by transfer from another agency.

In 44 Comp. Gen. 117 (1964), we held that the statutory restrictions applied to passenger vehicles acquired by transfer from other departments and agencies, with or without reimbursement. In overruling 26 Comp. Gen. 312 (1946) which had held the statutory provisions inapplicable to transfers without reimbursement, we reviewed the legislative history of the statute (then codified as 5 U.S.C. § 78) and found a clear intention that the acquisition of motor vehicles by purchase, transfer, or by any means was to be prohibited unless specifically authorized by an appropriation or other law. Our holding was as follows (44 Comp. Gen. 117, at 119):

> * * * It is the opinion of this Office, therefore, that the restrictions contained in 5 U.S.C. 78 quoted above are to be regarded as an absolute prohibition against the acquisition of such vehicles by purchase, transfer or any other means unless specific authorization for purchase or acquisition of vehicles is provided by an appropriation or other law. Transfers of passenger motor vehicles authorized under the provisions of section 202(a) of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. 483(a), with or without reimbursement, are embraced within limitations set forth in the quoted provisions above since such act is a general law relating to all Federal property and contains no specific authorization to acquire passenger motor vehicles without regard to the provisions in 5 U.S.C. 78, *supra*. Thus such transfers are required to be included within the purchase authorization contained in the annual appropriation acts.

By way of general background, section 202(a) of the Federal Property and Administrative Services Act, referred to in the quotation above, directs the Administrator of the General Services Administration "to promote the maximum utilization of excess property by Executive agencies and . . . provide for the transfer of excess property among Federal agencies . . . ." To accomplish this objective, personal property no longer needed by a Federal agency is required to be reported as excess to GSA which determines if other Federal agencies have a need for the excess property. Under GSA's Federal Property Management Regulations, Federal agencies acquiring excess personal property are authorized: (1) to use it for their own programs, or (2) to make it available to their grantees and cost reimbursable contractors. 41 C.F.R. § 101–43.301, 320.

The use of excess property in general by Federal grantees was approved by the Assistant Attorney General, Office of Legal Counsel, by letters of May 15, 1968, and May 25, 1970, to the Office of Economic Opportunity. The Comptroller General likewise approved making excess property available to grantees in a decision of December 21, 1967, B–162525. Excess property which is not needed by any Federal agency becomes "surplus property" to be disposed of by sale or by donation without cost to States for educational, public health or civil defense purposes, 40 U.S.C. § 484(c) and (j) (1970).

A number of problems have developed in both the grantee program and the donation program. The Ad Hoc Interagency Study Group on Utilization of Excess Federal Property, in its report of January 7, 1974, to the GSA Administrator, has made long-term recommendations to eliminate acquisition of excess property by Federal agencies for their grantees and to allow surplus property to be donated to States for general public use. These recommendations would require legislation amending the Federal Property and Administrative Services Act.

With regard to the restrictions on acquiring vehicles and aircraft in 31 U.S.C. § 638a, we have recognized exceptions to the statute where the use has been solely for research purposes. *See* 49 Comp. Gen. 202 (1969) and prior decisions cited therein. However, we do not believe that this limited exception should be extended to cover the normal use of motor vehicles and aircraft by grantees of Federal agencies. In such cases the Federal agency involved acquires custody and accountability for the excess property transferred to it for use by its grantees and, after a grant is completed, the property is subject to the control of the Federal agency. Thus, granting the LEAA's request would diminish the control of Congress over the number of vehicles and aircraft acquired by Federal agencies. Our holding in 43 Comp. Gen. 697 (1964) that the National Science Foundation's grantees may purchase aircraft for scientific research without regard to 31 U.S.C. § 638a is distinguishable because it involved expenditures from grant funds by grantees.

We conclude that, although 44 Comp. Gen. 117, *supra*, did not involve the question of the use of excess property by grantees, it is nevertheless controlling. We, therefore, hold that 31 U.S.C. § 638a applies to the acquisition by transfer by the Law Enforcement Assistance Administration of excess aircraft or passenger motor vehicles for use by its grantees in their regular law enforcement functions.

Our decision does not mean that the excess aircraft or vehicles will go unused. Instead, as indicated in the Ad Hoc Study Group's report, it may result in a more equitable distribution of such property. If no Federal agency has a direct need for such excess items for its own

programs, the items will be declared surplus by GSA and will be available for donation through State agencies to eligible recipients under section 203(j) of the Federal Property and Administrative Services Act, as amended, 40 U.S.C. § 484(j).

[B-183957]

Bids—Discount Provisions—Bid Bond Amount Calculated on Discount Price

Since Armed Services Procurement Regulation (ASPR) 2-407.3(b) provides that any prompt payment discount offered shall be deducted from bid price on assumption that discount will be taken and offered discount of successful bidder shall form part of award, where prompt payment discount is offered in bid where bid bond is required amount of bid bond may be properly calculated on discounted price.

Bonds—Bid—Deficiencies—Bid Rejection

While ASPR 10-102.5(ii) gives discretionary authority to contracting officer to decide whether bid bond deficiences should be waived, such discretion must have been intended for application within definite rules. Consequently, absent specific finding that waiver of requirement was not in best interest of Government, which was not made in instant case, bid should not have been rejected since it fell into stated exception; protest is therefore sustained and ASPR Committee requested to revise provision to make exception mandatory.

Bonds—Bid—Deficiencies—Waiver

To permit unbridled discretion under ASPR 10-102.5(ii) in determining when bid bond deficiency may be waived would totally defeat purpose of exception and allow its employment as substitute for rejecting bids for unrelated reasons such as nonresponsibility determinations.

In the matter of Commercial Sanitation Service, October 6, 1975:

This case involves a protest by Commercial Sanitation Service (Commercial) against the award of a contract to operate a refuse collection and disposal service for NORAD Cheyenne Mountain Complex and Fort Carson, Colorado, under invitation for bids (IFB) No. DAKF06-75-B-0106, issued by the Department of the Army.

The invitation was issued as a small business set-aside on March 7, 1975, with bid opening, as amended, scheduled for April 18, 1975. Three bids were received in response to the invitation. Commercial submitted the low bid of $187,962 with a prompt payment discount of 8 percent if payment was made within 20 days. This reduced Commercial's bid to $172,925. Dynamic International, Inc. (Dynamic), submitted the next low bid of $196,500 with a prompt payment discount of 10 percent if payment was made within 20 days. This resulted in a reduced bid of $176,850 from Dynamic.

Clause 31 of Standard Form 33 required that each bidder submit with his bid a bid guaranty in an amount equal to 20 percent of the bid

price or $3 million, whichever is less. Commercial submitted a bid bond in the form of a cashier's check in the amount of $34,585 which represented 20 percent of the bid price less the prompt payment discount. By letter dated May 8, 1975, the contracting officer notified Commercial that its bid had been rejected as nonresponsive for failure to submit a sufficient bid bond. The contracting officer implied that Commercial's check should have been in the amount of $37,592.40 which represents 20 percent of Commercial's bid price before the prompt payment discount is subtracted. An award was made to Dynamic on May 8, 1975, after the contracting officer determined that Commercial's bid was nonresponsive since the bid bond was in an amount less than that required by the invitation.

Counsel for Commercial submits that a distinction should be made between the bid price before the discount, referred to by counsel as the gross bid, and the bid price after discount, referred to by counsel as the net bid. He argues that since the bids were evaluated on the basis of the discounted price, the cashier's check submitted by Commercial should not have been considered as insufficient so as to cause rejection of its bid. Counsel further argues that the contracting officer acted improperly by refusing to consider the curative provisions of Armed Services Procurement Regulation (ASPR) § 10–102.5(ii) (1974 ed.) in rejecting Commercial's bid.

The procuring activity has taken the position that the bid price is the price bid before the prompt payment discount is subtracted. Term discounts are considered in the evaluation process, but are not deducted and reflected in the contract award amount as set forth in block 22 of Standard Form 33. A term discount has to be earned by the Government and cannot be taken as a matter of fact.

Section 2–407.3(b) of ASPR (1974 ed.) provides that any discount offered shall be deducted from the bid price if a prompt payment discount is offered for payment within 20 days. The bid offered by Commercial contained a 20-day prompt payment discount and, therefore, it was within the parameters of ASPR so as to be evaluated on the discounted price. Commercial, which was the incumbent contractor, asserts that in the past the Government has always taken advantage of the discounted price and it was not unreasonable for it to assume that the Government would do so in this instance. Counsel argues that since the bids were to be evaluated on the discounted price, it follows that a bid guaranty should be submitted on that price. Thus, it is urged that if a bid is to be evaluated on the discounted price, a bid guaranty submitted on the discounted price should be deemed sufficient.

While our Office has not decided this issue before, it is our view that where a prompt payment discount is offered by a bidder in a bid where

a bid bond is required, the amount of the bond may be calculated on the bid price less the discount. We think such an interpretation is reasonable since ASPR § 2–407.3(b) (1974 ed.) provides that any prompt payment discount offered shall be deducted from the *bid price* on the assumption that the discount will be taken, and it is this price upon which the bids are evaluated. While the Government does not always earn the prompt payment discount, the net price is still the price upon which the bids are evaluated, and the offered discount of the successful bidder shall form a part of the award. ASPR § 2–407.3(d) (1974 ed.). Therefore, we conclude that Commercial's bid was improperly rejected.

Although the foregoing is dispositive of the protest, we believe the remaining issue is significant and should be discussed. The other issue to be resolved is whether the contracting officer improperly rejected Commercial's bid in light of the curative provisions of ASPR § 10–102.5(ii), which provides that:

Noncompliance With Bid Guarantee Requirements. When a solicitation requires that bids be supported by a bid guarantee, noncompliance with such requirement will require rejection of the bid * * * except that rejection of the bid is not required in these situations:

* * * * * * *

(ii) when the amount of the bid guarantee submitted, though less than the amount required by the invitation for bids, is equal to or greater than the difference between the price stated in the bid and the price stated in the next higher acceptable bid * * *.

The Army has taken the position that the provision cited gives the contracting officer discretion to decide whether the provision should be invoked to permit the acceptance of a bid not in strict conformity with the bid guaranty requirement of the invitation.

Counsel for Commercial argues that the purpose of ASPR § 10–102.5(ii) is curative and it was promulgated to alleviate the type of situation which exists in the instant case. Counsel further contends that although the language of the provision is discretionary rather than mandatory, the contracting officer should have waived the defective bid guaranty and determined the bid to be responsive. Counsel also cites a similar provision in the Federal Procurement Regulations (FPR) which is no longer discretionary but mandatory so that a bid submitted with a bid bond less than the amount required by the invitation but equal to or greater than the difference between the price stated in the bid and the price stated in the next higher acceptable bid shall not be rejected if otherwise correct. *See* FPR § 1–10.103–4(b) (1964 ed. Circ. 1).

The contracting officer states that there is nothing in ASPR or in our decisions which irrevocably mandates that the contracting officer accept a bid guaranty less than that required in the invitation for bids.

The contracting officer takes the above position since an FPR provision substantially identical to the ASPR provision cited by counsel for Commercial was held to be discretionary in 40 Comp. Gen. 561 (1961). In that case we held that failure to submit a sufficient bid bond was a material deviation but despite the fact that the deficiency could be waived, we would not disagree with the contracting officer's determination not to waive the deficiency.

While we agree that failure to submit a sufficient bid bond is still a material deviation, see *A. D. Roe Company, Inc.*, 54 Comp. Gen. 271 (1974), 74-2 CPD 194, we do not believe that 40 *id.* 561, *supra*, is for application in the instant case. Although the language of the FPR provision then in use in that case was essentially the same as ASPR § 10-102.5(ii), the IFB in that case also provided that "This requirement for bid guarantee *will not be waived.*" [Italic supplied.] The IFB in the instant case does not contain the same forceful language. We note in this regard that subsequent to our decision in that case, the language in FPR § 1-10.103-4(b) was amended so as to make the application of the regulation mandatory.

In 38 Comp. Gen. 532 (1959), we held that beginning with invitations issued more than 60 days after February 5, 1959, bid bond requirements would be enforced in accordance with their language. In some instances the application of the rule appeared to lead to results which were harsh on the low bidder and not in the Government's best interest. It has been our view, however, that bid bonds are required in the vast majority of cases only by administrative regulation and that the applicability of and the exceptions to the requirement are also matters to be established by regulation.

The cited provision of ASPR was promulgated to provide exceptions to the general rule where deemed to be in the best interest of the Government. While the ASPR provision in question gives discretionary authority to the contracting officer to decide whether bid bond deficiencies should be waived, such discretion must have been intended for application within definite rules. Since the low bidder's failure to conform to the literal requirements of the bid bond provisions comes within one of the ASPR exceptions, such failure should be waived provided it is found by the procuring activity not to have been due to the protester's inability to obtain the bid bond in the required amount for financial or related reasons, or for such other valid reasons that would not make acceptance of the bid in the best interests of the Government. Stated differently, absent a specific finding, which was not made here, that a waiver of the requirement was not in the best interests of the Government, the bid should not be rejected if it falls into the stated exception. To rule otherwise

would permit unbridled discretion to totally defeat the purpose of the exception and allow its employment as as substitute for rejecting bids for unrelated reasons such as nonresponsibility determinations.

It is our view that since the failure of the bid to comply fully with the invitation requirements falls within one of the exceptions enumerated in ASPR, and there was no finding that its acceptance would in any way be detrimental to the best interests of the Government, or prejudice the rights it would otherwise have, the low bid should be regarded as responsive.

In view of the foregoing circumstances, we recommend that the contract with Dynamic be terminated for the convenience of the Government and that award be made to Commercial as the low bidder.

As this decision contains a recommendation for corrective action to be taken, it is being transmitted by letters of today to the congressional committees named in section 232 of the Legislative Reorganization Act of 1970, Public Law 91–510, 31 U.S. Code 1172.

In addition, we are recommending, by letter of today, to the ASPR Committee of the Department of Defense that the language of ASPR § 10–102.5 be revised so that it is no longer discretionary on the part of the contracting officer whether to accept a bid if the bid bond is deficient but falls within one of the enumerated exceptions.

[B–182766]

Property—Private—Damage, Loss, etc.—Government Liability—Rented Equipment Destroyed by Fire

Bailee, in the case of a bailment for mutual benefit, is held to a standard of due care and ordinary prudence. While presumption of negligence ordinarily arises from destruction of bailed property, this rule does not apply where property is destroyed by fire.

Agents—Government—Authority—Responsibility of Persons Dealing With Agents

Since persons who enter contractual relationships with the Government are charged with responsibility of accurately ascertaining the extent of a limited agent's authority, the Government is not bound by a damage clause signed by an employee beyond the scope of his authority.

Bailments—Rent—Lost or Destroyed

When bailed property is destroyed, its availability for use is ended and the bailment is at an end. Rental payments are not authorized beyond the date the subject matter of the bailment was destroyed.

In the matter of the Allen Business Machines Company, October 9, 1975:

This decision is in response to a submission from a Certifying Officer for the Administrative Office of the United States Courts concerning

a claim by Allen Business Machines Company (Allen) for payment of $325 incident to the destruction of a leased typewriter. The facts are not in dispute. A Purchasing Officer for the Administrative Office issued two purchase orders for the rental of a single typewriter, each purchase order specifying a rental term of approximately 3 months. The first purchase order was executed on September 26, 1973, and covered a period through December 10, 1973. The Purchasing Officer authorized an Administrative Office employee to receive the machine from Allen and to use the typewriter at her apartment in connection with a Government training course. The employee, in addition to acknowledging receipt of the typewriter, signed an agreement with Allen which purportedly obligated the Government to pay $325 if the machine was not returned on the due date (December 10, 1973). The agreement expressly made this $325 damage clause applicable if fire should destroy the typewriter. The purchase order, however, specified only the basic rental rate ($75) and the rental term. Allen has received the rent for this period. On December 10, 1973, the Purchasing Officer issued a second purchase order with a view toward extending the rental term an additional 3 months. Allen extended the rental term and fixed the expiration date in accordance with the terms of the second purchase order (March 4, 1974). It appears that neither the employee nor Allen specifically renewed the damage clause which allegedly bound the Government in the first rental transaction. A fire at the employee's apartment subsequently destroyed the typewriter on December 13, 1974. Allen filed a claim for $325, although it is unclear whether the $325 claim is submitted pursuant to the damage clause or, alternatively, whether it represents the replacement cost of the destroyed typewriter.

While the precise terms of the rental contract remain for discussion, the rental of the typewriter is to be regarded as a bailment for mutual benefit. B–171084, December 15, 1970. The Government, as a bailee in a bailment for mutual benefit, is required to exercise ordinary care to protect the bailed property in its possession. *Clark* v. *United States*, 95 U.S. 539, 542 (1877). In the case of a bailment for mutual benefit, the destruction of bailed property would ordinarily establish a presumption that the Government as bailee was negligent. See *Alliance Assurance Co.* v. *United States*, 252 F. 2d 529 (2d Cir. 1958). However, the weight of authority appears to support the rule that no presumption or inference of a bailee's negligence arises as a matter of law from the mere fact that the property, while in the bailee's possession, was destroyed by fire. 8 Am. Jour. 2d, *Bailments*, § 315 at 1202–1203 (1963). The record before us in this case contains no indication of negligence on the part of the employee concerning the fire which de-

stroyed the typewriter. On the contrary, the fire apparently originated in electrical wiring. Thus, absent any contractual provision increasing the Government's liability beyond its duty of ordinary care as a bailee, the instant claim may not be paid. *See* 23 Comp. Gen. 907, 908 (1944).

The purchase orders here contain no provisions which would alter the above conclusion. The using employee, in initially acknowledging receipt of the typewriter, did sign an agreement which attempted to allocate the risk of loss. However, aside from the fact that no loss allocation provision was signed in connection with the second rental transaction which was in force at the time the loss occurred, the using employee was an agent of limited authority and was not authorized to modify the terms of a purchase order, to contract, or to modify a contract on the behalf of the Government. Persons who enter contractual relationships with the Government are charged with the responsibility of accurately ascertaining the extent of the agent's authority. *See, e.g.*, B–180083, January 7, 1974, and cases cited therein. Since the employee lacked actual authority to contractually bind the Government, the damage or loss allocation clause must fail insofar as it purports to bind the Government. It is recognized that an unauthorized act by a limited or special agent may be expressly ratified by appropriate officials or ratified through a retention of benefits with full knowledge of the circumstances. However, neither form of ratification is demonstrated under the facts of this case. Accordingly, Allen's claim for damages is denied.

Additionally, the Government's obligation for rent under the second purchase order depends upon the availability of the property for use. When the typewriter was destroyed, its availability to the bailee ended and the bailment terminated. See *New L. E. & W. R. Co.* v. *New Jersey Electric Ry. Co.*, 38 A 828, 830 (1897). Therefore, the Government's liability for rent may not extend beyond the date of the typewriter's destruction.

[B–183683]

Contracts—Negotiation—Administrative Determination—Advertising *v.* Negotiation

Although procurement assigned priority designation 02 is sufficient authority for contracting officer to negotiate under public exigency exception rather than formally advertise, such authority does not give contracting officer authority to negotiate with only one source where other sources can meet agency's needs as applicable statute and regulations require solicitation of proposals, including price, from maximum number of qualified sources consistent with nature and requirements of supplies to be procured and time limitations involved.

Contracts—Negotiation—Requests for Proposals—Cancellation—Off-the-Shelf Items Procurement

While public exigency justification for negotiation imbues contracting officer with considerable range of discretion in determining extent of negotiation consistent

with exigency of situation, and determination and findings reasonably supported sole-source negotiation, request for proposals (RFP) should nevertheless be canceled and resolicited on unrestricted basis where protests prior to award indicate multimeter being procured is off-the-shelf item which other manufacturers can furnish within time required.

Contracts—Negotiation—Requests for Proposals—Copy Requested—Failure To Furnish

Where sole-source RFP was listed in Commerce Business Daily and protester was unable to obtain copy of RFP after reasonable efforts to do so prior to closing date, failure by agency to comply with request was contrary to ASPR 1-1002.1.

In the matter of Non-Linear Systems, Inc.; Data Precision Corporation, October 9, 1975:

By letters dated June 23, June 27, and August 4, 1975, with enclosed administrative reports, the Command Counsel, Headquarters United States Army Materiel Command, seeks to justify the proposed award of a contract to John Fluke Manufacturing Co., Inc. (Fluke), by the United States Army Missile Command, Redstone Arsenal, Alabama (MICOM), for 149 Fluke 8000A-01 multimeters after a negotiated, sole-source solicitation, request for proposals (RFP) DAAH01-75-R-0746. We have received protests against the proposed award from Non-Linear Systems, Inc. (Non-Linear Systems), and Data Precision Corporation (Data Precision). For the reasons that follow, the protests are sustained.

The following is a restatement of the facts leading up to the proposed award and the protests.

The multimeter is a component of the Guided Missile System Contact Support Set (TOW/DRAGON). Without an operating multimeter, the Contact Support Set is not suitable for its intended purpose, which is to isolate failures of the missile system in order to determine necessary corrective action to prevent deadlined equipment.

In April 1969, at the request of the Maintenance Engineering Division, Supply and Maintenance Directorate and the TOW Project Office, the Maintenance and Procedures Shop conducted tests on the TOW Missile System using Multimeter, model 300M AN/USM-303, FSN 6625-933-2406, a standard Army item used in the Land Combat Support System. This multimeter was found to be inadequate for troubleshooting the TOW Missile System because it would load the error detector card in both the search mode and digital mode.

Upon further testing by the Maintenance Shop using other meters, it was found that the John Fluke model 800 D was satisfactory for troubleshooting the TOW Missile System. However, the 800 D was an A.C. powered meter and for field use a battery-

powered meter was required. The John Fluke model 853A–03 (also called 853M) was found to be basically the same as the 800 D and was battery-powered.

Before the 853A–03 meter was selected for the TOW Missile System Shop Set, a letter was sent by MICOM to the United States Army Electronic Command, Fort Monmouth, New Jersey (ECOM), in May 1969. This letter specified the need for and *gave the parameters of a meter to be used with the TOW Missile System.* It was pointed out in this letter that the 853M meter had been evaluated by MICOM and that it met the necessary requirements for the TOW Missile System. It was also requested that ECOM procure and supply the John Fluke 853M, or an equivalent, to support the TOW requirement.

ECOM stated in August 1969 that it had no meter in its inventory that would meet MICOM's needs and recommended that MICOM purchase and provide the necessary support for same. ECOM also stated in November 1969 that it did not nor could it take cognizance of a meter equal or equivalent to the John Fluke 853M for which MICOM had requirements.

MICOM initially purchased 22 each of the 853A–03 John Fluke meters in November 1970, and deployed them as an item of the Shop Equipment, G.M. System, manufactured at Anniston Army Depot (ANAD). ANAD purchased an additional 33 meters to be used in the Shop Sets which were scheduled to be built.

In September 1973, Fluke advised the TOW Project Office that it was discontinuing the production of model 853M and recommended its new model 8000A–01 (NSN6625–00–210–7584). TOW obtained a Fluke Model 8000A–01 multimeter and MICOM performed a technical evaluation. The model was found to be satisfactory for TOW's requirements. The 8000A–01 was also being used by the Navy and Air Force; in addition, environmental testing to include vibration was conducted by the Navy, which met classification requirements.

On December 19, 1974, the Directorate for Materiel Management, Redstone Arsenal, issued a Procurement Work Directive (P/WD) for 149 8000A–01 Fluke multimeters. The P/WD had a Uniform Material Movement and Issue Priority System (UMMIPS) Priority Designator of 02 and requested a delivery of 88 multimeters on March 29, 1975, and 61 on July 7, 1975. The 149 multimeters will reportedly take care of MICOM's needs until March 1976. The contracting officer states that the need for 149 multimeters is as follows: 16 units in a back-order status, 28 units to provide the prescribed safety level in supply depot, 77 units to cover anticipated demands during the production and procurement cycle, 28 units to cover anticipated demands

during the reorder cycle. Information received in May showed that 51 units were then in a back-order status.

On April 4, 1975, solicitation RFP DAAH01-75-R-0746 was issued on a sole-source basis to Fluke for 149 Fluke multimeters 8000A-01. In the April 4 edition of the *Commerce Business Daily*, the RFP in question was announced with the due date of May 1, 1975. On April 7 or 8, Data Precision began its attempts to obtain a copy of the RFP. Data Precision tried unsuccessfully throughout April to get a copy of the RFP, and finally received one on May 1. (The details of this attempt will be given later.) Fluke responded to the solicitation by letter dated April 9, 1975, and submitted its formal proposal on April 23, 1975. On April 18, Non-Linear Systems protested the sole-source solicitation to our Office; on April 30, Data Precision took similar action.

MICOM seeks to justify the negotiated, sole-source solicitation to Fluke and the proposed contract thereunder on the following grounds: the requirement came to the contracting officer's shop with an Issue Priority Designator (IPD) of 02; the urgency of the requirement vested the contracting officer with considerable discretion to negotiate on a restricted basis with a contractor who had an established, quality product which had been used in the past; there were no specifications drawn up which defined the performance parameters required by the multimeter; there were no drawings which described the design of the instrument; the only purchase description available to MICOM was the John Fluke part number; documentation that was sufficient to provide other firms necessary data to manufacture the item was not available at the time, and to generate such technical data and run a complete procurement cycle would require more than 15 months.

The Issue Priority Designator 02 was sufficient authority for MICOM to negotiate rather than formally advertise for the multimeters. One of the exceptions to the formal advertisement requirement of 10 U.S. Code § 2304(a) (1970), is 10 U.S.C. § 2304(a)(2) (1970), the "public exigency" exception. Armed Services Procurement Regulation (ASPR) § 3-202.2(vi) (1974 ed.), which implements this section, provides:

> Application. In order for the authority [to negotiate due to public exigency] of this paragraph 3-202 to be used, the need must be compelling and of unusual urgency, as when the Government would be seriously injured, financially or otherwise, if the supplies or services were not furnished by a certain date, and when they could not be procured by that date by means of formal advertising. When negotiating under this authority, competition to the maximum extent practicable, within the time allowed, shall be obtained. The following are illustrative of circumstances with respect to which this authority may be used:
>
> * * * * * * *
>
> (vi) purchase request citing an issue priority designator 1 through 6, inclusive, under the Uniform Material Movement and Issue Priority System (UMMIPS).

Where, as here, a purchase request for supplies carries an IPD 01 through 06, ASPR § 3–202.2(vi) (1974 ed.) provides that "the public exigency" exception to the requirement for formal advertising, contained in 10 U.S.C. § 2304(a)(2) (1970), may be used without further justification. See *Hy Gain Electronics Corporation, Antenna Products Company*, B–180740, December 11, 1974, 74–2 CPD 324. However, the authority to negotiate for an item does not give the contracting officer the authority to negotiate with only one source. To the contrary, 10 U.S.C. § 2304(g) provides:

> In all negotiated procurements in excess of $10,000 in which rates or prices are not fixed by law or regulation and in which time of delivery will permit, *proposals, including price, shall be solicited from the maximum number of qualified sources* consistent with the nature and requirements of the supplies or services to be procured, and written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price, and other factors considered: * * *. [Italic supplied.]

As quoted above, ASPR § 3–202.2(vi) (1974 ed.) also requires the procuring activity to obtain competition to the maximum extent practicable within the time allowed.

The statutes and implementing regulations, although allowing negotiation due to a "public exigency," required MICOM to obtain maximum competition subject to the constraints of the nature and requirements of the supplies and the time in which the supplies were needed. The position of this Office has been that the contracting officer has a considerable degree of discretion to determine the amount of competition consistent with the exigency of the situation. *See* B–174968, December 7, 1972; B–176919, April 16, 1973. In reconciling the discretion given a contracting officer due to the "public exigency" exception with the maximum competition demanded by 10 U.S.C. § 2304(g) (1970) and ASPR this Office has stated:

> While the applicable statute (10 U.S.C. 2304(g)) requires that even where authority exists to negotiate procurements, proposals shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured, the "public exigency" justification for negotiation imbues the contracting officer with a considerable range of discretion in determining the extent of negotiation consistent with the exigency of the situation. In the absence of evidence indicating an arbitrary or capricious exercise of the discretion permitted, our Office is not required to object thereto. 44 Comp. Gen. 590, 593 (1965).

The contracting officer's Determination and Findings (D & F) of January 14, 1975, justifying the sole-source solicitation shows that the determination was based upon the following facts: the procurement work directive (P/WD) listed only a John Fluke manufacture number and a national stock number, which referred to the John Fluke Digital multimeter; the P/WD stated that no procurement history existed from which to solicit other sources; attached to the P/WD was a master format *K* indicating, according to MICOM Regulation 715–

84, that there was no documentation available to enable the Government to precisely, accurately and definitely state the information needed to competitively procure the item; and there were required delivery dates of 88 each, on March 29, 1975, and 61 each, on July 7, 1975, with a production lead time of 5 months.

While we believe the foregoing findings reasonably supported the determination to negotiate sole source, we also believe that the facts revealed as a result of the protests indicate that the continued restriction of the procurement (no award has been made) is neither necessary nor valid.

Tab 11 of the administrative report contains the letter from MICOM to ECOM dated May 21, 1969, in which MICOM laid out the parameters for the multimeter it desired. We quote:

> 3. The required TOW and SNILLBLACH parameters for a meter are as follows:
> (a) Portable, light-weight AC/DC meter (battery-powered).
> (b) High accuracy resistance checks (1% accuracy).
> (c) Low-scale, accurately-read meter at 0.
> (d) Low-scale 0 center, good read-out accuracy in low millivolt readings (no more than five millivolts full-scale readings).
> (e) Ten millivolt DC resolution from 0 scale.

Furthermore, the latter stated that enclosed was "a copy of the tentative specifications of the meter."

In a July 1973 letter from Fluke to the Procurement Contracting Division, Anniston Army Depot, in which Fluke suggests to MICOM that it use Fluke model 8000A–01 in place of its discontinued model 853A–03, Fluke states that it is enclosing *technical data files* for both the 853A–03 and the 8000A–01, and also points out in some detail the salient specifications of both the 853A–03 and the 8000A–01. In addition, Fluke notes that the latter model can be delivered 30 days after receipt of award.

Furthermore, the protesters have submitted evidence to the effect that the Army's requirement is for, and Fluke's item is, a standard off-the-shelf digital multimeter; that 20 or more firms produce off-the-shelf multimeters which will meet or exceed the performance parameters noted above; that there is no need for any technical documentation other than a listing of the salient characteristics of the Fluke model 8000A–01, which have been known to the Army since at least July 1973, and available to the general public in Fluke's published brochures; and the prices for their standard off-the-shelf multimeters, meeting or exceeding the capabilities of the specified Fluke model, are less than that quoted by Fluke. In addition, the 5-month production lead time cited by the contracting officer appears to be of questionable validity. A phone call to one of Fluke's sales offices by our Office revealed that one could obtain 50 multimeters within

30–90 days, not 5 months. Furthermore, Non-Linear Systems asserts that vendors of competitive models of the 8000A–01 can deliver in less than 30 days.

Counsel for the Army has stated that while it is the policy of the Department of Defense to compete procurement requirements as much as possible to avoid the appearance of favoritism or unethical conduct, if a given situation dictates procurement from one sole source only, the Government should not be compelled to do otherwise. To support this argument, Counsel has pointed to our decision, *California Microwave, Inc.*, 54 Comp. Gen. 231 (1974), 74–2 CPD 181, in which we said:

> We have also held that where the legitimate needs of the Government can be satisfied from only a single source the law does not require that those needs be compromised in order to obtain competition.

This decision does not justify the actions of MICOM in the instant case. The item involved in the procurement under consideration in B–180954, *supra*, was one which the protesting company would have to develop. In the instant case, the protesting companies contend that they and other manufacturers could have met the legitimate needs of MICOM for a multimeter without development since an off-the-shelf item is what is required and that is what Fluke is offering and what they would offer.

Neither is the fact that Fluke has provided MICOM with satisfactory multimeters in the past justification for negotiating with only Fluke. This Office has held that the fact that an instrument manufactured by one company has proven satisfactory in use is not sufficient basis to exclude others where the evidence indicates that they have the ability to meet the agency's needs. *See* 50 Comp. Gen. 209, 215 (1970). In that case, we noted that restriction of the procurement to a brand name rather than on an "or equal" basis was contrary to ASPR § 1–1206 (1974 ed.).

We believe that the above discussion adequately demonstrates that the solicitation should be canceled and the procurement resolicited on an unrestricted basis. We are not unmindful of the fact that the procurement was initated on an "exigency" basis. However, we note that whereas the P/WD was issued in December 1974, the D & F was not issued until January 14, 1975, and the RFP was issued on April 4, 1975. Furthermore, no award has been made and the protesters contend that a 30-day delivery requirement can be met.

We also believe something should be said concerning Data Precision's efforts to obtain a copy of the RFP. We relate the incident as explained by Mr. Robert M. Scheinfein, vice president for sales, Data Precision:

> In the April 4 edition of *Commerce Business Daily*, issue #PSA–6294, Page 23, the RFP in question was announced with the due date of May 1, 1975. On ap-

proximately the 7th or 8th of April, Redstone Arsenal was telephoned requesting a copy of the RFP. We were advised that we would receive a copy. On the 17th of April, I personally visited Redstone Arsenal, and not having received the RFP, I met with Mr. Charles Trenkle in Building 4488. Mr. Trenkle is the buyer for this RFP. At that meeting, attended by Mr. Trenkle, Mr. Turpin, my representative, and myself, Mr. Trenkle indicated that he could not give me the RFP because it was a sole source item. Shortly thereafter, he called in Mr. Jeff Darwin of the Army SBA. They indicated that in order to receive the RFP, DATA PRECISION had to be a qualified vendor.

They suggested that I contact Mr. Martin of Maintenance of Building 5681 who advised me that he was not concerned with either the qualification or procurement for the RFP. He directed me to Mr. Marion Anderson, the Chief of his section who indicated he had no responsibility regarding this project.

At that point, I went directly to Major General V. H. Ellis, the Commander of Redstone and, although I was unable to meet with him personally, his secretary referred me to his aide who, in turn, was kind enough to set up an immediate appointment with Mr. William Parker, Deputy Director of Procurement and Production.

Mr. Parker requested that I dictate a letter to his secretary * * * to formally request the RFP.

That afternoon, I received a telephone call from Captain Kowallik of Procurement, who indicated that in order to receive the RFP, DATA PRECISION "must be qualified prior to bidding". He then gave me the name of a gentleman at the Lexington Army Depot, whom I was able to finally contact after several days. Mr. Phil Smith of the Test Measurement Diagnostic Office indicated that he did not decide on this product and was not involved in this RFP and was not concerned with qualification.

On about the 29th of April, I again called Mr. Trenkle and indicated the total lack of cooperation with all contacts to whom I had been referred. At that time, the RFP had still not been sent to DATA PRECISION. On the 30th of April, I again called Mr. Trenkle, whom I advised that I would submit an official protest of the RFP. He indicated, at this time, they would send the RFP and that it was still a sole source procurement. * * * This was received the next day at DATA PRECISION, May 1, 1975, which was the closing date of the RFP.

These actions by MICOM are contrary to ASPR § 1–1002.1 (1974 ed.) which states:

> * * * When a solicitation for proposals has been limited as a result of a determination that only a specified firm or firms possess the capability to meet the requirements of a procurement, requests for proposals shall be mailed or otherwise provided upon request to firms not solicited, but only after advice has been given to the firm making the request as to the reasons for the limited solicitations and the unlikelihood of any other firm being able to qualify for a contract award under the circumstances * * *

MICOM offers no explanation for these actions, but labels them as "non-prejudicial" to Data Precision. We do not agree. MICOM's actions precluded Data Precision from competing on an item which it and other companies appear to be qualified to produce.

Finally, it should be noted that the procurement history of the multimeter, as related in the administrative report, fails to indicate any attempt to competitively procure an acceptable multimeter, although MICOM has known what its design and performance parameters were for the multimeter since 1969. Throughout this period, it has made no efforts to abide by the competitive procurement requirements of 10 U.S.C. § 2304(a) (1970), and the Armed Services Procurement Regulation. We believe that the present procurement is a good one for MICOM to implement the competitive mandate of the

applicable statute and regulations. Accordingly, by separate letter of this date, we are advising the Secretary of the Department of the Army of our views.

[B-183713]

Contracts—Specifications—Restrictive—Geographical Location—Extension

Geographic restrictions constitute legitimate restriction on competition where contracting agency properly determines that particular restriction is required. Determination of proper scope of restriction is matter of judgment and discretion involving consideration of services being procured, past experience, market conditions, etc. Moreover, use of geographic limitation creates possibility that one or more potential bidders beyond limit could meet Government's needs; therefore, procurement officials should consider extending geographic limit to broadest scope consistent with Government's needs.

Contracts—Specifications—Restrictive—Geographical Location—Delivery Provisions

Use of geographic restriction for procurement of "furnish" asphalt (that asphalt which is picked up, transported, and applied by DC) which limits procurement to those suppliers having facilities located within District of Columbia is not subject to objection, as geographic restriction serves useful purpose of eliminating those suppliers who appear unable to render acceptable "furnish" service to DC due to their decentralized location outside District of Columbia.

Contracts—Specifications—Restrictive—Geographical Location—Repair *v.* Furnishing Asphalt

Application of geographic restriction to "furnish" asphalt as opposed to "repair" asphalt is proper exercise of procurement discretion, as "furnish" asphalt is picked up, transported, and applied by DC workers whereas repair asphalt is both directly transported and applied by contractor and DC has sought to eliminate added expense of maintaining necessary asphalt temperature which would be required if "furnish" asphalt was procured from suppliers not centrally located within District.

Contracts—Specifications—Minimum Needs Requirement—Administrative Determination

Combination by procuring activity of two items in one solicitation (formerly two solicitations had been utilized) is proper exercise of procurement discretion since preparation and establishment of specifications to reflect needs of Government are matters primarily within jurisdiction of procurement agency and record substantiates fact that combination of items results in lower overall cost. Moreover, award can still be on item basis if doing so is in best interests of District of Columbia.

Contracts—Specifications—Similar Items—One Solicitation—Lower Cost

Contention that award under instant invitation for bids (IFB) can only operate to financial detriment of District is without merit, as instant IFB resulted in lower cost to District than prior uncombined procurements for similar items.

District of Columbia—Contracts—Labor Stipulations—Affirmative Action Programs

Allegation that District's policy of affirmatively promoting minority-owned business is thwarted by award under instant IFB is unsubstantiated in record presented.

In the matter of Paul R. Jackson Construction Company, Inc. and Swindell-Dressler Company, a Division of Pullman, a joint venture, October 9, 1975:

Invitation for bids (IFB) No. 0050-AA-02-0-6-KA, FY-75 First Asphalt Repair Contract was issued by the Department of Highways and Traffic, Government of the District of Columbia (DC). Bids submitted in response to the IFB were opened on April 28, 1975, the apparent low bidder being Asphalt Construction, Inc.

Prior to bid opening, however, our Office received a letter of protest from counsel on behalf of Paul R. Jackson Construction Company, Inc., and Swindell-Dressler Company, a Division of Pullman, Incorporated, A Joint Venture (J/SD) requesting cancellation or correction of the IFB. The protest arises mainly by reason of § 605.01 of the District of Columbia, Department of Highways and Traffic, Standard Specifications for Highways and Structures (1974) manual, incorporated by reference in the IFB, which states in pertinent part,

> This work shall consist of furnishing and delivering to District trucks at the *contractor's or subcontractor's plant within the District,* bituminous mixtures, * * *. [Italic supplied.]

The types of asphalt involved in this procurement, "furnish" and "repair," are defined as follows:

> "Furnish" asphalt is that asphalt which is furnished on D.C. trucks and placed by asphalt workers employed by the City.
> "Repair" asphalt is that asphalt which is furnished complete in place by the contractor in conjunction with concrete repairs to utility openings and repairs to defective roadway and alley areas.

Specifically, counsel has raised the following four arguments for cancellation or correction of the IFB:

1. The geographic restriction imposed by the IFB illegally restricts full and free competition.
2. The IFB gives an unfair competitive advantage to certain bidders.
3. The IFB does not serve the best interests of the District of Columbia.
4. Award of the contract, as it is presently drafted, would violate important policies of the District of Columbia.

USE OF GEOGRAPHIC RESTRICTION

Counsel for J/SD recognizes, and we agree, that geographic restrictions may constitute a legitimate restriction on competition where the contracting agency has properly determined, after careful consideration of the relevant factors involved, that a particular restriction is required. See *Descomp, Inc.*, 53 Comp. Gen. 522 (1974),

74–1 CPD 44; *Plattsburgh Laundry and Dry Cleaning Corp.*, 54 Comp. Gen. 29 (1974), 74–2 CPD 27. But, argues counsel,

> By contrast, the facts of the instant procurement reveal neither "required" geographic restrictions nor a reasonable basis for such restrictions. Instead of procuring specialized services for which close personal contact is required, the instant IFB solicits asphalt which, regardless of the source, can be supplied to District trucks as needed, * * *

DC, on the other hand, contends that,

> The nature of the work under Items 605 002, 605 006, 605 010, 605 014 and 605 016 for furnishing Asphalt on D.C. Trucks has in the past required, and still requires the procurement of this asphalt from plants within the boundaries of the District in order to maintain maximum in-place productivity at minimum in-place costs. The use of asphalt plants outside the District would adversely affect the rate of on-street production and in-place cost for the following reasons.
>
> 1. The time of the availability of asphalt at job sites would be reduced due to increased travel time of District trucks to and from the more distant plants. To maintain standard jobsite production would therefore require the employment of additional personnel and equipment, and/or the working of overtime hours, in order to compensate for this increased travel time.
>
> 2. Asphalt, to be usable, must be placed on the streets before its temperature drops below specified limits. The relative short hauls from District plants to job sites on standard body District trucks has allowed asphalt to be placed within specified temperature ranges. The use of plants outside the District would probably result in excessive heat loss to the asphalt with the probable need to expend additional funds to insulate or add heating units to truck bodies to maintain specified asphalt temperatures.

In view of the above, it is DC's position that the geographic restrictions are both necessary and justified for the "Furnish" asphalt, i.e., the asphalt "Furnished on D.C. Trucks."

As mentioned above, our Office has recognized the propriety of the use of geographic restrictions. We have stated that the determination of the proper scope of a restriction is a matter of judgment and discretion, involving consideration of the services being procured, past experience, market conditions, and other factors. See *Descomp, Inc.*, *supra*, and decisions cited therein. Moreover, wherever a restriction of this type is used there exists the possibility that one or more potential bidders beyond the limit could meet the Government's needs. Procurement officials should, of course, give consideration to extending the geographic limit to the broadest scope consistent with their needs. It is apparent, however, that as the limit is extended, the probability increases that at some point a contract will be awarded, the performance of which entails the difficulties which have been envisioned.

DC has premised its use of a geographic restriction in the instant procurement on the bases of reduced costs, decreased travel time and minimal heat loss during the transport of the "furnish" asphalt. In rebuttal, counsel for the protester invites our attention to the locations of two known potential suppliers outside of Washington, D.C., and the fact that repair work may be necessary at any location in the District. From this, counsel states that one could easily posit several specific

situations wherein "furnish" asphalt from either a Virginia or Maryland supplier would reach a specific destination within the District faster and with no less excessive heat loss than from the location of the present in-District awardee.

In our opinion, however, the real issue is not which supplier, whether located in or outside of the District, can reach a specific location faster or with less heat loss, but rather are the suppliers within the established geographic restriction so located as to provide acceptable "furnish" service to any location in the District. Referring to the map above, an examination of the location of the in-District asphalt suppliers discloses that the current awardee, as well as the second and third low bidders, are so situated as to be able to reach any location within the District within a reasonable time. On the other hand, those suppliers located outside of the District, while presumably able to reach *one* particular area of the District with greater speed, are situated in such a manner so as to make acceptable "furnish" service to many locations within the District unfeasible.

As noted in 53 Comp. Gen. 102 (1973), the use of a geographic restriction may be valid when doing so "serves a useful or necessary purpose." In the instant procurement, the elimination of those suppliers who appear unable to render acceptable "furnish" services to DC due to their location serves such a "useful or necessary purpose."

Moreover, our Office can understand the position taken by DC concerning the criticality of "heat loss" for "furnish" asphalt as opposed to "repair" asphalt. From the record before our Office, we note that "furnish" asphalt is to be picked up, transported, and applied by DC workers, whereas "repair" asphalt is to be directly transported and applied by the contractor. In our opinion, while a contractor may decide to incur the added expense of maintaining the necessary asphalt temperature DC, in an exercise of procurement discretion, has sought to avoid this added expense by requiring that the "furnish" asphalt be supplied from an asphalt plant within the District. Accordingly, we can find no basis to interpose an objection to this exercise of procurement discretion.

UNFAIR COMPETITIVE ADVANTAGE

Counsel for J/SD has contended that the combination of Class C "repair" asphalt with the Class C "furnish" asphalt creates an unfair competitive advantage for those bidders having asphalt plants within the District. The IFB requires that the "furnish" asphalt be supplied by an asphalt plant within the District. Therefore, counsel argues,

> If any bidder, prior to its bid, solicits quotations from the existing [District] asphalt producers, the price will likely be sufficiently high to assure award of the

contract to the incumbent suppliers. Similarly, if a bidder submits a low bid and then attempts to procure the asphalt after award, the price resulting from the noncompetitive market will undoubtedly be prohibitively high. To submit a bid under such circumstances would be irresponsible, if not foolhardy.

DC, on the other hand, has taken the position that the combination of the asphalt items was a proper exercise of procurement discretion. Admittedly, the contract as now designed is identical in nature to previous contracts through the Spring of 1973, when it was considered to be in the best interest of the District to design and advertise a separate "Asphalt Furnishing Contract" and a separate "Asphalt Repair Contract." But, DC argues,

During FY–74 and 75, four (4) separate "Furnishing" contracts were advertised and let. During this period of time, the price per ton for Class C asphalt on D.C. Trucks rose from $13.70/ton on the FY–74 Asphalt Furnishing Contract, D.C. Contract No. S–24693, to $22.60/ton on the FY–75 Asphalt Furnishing Contract, D.C. Contract No. 0532–AA–56–0–5–HB, or 65%.

During this same period of time, the price of Class C asphalt for repairs to utility openings, defective roadway and alley areas rose from $48.00/ton on the FY–74 First Asphalt Repair Contract, D.C. Contract No. 21092, to $80.00/ton on the FY–75 Second Asphalt Repair Contract, D.C. Contract No. 0516–AA–02–0–5–KA, or 67%.

On the present contract in question, the low bidder submitted bids of $17.00/ton for the furnishing of Class C asphalt on D.C. Trucks and $80.00/ton for Class C asphalt for repairs.

The recombining of both asphalt items under this contract appears to have resulted in no increase in unit price for Class C "repair" asphalt and a reduction in unit price for Class C "furnish" asphalt when compared to the prior FY–75 split contracts, thereby resulting in a substantial anticipated savings to the District. [Italic supplied.]

As often times stated by our Office, the preparation and establishment of specifications to reflect the needs of the Government are matters primarily within the jurisdiction of the procurement agency, to be questioned by our Office only when not supported by substantial evidence. 38 Comp. Gen. 190 (1958); 37 *id.* 757 (1958); 17 *id.* 554 (1938); B–176420, January 4, 1973. We recognize that Government procurement officials, who are familiar with the market conditions under which similar materials have been procured in the past, are generally in the best position to know the Government's needs and best able to draft appropriate specifications. Thus, we have held that the Government cannot be placed in the position of allowing bidders to dictate specifications or minimum needs which would have the effect of creating solicitations otherwise than most advantageous to the Government. *East Bay Auto Supply, Inc.*, 53 Comp. Gen. 771 (1974), 74–1 CPD 193.

Based on the record before us, we find that due consideration was given to the recombination of the asphalt items. Moreover, the record substantiates the fact that such a recombination results in a lower overall cost to DC. Additionally, Article 9 of the Instructions to Bidders has reserved to DC the right to award all or any of the items, ac-

cording to its best interests. This provision, in our opinion, retains the competitive atmosphere for the "repair" asphalt between District and non-District suppliers, while still insuring that DC pays the lowest overall price for all of the items involved. Therefore, we believe that DC properly exercised its discretion in drafting the specifications reflecting its minimum needs and we will not question this determination.

THE IFB IS CONTRARY TO THE BEST INTERESTS OF THE DISTRICT OF COLUMBIA

Counsel next contends that award under the instant IFB can only operate to the financial detriment of the District. Citing 43 Comp. Gen. 643 (1964) for the proposition that undue restrictions hamper competition, counsel urges that this procurement should be resolicited in a genuinely competitive market.

However, as detailed above, the instant IFB resulted in a lower cost to the District than prior procurements for similar items. Also, in 43 Comp. Gen., *supra*, our Office held that the award under the protested solicitation was proper in spite of both the restrictions in the IFB and the possible loss of savings on the project.

THE IFB CONTRAVENES IMPORTANT POLICIES OF THE DISTRICT OF COLUMBIA

Counsel for J/SD further alleges that the emerging policy of the District of affirmatively promoting minority-owned businesses cannot be served by the instant IFB. Counsel states that,

> The requirement that asphalt materials be obtained from the plants of District businesses no doubt reflects the well-intentioned desire to promote local business. Under other circumstances, this design could conceivably justify the imposition of narrow geographic restrictions. Nevertheless, regardless of its intention, this policy must defer to the more immediate policy of promoting minority-owned businesses such as Paul R. Jackson Construction Co., Inc., which in turn will ultimately contribute to the economic development of the District of Columbia.

DC has rebutted the above allegation by noting that the IFB brought bids from two minority-owned firms even without a bid from J/SD. Additionally, a minority-owned firm with an asphalt plant in the District has, for the first time, bid on a major repair contract.

In our opinion, based on the record before us, we cannot conclude that important policies of the District of Columbia Government were contravened under the instant IFB.

Finally, counsel questions the propriety of DC having made an award to Asphalt Construction, Incorporated, in view of the fact that

this protest was filed prior to the award. However, pursuant to our then applicable Interim Bid Protest Procedures and Standards, 4 C.F.R. § 20.4 (1974), an agency may make an award prior to a ruling on the protest by the Comptroller General by first informing our Office, through a written finding specifying the factors which will not permit further delay in the award. DC fully complied with the above by letter of June 20, 1975. Moreover, because of this and our failure to object to the use of the geographic restriction, no further discussion on this point is necessary.

In view of the foregoing, the protest of J/SD is denied.

[B–184400]

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

Where four responsive bids were received from small businesses under totally set-aside invitation for bids, and where low small business bid was less than 5 percent above low, big business bid submitted, adequate competition has been achieved.

Contracts—Awards—Small Business Concerns—Price Reasonableness

Mere fact that lower bid price is submitted by big business does not *per se* make award to small business, at slightly higher price, against public interest pursuant to Armed Services Procurement Regulation (ASPR) 1–706.3, since 15 U.S.C. 631 states policy of Congress to award fair proportion of Government procurements to small business firms, and therefore, Government may pay reasonable premium price to small business firms on restricted procurement to implement above-mentioned policy of Congress.

Bids—Collusive Bidding—Referral to Justice Department

Questions of alleged collusive pattern of bidding by small business firms should be referred to Attorney General by procuring agency for resolution pursuant to ASPR 1–111.2, since interpretation and enforcement of criminal laws are functions of Attorney General and Federal courts, not General Accounting Office.

In the matter of Society Brand, Inc.; Waldman Manufacturing Company, Inc., October 9, 1975:

This is a protest filed by counsel on behalf of Society Brand, Incorporated (SBI), involving invitation for bids (IFB) No. DSA100–75–B–1115, issued by the Defense Personnel Support Center (DPSC), Philadelphia, Pennsylvania. This matter was previously before our Office, 55 Comp. Gen. 133 (1975), wherein we determined that several of the issues of protest were untimely filed, and therefore, not for consideration. This decision will consider those issues of protest timely filed but not disposed of in the earlier decision.

The IFB in question was totally set aside for small business. Six bids were received from the thirteen firms solicited, the prices offered being as follows:

BIDDER	UNIT PRICE
SBI	$2.235/$2.249
Waldman Manufacturing Co., Inc. (Waldman)	2.29
Bernard Cap Co	2.40
Propper International, Inc	2.475
Bancroft Cap Co	2.63
Tampa G. Manufacturing Co	2.90

Neither Propper nor SBI certified as to their size status. Both firms, at present, have been determined by the Small Business Administration to be other than small business concerns. The four other bidders represented that they were small business concerns and that they are manufacturers of the items solicited.

INADEQUATE COMPETITION

Counsel for SBI first alleges that there was inadequate competition under this IFB and that it should be readvertised. However, as can be seen from the prices listed above, it appears that adequate competition from small business firms was received. DPSC points out that four responsive bids were received from small firms, all of whom offered on the total requirement at unit prices ranging from $2.29 to $2.90. The second low bid under the instant IFB (the low small business bid) was less than 5 percent above the low big business bid submitted. DPSC states, and we agree, that the foregoing represents adequate competition under the IFB.

REASONABLENESS OF PRICE

Counsel for SBI next contends that the small business prices received under the instant IFB were unreasonable, and therefore, the IFB should be cancelled and reissued on an unrestricted basis. Counsel submits that if an award is made to a small business in this instance, the Government will be paying an excessive price for the items in question, a premium which is neither within the intent of the Small Business Act nor in the public interest.

Armed Services Procurement Regulation (ASPR) § 1–706.3 (1974 ed.), entitled "Review, Withdrawal, or Modification of Set-Asides or Set-Aside Proposals" states, in pertinent part,

> * * * 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 * * *

However, the mere fact that a lower bid price has been submitted by a large business under the IFB does not *per se* make an award to a small business, at a slightly higher price, against the public interest within the meaning of ASPR § 1-706.3 above. Section 631, Title 15, U.S. Code (1970 ed.), states, as the policy of Congress, that a fair proportion of all Government procurement will be made to small business firms. Our Office, at 53 Comp. Gen. 307 (1973), has interpreted 15 U.S.C. § 631 *et seq.*, to mean that the Government may pay a reasonable premium price to small business firms on restricted procurements to implement the above-mentioned policy of Congress. In our opinion, the less than 5-percent price differential between the first and second low bids does not constitute an unreasonable premium price to be incurred in awarding this procurement to a small business firm.

PATTERN OF BIDDING

The final issue raised by counsel for SBI is the alleged "questionable" pattern of bidding reflected on this and other restricted headwear procurements on bids submitted by Waldman and certain other bidders. In rebuttal, counsel for Waldman 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 SBI may directly request the Department of Justice to consider the case if it believes criminal law violations are involved.)

In view of the foregoing, the protest of SBI is denied.

[B-183288]

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

Claims that alternative system can meet all present and future Army calibration needs at lower cost do not clearly show that request for proposals (RFP) requirement for expandable read/write computer memory is without any rea-

sonable basis, since Army, which must make determination of minimum needs and bear risk of inadequate performance resulting from improper determination, believes greater memory capacity will be needed in future to calibrate more complex equipment, that operator-configurable software will provide desirable flexibility and long-term cost savings, and that despite protester's performance claims, its approach may involve unacceptable technical and cost risks.

Contracts—Specifications—Adequacy—Scope of Work—Sufficiency of Detail

In any negotiated procurement, burden is on offerors to affirmatively demonstrate merits of their proposals. Where RFP contemplated fixed-price contract for supply of calibration system, not developmental effort, and instructed offerors to make such demonstration on paragraph-by-paragraph basis, offeror which proposed alternative approach to meeting requirements arguably bore even heavier burden of showing how its system would satisfy Army's needs.

Equipment—Automatic Data Processing Systems—Selection and Purchase—User Acceptability

Where offeror proposing alternative approach to meeting RFP requirements submitted voluminous technical literature, documents, manuals and articles but was proceeding on misconception that Army bore burden of demonstrating how its approach was not feasible, General Accounting Office (GAO) cannot conclude that Army's rejection of basic and alternate proposals as technically unacceptable is shown to be without any reasonable basis. Basic proposal's failure to meet expandable memory requirement and alternate proposal's lack of information on software interface indicate reasonable basis for rejection, notwithstanding protester's allegations of numerous technical errors by Army in failing to understand approach proposed.

Contracts—Negotiation—Requests for Proposals—Protests Under—Allegations of Unfairness Not Substantiated

Allegations of Army officials' persistent unfairness towards protester from time of initial proposal submission through conduct of negotiations, ultimate rejection of basic and alternate proposals, and participation in protest proceedings before GAO cannot be substantiated, since written record fails to demonstrate alleged unfairness, and in fact suggests reasonable explanations for Army's actions. Also, fact that agency officials declined for most part to join in oral discussion of issues at GAO bid protest conference is not objectionable, since agency responded to protester's allegations in several written reports, and conference is not intended to be formal hearing.

In the matter of Julie Research Laboratories, Inc., October 14, 1975:

The protest of Julie Research Laboratories, Inc. (JRL), involves a procurement by the United States Army Missile Command, Redstone Arsenal, Alabama, of "Laboratory Automated Calibration Systems" (LACS). JRL contests the Army's rejection of its proposals as technically unacceptable. Our conclusion is that JRL's protest must be denied.

BACKGROUND

Request for proposals (RFP) No. DAAH01-74-R-0877 was issued October 18, 1974, and sought offers for the LACS—a computer-controlled system to calibrate equipment such as meters, signal generators, oscillators, oscilloscopes and oscilloscope plug-ins. Among other re-

quirements, section 3.2 of the Scope of Work provided in pertinent part:

3.2 *LACS Processor*

3.2.1 *Scope*

This specification describes the computer, peripherals, and all software other than the calibration programs.

3.2.2 *Memory*

If the proposed system requires a shared central processor, the system computer shall have a minimum 32K (16 bit words) or equivalent expandable in the field to 64K words. If the proposed system requires a dedicated processor, the computer in each station shall have a minimum of 16K (16 bit words) or equivalent expandable in the field to 32K words.

JRL and several other concerns submitted offers. After a technical evaluation, written questions were posed to the offerors and written answers were received during January 1975. Oral discussions were then held and offerors were requested to submit written memoranda covering the points which had been discussed. The oral discussions with JRL were held on January 30, 1975, and JRL submitted its memorandum on February 6, 1975. Also, on February 6, 1975, and on subsequent occasions, there were further discussions over the telephone between JRL representatives and Redstone Arsenal personnel concerning, *inter alia*, the LACS memory requirements.

On February 14, 1975, the Army issued amendment 0002 to the RFP, which stated in part:

(c) For clarification purposes, the expandable memory (required by para 3.2.2 of the Scope of Work) shall be general purpose software usable memory.

On February 28, 1975, JRL and Army representatives discussed amendment 0002 over the telephone. On the same day, the Army issued amendment 0003 to the RFP, which stated:

Reference paragraph 3.2.2 of the Scope of Work as clarified by Amendment No. 0002 to the solicitation. General purpose software usable memory means that the programmer can reconfigure the software used in the memory for the required task through software means or techniques. NOTE: Only the expandable portion of the memory need be completely reconfigurable.

JRL's protest was filed on February 25, 1975, immediately after the protester received amendment 0002. In its initial protest letters, JRL contended that the Army by amendments 0002 and 0003 had changed section 3.2.2, *supra*, of the RFP to mean something different from what it originally said. JRL stated its belief that section 3.2.2 as originally written allowed the "expandable" portion of the memory to be "equivalent" to general purpose "read/write" memory; that JRL had proposed a suitable equivalent in the form of a calculator with expandable "read only memory;" and that by changing its requirements in amendments 0002 and 0003, the Army was arbitrarily goldplating its minimum needs by requiring "general purpose computers with

large, general purpose, completely redundant internal memories." JRL contended that this change was without any reasonable basis because it would substantially increase the Government's costs to obtain unnecessary capabilities. In short, it was JRL's initial position that the original RFP had adequately stated certain performance criteria, but that the effect of the amendments was to improperly introduce extraneous design criteria related to the memory requirement.

Notwithstanding its contention that the changed memory requirement was improper, in response to the amendments JRL offered its "Option 3" proposal on February 28, 1975, which substituted a minicomputer for the calculator, apparently in order to meet the Army's stated interpretation of the memory requirements.

The Army evaluated the JRL option 3 proposal, found it to be informationally deficient, and advised JRL of this by letter dated March 18, 1975. JRL responded by letter dated March 22, 1975, giving further information concerning its option 3 proposal. The closing date for best and final offers was March 28, 1975. JRL timely submitted a message extending its offer.

By letter dated April 21, 1975, JRL was advised that all of its proposals had been determined to be technically unacceptable by the Army. After the rejection of all of its proposals, JRL amplified its protest by broadly challenging the efficacy and fairness of the evaluation process as a whole.

In this regard, JRL contends that it proposed to furnish a customized version of its commercially available, off-the-shelf system, which meets or exceeds all the Army's needs. JRL states that its proposals were prepared by its technical experts, who are nationally and internationally recognized for inventing, designing, building and teaching in the field of calibration, test equipment, automated testing, systems, computers, and high level programming. JRL contends that its proposals—consisting altogether of almost 500 pages of material—provided sufficient detail to be technically clear, complete and acceptable to anyone sufficiently skilled in the widely diverse fields of electronic computer test equipment, electronic computers, electronic interface equipment, electronic automated calibration systems, and electronic computer programming and software.

JRL contends that, in view of these considerations, the Army's rejection of its proposals as technically unacceptable was incorrect. JRL questions the competence of the agency's technical evaluation team, alleging that no member could be regarded by any reasonable standard as an acknowledged technical expert in the wide ranging technology which is involved in this procurement. The protester characterizes the Army's technical evaluation report as containing totally

contradictory, misleading, deceptive, illogical, incorrect, false and technically inexpert information. JRL contends, specifically, that 38 of the 41 items cited in the Army's technical evaluation report are false.

As discussed *infra*, JRL also has made a number of allegations that the Army's treatment of its proposals throughout the procurement process was unfair.

Based on these points, JRL contends that our Office should uphold its protest and that it should receive the award, if low in price.

The Army's responses to these arguments, discussed in greater detail *infra*, are that amendments 0002 and 0003 did not change section 3.2.2 of the RFP, but rather were issued to clarify for JRL's benefit the requirement that the expandable portion of the computer memory be read/write memory; that this and other requirements are valid minimum needs of the Army; that the calculator offered in JRL's initial proposal cannot meet the read/write memory requirement because it offers read only memory; that the JRL alternate "Option 3" proposal—offering a minicomputer in lieu of the calculator—was unacceptable due to substantial informational deficiencies; and that the JRL proposals were properly rejected as technically unacceptable based upon an adequate and fair technical evaluation.

Minimum Needs of the Army

The initial question which must be addressed is the reasonableness of the Army's determination, reflected in RFP section 3.2.2 as amended, that as a minimum requirement the expandable portion of the processor memory must be read/write memory. The Army's justification for this requirement has been summarized by the contracting officer as follows:

> (d) Volume of Processor Memory Required
> Experiments with prototype automatic calibration systems (HP 9213A, HP 9213C, HP 9500-161) have convinced AMCC engineers that 16 K (16-bit words) is the absolute minimum now needed to perform existing tasks in the field. This same experience has demonstrated that situations will arise in the future when still greater memory capacity will be necessary; there will be software programs with longer segments than can be accepted by the present capacity. These longer, more complicated programs will result from the addition of new calibration test equipment * * *. It is a generally accepted fact in the industry that an operator can save considerable programming effort through the use of larger memory. Therefore the eventual expansion of memory to 32 K (16-bit words) will show cost savings through faster programming and calibration times enabling AMCC to reduce its support to the field.
> (e) Type of Processor Memory Required
> The specification calls out a minimum of 16K (16-bit words) which may be a mix of read only and read/write, plus expandability to an additional 16K (16-bit words) of general purpose read/write memory—that is, memory which can be reconfigured by the operator by software means. This flexibility allows the operator to program the LACS system to calibrate any and all instruments

by merely reconfiguring the software. The alternative as suggested by JRL is the use of Read Only Memory (ROM) for the expanded capability. ROMs are hard wired computer programs which are in a practical sense non-reconfigurable. Each program task requiring a ROM requires a different ROM for each task, and each time that task is changed the ROM would have to be sent back to the manufacturer for reconfiguration. Not only are ROMs proprietary to the manufacturer, but only ROMs from the manufacturer of the equipment will work in that equipment. This would force the Government into a sole source procurement for ROMs throughout the life cycle of the system. In addition, AMCC is not convinced, nor has JRL been able to show that ROMs can in fact be designed that will do all of the required tasks. At a minimum, the calibration ROMs would require extensive development and therefore be costly.

JRL contends that it is patently false that an additional 16K of read/write memory will have to be added to LACS in the future either to calibrate additional equipment or to reduce calibration costs and/or time and alleges that its commercially available system now in use calibrates equipment that is 2 to 5 times more complicated than the Army's without using the amount of read/write memory claimed to be needed by the Army. JRL contends that only three "standard" ROMs are needed by its system to handle any equipment now being tested, or which may be tested by LACS in the future.

Both JRL and the Army have cited several decisions of our Office dealing with the scope of review of an agency's determination of its minimum needs. In one of these decisions, *Manufacturing Data Systems Incorporated*, B–180608, June 28, 1974, 74–1 CPD 348, the general rule was stated as follows:

> It consistently has been held by our Office that the drafting of specifications to meet the Government's minimum needs is properly the function of the procuring agency. * * * We will not question the agency's determinations in this regard unless there is a showing that the determinations have no reasonable basis. * * * (citing decisions)

The Army has cited this decision and *Digital Equipment Corporation*, B–181336, September 13, 1974, 74–2 CPD 167, as being particularly pertinent to the present case because they involved somewhat similar factual situations and because our Office did not find that the determinations of minimum needs were shown to be without any reasonable basis.

We believe that these decisions do have pertinence to the present case. In *Manufacturing Data Systems*, for example, the protester objected, *inter alia*, to the required size of the core memory of a minicomputer, alleging that this would increase the system's cost by more than $20,000 to obtain only a savings of 5 to 10 seconds in processing time. The Army disputed this claim and stated that in view of the planned future expansion of the system, the required capabilities would result in a considerable future cost savings. Our Office was unable to conclude that no reasonable basis existed for the requirement.

Similarly, in *Digital Equipment Corporation*, we took note of the

agency's belief that incorporating a visual display system into a flight simulator was expected to impose greater real-time processing demands, thus justifying the 24-bit minimum memory length to which the protester objected.

These and other decisions make it clear that responsible agency officials are accorded a broad range of judgment and discretion in making determinations of minimum needs. Nevertheless, such determinations must be the product of informed and critical judgments. *Winslow Associates*, 53 Comp. Gen. 478 (1974), 74–1 CPD 14, involved a situation where for several reasons the contracting agency desired to purchase general purpose programmable simulators, but the protester contended that less costly, "hard wired," nonprogrammable simulators would better serve the agency's actual needs. The agency indicated that its approach offered superior long-term cost benefits because updating of the simulators could be accomplished by software changes as opposed to rewiring.

We held that while the protester had not clearly and convincingly shown that the agency's determination was in error, it had succeeded in casting doubt on several of the main points relied on by the agency in justifying the requirement for multipurpose simulators. Our decision recommended that the agency restudy its needs to determine whether multipurpose equipment was the only type that would satisfy its needs. After restudying its needs, the agency adhered to its prior determination to procure multipurpose simulators, and our Office found that there existed a rational basis for this determination. *Winslow Associates*, B–178740, May 8, 1975, 75–1 CPD 283.

In the present case, it is our impression that JRL's objections to the Army's position are premised upon the idea that its system offers a creative, innovative approach to meeting the Army's actual calibration needs, and that the Army's views are based on traditional, largely unexamined technical assumptions relating to the processor memory requirement. In this regard, it may be that JRL's existing systems are capable of performing calibration tasks of similar or greater complexity than the Army's present needs. However, we do not conclude that this is the case, since the only basis on the record for so doing is JRL's claims of its equipment's capabilities. Moreover, we have difficulty in seeing how the protester would be in a better position than the Army to anticipate what performance may be required over the life of LACS. It is the responsible Army personnel who must weigh these concerns, who must make a determination which will result in the procurement of equipment which will be sufficient to meet actual needs, and who must bear the risk that insufficient equipment may be procured if a proper determination is not made.

In any event, we believe that the major difficulty with JRL's overall position is that, even if its contentions are assumed to have some substantial merit, they do not prove enough. That is, they do not in our view clearly demonstrate that the Army's determination is unsupported by any reasonable basis. The Army's view regarding greater memory capacity to meet future calibration needs, the flexibility to be obtained through operator-reconfigurable software, and the concern over availability and cost of ROMs do not on their face appear to be unreasonable. Similiar agency concerns withstood objections to minimum needs determinations in *Manufacturing Data Systems* and *Digital Equipment Corporation*, *supra*. Also, we think it pertinent to note that the close scrutiny of the minimum needs determinations in those cases—as well as the doubts raised concerning the agency's position in *Winslow Associates*—all involved situations where it was alleged that the agency's determination directly or indirectly created a sole-source situation. This is not the case here. Rather, the risk, in the Army's view, is that acceptance of the JRL approach could create a sole-source situation. Further, the technical risks generally involved in adopting what amounts to an alternative approach would appear to be a valid concern of the contracting agency, where, as here, the contract contemplates the production of supplies, not a developmental effort. See, in this regard, *Digital Equipment Corporation*, *supra*, and the discussion of this point *infra*.

Also, we do not believe that the decisions of our Office cited by JRL are persuasive on the issues involved. *GAF Corporation*, 53 Comp. Gen. 586 (1974), 74-1 CPD 68, and B-157857, January 26, 1966, involved invitations for bids containing "brand name or equal" provisions and dealt with issues of whether the solicitations should be canceled. 49 Comp. Gen. 727 (1970) is cited by JRL for the valid principle that appropriated funds are available only to purchase articles which meet actual minimum needs, but this decision has no similarity on its facts with the present case. *Manufacturing Data Systems Incorporated*, B-180586, July 9, 1974, 74-2 CPD 13, involved a situation where our Office denied a protest against allegedly restrictive specifications in an Army RFP for commercial computer processing service because we could not conclude that there was no reasonable basis for the RFP's requirements.

One final point concerns JRL's allegations that the Army by means of amendments 0002 and 0003 was arbitrarily attempting to change its minimum needs midway through the procurement. We note that, in the January 30, 1975, oral discussions with JRL, the Army raised a question as to how the JRL proposal would meet the memory requirements. JRL's written responses submitted to the Army subsequent to the oral

discussions contain the following pertinent statement concerning JRL's understanding of section 3.2:

> The memory requirements specified in Section 3.2 of the LACS specification are considered to be design guides for general purpose computers, and are applicable to the LACS system specification when a computer of a particular configuration is utilized as a system processor. Therefore, the performance requirements and the general purpose computer design of the LACS specification are in conflict, and we believe that the computer design guide must be superseded by the performance specification.

Since the Army's position is that section 3.2.2 was intended all along to establish certain memory requirements characteristic of "general purpose computers," or, in effect, that there was no conflict in the specifications, we think that this statement by JRL lends considerable support to the agency's assertion that amendments 0002 and 0003 were merely clarifications and did not represent any change in the requirement.

For the foregoing reasons, we are unable to conclude on the record that the Army's determination of its minimum needs in this case can be found to have no reasonable basis.

Technical Evaluation of the JRL Proposals

JRL has indicated that a "thorough technical review" by our Office of the points at issue is necessary. At the outset, it is important to note that our Office has never taken the position that we will substitute our judgment for the agency's—by conducting technical evaluations of proposals and rendering determinations as to their acceptability—simply because a protest against the technical evaluation has been filed. On the contrary, our decisions have repeatedly emphasized that these functions are primarily the responsibility of the contracting agency, whose judgment will not be disturbed by our Office unless clearly shown to be without a reasonable basis. See, in this regard, *Austin Electronics*, 54 Comp. Gen. 60 (1974), 74-2 CPD 61; 52 Comp. Gen. 393, 399-400 (1972); 52 *id.* 382, 385 (1972).

In this light, the question before us is not whether JRL's proposals are technically acceptable. Rather, the issue is whether, upon review of the record, the Army's actions in conducting the technical evaluation and arriving at a determination that the JRL proposals were unacceptable have been clearly shown to be without a reasonable basis.

We have reviewed the record of the technical evaluation, as disputed by JRL, including the 41 points at issue referred to previously. We do not find it necessary to discuss these points in detail. For the reasons which follow, we cannot conclude that the requisite evidentiary showing has been made to cause our Office to object to the Army's actions.

We would first note that examination of the RFP does not reveal that novel, innovative approaches to meeting the Army's calibration needs were specifically requested. Offerors were not instructed that an ingenious concept or approach *per se* would be a primary evaluation and selection factor, taking precedence over the need to show in detail exactly how the requirements would be met. On the contrary, RFP section C–24 stated:

> Each contractor proposal shall respond to each specification described in sections 3.1 thru 3.7 of the Scope of Work on a paragraph by paragraph basis to demonstrate how each requirement will be met. * * *

It is our view that while the RFP may not have totally excluded proposals with some developmental aspects, it appears to have contemplated simply the award of a fixed-price contract for the procurement of hardware which would be sufficient to satisfy certain stated requirements.

These facts should be considered in light of the following principle stated in *Kinton Corporation*, B–183105, June 16, 1975, 75–1 CPD 365:

> * * * [I]t is axiomatic in negotiated procurement that an offeror must demonstrate affirmatively the merits of its proposal and that such merit is not to be determined by unquestioned acceptance of the substance of its proposal.

As JRL has stated, its proposals contained a substantial amount of data, some of which were submitted in the initial proposal, and some of which were submitted later in response to questions raised in the discussions. A large part of this information appears to consist of various manufacturers' technical and descriptive literature, technical manuals and reports, and articles published in technical journals and newspapers. It is with reference to this large volume of material that JRL contends the Army technical evaluators have failed to reach the proper technical conclusions and have failed to point out where JRL's technical assertions are in error. In addition, JRL contends that the Army has failed to ask JRL for additional items of technical information which might be needed to substantiate the soundness of JRL's technical approach. In this regard, the following statement from JRL's August 18, 1975, submission to our Office—which is one of several such statements by the protester—is pertinent:

> * * * It is absolutely untrue that the Army gave JRL *any opportunity whatsoever* to satisfy *any objections that the Army had*, in the time between February 5 and the close of business and final offers on March 28. On the contrary, the Army, by its failure to respond to JRL's suggestions that it would supply additional information, deliberately misled JRL into believing that it had completely satisfied the Army's requirements for information. [Italic in original.]

This statement is characteristic of JRL's position throughout the procurement and reflects, in our opinion, a fundamental misunderstanding by the protester of negotiated procurement procedures. We do not believe that the burden was on the Army to demonstrate that

JRL's system was not a feasible method of satisfying the requirements. Rather, the burden was on JRL to affirmatively demonstrate the merits of its approach. In fact, since JRL was offering what amounted to an innovative, alternative approach to meeting the requirements, under the particular circumstances of this procurement it arguably bore a heavier burden in this regard than would ordinarily be the case.

Given these considerations, we believe that the following review of the technical evaluation is sufficient. As far as JRL's initial proposal is concerned, we are satisfied that the Army had a reasonable basis to conclude that the calculator which was offered did not meet the expandable memory requirement of section 3.2.2 of the specifications. We also think it reasonably clear that this feature was regarded by the Army as one of the essential requirements of LACS. The fact that correction of this deficiency in the proposal would involve major revisions is illustrated by JRL's option 3 proposal, which substituted a minicomputer in lieu of the calculator in order to meet the memory requirement. Therefore, we have no objection to the rejection of JRL's initial proposal as technically unacceptable. See, in this regard, *PRC Computer Center, Inc.*, 55 Comp. Gen. 60 (1975), 75-2 CPD 35, and decisions cited therein.

As far as the JRL option 3 proposal is concerned, the Army found it to be deficient because, among other things, it did not describe the substituted processor system in sufficient detail to allow evaluation of interface hardware and operating system software. After review of the record, including JRL's option 3 proposal dated February 28, 1975, as supplemented by JRL's submission dated March 22, 1975, we are satisfied that this finding cannot be said to be without a reasonable basis. See, in this regard, *PRC Computer Center, Inc., supra*. There, the proposal of one of the protesters, the incumbent contractor under predecessor contracts, had been eliminated from the competitive range. The protester contended that its proposal responded to all RFP requirements, that any deficiencies were merely "informational," and that the contracting agency should simply have asked for any additional information it desired, especially in view of the protester's past satisfactory performance.

After reviewing several of the evaluation criteria relating to required clarity and definiteness of proposals, our decision stated:

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

Fairness of the Army's Consideration of JRL Proposals

JRL has raised several points which it believes may indicate a lack of good faith on the part of responsible Army officials in considering its proposals.

JRL first points to the Army's actions in connection with the submission of its initial proposal on December 6, 1974. The Army initially rejected the JRL proposal as late, but subsequently reversed its position and decided that the proposal was timely submitted. JRL alleges that in submitting its proposal, it followed instructions from the contracting officer's assistant, who therefore knew that the submission was timely; that for some unknown reason, the procurement office failed to follow its normal procedure for picking up proposals from the Redstone Arsenal communications center; that the contracting officer falsely told JRL that the Redstone Arsenal legal office was considering the proposal when he had in fact already mailed a letter to JRL rejecting the proposal as late; that the contracting officer refused to assist JRL in raising with the legal office the question of whether the proposal was submitted late; and that it was only because of JRL's own initiative in taking up the matter with an Army attorney that the error was corrected and the proposal accepted as timely.

The contracting officer's explanation of the matter is that the JRL proposal had been timestamped upon receipt in "zulu" time (Greenwich Mean Time), but that initially the stamp was believed to refer to local prevailing time because the letter "z" (denoting zulu time) was not shown. The contracting officer states that when JRL made inquiries concerning the matter, he declined to discuss its proposal and referred the JRL representatives to the legal office. The contracting officer has not specifically commented on JRL's allegations that he knowingly advised the protester that its proposal was being considered when in fact a letter rejecting the proposal as late had already been sent. The contracting officer states that as a result of inquiries by an attorney in the legal office to the communications center, the meaning of the timestamp was clarified and the JRL proposal was accepted as timely.

The reported facts indicate the probability of a reasonable misunderstanding by responsible Army officials which fortunately was corrected. We believe that to draw the inference that the contracting officer or other Army personnel were deliberately attempting to exclude the JRL proposal from consideration would be mere speculation.

JRL has also stated that there is good reason to suspect that several other prospective offerors were maintaining very close personal contact with members of the Army's technical evaluation team during the

time between issuance of the RFP and receipt of initial proposals. JRL points out that the RFP referenced a 500-page package of technical information needed to prepare a proposal. JRL alleges that the contracting officer has stated that "only two companies and JRL specifically expressed a need" for this information, and that these three offerors were the first to receive it. From this, JRL concludes that other competing offerors—which subsequently were sent the technical information—apparently did not need to request it because they had already started their proposal preparation with information improperly disclosed to them earlier by the Army. However, the statement of the contracting officer was not that only two companies and JRL made a request for the technical information, but that such was the situation as of October 29, 1974. Therefore, we believe that the allegations by JRL are unsupported on the record and are completely speculative.

In addition, JRL has made allegations concerning the fair mindedness of the contracting officer and the Army technical evaluators in connection with the oral discussions. For instance, JRL alleges that at the oral negotiations meeting on January 30, 1975, one of the Army technical evaluators allowed other Army personnel present to "heckle" the JRL presentation. It is alleged further that after the meeting the same person refused to accept approximately 150 pages of additional documentation offered by JRL in support of its proposal. Further, it is alleged that the same person refused to allow other members of the evaluation team to make an on-site examination of the interface, software, and operating characteristics of a JRL system located at Redstone Arsenal.

The Army's memorandum of the January 30, 1975, oral discussions indicates that JRL apparently felt it was being "picked on" as a result of the questions posed by Army negotiators. Having read and considered this memorandum as a whole, we do not believe it clearly demonstrates that Army personnel created an atmosphere of unfairness in the discussions. The general impression conveyed by the memorandum is that there was a serious and lengthy discussion of numerous technical issues.

As for the alleged refusal to accept the 150 pages of technical material, which included 46 pages of material identified by JRL as appendices "B" and "C" to its proposal, the record is not entirely clear. It is possible that the Army technical evaluator refused to accept this material because he believed that, since it supplemented the JRL proposal, it should have been furnished directly to the contracting officer rather than to the technical evaluation team. We note that JRL has stated that, desiring to leave the information with someone at

Redstone Arsenal, it gave it to an engineer who apparently had no direct connection with the present procurement. Also, we note that the Army has subsequently stated that it has been unable to locate this material. In this regard, the Army's July 22, 1975, report notes that no part of the proposal was labelled as appendices "B" and "C," and JRL apparently has never furnished these materials directly to the contracting officer.

We cannot conclude that these reported facts prove that the Army technical evaluator in question or other Army personnel treated JRL unfairly. We believe that it was JRL's responsibility to assure that any materials related to its proposals were transmitted properly to the responsible officials. Even if it were assumed *arguendo* that the technical evaluator acted inconsiderately in declining to accept the materials after the January 30, 1975, meeting, it would seem that the obligation nonetheless rested on JRL to make certain that the materials were submitted in a proper alternate fashion, as, for example, by timely mailing them to the contracting officer after the oral discussions. We note for the record that JRL furnished to our Office an index to the documents contained in appendices "B" and "C," and this information has been considered in reaching our decision.

Concerning the allegation that the Army technical evaluator refused to allow the evaluation team to make an on-site examination of a JRL system at Redstone Arsenal, the Army report indicates that due to the amount of time spent in oral discussions on January 30, 1975, there was not sufficient time for the examination; that the functions of the system which JRL proposed to demonstrate are not the same as the functions of LACS; and that nonetheless several interested Army personnel, including two persons who work in the same division as the Army technical evaluator in question, had in fact attended a demonstration of the JRL equipment on January 29, 1975. We do not find that these reported facts prove that the responsible Army personnel treated JRL unfairly.

JRL has also raised a point concerning the conduct of Army representatives at the bid protest conference held at our Office on July 2, 1975. JRL states that while it presented evidence at the conference supporting its contentions, the Army representatives present—including responsible Redstone Arsenal personnel—declined to respond. In this regard, we note that while the Army representatives did make some comments during the conference, for the most part they declined to discuss the issues, stating that the agency preferred to reply by means of a supplementary report subsequent to the conference. It is JRL's view that by declining to respond orally at the conference, the Army "lost its claim to credibility and clearly showed that its position on the issues is without merit."

We disagree. It is well established that decisions of our Office are based upon the written record. See our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975); our Interim Bid Protest Procedures and Standards, 4 C.F.R. part 20 (1974); B–165830, July 24, 1969. The Army responded in writing to JRL's protest contentions in two reports prior to the conference (April 18 and May 14, 1975) and in one report subsequent to the conference (July 22, 1975). JRL had an opportunity to comment in writing on each of these reports and did so. It is our view that an adequate written record upon which to base a decision was generated in the present case. Moreover, while a bid protest conference may be useful in fostering a discussion among the parties which helps to illuminate the issues, it is not intended to be a full-scale adversary proceeding with sworn testimony and examination of witnesses. In fact, our Office has specifically rejected the adoption of such a procedure. *See* 43 Comp. Gen. 257, 263 (1963).

An additional point raised by JRL relates to the Army's past procurements of calibration equipment. JRL asserts that our Office must carefully scrutinize the present procurement because it is but one example of a pattern of procurement actions which have the result of systematically destroying inventor-led, innovative, high technology, small and medium-size electronic companies. JRL has presented information showing what it terms a catastrophic cost increase in the history of Army calibration systems procurements from large companies since 1968.

In this regard, we must note that bid protest decisions of our Office are rendered in connection with legal objections to the awards or proposed awards of particular Government contracts. *See* B–176715, November 10, 1972. Thus, we believe that the historical information cited by JRL, which relates to broad procurement policy issues, is not directly pertinent to the issues in this case.

[B–183572]

Certifying Officers—Responsibility—Interagency Services

General Services Administration certifying officers who perform administrative functions relating to final processing of expenditure vouchers under interagency service and support agreement will not be regarded as certifying officers for purposes of 31 U.S.C. 82c liability to the extent that serviced Commission retains certification responsibility with respect to basic vouchers.

In the matter of General Services Administration certifying officers, October 15, 1975:

This decision is rendered at the request of the Assistant Administrator for Administration, General Services Administration (GSA), concerning the potential liability of GSA certifying officers who will

be performing functions pursuant to a proposed interagency service and support agreement.

The Assistant Administrator states that GSA presently provides administrative support services relating to the audit and payment of expenditure vouchers under agreements with a number of independent agencies, including the Occupational Safety and Health Review Commission (hereafter the Commission). The vouchers of such agencies, along with GSA vouchers, are processed through an automated accounting system. In the present agreement between GSA and the Commission, GSA certifying officers are authorized by the Commission to audit and certify on its behalf payroll transactions and all classes of vouchers payable from Commission funds.

The Commission now proposes to amend its agreement with GSA to provide in relevant part that the Commission will assume sole certification responsibility for all vouchers and invoices, with the exception of payroll and public vouchers for transportation of passengers (Standard Form 1171). GSA will continue to mechanically process vouchers in all categories for payment. Specifically, the GSA automated accounting system will include the amount of those vouchers certified by the Commission on a magnetic disbursing tape. The same magnetic tape would carry the amounts reflected on vouchers for GSA and other independent agencies provided administrative services, which GSA certifying officers audit and certify for payment. However, as to the vouchers for which the Commission will have sole certification responsibility, the proposed amendment provides that GSA will perform no audit function and assume no liability for certification. Prior to transmittal of the magnetic tape to the Department of the Treasury, a master voucher and schedule of payment (Standard Form 1166) will be prepared to accompany the master tape. The SF 1166 will reflect those vouchers certified by the Commission and will be signed by GSA certifying officers.

The Assistant Administrator inquires as to the liability under 31 U.S. Code § 82c (1970) of a GSA certifying officer who signs the SF 1166 insofar as it pertains to those vouchers certified by the Commission. This section provides that the officer or employee certifying a voucher is responsible for the existence and correctness of the facts recited in the certificate, voucher or supporting papers and the legality of the proposed payment, and shall be held liable for the amount of any illegal, improper, or incorrect payment resulting from any false, inaccurate or misleading certificate made by him, as well as for any payment prohibited by law or which did not represent a legal obligation. Particular concern is expressed as to the duty of a GSA official handling vouchers after certification by the Commission who may question the propriety of that certification.

As the Assistant Administrator points out, we have held that once there has been certification by an authorized official, later administrative processing of vouchers does not constitute certification for purposes of liability under 31 U.S.C. § 82c. 23 Comp. Gen. 953 (1944); 21 *id.* 841 (1942). Thus we observed in a letter dated March 30, 1960, to the Secretary of the Treasury, B-142380:

> Where the certifying officer who certifies the voucher and schedule of payments is different from the certifying officer who certifies the basic vouchers, we have consistently applied the principle that the certifying officer who certifies the basic vouchers is responsible for the correctness of such vouchers and the certifying officer who certifies the voucher-schedule is responsible only for errors made in the preparation of the voucher-schedule. * * *

The instant proposed amendment to the agreement between GSA and the Commission would, with the exception of payroll and transportation expenditures as noted above, restore the normal arrangement where in the officer who certifies basic vouchers is an employee of the agency whose funds are to be disbursed; and would leave GSA officials the sole function of mechanically processing such vouchers for final payment. *Cf.* 44 Comp. Gen. 100 (1964). Accordingly, the legal liability of the GSA official is limited to errors made in his final processing. Of course, to the extent that a GSA official might question the propriety of a Commission certification, we believe that he should, in the interest of good administration, bring the matter to the attention of appropriate Commission officials.

[B-180278]

Contracts—Awards—Propriety—Grantees Under Federal Grants-in-Aid—Review

General Accounting Office (GAO) will undertake reviews concerning propriety of contract awards under Federal grants made by grantees in furtherance of grant purposes upon request of prospective contractors where Federal funds in a project are significant.

Contracts—Review—Federal Aid, Grants, etc.—Rational Basis

To extent grant reviews will be concerned with application and interpretation of local procurement law, with which grantees should be familiar, they will not be disadvantaged. In other cases, since review will only be concerned with application of "basic principles," rather than all intricacies of Federal norm, it will not result in mechanistic application of Federal procurement law.

Bids—Competitive System—Federal Aid, Grants, etc.—Basic Principles

Basic principles of Federal norm of competitive bidding are intended to produce rational decisions by those who purchase for Federal Government; to extent, therefore, that grantee's procurement decision (and concurrence in decision by grantor agency) is not rationally founded, it may be in conflict with fundamental Federal norm. Procurement under "rational basis" test does not require detailed knowledge of GAO decisions.

Contracts—Review—Federal Aid, Grants, etc.—Administrative Reports

Multiple layers of Federal, State and local Government involved in typical grant review situation will not impose enormous burden on Federal grantor in producing report responsive to request for review of contract under Federal grant.

Bids—Evaluation—Criteria—Federal Aid, Grants, etc.

Grantee's decision to give greater weight to long-range operating cost, rather than initial capital cost, in selecting successful bidder can be rationally supported so long as evaluation criteria for award makes clear basis upon which bids will be evaluated.

Contracts—Status—Federal Grants-in-Aid

Prior reviews of contracts awarded under Federal grants are considered consistent, in the main, with principles enunciated here. However, to extent any prior precedent may be inconsistent it should not be followed. B-178960, September 14, 1973, overruled.

Contracts—Awards—Federal Aid, Grants, etc.—By or for Grantees—Review

GAO will consider requests for review of contracts awarded "by or for" grantees. Where record shows that grantee's engineering consultant drafted specifications, evaluated subcontractors' bids, recommended that grantee award subcontract to specific proposed subcontractor, and grantee instructed prime contractor to award questioned subcontract to company proposed by consultant, award is considered to be "for" grantee because grantee's participation had net effect of causing subcontractor's selection.

Contracts—Subcontracts—Award Propriety—Federal Aid, Grants, etc.—Review

Corrective action is not recommended concerning questioned subcontract awarded under Federal grant since it cannot be concluded that questioned temperature specification for incinerator project was ambiguous or that company receiving award submitted bid which was nonresponsive to specification.

In the matter of Copeland Systems, Inc., October 17, 1975:

Copeland Systems, Inc. requests that GAO review the award of a subcontract by Pittman Construction Company, Inc., on behalf of the Sewerage and Water Board of New Orleans (grantee) to Dorr-Oliver, Inc., for the incinerator portion of a project to expand and upgrade a waste treatment plant. The contract was financed in significant part (75 percent) by Environmental Protection Agency (EPA) funds.

GAO REVIEW ROLE-CONTRACTS AWARDED UNDER FEDERAL GRANTS

During the pendency of Copeland's complaint, EPA urged that we clarify our Office's current views concerning acceptance of "bid protests under grants." Specifically, EPA suggested that whether our

Office should review complaints against awards under grants should depend on the consideration of: (1) the degree of the Federal financial interest involved; (2) the primary Federal interest (which may not be "based solely upon mechanistic application of Federal procurement practices or policies"); (3) the grantee interest (which may involve greater concern with long-term operating costs rather than the absolute amount of capital costs for construction projects); (4) the relative lack of procurement law knowledge possessed by grantees in general; the even greater lack of awareness by grantees of the procurement law decisions of our Office; (5) the greater difficulty attending the preparation of agency reports responsive to complaints against awards made under grants given the complex layers of Government and private contractors involved in grant matters (for example, in the subject case five entities were involved—(1) EPA, including its Dallas Regional Office; (2) the state agency; (3) the municipal grantee; (4) the consulting engineer acting on behalf of the grantee; and (5) the prime contractor); and (6) GAO precedent which seems to evidence different approaches on handling complaints against contracts awarded under Federal grants.

Complaints about awards of contracts under Federal grants have previously been reviewed by our Office. *See*, for example, 37 Comp. Gen. 251 (1957); B–154606, August 20, 1964; B–161681, August 11, 1967; B–172196, May 27, 1971; 52 Comp. Gen. 874 (1973); *Chicago Bridge & Iron Company*, B–179100, February 28, 1974, 74–1 CPD 110; *Thomas Construction Company, Inc., et al.*, 55 Comp. Gen. 139 (1975). Our reviews have been made for the purpose of insuring that contract awards by grantees have complied with any requirements made applicable by law, regulation or the terms of the grant agreement.

We continue to be of the view that our review role is appropriate notwithstanding the concerns expressed by EPA. Because of this view, we recently issued a Public Notice entitled "Review of Complaints Concerning Contracts Under Federal Grants," 40 Fed. Reg. 42406, September 12, 1975. This notice provides that we will undertake reviews concerning the propriety of contract awards made by grantees in furtherance of grant purposes upon request of prospective contractors. It specifically provides, however, that these complaints are not for consideration under our Bid Protest Procedures (see 40 Fed. Reg. 17979, April 24, 1975), since there is no direct contractual relationship between the Federal Government and the party engaged in contracting with the grantee. Further, it states we will not review complaints where Federal funds in a project as a whole are insignificant.

Many grant agreements require application of "local" procurement law (usually State) to govern the procurement procedures being followed in the award of contracts under the grants. Presumably grantees are familiar with local procurement law and practices. To the extent our reviews will be partially concerned with the application and interpretation of local procurement law of which the grantee should have a degree of familiarity, we do not think the grantee will be disadvantaged. To the extent our reviews will be concerned with Federal procurement policy, it will not be mechanistically applied. On the contrary, we will only be concerned with the application of "basic principles." As we stated in *Illinois Equal Employment Opportunity Regulations for Public Contracts*, 54 Comp. Gen. 6 (1974), 74–2 CPD 1:

> It is clear that a grantee receiving Federal funds takes such funds subject to any statutory or regulatory restrictions which may be imposed by the Federal Government. 41 Comp. Gen. 134, 137 (1961); 42 Comp. Gen. 289, 293 (1962); 50 Comp. Gen. 470, 472 (1970), *State of Indiana* v. *Ewing*, 99 F. Supp. 734 (1951), cause remanded 195 F. 2nd 556 (1952). Therefore, although the Federal Government is not a party to contracts awarded by its grantees, a grantee must comply with the conditions attached to the grant in awarding federally assisted contracts.
>
> We believe that, where open and competitive bidding or some similar requirement is required as a condition to receipt of a Federal grant, certain basic principles of Federal procurement law must be followed by the grantee in solicitations which it issues pursuant to the grant. 37 Comp. Gen. 251 (1957); 48 Comp. Gen., *supra*. In this regard, it is to be noted that the rules and regulations of the vast majority of Federal departments and agencies specify generally that grantees shall award contracts using grant funds on the basis of open and competitive bidding. This is not to say that all of the intricacies and conditions of Federal procurement law are incorporated into a grant by virtue of this condition of open and competitive bidding. See B–168434, April 1, 1970; B–168215, September 15, 1970; B–173126, October 21, 1971; B–178582, July 27, 1973. However, we do believe that the grantee must comply with those principles of procurement law which go to the essence of the competitive bidding system. See 37 Comp. Gen., *supra*. One of these basic principles is that all bidders must be advised in advance as to the basis upon which their bids will be evaluated, so that they may compete for award on an equal basis. 36 Comp. Gen. 380, 385 (1956); 37 Comp. Gen., *supra;* 48 Comp. Gen., *supra;* B–179914, March 26, 1974.

Obviously, it is difficult to detail all that is "fundamental" to the Federal system of competitive bidding. However, basic Federal principles of competitive bidding are intended to produce rational decisions and fair treatment. To the extent, therefore, that a grantee's procurement decision (and the concurrence in that decision by the grantor agency) is not rationally founded, it may be considered as conflicting with a fundamental Federal norm. The decision will, in all likelihood, also be considered inconsistent with fundamental concepts inherent in any system of competitive bidding.

Under a "rational basis" test we do not consider that a grantee's possible ignorance of our decisions or the intricacies of Federal procurement law will work to the grantee's disadvantage since what is

"rational" under the particular circumstances involved will be more a matter of logic than knowledge of detailed rules. Nor do we think that the multiple layers of Federal, state and local governments involved in the typical grant review situations will impose an enormous burden on a Federal grantor in producing a report responsive to the complaint in question. For example, in the instant case, a comprehensive report reflecting the views of the governments involved, including the grantee's expressed concern with the importance of operating costs, was produced within a reasonable time period. Moreover, it is not uncommon in bid protests under direct Federal procurements that the views of several agencies and private individuals have to be assembled before the record is ready for our decision.

It is our further view that a grantee's decision to give greater weight to long-range operating cost, rather than initial capital cost, of an item in determining the successful bidder can be rationally supported so long as the evaluation criteria for award make this greater weight reasonably clear to all bidders.

EPA's expressed concern that our prior approaches in the grant area are inconsistent is based on observation that there have been prior reviews of awards under grants (B–161570, January 29, 1968, and B–166808, June 16, 1969) which concede the grantor agency's primary authority to determine whether the grantee has properly awarded a contract, although other decisions (B–171919, May 28, 1971, and B–177042, January 23, 1973, among others) imply that we may question a grantor agency's determination. Additionally, EPA cites B–178960, September 14, 1973, where we declined to respond to a request to review the award of a contract under a grant because we viewed the request to be comparable to a protest of a subcontract award. Mention is also made of B–178972, August 16, 1973, where we declined to exercise bid protest authority over a protest concerning the initial awarding of a grant.

We think our prior grant cases are consistent, in the main, contrary to EPA's suggestion. We do not perceive any inconsistency, for example, in recognizing the grantor's primary authority to determine the grantee's compliance with grant provisions while also recognizing our right to recommend corrective action when we think the determinations reached are not rationally founded. To the extent any of our prior precedent is inconsistent with this position it should not be followed. *See* B–178960, *supra*. Our decision B–178972, *supra*, is also considered to presently express our policy decision not to exercise legal review authority over the initial awarding of grants because these awards are usually not governed by competitive bidding principles imposed by statute or regulation.

THE SPECIFIC SITUATION

A threshold question—whether Copeland's status as a prospective subcontractor precludes it from requesting our review of the award in question—is initially for decision.

We have decided to consider requests for review of contracts awarded "by or for" grantees. Here the record shows that the grantee's engineering consultant drafted the specifications, evaluated subcontractor bids, and recommended to the grantee that Dorr-Oliver, rather than Copeland, be selected for award. The grantee then directed Pittman to award the subcontract in question to Dorr-Oliver. Although Pittman was the party actually awarding the subcontract in question, the award must be considered to have been made "for" the grantee because the grantee's participation in the award process had the net effect of causing Dorr-Oliver's selection. *Cf. Optimum Systems, Inc.*, 54 Comp. Gen. 767 (1975), 75-1 CPD 166.

Turning to the substance of the subject complaint, Copeland asserts that a provision of the bidding document for the incinerator was critically ambiguous in that it failed to provide a common base for evaluating and comparing projected 20-year operating costs for the systems proposed by Copeland and Dorr-Oliver. (Award was to be based on a price comparison of capital and projected operating costs for the incinerator systems proposed.)

The provision referenced by Copeland reads: "Design shall be based on flue gas inlet temperature of 1600° F. (1800° F. max.), air outlet temperature 1000° F. (1200° F. max.). American Schack is the approved source." Copeland states that operating costs consist of the fuel costs incurred to pre-heat air to 1600° F. (Under the specification 1800° F. is the maximum inlet temperature. The 1600° F. figure is apparently cited because both Copeland and Dorr-Oliver used this figure in computing fuel costs.) The preheating process is partially assisted by using heated exhaust air (at an outlet temperature of 1000° F.-1200° F. from the incinerator). The preheated air is then injected into the incinerator reactor where the waste is burned.

Copeland argues that it based its fuel costs on the assumption that the temperature of the exhaust air for preheating would be 1000° F.; Dorr-Oliver, Copeland further argues, based its bid for fuel cost on the assumption that the temperature of exhaust air would be 1200° F. Since the preheating process would obviously be better aided by exhaust air at a 1200° F., rather than a 1000° F., temperature, Copeland argues that Dorr-Oliver would necessarily need less fuel to preheat air to the 1600° F. temperature needed for operation of the incinerator. Thus, Copeland asserts that the lower projected operating cost

for Dorr-Oliver's incinerator (which made Dorr-Oliver's overall bid for the incinerator lower than Copeland's overall bid even though Copeland's proposed capital cost for the incinerator was less than Dorr-Oliver's proposed capital cost) was due to Dorr-Oliver's advantage in calculating fuel costs from a temperature of 1200° F. rather than 1000° F.

Copeland contends Dorr-Oliver's bid is nonresponsive because the specification required bidders to use 1000° F. rather than 1200° F. (used by Dorr-Oliver) as the temperature "base" for determining fuel costs. This position is based on argument that the 1200° F. figure was listed in parenthesis and followed by the notation "max." and that bidders were, therefore, being instructed to compute fuel costs at the "design" temperature base of 1000° F. rather that the "maximum limit" temperature of 1200° F. To buttress this position, Copeland recites advice allegedly furnished by various individuals that its interpretation is correct. Alternatively, Copeland suggests the specification is ambiguous because it permitted bidders to submit operating costs on an unequal basis.

The grantee and EPA both adopted the consulting engineer's view of the specifications in question. The engineer's view was that the specifications reasonably allowed "each manufacturer some leeway in his design to obtain optimum performance of his equipment." Based on this view, the grantee and EPA concluded that the specifications were not ambiguous, as claimed, and the grantee then made an award to Dorr-Oliver.

Since temperature leeway was to be allowed bidders (an intent which we think is reasonably clear from a reading of the specification, notwithstanding the use of parenthesis and the notation "max." associated with the 1200° F. and 1800° F. temperatures), we do not agree that Dorr-Oliver's use of 1200° F. was nonresponsive to the specification. The use simply conformed to one of the temperature limits imposed on all bidders. The decision to use this limit (or any other temperature level between 1000° F.–1200° F.) was within the informed discretion of each bidder. Each bidder's decision was obviously based on competitive and capital operating cost "trade-off" considerations. To the extent all bidders were competing within the same temperature range, competition was had on an equal basis.

Thus, we find rational support for the procurement decisions question by Copeland.

CONCLUSION

We find no basis to question EPA's enforcement of the competitive bidding requirement of the subject grant agreement insofar as the award to Dorr-Oliver is concerned.

[B-182533]

Contracts—Protests—Persons, etc., Qualified to Protest—Interested Parties

Requirement that party be "interested" in order to lodge formal protest serves to ensure party's diligent participation in protest process so as to sharpen issues and provide complete record on which correctness of challenged procurement may be decided.

Contracts—Protests—Interested Party Requirement

Generally, in determining whether protester satisfies "interested party" requirement, consideration should be given to nature of issues raised by protest and direct or indirect benefit or relief sought by protester.

Contracts—Protests—Persons, etc., Qualified to Protest—Small Business Subcontracting

Non-8(a), non-small business concern is considered interested party so long as it contends that concern proposed for 8(a) award does not belong in 8(a) category whose application prevents protester from competing; test of interested party for 8(a) protests clarifies prior discussion in *Klecn-Rite Janitorial Services, Inc.*, B-178752, March 21, 1974, 74-1 CPD 139; *City Moving and Storage Company, Inc.*, B-181167, August 16, 1974, 74-2 CPD 104; and *Kings Point Manufacturing Company, Inc.*, 54 Comp. Gen. 913, 75-1 CPD 264.

Contracts—Awards—Small Business Concerns—Disadvantage Test

Examination of "social disadvantage" determination made of owner of firm proposed for 8(a) award shows that Small Business Administration (SBA) did consider factors regarding disadvantage other than racial identity of owner or owner's alleged inability to obtain bonding. Determination is considered rationally supported, given broad guidelines conveyed in SBA policy and regulation concerning what constitutes "disadvantage."

Contracts—Awards—Small Business Concerns—Procurement Under 8(a) Program

Because other issues raised by non-small business, non-8(a) concern in protest against 8(a) award are indirectly related to basic eligibility determination of firm proposed for 8(a) award, it is considered that concern is interested party as to other issues.

Contracts—Awards—Small Business Concerns—Procurement Under 8(a) Program—Excess Costs

Because Department of Army states it is aware of requirement that SBA must fund any costs of 8(a) services in excess of what Department considers current fair market price for services, it appears that Department will charge SBA any excess costs involved in subject 8(a) procurement contrary to protester's suggestion that Department will not.

Contracts—Awards—Small Business Concerns—Fair Proportion to Small Business Concerns—Administration of Program

Since it is Department of Army's policy to enter into contracts with SBA to foster small business (including 8(a) growth), it is not considered improper for Department to have advised SBA of availability of proposed procurement of KP services for 8(a) program or fact that proposed 8(a) concern was currently providing similar services at one of facilities involved in proposed procurement.

Small Business Administration—Authority—Small Business Concerns—Allocation of 8(a) Subcontracts

Review does not suggest that SBA has arbitrarily decided that proposed 8(a) concern is still in need of further assistance through proposed 8(a) award.

In the matter of ABC Management Services, Inc., October 21, 1975:

For the last year or more, ABC Management Services, Inc. (ABC), has been performing KP (mess attendant) services for the Department of the Army at Fort Ord, California, and at a nearby installation, Hunter Liggett.

Harris Management Company (Harris) is currently a subcontractor to the Small Business Administration (SBA) under the "8(a) program" (a program to assist small business concerns owned and controlled by socially or economically disadvantaged persons) and is performing KP services at another installation (the Presidio of Monterey) nearby the Ford Ord complex.

ABC alleges that in April 1974 the Fort Ord procurement office proposed to the San Francisco regional office of SBA that the mess attendant requirements at Fort Ord be consolidated with those at the Presidio of Monterey; that the Department further requested SBA to propose a contractor capable of performing the combined services under the 8(a) program; and that SBA answered that it would perform the services at an estimated cost of $1,650,551 and subcontract the work to Harris under the 8(a) program.

Once the Department's proposed course of action became known, ABC submitted a protest in October 1974 to our Office against the decision to award the KP requirements at both installations to Harris. Although ABC's protest contains several grounds, the chief complaints raised are that Harris is not owned by socially or economically disadvantaged persons and therefore Harris is not eligible for an 8(a) award.

In reply, both SBA and Harris assert, in effect, that ABC is not sufficiently interested in the award in question to properly raise the specific issue of Harris' eligibility under the 8(a) program, or any other issue relating to the propriety of the Harris award, in the context of a formal bid protest. The lack of sufficient interest is based on ABC's recent admissions that it is not currently a small business and that it would not be entitled to "bid on the Ft. Ord procurement at the present time" even if the services in question were resolicited under a total small business set-aside procurement should the 8(a) award to Harris not be upheld. ABC's admission that it would not currently be entitled to "bid on the Ft. Ord procurement" is apparently based on its assumptions (which have not been contradicted by the Army) that if the subject 8(a) award were to be terminated there would still

be a need for the KP services involved and that the needed services would be procured only through competition limited to small business concerns—thereby preventing ABC from competing.

The threshold question for decision, then, is whether ABC is an "interested party" so as to permit consideration of its protest under GAO's Interim Bid Protest Procedures and Standards (4 C.F.R. § 20 (1974)) which were in effect when the protest was filed. In order for a protest to be heard, the party filing the protest must be "interested." 4 C.F.R. § 20.1(a). (The requirement that a party filing a protest must be "interested" is also found in § 20.1(a) of the current Bid Protest Procedures which were published in the Federal Register on April 24, 1975.)

The requirement that a party be "interested" serves to ensure a party's diligent participation in the protest process so as to sharpen the issues and provide a complete record on which the correctness of the challenged procurement may be decided. We do not equate, however, the concept of "standing to sue" as developed by the courts with the concept of "interested party" as used in our Procedures. A protester may well be viewed as possessing a sufficient interest in the award selection in question even though the protester may not or does not choose to bid on the procurement. For example, protests have been considered by our Office which were filed by a labor union, a contractors' association and a Chamber of Commerce. See *District 2, Marine Engineers Beneficial Association-Associated Maritime Officers, AFL-CIO*, B–181265, November 27, 1974, 74–2 CPD 298; B–177042, January 23, 1973, and 49 Comp. Gen. 9 (1969). Generally, in determining whether a protester satisfies the "interested party" requirement, consideration should be given to the nature of the issues raised by the protest and the direct or indirect benefit or relief sought by the protester.

Having these factors in mind, it is our further view that a protester should be considered an interested party under our Procedures if it contends that the apparently successful bidder does not belong in the category whose application prevents the protester from competing. Notwithstanding ABC's status as a non-small business, non-8(a) concern, we consider ABC to be an interested party to the extent it contends that Harris does not properly belong in the 8(a) category whose application prevents ABC from competing.

The fact that historically, in the absence of an 8(a) classification, the services in question have been procured through competition limited only to small business concerns, does not bar ABC's protest. The protest should not be barred because whether the current purchase would be set-aside for small business in the absence of an 8(a) designation is conjectural.

This test of interested party in protests involving 8(a) award clari-

fies prior discussion of the issue in *Kleen-Rite Janitorial Service, Inc.*, B–178752, March 21, 1974, 74–1 CPD 139; *City Moving and Storage Company, Inc.*, B–181167, August 16, 1974, 74–2 CPD 104; *Kings Point Manufacturing Company, Inc.*, 54 Comp. Gen. 913 (1975), 75–1 CPD 264.

ABC's argument that the controlling owner of Harris is not "socially or economically disadvantaged" is based on the owner's current status as a retired officer (Lieutenant Colonel) of the United States Army. This current status, ABC further alleges, suggests that the owner had the "benefit of a college education plus training at an officer candidate school or military academy," and shows, therefore, that the owner was not then, or now, a disadvantaged person. Because of these circumstances, ABC asserts that the owner was found to be disadvantaged solely because he is a black American. Additionally, ABC asserts that the alleged inability of Harris' owner to obtain bonding commitments does not support a finding of disadvantage here.

SBA has furnished us with a copy of its determination that Harris' owner is "socially disadvantaged." SBA considers the information detailed in that determination to be confidential and not subject to disclosure. To our knowledge, ABC has not contested this restriction in an appropriate forum.

Our examination of the "social disadvantage" determination shows that SBA did consider factors other than the racial identity of the owner or the owner's alleged inability to obtain bonding. It is our further opinion that the factors listed show that SBA's determination is rationally supported, given the broad guidelines conveyed in SBA policy and regulation concerning what constitutes "disadvantage." See, for example, 13 C.F.R. § 124.8–1(c) (1975).

ABC raises three other issues relating to the propriety of the 8(a) award to Harris:

(1) The proposed procurement is illegal unless the Army agrees to charge SBA the excess costs (relating to the difference between the market cost and the higher 8(a) cost of the required KP service) of the procurement;

(2) The proposed procurement is illegal because it was initiated by the Army; and

(3) The proposed 8(a) subcontract is illegal because it is not necessary to make Harris a self-sustaining competitive entity.

Because these issues are indirectly related to the basic eligibility determination questioned by ABC, we also consider ABC to be an interested party as to these issues.

As to issue (1), the Department advises that its "Contracting Officer is aware of the provisions of Armed Services Procurement Regulation (ASPR) § 1–705.5(b)(2) [1974 ed.] whereby the SBA must fund

any costs in excess of what DOD considers to be the current fair market price for these services." Thus it appears that the Department will charge SBA any excess costs involved in the subsidy of the subject 8(a) procurement contrary to ABC's suggestion that it will not.

The Department also denies that there was any impropriety in its decision to offer the combined requirements of KP services for the installations in question to SBA for a possible 8(a) award.

The Department insists that it did not have any preference for Harris or any other proposed 8(a) concern so long as the concern in question was capable of performing the service. Further, the Department believes that its offer to SBA was entirely consistent with ASPR § 1–705.5(b)(1) which provides:

> * * * It is the [general] policy of the Department of Defense (DoD) to enter into contracts with the SBA to foster or assist in the establishment or the growth of small business concerns as designated by the SBA so that these concerns may become self-sustaining, competitive entities within a reasonable period of time * * *.

Since it is the Department's policy to enter into contracts with SBA to foster small business (including 8(a) growth), we do not consider it improper for the Department to have advised SBA of the availability of the subject procuremnet for the 8(a) program or the fact that Harris was currently providing KP services at one of the facilities in question. This view is not inconsistent, as has been suggested by ABC, with the SBA's ultimate authority (described in 13 C.F.R. § 124.8–2) to select a proposed procurement and subcontractor for performance of an 8(a) award. Indeed, we read the Department's written offer of the availability of the subject procurement for the 8(a) program (as set forth in a April 15, 1974, letter from the contracting officer to the SBA) as implicitly acknowledging SBA's ultimate selection authority.

Finally, SBA has insisted that the proposed award to Harris is consistent with a comprehensive business plan submitted by Harris which was approved on March 30, 1973, for a 3-year period of assistance. SBA further insists that the proposed award will provide Harris with an "opportunity to continue its progression toward viability."

There is obvious conflict between SBA and ABC as to whether Harris needs the present 8(a) assistance to become a self-sustaining firm. There are no fixed "dollars and cents" criteria that can be applied to resolve this conflict. As in the case of eligibility questions involving social or economic disadvantage, the question of how much aid a concern needs to become self-sustaining is largely a judgmental one for SBA. See *Kings Point Manufacturing Company, Inc., supra.* Our review of the record does not suggest that SBA has arbitrarily decided that Harirs is not yet a self-sustaining entity (even though it may have

already secured a non-8(a) award as alleged by ABC) and that Harris is, therefore, still in need of further assistance through the subject 8(a) award.

Protest denied.

[B-184664]

Compensation—Overtime—Defense Attache Office Personnel in Saigon—Evacuation of South Vietnam

Overtime performed by Defense Attache Office (DAO) personnel in Saigon during the period of March 30, 1975, through April 30, 1975, immediately prior to the evacuation of American personnel from South Vietnam, was approved by the Defense Attache on June 6, 1975, after the normal procedures for approval and payment of overtime had been modified. The compensation for overtime is mandatory where the work actually performed is officially ordered or approved.

Vietnam—Evacuation—Overtime Claims by Defense Attache Office Personnel in Saigon—Retroactive Approval

The retroactive modification of a regulation requiring that overtime performed by DAO civilian personnel be specifically approved by DAO division chiefs or their designated representatives is permissible since the regulation modified was primarily designed to govern internal agency procedures rather than designed to benefit a party by entitling him to either a substantive benefit or procedural safeguard. Accordingly, if Major General Smith is the authorized official to approve the payment of overtime, his approval of June 6, 1975, is sufficient to allow payment of overtime as reported on the time and attendance reports of DAO civilian personnel.

Claims—Evidence To Support—General Accounting Office Discretionary Authority

31 U.S.C. 71, which provides that all claims by and against the Government shall be settled by the General Accounting Office, leaves to the discretion of this Office what evidence is required in support of such claims.

Claims—Evidence—Administrative Determination Acceptability—Foreign Country

Where, due to unusual circumstances, the presentation of the best evidence to support a claim will be impossible, impracticable, or will place an undue burden on the agency or individual concerned, this Office in the exercise of its discretion will accept such other pertinent data from which the necessary information may be reconstructed, and on this basis, authorize payment.

In the matter of payment of overtime claims of Defense Attache Office civilian personnel in Saigon, October 28, 1975:

By letter of July 23, 1975, the Commander of the Navy Accounting and Finance Center requested our decision with respect to the claims of Department of Defense employees from the United States Residual Defense Attache Office (DAO), Saigon, at Fort Shafter, Hawaii, for overtime worked from March 30, 1975, through April 30, 1975, under the extraordinary conditions prevailing during that period in Saigon, Vietnam. Forwarded to us along with the request for our decision is a report of May 1975, sent from the Residual DAO, to the Navy Comp-

troller, Washington, D.C., which detailed the unusual circumstances prevailing at the DAO, Saigon, during the month of April. The report stated that both United States and LN work forces were to work 7 days a week until further notice in view of the problems arising from the deteriorating military situation in Vietnam and the evacuation of United States and LN employees.

The report also provided that:

AS CIRCUMSTANCES MAY VARY FOR EACH CLAIM FOR OVERTIME AND CONSIDERING THE FACT THAT AS EACH DAY PASSES IT WILL BECOME MORE DIFFICULT FOR AN INDIVIDUAL TO FACTUALLY SUBSTANTIATE HIS CLAIM, IT IS RECOMMENDED THAT SUCH CLAIMS BE PAID ON THE CERTIFICATION OR SWORN STATEMENT OF THE INDIVIDUAL CONCERNED. * * *

In May 1975, the following directive regarding the overtime payment of DAO civilian personnel was issued by the Residual DAO Saigon office at Fort Shafter, Hawaii:

1. DUE TO THE UNUSUAL CIRCUMSTANCES PREVAILING AT DAO SAIGON DURING THE MONTH OF APRIL NORMAL PROCEDURES FOR APPROVAL AND PAYMENT OF OVERTIME ARE HEREBY MODIFIED AS FOLLOWS:

A. FOR THE TIME PERIOD 30 MARCH THRU 30 APRIL 75 OVERTIME HOURS WORKED BY DAO CIVILIAN EMPLOYEES REMAINING IN VIETNAM AT THE TIME THE OVERTIME WAS WORKED SHOULD BE PAID AS REPORTED ON T & AS. FOR THIS PERIOD, THE REQUIREMENT FOR SPECIFIC APPROVAL BY DAO DIVISION CHIEFS OR THEIR DESIGNATED REPRESENTATIVE OF OVERTIME WORKED HAS BEEN WAIVED.

By order of June 6, 1975, Major General Homer D. Smith, the Defense Attache at the Residual DAO, Saigon, at Fort Shafter, Hawaii, approved the payment of overtime:

* * * as reported on the T & AS of DAO personnel for the following pay periods:

30 Mar—12 Apr
13 Apr—26 Apr

This approval of overtime payment is made in lieu of individual approvals by each of the Div/Ofc Chiefs of the DAO Command Group.

We have been asked to decide whether the overtime approval of Major General Smith is sufficient to permit payment of the uncertified overtime worked. We note that the statute governing the payment of overtime, 5 U.S. Code § 5542, and the implementing regulations, 5 C.F.R. § 550.111 and chapter 550, subchapter 1-3, FPM, February 28, 1973, make the payment of overtime actually worked mandatory where officially ordered or approved. See *Rapp* v. *United States*, 167 Ct. Cl. 852 (1964); *Anderson* v. *United States*, 136 Ct. Cl. 365 (1956).

In the instant case, the Residual DAO modified the normal procedures for the approval and payment of overtime by waiving the requirement for specific approval by DAO division chiefs or their designated representatives of overtime worked. Since the regulation modified was primarily designed to govern internal agency procedures

rather than designed to benefit a party by entitling him to either a substantive benefit or procedural safeguard, it appears that the retroactive modification of the requirement of specific approval by DAO division chiefs or their designated representatives falls within the general principle cited in *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 539 (1970), that " 'it is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it * * *' *NLRB* v. *Monsanto Chemical Co.*, 205 F. 2d 763, 764 * * *." See *Starzec* v. *United States*, 145 Ct. Cl. 25 (1959). In light of the modified procedures, if Major General Smith is the authorized official to approve overtime, his June 6, 1975 approval of overtime as reported on the time and attendance reports of DAO personnel is sufficient.

A more serious problem, however, concerns the quantum of evidentiary support which should accompany each claim for overtime before the claim may be properly certified for payment. In a somewhat similar situation involving a claim for arrears of military pay of an officer who died in combat conditions prior to the fall of the Philippines to the Japanese in World War II which resulted in the loss of the military and disbursing records necessary to accurately adjust the claim, we recognized that under our statutory authority to settle and adjust claims brought against the Government, 31 U.S.C. § 71, we may exercise our discretion as to what evidence shall be the basis for the allowance of a particular claim. 22 Comp. Gen. 269 (1942). We have as a general rule required that all claims against the Government be supported by the best evidence obtainable. Nonetheless, we are cognizant of the fact that certain situations will inevitably arise where the presentation of the best evidence will be impossible, impracticable, or will place an undue burden on the agency or individual concerned, and, consequently, we have exercised our discretion in establishing the quantum of evidentiary support necessary to certify a claim.

In accordance with this principle, we have for example accepted a claimant's diaries to establish that the claimant did continuously perform overtime work throughout the entire period of his claim including those periods not supported by personal records. B–138771, B–134038, May 23, 1968, B–164050, January 15, 1970. Furthermore, we have accepted the "certificates" of two supervisors of a claimant to establish that the standard work program at the claimant's duty stations consisted of 48-hour workweeks and consequently to conclude that claimant performed compensable services consisting of 48 hours a week. The common denominator of all these decisions is that while a settlement of a claim by our Office must be predicated (if at all possible) upon official records, we will, where the circumstances so war-

rant, accept other pertinent data from which the necessary information may reasonably be reconstructed. B–134038, May 23, 1968.

We are not unmindful of the personal sacrifices which the DAO personnel at Saigon have made during the period in question. Nor are we forgetful of the congressional directive that overtime worked by an employee where ordered or approved by a responsible and authorized official must be compensated. However, we may not in derogation of our statutory duties sanction the payment of claims of doubtful validity due to the lack of either official records or suitable evidence from which the amount of overtime may reasonably be reconstructed. Nevertheless, in light of the extraordinary circumstances prevailing in Saigon during this period, we believe that the time and attendance reports contemporaneously maintained plus such other pertinent records from which the amount of overtime claimed may be reasonably approximated will adequately protect the Government's interest, and the claims may be allowed in such amount as may be found due. We wish to emphasize that this decision in no way modifies existing procedures for the review and allowance of claims, but merely indicates the acceptable limit to which the Navy Accounting and Finance Center may proceed in certifying these claims for payment.

Accordingly, upon receipt of each claim for payment of overtime, and prior to certification, it is the duty of the certifying officer to review each claim supported by time and attendance reports as to the reasonableness of the amount of overtime claimed, considering whatever supporting information is available along with the appropriate regulations and cases. If the certifying officer should have reasonable doubts as to the amount of overtime actually worked, he may require such supporting evidence as is consonant with this decision prior to certification of the claim. In the event that the certifying officer remains unsatisfied with the claim, the matter may be submitted on an individual case basis to our Transportation and Claims Division as a doubtful claim.

[B–180010]

Arbitration—Award—Denial of Overtime Assignment—Violation of Collective Bargaining Agreement

Federal Labor Relations Council questions the propriety of sustaining an arbitration award of 1 hour backpay to an employee deprived of overtime work in violation of a negotiated labor-management agreement. Agency violations of such agreements which directly result in loss of pay, allowances or differentials, are unjustified and unwarranted personnel actions as contemplated by the Back Pay Act, 5 U.S.C. 5596. Therefore, where an agency obligated itself in a labor-management agreement to provide 2 hours of productive work when an employee is held on duty beyond his regular shift and, in violation of such agreement, provided him only 1 hour, an arbitration award providing backpay to the employee for the additional hour may be sustained.

In the matter of the Portland (Maine) Air Traffic Control Tower—arbitration award of backpay to air traffic controller deprived of overtime work, October 29, 1975:

This matter involves a request for an advance decision from the Federal Labor Relations Council (FLRC) on the propriety of a payment ordered by a labor relations arbitrator in *Professional Air Traffic Controllers Organization and Federal Aviation Administration, Portland, Maine, Air Traffic Contol Tower* (Gregory, Arbitrator), FLRC No. 74A–15.

The facts in the case are as follows. The Portland, Maine, Air Traffic Control Tower is operated by air traffic controllers employed by the Federal Aviation Administration (FAA). The control tower normally operates between 7 a.m. and 11 p.m. daily; however, occasionally an evening flight of Delta Airlines arrives in Portland considerably later than its scheduled time. Whenever this flight arrives late, the air traffic controller on duty is required to remain at work after his regular quitting time of 11 p.m. The chief controller had established work guidelines for controllers required to stay beyond their normal quitting time that allowed 1 hour of overtime pay for any time worked after 11 p.m. and terminated before midnight and 2 hours of overtime pay if the work time extended beyond midnight.

On June 21, 1973, the evening Delta flight arrived late at the Portland Airport and did not depart until 11:26 p.m. Mr. Richard A. Fournier was the air controller on duty at the time. He remained beyond his normal quitting time and closed the control tower at midnight. He was paid for 1 hour of overtime at the appropriate rate pursuant to the work guides established by the chief controller.

Mr. Fournier and his labor organization, the Professional Air Traffic Controllers Organization (PATCO), filed a grievance on June 22, 1973, alleging that the work guidelines established by the chief controller violated article 40, section 5, of the negotiated agreement then in force, which reads as follows:

ARTICLE 40—OVERTIME

Section 5. Whenever an employee is held on duty beyond his regular shift, he shall be guaranteed a minimum of two hours of productive work.

The employee's grievance was denied by the agency on the basis that the facility could not provide productive work after assistance to Delta Airlines had been completed. The disputed matter was submitted to arbitration. The arbitrator made the following finding and conclusion:

* * * it is my opinion that the grievant's and PATCO's interpretation of Article 40, Section 5, with reference to the present case, is correct. My conclusion, there-

fore, is that under Article 40, Section 5 of the agreement the grievant was entitled to two hours of overtime pay at the appropriate overtime rate when he was held over on the evening of June 21, 1973.

Accordingly, the arbitrator allowed the grievance of Richard A. Fournier and awarded him another hour's pay at the appropriate overtime rate, in addition to what he has already received, for having been held over beyond his regular shift on June 21, 1973.

The FAA petitioned the FLRC for review of the above-quoted award alleging that the award directing payment for an additional hour of overtime conflicts with applicable law, regulations, and decisions of our Office.

Under the provisions of 5 U.S. Code § 5542(a) (1970) and the regulations implementing the statute contained in 5 C.F.R. § 550.111, an agency has authority to order or approve overtime work which is defined as each hour of work in excess of 8 hours in a day. The statute and regulation also require that such work must be performed by the employee in order for him to receive overtime pay. The FAA, in its agreement with PATCO, exercised its statutory authority and, in effect, authorized overtime work of at least 2 hours for employees held over beyond their regular shifts since it agreed to provide productive work for such overtime period. During the proceedings, the agency argued that no work was available for the overtime added to the tour; however, this was effectively countered by the union in pointing out that many administrative, operational, and training tasks could have been assigned to a controller who was held over on duty beyond his regular tour. Such tasks include resetting runway lights, securing the recording equipment, securing the facility logs, determining the traffic count for the daily operations survey for the tower, securing the tower upon his departure, training with operational manuals, and familiarization with operating procedures.

The arbitrator found that the FAA violated the terms of the negotiated agreement by failing to fulfill its commitment of providing the required 2 hours of productive overtime work for the employee.

We have held that where an arbitartor has made a finding that an agency has violated a mandatory provision of a negotiated agreement which causes the employee to lose pay, allowances or differentials, such violation is as much an unjustified or unwarranted personnel action as is an improper separation, suspension, furlough without pay, demotion or reduction in pay, as long as the provision was properly included in the agreement. Accordingly, the Back Pay Act, 5 U.S.C. § 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. 54 Comp. Gen. 312 (1974), 54 *id.* 403 (1974), 54 *id.* 435 (1974), and 54 *id.* 538 (1974).

Section 5596 of Title 5, U.S. Code, the authority under which an agency may retroactively adjust an employee's compensation, provides, in part, as follows:

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

(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and

(2) *for all purposes, is deemed to have performed service for the agency during that period* * * *. [Italic supplied.]

The implementing regulations for the above-quoted statute concerning the recomputation of pay for employees who have undergone an unjustified or unwarranted personnel action specifically provide for the payment of premium pay. In this regard section 550.804 of title 5, Code of Federal Regulations, provides as follows:

(b) In recomputing the pay, allowances, differentials, and leave account of an employee under paragraph (a) of this section, the agency shall include the following:

(1) Premium pay which the employee would have received had it not been for the unjustified or unwarranted personnel action * * *.

In 54 Comp. Gen. 1071 (1975), we held that where an employee was deprived of overtime work in violation of a negotiated agreement, the employee may be awarded backpay for the overtime lost under the provisions of the Back Pay Act. Accordingly, we have no objection to the implementation of the arbitration award requiring the payment of an additional hour of overtime to the grievant for overtime work that the FAA authorized and failed to provide as it had obligated itself to do under the agreement. The amount of the payment must be determined by the FAA and made in accordance with the provisions of 5 U.S.C. § 5596 and implementing regulations.

[B–182816]

Attorneys—Fees—Suits Against Officers and Employees—Official Capacity

Where U.S. Attorney undertook defense of former Small Business Administration (SBA) employee who was sued as result of actions committed while acting within the scope of his employment and during course of proceedings U.S. Attorney withdrew for administrative reasons, necessitating former employee's re-

taining the services of private counsel although Government's interest in defending employee continued throughout proceedings, we would not object to SBA's reimbursing former employee an amount for reasonable legal fees incurred. 28 U.S.C. 516–519, 547, and 5 U.S.C. 3106 are not a bar in such circumstances since to hold otherwise would be contrary to the rule that cost of defending such cases should be borne by the Government.

In the matter of reimbursement of legal fees by Small Business Administration, October 29, 1975:

The Administrator of the Small Business Administration (SBA) requested our decision as to whether SBA has authority to reimburse a former employee (Mr. J. N. Hadley) for legal fees incurred as a result of his obtaining the services of private counsel to defend him in a suit arising out of actions committed while acting within the scope of his employment.

The record indicates that upon initiation of the action against Mr. Hadley by the service of process and complaint upon him, the SBA referred his case to the Department of Justice for legal representation. The Department referred the matter to the United States Attorney in Billings, Montana, with instructions that he represent Mr. Hadley's interest. The United States Attorney handling the matter made timely application to remove the cause from the State court in which it was filed to Federal court. Unfortunately, the removal application was ineffective since, through inadvertence, it had been filed in the name of the United States rather than in the name of the employee who was the party defendant.

Because of this oversight, the case was not effectively removed. Also, no answer was filed in the State proceeding on behalf of the defendant, and the statutory time for appearance expired. A judgment by default was summarily entered in the State proceeding and the plaintiff promptly took steps to execute the judgment against Mr. Hadley's property encumbering all of his real property and seizing his bank account. The United States Attorney did move to set aside the default judgment in the State proceeding, but no answer or affidavit was filed with the motion as required by law to state a defense to the complaint, and no stay of execution was requested to stop a judicial sale or to stop delivery of Mr. Hadley's property to the plaintiff. The plaintiff's attempts to execute the judgment caused Mr. Hadley to retain private counsel, who thereupon secured a stay of execution until the default judgment could be set aside.

The United States Attorney informed Mr. Hadley's attorney that he did not desire to remain as counsel in the case, but he was encouraged to continue as such for the time being in the event developments made his participation an advantage to the defense. After extensive

briefing and argument, the State District Court entered its order setting aside the default judgment and plaintiff appealed to the Montana Supreme Court. A motion to dismiss the appeal was filed on the ground that the District Court's order was not appealable and after more extensive briefing, the motion was granted.

The United States Attorney did not participate on the briefs or in the court appearances subsequent to Mr. Hadley's retaining the services of private counsel. Following the granting of the motion to dismiss the appeal, the United States Attorney requested and was granted an order permitting his withdrawal as an attorney for the defendant, although it was not then clear that the case would be dropped by the plaintiff.

Subsequently, Mr. Hadley's property was released from execution and all property under levy was returned to him. However, Mr. Hadley has incurred $1,947.87 in legal fees in procuring the services of private counsel to protect his interest for which he has requested reimbursement.

Although officials within the SBA all agree that equity and good conscience dictate reimbursement of the legal expenses, the Administrator states that there is concern for the legality of such reimbursement by the Agency in view of 5 U.S. Code § 3106 (1970) which provides that:

> Except as otherwise authorized by law, the head of an Executive department or military department may not employ an attorney or counsel for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested, or for the securing of evidence therefor, but shall refer the matter to the Department of Justice. This section does not apply to the employment and payment of counsel under section 1037 of title 10.

Therefore, we have been asked to determine whether Mr. Hadley may be reimbursed by the SBA for the legal expenses he incurred as described above.

It is noted that the term "Executive department" as defined by 5 U.S.C. § 101 (Supp. III, 1973) does not include the SBA, since it is an "Independent establishment" as defined by 5 U.S.C. § 104 (Supp. III, 1973). Since such definitions are applicable throughout Title 5 of the U.S. Code, absent a specific provision to the contrary, the SBA does not fall within the language of the specific prohibition of 5 U.S.C. § 3106. However, there are other provisions of law which similarly evidence the intent of the Congress to assign to the Department of Justice, under the direction of the Attorney General, comprehensive authority to supervise and control the conduct of litigation in which

the United States, an agency or officer thereof is a party. These other relevant provisions of law provide as follows:

28 U.S.C. § 515. Authority for legal proceedings; commission, oath, and salary for special attorneys.

(a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

(b) Each attorney specially retained under authority of the Department of Justice shall be commissioned as special assistant to the Attorney General of special attorney, and shall take the oath required by law. Foreign counsel employed in special cases are not required to take the oath. The Attorney General shall fix the annual salary of a special assistant or special attorney at not more than $12,000.

28 U.S.C. § 516. Conduct of litigation reserved to Department of Justice.

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

28 U.S.C. § 517. Interests of United States in pending suits.

The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

28 U.S.C. § 518. Conduct and argument of cases.

(a) Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested.

(b) When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so.

28 U.S.C. § 519. Supervision of litigation.

Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

28 U.S.C. § 547. Duties.

Except as otherwise provided by law, each United States attorney, within his district, shall—

(1) prosecute for all offenses against the United States;

(2) prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned.

These provisions of law make it clear that unless otherwise authorized by law, only the Attorney General or the United States Attorney can represent the Government's interest in a court action. *Cf. United States* v. *Daniel, Urbahn, Seelye and Fuller*, 357 F. Supp. 853 (N.D. Ill. 1973); *Richter* v. *United States*, 190 F. Supp. 159 (E.D. Pa. 1960), affirmed, 296 F. 2d 509 (3d Cir. 1961), *cert. denied*, 369 U.S. 828 (1962); *Sutherland* v. *International Insurance Co. of New York*, 43

F. 2d 969 (2d Cir. 1930). Inasmuch as Mr. Hadley was involved in the suit only as a result of his performance of official duties, the matter of his defense appears to be a valid concern of the United States. The Department of Justice in its letter of July 25, 1975, stated that the representation of Mr. Hadley was undertaken—

> * * * in spite of the absence of a direct financial impact upon the United States, in recognition of other fundamental interests to be served in defending suits brought against Government employees acting within the scope of their duties. The United States acts through its employees. Accordingly, upholding the authority and propriety of actions taken by employees in furtherance of their duties serves as well to protect the Federal Government as the employee. *See, e.g., Johnson* v. *Maryland*, 254 U.S. 51, 55–56 (1920). The Government would face obvious morale problems if it failed to defend employees carrying out official policy. Federal employees would be less vigorous in upholding Federal law and in discharging their duties if, when sued, they had to absorb their expenses of litigation. For these and other reasons it has long been the general policy of the Department of Justice to afford representation to employees sued for acts taken in the performance of their official duties. The Attorney General's authority to implement this policy is counted among his statutory powers. 28 U.S.C. 517 and 518. This authority was upheld in *Booth* v. *Fletcher*, 101 F. 2d 676, 682 (C.A.D.C., 1938), *cert. den.*, 307 U.S. 628; *Swanson* v. *Willis*, 114 F. Supp. 434, 435 (D.C. Alaska, 1953); *Bradford* v. *Harding*, 108 F. Supp. 338, 339 (E.D.N.Y., 1952).

Although provisions of law cited, *supra*, preclude the Administrator from reimbursing the employee for expenses of hiring private counsel if representation from the United States Attorney was available, if such representation was sought, but was unavailable, we believe such provisions of law would not be a bar to reimbursement if otherwise appropriate. To hold otherwise would yield a result contrary to the general rule that such litigation expenses should be borne by the United States rather than the employee. See *Konigsberg* v. *Hunter*, 308 F. Supp. 1361, 1363 (W.D. Mo. 1970) and 6 Comp. Gen. 214 (1926).

Recently we considered the question of the propriety of the use of judiciary appropriations to pay litigation costs, including minimal fees to private attorneys, when a Federal judge, judicial officer, or judicial entity was sued as a result of actions taken in the discharge of their official duties. We held that, subject to certain qualifications not here applicable, 28 U.S.C. §§ 516–519, and 5 U.S.C. § 3106, would not—

> * * * preclude the use of judiciary appropriations to pay the costs of litigation including minimal fees to private attorneys—if you determine the use of private attorneys is necessary—in those cases where it is determined that it is in the best interest of the United States and necessary to carry out the purposes of the Federal judiciary's appropriations for the judicial officer or body to be defended or represented in that litigation, and the Department of Justice has declined to provide representation. 53 Comp. Gen. 301, 305 (1973).

We see no basis for departing from that principle in the present circumstances. The Department of Justice initially decided that it

was in the interest of the United States to defend Mr. Hadley, and it undertook to provide him with legal representation. However, as the proceedings progressed, representation by the United States Attorney became, in effect, unavailable, according to a letter dated July 25, 1975, which we have received from Assistant Attorney General Rex E. Lee. This necessitated Mr. Hadley's procuring the services of private counsel. The Department of Justice does not claim that the withdrawal of representation by the United States Attorney was due to a determination that the United States was no longer officially interested in the defense of Mr. Hadley. Thus the defense of Mr. Hadley, through the services of private counsel was still an obligation of the United States. The aforementioned letter from the Department of Justice interposes no objection to that conclusion.

Therefore, we would have no objection to SBA reimbursement of Mr. J. N. Hadley for legal fees incurred as a result of his obtaining the services of private counsel to defend him in this suit, arising out of actions committed while acting within the scope of his employment, in an amount it determines to be reasonable. Such reimbursement in this limited context may be considered a necessary expense incurred by the employee in the course of his official duties, and paid from appropriations otherwise available for such expenses.

[B-183444]

Federal Procurement Regulations—Applicability—Grantee Procurements—Environmental Protection Agency

Federal Procurement Regulations (FPR) do not apply to award made under Environmental Protection Agency (EPA) grant for municipal sewer construction, since FPR pertains to direct Federal procurements and reference in EPA grant regulations to "Federal law" does not incorporate FPR by reference.

States—Federal Aid, Grants, etc.—Municipalities—Federal Procurement Regulations *v.* OMB Circular A-87

Regulations incorporating FPR cost principles in situations involving allocation and allowability of cost on grants to other than educational institutions or State and local Governments does not make FPR generally applicable to procurements by EPA grantees. In fact, where State or local Government is grantee, OMB Circular A-87 regarding allowability of costs applies and not FPR.

Bids—Evaluation—Aggregate *v.* Separable Items, Prices, etc.—Total *v.* Extension Differences

While invitation for bids (IFB) clause, stating that aggregate total of lump-sum and unit price items, based on estimated quantities, shall be basis for comparison of bids, assumes that extended price for each item will equal product of unit price times estimated quantity, it does not indicate that where there is inconsistency one shall prevail over other.

Bids—Mistakes—Correction—Discrepancy Between Words and Figures

IFB provision stating, if discrepancy occurs betwen written and figure prices, price most favorable to municipality will be taken as bidder's intention applies where discrepancy exists between price stated in words and same price stated in figures and not where there is mistake between unit and extended price.

States—Federal Aid, Grants, etc.—Municipalities—Contracts—Awarded Under State Law

Contract awarded under Iowa law pursuant to EPA grant to City of Davenport, Iowa, appears to be improper. City's construction of bid, which contained discrepancy between unit price and extended price for one item which resulted in displacement of another bid, was not proper because intended bid price for item was subject to more than one reasonable interpretation. Valid and binding contract comes into being under Iowa law only if essence of contract awarded is contained within four corners of bid submitted.

In the matter of Lametti & Sons, Inc., October 31, 1975:

This matter involves a procurement for the construction of a riverfront sanitary interceptor sewer system by the City of Davenport, Iowa, under a grant from the United States Environmental Protection Agency (EPA) pursuant to title II of the Federal Water Pollution Control Act Amendments of 1972, Public Law 92-500, 33 U.S. Code 1281. EPA's share of the cost of the project is 75 percent, which is approximately $6 million.

Pursuant to the grant, the City of Davenport issued an invitation for bids (IFB) for the construction. Four bids were submitted by the date set for bid opening, February 25, 1975. Lametti & Sons, Inc. (Lametti), submitted a bid of $7,972,971, while Johnson Bros. Highway & Heavy Constructors, Inc. (Johnson), submitted a bid in the amount of $8,702,645. The two other bids submitted were both in excess of $9 million.

Item 8 of Johnson's bid as submitted read:

Item No.	Quantity and Unit	Description	Total Price (Figures)
8	2,577 L.F.	72 inch (I.D.) RCP Class IV in Tunnel (Avg. Depth 33.2 ft.) including rock excavation and manholes. Complete in place at the unit price per lineal foot of	
Five Hundred Seventy and no/100 (In Writing)		($570. 00) (Figures)	$2, 241, 990 (Figures)

After the bid opening, the bids were delivered to the Director of Public Works for the City of Davenport, who reviewed the bonds and insurance. The bids were then delivered to the office of Warren and Van Praag, Inc., the consulting engineers for Davenport, with instructions to review the bids, check the calculations and prepare a tabulation sheet for bid comparison.

During the calculation check, an apparent error in item 8 of the Johnson bid was discovered in that, if the $570 unit price is multiplied by the stated quantity (2,577), the extended price is $1,468,890 rather than the $2,241,990 quoted. Conversely, if the $2,241,990 extended price on item 8 is divided by the stated quantity (2,577), the unit price is $870 instead of $570.

What happened after the discovery of the error is disputed. The manager of the Davenport office of Warren and Van Praag, Inc., asserts in an affidavit that:

> * * * Johnson Bros. representatives were notified informally and told that the review was not complete.
> During the day of February 26, the four bids were reviewed in detail. The error in the extension of Item 8 of Johnson Bros. bid was corrected by my staff and the total of the unit price items and the lump sum item was corrected accordingly. * * *

Lametti contends on the other hand that Johnson was asked whether the unit price or the extended price was the intended price and then advised Warren and Van Praag, Inc., that the unit price was the intended price.

However, in any event, it is clear that Warren and Van Praag, Inc., altered the bid of Johnson by striking the extended total price for item 8 ($2,241,990) and inserting in lieu thereof the figure of $1,468,890. The aggregate of the total item prices in the Johnson bid was then revised downward from $8,702,645 to $7,929,545, which was $43,426 less than the Lametti bid.

Following the correction of the Johnson bid, Lametti filed a protest with the city. After a series of meetings involving the Director of Public Works for Davenport, representatives of Johnson and Lametti and the Corporation Counsel of Davenport, the City Council passed resolutions on March 5 and 12, 1975, to award the contract to Johnson based upon reports of the Davenport Corporation Counsel and the Director of Public Works. Those reports indicated that the actions taken with respect to the Johnson bid were proper since (1) they were in accordance with instructions to bidders paragraph 5–f relating to

discrepancies in bid prices; (2) the principal law governing the award was that the State of Iowa and the correction of the Johnson bid was in accordance with the holding in *Wigodsky* v. *Town of Holstein*, 192 N.W. 916 (Iowa 1923); and (3) the correction of the Johnson extended bid for item 8 to conform to the unit price for that item was consistent with paragraph 2 of the IFB.

Lametti thereafter filed a protest with the EPA Regional Administrator. On April 11, 1975, the Regional Administrator rendered a decision denying the protest of Lametti on the basis that under Iowa law correction of the Johnson bid was not improper even though it displaced Lametti's seemingly low bid. Following the adverse EPA decision, Lametti filed a protest with this Office and instituted an action for declaratory relief in the United States District Court for the Southern District of Iowa, Davenport Division, entitled *Lametti & Sons, Inc.* v. *City of Davenport, Iowa*, Civil Action No. 75–28–D. Johnson intervened in this action.

We have decided to undertake reviews of complaints concerning contracts under Federal grants. *See* 40 Fed. Reg. 42406 (1975). However, our Office will not consider a matter pending before a court of competent jurisdiction except when the court indicates its interest in obtaining our views. See *Thomas Construction Company, Incorporated, et al.*, 55 Comp. Gen. 139 (1975), 75–2 CPD 101. On June 9, 1975, the court issued an order inviting this Office to participate in the case either through an amicus brief or an advisory opinion.

Lametti asserts that the award of the contract for construction of the sewer system by Davenport to Johnson was illegal and the contract should be awarded to it. As the basis of its contention, Lametti raises the following main arguments:

1. The Federal rule (set out in the Federal Procurement Regulations) prohibiting the displacement of the apparent low bidder, unless both the existence of a mistake and the intended bid are apparent from the displacing bid itself, is applicable to the award of this contract; and

2. The Federal rule precluded the displacement of Lametti's bid.

When the Federal Government makes grants, it has a right to impose conditions on the grants. *State of Indiana* v. *Ewing*, 99 F.Supp. 734 (1951), vacated as moot, 195 F.2d 556 (1952). Therefore, although the Federal Government is not a party to contracts awarded by its grantees, a grantee must comply with the conditions attached to the grant in awarding federally assisted contracts. See *Illinois Equal Em-*

ployment Opportunities Regulations for Public Contracts, 54 Comp. Gen. 6 (1974), 74–2 CPD 1. In this case, the grant to the City of Davenport was subject to restrictions imposed by the enabling legislation (33 U.S.C. § 1251 (Supp. III 1973)), applicable regulations and the terms and conditions in the grant agreement.

Lametti contends that the applicable EPA regulations, 40 C.F.R. § 35.900, *et seq.* (1974), incorporate by reference the Federal Procurement Regulations (FPR), 41 C.F.R. chapter 1 (1974) (and decisions interpreting them), and make them applicable to procurements by EPA grantees. Lametti specifically cites 40 C.F.R. §§ 35.935–4, 35.939 (a) and 35.939(b) in support of this contention. Section 35.935–4 states:

> The construction of the project, including *the letting of contracts* in connection therewith, *shall conform to* the applicable requirements of *State, territorial, and local laws* and ordinances to the extent that such requirements do not conflict with Federal laws and this subchapter. [Italic supplied.]

Section 35.939(a) provides:

> *The grantee is primarily responsible for selecting the low, responsive, and responsible bidder in accordance with applicable requirements of State, territorial, or local laws* or ordinances, as well as the specific requirements of *Federal law or this subchapter directly affecting the procurement* (for example, the nonrestrictive specification requirement of § 35.935–2(b) or the equal employment opportunity requirement of § 35.935–6) and for the initial resolution of complaints based upon alleged violations. * * * [Italic supplied.]

Taken together, we believe that these regulations require that the contractor for the project be selected by the grantee in accordance with local, State, or territorial law, except where there is a conflict between State, local or territorial law and a specifically applicable Federal law, in which event the Federal law shall govern. We do not believe that FPR constitutes such a specifically applicable law since by its own terms it applies only to procurements made by Federal agencies. *See* FPR §§ 1–1.002 and 1–1.004 (1964 ed. amend. 141) and *Shaw-Henderson, Inc.* v. *Schneider*, 335 F.Supp. 1203, 1215 (W.D. Mich. 1971), affirmed 453 F. 2d 748 (6th Cir. 1971).

Lametti cites the following portion of 40 C.F.R. § 35.939(b) regarding the incorporation of FPR:

> * * * If the grantee proposes to award the contract or to approve award of a specified sub-item under the contract to a bidder other than the low bidder, the grantee will bear the burden of proving that its determination concerning responsiveness of the low bid is in accordance with Federal law and this subchapter * * *.

However, for the reason just indicated, we do not believe that FPR is applicable to this section. Moreover, the section applies to a situation

where the grantee proposes to reject a bid for lack of responsiveness which is not the case here.

For the incorporation of FPR, Lametti also relies upon 40 C.F.R. § 30.701 (1974) which states:

> Except as otherwise provided by statute, allocation and allowability of costs will be governed in the case of grants to educational institutions by the provisions of Office of Management and Budget (OMB) Circulars Nos. A–21 (Revised), and A–88, and in the case of grants to State and local governments by the provisions of OMB Circular A–87. All other grants shall be governed by the policies and principles established in the Federal Procurement Regulations, Title 41, Code of Federal Regulations, Chapter 1, Subpart 1–15.2 to the greatest practicable extent.

Contrary to the position of Lametti, this regulation does not make FPR generally applicable to procurements by EPA grantees. This regulation pertains solely to "allocation and allowability of costs" by grantees and establishes for that limited purpose what shall apply. In that situation, where a State or local Government is a grantee, as here, OMB Circular A–87 applies and not FPR.

Thus, we disagree with Lametti's position that FPR has been incorporated into the EPA regulations governing the award of contracts by its grantees. Therefore, we believe that the instant procurement is governed by State and local law in accordance with 40 C.F.R. § 35.939(a).

The leading Iowa case on the displacement of the low bidder is *Wigodsky* v. *Town of Holstein*, *supra*. That case involved the issuance of an IFB by a municipality which sought bids on various classes of pavement. The resolution of the town council for the paving work provided that class "L" would be for paving 7 inches thick and class "M" would be for the same paving 6 inches thick. However, the IFB mistakenly designated classes "L" and "M" as 6- and 7-inch paving respectively.

Of the five bids received, all but one contained a higher price for class "L" than for class "M.". The council concluded that this was a clear error due to the transposed order and treated the lower prices for the class "M" paving as the bids for the 6-inch paving. The bidder who was determined to be low by this method of evaluation admitted making such an error when questioned after the bid tabulation. The court after discussing the purpose of the statute requiring that contracts be let upon competitive bids stated in upholding the award that the mistake of the bidder was "so patent that the council could not well have construed the bid otherwise than it did."

The Iowa statute relevant to the instant case states that "All contracts for the construction or repair of street improvements and for sewers shall be let * * * to the lowest bidder by sealed proposals * * *." Section 391.31 Iowa Code Ann. (1975 Supp.). It has been held that a public body has some discretion in making an award under a procurement statute and that an Iowa court will not substitute its judgment for a discretionary action of a public body. *Menke* v. *Board of Education, Independent School District of West Burlington*, 211 N.W.2d 601 (Iowa 1973), Accord on a Federal level—*M. Steinthal & Co., Inc.* v. *Seamans*, 455 F. 2d 1289 (D.C. Cir. 1971). It is equally clear that the municipalities of Iowa cannot properly make awards of contracts that are in violation of the procurement statutes. *Atkinson* v. *Webster City*, 158 N.W. 473, 479 (Iowa 1916). See *Weiss* v. *Incorporated Town of Woodbine*, 289 N.W. 469 (Iowa 1940); *Miller* v. *Incorporated Town of Milford*, 276 N.W. 826 (Iowa 1937); *Greaves* v. *City of Villisca*, 266 N.W. 805 (Iowa 1936); *Brutsche* v. *Incorporated Town of Coon Rapids*, 264 N.W. 696 (Iowa 1936); *Northwestern Light & Power Co.* v. *Town of Grundy Center*, 261 N.W. 604 (Iowa 1935); *Urbany* v. *City of Carroll*, 157 N.W. 852 (Iowa 1916). Moreover, section 35.939 of the EPA grant regulations imposes upon the grantee the responsibility to comply with applicable State or local legal requirements and, where complaints of violations are received, provides a reviewing procedure to assure that there has been compliance with the requirements. Therefore, the responsibility exists for the municipality to award a contract under the procurement statutes in accordance with the legal requirements. In the circumstances, the municipality should not be allowed to defend against a complaint of a violation of the procurement statute on the basis that there was no fraud or collision. See *Menke* v. *Board of Education, Independent School District of West Burlington, supra.*

In *Atkinson* v. *Webster City, supra*, the court held that "The object of such provisions [the procurement statute] is to prevent favoritism, corruption, extravagance, and improvidence in the awarding of municipal contracts, and they should be so administered and construed as to fairly and reasonably accomplish such purpose" and that the statute "must be *strictly construed.*" [Italic supplied.] It is clear from the decision in the case that awards are to be made on the basis of the bids submitted and not upon extrinsic evidence submitted after bid opening. In that connection, the court ruled that the city council had no authority to award a contract to the low bidder, who, after bid

opening, but before award, offered, at no additional cost, to provide the city with a better grade of asphalt than it had originally bid. The court, after discussing the mere possibility of future impropriety should the statute not be strictly construed, held the requirement in the statute for the contract to be let "by sealed proposals" did not allow the council to award based on extrinsic material even though it was in fact submitted by the determined low bidder and merely made the bid better for the city.

The argument is made that all Davenport did was to make a proper construction of the Johnson bid rather than to acquiesce in any claim of mistake. However, this was also the situation which existed in *Wigodsky*, i.e., the city realized that there was an error in the bid and what the intended bid was before the bidder agreed as to the error and the intended bid. In following *Wigodsky*, we believe that, if Johnson's tendered bid price for item 8 was so patent that Davenport could not reasonably have construed its bid in any other manner, then the award was proper. If, however, there is more than one reasonable construction of the Johnson bid when read in its entirety, then we believe the *Wigodsky* test was not met and the award was improper.

In this regard, it is argued that paragraph 2 of page 8 of the IFB supports the city's construction of the Johnson bid. That provision states:

> The aggregate total of the above lump sum and unit price items, based on the estimated quantities, shall be the basis for establishing the amount of the performance bond and for comparison of bids. Said total in the case of unit price bids, shall not be understood to be a single lump sum proposal or contract price.

The memorandum of the EPA regional counsel, referenced in the Regional Administrator's denial of Lametti's protest, indicated that this provision was particularly persuasive in the disposition of the protest. The memorandum stated:

> * * * In order to afford a uniform basis for comparison, this provision must necessarily be construed as meaning that the subtotals of unit price items making up the aggregate total must be based *and correctly computed* on the estimated quantities. To provide for comparison of bids based on the aggregate total of unit price extensions, even though such extensions may have been erroneously computed, would be wholly unrealistic and would multiply the opportunities and occasions for bidders to claim or refrain from claiming mistakes in bidding, whichever course might seem most advantageous.

We interpret paragraph 2 to mean simply that the arithmetic sum of the 33 "total" or extended prices (one being a lump-sum price and the other 32 being prices computed by the bidder by multiplying a unit price by an estimated quantity) would be used to compare the bids of competing potential contractors. While we agree that the provi-

sion assumes that the extended price will equal the product of the unit price times the estimated quantity, it does not indicate that where there is an inconsistency one shall prevail over the other. Even if there was such an indication, it would not preclude an error being made in the dominant price. In the immediate case, it would be equally as reasonable to conclude that for item 8 Johnson intended the $2,241,990 extended price (Lametti's price was $1,876,056) as to conclude that it intended the $570 unit price (Lametti bid $728 per unit while the other bidders bid $600 and $700, respectively). Similar situations involving inconsistencies between unit and extended prices have been considered in 49 Comp. Gen. 12 (1969); B-167303, July 18, 1969; and B-179222, August 2, 1973. In each of these decisions we concluded that since it was not evident from the bid itself if the error was in the unit price or in the extended price, correction of the bid so as to displace a lower bidder was not permissible. In view of the reasonable alternatives in the Johnson bid on item 8, we do not believe that the intended price was so patent that the city could not reasonably have construed the bid in any other manner but that in which it did, as required by *Wigodsky*.

Similarly, we do not believe that paragraph 5-f of the IFB instructions to bidders, relied on by the city in construing the Johnson bid, supports the city's position. That provision in pertinent part states:

> The price must be written in the bid, and also stated in figures, and if any discrepancy occurs between the *written and figured* prices, those most favorable to the municipality will be taken as the intention of the bidder. * * * [Italic supplied.]

Like section 3-118(c) of the Uniform Commercial Code, this provision is a rule of construction which applies only where a discrepancy exists between the price stated in words and the same price stated in figures, i.e., where the unit price in words says one thing and the unit price in figures another. However, that is not the case in the instant situation since there is no discrepancy between the unit price stated in words and figures. As noted above, Johnson's bid for item 8 indicated both "five hundred and seventy dollars" and "$570.00." The mistake involved is between the "total," or the extended price, and the unit price (both written and figured) as multiplied. Since there is no discrepancy between the written and the figured unit price for the same item, paragraph 5-f does not apply and it appears that reliance upon it was inappropriate.

In view of the above, we do not perceive the basis within the four corners of Johnson's bid upon which the city could have relied to

determine the intended bid price. The determination that for item 8 Johnson intended the $570 unit price rather than the $2,241,990 "total" or extended price therefore was based on mere surmise subsequently reinforced by Johnson's preaward actions (the precise character of which need not be decided). Our interpretation of the *Atkinson* and *Wigodsky* cases, *supra*, is that a valid and binding contract comes into being under Iowa law only if the essence of the contract awarded is contained within the four corners of the bid as submitted since the award must be made "to the lowest bidder by sealed proposals." See *Atkinson*, *supra*, at 479.

As set out in *Iowa Electric Light & Power Co.* v. *Incorporated Town of Grand Junction*, 250 N.W. 136, 139 (Iowa 1933), the right of a municipality to enter into a contract is derived from statute and where an award is made in contravention of the statute the resulting contract is invalid. See also *Atkinson*, *supra*. While the Iowa courts do not consider that mere irregularities in the solicitation and award render the resulting contract void, see *Urbany* v. *City of Carroll*, *supra*, this has been in situations that involved form over substance such as: the publication of notice of the procurement prior to the required final approval by the budget director, *Johnson* v. *Incorporated Town of Remsen*, 247 N.W. 552 (Iowa 1933); the publication of the notice in three rather than the required four publications and providing for less than 10 days between the last publication and bid opening, *Koontz* v. *City of Centerville*, 143 N.W. 490 (Iowa 1913); and a discrepancy between the publication and the specifications as to the amount of the bid bond required, *Tony Amodeo Co.* v. *Town of Woodward*, 185 N.W. 94 (Iowa 1921). That is not the case here, since the interpretatiton of the bid had a material and substantive effect in that it was determinative of the award of an $8 million contract and we believe that based on Iowa law the award was improper.

[B-184831]

Bonds—Bid—Signatures—Corporate Agent

Where bid bond, submitted with properly executed bid, is signed by corporate agent whose authority to sign bond on behalf of corporation is questioned, accompanying bid may be considered for award since surety's obligation to Govt. would not be affected by absence of authorized signature on bond.

Agents—Of Private Parties—Authority—Contracts—Bid Bond

Evidence required to establish authority of particular person to bind corporation is for determination of contracting officer, and record provides no basis for concluding that contracting officer incorrectly determined that agent was authorized to sign bid bond.

In the matter of General Ship and Engine Works, Inc., October 31, 1975:

Invitation for bids (IFB) No. N62794–76–B–0003, issued by the Department of the Navy, solicited bids for specified topside repairs on a Navy destroyer. On August 20, 1975, six bids were received and opened. Bromfield Corporation submitted the low bid of $1,308,170.73, while General Ship and Engine Works, Inc. submitted the second low bid of $1,330,000. However, General Ship, alleging a deficiency in the bid bond submitted by Bromfield, has protested award of a contract to that firm.

The IFB contained a requirement that bids "must be accompanied by a bid bond or bid guarantee in the penal sum equal to 20 percent of the total price offered." Paragraph 10 of that section of the IFB entitled "General Terms and Conditions of Invitation For Bids Under Master Contract For Repair and Alteration of Vessels" provided that the bid bond must be on Standard Form (SF) No. 24 and that bids not accompanied by such bid bond or other permissible bid guarantee in the prescribed amount "shall be rejected without further consideration, except as otherwise provided in paragraph 10–102.5 of the Armed Services Procurement Regulation [ASPR]." Instruction No. 2 on SF 24 states the following:

> The full legal name and business address of the Principal shall be inserted in the space designated "Principal" on the face of this form. The bond shall be signed by an authorized person. Where such person is signing in a representative capacity (e.g., an attorney-in-fact), but is not a member of the firm, partnership, or joint venture, or an officer of the corporation involved, evidence of his authority must be furnished.

Bromfield's bid bond as submitted was signed "Dana A. Summerville," with "Bromfield Corporation" typed below the signature. In addition, the Bromfield corporate seal was affixed next to the signature. General Ship contends that the bid bond was not valid because Mr. Summerville was only a messenger rather than an officer of the Bromfield Corporation and the bid was not accompanied by evidence of Mr. Summerville's authority to sign the bond on behalf of the corporation as required by SF 24.

The Navy asserts that the bid may be accepted because Mr. Summerville was known to be an authorized representative of Bromfield and because evidence of his authority to sign the bid bond was furnished after bid opening. However, General Ship's position is that a bid bond must be valid on its face; that bid bond requirements are strictly construed and may not be waived by the contracting officer; that in the present case no evidence as required by SF 24 was furnished showing

the authority of Summerville to act on behalf of Bromfield; that such evidence must be furnished before bid opening; and that if Bromfield's bid bond is found to be satisfactory it would afford the bidder "two bites at the apple."

We have consistently held that bid bond requirements must be considered a material part of the IFB and the contracting officer cannot waive the failure to comply with these requirements. *See, e.g.*, 38 Comp. Gen. 532 (1959); 39 *id.* 60 (1959); 44 *id.* 495 (1965); 50 *id.* 530 (1971); 52 *id.* 223 (1972). However, we have stated that "we do not regard the instructions on the back" of SF 24 as the type of material bid bond requirements with which bidders must comply in order to be responsive. B–152589, October 18, 1963. Rather, since the purpose of the bond is to secure liability of a surety to the Government in accordance with the terms of the bond, 52 Comp. Gen. 223 (1972), the question presented in cases where bid bond requirements are not complied with is "whether the Government obtains the same protection in all material respects under the bond actually submitted as it would have under a bond complying completely with the instructions on Standard Form 24." B–152589, *supra.*

Obviously, where a bidder does not submit a required bid bond, the Government is not protected and the bid must be rejected. 38 Comp. Gen. 532, *supra;* 42 Comp. Gen. 725 (1963). A similar result is reached if the amount of the bond is insufficient, 39 Comp. Gen. 827 (1960); 40 *id.* 561 (1961), or if the bond names a principal other than a nominal bidder. *A. D. Roe Company, Inc.*, 54 Comp. Gen. 271 (1974), 74–2 CPD 194, and cases cited therein.

In other situations, however, we have held that the bidder's failure to comply with a requirement relating to execution of a bid bond did not require rejection of the bid because it appeared that the surety would be liable on the bond notwithstanding the bidder's deviation. In 39 Comp. Gen. 60, *supra*, we held that a date on the bond prior to the date on the bid itself, even though forbidden by a SF 24 instruction, did not affect the liability of the surety. In B–152589, *supra*, where a partnership was the bidder and only one partner signed the bond despite the SF 24 instruction requiring all partners to execute the bond, we held that the Government would be able to enforce the surety's obligation resulting from the partnership's contract with the surety and that the bid therefore could be considered for award. Other cases in which we found the surety's obligation unaffected by a bidder's deviation from stated requirements have involved a failure to

affix the corporate seal to the bond, B–164453, July 16, 1968 and B–145301, April 21, 1961, and even a failure of the bidder to sign the bond at all. B–173475, October 22, 1971 and B–164453, *supra.*

The protester asserts that in this case the surety would not be liable on Bromfield's bid bond. In this regard, the protester has cited Stearns, *The Law of Suretyship* § 7.11 (5th ed. 1951), Simpson, *Handbook on the Law of Suretyship* 271 (1950), and *Dole Brothers Co.* v. *Cosmopolitan Preserving Co.*, 167 Mass. 481, 46 N.E. 105 (1897), for the proposition that a surety is not liable on the bond executed by an unauthorized agent of the principal. In the *Dole Brothers Co.* case, which is relied upon by the above authors, the court held only that since the sureties did not actually know that the principal's agent was not authorized to sign the bond on behalf of the principal, "upon the face of the paper [bond] * * * without more, [the sureties] do not appear to be liable. * * * The instrument as delivered was not what it purported to be, and not what the sureties, if they judged from the instrument alone, must have supposed it to be. Without further proof they cannot be held upon it." 46 NE at 106.

We do not believe that the case is controlling in the instant situation. In 72 C.J.S. *Principal and Surety* § 24 (1951), it is stated:

> Want of authority of the person who executes an obligation as the agent or representative of the principal will not, as a general rule, affect the surety's liability thereon, especially in the absence of fraud, even though the obligation is not binding on the principal. *This rule is especially applicable where* there is no positive illegality in the contract, and where the surety was cognizant of the want of authority, or where *it affirmatively appears that the principal is in fact indebted or under obligation to the creditor or obligee.* A surety signing a partnership note has been held bound, although the note was signed by a member of the firm without authority. [Footnotes omitted and italic supplied.]

Additionally, section 7.9 of Stearns, *supra*, states in part:

> Where the suretyship instrument recites that the principal is to sign it also, but the principal fails to do so, the courts are in disagreement as to whether the surety may plead the principal's failure to sign as a successful defense in an action by the creditor. A number of cases have held that the surety is not bound on the theory that the recital of the principal's name in the body of the instrument is notice to the creditor that the surety does not intend to be liable unless his principal signs. *Where, however, the principal is liable without signing the bond, as where he has made a separate agreement with the creditor or he is liable by virtue of an office he holds, other courts have refused to relieve the surety of liability because of the principal's failure to sign the suretyship bond.* [Footnotes omitted and italic supplied.]

In *Dole Brothers Co.*, the court did not have for consideration any "further proof" such as a separate agreement establishing the principal's obligation to the creditor or obligee. Thus the court was necessarily concerned with protecting the rights of the surety in a situation

where the surety might have had no recourse against the principal. As the court said, "Such an instrument is supposed to be signed by the sureties as a contract binding upon the principal as well as upon themselves. They may be presumed to rely upon the rights of the obligee to proceed against the principal, and upon their own right to recover from him under the instrument if they are compelled to pay for his benefit." 46 NE at 106. Here, however, there is a separate agreement, in the form of a bid, establishing Bromfield's obligation to the Government. Bromfield's bid, which was submitted with the bid bond in question, was signed by the President of Bromfield and, insofar as the record indicates, was proper in all other respects. Bromfield would thus be fully found to perform upon acceptance of the bid. Furthermore, the bond itself, to which there was affixed the Bromfield corporate seal, contained the signature of the surety, identified the procurement to which it was applicable, and stated the appropriate penal amount. As indicated above, we have held that in similar cases, where the principal did not sign the bond at all, the surety's obligation was not affected thereby. B–173475, *supra;* B–164453, *supra.* Thus, it is our belief that under the circumstances existing here the weight of authority mandates the conclusion that the surety could not avoid its obligation under the bond.

In addition, we point out that while the above discussion is predicated on the assumption that Mr. Summerville was not authorized to sign the bond, it is far from clear that such is the case. The SF 24 instruction, while referring to "evidence" of a corporate agent's authority, does not specify what form such evidence may take. Here, the record indicates that Mr. Summerville was known to both the surety and the contracting agency as a representative of Bromfield. We also understand that Mr. Summerville carried the corporate seal with him, and both signed the bid bond and affixed the corporate seal thereto in the bid room prior to opening. It is conceivable that these facts could well be "evidence" of Mr. Summerville's apparent, if not actual, authority. In this regard, ASPR § 20–102(c) (1974 ed.) provides that the evidence required to establish the authority of a particular person to bind a corporation is for the determination of the contracting officer. We perceive no basis here for concluding that the contracting officer acted incorrectly in determining that Mr. Summerville was authorized to sign the bid bond on behalf of the corporation.

For the foregoing reasons, the protest is denied.

U. S. GOVERNMENT PRINTING OFFICE : 1976 O - 599-443