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COMPTROLLER GENERAL OF THE UNITED STATES

Elmer B. Staats

DEPUTY COMPTROLLER GENERAL OF THE UNITED STATES

Robert F. Keller

GENERAL COUNSEL

Paul G. Dembling

DEPUTY GENERAL COUNSEL

Milton J. Socolar

ASSOCIATE GENERAL COUNSELS

F. Henry Barclay, Jr.

John J. Higgins

Paul Shnitzer

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[B-181686]

Arbitration—Award—Grant of Sick Leave—Implementation by Agency—No Legal Authority

Award of arbitrator granting sick leave to an employee who attended sick member of family not afflicted with a contagious disease, who as a result was not able to perform his duties, may not be implemented by agency since there is no legal authority to grant sick leave in the circumstances.

In the matter of approval of sick leave for incapacity due to fatigue, September 2, 1975:

The Federal Aviation Administration (FAA), Department of Transportation, asks whether it may legally comply with an arbitrator's award in *FAA and Professional Air Traffic Controllers' Organization (PATCO)*, Anthony J. Sabella, Arbitrator (case No. 74K/03131). The award requires that an employee be charged sick leave rather than annual leave for an absence of 5 hours because of physical fatigue resulting from lack of sleep. The stipulated facts on which the award is based are summarized as follows.

At 5:30 a.m. on June 14, 1973, the grievant, Mr. Charles T. Turner, Air Traffic Control Specialist at the Memphis Air Route Traffic Control Center, called the Center to request sick leave because he had been up during the night with his sick wife and needed rest. The request was made to Mr. Roy Turner, Assistant Chief at the Center who was the management official in charge of the 12 midnight to 8 a.m. shift. The grievant stated that he needed some rest and would try to make it in to work at a later time. Assistant Chief Turner approved the sick leave request and relayed that information to Mr. Joe Anderson, Assistant Chief on the day shift.

At 8:30 a.m. that morning, Assistant Chief Anderson called the grievant at his home and asked him about his intentions for reporting to work at a later time. During that conversation Mr. Anderson questioned whether the absence could be charged to sick leave. Mr. Anderson told the grievant that the Center needed him and asked him if he intended to come in. The grievant agreed to come in, and he reported for work at 9:20 a.m.

Upon arriving at the Center, the grievant informed his team supervisor that he was not physically able to control traffic and that he wanted to take leave as soon as he could be spared. He was assigned to an "A" position, which does not require the handling of live air traffic. He worked that position until 1 p.m. at which time leave was approved for the remainder of the day. The team supervisor advised the grievant that he was not sure whether the leave would be annual or sick leave. Later the chief of the Memphis Center decided that the

grievant's absence would be charged to annual leave. Accordingly, Mr. Charles T. Turner was charged 3 hours annual leave from 0700–1000 hours and 2 hours annual leave from 1300–1500 hours.

The employee's grievance was submitted to arbitration pursuant to the dispute settlement procedure set forth in Article 7 of the April 1973 labor-management agreement then in effect between PATCO and the FAA. The agency relied upon Article 42 of the PATCO agreement which provides that the administration of all matters covered by the agreement is governed by existing or future laws and the regulations of appropriate authorities, including the policies set forth in the Federal Personnel Manual (FPM).

The union contended that the denial of sick leave was a violation of Article 29 of the PATCO agreement which provides in pertinent part as follows:

> Section 1. An employee shall earn and be granted sick leave in accordance with applicable law and regulations.
> Section 2. Approval of sick leave shall be granted to an employee who is incapacitated for the performance of his duties.

In reaching the conclusion that the grievant should have been allowed sick leave, the arbitrator noted that the parties had agreed on the broad language "incapacitated for performance of his duties," rather than the language of Civil Service Commission regulations which allows sick leave when an employee "is incapacitated for the performance of duties by sickness, injury, or pregnancy and confinement." The arbitrator stated that the general meaning of "incapacitated" is to be unfit or incapable or disqualified and that "[o]ne who is required to be mentally alert, fit to make a decision affecting lives is as incapacitated by physical and mental fatigue, lack of rest, etc. as the typist who may have broken a hand." He added that the assigning of the "grievant in a position, not involving live air traffic was some indication that grievant's condition was incompatible with controlling air traffic, his job duty." The arbitrator, therefore, sustained the grievance and ordered the absence charged to sick leave.

In the request for our decision, the FAA questions whether it may properly implement the arbitrator's award in granting the employee sick leave for June 14, 1973. The FAA states its belief that the disapproval of sick leave is in accordance with the Civil Service Commission's regulation on sick leave (5 C.F.R. § 630.401) which provides for granting sick leave when the employee:

> (b) Is incapacitated for the performance of duties by sickness, injury, or pregnancy and confinement;
> (c) Is required to give care and attendance to a member of his immediate family who is afflicted with a contagious disease; or * * *.

The FAA's letter concludes by stating that the arbitrator's award appears to conflict with the Civil Service Commission's regulation and,

therefore, requests our decision as to compliance with the award. First of all, we note that section 6311 of Title 5, U.S. Code, vests the Civil Service Commission with the authority to prescribe the conditions under which sick leave may be granted.

As to the effect of an arbitration award that is not in keeping with the controlling laws and regulations, Executive Order 11491, October 29, 1969, as amended, provides that applicable law and regulations will be controlling over the labor-management agreement. Section 12(a) thereof provides, among other things, that any agreement entered into between an agency and a labor organization is subject to the provisions of existing or future laws and regulations, including policies set forth in the FPM. The same provision is included in Article 42 of the FAA–PATCO agreement.

Because of the Commission's statutory duty to prescribe regulations for sick leave, we requested the Commission's opinion on whether the arbitration award of sick leave to Mr. Charles T. Turner conflicts with the regulations. The Commission, by its Director, Bureau of Policies and Standards, advised us that the arbitrator's award clearly conflicts with the sick leave regulations for the following reasons.

The Commission stated that, although Mr. Charles T. Turner may have been incapacitated to perform his duties, he was not incapacitated for any of the specific reasons cited by Civil Service Commission Regulation 630.401, quoted above. The Commission stated that it "has consistently interpreted this regulation to mean that sick leave is appropriate for use only when the circumstances specifically and literally meet the criteria contained in the regulation."

Moreover, the Commission stated that the generous amounts of annual leave granted to Federal employees were authorized by law with the understanding that they were meant for more than vacations, i.e., annual leave was also to be used for a variety of personal and emergency reasons. Such reasons can include transporting member of the family to a doctor or hospital for emergency treatment; staying home with a member of the family who is ill, but *not* with a contagious disease; being tired or fatigued because of loss of sleep due to any one of a number of causes, ranging from care of an ill member of the family to worry over family problems.

The Commission concluded that the arbitrator's award conflicts with its regulations on sick leave, and does not recognize the appropriateness of annual leave to the circumstances in this case.

We agree with the Commission's reasoning and conclusion. We would further add that the arbitrator failed to give effect to section 1 of Article 29 of the agreement which expressly provides that sick leave will be granted "in accordance with applicable law and regulations." Section 2 of the article in providing for approval of sick leave for an

employee who is incapacitated for duty must be read in the light of section 1 to incorporate the specific incapacitating factors listed in the Commission's regulations.

Accordingly, the arbitrator's award of 5 hours of sick leave to Mr. Charles T. Turner may not be lawfully complied with. *See* 53 Comp. Gen. 1054 (1974).

[B-128493, B-158834]

Pay—Periods of Confinement by Military Authorities for Foreign Civil Offenses—Under Jurisdiction of Installation Commanders

A service member charged with commission of a civil offense on foreign soil is entitled to his pay and allowances for any pretrial custodial period at a U.S. military installation where the decision to incarcerate or to merely restrict member to duty station and assign him to perform duties on full-time basis remains in installation commanders. 36 Comp. Gen. 173, modified.

Pay—Absence Without Leave—Civil Arrest—Confinement—Trial and Appellate Review

A service member charged with commission of a civil offense on foreign soil is not entitled to pay and allowances for period when actually absent from military installation for purposes of judicial proceedings by foreign civil authorities unless such absence is excused as unavoidable.

Pay—Absence Without Leave—Civil Arrest—NATO Status of Forces Agreement

A service member charged with commission of a civil offense on foreign soil is to be considered constructively absent from duty and not entitled to pay and allowances when member is actually incarcerated on the basis of request for incarceration by foreign civilian authorities under the provisions of a treaty or other international agreement. 36 Comp. Gen. 173, modified.

In the matter of pay and allowance entitlements of confined military personnel, September 3, 1975:

This action is in response to a letter from the Assistant Secretary of Defense (Comptroller) requesting an advance decision concerning the pay status of service members held in confinement by military authorities for foreign civil offenses as discussed in Department of Defense Military Pay and Allowance Committee Action No. 512, which was enclosed with the request.

The question posed in the Committee Action is:

> May Rules 7 and 8, Table 1-3-2, Department of Defense Military Pay and Allowances Entitlements Manual, which are based on Comp Gen Decisions (36 Comp Gen 173 and 45 Comp Gen 766), be modified to allow members in confinement by military authorities for foreign civil offenses to accrue pay and allowances at least until they are initially convicted?

The Committee Action states that the Department of Defense Military Pay and Allowances Entitlements Manual (DODPM) provides that a member held in confinement by military authorities for a foreign civil offense is entitled to otherwise proper credits of pay and

allowances until the foreign country exercises jurisdiction by charge, indictment, recall of waiver of jurisdiction or other proper process and that these rules are based on several decisions of this Office and cited in the Committee Action. It is, however, pointed out that when these decisions and the resultant rules have been applied in certain situations, they have operated to deny pay and allowances to certain members who are in essentially the same circumstances of confinement as other members who are entitled to receive pay and allowances.

The Committee Action states that under various status of forces agreements, foreign courts have jurisdiction over American servicemen who allegedly commit certain categories of offenses on foreign territory. Cited as a typical example is the status of forces agreement between the United States and the Federal Republic of Germany. It is indicated that in accordance with the agreement applicable to that country, there is a general waiver of jurisdiction by German authorities with regard to the alleged commission of most civil offenses by United States military members. Under this agreement, the German authorities have 21 days to recall the waiver. Apparently, during this time, charges under the Uniform Code of Military Justice are preferred against the accused members, with a view toward trial by courts-martial. If so, the member may be placed in pretrial confinement at the military installation under these charges. Should the German authorities recall their waiver, the service member may still remain in military confinement while awaiting trial by the German courts. It is pointed out, however, that the military charges can remain in effect even though trial by the foreign authorities does not materialize.

The Committee Action goes on to state that the only lawful basis for military authorities to confine a member would be the alleged violation of the Uniform Code of Military Justice, as the recall of waiver by German authorities provided no basis for military confinement.

Cited is an example of the difficulties which the services have encountered regarding pay and allowances entitlements in these cases, involving two soldiers who may have committed the same offense. Both are placed in the same military stockade in pretrial confinement under Uniform Code of Military Justice charges. German authorities recall waiver of jurisdiction in one case, but not the other. Under the current regulations entitlement to pay and allowances stops for the member subject to recall of waiver, but continues for the other member until the sentence of the court-martial, which may include either a partial or total forfeiture of pay and allowances, is approved and applied by the convening authorities.

In this regard, the discussion indicates that in the case in which recall of waivers is exercised, one member may remain in a military confinement facility for as much as a year or more before German authori-

ties try him, yet the physical circumstances of confinement are the same for the other member who will ultimately be tried by courts-martial since both prisoners are under custodial control of American military authorities. Furthermore, it is pointed out that both may have dependents whose welfare is predicated on the continuation of such pay and allowances.

With regard to the above, the Committee Action states that the decisions to recall or not recall waivers by German authorities are, at best, based on factors completely unrelated to the merits of allowing a member continued pay and allowance entitlements during such periods and that such waiver decisions are not irrevocable.

The law provides that a member of the military service who is absent without leave forfeits all pay and allowances for the period of that absence unless it is excused as unavoidable. 37 U.S. Code 503. For many years service regulations have provided that a member who is charged with a civil offense and confined by civil authorities is in an unauthorized absence and is not entitled to pay and allowances for such period unless his commanding officer excuses the absence as unavoidable after the results of the civil trial are known. If the absence is excused as unavoidable, the withheld pay and allowances may be paid. *See* Section B, Chapter 3, Part 1, DODPM.

Similar regulations have been recognized and applied over the years by accounting officers of the Government and the Court of Claims. See *White* v. *United States*, 72 Ct. Cl. 459 (1931), where the court refers to the rules which have been in effect at least since 1844.

We believe that it is established without question that a member who is not on authorized leave and who is in the hands of civil authorities charged with a crime is in an absence-without-leave status and is not entitled to receive his pay until it is determined that his absence is unavoidable and, therefore, excused.

Regarding the above, it is clearly evident that if, in the situation described in the Committee Action, a member had been turned over to a the German authorities to be held in a German prison pending trial, he would not have been entitled to pay for the period of his confinement until the nature of his absence could be determined after disposition of the civil charges against him.

One of the purposes of a status of forces agreement is to permit a member who has committed an offense in a foreign country, e.g., the Federal Republic of Germany, to be held in confinement by American military authorities for the German authorities in lieu of confinement in a civil prison. Such agreement appears to be for the benefit of the member in that it would seem more desirable for him to be confined by his military service than be restricted to a foreign jail.

In 36 Comp. Gen. 173 (1956), we considered several questions presented in Department of Defense Military Pay and Allowances Committee Action No. 144, concerning situations where members of a uniformed service (1) are arrested by civil authorities in a foreign country for civil offenses, (2) are then released to the custody of United States military authorities, (3) are confined by such military authorities pending release to civilian authorities for trial, and (4) are tried and found guilty by the foreign court. We concluded therein that since the members were being held by the military authorities for the local civil authorities and were only under qualified and conditional custody and control of the United States military authorities, such members were to be regarded as being constructively absent during such periods and precluded from receiving pay and allowances during such absence unless the absence was excused as unavoidable.

In decision B–132595, August 26, 1957, involving an Air Force enlisted man charged with, and convicted of, a civil offense by Japanese civil authorities, but who was released to United States military authorities for certain periods pending trial and pending appeal of his conviction, we concluded that the member was entitled to pay and allowances for each day when he was neither held in "confinement" for civil authorities nor considered to be absent from duty without leave.

In reaching that conclusion we said that:

> While a member of the uniformed services who is restricted to his base, in a sense, is being confined by military authorities, the term "confinement" was used in the decision of August 28, 1956 [36 Comp. Gen. 173], as having reference generally to periods of actual incarceration. The term as there used does not include periods when the member is in a duty status while awaiting civil trial even though his area of movement is restricted during such period.

In 45 Comp. Gen. 766 (1966), we held that the right to pay and allowances of a member of the uniformed services while being held by United States military authorities on behalf of German civil authorities is not to be determined on the basis of custody alone. The criterion expressed in that case was whether there is a loss to the Government of the member's services and if there is such a loss, whether it was the direct result of his committing the civil offense or whether it may be considered that his confinement or any part thereof was effected solely in connection with courts-martial proceedings.

Decision B–169366, April 8, 1970, involved an Army enlisted man who was charged, convicted and sentenced to a period of confinement for a civil offense by Spanish authorities, who was released to United States Naval authorities in Spain pending appeal and who performed military duties at a Naval Station. We held therein that, except for any period of actual confinement by military authorities, the

member might be allowed pay and allowances for any periods during which he performed military duties appropriate to his grade and military specialty as distinguished from those duties normally required of military prisoners. Compare 51 Comp. Gen. 380 (1971). Also compare 52 Comp. Gen. 317 (1972) and 54 *id.* 862 (1975).

Based on the foregoing, the DODPM provides in Rules 7 and 8 of Table 1–3–2, that a member in confinement by military authorities for a foreign civil offense is entitled to otherwise proper credits of pay and allowances for the period before the date the foreign country exercises jurisdiction, but that the member is not entitled to pay and allowances on and after the date jurisdiction is exercised except for that part of the confinement period that is covered by authorized leave, unless the absence is excused as unavoidable.

Rules 7 and 8 are operable, however, only in situations where the foreign country has the right to exercise jurisdiction over members of the United States Armed Forces under the terms of a treaty or other agreement with the United States.

The basic statutory provision underlying the decisions of this Office is 37 U.S.C. 503(a) (1970), which states:

> A member of the Army, Navy, Air Force, Marine Corps, Coast Guard, or Environmental Science Services Administration, who is absent without leave or over leave, forfeits all pay and allowances for the period of that absence, unless it is excused as unavoidable.

For purposes of the statute, this Office has considered a member confined by the military for civil authorities as being "absent" when the member is not under the unqualified and unconditional control of the United States military authorities. The determining factor has not been who has physical custody of the member, but rather, who has jurisdiction over the individual member. It is upon this basis that the regulations of the several services have been written to indicate that entitlement to pay and allowances would be determined on the jurisdictional aspect rather than that of physical custody.

In this regard, the Supplementary Agreement to the NATO Status of Forces Agreement (14 U.S.T. 531 *et seq.*), signed at Bonn, Germany, August 3, 1959, contains therein provisions which govern the treatment to be afforded members accused of the commission of certain offenses in the Federal Republic of Germany and provides in part:

> Article 22
> 1. (a) Where jurisdiction is exercised by the authorities of a sending State, custody of members of the force, of the civilian component, or dependents shall rest with the authorities of that State.
> (b) Where jurisdiction is exercised by the German authorities, *custody* of members of a force, of a civilian component, or dependents *shall rest with the authorities of the sending State* in accordance with paragraphs 2 and 3 of this Article.

2. (a) Where the arrest has been made by the German authorities, the arrested person shall be handed over to the authorities of the sending State concerned if such authorities so request.

(b) Where the arrest has been made by the authorities of a sending State, or where the arrested person has been handed over to them under sub-paragraph (a) of this paragraph, they

(i) may transfer custody to the German authorities at any time;

(ii) *shall give sympathetic consideration to any request* for the transfer of custody which may be *made by the German authorities* in specific cases.

* * * * * * *

3. Where *custody* rests with the authorities of a sending State in accordance with paragraph 2 of this Article, it *shall remain with these authorities until release or acquittal by the German authorities or until commencement of the sentence.* The authorities of the sending State shall make the arrested person available to the German authorities for investigation and criminal proceedings * * * and shall take all appropriate measures to that end and to prevent any prejudice to the course of justice * * *. *They shall take full account of any special request regarding custody made by the competent German authorities.* [Italic supplied.]

The language of this agreement seems to indicate clearly that custody and control of the arrested member is to remain with the sending State (United States), until release, acquittal of charges or commencement of the sentence. The agreement states that the sending State "may transfer custody" at any time and that it "shall give sympathetic consideration" to a request for transfer of custody. These provisions, however, are not mandatory.

In the present case, however, since charges were preferred under the Uniform Code of Military Justice, it would seem that both the civilian and military authorities have exercised some degree of jurisdiction over the accused member. Thus, it would appear that where both authorities are authorized to exercise jurisdiction over the member, entitlement to pay and allowances cannot be based on a determination of which State has jurisdiction. Rather, the appropriate test would seem to be which State has the appropriate effective control over the member.

Indicative of the degree of control exercised by the military authorities, as noted in the submission, is the degree of restraint which will be imposed upon the member while he is in military custody as decided exclusively by the appropriate military commander. A final indication of the continuing control exercised by the military authorities is demonstrated by the continued confinement of the member if the civilian authorities withdraw the recall of waiver or drop the charges before disposition of the case, since the member is still subject to disposition of the charges under the Uniform Code of Military Justice.

It appears from the submission that there are few, if any, definitive rules regarding the need for actual incarceration as opposed to mere restriction to the base in most instances where custody remains in United States military authorities and that the commander of the

military installation involved may act at his discretion. While no information was presented in the submission to show the percentage of custodial prisoners who are actually placed in pretrial confinement following withdrawal of waiver by the foreign civil authorities, or the types of offenses which by service regulation may require incarceration pending such civilian trial, other than in the most serious offenses, no reason is apparent why a member merely by virtue of having committed a civil offense on foreign soil must remain incarcerated for protracted periods of time prior to sentencing. It is our view that in any case where the commander of the military installation retains the discretionary authority to decide to incarcerate a member (or to merely restrict him to the duty station and assign him to perform useful and productive duties on a full-time basis) such member could not be considered as being "constructively absent" for the purposes of entitlement to pay and allowances. However, such member would not be entitled to pay and allowances for those periods when actually absent from the military installation where his presence is required by foreign civil authorities for purposes of any judicial proceedings, unless such absence is excused as unavoidable.

In connection with the above, it is to be noted that in paragraph 3 of the before-quoted Supplemental Agreement, it provides that where custody rests with the sending State (United States): "They shall take full account of any special request regarding custody made by the competent German authorities." Thus, where a member is actually incarcerated by military authorities on the basis of a specific request by the foreign civilian authorities, it is our view that the member is at that point under the effective control of the foreign civilian authority and must be considered as "constructively absent" from duty during the time of such incarceration. Therefore, in such a situation, we must conclude that the member is not entitled to pay and allowances unless such absence is excused as unavoidable.

The question asked in the Committee Action is answered in the affirmative, subject to the before-stated limitations. Our decision 36 Comp. Gen. 173 (1956) is modified accordingly, and any other decisions inconsistent with the foregoing will no longer be followed.

[B-182500]

Mileage—Travel by Privately Owned Automobile—Common Carrier Cost Limitation—Computation—Total Actual Cost *v.* Total Constructive Cost

Although on basis of our decisions agency travel regulation requires the actual versus constructive costs for transportation and per diem to be compared separately in determining employee's reimbursement when, for personal reasons,

privately owned conveyance is used in lieu of common carrier transportation, our decisions were based on our interpretation of regulations which have been superseded. We interpret the current regulation, Federal Travel Regulations (FTR) para. 1–4.3, as requiring agency to determine employee's reimbursement for such travel by comparing total actual costs to total constructive costs. 45 Comp. Gen. 592 and 47 *id.* 686 will no longer be followed.

Mileage—Travel by Privately Owned Automobile—Advantage to Government—Temporary Duty—Local Travel

Since rental cars and taxicabs are considered special conveyances under FTR, the constructive cost of local travel by such modes may not be included as constructive cost of common carrier transportation under FTR para. 1–4.3 for purpose of determining maximum reimbursement when for personal reasons privately owned conveyance is used in lieu of common carrier transportation. However, to extent such local travel is authorized, the constructive cost of common carrier transportation (bus or streetcar) for such travel may be included or use of privately owned conveyance may be approved as being advantageous to the Government and reimbursement determined on this basis.

In the matter of reimbursement for use of privately owned automobile, September 4, 1975:

On the basis of a reclaim voucher submitted by Mr. Carl H. Cotterill representing travel expenses incurred by him while performing temporary duty, an authorized certifying officer for the Bureau of Mines, United States Department of the Interior, has requested an advance decision as to the proper method of determining constructive travel expenses when as a matter of personal preference a privately owned automobile is used for official travel in lieu of common carrier transportation.

By a travel order dated June 10, 1974, Mr. Cotterill was authorized to travel from Washington, D.C., to Troy, New York, and return to perform temporary duty. Mr. Cotterill was authorized to travel by a privately owned automobile but reimbursement was limited to a mileage rate of 12 cents per mile, not to exceed the cost of travel by common carrier including consideration of per diem. The travel order also authorized the use of taxicabs.

In submitting his voucher for reimbursement for this travel, Mr. Cotterill claimed reimbursement for the total of his actual mileage plus the actual per diem for this travel. This total was less than the total of the constructive cost of common carrier transportation plus the constructive per diem by that mode of transportation. In computing the constructive cost of common carrier transportation, Mr. Cotterill included a constructive cost of $54.10 for renting an automobile to perform 108 miles of local travel in Troy. Although Mr. Cotterill has not claimed reimbursement for the use of his automobile for this local travel, his voucher indicates that he did use his car to perform 108 miles of official local travel in Troy.

The Bureau of Mines, however, computed his allowable reimbursement by comparing the actual versus the constructive costs for trans-

portation and per diem separately rather than comparing the total actual costs with the total constructive costs as claimed by Mr. Cotterill. This resulted in a suspension of $25 of his claim because he was allowed actual mileage cost ($119.63) which was less than the constructive transportation costs and was allowed constructive per diem ($118.75) which was less than the actual per diem by 1 day or $25. The Bureau of Mines states that on the basis of our decisions, 45 Comp. Gen. 592 (1966), and 47 *id.* 686 (1968), the Bureau of Mines Revised Travel Handbook, May 1972, requires the actual versus the constructive costs for transportation and per diem to be compared separately. Moreover, on the basis of our decision, B–178005, April 4, 1973, the Bureau of Mines has questioned the propriety of including as a constructive transportation cost the constructive cost of renting an automobile for local travel.

In 45 Comp. Gen. 592, *supra*, we concluded that separate limitations were required on the payment of mileage and per diem. That decision was based on our interpretation of section 3.5b(2) of Bureau of the Budget Circular No. A–7 (March 1, 1965), which prescribed in paragraphs (a) and (b) separate methods for determining mileage and per diem payments when, for personal reasons, employees elect to use their own automobile for official travel.

However, that provision was superseded by section 4.3 of Office of Management and Budget Circular No. A–7 (August 17, 1971). Section 4.3 (currently, Federal Travel Regulations (FPMR 101–7) para. 1–4.3 (May 1973)) provided for payment for the use of a privately owned conveyance in lieu of common carrier transportation in part as follows:

> * * * Whenever a privately owned conveyance is used for official purposes as a matter of personal preference in lieu of common carrier transportation under 2.2d payment for such travel shall be made on the basis of the actual travel performed * * * plus the per diem allowable for the actual travel but the *total allowable* will be *limited* to the *total constructive cost* of appropriate common carrier transportation including constructive per diem by that method of transportation. * * * [Italic supplied.]

In view of the references in section 4.3 to "the total allowable" and "the total constructive cost," we believe that this provision should be interpreted as requiring an agency to determine an employee's entitlement to reimbursement for such travel on the basis of his total actual travel costs (transportation and per diem), limited to the total constructive travel costs (transportation and per diem).

This conclusion is supported by the explanation of the revision of section 4.3, Office of Management and Budget Circular No. A–7 (August 17, 1971), contained in the "Summary of Changes" issued by the Office of Management and Budget on August 17, 1971, in connection

with the revision of that circular. The "Summary of Changes" explains the purpose of the revision of section 4.3 as follows:

> * * * Reworded to provide that total allowance for actual travel (including per diem) will be limited by total constructive allowance (including per diem).

The requirement of the Bureau of Mines Revised Travel Handbook to compute an employee's entitlement to reimbursement for the use of a privately owned conveyance as a matter of personal preference in lieu of common carrier transportation on the basis of separate limitations on transportation and per diem is inconsistent with the above interpretation of Federal Travel Regulations (FTR) para. 1–4.3 (May 1973). Accordingly, the Bureau of Mines Revised Travel Handbook should be revised to provide, in accordance with FTR para. 1–4.3 (May 1973), that the total reimbursement allowable for the use of a privately owned conveyance as a matter of personal preference in lieu of common carrier transportation is limited to the total amount of the constructive cost of common carrier transportation plus constructive per diem by that mode of transportation. Since the Bureau of Mines Revised Travel Handbook is valid only to the extent it is consistent with the FTR, Mr. Cotterill's reimbursement should be computed in accordance with the above interpretation of FTR para. 1–4.3 (May 1973). To the extent that our decisions 45 Comp. Gen. 592, *supra*, and 47 *id.* 686, *supra*, are inconsistent with this decision, they should no longer be followed.

Concerning the propriety of including the constructive cost of a rental car for 108 miles of official local travel as a constructive transportation cost for determining the maximum allowable reimbursement for the use of a privately owned conveyance as a matter of personal preference in lieu of common carrier transportation (Mr. Cotterill has requested approval of the use of a rental car and was authorized to use taxicabs. However, rental cars and the use of taxicabs for local travel are regarded as special conveyances under the FTR. *See* FTR paras. 1–2.2c(4) and 1–3.2a (May 1973). Thus, except for the use of taxicabs for travel to and from common carrier terminals under FTR para. 1–4.3b (May 1973), the constructive cost of rental cars or taxicabs may not be included as a constructive cost of common carrier transportation under FTR para. 1–4.3 (May 1973) since these modes of travel are not considered to be common carrier transportation. *Cf.* B–132872, October 3, 1957; B–147285, October 24, 1961; and B–178005, *supra*.

However, under FTR para. 1–2.3a (May 1973), transportation by bus or streetcar is authorized at a temporary duty station between places of business and between places of lodging and business. Moreover, FTR para. 1–2.3b (May 1973) provides that the expense of

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daily travel at a temporary duty station required to obtain meals may be approved as necessary transportation. To the extent that the 108 miles of local travel performed by Mr. Cotterill was of the type covered by these provisions and where necessary is approved, the constructive cost of this transportation by common carrier (bus, streetcar, etc.) may be included in the constructive cost of transportation under FTR para. 1-4.3 (May 1973). In the alternative, since Mr. Cotterill was authorized to use taxicabs as being advantageous to the Government in the performance of his temporary duty, it appears that it could be determined under FTR para. 1-2.2c(3) (February 6, 1974) that the use of his automobile for local travel at his temporary duty station was advantageous to the Government. In this case reimbursement for the use of his automobile for the local travel would be determined under the provisions of FTR para. 1-4.2a (February 6, 1974).

[B-171152]

Foreign Differentials and Overseas Allowances—Territorial Cost-of-Living Allowances—Basic Pay Requirement—Exception—Alaska Railroad Employees With Administratively Set Salaries

Amount in lieu of the cost-of-living allowance may be paid to employees in Alaska of the Federal Railroad Administration, Department of Transportation, whose pay is fixed administratively, since the statutory provisions limiting such salaries to amounts not in excess of salaries of specified grades under the General Schedule refer to basic compensation rates in subchapter I, Chapter 53, Title 5, U.S. Code, not to allowances in Chapter 59, Title 5, U.S. Code.

In the matter of payment in lieu of cost-of-living allowance to employees whose pay is administratively fixed, September 10, 1975:

This decision is in response to a letter from the Assistant Secretary for Administration, Department of Transportation, requesting our opinion as to whether employees whose pay is set administratively rather than by statute may be paid an amount representing an allowance for higher costs of living in Alaska without regard to the statutory provisions limiting basic pay under the General Schedule to that specified for level V of the Executive Schedule.

The situation giving rise to the inquiry was summarized as follows in the Assistant Secretary's letter of June 16, 1975:

The compensation for the seven employees in question (the general manager, assistant general manager and five other officers of the Alaska Railroad, all stationed in Alaska) is set administratively by DOT under the authority of 43 U.S.C. 975, Executive Order 11107 and section 6(i) of the Department of Transportation Act, P.L. 89-670, 49 U.S.C. 1655(i). The Secretary of Transportation has delegated the authority to operate and administer the Alaska Railroad to the Administrator, FRA. Annual appropriations acts for FRA/DOT prescribe certain limitations on the salaries of these employees. For example, P.L. 93-391, making appropriations for DOT for fiscal year 1975, states that:

"no employee [of the Alaska Railroad] shall be paid an annual salary out of said fund in excess of the salaries prescribed by the Classification Act of 1949, as amended, for GS–15, except the general manager of said railroad, one assistant general manager at not to exceed the salaries prescribed by said Act for GS–17, and five officers at not to exceed the salaries prescribed by said Act for grade GS–16."

Identical language is found in appropriations acts for the fiscal years preceding 1975. In addition, 5 U.S.C. 5363 provides that:

"the head of an Executive agency or military department who is authorized to fix by administrative action the annual rate of basic pay for a position or employee may not fix the rate at more than the maximum rate for GS–18."

Federal employees stationed in Alaska whose basic salaries are paid under the General Schedule may be paid a cost of living allowance (hereafter "COLA") pursuant to 5 U.S.C. 5941. That section provides as follows:

"(a) Appropriations or funds available to an Executive agency, except a Government controlled corporation, for pay of employees stationed outside the continental United States or in Alaska whose rates of basic pay are fixed by statute, are available for allowances for these employees. The allowance is based on—

(1) living costs substantially higher than in the District of Columbia;

(2) conditions of environment which differ substantially from conditions of environment in the continental United States and warrant an allowance as a recruitment incentive; or

(3) both of these factors.

The allowance may not exceed 25 percent of the rate of basic pay." * * *

Since the cost-of-living allowance by the statutory definition above applies only to employees whose pay is fixed by statute, the seven employees of the Alaska Railroad whose pay is set administratively are ineligible for the allowance, thereby placing them in a less advantageous situation than similarly situated employees paid under the General Schedule. However, two of our decisions have permitted the practice of according "like benefits to the two classes of employees." B–94742, May 8, 1950; 40 Comp. Gen. 628 (1961). The 1950 decision stated, in part, that—

* * * no objection is perceived to the administrative prescribing of "additional compensation" for such employees on account of services performed outside the continental United States or in Alaska by adoption of such regulations as would be similar to those contained in Executive Order No. 10,000, the adoption of which plan would accord like benefits to the two classes of employees * * *.

After a careful study of the applicable statutes, the 1961 decision concluded that Congress did not intend to treat employees not subject to the Classification Act less favorably than those subject thereto.

In 31 Comp. Gen. 466 (1952), we held that the payment of a cost-of-living allowance in Hawaii should be considered "additional compensation" and, therefore, had to be considered in computing the aggregate compensation limitation that could be paid to the employees in question under the Judiciary Appropriation Act of 1952, as amended, 65 Stat. 613. Although that case is similar to the present one, it is distinguishable in that the positions there involved were funded

under the Judiciary Appropriation Act. That act is couched in terms of *aggregate* salary limitations; that is, the total salaries of all employees of a judge may not exceed the aggregate salary limitation contained in the annual appropriation act where there is a cost-of-living allowance paid in addition to basic salaries. If aggregate salaries were sufficiently low, or if fewer employees were hired, then a cost-of-living allowance could be paid to the extent that the aggregate amount paid did not exceed the appropriation limitation. Since in the present case there is no such aggregate salary limitation, the holding of the 1952 decision is inapplicable.

Our interpretation of the proviso in Public Law 93–391 (88 Stat. 768) limiting the annual salary of employees of the Alaska Railroad to salaries prescribed by the Classification Act of 1949, as amended (5 U.S. Code 5101), is that it applies only to the basic rate of pay under the Classification Act and does not forbid additional allowances for the cost of living. Such an interpretation puts the two classes of employees on a more equal footing. In our 1961 decision this conclusion was held to be preferable since it was reasonable to presume Congress did not intend to place one class of employees in an inferior position to the other.

On January 8, 1971, section 3(a) of Public Law 91–656 added 5 U.S.C. § 5308 which provides that "[P]ay may not be paid, *by reason of any provision of this subchapter*, at a rate in excess of the rate of basic pay for level V of the Executive Schedule." [Italic supplied.] The enactment of section 5308 lends further support to our earlier conclusion that Congress did not intend to differentiate between employees paid under the General Schedule and those paid under administrative orders. Section 5308 applies only to "pay" under "any provision *of this subchapter*" (Pay Comparability System) and not to other payments authorized elsewhere. The language of this section precludes periodic increases in the amount of basic pay for General Schedule and administratively fixed salaries (whose maximum amounts may not exceed the amounts under the Pay Comparability System subchapter) when such increases would raise the employee's annual salary, exclusive of other payments such as a cost-of-living allowance, above the basic pay for level V of the Executive Schedule. Since the cost-of-living allowance is not authorized in the Pay Comparability System subchapter, but by chapter 59, it is not basic pay and 5 U.S.C. § 5308 is not applicable to it or to a sum in lieu thereof.

In view of the above, the Administrator, FRA/DOT, may properly pay amounts representing the cost-of-living allowance in Alaska to employees whose pay is fixed administratively. Of course such amounts should not be in excess of the cost-of-living allowance

that would be paid to employees in comparable grades under the General Schedule.

[B-184287]

Experts and Consultants—Travel Expenses—Within Metropolitan Area—Commuting From Residence to Place of Employment

Intermittently employed consultant may be paid transportation expenses pursuant to 5 U.S.C. 5703 and paragraph C3053, subparagraph 2, of the Joint Travel Regulations, Volume 2, for commuting from his residence to place of employment where residence is outside corporate limits but within metropolitan or geographic area of place of duty, insofar as his intermittent employment occasions him transportation expenses he would not otherwise have incurred. 22 Comp. Gen. 231, overruled.

In the matter of transportation expenses of an intermittent consultant, September 10, 1975:

By letter dated June 24, 1975, the Department of the Army, through its Authorized Certifying Officer, requests advice as to whether the voucher submitted by Mr. Ralph E. Pollara may be certified for payment. Mr. Pollara, who we understand is an intermittently employed consultant hired under the authority of 5 U.S. Code 3109, has claimed reimbursement for travel between his home in Livingston, New Jersey, and the Picatinny Arsenal, Dover, New Jersey—a round-trip distance of 42 miles—for 9 days of his employment in June of 1974. His claim is for travel of 378 miles distance for which he seeks reimbursement of 12¢ per mile for a total claim of $45.36.

The Certifying Officer questions the propriety of payment, noting a discrepancy between the language of subparagraph 2 of Paragraph C3053 of the Joint Travel Regulations (JTR), Volume 2, and our holding in 22 Comp. Gen. 231 (1942). While recognizing that the language of the above-cited paragraph of the JTR purports to authorize payment of mileage for transportation between an intermittently employed consultant's home or place of business and his place of duty notwithstanding that all may be located within the same metropolitan or geographic area, doubt is expressed inasmuch as several consultants, like Mr. Pollara, are retired former employees of Picatinny Arsenal who commute from the same residences they commuted from prior to retirement. Hence, their commuting costs are no greater than those they incurred as regular employees in commuting to and from work on a daily basis.

The language of Paragraph C3053, JTR, Volume 2 here in question is as follows:

C3053 TRAVEL OF CONSULTANTS AND EXPERTS

1. AUTHORITY. Title 5 U.S. Code 5703 and the Defense Production Act of 1950 (64 Stat. 819, as amended; 50 U.S. Code, App. 2160), provide entitlements for travel expenses and allowances for consultants and experts who are in an

employment status with or without compensation. Authorization for transportation, allowances, and reimbursement of expenses incident to temporary duty assignments will be in accordance with the provisions in this volume (see par. C8101–4).

2. CONDITIONS. Consultants and experts employed intermittently or serving without compensation (W.O.C.) are entitled to the following:

* * * * * * *

2. expense for transportation for official travel between home and place of business and place of duty when these places are located in the same metropolitan or geographic area;

That part of our holding in 22 Comp. Gen. 231, *supra*, which is indicated to be inconsistent with the above-quoted language of the JTR is summarized in the digests thereto as follows:

The mere designation of an officer or employee, employed either for full or part time work, as a consultant and paying him only "when actually employed" does not relieve him of the general requirement to bear the cost of transportation from his home or place of residence to his regular post of duty.

* * * * * * *

Where a consultant employed on the basis of "when actually employed" works intermittently several days per week at the same post of duty and reports to that place and returns to his residence each week, such place of regular duty is to be regarded as his official station, even though the place of his residence has been designated as his official station, and he is not entitled to traveling expenses from and to his residence.

As suggested by the certifying officer, our holding placed the intermittently employed consultant in no different status than any full or part-time Federal employee with respect to his responsibility to bear the expense of commuting between his residence and place of duty. That decision, however, predated enactment of Public Law 79–600, approved August 2, 1946, 60 Stat. 806, which, at section 5, included special authority for payment of subsistence and transportation expenses of intermittently employed experts and consultants. This was codified as 5 U.S.C. 5703. Section 5703 of Title 5, U.S. Code, was amended by Public Law 94–22, 89 Stat. 84, approved May 19, 1975, and provides the following special authority.

An employee serving intermittently in the Government service as an expert or consultant and paid on a daily when-actually-employed basis, or serving without pay or at $1 a year, may be allowed travel or transportation expenses, under this subchapter, while away from his home or regular place of business and at the place of employment or service.

By virtue of this provision our holding in 22 Comp. Gen. 231, *supra*, is no longer applicable.

The language of Paragraph C3053 of the JTR Volume 2 quoted above is a reflection of our interpretation of section 5 of Public Law 79–600 as set forth at 28 Comp. Gen. 192 (1948) and B–143631, August 12, 1960. In the latter of those cases we considered the transportation expense claim of an intermittently employed consultant whose residence was outside the corporate limits but within the metropolitan or geographic area of his place of employment with the Federal Govern-

ment. We there indicated that, depending upon the particular circumstances of his assignments, an intermittently employed expert or consultant could be reimbursed transportation expenses insofar as his intermittent employment caused him to incur transportation costs he would not otherwise have had. In the particular case of the employee there involved we found that he had not in fact incurred additional transportation expenses by reason of his Federal employment. We stated in this regard as follows:

> The basis for payment of travel expenses * * * is to reimburse an employee for additional expenses which he may incur by reason of traveling on offiical business. * * * Similarly, if an employee ordinarily commutes from his home to perform business in the area in which the travel is performed, there would be no authority for reimbursement for the costs of commuting. However, the fact that the travel is performed at a place within commuting distance at which he ordinarily would not incur any additional transportation * * * expenses would not preclude reimbursement of transportation costs * * * where additional costs for transportation * * * are necessarily incurred. 28 Comp. Gen. 192.
>
> * * * * * * *
>
> Mr. Donovan is privately employed by the Aluminum Company of America at Edgewater, New Jersey. He also spends part of his time at the C.I.O. Council in Bergen County, New Jersey. Both places are within commuting distance of his home. Therefore, the costs of transportation from his residence to his temporary place of duty in New York and return may not be allowed since such costs do not represent an additional expense which Mr. Donovan would not ordinarily incur in proceeding from his home to his place of private business.

The rule expressed herein is unaffected by the amendment to section 5 by Public Law 94–22.

In accordance with the provision at Paragraph C3053, JTR, Volume 2, and insofar as his intermittent duty at the Picatinny Arsenal caused him to incur transportation expenses that he, as a retired employee, would not otherwise have had, Mr. Pollara's voucher may be certified for payment if otherwise correct.

[B–182979]

Contracts—Negotiation—Competition—Discussion With All Offerors Requirement—Proposed Revisions

By accepting offeror's initial turnkey housing proposal—regarded as most favorable to Government—which nonetheless substantially varied from specific request for proposals (RFP) requirements, Navy waived those requirements for purposes of competition among seven offerors in competitive range. This change is specifications, without complying with provisions of Armed Services Procurement Regulation (ASPR) 3–805.4 (1974 ed.), deprived other offerors of equal opportunity to compete and Government of benefits of maximum competition.

Contracts—Negotiation—Competition—Award Under Initial Proposals

Where substantial technical uncertainties exist in initial proposals, award on basis of initial proposals is precluded though proposals may be considered technically acceptable. 10 U.S.C. 2304(g) requires written or oral discussions to be conducted with offerors in competitive range to extent necessary to resolve technical uncertainties, so that Government can be assured of obtaining most advantageous contract.

Contracts—Negotiation—Changes, etc.—Price Revision After Close of Negotiations

Attempted late price reductions submitted by unsuccessful offeror after receipt of initial proposals were properly rejected, because RFP late proposal clause (See ASPR 7-2002.4 (1974 ed.)) provided generally for rejection of late proposals and modifications, and none of specified exceptions to general rule were satisfied. But Navy then erred in accepting late price increase from successful offeror, as this action constituted discussions with that offeror and discussions were not held wtih other offerors in competitive range.

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

Where award on basis of initial proposal substantially varying from RFP requirements has changed specifications and substantial uncertainties in initial proposals and improper acceptance of late price modification required written or oral discussions with all offerors in competitive range, protest is sustained. General Accounting Office recommends competition be renewed through discussions with offerors based on actual minimum requirements, disclosing information showing relative importance of price as evaluation factor. Depending on competition results, existing contract should be terminated for convenience, or, if contractor remains successful, contract should be modified pursuant to final proposal.

In the matter of the Corbetta Construction Company of Illinois, Inc., September 12, 1975:

Corbetta Construction Company of Illinois, Inc., and Joseph Legat Architects (hereinafter Corbetta) have protested against the award of a contract to Towne Realty, Inc., Woerfel Corporation and Miller, Waltz, Diedrich, Architect & Associates, Inc., a joint venture (Towne) under request for proposals (RFP) No. N62472-72-R-0298, issued by the Northern Division, Naval Facilities Engineering Command. The RFP sought offers to design and construct 210 family housing units at the Naval Training Center, Great Lakes, Illinois. Corbetta seeks termination of the Towne contract and an award to itself. Also, Corbetta claims its proposal preparation costs.

Corbetta's several submissions make numerous and detailed allegations of error by the Navy in the conduct of the procurement. For its part, the Navy has responded with detailed reports denying the protester's contentions. All of the issues raised have been considered, but this decision concentrates on the resolution of those issues which we believe are dispositive of the matter.

Corbetta's principal contentions are as follows:

—The Navy improperly evaluated the Towne technical proposal by failing to adequately penalize it for not less than 124 deficiencies. By accepting a proposal which should have been judged unacceptable, the Navy improperly waived certain essential technical requirements of the RFP.

—In regard to the foregoing, the Navy failed to comply with the requirements of the Armed Services Procurement Regulation (ASPR)

(1974 ed.) concerning the conduct of discussions with all offerors within the competitive range.

—If the Navy had allowed Corbetta to compete upon the basis of the "relaxed" requirements applied to Towne, Corbetta could have made a substantial reduction in its offered price and its proposal would have become the most advantageous, price and other factors considered.

—Even accepting the results of the erroneous technical evaluation, Corbetta should have received the award for other reasons. The Navy improperly refused to consider three attempts by Corbetta, after the receipt of initial proposals, to substantially reduce its offered price. Nevertheless, the Navy accepted an extension of the Towne offer conditioned upon a $247,640 increase in its offered price. The acceptance of Corbetta's offered price reductions, either with or without considering the $247,640 Towne price increase, would have made Corbetta's the most advantageous proposal under application of the price/quality evaluation ratio stipulated in the RFP.

For the reasons which follow, we sustain the protest and recommend, *inter alia*, that the RFP be reinstated and negotiations opened with all offerors within the competitive range. In view of our recommendations, we see no need to consider further Corbetta's claim for proposal preparation costs.

BACKGROUND

The RFP, issued April 22, 1974, solicited "basic" proposals (including offered prices for the entire work set forth in the RFP), prices for four deductive items (specific items which might be deleted), and also allowed offerors to list other deductive items which were over the minimum requirements and which the offeror was willing to delete. Eight offerors submitted proposals. The proposals were identified only by number, but for purposes of clarity will be discussed here by name. One proposal was rejected for failure to submit a bid bond, and the remaining seven were evaluated.

Corbetta's basic proposal received the highest technical rating (772 out of a possible 1,000); Towne ranked second (647), and the remaining five offerors were ranked from 584 to 476. Towne's basic proposal price was lowest ($6,191,000); Corbetta was second lowest ($7,690,400) and the remaining five offerors' prices ranged from $7,790,000 to $8,949,500.

In this regard, the record does not reflect any formal determination of a competitive range. However, the Navy representative who attended the May 29, 1975, conference on the protest at our Office indicated that the seven offerors whose proposals were evaluated were considered to be within the competitive range for this procurement.

In a report dated September 25, 1974, to the Commanding Officer,

Northern Division, Naval Facilities Engineering Command, the Navy Contract Evaluation and Selection Board recommended award to Towne. The Board's report recognized that Corbetta, considering both the basic proposal and the basic less all combinations of deductive items, provided "significantly more quality" than Towne. However, the Board noted that Towne's price was lower, and that the price/quality ratio was roughly the same for both. In this regard, the Navy's Standard Technical Evaluation Manual (TEM) for Turnkey Family Housing provides for use of the price/quality ratio (price÷quality points) as an evaluation and selection technique, and that selection will normally be on the basis of the lowest price/quality ratio. As applied to Towne and Corbetta, the ratio yielded the following basic proposal dollars-per-points figures:

$$\text{Towne}: \frac{\$6,191,000}{674} = \$9,569$$

$$\text{Corbetta}: \frac{\$7,690,000}{772} = \$9,962$$

In this regard, we note that the modified version of the TEM which was released to the offerors did not disclose the Navy's use of the price/quality ratio or its significance in the evaluation and selection process, nor was this information contained in RFP section 1C.14, "Evaluation Criteria."

Notwithstanding the September 1974 recommendation of an award to Towne, the Navy report to our Office indicates that no award was possible at that time. This was because all offerors' proposed prices, even with all deductives, exceeded the applicable statutory cost limitation. In this regard, section 502(b) of Public Law 93–166, November 29, 1973, 87 Stat. 675, provided that the average unit cost for each military department for all units of family housing constructed in the United States shall not exceed $27,500. The statutory cost limitation as applied to this procurement (210 units × $27,500) was therefore $5,775,000. The Towne basic proposal with deductives, priced at $5,923,000, reflected an average cost per unit of $28,205. As noted *supra*, all other proposals were higher in price.

The Navy report indicates, however, that in September 1974 Congress was considering the fiscal year 1975 military construction authorization bill, and it was anticipated that the average unit cost limitation would be raised to $30,000. On this basis, the statutory cost limitation for the project would be $6,300,000. The selection board relied on the expected future limitation in recommending award to Towne.

Between September 30, 1974, and October 15, 1974, Corbetta submitted three unsolicited reductions to its offered price, which the Navy

rejected. In the meantime, the Navy requested all seven offerors to extend their offers to December 6, 1974, because the fiscal year 1975 authorization bill had not yet been enacted. All offerors granted the extension; Towne's extension was conditioned upon a $247,640 increase in its price "due to the current economic situation," in Towne's words. Further extensions through January 6, 1975, were sought and obtained from the offerors without changes in the offers. Public Law 93–552, enacted December 27, 1974, 88 Stat. 1757, provided for an average cost limitation of $30,000. A notice of contract award, dated January 6, 1975, was issued to Towne. The award, which reflected the above Towne price increase, was made at a total price of $6,235,840 for the basic proposal with certain deductives.

The record does not indicate that any written or oral discussions were conducted with the offerors at any time up to the award. The Navy report indicates that the accepted $247,640 increase in Towne's price was the only change to the proposals as originally evaluated.

TECHNICAL EVALUATION OF TOWNE PROPOSAL— REQUIREMENT TO CONDUCT DISCUSSIONS

Before considering specific issues in this area, it is useful to describe generally some of the contents of the RFP and what offerors were asked to submit. In this regard, the RFP Standard Form 21, Modified Proposal Form, contained a "CAUTION" that "PROPOSALS SHOULD NOT BE QUALIFIED BY EXCEPTIONS TO THE CONDITIONS CITED IN THE REQUEST FOR PROPOSAL." Page 1 of the RFP, bearing the heading NAVFAC SPECIFICATION NO. 04–72–0298, stated "This specification consists of 143 pages." Further, section 1A.2 stated:

> The specification and attachments outline the criteria and requirements to be used by proposers in submitting their proposal. Proposals must be submitted in accordance with this specification and include the "Required Data," as specified herein.

Section 1C.2 sets forth the required data to be submitted with proposals. Among this information was "required technical data" (section 1C.13), including specifications (showing, among other things, quality of materials and fixtures); drawings (showing overall site layout, site plan, floor plans, elevations, and other features); and an equipment schedule (identifying equipment size, capacity, manufacturer, model, and other information).

In addition, section 1C.13 cautioned that failure to submit all data might be cause for determining a proposal "nonresponsive"; section 1C.8 mentioned "failure to comply with technical features" as an illustration of a circumstance which might result in a proposal being held "nonconforming" and ineligible for award.

In addition to the requirements applying to submission of proposals, section 1B.22(a) provided that after award the contractor would be required to submit construction drawings, specifications, and design calculations:

> The contractor shall submit for review within 60 days after award six copies of final construction drawings and specifications, which will be in accordance with the requirements of the RFP, the contractor's proposal, and all other terms and conditions affecting contract award. Upon completion of Navy review of the plans and specifications, the contractor shall furnish one reproducible copy of the drawings and specifications. Design calculations shall be submitted for mechanical, electrical, structural (particularly wind loading analysis and design) and plumbing work, pavements, all utilities, storm drainage, heat transmission coefficients, and as otherwise necessary for a complete review of all engineering design work. Electrical design calculations shall include voltage drop computations, short circuit analysis, load calculations, and lighting calculations. Design calculations which are developed for standardized or repetitive features of the housing units shall be extended, as may be appropriate, to account for non-standard siting features such as building orientation, "end unit" requirements in multi-unit buildings and variations in terrain which impact housing water service pressure and drainage characteristics. Final drawings and any subsequent changes to these drawings shall be approved by a registered professional architect or engineer before submittal for review. Such review does not constitute approval or acceptance of any variations from the RFP or from the proposal unless such variations have been specifically pointed out in writing by the contractor and specifically approved in writing by the Navy.

As noted *supra*, Corbetta has argued that the Navy failed to properly evaluate the Towne technical proposal as regards 124 omissions, deficiencies or other shortcomings, and that in so doing the Navy in effect waived certain requirements of the RFP.

The Navy's position is that the RFP did not require the proposals to be final designs of the housing project, but only that they be in sufficiently concrete form so as to be susceptible of evaluation under the factors stated in the RFP. Thus, the Navy is of the view that the technical evaluators properly would not object to missing details or nonconforming items in initial proposals, as RFP section 1B.22(a), *supra*, contemplated that the final design will be accomplished during contract performance. The Navy indicates that upon reviewing the contractor's submission of data under section 1B.22, it will insure that all "inchoate" elements of the Towne proposal conform to the RFP requirements.

In contrast to a proposal with "missing details or nonconforming items," the Navy report notes that "Obviously clarification will be sought and obtained at the proposal stage when the proposal affirmatively and significantly deviates from the requirements of the RFP."

Consideration of applicable legal principles must begin with 10 U.S. Code § 2304(g) (1970) which establishes a general requirement to conduct written or oral discussions with all responsible offerors within a competitive range in a negotiated procurement. The statute and implementing regulations (see ASPR § 3-805.1 (1974 ed.)) pro-

vide exceptions to this requirement. In this regard, ASPR § 3–805.1 (a), (b) (1974 ed.) states in pertinent part:

(a) Written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, except that this requirement need not be applied to procurements:

* * * * * * *

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

(b) For the sole purpose of eliminating minor uncertainties or irregularities, such as discussed in 2–405, an inquiry may be made to an offeror concerning his proposal. Such inquiries and resulting clarification furnished by the offeror shall not constitute discussions within the meaning of this paragraph 3–805. If the clarification prejudices the interest of other offerors, award may not be made without discussion with offerors in the competitive range.

ASPR § 3–807.1(b)(1) (1974 ed.) further describes "offers responsive to the expressed requirements of the solicitation" as one of the necessary components of "adequate price competition."

Where an exception to the statutory requirement is not invoked and negotiations are conducted, it has been held that the failure to conduct written or oral discussions with offerors to the extent necessary to resolve uncertainties relating to the work requirements or the price to be paid violates the requirement for meaningful negatiotions. See *Signatron, Inc.*, 54 Comp. Gen. 530 (1974).

In addition to the competitive benefits to be derived from meaningful negotiations with the offerors, negotiations may be required to insure that all offerors are competing on an equal basis. It is a fundamental principle in Government procurement that the competition be conducted on the basis of the work actually to be performed, that is, that the contract awarded is the contract that bidders or offerors have competed for. See *A&J Manufacturing Company*, 53 Comp. Gen. 838 (1974).

In this regard, ASPR § 3–805.4 (1974 ed.) provides in pertinent part:

3–805.4 *Changes in Government Requirements.*

(a) When, either before or after receipt of proposals, changes occur in the Government's requirements or a decision is made to relax, increase or otherwise modify the scope of the work or statement of requirements, such change or modification shall be made in writing as an amendment to the solicitation. When time is of the essence, oral advice of changes may be given if (i) the changes involved are not complex in nature, (ii) a record is made of the oral advice given, (iii) all firms to be notified (see (b) below) are notified as near to the same time as feasible, preferably the same day, and (iv) the oral advice is promptly confirmed by the written amendment.

* * * * * * *

(c) When a proposal considered to be most advantageous to the Government involves a departure from the stated requirements, all offerors shall be given

an opportunity to submit new or amended proposals under (a) or (b) above on the basis of the revised requirements, provided this can be done without revealing to the other offerors the solution proposed in the original departure or any information which is entitled to protection under 3-507.1.

Thus, in a situation where the RFP called for "100%" compliance with a stated requirement, the agency's acceptance of a different approach to meeting the requirement represented a change in the requirement, and the failure to amend the RFP so as to allow competing offerors the opportunity to submit revised proposals was held to be a departure from ASPR § 3-805.4 (1974 ed.). *Unidynamics/St. Louis, Inc.*, B-181130, August 19, 1974. The same principle applies where a protester has been misled into believing that the solicitation requires it to meet certain stated requirements, whereas, in fact, this was not the agency's intention, and an offer to meet lesser requirements was considered to be acceptable. See *Instrumentation Marketing Corporation*, B-182347, January 28, 1975. In that decision we stated: "* * * it was incumbent upon the contracting officer to issue a written amendment which clearly set forth the Government's actual requirements and to allow the submission of offers based on those requirements." To the same effect, see *Annandale Service Company et al.*, B-181806, December 5, 1974; *Signatron, Inc., supra;* and *Computek Incorporated et al.*, 54 Comp. Gen. 1080 (1975).

To be compared with the foregoing cases is the situation where the agency properly amends the RFP advising offerors of the change in requirements, so that competition may then proceed on an equal basis. See *Connelly Containers, Inc.*, B-183193, June 16, 1975.

None of the foregoing decisions involved turnkey military family housing procurements, but our Office has recognized that the principle of providing an equal opportunity to offerors to revise their proposals in response to changes in requirements does apply in this context. *See* 51 Comp. Gen. 129, 133 (1971); B-170731(2), July 21, 1971.

Moving to the specific points of technical nonconformity in the Towne proposal alleged by Corbetta, we must state at the outset that we do not consider it necessary to review here each and every allegation made. We think that the following discussion is adequate for the purposes of resolving the matter.

The following are summary statements of 26 instances of alleged omissions in the Towne proposal. References in parentheses are to sections of the RFP:

—(2A.4.A(10)) No provision made to widen existing waterway due to reduction in flood plain.

—(2A.4.B(1)) Main collector roads do not provide for required on-street parking because of minimum widths shown.

—(2A.4.C(1)) Water traps (ponding) are present in several locations.

—(2A.4.C(11)) Required new pipe to Skokie drainage ditch is omitted from proposal drawings.

—(2A.4.D(2)) Insufficient sectional control valves in water system.

—(2A.4.D(6)) Failure to provide master metering of utilities on major supply lines into housing sites.

—(2A.4.E(5)) Three unauthorized sewer line connections.

—(2A.4.F(5)) Only one-half of the required gas plug valves are provided.

—(2A.4.G(10)) Excessive distance between some street lights.

—(2A.4.I(1)) "Tot lots" are not fenced.

—(2A.4.B(4)) In a number of locations there is a failure to provide sidewalks on both sides of the street.

—(2A.4.A(2)) Failure to provide backyard screening. In 48 units the living and dining room view is a 7-foot wire fence along a drainage ditch. Towne's proposal drawing number 1 indicates that in four units along Superior Street, when back door is opened occupants would exit into drainage ditch were it not for the fact that the 7-foot fence prevents the back door from opening.

—(2A.5.C(3)) Failure to provide bedroom windows not more than 48 inches above the floor to permit escape of occupants in emergencies.

—(2A.5.F(9)) Proposal offers semigloss paint rather than required vinyl wall covering in bathrooms.

—(2A.10.A(1)(b)) Failure to provide distribution of heating or cooling to any of the bathrooms.

—(2A.10.A.1(e)) Towne has proposed insulating the attics with blown fiberglass. This would tend to close off the attic ventilation. Also, Towne drawings Nos. 14, 15 and 16 do not show any provision for access to the attics, which is necessary in order to check the insulation and/or repair the television antennas.

—(2A.6.B(11)) Failure to indicate that steel embedded in concrete will be galvanized and asphalt coated.

—(2A.6.C) Proposal offers aluminum-on-galvanized-steel gutters and downspouts whereas RFP prescribed nonferrous gutters and downspouts.

—(2A.6.I) Failure to provide pressure treated wood protection at foundation sills/plates.

—(2A.6.M) Failure to indicate information necessary to determine compliance with weatherstripping and threshold requirements.

—(2A.7.D) Failure to indicate that glass extending to within 18 inches of floors will be fully tempered safety glass.

—(2A.10.B(14)) Failure to indicate ground fault electrical circuit interruption for west area and exterior locations.

—(2A.10.B(10)) Failure to furnish lighting fixture and outlet in carport area.

—(2A.10.C(14)) Failure to provide hose bibs at front and rear of each unit.

—(2A.3.C) Failure to indicate pressure relief valve and discharge drainage line for the water heater.

—(2A.10.C(13)) Failure to show 4-inch dryer vents for clothes dryers.

The Navy report makes the following identical reply to each of the foregoing items cited by the protester:

> The G–73 [Towne] proposal is in strict accordance with all provisions of the RFP. Although this item is not clearly presented on the proposal drawings, it will be properly shown in the final design documents and will be thoroughly reviewed by the Government.

In considering the foregoing, we must first direct our inquiry to the nature of the RFP specifications, such as the 26 particular sections cited above, and to their meaning within the context of a negotiated turnkey housing procurement. In this regard, the following observation from 51 Comp. Gen. 129, *supra*, at page 131, is pertinent here:

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

We note that some of the RFP specifications do set forth a rather general description of the Navy's needs in permissive or precatory terms. For example, section 2A.4.A, dealing with site design and con-

struction, advises that "Variety in groupings, arrangements, and siting configurations of houses is encouraged * * *" and that "Maximum attention to solar orientation is recommended * * *." Yet the same section also states: "The proper grouping of units *will* provide backyard screening, separation of pedestrian and vehicular traffic, recreation, and natural open spaces. * * * Appropriate buffer areas suitably landscaped *shall* be provided to separate and screen from undesirable external influences." [Italic supplied.] It would be difficult to conclude that these terms represent anything but mandatory, albeit general, requirements. See, in this regard, the protester's argument concerning Towne's failure to provide backyard screening, *supra.*

Of even greater significance is the fact that other sections of the RFP set forth highly specific requirements. Consider, for example, section 2A.4.I(1): "Provide fencing around tot lots which are near to streets." In this regard, it is of interest to note that the award to Towne apparently deleted the tot lots altogether, although the specification only mentions submitting a deductive price for the omission of tot lot equipment. Also, section 2A.4.B(4) states: "Sidewalks on both sides of the streets shall be included in basic scope of proposals." Section 2A.4.C(1): "Ponding anywhere on the site will not be acceptable." Section 2A.6.B(11): "Steel embedded in concrete * * * shall all be galvanized and * * * the entire embedded length * * * shall be asphalt coated." We believe it is unnecessary to go into further detail except to indicate that the 26 illustrations cited above appear to involve features or items stated as mandatory requirements of the RFP, many of which are highly specific.

In this light, we have considerable difficulty with the Navy's view that the elements of the Towne proposal cited above merely involve somewhat unclear items or minor details which, under the scheme of turnkey procurement, can properly be corrected in the final design review. We agree with the sense of Corbetta's comment that where a specific required item is not shown at all in the proposal, it can hardly be classified as not clearly presented.

The Navy has stated, however, that the Towne proposal is in strict accordance with all provisions of the RFP. While the basis for this statement is not clear, it possibly refers to a cover letter dated July 5, 1974, submitted with the Towne proposal. This letter stated in pertinent part:

> In compliance with the Request for Proposal, the undersigned proposes to perform all design and construction for the 210 units of Military Family Housing project at the Naval Training Center (Forrestal Village), at Great Lakes, Illinois, in strict accordance with the general provisions, plans, specifications, schedules, drawings and conditions for the consideration of the prices stated. * * *

We have held that where an RFP requires offerors to submit detailed technical proposals, a blanket offer of compliance is not an adequate

substitute. *See* 53 Comp. Gen. 1 (1973). Similarly, we think that given the detailed specifications stated in mandatory terms, Towne's blanket offer is insufficient to cure the proposal's omissions or deviations from the specific requirements of the RFP. We believe that the reasonable interpretation of the Towne proposal's omitted items is that the offeror is not offering to furnish these items. This result is in accord with the principle of interpretation that the meaning of an instrument's specific provisions will govern over more general statements. 4 Williston on Contracts, Third Edition Section 619.

Likewise, we do not believe that the instances of omission in the Towne proposal could properly be characterized as "minor details." It may be true that the price impact of individual items is relatively small. For example, the protester estimates the price of the light fixtures and outlets in the carport area at $12,500, and the hose bibs and piping at $33,600. But we think it is apparent that the overall price impact, given the volume of omissions, could well be substantial. Corbetta speculates that conformance with all RFP requirements would increase Towne's price by $650,000. Conversely, the protester contends that if it had been allowed to compete on the basis of the relaxed requirements applied to Towne, it could have decreased its price to $5,817,000. Whatever the actual impact, the vital point is that such questions should not be left to speculation, but should be tested by means of discussions with all offerors in the competitive range and an opportunity for offerors to submit revised proposals. *See*, in this regard, B–170731(1), July 21, 1971, where this principle was discussed in connection with the price impact of an offeror's substitution of cedar roof shingles for asphalt shingles in a Navy turnkey housing procurement.

In addition to the omissions, we note that there appear to be several instances where the Towne proposal either affirmatively deviated from the RFP requirements, or contained inconsistent or ambiguous responses to the requirements. A brief summary of nine of these elements of the Towne proposal as cited by the protester and the Navy's responses follows:

—Towne's overall site plan layout dawing, 1″–100′ scale does not show gas utility lines as required by RFP section 1C.13.

Navy: Gas utility lines are shown. Some are incorrectly located, but Towne has been directed to properly locate them.

—Towne's erosion control drawings, 1″–40′ scale, show six housing units located within the 40-foot restriction line (established by RFP section 2A.4.A(5), as amended by RFP amendment No. 1) of the Skokie drainage ditch.

Navy: Towne's site design drawings, 1″–100′ scale, indicate compliance with the 40-foot setback.

—Eight housing units cannot use an existing fire hydrant, as proposed by Towne, because of the intervening 7-foot high fence (RFP section 2A.4.D(3)).

Navy: Towne has been directed to investigate the possibilities of using the existing fire hydrant. This is a matter of final design review.

—Towne's specifications information furnished under RFP section 1C.13(a) indicates no building paper under exterior walls whereas RFP section 2A.6.D required building paper under all siding materials.

Navy: Towne's drawing No. 20 (furnished pursuant to RFP section 1C.13(b)) indicates building paper.

—Towne proposal drawings Nos. 14, 15 and 16 indicate sliding glass doors, which are prohibited by RFP section 2A.7.E.

Navy: Towne drawings Nos. 17, 18 and 19 (elevations) do not indicate sliding glass doors.

—Towne's proposal fails to provide either a master cable TV system or a common antenna system as required by RFP section 2A.10.B(13).

Navy: TV outlets are indicated on floor plans of living and family rooms.

—Towne proposal drawings Nos. 14, 15 and 16 show heating/cooling supply outlets in the second floor—a feature prohibited by RFP section 2A.10.A.1(b).

Navy: Indications on these sheets do not necessarily mean the supplies will be in the floor.

—The Towne proposal offers locksets which do not conform to the RFP specifications. (Section 2A.6.M.5(a))

Navy: Towne has been directed to install locksets which meet the RFP requirements.

—Towne's proposal drawing No. 20 identifies exterior siding as "hardboard siding" whereas Towne's specifications information indicates exterior walls as "plywood * * * 5/8″." The installation method for each is different and Towne has failed to provide sufficient information as to its intentions.

Navy: Towne will conform to the typewritten portions of the contract. The contract requires the plywood properly installed.

Where a turnkey housing proposal provides at least some response to specific requirements of the RFP, we do not disagree with the Navy's general observation that expert technical evaluators might properly decide not to question relatively minor details or areas in which the proposal might appear to be somewhat unclear. It must also be noted that the content and extent of discussions necessary to meet the statutory requirement is a matter of judgment primarily for determination by the contracting agency and is not subject to objection by our Office unless clearly without a reasonable basis. See *Austin Electronics*, 54 Comp. Gen. 60 (1974).

But where, as here, it appears that no aspect of the successful proposal has been subjected to question through discussions, and portions of the proposal admittedly depart from the requirements or are unclear, we think the same difficulty is present as is involved in the case of outright omissions in the proposal. That is, where an offeror proposes to furnish something different from what is called for, the reasonable interpretation is that its offer is thereby limited to what it proposes to furnish, and that by accepting the offer the Government is changing its requirements.

Also, where the offer is unclear, e.g., contains inconsistent or ambiguous responses to specific RFP requirements, it becomes uncertain what the offeror is proposing to furnish and what the Government is contracting for. In this regard, we note that the Navy's April 18, 1975, report contains an enclosure, apparently prepared by the Navy technical evaluators, which discusses the technical quality of the Corbetta and Towne proposals. This document concludes by stating: "Many parts of * * * [Towne's] proposal are questionable or unclear and will require careful scrutiny at final design." It is our view that, as with the case of omissions, the cumulative weight of deviations and uncertainties in the offer tends to offset a contention that the items are minor details.

Aside from Towne's proposal, an additional consideration is the effect of deviations, omissions and uncertainties present in the other six offers in the competitive range. In this regard, the Navy's April 18, 1975, report asserts that there were more than 15 nonconforming items in Corbetta's proposal. We note that the other five offers in the competitive range received substantially lower technical ratings than Corbetta and Towne. Under these circumstances, we think it unlikely that these offers contained no deviations, omissions or uncertainties which properly would call for discussions.

As noted previously, one of the necessary criteria of "adequate price competition"—the only apparent basis which could be relied on here to justify an award on the basis of the initial proposals—is that there are at least two offers responsive to the expressed requirements of the

solicitation. We think the foregoing facts raise some doubts as to whether this criterion was met. In any event, it is our view that the existence of substantial technical uncertainties in initial proposals—whether due to the proposals' failure to conform to a key technical requirement, or to the cumulative effect of a large number of relatively minor items—requires the conduct of written or oral discussions to the extent necessary to resolve the uncertainties. This conclusion follows from the statutory requirement to conduct discussions and from the limited nature of the exception to this requirement that award can sometimes be made on the basis of the initial proposals. Unlike an advertised procurement, where competition is solely on the basis of price, a negotiated procurement involves consideration of both price and "other factors," i.e., technical considerations. In this connection, we understand that the concept of negotiated turnkey housing procurement represents a departure from the prior practice of advertising for this work and an attempt to obtain housing which represents the best value to the Government, considering both price and technical quality.

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

We would also note that where, as here, substantial technical uncertainties in the initial proposals are involved, it is clear that ASPR § 3-805.1(b) (1974 ed.), quoted *supra*—which provides that clarification obtained to eliminate minor uncertainties or irregularities in initial proposals does not constitute "discussions"—is not pertinent. By way of comparison, for a case in which minor uncertainties were properly clarified in accordance with ASPR § 3-805.1(b) (1974 ed.), see *Ensign Bickford Company*, B-180844, August 14, 1974.

The Navy has asserted that it will insure that Towne's performance of the contract fulfills the requirements of the RFP. In this regard, the agency cites the RFP's Precedence clause, section 1B.4.1.5, which indicates that the provisions of the RFP take precedence over the contents of the contractor's proposal. Whether or not the contractor's performance will conform to the requirements is immaterial as far as the present protest is concerned. The issue here is not whether Towne will conform to the RFP requirements, but whether the requirements

of competitive negotiation were complied with in the procurement. See *Instrumentation Marketing Corporation, supra.*

In any event, we are of the view that notwithstanding the Precedence clause, a situation of this kind is ripe with the potential for disputes between the Government and the contractor. We note that in the context of a contractor's claim of compensation for additional work it does not believe it is required to furnish, it may be open to question whether a statutory cost limitation can provide an effective barrier to the Government's involuntarily incurring additional costs. See, for example, *Ross Construction Corporation* v. *United States*, 392 F.2d 984, 183 Ct. Cl. 694 (1968). Also, any voluntary modifications to the town contract which might be needed to require it to meet all the RFP requirements and which involve additional costs to the Government would, of course, amount to a noncompetitive procurement between the Navy and Towne for requirements which should have been competed for prior to award. These potential difficulties and risks could and should be minimized by meeting the requirement to conduct meaningful discussions with all offerors prior to award.

Based on the foregoing, we are satisfied that the Towne proposal was substantially at variance with the RFP's requirements. We need not decide, as the protester urges, that Towne's proposal therefore should have been rejected as technically unacceptable. The flexibility of negotiated procurement permits consideration of proposals which do not fully conform to the specifications. But, by the same token, the flexibility of negotiated procurement cannot be used to effect changes in the Government's requirements by accepting the most favorable initial proposal which substantially varies from the RFP's stated requirements. We believe that by such action, the contracting agency waives, for the purposes of the competition among the offerors, the stated requirements as to which the successful proposal fails to conform. In these circumstances, the contracting agency has departed from the requirements of ASPR § 3–805.4 (1974 ed.), other offerors have not been given an equal opportunity to compete, and the Government has been deprived of the benefits of the maximum competition contemplated by the statute and regulations. Also, we believe that the presence of uncertainties as to the technical aspects of the various proposals precluded an award on the basis of the initial proposals and required the conduct of written or oral discussions with all offerors within the competitive range.

The foregoing circumstances, considered together with our conclusion, *infra*, concerning the Navy's acceptance of Towne's late price increase, compel the finding that the award to Towne be judged improper and that the protest be sustained.

LATE MODIFICATIONS TO CORBETTA AND TOWNE PROPOSALS

Corbetta contends that the Navy should have accepted its three attempted price reductions (apparently totaling $325,400) and should have rejected the $247,640 Towne price increase. The Navy, on the other hand, believes that Corbetta's late price reductions were properly rejected under the RFP's late proposal clause. As for the Towne price increase, the Navy contends that once an offer expires, the offeror is free to review the offer on whatever terms it then deems desirable. Further, the Navy submits that to deny an offeror the ability to revise its price on extension would result in continued participation in the procurement under economic duress, or a refusal to extend. The Navy cites B–164569, December 6, 1968, in support of the principle that an offeror can revise its price upon extending its offer; B–161513, July 24, 1967 and 49 Comp. Gen. 625 (1970) are cited to establish a distinction between the propriety of rejecting Corbetta's late price reductions, on the one hand, and the propriety of accepting Towne's price increase, on the other.

Judging from the facts of record at the time in question, and without the benefit of knowledge of changes in offers which would have resulted from technical discussions had they been conducted, we must conclude that the Navy acted properly in rejecting Corbetta's late price modifications.

Section 1B of the RFP contained a clause entitled "*LATE PROPOSALS, MODIFICATION OF PROPOSALS OR WITHDRAWAL OF PROPOSALS* (1973 SEP)." This clause is substantially identical to the one set forth in ASPR § 7–2002.4 (1974 ed.). It provides generally that late proposals shall be rejected, with three specified exceptions, none of which is relevant here. The clause also provides that late modifications, except those resulting from a request for best and final offers, are subject to the provisions regarding rejection of late proposals. This exception likewise is not pertinent here. Under the circumstances, we conclude that the Navy properly rejected Corbetta's late modifications notwithstanding the protester's contention that the price reductions would have given it the most favorable price/quality ratio.

Corbetta has referred to a provision in the clause that a late modification of an otherwise successful proposal which makes its terms more favorable to the Government will be considered at any time it is received. However, we note that prior to the attempted price reductions, Corbetta's proposal was not "an otherwise successful proposal" within the meaning of the provision. At that time, the only otherwise successful proposal was Towne's, which had the most favorable price/quality ratio and which had been selected for award.

Though rejection of Corbetta's late modifications was proper, we believe the Navy erred in accepting Towne's price increase. We first note that since Towne's price increase was obviously not favorable to the Government, the RFP's late proposal clause could not justify its acceptance. Moreover, we do not view B–164569, *supra*, as lending support to the Navy's position. B–164569 involved a situation where the contracting officer had properly decided to make an award on the basis of the initial proposals without negotiations. The decision held that while the contracting officer could have asked for and considered price revisions in conjunction with his request for extensions of the period during which offers could be accepted, he was not, as the protester contended, required to do so. We believe that the decision read as a whole clearly indicates that any request for and consideration of price revisions would have to be undertaken consistent with the requirement to conduct discussions with all responsible offerors within a competitive range.

See, in this regard, 51 Comp. Gen. 479 (1972), where, based upon the initial proposals, three offerors were considered to be within the competitive range, and the agency asked one of the three to review its price. As a result, the offeror submitted a price reduction. We held that the offer of a price reduction and the Government's acceptance constituted discussions, and that discussions with one offeror necessitated discussions with all offerors within the competitive range, citing 50 Comp. Gen. 202 (1970).

See also B–171015 (1), (2), July 13, 1971, a case involving a Navy turnkey housing procurement where the successful offeror was allowed to increase its price by $90,000 but other offerors were given no opportunity to revise their prices. Our decision did not object to the limitation on negotiations under the special circumstances of that case, which involved the presence of certain auction risks due to the unauthorized and premature public disclosure of prices. It follows *a fortiori* that negotiations would be required with all offerors in the competitive range absent such special circumstances.

As for B–161513, *supra*, and 49 Comp. Gen. 625, *supra*, in the former decision it was held that a late price modification was properly rejected, and in the latter that the agency improperly accepted a late price modification. We do not believe that either decision provides support for the acceptance of Towne's late modification.

In view of the foregoing, the Navy's acceptance of the Towne price increase was not proper under the circumstances, because discussions were thereby conducted with Towne without meeting the obligation to conduct discussions with other offerors within the competitive range. In view of this conclusion, the Navy's comment con-

cerning possible economic duress suffered by offerors in extending their offers is of no consequence. In this connection, it is pertinent to note that while Corbetta's late price reductions were properly rejected, they could have been considered for the purpose of deciding whether to enter into discussions with the offerors. A late price reduction, though unacceptable *per se*, may be an indication that opening negotiations, rather than making an award on the basis of the initial proposals, would prove highly advantageous to the Government. *See* 53 Comp. Gen. 5 (1973). In short, Corbetta's substantial price reduction was an indication that discussions might be in the Government's best interests. In addition, since the Navy could not proceed with any award until the enactment by Congress of the new statutory cost limitation, it would appear that ample time was available between October and December 1974 for thorough discussions. Also, while Towne's initial proposal was the only one whose price was within the expected future statutory limitation, discussions with the offerors might have resulted in Corbetta and other offerors reducing their prices so as to come within the limitation.

RECOMMENDATION

In considering possible remedies, we must note that it would be difficult to find that a termination for convenience is in the Government's best interest where the present contractor is providing the Government's actual minimum needs for which there has been adequate competition initially. See *Data Test Corporation*, 54 Comp. Gen. 715 (1975), and decisions cited therein.

In the present case, we note that Towne was required under the contract to submit final design drawings within 60 days after award (March 7, 1975), which were required to be approved by the Navy before construction could proceed. At the conference on the protest on May 29, 1975, which was attended by the Navy and Towne, the Navy representative advised that Towne's final design drawings were under review at that time and that no construction had begun. We understand that construction commenced on or about July 28, 1975.

We do not have first-hand knowledge of the manner in which contract performance is proceeding. This matter is the function and responsibility of the Navy in the course of its administration of the contract. However, the foregoing facts raise some doubts as to whether the work is proceeding in the manner required and whether it will be completed on schedule (540 calendar days after notice of award).

Moreover, as noted *supra*, we are of the view that there was no adequate competition initially for the Government's actual minimum needs. Under the circumstances, we recommend that competition based

on the actual requirements be renewed in order to determine whether a termination for convenience of the current contract is called for.

We recommend that the Navy immediately reinstate the RFP and open negotiations with all offerors within the competitive range. Upon reinstating the RFP and before opening negotiations, the Navy should issue an amendment to the RFP clarifying and revising the work requirements to the extent necessary to make them consistent with its actual minimum needs. Further, an amendment should be issued making clear to offerors the relative importance of price as an evaluation factor. The terms of this amendment should be consistent with the views of our Office on this subject as expressed in *TGI Construction Corporation et al.*, 54 Comp. Gen. 775 (1975).

After the negotiations, the present contract should be terminated for the convenience of the Government and a new contract entered into with the successful offeror, if other than Towne. If Towne remains successful, the existing contract should be modified in accordance with its final proposal. As in other cases where our Office recommends corrective actions of the type discussed above, e.g., *Data Test Corporation*, *supra*, nothing in our recommendations should take precedence over any possible termination for default of the existing contract should such action be deemed appropriate and necessary by the contracting agency.

By letter of today, we are advising the Secretary of the Navy of these recommendations.

In view of the recommended remedy, we see no basis on the present record to consider further Corbetta's claim for proposal preparation costs.

As this decision contains recommendations 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.C. § 1172 (1970).

[B–184248]

Bids—Late—Telegraphic Modifications—Evidence of Timely Delivery

Telegraphic bid modification, Government time-stamped 3 minutes after time for bid opening in office designated in invitation for bids (IFB), which, if for consideration, would make third low bidder low, was properly rejected as late, notwithstanding documentary evidence of Western Union indicating delivery at time for bid opening, since only acceptable evidence to establish timely receipt in IFB is time-date stamp of Government installation on bid wrapper or other documentary evidence of receipt maintained by installation.

Contracts—Protests—Timeliness

Allegation that protest was untimely filed is unfounded since protester received formal notification as to reasons telegraphic modification was submited late

and not for award consideration on June 16 and telegram protesting award was received at General Accounting Office (GAO) within 10 working days on June 20. See section 20.2(a) of Bid Protest Procedures, 40 Federal Register 17979 (1975).

General Accounting Office—Contracts—Recommendation to ASPR Committee and FPR Division—Revision of Late Bid Provisions of Procurement Regulations

Recommendation is made to Armed Services Procurement Regulation Committee and Federal Procurement Regulations Division that GAO comments on the possibility that late bid provisions involving acceptable evidence to establish timely receipt of bids may be unnecessarily causing Government to lose benefits of low bids be considered with respect to possible revision of procurement regulations.

In the matter of the B. E. Wilson Contracting Corporation, September 12, 1975:

This is a protest, filed on June 20, 1975, by counsel on behalf of the B. E. Wilson Contracting Corp. (Wilson) against the award of a contract to Ducon Inc. and Ralph B. Slone (Ducon) as the low bidder under invitation for bids (IFB) No. R5–75–134, issued by the United States Forest Service for the reconstruction of Kitchen Creek Road, Cleveland National Forest. Wilson contends that a telegraphic modification which reduced its bid price below that of Ducon was improperly rejected by the Forest Service as a late modification.

The IFB, as amended, scheduled the bid opening for 2 p.m. on May 29, 1975. Wilson's bid was the third lowest of the five bids received. The evidence indicates that on May 29, 1975, a telegraphic modification of Wilson's bid was received at the location designated by the IFB. The modification, if proper for consideration, would make Wilson's bid the lowest.

By letter dated June 4, 1975, to the contracting officer, counsel for Wilson advised that the telegraphic modification to the Wilson bid was delivered by the time set for bid opening. By letter dated June 10, 1975, received by counsel for Wilson on June 16, 1975, the contracting officer advised Wilson of his decision that the telegraphic modification was received after the exact time for receipt specified in the IFB and could not be considered for award purposes. We note that the protest was filed here within 10 working days of when counsel for Wilson was advised of the contracting officer's decision. Therefore, despite Ducon's argument to the contrary, the protest was timely filed under section 20.2(a) of our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975).

The IFB included a supplement to instructions to bidders, Standard Form 22 (Clause 7 Late Bids and Modifications or Withdrawals), which contained the following:

(a) Bids and modifications or withdrawals therefore received at the office designated in the solicitation after the exact time set for receipt will not be considered unless they are received before award is made; and either

* * * * * * *

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

* * * * * * *

(c) The only evidence acceptable to establish:

* * * * * * *

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

The modification was dispatched from the Western Union office at Imperial Beach, California, at 11 a.m. on May 29, 1975. The telegram was received at the Western Union office in San Francisco, California, and was released for delivery to the site designated in the IFB for receipt of bids at 1:48 p.m. on May 29, 1975, 12 minutes before bid opening. The circumstances surrounding the receipt of the telegraphic modification are explained by the Government and the protester in the following manner.

The Forest Service report to our Office contains affidavits of personnel at the site which read, in pertinent part, as follows:

* * * I took the envelope and the receipt. I signed the receipt and handed it back to the man. I did not date or note the time I signed the receipt on it. * * * Since the bids for the Kitchen Creek project were scheduled to be opened at 2:00 p.m. on May 29, 1975, I thought it might be a modification of one of the bids for that project. I *immediately* took the envelope, walked to the time stamp machine, which was in the same room, and time-stamped the envelope. The time stamped was 2:03 p.m. * * *

* * * * * * *

On May 29, 1975, at *approximately* 2:00 p.m., I observed a man walk into Room 822 of the Appraiser's Building. He walked to and stood in front of the desk occupied by * * *. I saw him hand her an envelope and a piece of paper. I saw her write on the piece of paper and hand the paper back to the man. The man then left the room. A very short time after the man left the room I saw * * * get up from her desk with the envelope in her hand, go to the time stamp machine, and time stamp the envelope * * *. [Italic supplied.]

Counsel for Wilson invites our attention to the Western Union Route-Call Record signed by the Government employee which contains a notation "2/00." Counsel states this indicates delivery by Western Union by 2:00 p.m. Further, counsel forwarded a letter from the District Manager of Western Union in San Diego, California, which states that, according to the copy of the delivery record, the telegram was delivered at 2 p.m. on May 29, 1975.

Our Office has consistently held that the bidder has the responsibility to assure timely arrival of its bid for a scheduled bid opening and must bear the responsibility of the late arrival of a bid or a modification. Late receipt of a bid will result in its rejection unless the specific conditions set forth in the IFB are met. *Astro Development Laboratories, Inc.*, B–181021, July 17, 1974, 74–2 CPD 36; and *Solvent Chemical Company, Incorporated*, B–181033, June 21, 1974, 74–1 CPD 338. In the instant case, as quoted in part above, the IFB contained

the notice prescribed in Federal Procurement Regulations § 1-2.201 (a)(31) (1964 ed. amend. 132) governing, among other things, the acceptability from a timely submission standpoint of telegraphic modifications.

Under the above IFB provision, it is clear that the Wilson telegraphic modification was not timely received at the contracting agency. This is because the only cognizable evidence of timely receipt is the time-date stamp of 2:03 p.m. on the bid envelope.

Further, there is no other documentary evidence of receipt maintained at the installation to establish timely receipt. In this regard, the following documentation, not maintained by the installation, submitted by counsel to support timely receipt is not for consideration: (1) handwritten telegram showing modification was placed into transmission at 11 a.m. on May 29, 1975; (2) Western Union Route-Call Record showing handwritten time of "2/00"; and (3) letter from Western Union District Manager indicating delivery at 2 p.m.

Since the evidence submitted fails to establish timely receipt according to the provisions of the IFB under which Wilson and all bidders competed, the Wilson bid was properly rejected as late. See *Lambert Construction Company*, B-181794, August 29, 1974, 74-2 CPD 131.

We find it necessary to comment on what we believe to be a situation highlighted by this case where the Government may be unnecessarily losing the benefit of low bids. As we have recognized in prior decisions, valid policy reasons require the strict application of the rules governing late bids and modifications even though in certain instances a strict application might operate harshly. The late bid rules are applied strictly despite the possibility that a late bidder might lack knowledge of other bids or act in good faith. This view has, for example, been evidenced by decisions of our Office approving the rejection of bids submitted only one or a few minutes late.

The current standard IFB provisions prescribed by the FPR (and the Armed Services Procurement Regulation (ASPR)) governing late bids permit the timely submission up until a specific time for receipt. Late bids may be considered if received before award is made and late receipt is due solely to Government mishandling at the Government installation. On the other hand, the only evidence acceptable to establish the *time of receipt* at the Government installation is its time-date stamp on the bid wrapper or other documentary evidence maintained by the installation. The other documentary evidence appears to mean contemporaneous evidence rather than after-the-fact affidavits, for example.

The provisions appear to be silent on mishandling *in the process of* as opposed to *after* receipt at the Government installation. What oc-

curred in this case highlights the distinct possibility that bids timely received in the physical sense at or just before a scheduled bid opening would be considered late due to an unreasonable period of time necessary for Government personnel at the proper bid receiving site to effect "the only evidence acceptable to establish" time of receipt under the standard IFB provisions. And, a bid physically received timely at or just before bid opening would be considered late even if Government personnel exercised all due diligence in time-date stamping or otherwise documenting receipt under the late bid provisions. We note here that we did not decide whether the evidence in this case established timely receipt in the physical sense of the Wilson bid.

In view of the above, we are recommending, by letters of today, to the Federal Procurement Regulations Division of the General Services Administration and the ASPR Committee of the Department of Defense that our comments be considered with respect to possible revisions of the appropriate procurement regulations.

[B-140073]

Vehicles—Rental—Credit Card Use

Rental car agreement stating cost had been charged to personal credit card does evidence that employee incurred rental cost as a personal obligation and will be regarded as satisfying receipt requirements of Federal Travel Regulations para. 1-11.3c(5) for purpose of reimbursing employee for cost of rental car. Credit card number need not be shown on invoice. From the nature of the transaction it must appear that the Government could not be held liable for the expense in the event of nonpayment of the obligation by the employee.

In the matter of acceptability of credit card payment for car rental, September 15, 1975:

This action involves a request for a decision submitted by the Department of Housing and Urban Development (HUD) as to the propriety of reimbursing Mr. David P. Corsi for the cost of renting a car while traveling on official business.

The record indicates that, although Mr. Corsi did not furnish a receipt showing that he paid the cost of renting the car, he submitted a copy of his rental agreement with Airways Rent-A-Car. This agreement shows the cost of the rental, the basis for the charges, and is stamped "This bill has been paid through Bank Americard." Mr. Corsi's claim for the cost of the car rental was administratively disallowed by HUD because our decision 39 Comp. Gen. 164 (1959) was interpreted as requiring his credit card number to be shown on the agreement. Moreover, HUD apparently believes that this agreement should not be accepted as a receipt since any traveler could, in this manner, stamp a copy of a rental agreement.

In 39 Comp. Gen. 164, *supra*, we recognized that where an employee obtained goods or services on his personal credit, an invoice from the vendor would not generally be considered to be a "receipt" in the strict sense of the word since it does not constitute a written acknowledgment that the employee has paid a certain sum. However, in view of generally accepted business practices, we held that evidence of a personal obligation incurred by a traveler for allowable goods and services would be regarded as being in the nature of a "receipt" and satisfying the requirements of section 11 of the Standardized Government Travel Regulations (now Federal Travel Regulations (FPMR 101–7), para. 1–11.3c(5) (May 1973)).

Although we did not, in that case, generally define what type of evidence of a personal obligation we would regard as satisfying the requirements for a receipt, we did hold that the rental car invoice involved therein which was stamped "Diner's Club" would satisfy the receipt requirements. We also held that it must appear from the nature of the transaction that the Government could not be held liable to the vendor or the credit card company in the event of nonpayment of the obligation by the traveler. *See also* 46 Comp. Gen. 424 (1966).

In the present case, it is clear from the rental agreement that the cost of the rental car was incurred as a personal obligation of Mr. Corsi and that Airways Rent-A-Car accepted a personal credit card to satisfy this obligation. We do not believe it is necessary, although it might be desirable, for the credit card account number to be shown on the invoice. Since it does not appear that the Government could be held liable to the vendor or the credit card company, we believe that this agreement may be regarded as meeting the requirement for a receipt for the purpose of reimbursing Mr. Corsi for this expense.

While we agree that any traveler could stamp a copy of a rental agreement, we point out that it would be even easier for a traveler to check the box on the agreement to indicate a cash payment or to write or imprint his credit card information on the agreement. These considerations are not material to the question of whether the agreement may be regarded as a receipt, but concern the question of whether the rental agreement had been falsified. In this connection certification of the travel voucher is a certification that the expenses, as evidenced by the supporting documents, have been incurred. If such expenses were not incurred by the claimant to the extent claimed, the provisions of 28 U.S. Code § 2514 (1970) and 18 U.S.C. § 287; *id.* § 1001 (1970), relevant to fraudulent claims, would be for consideration.

Accordingly, the car rental cost may be paid if otherwise proper.

[B-107243]

Customs—Employees—Overtime Services—Reimbursement—Customs Service Inspectional Employees—Parties in Interest Not Liable for Retroactive Salary Increases

In 1972 and 1973 flying club arranged aircraft flights and paid for required overtime services of Customs Service inspectional employees pursuant to 19 U.S.C. 267. In 1974 Customs Service billed the club for additional overtime salary payments resulting from retroactive pay increases from October 1, 1972, to January 6, 1973. Parties in interest are not liable for the charges stemming from a retroactive pay increase since generally accounts billed and paid for at prevailing rates may not be subsequently reopened and statute does not explicitly require retroactive salary increases to be paid for by parties in interest. 31 Comp. Gen. 417 and B-107243, November 3, 1958, shall no longer be followed.

General Accounting Office—Decisions—Reflecting Change in Construction of Law—Effective From Date of Decision

Comptroller General decision stating that parties in interest who use overtime services of Customs Service inspectional employees are not required to pay for employees' retroactive salary increase reflects a change in construction of the law. Therefore, the decision is not retroactive, but is effective from the date of its issuance. In the circumstances present in this case, our Office would offer no objection to collection action being terminated under 4 C.F.R. 104.3.

In the matter of Pegasus, the Flying Country Club—retroactive charges for reimbursable inspection services rendered by U.S. Customs Service, September 16, 1975:

This is an advance decision to the Secretary of the Treasury concerning the propriety of retroactive charges for reimbursable services rendered by the U.S. Customs Service to Pegasus, the Flying Country Club, St. Louis, Missouri, resulting from a retroactive pay increase for Federal employees.

The record shows that Pegasus, the Flying Country Club, is a club which organizes aircraft flights on behalf of its members. During the period October 11, 1972, to January 2, 1973, incident to the performance of some of these flights, Pegasus was required to use the inspectional services of the Customs Service. Under 19 U.S. Code § 267 (1970), parties in interest using such services are required to reimburse the Customs Service for overtime compensation paid to employees of the Customs Service in connection with such services at rates prescribed by the Secretary of the Treasury. Under standard procedures, Pegasus was billed for the reimbursable services and paid for them.

However, subsequent to these events, Customs Service officers and employees received a retroactive pay increase for the period from October 1, 1972, to January 6, 1973. This retroactive pay increase was a result of the court's decision in *National Treasury Employees Union* v. *Nixon*, 492 F.2d 587 (D.C. Cir. 1974). President Nixon had suspended a pay increase for Federal employees for the period from October 1, 1972, to January 6, 1973, but the court declared that the

President had a constitutional duty to grant the pay increase. Thereafter, the President complied with the court's decision, and a retroactive pay increase was awarded Federal employees.

On October 1, 1974, the Customs Service sent out supplemental bills to the parties in interest who had used its services during October 1, 1972, through January 6, 1973, to recover the additional cost of the retroactive pay increases for the employees who had performed the inspectional services. Two supplemental bills were sent to Pegasus. The additional charges ranged from $0.92 to $4.92 per item, the total additional bills being $24.64 and $13.78.

Pegasus challenged these retroactive charges, contending that it is impossible for it to go back to each member for the small amount required. According to its chairman, Pegasus charges its passengers a fee which includes the cost of the customs services provided. Pegasus then closes its books on each flight when all charges have been paid. Pegasus argues that it is improper for the Customs Service to subsequently pass back retroactive pay increases when the services rendered were billed and paid for at the prescribed rate in effect at the time they were performed.

The Customs Service states that Pegasus was billed for the retroactive pay increase pursuant to our decision in 31 Comp. Gen. 417 (1952), which held that when Customs Service employees received a retroactive pay increase in 1951, the parties in interest for whom the Customs Service had performed reimbursable-type services during the period affected by the increase were liable to the Government for reimbursement of the additional amounts payable to the employees, whether or not the parties had already paid or been billed for the services at the old rates. The above decision was based on the statute permitting the rendition of inspectional services at night or on Sundays and holidays upon the condition that the private interests requesting the services reimburse the United States for the extra compensation for overtime services payable to customs officers and employees performing such services. 19 U.S.C. § 267 (1970), *supra*. In decision B–107243, November 3, 1958, we affirmed the 1952 decision.

We note that, although 19 U.S.C. § 267, *supra*, provides that the parties in interest shall pay the extra compensation to the appropriate customs officer and he in turn shall pay it to the various customs officers and employees involved, the United States Government is ultimately obligated to pay the extra compensation under 19 U.S.C. § 267, *supra*, regardless of any nonpayment by the parties in interest. *United States* v. *Myers*, 320 U.S. 561 (1944). Therefore, the customs officers and employees involved will not suffer any loss if the parties in interest do not pay for retroactive pay increases. *See* 31 Comp. Gen. 417, 420, *supra*.

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The rule stated in our decision 31 Comp. Gen. 417, *supra*, requiring additional billings for retroactive pay increases does not rely on any explicit statement in the law nor in the legislative history. Rather, the decision stated that no reason was suggested or apparent why the obligation of the parties in interest to reimburse the Government should not include the additional amounts payable to employees as retroactive pay increases. 31 Comp. Gen. 420, *supra*.

Upon further consideration of the matter, we find that billing the parties in interest, such as Pegasus, for retroactive pay increases creates an undue burden on them since it is difficult or impossible for them to prorate the bills and charge small amounts to their customers or passengers long after the service has been rendered and the bill has been paid. Moreover, such billing for retroactive pay increases runs contrary to the general legal principle that accounts should be final after billings and payments have been made in accordance with the rates in effect at the time the services are rendered. Although Congress, by statute, has required the parties in interest to pay for the extra compensation of overtime services of customs officers and employees when their services are required at night, on Sundays, or on holidays, we do not believe that Congress intended to impose retroactive charges on the parties in interest. Since Congress did not explicitly provide that parties in interest should be billed for the retroactive pay increases of the officers and employees whose services were used, we now hold the parties in interest are not liable for the charges stemming from a retroactive pay increase.

Since our decision of today reflects a change in construction of the law, it will not be given retroactive effect. Accordingly, this decision shall be treated as effective from the date it is issued. 54 Comp. Gen. 890 (1975); 52 *id.* 99, 105 (1972); 36 *id.* 84 (1956); 27 *id.* 686, 688 (1948). In the circumstances present in the Pegasus case, however, our Office would offer no objection to collection action being terminated under 4 C.F.R. § 104.3.

In view of the above our decisions 31 Comp. Gen. 417 (1952), *supra*, and B–107243, November 3, 1958, shall no longer be followed.

[B–184026]

Officers and Employees—Transfers—Relocation Expenses—House Trailers, Mobile Homes, etc.—Purchase Costs

Employee who, pursuant to transfer of station, purchased mobile home for use as residence at new station may be reimbursed for miscellaneous expenses normally associated with relocation of mobile homes. Federal Travel Regulations (FTR) para. 2-3.1(b) (May 1973).

Officers and Employees—Transfers—Relocation Expenses—House Trailers, Mobile Homes, etc.—Household Effects Shipment Precluded

Employee who moves household goods from old station to new station pursuant to transfer may not later claim expenses for transportation of mobile home under FTR para. 2-7.1(a) (May 1973).

In the matter of a claim for miscellaneous expenses for mobile home purchased during transfer, September 16, 1975:

This action is in response to a request from Mr. Orris C. Huet, an Authorized Certifying Officer of the National Finance Center, Department of Agriculture, New Orleans, Louisiana, for a decision whether a reclaim voucher in favor of Mr. James E. Moore for reimbursement of $268 for miscellaneous expenses incurred in connection with a transfer of official station may be certified for payment.

Mr. Moore was authorized reimbursement of expenses incident to a transfer of official station from Eugene, Oregon, to Oregon City, Oregon, by Travel Authorization No. 16414020 dated March 27, 1974. Mr. Moore was allowed, *inter alia*, transportation of his immediate family and household goods and such other expenses as were justified under the Federal Travel Regulations (FPMR) (May 1973).

Mr. Moore completed his move and submitted a travel voucher for miscellaneous expenses in the amount of $468, the maximum amount for which he was eligible based on the limitation prescribed by paragraph 2-3.3b of the Federal Travel Regulations (FTR). Mr. Moore's original itemized claim for miscellaneous expenses was as follows:

$147.50—Mobile Home Hookup
475.00—Mobile home set-up
55.00—Water and Sewage connections
47.75—Blocks and pads
15.00—Remove hitches

$740.25

Upon review of Mr. Moore's claim, the Audit Section of the National Finance Center disallowed all of the above expenses. The disallowance was based on the face that the mobile home was newly purchased at Mr. Moore's new duty station and reimbursement of the cost of newly acquired items is prohibited. FTR para. 2-3.1c(5) (May 1973). Accordingly, Mr. Moore was reimbursed only $200 at the minimum rate. FTR para. 2-3.3a(2) (May 1973).

Paragraph 2-3.1 of the Federal Travel Regulations (May 1973) states, in pertinent part:

2-3.1. *Applicability.*

a. Purpose for allowance. The miscellaneous expenses allowance authorized by 2-3.2 and 2-3.3 is for the purpose of defraying various contingent costs asso-

ciated with discontinuing residence at one location and establishing residence at a new location in connection with an authorized or approved permanent change of station.

b. *Types of costs covered.* The allowance is related to expenses that are common to living quarters, furnishings, household appliances, and to other general types of costs inherent in relocation of a place of residence. The types of costs intended to be reimbursed under the allowance include but are not limited to the following:

(1) Fees for disconnecting and connecting appliances, equipment, and utilities involved in relocation and costs of converting appliances for operation on available utilities;

(2) Fees for unblocking and blocking and related expenses in connection with relocating a mobile home, but not the transportation expenses allowed under 2-7.3;

* * * * * * *

(4) Utility fees or deposits that are not offset by eventual refunds;

* * * * * * *

The Authorized Certifying Officer states, in regard to the disallowance of the claim:

It would appear Para. 2-3.1.b.(2) limits reimbursement of setting up a mobile home, blocks, pads, removing hitches, etc., to those situations where a mobile home was relocated.

While he is correct if FTR para. 2-3.1(b)(2) is read literally, the guidance provided by it should be read in the context of the entire paragraph. In this regard, FTR para. 2-3.1(b)(2) is an example of a covered cost, but not an express limitation. What is intended is to cover those "general types of costs inherent in relocation of a place of residence."

The authority for the promulgation of part 3 of chapter 2 of the Federal Travel Regulations which provides an allowance for miscellaneous expenses is subsection 5724a(b) of Title 5, U.S. Code (1970), which provides that an employee who is reimbursed under subsection (a) of that section is entitled to an allowance for miscellaneous expenses.

Subsection 5724a(a)(4), referred to above, provides for reimbursement of the expenses of the sale of an employee's residence at the old duty station and purchase of a home at the new duty station. The Office of Management and Budget, in revising Circular No. A-56 on June 26, 1969, defined a "residence" (and by implication "home") to include a house trailer, the land it stands on, or both as a unit. We concurred in that definition, 49 Comp. Gen. 15 (1969), and it has since been adopted in the current regulations. FTR para. 2-6.1(b) (May 1973). Thus, since both subsections of section 5724a must be construed *in parii materia*, we conclude that miscellaneous expenses normally incurred in establishing a new residence include those expenses normally connected with a house trailer, whether relocated from the former station or purchased at the new station. Such expenses may be reimbursed under part 3 of chapter 2 of the Federal Travel Regulations.

In view of the above, the miscellaneous expenses under FTR para. 2–3.1(b) which would normally be allowed on a relocation of a trailer may be reimbursed. These would be the costs of the mobile home hookup ($147.50), water and sewer connections ($55), blocks and pads ($47.75), and removal of hitches ($15); the total being $265.25.

With regard to the remaining cost claimed ($475) for mobile home set-up, no adequate description is furnished of the services involved. It may include transportation expenses which are not eligible for reimbursement under FTR para. 2–3.1(b)(2), *supra*. We assume, since such information is not before us, that Mr. Moore has already used his transportation allowance to move his household goods. If so, he is not eligible for reimbursement of transportation expenses under FTR para. 2–7(a).

The miscellaneous expenses, other than the $475, may be reimbursed. Since reimbursement has already been partially made in the amount of $200, the voucher, if otherwise correct, may be certified in the amount of $65.25. The remainder of the claim, characterized as set-up costs, must be described with some particularity before a determination may be made whether or not it may be reimbursable in whole or in part under the Federal Travel Regulations.

[B–183381]

Bids—Unbalanced—Estimates—Accuracy

As general rule, mathematically unbalanced bid—bid based on enhanced prices for some work and nominal prices for other work—may be accepted if agency, upon examination, believes invitation for bid's (IFB) estimate of work requirements is reasonably accurate representation of actual anticipated needs. But where examination discloses that estimate is not reasonably accurate, proper course of action is to cancel IFB and resolicit, based upon revised estimate. B–161208, Aug. 8, 1967, modified.

Bids—Acceptance—Unbalanced Bids—Improper

Proposed acceptance of apparent low mathematically unbalanced bid is not proper where (1) agency determines bid is low through reevaluations using substantially revised estimates of work requirements, which, in themselves, indicate that "material unbalancing" (existence of reasonable doubt that any award would result in lowest cost to Government) is present; (2) under reevaluation using one of revised estimates, bid is not low, confirming existence of material unbalancing; (3) reevaluation procedure has effect of introducing new evaluation factors into procurement and contravenes requirement that bidders compete equally based on objective factors in IFB. B–161208, Aug. 8, 1967, modified.

In the matter of Edward B. Friel, Inc., September 22, 1975:

This decision involves issues of unbalanced bidding on two requirements-type, 1-year term contracts. The invitations for bids (IFB's)—Nos. GS–03B–49528 and –49529—were issued by the General Services Administration (GSA). IFB –49528 involved miscellaneous elements of work connected with the installation of acoustical ceilings in

several Government buildings; IFB –49529 involved miscellaneous elements of work connected with the installation of partitions.

Edward B. Friel, Inc. (Friel), Michael O'Connor, Inc. (O'Connor), and Free State Builders, Inc. (Free State), bid on both IFB's. Each bidder through its counsel has presented arguments demonstrating what it considers to be proper disposition of the apparent low bids and/or the solicitations. We will discuss each IFB in turn.

IFB –49528

IFB –49528 called for submission of unit price bids on 51 items, many of which further required the submission of unit prices for subitems. For each item or subitem, bidders were required to submit a price for performing that work during Government working hours and a price for performing the work during non-Government working hours. Each unit price for work during Government and non-Government hours was to be multiplied by a specified evaluation quantity. These evaluation quantities were estimates of GSA's expected work requirements. All extended prices in the Government hours column were to be totaled and multiplied by a factor of 90 percent, representing the probability that most of the work would be performed during Government working hours. The total of extended prices in the non-Government working hours column was to be multiplied by a factor of 10 percent. The two factored figures were to be added together to obtain a total evaluated price.

Following this formula, the evaluated bid prices were:

O'Connor	$342,648.94
Friel	391,864.65
Free State	411,354.87
Tuxedo Contractors, Inc	425,813.25
Elrich Construction Co., Inc	477,374.00
Ogburn & Associates, Inc	514,959.50
Cherokee Construction Company, Inc	517,313.60
Silas Bolef Company	2,288,504.40

Friel protested against the O'Connor bid as unbalanced, and Free State's protest then requested an examination of the bids by our Office.

GSA's initial report to our Office, dated April 30, 1975, stated that O'Connor's bid was unbalanced in so many respects that it was neither practical nor necessary to describe the unbalanced elements in detail. GSA also stated that it had reviewed the IFB's evaluation formula and the estimated quantities which were stated therein and had found the estimated quantities to be defective.

In this regard, the agency expressed the view that use of actual prior year requirements as the evaluation quantities would be the

soundest means of evaluating the bids for a term contract of the type involved here. The report included a "quantity take-off" showing the actual quantities of items ordered under the predecessor contract, which differed "substantially or even radically" from the estimated quantities which had been included in the IFB. In applying the actual quantities to the bids, GSA concluded that because the quantity differences were so great in so many items, and because the evaluated bid prices were relatively close, the cost impact of the unbalancing could not be realistically estimated. GSA's April 30, 1975, report, therefore, concluded that since there was insufficient assurance that award to any bidder would result in lowest cost to the Government, IFB –49528 should be canceled and the bids resolicited using the prior year's requirements, or a projection based thereon.

O'Connor, in its comments on the April 30, 1975, report, argued that there existed no compelling reason under Federal Procurement Regulations (FPR) § 1–2.404–1 (1964 ed. Circ. 1) (41 C.F.R. § 1–2.404–1 (1974)) to justify cancellation of the IFB. O'Connor pointed out that the basis used by the contracting officer in formulating the estimated quantities included in the IFB had not been shown, and that, absent evidence to the contrary, the quantities should be assumed to have a rational basis. Moreover, O'Connor's comments included calculations showing that using the actual prior year requirements set forth in the report, its bid remained lowest in price.

In a later report to our Office, dated June 24, 1975, GSA modified its prior position and proposed to accept the O'Connor bid. In reaching this conclusion, GSA noted that over a period of time three estimates of the quantity of requirements had been made. The first estimate (the one contained in the solicitation) was made at the time the IFB was being prepared, prior to February 27, 1975. The preparing office sought to secure quantity takeoffs, by item of work, from the orders issued up to that time under the predecessor contract. The totals for each item were doubled to get an approximate projection of a year's requirements.

When the protests were filed, GSA then sought to verify whether the IFB's weighting factors were valid. For this purpose, a second quantity takeoff by item was made in April 1975 and was included in GSA's initial report. These figures took into account work orders issued up to that time and, in GSA's words, they "* * * clearly disclosed that serious errors must have been committed in making the original take-off on which the [IFB's] evaluation factors were based."

Further, based on GSA's initial conclusion that cancellation and readvertisement was necessary, a third quantity takeoff was made for purposes of preparing the new IFB. One important change was that

the proposed new IFB eliminated the provision for submission of two separate prices on each item (one for performance during Government working hours and the other for performance during non-Government working hours). This was because GSA had determined, based on experience under the predecessor contract, that the two types of requirements arose in a ratio of approximately 40:60, that is, in "roughly equal" proportions.

In addition, the draft of the new IFB redefined the units on which bid prices were to be submitted and proposed to call for unit prices for approximately 119 items. Also, several new items of work were apparently added.

GSA found that the application of these three sets of estimates to the bids resulted in O'Connor's bid being lowest in each instance. In applying the third quantity takeoff, GSA took the approach that, because of the differences in the bid forms, wherever different bid prices had been submitted (as, for example, significantly different prices for performing an item during Government hours and non-Government hours), the higher of O'Connor's two prices was used in the recalculation and the lower of the two prices submitted by Friel and Free State. We note that for most items O'Connor's "Government hours" prices appear to be substantially higher than its "non-Government hours" prices whereas Friel's prices for both appear to be identical for all items, and Free State's prices for both are almost identical for all items.

The essence of GSA's final position in the matter is stated as follows in its June 24, 1975, report to our Office:

> We are fully appreciative of the principle that bids must be evaluated on the basis specified in an invitation and not on any basis not so specified. However, these reevaluations are for an entirely different purpose. They serve to show that although the evaluation formula in the invitation for bids on Contract No. GS-03B-49528 was defective, it is not so defective as to constitute a "compelling reason" to cancel the solicitation and readvertise. The computations made on two other bases serve only to demonstrate that the formula specified in the invitation did, in fact, fulfill the intended purpose (namely, that of identifying which bid, if accepted, would result in lowest contract cost to the Government).

However, we note that it was subsequently brought out that GSA, in its calculations using the third quantity takeoff, made an error in addition. GSA had found that O'Connor's bid was low at $553,482, Free State's second low at $650,230 and Friel's third low at $723,468. Friel, in its July 11, 1975, letter to our Office, included information showing that O'Connor's bid, if correctly totaled under the approach used by GSA, would be $747,152. At the conference on the protest held on July 24, 1975, the GSA representatives admitted that their calculations were in error on this point. Therefore, while it appears that O'Connor's bid is lowest using the first and second quantity takeoffs, under the third quantity takeoff as applied by GSA it is not lowest.

Also, GSA in a report to our Office dated July 14, 1975, further refined its evaluation by applying the second quantity takeoff figures to the bids and correcting the 90:10 ratio to a 40:60 ratio.

To summarize, the various evaluations show the following results:

—Evaluation 1 (using the estimated requirements and the 90:10 ratio in IFB–49528):

O'Connor	$342,648.94
Friel	391,864.65
Free State	411,354.87

—Evaluation 2 (using the actual requirements under the predecessor contract and the 90:10 ratio):

O'Connor	$650,301.29
Friel	674,569.85

—Evaluation 2A (using the actual requirements under the predecessor contract and a 40:60 ratio):

O'Connor	$412,788.48
Friel	674,615.85

—Evaluation 3 (using the most recent estimate of requirements, the third quantity takeoff, and applying the higher of O'Connor's two prices for any given item and the lower of the two prices submitted by the next two lowest bidders):

O'Connor	$747,152
Friel	723,468
Free State	650,230

Friel believes that GSA has erred in concluding that the resolution of an unbalanced bidding situation turns solely upon the propriety of the bid evaluation factors. Friel's position can be summarized as follows. The propriety of the evaluation factors represents only the first step in a proper analysis. If an IFB is structured so as to encourage unbalanced bidding, it is *per se* defective and no bid can be properly evaluated; there is insufficient assurance that any award will result in the lowest cost to the Government. On the other hand, if the IFB evaluation factors reasonably weight the several unit prices according to their relative importance on some bona fide and reasonable basis such as prior year requirements, the IFB evaluation formula discourages bid unbalancing and is proper. If a mathematically unbalanced bid is submitted, consideration of the range over which requirements may reasonably be expected to fluctuate is simply a means to determine whether that bidder, through intentional unbalancing of its bid, has prevented a proper evaluation of its bid.

Friel cites *Mobilease Corporation*, 54 Comp. Gen. 242 (1974), 74–2 CPD 185, in support of the proposition that resolution of bid unbalancing cannot be limited solely to the propriety of the bid evalua-

tion criteria. *Global Graphics, Incorporated*, 54 Comp. Gen. 84 (1974), 74-2 CPD 73, is also cited in support of a two-step analysis, i.e., consideration of the propriety of the evaluation formula, as well as "the independent principles which focus upon individual bidder conduct." Friel believes that B-172789, July 19, 1971, recognizes that bidder conduct of intentionally unbalancing its bid to a material extent requires rejection of that individual bid notwithstanding the propriety of the IFB evaluation factors. Also, B-172154, April 23, 1971, is cited as an example of a case focusing solely on bidder conduct—a situation where, regardless of the evaluation factors, the extent of bid unbalancing was so great that sufficient doubt arose that an award to the bidder would result in the lowest cost to the Government.

Following this reasoning, it is Friel's position that O'Connor's bid is materially unbalanced and must be rejected, and that award should be made to Friel, which submitted the lowest-priced, responsive bid. Friel points out that the three quantity takeoffs developed by GSA are "extremely disparate," and that GSA cannot, by mechanically plugging unit prices into new evaluation quantities, conclude that the materially unbalanced O'Connor bid is lowest. Friel also points out, as noted *supra*, that GSA's calculations that O'Connor's bid is lowest based on the third quantity takeoff are in error.

Moreover, Friel points out that aside from the numerical totals, GSA has overlooked the drastic sensitivity of O'Connor's bid in relation to changing requirements, since the price difference between the O'Connor and Friel bids is relatively slight, and with possible changes in GSA's estimated quantity of requirements—as illustrated, for example, by the third quantity takeoff—the O'Connor bid is displaced as lowest.

Free State's position is that the bids must be evaluated on the basis of the evaluation factors stated in the IFB. Free State believes that to apply new evaluation factors to bids already submitted "* * * is to engage in conjecture and speculation of so vast a degree as to leave the Government in the position of awarding a contract which has never been advertised and on which the bidders have had no informed opportunity to prepare an intelligent competitive bid." Free State agrees with GSA's original position that IFB-49528 should be canceled.

In addition to the decisions of our Office mentioned *supra*, the parties have cited other decisions dealing with unbalanced bidding. We will take advantage of this opportunity to clarify our position on the issues of unbalanced bidding raised by the parties. Having reviewed the facts of record and our decisions, we believe the following principles are pertinent.

B–168205(1), June 30, 1970, describes unbalanced bidding as follows:

> * * * The term "unbalanced" * * * is applied to bids on procurements which include a number of items as to which the actual quantities to be furnished is not fixed, in which a bidder quotes high prices on items which he believes will be required in larger quantities than those used for bid evaluation, and/or low prices on items of which he believes fewer will be called for. * * *

Our Office has recognized the two-fold aspects of unbalanced bidding. The first is a mathematical evaluation of the bid to determine whether each bid item carries its share of the cost of the work plus profit, or whether the bid is based on nominal prices for some work and enhanced prices for other work. The second aspect—material unbalancing—involves an assessment of the cost impact of a mathematically unbalanced bid. A bid is not materially unbalanced unless there is reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will not result in the lowest ultimate cost to the Government. See *Mobilease Corporation*, *supra*. We think the controversy in this case largely involves a question of how it is determined that material unbalancing is present.

We believe that, as a general rule, the inquiry into material unbalancing begins with an examination of the solicitation and its evaluation formula. The determination that a mathematically unbalanced bid has been submitted has the effect of calling into question the accuracy of the solicitation's estimate of the anticipated quantity of work and, thus, the evaluation basis upon which bids or offers are being considered for award. If, after examination, the contracting agency believes that the solicitation's estimate is a reasonably accurate representation of actual anticipated needs, then the mathematically unbalanced low bid may be accepted. See *R & R Inventory Service Inc.*, 54 Comp. Gen. 206 (1974), 74–2 CPD 163; *cf.* 51 Comp. Gen. 792 (1972).

On the other hand, in cases where the contracting agency concludes after examination that the solicitation's estimate is not a reasonably accurate representation of actual anticipated needs, we have indicated that the solicitation should be canceled. *See* B–159684, October 7, 1966; B–164429, August 21, 1968.

It is also pertinent to note that in determining whether a cogent and compelling reason exists to cancel an IFB, consideration of at least two basic factors is involved—whether the best interests of the Government would be served and whether bidders would be treated in an unfair and unequal manner. The fact that the terms of an IFB are deficient in some way does not necessarily justify cancellation after bids have been opened and bidders' prices exposed. For instance, even in a case where the agency believed the IFB's purchase

description to be materially deficient, our Office found no cogent and compelling reason to support the cancellation where bidders had offered to meet the Government's actual requirements and the cancellation was believed to damage the integrity of the competitive bidding system. *See* 52 Comp. Gen. 285 (1972). In *Joy Manufacturing Company*, 54 Comp. Gen. 237 (1974), 74-2 CPD 183, the agency canceled an IFB and proposed to resolicit because it desired to add additional specifications. However, it appeared that the low, responsive bid had offered an item which might meet the additional specifications which were proposed to be added. In these circumstances, our Office held that acceptance of the low bid—if it were found to meet all of the Government's actual needs—would work no prejudice to the other nonresponsive bidders.

Even where the deficiency in the IFB is related to the method of calculating the lowest overall price, cancellation is not necessarily justified. For example, in 50 Comp. Gen. 583 (1971), it appeared that the IFB's provisions concerning award on aggregate and separable items were defective. We held, however, that since the record did not show that competition for the total work was adversely affected by the award provisions, award should properly be made to the lowest overall bidder.

Decisions such as 52 Comp. Gen. 285, *Joy Manufacturing Company*, and 50 Comp. Gen. 583, *supra*, are readily distinguishable from the present situation. Here, the deficiency in the IFB covers the sum total of the work being called for (i.e., the estimated quantum of requirements) and this factor, in turn, directly controls the bid prices.

In this light, the initial difficulty with GSA's position is that its reevaluations demonstrate, in our view, the existence of a reasonable doubt that acceptance of the O'Connor bid, or award to any mathematically unbalanced bidder, would result in the lowest ultimate cost to the Government. There are two reasons for this. The first is the substantial variations between the IFB's estimates and the succeeding estimates. This in itself tends to create substantial doubt that award to any mathematically unbalanced bidder or, for that matter, any bidder, would result in the lowest cost. In other words, where the IFB's estimates are not reasonably accurate, there is a strong indication *per se* that material unbalancing is present. In this regard, it must be noted that whatever estimated quantities are used in evaluating the bids are, of course, precisely that—estimates of what may be ordered in the future under the contract. There are no "actual requirements" on which to evaluate bids, and the substitution of one estimate for another merely reflects the agency's best judgment, at a given point in time, of what may transpire in the future and what ultimate costs the Government may incur.

The second reason is that under one of the evaluations—the third quantity takeoff—the O'Connor bid is not low. This, in our view, confirms the existence of a reasonable doubt that any award to a mathematically unbalanced bidder or any bidder would result in lowest overall cost. See, in this regard, GSA's position concerning the proposed cancellation of IFB–49529, *infra.*

In addition, we believe that the procedure employed by GSA in reevaluating the bids based on substantially different quantity estimates is in itself contrary to the requirements of 41 U.S.C. § 253(b) (1970). This law requires that after advertising, award shall be made to that responsible bidder whose bid, conforming to the IFB, will be most advantageous to the Government, price and other factors considered. We have stated that among the purposes of this provision is to give all persons equal right to compete for Government contracts. 36 Comp. Gen. 380 (1956).

We understand the distinction drawn by GSA, *supra*, that its reevaluations were only for the purpose of demonstrating that the IFB's evaluation criteria served their intended function of identifying the lowest bid. However, we believe that the net effect of a procedure of this type is to introduce totally new evaluation factors into the procurement. To sanction this approach would mean that any instance where mathematically unbalanced bids are submitted could result in a reevaluation by the contracting agency using some basis other than the one specified in the IFB.

One apparent problem with this approach is that in the absence of any protests, the reevaluation would presumably be conducted without the bidders' knowledge. This would be contrary to the open and public nature of advertised procurement procedures and to the requirement that the IFB inform all bidders of the objective factors upon which they are to submit their bids and on which their bids are to be evaluated. *See* 36 Comp. Gen., *supra.* Also, in any case involving unbalanced offers in a negotiated procurement, e.g., *Global Graphics, Incorporated*, *supra*, a reevaluation process of this kind would of necessity be conducted on a confidential basis, because disclosure of the number, identity and ranking of offerors prior to award of a negotiated contract is prohibited. *See* FPR § 1–3.805–1(b) (1964 ed. Circ.1) (41 C.F.R. § 1–3.805–1(b) (1974)). Unless the details of the evaluation were made public after the award, offerors would have no means of knowing how their offers were evaluated, or whether they would have a basis for protest.

Also to be noted is the fact that as the estimates used in the reevaluations change, the possibility is raised that the bidders, if they had the opportunity, might change their pricing strategy and offer different bid prices. We believe that proposed acceptance of an appar-

ent low bid, which is based, in effect, on a revised evaluation formula, must be viewed as making an award on a basis as to which unsuccessful bidders have not had an opportunity to compete.

For the foregoing reasons, we believe that GSA's proposed acceptance of the O'Connor bid is not proper. IFB –49528 should be canceled and the requirement resolicited based upon what GSA, in its best judgment, believes to be a correct estimate of actual anticipated needs.

It appears that GSA, in adopting the position it has taken in this case, was relying primarily on *Global Graphics, Incorporated, supra.* GSA has cited this decision in support of the proposition that an IFB's evaluation criteria may be defective, but not so defective as to constitute a cogent and compelling reason to cancel the solicitation.

Global Graphics involved a situation where an RFP did not specify estimated quantities. Our decision noted that the low offer was unbalanced, but that the contracting agency also believed the price was fair and reasonable when compared to prices previously paid for the supplies. This result could be read, as GSA has done, as implying that although a solicitation is defective in failing to discourage unbalanced offers, an unbalanced offer could nonetheless be accepted absent a sufficient quantum of doubt that the award would not represent the lowest cost to the Government.

As with all decisions of our Office, *Global Graphics* must stand upon its own facts. Given those facts, to the extent that the decision may be susceptible of the interpretation stated by GSA, it will no longer be followed by our Office. In this regard, we would note that the solicitation in *Global Graphics* lacked any estimate of anticipated requirements, and that our decision specifically noted that, due to substantial performance of the contract, corrective action was not in the Government's best interests. In this regard, we have taken the position that the absence of estimated quantities in solicitations—encouraging unbalanced bidding and making it impossible to determine whether the bid prices are fair and reasonable—properly calls for cancellation of the solicitation. *See* 43 Comp. Gen. 159 (1963).

As for Friel's position, we think that the foregoing discussion is sufficient to indicate that the appropriate course of action in the present case is to cancel IFB –49528. We do not believe that the decisions of our Office cited by Friel, *supra*, support its proposed disposition of the bids under the circumstances of this case.

Mobilease Corporation, supra, does indicate that a showing of bidder conduct involving collusion or fraud is an element in determining whether to accept an unbalanced bid; however, the decision also points out that "* * * the more critical test of unbalancing is the quantum of doubt surrounding the price which the Government must ultimately pay as a result of its decision to accept a mathematically

unbalanced bid." 54 Comp. Gen. 242, at 246. Without attempting to delineate what kind of evidence would be necessary to make a showing of collusion or fraud, we think it reasonably clear that variations among bidders in prices quoted for different items are insufficient, since such variations are normally to be expected under the circumstances. *See* 35 Comp. Gen. 33 (1955).

B–172789, *supra*, involved a situation where the IFB's estimated requirements, based on orders placed under the predecessor contract, were believed to be "as accurate as this agency can make them." In addition, in its consideration of the protest the agency attempted to estimate at what point in production the protester's bid would become more advantageous to the Government and decided that, based on the quantities ordered in the last 25 orders placed under the predecessor contract, the apparent low bid would offer the lowest price. The agency therefore proposed to accept the apparent low bid, and our decision denied the protest against this action. We do not read this decision as supporting Friel's proposition that a bidder's conduct in materially unbalancing its bid requires rejection of the bid notwithstanding the propriety of the IFB's evaluation criteria.

Our decision B–172154, *supra*, is not entirely specific on the issue of whether and to what extent the IFB was considered defective. The decision could be interpreted, as Friel has done, to support the proposition that a bidder's conduct alone could properly result in rejection of that bidder's materially unbalanced bid, and that the next low bid could properly be accepted. Since, in the present case, we have determined that the IFB's estimates *per se* were so defective as to reasonably indicate the existence of material unbalancing, we do not believe that B–172154, *supra*, is directly in point.

We would also note that B–161208, August 8, 1967, a decision not cited by the parties, involved a situation somewhat similar to the one here. In that case GSA canceled an IFB because of erroneous weight factors, revised them, and resolicited. After bids were opened under the second IFB, GSA examined the revised weight factors, concluded that they still did not accurately reflect the potential requirements, and made further revisions. GSA concluded, after applying the final revised weight factors to the bids already opened, that awards to the apparent low bidders under the second IFB would result in the lowest ultimate cost to the Government. Our decision did not object to this conclusion.

B–161208, *supra*, is lacking in detail as to the extent of the defects in the second IFB's weighting factors and the closeness of the various bid prices. The IFB involved work in two service areas. As to the first area, the weights reportedly contained "inaccuracies," and the apparent low bid was unbalanced. As to the second service area, the final revised

weights were "markedly changed" from those in the second IFB, but it was reported that the low bid on that portion of the work was not in any respect unbalanced. We note that if the revised weight factors in the second IFB had been believed by GSA to be reasonably accurate, though not 100 percent accurate, then consistent with our views as expressed in this decision, awards could have been made. However, to the extent that B–161208, *supra*, suggests that awards could be made based upon estimates which were not reasonably accurate, it will no longer be followed by our Office.

IFB–49529

This IFB was basically similar to IFB–49528 with respect to unit price bidding and method of evaluation except that the total of extended unit prices for work during Government working hours was multiplied by a factor of 10 percent and the total of extended unit prices for non-Government working hours was multiplied by a factor of 90 percent.

The evaluated bid prices were:

O'Connor	$267,671.40
Free State	278,338.50
Klein Construction Co., Inc	391,280.00
Tuxedo Contractors, Inc	437,575.00
Friel	464,357.50
Ogburn & Associates, Inc	483,698.00
Doit Contractors, Inc	508,165.00
Elrich Construction Co., Inc	979,993.00

GSA proposed to cancel this IFB and resolicit because the evaluation formula was defective. GSA believes that the primary defect is that actual prior year experience indicates the Government hours vs. non-Government hours requirements arise in about 50:50 proportions, not 10:90. GSA's June 24, 1975, report pointed out that if O'Connor's bid was accepted and the requirements were to run in a 50:50 ratio, O'Connor would be paid more than the next low bidder.

Also, GSA's July 14, 1975, report included calculations applying the actual requirements under the prior contract to the bids and correcting for a 50:50 ratio. O'Connor's bid totaled $594,496.97 and Free State's bid $515,113.30.

Based on a determination that cancellation of IFB –49529 would be in the best interests of the Government GSA proceeded to cancel the IFB and resolicit under IFB –49549.

O'Connor has protested against the cancellation. In its July 31, 1975, letter to our Office, O'Connor took the position that GSA should reconsider the cancellation, because it is only sensible to assume that most

orders will in fact be placed for work during non-Government hours, so as to accommodate Government personnel and save expense to the Government.

In light of our views expressed *supra*, in connection with IFB -49528, we have no objection to GSA's cancellation of IFB -49529.

In view of the foregoing, the protests and the proposed dispositions of the bids and/or solicitations are decided accordingly.

[B-183949]

Securities and Exchange Commission—Fees—Investment Adviser—Refunds

Annual charge assessed pursuant to User Charge Statute, 31 U.S.C. 483a, by Securities and Exchange Commission (SEC) upon investment advisers and deposited in Treasury as miscellaneous receipts, which charge is now considered erroneous by SEC because of recent Supreme Court decisions, may be refunded by SEC out of permanent indefinite appropriation established by 31 U.S.C. 725q-1 to pay moneys "erroneously received and covered." This refund is authorized to all who paid such invalid fee regardless of whether payment was made under protest.

In the matter of refund by Securities and Exchange Commission of investment adviser fees, September 22, 1975:

This decision is in response to a request from the Chairman of the Securities and Exchange Commission (SEC). On March 29, 1974, the SEC repealed its $100 annual assessment imposed upon investment advisers registered with the Commission. This fee was charged, pursuant to the User Charge Statute, 31 U.S. Code § 483a (1970) to all investment advisers registered with Commission, whether or not any services were performed on behalf of the registrant. The fee was imposed only for the years 1971, 1972 and 1973.

The charge was repealed in response to two recent Supreme Court decisions construing the User Charge Statute. While the decisions did not deal specifically with these investment adviser fees, the SEC feels that its annual investment adviser fee did not meet the criteria set forth in those decisions. See *National Cable Television Association, Inc.* v. *United States, et al.*, 415 U.S. 336 (1974) and *Federal Power Commission* v. *New England Power Company, et al.*, 415 U.S. 345 (1974). *Cf. id.*, fn. 4, p. 350, where these fees are mentioned.

The Commission is now in receipt of numerous requests for refunds of the $100 fee from persons registered as investment advisers during the 3 years in question. The Commission desires to return the fees but it questions the right of a person to a refund of fees erroneously collected in the absence of a protest at the time the fee was paid. In this regard we are advised that it would probably be impossible for the Commission to ascertain whether any given registrant

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paid under protest. Hence the Chairman of SEC seeks our decision on the SEC's authority to refund the subject fees.

If the SEC, in accordance with the aforementioned Supreme Court decisions, determines that it has erroneously assessed the annual investment advisers fees, and if it has deposited those funds as miscellaneous receipts in the Treasury, it may initiate action to refund those moneys out of the permanent indefinite appropriation established by 31 U.S.C. § 725q–1 (1970). That section appropriates to the Treasury Department, out of any moneys not otherwise appropriated, such sum—to be known as a permanent indefinite appropriation— as may be necessary for the purpose of refunding moneys erroneously received and covered into the Treasury. There is nothing in that section which differentiates between funds received under protest and those received without protest. Moreover, as an equitable matter, when the Government has erroneously charged a fee, we see no reason to in effect penalize those who do not raise objections to payment of the fees to the charging agency. Hence, if the SEC desires, it may, in our view, refund the erroneously received and covered funds to all those who paid it.

The Chairman suggests that if a refund is authorized, the fees should be reclassified from the original receipt account to the SEC's deposit fund suspense account 50X6875. However, since in the instant situation the investment adviser fee was void *ab initio*, the procedure set forth in paragraph (2) of our circular letter of March 24, 1960, B–142380 (a copy of which is being sent to the Chairman of the SEC), to the heads of departments, independent establishments and others concerned, must be employed in the refund of the subject fees. See also Treasury Fiscal Requirements Manual, section 3070.10 (1973).

[B–183463]

Contracts—Negotiation—Reopening—Propriety—Auction Bidding Not Indicated

Various changes made to specification requirements and evaluation scheme after submission of initial best and final offers, resulting in additional calls for new best and final offers, does not indicate presence of "auction bidding" since record shows changes were based on legitimate Government needs which warranted reopening negotiations. Neither is auction indicated by fact that reduced price offered in revised best and final offers was not related to change, since offerors are free to revise proposals in any manner they deem appropriate once negotiations are reopened.

Contracts—Negotiation—Requests for Proposals—Protests Under—Favoritism Alleged—Evidence Lacking

Offeror's claim that agency showed favoritism toward other offeror by waiving certain specification requirements is not supported by record, which shows only that one specification requirement was relaxed and such relaxation accommodated both offerors.

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

Series of specification changes and requests for new best and final offers did not cause technical "leveling" of proposals, which refers to unfair practice of helping an offeror bring unacceptable proposal up to level of other adequate proposals through successive rounds of negotiations, since the only two proposals under consideration were both regarded as acceptable throughout testing and evaluation period and proposal which protester regards as having been brought up to level of its proposal was regarded by agency as superior proposal.

Contracts—Negotiation—Evaluation Factors—Factors Other Than Price—Technical Acceptability

Although cost was listed as the least important of four evaluation factors used in the evaluation of proposals leading to the award of fixed price contracts, protester's claim that cost was ignored by agency is incorrect, since cost was considered both in computation of numerical scoring and again in source selection process. Since negotiated procurement was involved, award may be made to technically superior offeror, notwithstanding that offeror's higher price.

Contracts—Negotiation—Evaluation Factors—Cost Analysis—Normalized Treatment

"Normalization" methodology used to compute dollar value of technical point spread between proposals did not conform to established relative weights and produced misleading result which could have affected source selection decision. Therefore, Comptroller General recommends that source selection decision be reconsidered on basis of appropriate computation.

Contracts—Negotiation—Prices—Reasonableness

Agency's failure to audit revised proposal is not objectionable, since contracting officer need not request audit when sufficient information is available to determine price reasonableness and determination that such information is available is not subject to question unless clearly erroneous.

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

Protester's claim that agency unduly restricted competition by seeking production proposals only from development contractors instead of conducting new competition is untimely, since under 4 C.F.R. 20.2(a) the issue should have been raised prior to the date set for receipt of proposals.

Contracts—Negotiation—Awards—Multi-Year Basis

Award of negotiated contract on multi-year basis when technical considerations rather than cost were primary factors for award was inappropriate since multi-year contracting method envisions award on basis of lowest evaluated unit price.

In the matter of the Bell Aerospace Company, September 23, 1975:

Bell Aerospace Company has protested against the award of production contracts to the Singer Company, Kearfott Division, for a Marine Remote Area Approach and Landing System (MRAALS). Bell claims that the conduct of the procurement, including the selection and application of evaluation factors, specification changes, and multiple requests for best and final offers was improper, resulted in "auction bidding," and reflected favoritism toward Singer. Bell

asserts that a proper evaluation would result in award to Bell as the technically superior and lower priced offeror.

We have extensively examined the various matters raised by this protest and, as more fully discussed below, it is our conclusion that, for the most part, the record does not support the allegations made by Bell. However, it appears to us that a cost normalization technique used by the Navy to determine the dollar value of the superior rated proposal produced a misleading result which could have influenced the source selection decision. For that reason, we are recommending that the Navy reconsider its selection decision on the basis of the views expressed herein.

The MRAALS is a microwave beam approach and landing system which is intended to enable helicopters and other vertical takeoff and landing types of aircraft to land in remote areas under conditions of minimum visibility. It consists of a ground subsystem and an airborne subsystem. In 1972 the Naval Electronic Systems Command (NAVELEX) conducted a competitive procurement which resulted in the award of parallel development fixed price incentive contracts to Bell and to Singer, pursuant to which each contractor was to develop and furnish MRAALS ground and airborne subsystem test models. The contracts contained an option clause allowing the Government to award a production contract for the ground subsystem "to the successful Phase I contractor," as well as a requirement for the contractor to submit a proposal for the production of ground subsystem. Both contractors furnished the test models and production proposals in 1973. In November of that year, the contracts were modified to require the submission of a proposal for the production of the airborne subsystem, and to provide that evaluation of such proposals and any award made as a result thereof would be by the Naval Air Systems Command (NAVAIR). In January 1974 airborne subsystem proposals were submitted by both contractors.

Subsequently, NAVELEX conducted discussions with, and in June 1974, received best and final offers from the two contractors on the ground subsystem proposals. However, in December 1974, Bell and Singer were advised that each contractor's proposal for the subsystem was to be combined into a single proposal, that the evaluations of each subsystem would be weighted equally, that a single contractor would be selected for both subsystems, but that separate awards would still be made by NAVELEX and NAVAIR. Combined best and final offers for both subsystems were submitted in January 1975, and again in February after the Navy modified certain requirements. Technical and cost evaluation of the two final proposals resulted in a score of 921.8 for Singer and 851.5 for Bell, although the Bell price ($7,863,-

971 for the ground subsystem and $2,539,438 for the airborne subsystem) was lower than the Singer price ($8,492,932 for the ground subsystem and $4,414,000 for the airborne subsystem). On March 12, 1975, a firm, fixed price 2-year contract for the ground subsystem was awarded to Singer. Bell protested to this Office on March 19, 1975. In May 1975, NAVAIR awarded the airborne subsystem contract to Singer, notwithstanding the pendency of the Bell protest, upon a determination that delivery of the MRAALS would be "unduly delayed" if prompt award was not made.

We will first consider Bell's assertion that the Navy conducted an auction on this procurement. The Armed Services Procurement Regulation (ASPR) states that "Auction techniques are strictly prohibited; an example would be indicating to an offeror a price which must be met to obtain further consideration, or informing him that his price is not low in relation to another offeror." ASPR § 3-805.3 (c) (1974 ed.). Here, Bell does not assert that Singer was given a price it had to meet. Rather, Bell suggests that Singer was informed that its price was not low with respect to Bell's price and that the "auction bidding" is indicated by substantial changes in Government requirements which were used to justify calling for new best and final offers which in turn enabled Singer to lower its prices by amounts unrelated to those changes. In this regard, Bell has presented a detailed analysis of the various changes which purportedly shows that those changes were more illusory than of any real substance.

The question of whether an auction has been conducted through the reopening of negotiations and the submission of new best and final offers must be determined in the light of the particular circumstances of each case. 50 Comp. Gen. 619 (1971); B-173482, October 1, 1971. The fact that best and final offers are repeatedly requested by a contracting agency does not automatically establish the creation of an auction. See *Patty Precision Products Company*, B-182861, May 8, 1975, 75-1 CPD 286. Although, as suggested in the latter case, requests for new offers which are not based on substantial changes to existing solicitation provisions and requirements may indicate the possible existence of an auction, we "would not be justified in questioning the legality of a contract awarded where the solicitation has been modified * * * subsequent to * * * submission of best and final offers, unless such action is fraudulent, capricious, arbitrary, or is so grossly erroneous as to imply bad faith." B-173482, *supra*. Therefore, we must closely examine the revisions which led the Navy to request best and final offers on three occasions.

The first changes of which Bell complains were set forth in a NAVELEX letter dated December 6, 1974. It was this letter that required the submission of combined proposals and provided for the

equal weighting of the ground and airborne subsystem evaluations and the selection of a single contractor for both subsystems. The letter incorporated a new NAVAIR specification which controlled the design of the airborne subsystem. In addition, the letter updated the ground subsystem specification by incorporating changes which had been set forth in previous NAVELEX letters and by making "the following new changes:"

1. A split-site operation using two ground subsystems was established as a firm requirement. Previously, the capability for split-site operation was listed as an option.

2. A requirement for 252 air to ground TACAN channels was imposed.

3. The weight limitation of 80 pounds for the "Az/El and DME transmitting groups" was changed to 110 pounds. Bell argues that the requirement for split-site operation and 252 channels had previously been established by the NAVELEX letters, and that the weight change was merely a reflection of an existing contractual provision envisioning weights of over 80 pounds.

The record shows that between February and May 1974 NAVELEX sent Bell a series of letters which contained questions and specification changes which were to be discussed and which were to result in the submission of a best and final offer by June 10, 1974. These letters requested a priced option for a split-site system, and we agree that, standing alone, the conversion of that option to a firm requirement did not involve the type of change necessitating a new call for best and final offers. Neither, in our opinion, did the imposition of the 252 channel requirement. Although it is not clear that the requirement was established by these letters (on the one hand, Bell believes the existing specifications encompassed it; on the other hand, while a May 1, 1974, NAVELEX letter stated "A minimum of 252 TACAN (X-Y) operating channels * * * is required and shall be usable with AN/ARN-84 TACAN equipped aircraft," a subsequent letter dated May 31, 1974, changed the provision to "the MRAALS Ground Subsystem shall be capable of 'Inverse' TACAN operation based on the AN/ARN-84."), it appears that the June 1974 best and final offers from both Bell and Singer were based on the 252 channel requirement.

However, we think the weight limitation did involve a material change. Although Bell refers to a contract clause which provided for a penalty of $2,000 per pound (up to a maximum of $40,000) for each pound by which the ground subsystem exceeded 80 pounds as sufficient contractual authority for the offerors to furnish subsystems weighing more than 80 pounds, we believe that the relaxing of the desired weight limitation from 80 pounds to 110 pounds, thereby eliminating the penalty, is a substantial change from the initial requirements. See

B–171349, November 17, 1971. In this regard, we note that the weights of the Bell and Singer models were 88 and 98 pounds, respectively, and that the Navy reports that both contractors' subsystems required changes which would increase the weight of the production units. Thus, while it appears that the change in weight limitation was made to accommodate the two competing designs, the relaxation of the weight ceiling to 110 pounds conceivably could have provided Bell and Singer more flexibility in designing their subsystems which could have impacted on cost. Under these circumstances, we think it was reasonable for the Navy to view the weight change as warranting a call for revised proposals. *See* ASPR § 3–805.4.

In addition, we think it is clear that adoption of the revised evaluation scheme made it incumbent upon the Navy to give Bell and Singer an opportunity to submit revised proposals. We have repeatedly stated that offerors should be informed of each evaluation factor and its relative importance so that both the procuring activity and the responding offerors may be on common ground with respect to an understanding of the basis for selection for award. See *AEL Service Corporation, et. al.*, 53 Comp. Gen. 800 (1974), 74–1 CPD 217, and cases cited therein. The requirement to so inform offerors is now contained in ASPR § 3–501(b) Sec. D. Thus, once the Navy decided to depart from its original procurement plan of awarding a contract only for the ground subsystem and instead award contracts to a single contractor on the basis of separate evaluations of equally weighted ground and airborne subsystem proposals, it was required to so notify the two offerors and provide them with an opportunity to submit revised proposals on the basis of the newly adopted evaluation plan. Therefore, we believe that the December 6, 1974, call for best and final offers was based on substantial changes and cannot be viewed as improper in that regard.

The next call for best and finals came in a NAVELEX letter dated February 3, 1975. That letter made two changes to the specified requirements: the conduct of a test required by the airborne subsystem specification was changed from no stated test level to test level F, and a data requirement for engineering drawings was deleted and replaced by an option item at a price to be negotiated. The letter stated that the basis for the second change "is that this procurement covers all known Navy/Marine Corps requirements. In the event a requirement for reprocurement by another Government activity emerges during the course of this contract, the option may be negotiated at that time."

Bell states that the change to test level F was not significant because it "did not increase the required test time, but "added only temperature cycling." However, Bell's own submission to this Office of May 30, 1975, indicates that Bell increased its total price for the airborne sub-

system by $10,652 because of the "increase in severity of testing." Thus, this change alone could reasonably be viewed as warranting another call for best and final offers. In addition, we believe that the elimination of the requirement for engineering drawings must be regarded as a substantial change. Bell's price for the drawings was nearly $45,000; Singer's price was in excess of $1 million. In B–173482, *supra*, we stated that an agency's decision to reopen negotiations on the basis of an *additional* requirement for manufacturer's drawings, which resulted in proposal price increases of $22,000 by one offeror and $175,000 by another, could not be regarded as arbitrary. Similarly, we would not view a call for best and finals on the basis of a *deletion* of the drawing requirements as unreasonable. Accordingly, we must conclude that the Navy had a proper basis for requesting new best and final offers on December 6, 1974, and February 3, 1975.

With respect to the alleged auction, however, we must also consider Bell's claim that successive Singer price reductions and the deletion of the engineering drawing requirement are "evidence" of "auction bidding," the latter apparently because the Singer price for the drawings was vastly higher than Bell's price. The record shows that during cost analysis of the proposals, "it was noted that a discrepancy existed" in the offered prices for the engineering drawings. This discrepancy was the "apparent disparity" between Bell's price of $44,701 for the drawings and Singer's price of $1,069,673. As a result, a review was made by a Data Review Board which found "no apparent intended use" for the drawings and directed the removal of that requirement. The removal and subsequent reduction of Singer's price is what Bell regards as evidence that Singer was informed that its price was high in relation to Bell's price.

While it is clear that deletion of the requirement for the drawings would probably result in the lowering of Singer's proposal price substantially more than the lowering of Bell's price, the facts of record do not establish that Singer was told that its price was too high *vis-a vis* Bell's price or that Singer attempted to meet Bell's price. In this regard, we note that Singer, in response to the deletion of the data requirement, did not lower its price by $1,069,673. Instead, in its proposal dated February 5, 1975, it included a new item identified as "non recurring Re-design and Drafting" at a price in excess of $52,000 and offered a total price for the ground subsystem that was only $617,000 less than its previously offered price. This left Singer's ground subsystem price more than $622,000 higher than Bell's previous offer.

It is true, as Bell points out, that Singer did lower its prices each time it submitted a new best and final offer and that these decreases do not appear to be directly related to the changes which resulted in calls for new offers. For example, Singer lowered its price for the

airborne subsystem by $176,000 in its February 5th offer even though the only change affecting the airborne subsystem involved the increase in testing level, a change which caused Bell to increase its price. However, once negotiations were properly reopened and new best and finals were requested, both Singer and Bell were free to revise their proposals, including price, in any manner they deemed appropriate, and we will not speculate on the reasons why Singer chose to reduce its price. B–173482, *supra; see also* B–177758, July 13, 1973 and B–174947, August 30, 1972. We have noted, however, that "it is not uncommon for offerors to offer substantial price reductions in the final stages of negotiations, even without changes in the Government's requirements." *Global Graphics, Inc.*, 54 Comp. Gen. 84, 87 (1974), 74–2 CPD 73. We also note here that Singer's February 5th price proposal for the airborne subsystem represented not only an overall reduction in price, but also a significant restructuring of the various item prices that make up the bottom line figure. The evidence of record does not establish that this restructuring and accompanying price reduction were the result of auction techniques.

Accordingly, in view of the record that has been presented, we cannot conclude that the award to Singer was the result of an auction.

Bell also contends that the Navy demonstrated favoritism toward Singer by waiving various specification requirements. Bell states that the waivers were accomplished through modifications and deletions which had the effect of technically "leveling" the two competing proposals. These modifications involved the imposition of a firm requirement for 252 channels; the deletion of a requirement for the azimuth/elevation guidance station identification coding technique to be identical to the AN/TRN–28A system; allowing the use of the AN/ARN–84 TACAN; and changing the weight limitation to 110 pounds. In addition, Bell claims that these first three changes also constituted a waiver to a ground subsystem specification requirement that the production unit be identical to the service test model.

We will consider each of these modifications in turn:

1. *252 channels.* Singer's test model was designed to operate with 20 channels, but Singer's June 1974 best and final offer was based on the Navy's obvious desire for a 252 channel operation. If Bell is correct in its assertion that this was an original specification requirement (our record is not dispositive of this point), then it would appear that the Navy during negotiations insisted upon Singer's compliance with it. If the requirement was not added until after Singer delivered its test model, then the new requirement would appear to have placed an additional burden on Singer. In either event, we fail to see how the Navy "waived" this requirement for Singer.

2. *Identicality with AN/TRN-28A system.* Bell states that Singer did not comply with this original specification requirement. The Navy states that the modification, which changed a mandatory provision to a permissive one, was made "to clarify the Government's actual intent which had not been reflected in the original requirements." This may well have been of benefit to Singer. However, the record does not establish that the change was not also made to reflect actual Government requirements, and we therefore cannot object to the change merely because it may have been beneficial to Singer.

3. *TACAN.* The Bell system is designed around the AN/ARN-52 TACAN, while the Singer system is based on the AN/ARN-84 TACAN. The original solicitation did not contain an explicit requirement that the MRAALS be compatible with a particular TACAN, but did indicate that the Navy intended to equip 1000 aircraft with the MRAALS airborne subsystem and that all of those 1000 aircraft were currently equipped with the AN/ARN-52. Nevertheless, Singer, according to the Navy, based its successful 1972 proposal on the use of the AN/ARN-84. In addition, after the test models and production proposals had been furnished, NAVAIR, by letter dated April 8, 1974, informed NAVELEX that "The TACANS presently installed and/or to be installed in the helicopter scheduled for MRAALS are the AN/ARN-52 and AN/ARN-84. The MRAALS requirement should state that both MRAALS systems should be compatible with either TACAN aircraft installation." This was followed by the NAVELEX letters of May 1 and 31, 1974, to both offerors, which, as mentioned above, indicated that the MRAALS would have to be "usable with" or based on AN/ARN-84 TACAN equipped aircraft. Ultimately, the updated ground subsystem specification transmitted with the Navy's December 6, 1974, letter included the statement that "Compatibility with existing airborne components of C-SCAN * * * and TACAN (Radio Sets AN/ARN-52 or AN/ARN-84), or both is required."

Bell contends that the Navy actually needs a MRAALS that is compatible with the AN/ARN-52, that Singer's failure to produce such a system precluded the Navy's cross-testing of Singer's ground subsystem, and that the Navy's willingness to accept the Singer MRAALS without such testing and the specification change which explicitly permitted compatibility with either the AN/ARN-52 or AN/ARN-84 reflect nothing but bias in favor of Singer.

The record does not indicate why the Navy in 1972 accepted Singer's proposal to furnish a MRAALS based on the use of the AN/ARN-84. The Navy report furnished in this case states only that "There is currently within the Navy a directive to include ARN-84 TACAN

sets in those aircraft programmed for MRAALS." It is also our understanding that the Navy hoped to have AN/ARN-84 TACANS in use in the aircraft by the time the MRAALS would be installed. However, in an interim report dated September 10, 1974, from the Commanding General of the Marine Corps Development and Education Command to the Commandant of the Marine Corps, it was stated that while "it is anticipated that at some future date all the AN/ARN-52's will be replaced by AN/ARN-84's, it is inevitable that MRAALS will be exposed to AN/ARN-52's." If that is the case, it would appear that what the Navy needs is a MRAALS that will function effectively with both TACAN sets.

In this regard, we are informed by the Navy that, notwithstanding the ground subsystem specification change which appeared to permit compatibility with either TACAN, the Navy interprets the overall specification as requiring system compatibility with both TACANs, and that this was made clear to both Bell and Singer during negotiations. We further understand that in its best and final offers Singer did propose to furnish a system that would be compatible with both TACANs, but that the proposal did not provide details on this point. As a result, the Singer proposal was scored lower in this area than it might have been because, in the view of the Navy's evaluators, "degraded DME/PDME operation with the ARN-52 is expected." The Bell system, on the other hand, was regarded favorably in this area because of its high compatibility with the two TACANs.

We do not see how these circumstances indicate a waiver of requirements in favor of Singer. Rather, it appears that a requirement was imposed upon Singer which was not originally contemplated by that company, and that Singer was penalized in the technical evaluation because it did not demonstrate in detail in its proposal how it would comply with that requirement. The fact that the Navy relied on analyses and projections, rather than direct testing, to determine the likelihood of acceptable (although "degraded") performance by the Singer system with the ARN-52 TACAN does not, in our view, indicate favoritism to Singer, since the extent to which testing is required is a matter of judgment for agency technical personnel. See *Hoffman Electronics Corporation*, 54 Comp. Gen. 1107 (1975), 75-1 CPD 395, and cases cited therein. Under the circumstances, we cannot say that the Navy acted unreasonably in not requiring actual testing.

4. *Weight.* As discussed above, the weight change appears to have been made to accommodate both contractors' systems since both ground subsystem test models weighed more than the initially specified 80 pounds. Bell's assertion that this specification modification favored Singer therefore apparently stems from the fact that the

Singer unit, which weighed 98 pounds, exceeded the 80 pound limitation by more than the Bell unit, which weighed 88 pounds. Under these circumstances, we could agree with Bell only if it were shown that the Government's actual needs permitted relaxation of the weight ceiling only to a level which would accommodate the Bell unit but not the Singer unit. Since there has been no such showing, we cannot say that the Navy's decision to keep both contractors' systems under consideration by tolerating a subsystem weight up to 30 pounds over the initial limit was the result of bias in favor of one of those contractors.

With regard to the requirement of identicality between the ground subsystem service test model and production units, the development contracts required Singer and Bell to show in their production proposals how that identicality would be achieved. The record indicates that as a result of testing conducted with the models, both contractors proposed to make certain changes and both proposals were evaluated on the basis of these changes. As a result, the ratings in the evaluation category that included identicality reflected the fact that neither contractor would achieve full identicality. We fail to see how this is indicative of a waiver solely in favor of Singer.

Finally, we do not agree that the Navy's actions here caused a technical leveling of the Bell and Singer proposals. Leveling refers to the "unfair" practice of helping an offeror "through successive rounds of discussions to bring his original inadequate proposal up to the level of other adequate proposals by pointing out those weaknesses which were the result of his own lack of diligence, competence, or inventiveness in preparing his proposal." 51 Comp. Gen. 621, 622 (1972). Clearly, that is not what happened here. The record indicates that both the Bell and Singer proposals were considered generally acceptable throughout the testing and evaluation period; that there were deficiencies and other problems associated with both contractors' test models; that proposal changes were made after these areas were pointed out by the Navy; and that after these changes were made the Singer system was regarded as overall technically superior. Thus, it cannot be said that the modifications that were subsequently made to the MRAALS specifications had the effect of helping Singer bring its proposal up to the level of Bell's proposal.

We next consider Bell's claim that the Navy did not properly evaluate the technical and cost elements of its proposal. Bell believes that the technical evaluation included the results of Government testing with the airborne subsystem "in clear violation of the evaluation criteria" and that the cost evaluation was faulty because of the low weight given to cost as an evaluation factor and because of the cost normalization technique used by the Navy.

The development contracts stated that "award will be made to the Contractor whose proposal and Phase I accomplishments are the most advantageous to the Government and offer the highest potential for successfully carrying out the program including primarily excellence of approach, test results, together with management plan, personnel, and other factors as well as cost." The contracts then set forth, in decreasing order of importance, the evaluation areas of technical, logistics, contractual and management, and cost. In the technical area, the criteria for the ground subsystem included the results of all contractor and Government tests, while the criteria for the airborne subsystem referred only to "Results of all Contractor tests."

Bell's concern that the results of Government testing of the airborne subsystems were considered in the evaluation apparently reflects the fact that Bell's airborne subsystem model, while consistent with what was contractually required, was more basic than the Singer airborne test model. However, the Navy reports that the test results "were used primarily to develop a more definitive airborne specification," and only "enter(ed) into the evaluation process as a basis for establishing credibility of the Phase II production proposals."

The record supports the Navy's statements. The report of the MRAALS Marine Corps Division Evaluation Board (MCDEB) indicates that the Board, in evaluating the airborne subsystems, did not score the results of *any* testing. However, Bell's proposal was regarded as weak because it did not convincingly establish that Bell could produce the system in accordance with the desired schedule in light of the changes that had to be made to its airborne subsystem. This was reflected in the lower scores Bell received in the technical criterion "Identification of any remaining risk areas and/or areas requiring special attention with proposed solution/recommendations" and the contractual and management criterion of "Proposed Milestones and Realism." Thus, we do not conclude that the Navy improperly considered the results of Government testing in the evaluation of proposals. We do note that the Navy's failure to evaluate the results of contractor testing of the airborne subsystem was contrary to the stated evaluation criteria. However, since Bell has not objected to this aspect of the evaluation and since it does not appear from the record that an evaluation of contractor testing would have had a material effect on the Navy's selection of a production contractor, we do not consider that the awards may be upset on this basis. *E. G. & G. Incorporated*, B–182566, April 10, 1975, 75–1 CPD 221; *Training Corporation of America*, B–181539, December 13, 1974, 74–2 CPD 337.

Bell's complaint concerning the weight given to cost in this procurement is twofold. First, Bell claims that the Navy lowered the weight

originally assigned to the cost factor as a "conscious manipulation of the evaluation factor" designed to favor Singer. Second, Bell asserts that the decreased weight rendered cost virtually meaningless as an evaluation factor despite the established criteria set forth in the development contracts and despite various decisions of our Office holding that cost cannot be ignored in the awarding of contracts.

The record indicates that under the scoring system used by the Navy, the maximum weighted scores that could be awarded for each subsystem were 360 for technical, 220 for logistics, and 150 for contractual and management. A December 1974 NAVELEX memo established a maximum raw score of 50 for cost which was to be given a weight of 10 for a maximum weighted score of 500. In February 1975 the Navy recognized that this would establish cost as the most important single evaluation factor, although criteria established for the procurement identified cost as the least important element of the evaluation. The Navy therefore determined that a "typographical error" was made in the NAVELEX memo which, when corrected, established a weight of 1 and a maximum weighted score of 50 for cost.

The record does not establish whether the Navy's error was in fact a typographical one. Nevertheless, it is clear that the original weight assigned to cost was inconsistent with the relative weights of the evaluation factors set forth in the contracts, and that the Navy's actions were taken to conform the evaluation with the stated criteria. Although the Navy could have conformed to those criteria by assigning any weight of less than 3 to cost (e.g., a weight of 2.5 applied to the maximum score of 50 would produce a weighted score of 125, less than the 150 points possible under contractual and management), it does not appear that such a higher weight, when applied to the raw scores given to Bell's subsystems, would have changed the ultimate result. Accordingly, we cannot agree that the Navy "manipulated" the cost weight from 10 to 1 in order to benefit Singer.

Bell correctly states that cost cannot be ignored by an agency in the contractor selection process. *See* 51 Comp. Gen. 153, 161 (1971) and 50 *id.* 110 (1970). However, Bell is not correct in asserting that it is entitled to the awards merely because it submitted an acceptable offer at the lowest price. In a negotiated procurement, cost need not be the controlling factor and award may be made to a higher-priced, higher-rated offeror. 52 Comp. Gen. 198, 211 (1972); 50 *id.* 110, 113, *supra; Stephen J. Hall & Associates, et al.*, B–180440, B–132740, July 10, 1974, 74–2 CPD 17. But, "if a lower priced, lower scored offer meets the Government's needs, acceptance of a higher priced, higher scored offer should be supported by a specific determination that the technical superiority of the higher priced offer warrants the additional cost

involved in the award of a contract to that offeror." 51 Comp. Gen. 153, 161, *supra.* This determination must be in addition to any point scores which reflect cost, since we do not believe "that, where a fixed-price contract is contemplated, the use for evaluation purposes of a numerical rating in which cost to the Government is assigned points along with other factors in itself justifies acceptance of the offer with the highest number of points without regard to price." 51 Comp. Gen. at 161, *supra.*

We think the record establishes that the Navy did consider cost in this procurement and that its consideration was consistent with the views expressed above. The evaluation factors clearly indicated that cost would be considered, although as the least important of the four evaluation areas. Under the weighting system used by the Navy, cost represented approximately 6.4 percent of the numerical ratings, while technical, logistics, and contractual and management counted for approximately 46.2 percent, 28.2 percent, and 19.2 percent, respectively. Although cost was thus significantly less important in the numerical scoring than the other factors, it appears that cost was also considered separately from the numerical ratings in the final selection process by the Marine Corps Division Advisory Council (MCDAC), which after reviewing the Evaluation Board's report, recommended award to Singer after specifically considering the cost difference between the two contractors' proposals and concluding that acceptance of Singer's proposal would be more advantageous to the Government. Accordingly, we believe cost was given appropriate consideration and that, in this regard, this case is not significantly different from many others in which award of a fixed-price contract was made to a higher-priced but technically superior offeror. See *Applied Systems Corporation*, B–181696, October 8, 1974, 74–2 CPD 195; *Sperry Rand Corporation, Univac Division*, B–179875, September 12, 1974, 74–2 CPD 158; *Stephen J. Hall & Associates, et al., supra; Radiation Systems Incorporated*, B–180018, June 12, 1974, 74–1 CPD 322; *NHA Housing, Inc.*, B–179196, April 24, 1974, 74–1 CPD 211.

We do have some question, however, about the methodology used by the MCDEB to normalize point scores. Through this "normalization" process, a dollar value was assigned to the point spread between the Bell proposal and the higher rated Singer proposal in each of the evaluation areas of technical and logistics. Using these dollar values, the Navy decided that there were value advantages to the higher priced Singer proposal which, in effect, made Singer's ground subsystem proposal the most advantageous offer from a cost as well as a technical viewpoint.

It appears to us that the MCDEB's method for computing the dollar value of the point spreads produced a misleading indication regarding

the value of Singer's proposal. The MCDEB started with the difference in scores received by Bell and Singer in the technical and logistics areas, and then computed for each area the percentage of the maximum possible points represented by that difference. The following table sets forth the figures used by the MCDEB for the ground subsystem.

	Numerical score				Percent of
	Bell	Singer	Maximum	Difference	maximum
Technical	196. 5	209. 9	360	13. 4	3. 72
Logistics	105. 5	127	220	21. 5	9. 773

The Board then applied those percentages to the Navy's $100,000 estimated unit price for the subsystem, which resulted in a finding that Singer's higher scores were worth $13,493 ($3,720 for technical plus $9,773 for logistics). The MCDAC added this $13,493 to Bell's lower unit price of $97,086.06 and concluded that since the $110,579.06 total was $5,728.05 more than the Singer unit price of $104,851.01, Singer's proposal for the ground subsystem "provides the Government with a net unit savings of $5,728.05." (The scores for the airborne subsystem proposals were also normalized in this fashion based on the estimated unit price of $40,000, but the MCDAC did not compute any "net unit savings" for this subsystem.)

Our doubts arise from the Navy's use of cumulative dollar figures which were computed separately for each of two evaluation factors. Under this methodology, the cumulative dollar value of a superior proposal would depend upon the number of individual evaluation factors used in the normalization process, i.e., the higher the number of evaluation factors used, the higher the computed cumulative dollar value (assuming a higher numerical score for the superior offeror for each of the factors). For example, in the instant case, had the Navy also considered contractual and management, the third non-cost evaluation factor used to determine numerical ratings (the record is silent as to why it did not), the value advantage of the Singer proposal would have been the total of $3,720 plus $9,773, and whatever dollar value would have been computed for this third evaluation area. In a more extreme case, the use of many non-cost evaluation factors utilized in this kind of normalization process would produce a value advantage in total dollars that could approach the proposed cost of what is being purchased. We question the effectiveness of this type of computation.

In addition, the methodology used does not necessarily conform to established relative weights, and in fact did not in this case. As shown above, the difference for the technical evaluation area was figured on a base of 360 while the difference for the logistics area was figured on a base of only 220. Therefore, identical point differences in both

areas would necessarily result in a higher value for the point spread in the logistics area. Thus, even though technical was supposed to be the most important evaluation area, under the Navy's cost normalization method an offeror's point superiority in the logistics area would be worth more than the same point superiority in the technical area. As a result, the dollar value assigned for the point spread for logistics was inflated *vis-a-vis* the value assigned for the technical point spread. This, in our view, necessarily distorted the relative values of the proposals.

Quantifying technical point scores in terms of dollar advantage is a recognized method for determining the proposal most advantageous to the Government in terms of mix of cost and quality. For example, in the turnkey housing area, cost/quality ratios are computed on the basis of proposed price and total technical points awarded. See *TGI Construction Corporation, et al.*, 54 Comp. Gen. 775 (1975), 75-1 CPD 167; *NHA Housing, Inc., supra.* Those ratios preserve the relative weights of the various technical evaluation factors and avoid the problems inherent in what the Navy did here. A similar result could have been attained in this case had the Navy, while utilizing its particular normalization technique, computed the dollar advantage of the superior proposal on the *totals* for the evaluation areas to be utilized rather than the aggregate of separate computations made for each area. Such a computation would result in the following:

	Numerical score				Percent of
	Bell	Singer	Maximum	Difference	maximum
Technical	196. 5	209. 9	360	13. 4	
Logistics	105. 5	127	220	21. 5	
Totals	302. 0	336. 9	580	34. 0	6. 017

As thus computed, the value advantage in dollars of the Singer proposal for the ground subsystem would be 6.017 percent of $100,000, or $6,017. Had this figure been used by the MCDAC in place of $13,493, Bell's price would have been regarded as resulting in a "net unit savings" of $1,747.95 (Bell price of $97,086.06 plus $6,017 equals $103,103.06; the difference between that and the Singer price of $104,851.01 is $1,747.45).

We do not mean to suggest that the Navy had to compute the dollar value advantage of the technical superiority of the Singer proposal in this way. Although, as stated, this type of computation would preserve the relative weights of the non-cost evaluation categories with respect to each other, we recognize that it would have the effect of weighting cost as the full equivalent of the non-cost categories. The record does not indicate whether the Navy in performing this "nor-

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malization," intended such a result. It may well be that the Navy would regard as more appropriate a "normalization" method that would not so equalize non-cost factors, but would preserve the relative weights of technical and logistics with respect to cost. For example, under such computation, the dollar value of the Singer proposal would still retain the $3,720 advantage for technical superiority; however, the $9,773 figure for logistics would be scaled down approximately 38.9 percent to $5,973 (the amount by which logistics is weighted less than technical) to reflect the relative lower weight given to that category. Thus, the value of the Singer proposal would be $9,693 ($3,720 plus $5,973), and this, when added to Bell's lower unit price of $97,086, would total $106,779, compared to Singer's unit price of $104,851. Thus, such a computation would not show a "net unit savings" for Bell, but rather would suggest a slight advantage to the Singer proposal.

The record shows that the source selection official based his decision on the recommendation of the MCDAC, which reported a value advantage of the Singer proposal on the basis of the cost normalization computation. Had the source selection official been advised of the results of a more appropriate computation as suggested above, he might not have made the decision he did. However, on the basis of the record, we cannot say that the source selection authority would have selected Bell for contract award. As indicated, a reasonable computation pursuant to the "normalization" approach used here could show a "net unit savings" for either the Bell or Singer proposal, depending upon the value *vis-a-vis* cost that the Navy determines each evaluation factor differential should have. In addition, even if a proper computation revealed a "net unit saving" for Bell, we would not regard that as mandating award to Bell. We have stated that numerical scores are useful as guides for intelligent decision-making, but that they are not controlling in the selection process. 52 Comp. Gen. 686 (1973). Similarly, we think that the results of any dollar value computation of the type done here would not have automatically dictated the selection of a contractor. We have also recognized that source selection officials are not required to follow the recommendations made to them by evaluation and advisory groups. 51 Comp. Gen. 272 (1971). Here, in addition to the discussion of relative values of the two proposals which was based on what we regard as an improper computation, the MCDAC report states:

* * * there is no near "excellent" or better offer but two "acceptable" with one of those bordering on "marginal." While the process of evaluation, in accordance with the approved criteria, indicates an obvious superiority of the Singer system it should also be noted that this difference has prevailed throughout the development of MRAALS. Specifically, the Singer system has performed better and exhibited fewer technical problems than the Bell System. Also, any technical corrections required during testing of development models and evaluation of the production proposals have not been directed by the Government but left

to the option of the offerors. In every case the technical design changes offered by Singer have been more acceptable and of less risk than those offered by Bell. * * *

This suggests that the Navy's selection official could have reasonably determined that acceptance of the Singer proposal would be more advantageous to the Government notwithstanding Singer's higher cost and a dollar value computation in Bell's favor.

In any event, this is not a matter for decision by this Office, but rather for the source selection official, who must weigh the various factors involved. "Our role is to test the reasonableness of the result." *Lockheed Propulsion Company; Thiokol Corporation*, 53 Comp. Gen. 977, 1051 (1974), 74–1 CPD 339; see also *Dynalectron Corporation et al.*, 54 Comp. Gen. 562 (1975), 75–1 CPD 17. Therefore, in view of our conclusions regarding the misleading result of the cost normalization computation utilized, we are advising the Secretary of the Navy, by separate letter of this date, that the circumstances warrant a new normalization computation and a reconsideration of the source selection decision in light of the views expressed above.

Two other issues have been raised by Bell, both regarding the airborne subsystem proposals. One concerns the Navy's failure to perform an audit; the other concerns allegedly restrictive competition for procurement of the airborne subsystem.

Bell asserts that a cost analysis was performed on the ground subsystem proposals, but not on the airborne subsystem proposals. Bell contends that this "denied Bell the right to fully and fairly compete and have its proposal fairly evaluated." ASPR § 3–807.2(a) states that "Some form of price or cost analysis is required in connection with every negotiated procurement action. The method and degree of analysis, however, is dependent on the facts surrounding the particular procurement and pricing situation." ASPR § 3–801.5(b)(1) provides that the contracting officer need not request an audit review if information "already available * * * is adequate to determine the reasonableness of the proposed cost or price." We have held that under such a provision there need not be an audit of proposals "submitted on each and every round of a negotiated procurement." 50 Comp. Gen. 418, 424 (1970). We have further held that "whether or not 'already available' information is 'adequate' is a matter primarily within the discretion of the procuring activity, which will not be questioned by our Office unless shown to be clearly erroneous." 50 Comp. Gen. at 424. There has been no such showing in this case.

Bell also states that once the Navy decided to procure the airborne subsystem, it unduly restricted competition by considering offers only from Bell and Singer instead of conducting a new competition. Bell overlooks the fact, however, that only Bell and Singer, as the development contractors, were in a position to furnish both MRAALS sub-

systems. See *Hoffman Electronics Corporation, supra.* In any event, Bell's assertion in this regard is untimely, since this point should have been protested prior to the date for submission of offers to furnish the airborne subsystem. *See* 4 C.F.R. § 20.2(a) (1975).

Although this point has not been questioned by Bell, we note that the contract awarded by NAVELEX was on a multi-year basis. ASPR § 1–322.2(b) provides that when multi-year procurement is used formal advertising is the preferred method of procurement. Further, ASPR § 1–322.4(a) provides that multi-year awards are to be made on the basis of lowest evaluated unit price except in situations not applicable here. *See* 50 Comp. Gen. 788 (1971). We believe that award on a multi-year basis is inappropriate for the type of procurement conducted here since multi-year does not envision award primarily on the basis of technical considerations. We are calling this matter to the attention of the Secretary of the Navy.

[B–184233]

Contracts—Labor Stipulations—Nondiscrimination—"Affirmative Action Programs"—Grants-in-Aid

Bidder who fails to submit, prior to bid opening, affirmative action plan under Part II of Bid Conditions, but who has properly executed and submitted Part I certification wherein bidder "will be bound by the provisions of Part II" for listed appropriate trades to be used in the work, has submitted responsive bid; that pages of Part II were not submitted with bid is of no consequence. Bids containing no Part I or Part II documentation were nonresponsive. Recommendation is made that grantor agency, which concluded that all bids were nonresponsive, advise grantee to award contract to bidder who submitted Part I certification.

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

There is no basis to conclude that bidders were unreasonably misled as to affirmative action requirements clearly set forth which were included in invitation for bids containing bidders' schedules, provisions, conditions, drawings and specifications, rather than with separate bid packet. Requirements clearly advised that, unless proper documentation was submitted, bid would be considered nonresponsive.

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

That bidder has affirmative action plan filed elsewhere or has agreed to accept standard equal opportunity clause of an invitation does not create the required binding obligation to the affirmative action requirements of present invitation.

In the matter of the O. C. Holmes Corporation, September 23, 1975:

Invitation for bids No. 1–7018/002–7 CSWP was issued on May 20, 1975, by the Sonoma County (California) Water Agency for channel improvement of a portion of the Central Sonoma Watershed Project.

Substantial financial assistance utilizing grant funds is being provided by the Soil Conservation Service, United States Department of Agriculture, under the Watershed Protection and Flood Prevention Act, 16 U.S. Code § 1001, *et seq.* (1970).

Five bids were received and opened. The O. C. Holmes Corporation (Holmes) objects to any award to the low bidder, the Piombo Corporation, inasmuch as the latter did not include with its bid the pertinent documentation required by the bid conditions containing the affirmative action requirements of the invitation. Part III of those requirements states that "Failure to submit a Part I certification or a Part II affirmative action plan, as applicable, will render the bid nonresponsive." Holmes, the only bidder to submit any documentation under the requirements, a Part I certification, believes that, as second low bidder, it should receive the contract award.

The Soil Conservation Service believes that all bidders who did not submit the proper affirmative action documentation with their bids prior to bid opening—the Piombo Corporation submitted a Part I certification after bid opening—submitted nonresponsive bids. The Service believes the Holmes bid is also nonresponsive since the unions Holmes proposes to employ are not signatory to the Hometown Plan with which the affirmative action requirements call for compliance, and no affirmative action plan was submitted by Holmes under Part II. In view of this, the Soil Conservation Service concludes that all bids should be considered nonresponsive and the requirement readvertised. The contracting officer believes that the low bidder's failure to submit the necessary documentation until after bid opening may be waived as a minor informality, and has asked concurrence of the Soil Conservation Service to award the contract to Piombo.

We have recognized that under contracts made by grantees of Federal funds, the Federal Government is not a party to the resulting contract. However, the cognizant Federal agency has the responsibility to determine whether there has been compliance with the applicable statutory requirements, agency regulations, and grant terms, including a requirement for competitive bidding. In such cases we have assumed jurisdiction in order to advise the agency whether the requirements for competive bidding have been met. *Thomas Construction Company, Incorporated, et al.*, 55 Comp. Gen. 139 (1975), 75-2 CPD 101; 52 Comp. Gen. 874 (1973).

In the case of *Illinois Equal Employment Opportunity regulations for public contracts*, 54 Comp. Gen. 6 (1974), 74-2 CPD 1, we made the following statement with respect to the applicability of basic principles of Federal procurement law to awards by grantees:

* * * * * * *

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*. * * *

In our view, these principles apply to this situation. The Project Agreement (containing the terms and conditions of the grant) provided that the invitation shall include Soil Conservation Service requirements and that the Sonoma County Water Agency shall receive, protect and open bids and make award to the lowest qualified bidder, with written concurrence from the Service.

The pertinent portions of the affirmative action requirements in the bid conditions read, as follows:

For all Federal and Federally-Assisted Construction Contracts to be Awarded in Solano, Napa, Lake, Marin, Mendocino and Sonoma Counties, California.

Part I: The provisions of this Part I apply to bidders, contractors and subcontractors with respect to those construction trades for which they are parties to collective bargaining agreements with a labor organization or organizations and who together with such labor organization(s) have agreed to the Tripartite Agreement for Equal Employment of Minorities in the Construction Industry for Solano, Napa, Lake, Marin, Mendocino and Sonoma Counties, California (but only as to those trades for which there are commitments by labor organizations to specific goals of minority manpower utilization) together with all implementing agreements that have been and may hereinafter be developed pursuant thereto, all of which documents are incorporated herein by reference and are hereinafter cumulatively referred to as The North Bay Plan or The Plan.

Any bidder, contractor or subcontractor using one or more trades of construction employees must comply with either Part I or Part II of these Bid Conditions as to each such trade. Thus, a bidder, contractor or subcontractor may be in compliance with these conditions by its inclusion, and participation, together with its union, in the Plan, as to trade "A," thereby meeting the provisions of this Part I, and by its commitment to Part II in regard to trade "B" in the instance in which it is not included in the Plan and, therefore, cannot meet the provisions of this Part I.

To be eligible for award of a contract under this Invitation for Bids, a bidder who, together with the labor organizations with whom it has collective bargaining agreements, is signatory, either individually or through an association, to the Plan must execute and submit as part of its bid the following certification, which will be deemed a part of the resulting contract:

"_____ certifies that:
(Name of bidder)

(a) it intends to use the following listed construction trades in the work under the contract, either itself or through subcontractors at any tier _____
_____
_____.

(b) the labor organizations with whom it has collective bargaining agreements who are signatories to the Tripartite Agreement for Solano, Napa, Lake, Marin, Mendocino and Sonoma Counties, California (hereinafter the Plan) are as follows: _____
_____
_____

(c) the labor organizations with whom it has collective bargaining agreements who are *not* signatories to the Plan are as follows: _____
_____
_____
(d) the following is a full list of all present construction work or contracts to which it is a party in any capacity in the counties, to which the Plan is applicable: _____
_____
_____;
(e) it will comply, and require its subcontractors to comply, with all of the terms of the Plan on all work (both federal and non-federal) in the counties indicated in the preceding paragraph (d) above, with respect to any trade as set forth in paragraph (b) hereof for which it or its subcontractors are committed to the Plan and will be bound by the provisions of Part II of these Bid Conditions on all work in such counties for all other trades as set forth in paragraph (c) hereof; and (f) in the event the bidder is no longer participating in an affirmative action plan acceptable to the Director of the Office of Federal Contract Compliance, including the Plan, the bidder will comply with Part II of these Bid Conditions.
_____
(Signature of authorized representative of bidder.)"

* * * * * * *

The corporate name of Holmes was inserted under "Name of Bidder," names of the various trades it would use under "(a)," the word "None" under "(b)" and "(d)," the same trades as in "(a)" under "(c)," and the president of Holmes (who signed the bid) signed in the place designated "Signature of authorized representative of bidder."

Part II of the affirmative action requirements provides:

Part II: A. *Coverage.* The provisions of this Part II shall be applicable to those bidders, contractors and subcontractors who in regard to such construction trades:

1. Are not or hereafter cease to be signatories to the Plan referred to in Part I hereof;

2. Are signatories to the Plan but are not parties to collective bargaining agreements covering that trade;

3. Are signatories to the Plan but are parties to collective bargaining agreements with labor organizations who are not or hereafter cease to be signatories to the Plan;

4. Are signatories to the Plan but as to which no specific commitment to goals of minority manpower utilization by labor organization have been executed pursuant to the Plan; or

5. Are no longer participating in an affirmative action plan acceptable to the Director, OFCC, including the Plan.

B. *Requirement—An Affirmative Action Plan.* The bidders, contractors and subcontractors described in paragraphs 1 through 5 above will not be eligible for award of a contract under this Invitation for Bids, unless such bidder has submitted as part of its bid, and has had approved by the SONOMA COUNTY WATER AGENCY a written affirmative action plan, embodying both (1) goals and timetables of minority manpower utilization [1] and (2) specific affirmative action steps directed at increasing minority manpower utilization by means of applying good faith efforts to carrying out such steps or is deemed to have submitted such a program pursuant to Section 3 of this Part II. Both the goals and timetables, and the affirmative action steps must meet the requirements of this Part II as set forth below for all trades which are to be utilized on the project, whether subcontracted or not. [Footnote omitted.]

Our Office has consistently held that where, as here, an invitation for bids makes compliance with affirmative action requirements a matter

of bid responsiveness, the failure of a bidder to demonstrate compliance prior to bid opening requires the rejection of that bid as nonresponsive. 50 Comp. Gen. 844 (1971); 52 Comp. Gen., *supra*. Piombo's submission of the Part I certification after bid opening is not for consideration since the affirmative action requirements are matters of responsiveness. *Weaver Construction Company*, B–183033, March 14, 1975, 75–1 CPD 156. Accordingly, we agree with the Soil Conservation Service that the bids of all bidders (except Holmes) who failed to submit Part I or Part II documentation prior to bid opening were nonresponsive.

As regards the bid of Holmes, however, we note that the executed Part I certification submitted with its bid stated that "[the bidder] will be bound by the provisions of Part II of these Bid Conditions on all work in such counties [to which the Plan was applicable] for all other trades as set forth in paragraph (c) [completed by Holmes] hereof; * * *." We have recognized that a bidder can commit itself to affirmative action requirements in a manner other than that specified in the invitation. 51 Comp. Gen. 329 (1971); B–176260, August 2, 1972; B–177846, March 27, 1973. Consequently, the responsiveness of the Holmes bid need not be measured by the failure of that firm to submit an affirmative action plan consistent with the goals and timetables of minority manpower utilization and specific affirmative action steps directed at increasing such utilization as outlined in Part II. Rather, the bid is responsive or not as evidenced by the commitment or noncommitment to the Part II plan for proposed trades not signatory to the Part I plan. There can be no question that, under the last quoted provision of the affirmative action requirements, Holmes promised to be bound by the Part II provisions for all trades not subject to the Part I Plan. We do not see how such an obligation to comply with Part II is any less binding than if Holmes had submitted a plan conforming to the Part II provisions. Therefore, notwithstanding the provisions of Part II or Part III that submission of a plan with the bid, where applicable, was a necessary prerequisite to the submission of a responsive bid, we conclude that the Holmes bid should be considered responsive. See *Bartley, Incorporated*, 53 Comp. Gen. 451 (1974), 74–1 CPD 1 and 51 Comp. Gen., *supra*, where we reached the same conclusion based on similar affirmative action requirements as were involved here.

The record is unclear as to whether the pages of Part II of the affirmative action requirements were also submitted with the Holmes bid. Whether they were or not is irrelevant to our conclusion. *See* 51 Comp. Gen., *supra*. The decisions cited by the Soil Conservation Service are distinguishable. In *John E. Northrop Co.*, B–181674, August 6,

1974, 74-2 CPD 82, the bidder did not fill out the trades it would use and, consequently, could not be bound to apply any affirmative action plan to any trade. To the same effect, our decision 52 Comp. Gen., *supra*, is distinguished in *Bartley, Incorporated, supra.*

The Soil Conservation Service believes that bidders may have been misled as to what was to be submitted with their bids insofar as the affirmative action requirements are concerned. The bid packets given to interested bidders did not include the affirmative action requirements. These requirements were instead included in the invitation for bids containing schedules, conditions, provisions, drawings and specifications simultaneously given to bidders. In this connection, the Soil Conservation Service notes that after bid opening Piombo stated it believed submission of the bid packet alone was required by the time for bid opening.

While it is unfortunate that all bidders but Holmes failed to submit affirmative action requirement documents, our review of the bid packet and invitation for bids discloses no basis to conclude that bidders were unreasonably misled by the inclusion of the affirmative action requirements only in the invitation. The requirements are clearly set out as a 16-page bid condition following a sample bid schedule and a direction to bidders stating the time of bid opening. In view of the clear pronouncement in Part III of the requirements that a failure to submit documentation showing compliance with Part I or Part II would "render the bid nonresponsive," we cannot see how the failure to submit such with the bid may be excused.

Further, the fact that the low bidder may have been a member of the Plan or may have filed affirmative action programs elsewhere does not constitute a commitment that places a binding obligation on it under the present invitation. *See* B-176328, November 8, 1972. Also, the mere fact that the low bidder or any other bidder has in the past or in the present invitation accepted the basic equal opportunity clause set forth therein is not sufficient evidence to constitute the necessary commitment to the affirmative action requirements. 52 Comp. Gen., *supra.*

Accordingly, we recommend that the Soil Conservation Service advise the Sonoma County Water Agency to award the contract to Holmes if that bidder is otherwise responsive and responsible.

[B-182995]

Bids—Hand Carried—Delivery Location

Provision in solicitation that bids be mailed to certain address or hand-carried to depositary located at mailing address does not prohibit hand delivery to official located in bid opening room who was authorized to receive bids.

Bids—Opening—Time for Opening Determination

Bid deadline for hand-carried bid may not be deemed to have arrived because of bid opening officer's removal of bids from depositary since public declaration that time set for bid opening had arrived subsequently was made by authorized official consistent with clock in bid opening room.

Bids—Late—Time Variances

Where bid opening officer states that hand-carried bid initially was tendered, according to clock in bid opening room, prior to scheduled bid opening time and prior to the authorized public declaration that such time had arrived, rejection of bid as late is not required even though officer initially rejected tender of the bid in accordance with time shown on unsynchronized clock outside bid opening room. Authorized public declaration, made in accordance with clock in bid opening room, that time for bid opening has arrived is *prima facie* evidence of that fact.

Bids—Late—Conflicting Statements

Factual statements made by attendee at bid opening who claimed to have observed occurrences from far corner of room are rejected in preference to contrary statements submitted by bid opening officer and alternate who directly participated in contested delivery of bid.

Bids—Late—Acceptance—Not Prejudicial to Other Bidders

Hand-carried bid may be accepted even though received late since lateness is result of bid opening officer's erroneous rejection of initial tender which was timely made and consideration of bid does not compromise integrity of competitive bid system.

Bids—Two-Step Procurement—First-Step—Protest Timeliness

Notwithstanding that protester might have deduced the identity of the precise model on which low bid was submitted from shipping weight and container size stated in bid on step two of two-step procurement, protest issue of model's acceptability under first step of procurement is timely since it was filed promptly after agency revealed the precise model bid by low bidder.

Contracts—Specifications—Conformability of Equipment, etc., Offered—Technical Deficiencies—Two-Step Procurement

Protester's extrapolation from low bidder's data that low bidder would not meet contract's compaction test requirement is rejected since all permissible variations in compaction test procedures were not covered in low bidder's data and therefore unacceptability of low bidder's product has not been established.

Contracts—Specifications—Conformability of Equipment, etc., Offered—Acceptance—Propriety

Argument that low bidder's proposed unit is not acceptable because it did not meet specification requirement regarding both length of public marketing of unit and type of engine offered is rejected since record supports opposite conclusion.

Bids—Two-Step Procurement—First Step—Technical Approaches

While three units accepted under first step of two-step procurement were not equal in terms of weight, horsepower, or price, proposals frequently are based on different technical approaches. In the circumstances agency acted reasonably in determining that three proposals were acceptable and thus available for step two competition.

Bids—Mistakes—Correction—Rule

Departments are authorized under applicable procurement regulation to make administrative determinations prior to award to resolve suspected mistakes in bid.

In the matter of the Hyster Company, September 24, 1975:

Hyster Company has protested award to any other bidder under invitation for bids (IFB) No. 700-74-B-3876, issued by the Defense Supply Agency (DSA). The solicitation is the second step of a two step procurement for high speed compactors. Bid opening, as amended, was scheduled for December 18, 1974, and bids were received from Koehring Road Division, Hyster Company, and Caterpillar Tractor Company. Hyster contends that Koehring's low bid was late and that the equipment proposed by Koehring is in a different class from that offered by other bidders and is unacceptable. Alternatively, Hyster alleges that if the Koehring equipment is considered acceptable, the DSA specifications are ambiguous, requiring cancellation of the IFB and revision of the specifications.

The IFB provided that bids would be received at the procuring activity's Bid Opening Room in Building 12–1B or, if hand-carried, in the depositary located in that building until 10:30 a.m., local time, on the date of opening. All offers recieved were to be opened at that time.

The issue of whether Koehring's bid was late involves the time and manner in which it was received. DSA reports that shortly before 10:30 a.m. on the bid opening date, the bid opening officer proceeded to the depositary located in the reception room of Building 12–1B. When the clock in the reception room indicated exactly 10:30, the bid opening officer opened the bid box, removed the bids, and carried them to the bid opening room some fifty feet away. DSA reports that almost immediately after entering the bid opening room this officer was approached by Koehring's representative who tendered the company's bid. DSA reports, based on the documented statements of the bid opening officer and her alternate, the clock in the bid opening room had not reached 10:30 a.m. when the bid was first tendered, but that the bid opening officer refused to accept the bid believing that the bid was late by the reception room clock. When the bid opening room clock read 10:30 a.m., the alternate bid opening officer announced the hour and that the time for bid opening had arrived. Both officers report that bids had not been opened at the time of this announcement. Solicitations issued for several procurements were scheduled to be opened at the appointed time.

Since the tender by Koehring representatives was rejected, they requested that the matter be discussed with the bid opening officer's supervisor. It is reported that the bid officer and the bidder's representatives left the bid room at approximately 10:32 a.m., before any bids were made available for examination (the bids were not read aloud). Following a brief discussion with the supervisor, the bid

opening officer accompanied the bidders to the reception room where both Koehring representatives remained alone in possession of Koehring's bid for three to five minutes while the bid opening officer located counsel. The officer returned to the reception area with counsel and then proceeded with the bidder's repersentatives to the bid room. The party arrived there at approximately 10:45 a.m., after bids were opened and made available for examination. At approximately 10:50 a.m. Government personnel finally agreed to take possession of the Koehring bid.

Hyster Company argues that Koehring's bid is late and must be rejected. It contends the bid was required to be, but was not, hand-carried to the bid depositary by the time specified. In support of this argument Hyster has referred to the solicitation's bid delivery instructions, Armed Services Procurement Regulation (ASPR) § 2-402.1(a) (1974 ed.), concerning the opening of bids and past decisions of this Office. In this connection the solicitation provides:

> Sealed offers . . . will be received at the place specified in block 8 [DSA, Defense Construction Supply Center, Attn: DCSC-POB Bid Opening Room, Bldg. 12-1B] OR, IF HAND-CARRIED IN THE DEPOSITARY LOCATED IN BLDG. 12-1B, DCSC, Columbus, Ohio until 10:30 a.m. local time at the place of opening, 74 June 18 [subsequently amended to December 18, 1974]. If this is an advertised solicitation, offers will be publicly opened at that time. CAUTION—LATE BIDS/PROPOSALS. See applicable provision in Section C of this solicitation.

In our opinion it is self-evident that the above provision does not restrict an authorized Government official from receiving a hand-carried bid which is tendered to such official rather than placed in the bid depositary. Moreover, we fail to see any valid purpose for imposing such a restriction as argued by Hyster. In this case the bid was tendered to the bid opening officer in the bid (opening) room, a location which is expressly listed in the solicitation (block 8) as a place for receipt of bids.

Furthermore, Hyster contends that pursuant to our decision in 47 Comp. Gen. 784, 786 (1968) the Koehring bid should be considered late because (1) it was not placed in the bid depositary by 10:30 a.m. and (2) the bid deadline occurred by virtue of the bid opening officer's removal of the bids from such depositary. In that decision we discussed the duty imposed upon the bid opening officer by ASPR § 2-402.1(a), which provides as follows:

> (a) the official designated as the bid opening officer shall decide when the time set for bid opening has arrived, and shall so declare to those present. He shall then personally and publicly open all bids received prior to that time * * *

Our decision stated that the bid opneing officer decided when the *2:00 p.m.* deadline for receipt of bids had arrived "by removing all the bids from the bid depositary box outside the bid opening room at 1:58 p.m., on May 2, 1968, and placing them in the room for public open-

ing." We went on to say, however, that "we interpret ASPR 2–402.1 (a) to mean that the bid opening officer's decision to commence opening bids at 2:00 p.m. prohibited consideration of a bid submitted * * * at 2:15 p.m. even though no bid prices from that particular set [solicitation] had been read." Thus, read in its entirety that decision does not stand for the proposition that a bid must be hand-carried only to bid depositaries or that the deadline for hand-carried bids occurs when bids are removed from the depositary. In fact, it has been our position that it is enough that the bid be delivered to the bid opening officer, or other Government representative authorized to receive it, at the scheduled time for opening. 40 Comp. Gen. 709, 711 (1961). Accordingly, we are unable to agree that Koehring's bid is late merely because it was hand delivered to the bid opening officer rather than to the bid depositary prior to bid opening or that the time for bidding had passed merely because of the removal of bids from the depository irrespective of the actual time such removal took place.

Hyster also argues that the Koehring bid was not tendered by 10:30 a.m. on either the reception room clock or the bid opening room clock. In this connection the Government states that the reception room clock showed exactly 10:30 a.m. when bids were removed from the depositary and that the bid in question was first tendered and rejected shortly thereafter in the bid opening room. However, the bid opening officer and her alternate have submitted in signed statements that the clock in the bid opening room had not reached 10:30 a.m. when the Koehring bid was first tendered in that room; that the alternate officer announced that the time for bid opening had arrived when the bid opening room clock reached 10:30 a.m.; and that no bids were opened prior to this announcement.

Hyster states several bases for its belief that 10:30 a.m. had arrived on the bid opening room clock. It submits that the bid opening officer's refusal to accept Koehring's bid indicates it was past 10:30 a.m. Hyster argues that it is inconceivable that the bid opening officer "would have rejected the bid out-of-hand if she had been aware that [the bid opening room] clock showed only 10:29." However, in view of this officer's direct statement that the bid opening room clock had not reached 10:30 a.m. when she refused to receive Koehring's bid, her belief that bidding time had arrived and refusal to receive the bid apparently were based on the time shown on the reception room clock. Subsequently, the alternate bid opening officer declared, in accordance with the bid opening room clock, that the bid opening time had arrived. Statements by both officers indicate that bids had not been opened prior to such declaration. The alternate bid opening officer was authorized to make the declaration in accordance with ASPR § 2.402.1 (b)

(1974 ed.) and the contracting officer indicates that such action by an alternate is consistent with usual procedures.

Normally such a declaration serves as *prima facie* evidence of the arrival of the bid opening time. 40 Comp. Gen. 709, 711 (1961). Unless there is a clear record to show that the bid opening room clock showed a later time, the authorized declaration of bid opening time on the basis of the bid opening room clock must serve as the criterion for determining lateness. Thus, in this case the bid opening officer's initial belief that the time shown on the reception room clock was controlling does not overcome the effect intended by the regulation to be given the authorized public declaration. We therefore believe that Hyster has not made a case for lateness merely on the basis of the bid opening officer's initial rejection of the bid.

Hyster also argues that it was past 10:30 a.m. on either clock when Koehring's bid was tendered since time was consumed by the bid opening officer in placing the bids on the table used for bid opening or in handing them to the abstractors. However, the record before us does not indicate that such action delayed the tender of Koehring's bid. To the contrary, the bid opening officer has stated that the bid was tendered immediately after her entry into the room.

Hyster also has furnished a statement by a representative of the Caterpillar Tractor Company who attended the bid opening. The Caterpillar representative's statement recalling the bid opening is dated February 17, 1975, or two months after the bid opening, and was submitted in rebuttal to the procuring agency's initial report to this Office dated February 10, 1975. This individual apparently was interested in two procurements for which bid opening was scheduled at 10:30 a.m. on December 18, 1975. The pertinent observations in the sequence presented in this statement are as follows: (1) at approximately 10:15 a.m. Caterpillar's representative proceeded to the bid opening room in the company of two Government contract personnel who were interested in the opening of another solicitation. These individuals positioned themselves in the corner of the room farthest from both the entrance to the room and the bid opening table; (2) while in the bid room Caterpillar's representative participated in a general conversation with the accompanying Government personnel and he observed that "the bid officers were opening the bid packages and filing the contents in folders"; (3) the Government buyer with whom he was conversing stated "Here comes someone with a bid" but that the Caterpillar representative did not observe the time this comment was made; (4) a young man in a white top coat entered the bid room carrying what appeared to be a bid package; (5) "soon" thereafter the Caterpillar representative was furnished two bid folders, one of which contained the Hyster and Caterpillar bids for

the subject procurement, and he commenced copying these bids; (6) after copying the compactor bids he asked to see the enclosures to the Hyster bid, observed that Government counsel had been called to settle the late bid matter, and noticed a Koehring representative in the room holding what appeared to be a bid package; (7) after returning to his table to copy bids on another procurement he was distracted by a heated discussion taking place in the bid room during which a Koehring representative stated "A minute is sixty seconds long, and the clock in the lobby where the bid depositary is located is fast"; and (8) the Caterpillar representative became concerned about the synchronization of the clocks, proceeded to check the lobby clock, observed that it was one minute *slower* than the clock in the bid opening room, and upon his return to the bid room he reported this observation to both Government personnel in his company.

Hyster believes this statement establishes that (1) the reception room clock was one minute slower than the bid opening room clock and that it therefore was later than 10:30 a.m. on either clock when Koehring's bid was tendered; (2) the individual carrying Koehring's bid entered the bid room after the opening of bids had commenced; and (3) the bid was tendered after "the bid officers were opening the bid packages and filing the contents in folders." The Government personnel who were in the company of the Caterpillar representative in the bid opening room have submitted signed statements recalling that "it was close to" 10:30 a.m. when the young man in a white top coat entered the bid room with a hand-carried bid but both disavow any knowledge as to the exact time this occurred and neither recalls that opening of bids had commenced at that time. In addition, neither individual recalls that the Caterpillar representative commented that the clock in the reception room was slower than the clock in the bid room or even that this individual checked the synchronization of the two clocks.

As to whether the individual carrying Koehring's bid entered the bid room after the commencement of the opening of bids, the bid opening officer and her alternate directly evidenced that the bid was first tendered in the bid room prior to 10:30 a.m., prior to the announcement that bid opening time had arrived and prior to opening of bids. Moreover, the contracting officer has reported that bids normally are placed *unopened* in folders on a table in the bid room according to solicitation number and that bids are not opened until the bid opening is announced. From our review of the record it is clear that the Caterpillar representative's attention was not directed exclusively to the occurrences at issue. Rather he was engaged in conversation with other individuals. In our opinion the Caterpillar representative's uncorroborated statement as to the point in time,

vis-a-vis the actual opening of bids, that Koehring's bid was first tendered is not sufficiently convincing to cause us to question the statements of those directly involved in this episode.

In connection with the synchronization of the clocks at issue the contracting officer reports that he personally checked the clocks three hours after the bid opening and observed that the reception room clock was approximately 1½ minutes *faster* than the bid opening room clock. In view of the actual observance that Koehring's bid was tendered prior to 10:30 a.m. on the bid opening room clock, we find that the weight of the evidence does not support the uncorroborated contrary statement of Caterpillar's representative.

Hyster also contends that Koehring's bid must be considered late since it was not put into the Government's possession until some 20 minutes after bid opening, during which time the opportunity for fraud and bid alteration existed for a 3–5 minute period while the Koehring representatives were alone outside of the bid opening room. Although Hyster does not allege that the Koehring representatives acted in such a manner, it believes that regard for the integrity of the competitive bid system requires that bids subject to such potential infirmities be rejected. In this connection Hyster relies on the requirement in the procurement regulations for receipt of bids prior to opening and also points out that in 40 Comp. Gen. 709, 710–11 (1961), this Office stated the following:

> The general rule is, of course, that except where due solely to delays in the mail for which the bidder is not responsible, bids not received by the time set for opening shall not be considered for award. See for example Armed Services Procurement Regulation 2–303.5. See also 37 Comp. Gen. 35. The basic purpose of that rule is to prevent opportunities for fraud or undue advantage which might be obtained if bidders could submit their bids after the time set for bid opening. The requirement so far as we are concerned, however, is that the bid should be in the hands of the bid opening officer, or other Government representative authorized to receive it, at the scheduled time for opening.

The general rule followed by this Office is that the bidder has the responsibility for the delivery of its bid to the proper place at the proper time. However, a hand-carried bid which is received late may be accepted where bid lateness was due to improper Government action and consideration of the late bid would not compromise the integrity of the competitive bid system. *Le Chase Construction Corporation*, B–183609, July 1, 1975; 51 Comp. Gen. 69 (1971); and 34 *id.* 150 (1954). We recognize that where there is a delay between the initial tender of a bid and subsequent Government possession of the bid after bid opening, and when there is a genuine question whether the bid is exactly the same as when originally tendered, rejection of the bid is necessary in order to safeguard the competitive bid system against the possibility of acceptance after bid opening of a subsequently altered or otherwise modified bid. *See, e.g.*, B–143288, June 30, 1960. However,

this Office has sustained the acceptance of a bid coming into the Government's possession after bids were exposed where it could be shown by corroborating evidence that the bid as tendered was not altered. 41 Comp. Gen. 807 (1962). DSA has advised this Office that "there is not the slightest indication that Koehring's bid was opened or in any way altered after [the Koehring representative] offered the same to [the bid opening officer] or that Koehring's representative gained any actual knowledge of the other bids before they returned to the bid opening room * * * at about 10:45." In this connection we note that bids were not read aloud but were made available for perusal in the bid opening room and that the Caterpillar representative was in possession of the public file copy until the reentry into the bid room of Koehring's representatives, the bid opening officer, and counsel. Although the opportunity for switching bids exists, the probability of such an occurrence is tenuous. We believe the record provides no basis to question whether the Koehring bid as originally tendered was the bid finally received. Since Hyster has not presented any evidence in this regard, we conclude that in the circumstances DSA may accept the Koehring bid.

With respect to the adequacy of the Koehring bid, Hyster has raised several objections. Hyster believes that the model K–300 proposed by Koehring is roughly half the weight and horsepower of the Hyster unit, and that it will not meet the minimum requirement that the compactor offered be capable of compacting 1500 compacted cubic yards per hour of soil. Hyster argues that Koehring's bid is thus nonresponsive and submits that the Government will be required to upgrade the Koehring proposal and to compensate Koehring for the additional work done. As a result of DSA's action in permitting Koehring to bid its K–300 model (which is considerably less expensive than the other bidders' models), Hyster believes that DSA has not secured either the price competition contemplated by ASPR § 2–503.1(e) (1974 ed.) or the full and free competition required under ASPR § 2–502(a)(i) (1974 ed.). Hyster also believes that the Koehring model K–300 is not responsive since it allegedly has not been marketed for 1 year prior to the opening of the first step proposals and since the engine offered is not normally furnished on Koehring's commercial production compactors. Additionally, Hyster believes that the Koehring unit bid price is inconsistent with the extended bid price. Finally, Hyster argues that if the Koehring K–300 model is acceptable under the first step specifications, then such specifications are ambiguous, requiring cancellation of the procurement. Hyster contends it would have bid a less expensive model if it had interpreted the solicitation in the manner now urged by DSA.

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With respect to Hyster's allegation that the Koehring bid is nonresponsive and cannot be accepted because of noncompliance with both the first step specifications and ASPR, Koehring submits, and is joined by DSA, that Hyster's contention is untimely since it is made after the close of the first step of the procurement. It is contended that, at the latest, Hyster knew or should have known from the shipping weight and container size stated in the Koehring bid documents, which information was available by December 19, 1974, that Koehring had bid on the K–300. Thus, it is argued that Hyster's protest, filed on February 21, 1975, is untimely.

This Office will consider bid protests against agency action under step one of a two-step procurement, even if filed after bid opening under step two, as long as the protester did not have a prior opportunity to know the basis of protest. B–172886, July 13, 1971. Pursuant to 4 C.F.R. § 20.2(a) (1975), in effect at the time its protest was filed, Hyster was required to file its protest within 5 working days of when it knew or should have known that DSA would consider the Koehring K–300 model to be acceptable. In our opinion Hyster was not in a position to know with certainty that the K–300 model was considered acceptable until February 24, 1975, when the contracting officer finally supplied Hyster with the information, first requested on December 19, 1974, concerning Koehring's proposal. Under these circumstances, we do not believe Hyster was required to protest the acceptability of the K–300 unit until it received this information which it otherwise diligently pursued.

The major thrust of Hyster's contention that Koehring's bid is nonresponsive to the specification is that the K–300 cannot meet the solicitation compaction requirement. Paragraph 2.2 of the solicitation's item description required, in part, that the compactor be capable of compacting a minimum of 1500 compacted cubic yards per hour of soil conforming to type SC (Unified Soil Classification System) to at least 95 percent Modified AASHO in compacted lifts of not less than 6 inches. Paragraph 2.18.2 required offerors to submit with proposals the compaction data stated in Appendix I to prove that the soil specified has been compacted to a density of 95 percent Modified AASHO at a rate of not less than 1500 compacted cubic yards per hour. In addition paragraph 2.18.3 requires that the first compactor produced in accordance with the item description be subject to an operational demonstration as outlined in Appendix II.

The test required in Appendix II (Productivity and Gradeability) provided a more detailed procedure to establish whether the compactor would meet the minimum performance requirements. Specifically, the compacted fill plat width was to be 31 feet wide with an actual

width of the fill being a minimum of 33 feet. The offeror was to continue compaction operation until it believed 1500 cubic yards had been compacted, with time used in density testing not counted as compaction time. Three tests were to be made, with a required minimum compaction rate of 1500 compacted cubic yards per hour.

On the basis of the "Appendix I" data DSA ultimately concluded that the K–300 had the capability to compact 1500 cubic yards as required in the item description. However, Hyster contends that Koehring's data indicates that the K–300 can compact the required 1500 cubic yards only when used at 100 percent efficiency, excluding turn around time and any other time the compactor was off the test plat during compaction. As indicated by Hyster, the K–300 compacted 1554 cubic yards at 100 percent efficiency on an optimum 24 foot test lane using 12 passes. However, it is pointed out that the Operational Demonstration in Appendix II will require 18 passes over the 31 foot wide area of compacted fill, that excess compactor drum overlap will reduce efficiency to approximately 86 percent, that time lost between passes will lower efficiency to 83 percent yielding approximately 1300 cubic yards which can be compacted by the K–300 in a running hour. Thus, Hyster believes that Koehring cannot meet DSA's compaction requirements pursuant to the test set out in Appendix II, which it interprets to be the minimum productivity level desired by DSA.

By letter dated August 20, 1975, DSA forwarded the Army's technical analysis of Hyster's argument. The Army states:

1. The extrapolation of the Koehring test data by Hyster has been examined. We can find no error in their extrapolation if the compacted width must be exactly 31 feet. However, use of this extrapolation to prove that the Koehring machine cannot meet the compaction rate required during the first article tests requires the assumption that there are no variables involved. This would not be the case. The compacted depth, soil, moisture content, and compaction speed may all be different during the first article tests than those used in obtaining the test results submitted during step 1 by Koehring. The extrapolated test results of 1300 cubic yards is 13 percent lower than the required 1500 cubic yards. An increase in average speed from 6.8 to 7.7 MPH or an increase in compacted depth from 7 inches to 7.9 inches, or a combination thereof, would result in meeting the requirements. The soil composition and moisture content can be optimized to improve test results. All of these changes in test procedures and techniques are plausible.

2. The requirement for data to be submitted during step 1 stated: "The offeror shall furnish actual data ('soil-bin' analysis not acceptable) to prove that his compactor/roller has compacted a soil corresponding to group SC of Unified Soil Classification System to a density of 95 percent modified AASHO at a rate of not less than 1500 compacted cubic yards per hour." Koehring submitted data that met this requirement. There was no requirement that he submit data which proved that he could meet the compaction rate under the conditions of test specified for the first article demonstration, either from an actual standpoint or an extrapolated standpoint. Therefore, the data submitted by Koehring would not be used for extrapolation, especially since it would be impossible to exactly duplicate the test again. The unvalidated data was not intended to eliminate the requirement for the test under the first article demonstration.

3. This center does not have data base which would either refute or substantiate Koehring's guarantee that their model K–300 compactor will compact the required 1500 cubic yards per hour under the conditions specified for the first article demonstration.

4. Based on the above, it is concluded that:
A. The extrapolation of the Koehring data by Hyster does not validly establish that Koehring cannot meet the requirement of the item description.
B. Koehring has met the technical requirements of Appendix I of the item description as pertains to the production rate.
C. There is no technical basis for excluding Koehring from contract award.

The two-step formal advertising procedure has been recognized as combining the benefits of competitive advertising with the flexibility of negotiation. 50 Comp. Gen. 346 (1970). While the second step of this procedure is conducted under the rules of formal advertising, *see* ASPR § 2–503.2 (1974 ed.), the first step, in furtherance of the goal of maximized competition, contemplates the qualification of as many technical proposals as possible under negotiation procedures. 50 Comp. Gen. 346, 354 (1970). This procedure requires that technical proposals comply with the basic or essential requirements of the specifications but does not require compliance with all details of the specifications. 53 Comp. Gen. 47, 49 (1973). Thus, the responsiveness of the first-step proposal would not be affected by its failure to meet all the specification details "if the procuring agency is satified * * * that the essential requirements of the specification will be met." 50 Comp. Gen. 337, 339 (1970). It is our opinion that the Army has demonstrated a substantial basis for its determination that the Koehring proposal is acceptable notwithstanding the data submitted by the firm.

We recognize that the solicitation's Proposal Evaluation Plan stipulated that the data submitted under step one would be evaluated to assure the Government that the required compaction rate could be achieved by the equipment offered. However, we do not agree with Hyster's observation that the Koehring proposal must therefore be rejected on the grounds it cannot meet the operational test compaction requirements as stated in Appendix II since the operational test is required to be performed during the course of contract performance and the data necessary to establish compliance with the test was not available. Although DSA could not accept a proposal which it knew could not meet the operational test requirements, the solicitation did not require that the step one compaction standards were to be read together with the Appendix II data requirements. With respect to Hyster's contention that the Koehring unit must be rejected for lack of assurance that it can meet DSA's requirement, our interpretation of the solicitation is that data submitted by offerors which satisfied the step one data requirement was sufficient assurance that the unit offered could meet the minimum compaction requirements.

In connection with Hyster's argument that the K–300 is not acceptable under the first step solicitation because the K–300 has not been marketed for one year prior to submission of proposals and also be-

cause the engine offered is not normally furnished in the K–300 commercial compactor, Koehring has advised this Office that as of April 30, 1975, over 48 percent of all K–300 units shipped had Caterpillar engines. The first of these units was shipped in January 1970. Koehring units recently were shipped in January 1975, and additional units were scheduled for shipment in May and June 1975. It appears that the Caterpillar engine normally is used in the commercial K–300 unit. As to whether the K–300 had been "marketed for one year prior to the date of the opening of the technical proposal," Hyster would construe this provision as requiring that the product be marketed within the year immediately preceding the solicitation's opening. However, we believe this interpretation is too restrictive and not required by the solicitation language. Since a review of the record indicates that the K–300 unit has been marketed since 1970, we believe Hyster's contention is without merit.

Hyster also challenges the competitive nature of this procurement, contending that once DSA accepted the varying proposals under step one Koehring's much cheaper model was destined to capture the low bid position. Hyster questions whether the procurement could be competitive when, under step two, Hyster's unit weighed 57,000 pounds with 330 horsepower as compared to 30,000 pounds and 175 horsepower for the K–300. Since the resulting bid price of $49,840 for the Koehring unit was considerably lower than the Hyster bid of $64,908 (with Caterpillar at $89,164), Hyster submits that the second step was essentially noncompetitive and thus improper. Moreover, Hyster points to the full and free competition envisioned by ASPR § 2–502(a)(i) (1974 ed.) and adequate price competition required by ASPR § 2–503.1(e) (1974 ed.), and alleges that DSA did not fulfill its obligation to insure such competition.

We have recognized that it is inherent in two-step formal advertising that when an offeror submits a proposal the technical approach it adopts may vary from the technical approaches adopted by the other offerors. *High Vacuum Equipment Corp.*, B–179806, March 4, 1974. In determining which proposals are acceptable, the responsible procuring agency has considerable discretion and its determinations will not be overturned unless unreasonable. 51 Comp. Gen. 85 (1972). We believe the agency's actions in this case were based upon its stated requirements and were within the bounds of its discretion.

Finally, Hyster points out that Koehring's unit and extended prices do not agree, and thus it argues that the bid should be disqualified. The record reflects that, for the total quantity of 208 compactors, Koehring bid a unit price of $49,840 and an extended total amount of $10,574,720, which is the equivalent of $50,840 per unit, or a total

of $208,000 over the unit price bid for the advertised quantity. It appears, however, that Koehring is the low bidder irrespective of which amount is proven to be the intended bid.

In this connection, Departments are authorized to make administrative determinations prior to award to resolve suspected mistakes in bids. ASPR § 2-406 (1974 ed.). We understand that DSA has requested verification of Koehring's bid and that the matter will be administratively resolved pursuant to the above-cited regulation.

In view of the above, the protest is denied.

[B-182560]

Contracts—Negotiation—Competition—Preservation of System's Integrity—Status of Undisclosed Competitor

Where Agency representative brought protester's employee into meeting with competitor without disclosing relationship and discussion may have given protester competitive advantage, request for proposals should be revised to eliminate advantage, if that can be done without sacrifice to Agency interests, since such action would enhance competition and provide opportunity for all interested parties to compete. However, if Agency interests call for continuing procurement in form that precludes elimination of possible competitive advantage, protester may be excluded from portion of procurement involving possible advantage.

In the matter of The Franklin Institute, September 26, 1975:

On August 8, 1974, the Contracts Management Division of the Environmental Protection Agency (EPA) issued request for proposals (RFP) WA-74-E371 for operation and maintenance of a "solid waste information retrieval system" (SWIRS). The period of contract performance was stated to be for the period from January 1, 1975, through December 31, 1975. An option period of 1 additional year was also provided.

BACKGROUND

Prior to August 1974 SWIRS was operated by The Franklin Institute under contract with EPA. The computer system ("hardware and software") necessary for the operation was furnished to Franklin by EPA using a system located at the National Institutes of Health (NIH). Some time during 1974 EPA decided to change from the NIH system to a system provided by a private contractor. The change was to be made under RFP-E371.

THE AUGUST VISIT

On August 8 or 9, 1974 (the Agency and the parties to the protest do not agree on the precise date involved), EPA's SWIRS project

officer, in the company of one of Franklin's employees, visited the Rockville, Maryland, office of Informatics, Inc. By letter dated October 18, 1974, Informatics' counsel alleged that at the August visit the officer introduced his companion to Informatics' employees as his "technical representative." Informatics further alleged that discussions were then held relating to the "technical approach that Informatics * * * was planning to include in its proposal in response to RFP–E371." (This approach, we understand, permits data to be "inputted" (placed in) the computer system via the preparation of magnetic tapes; by contrast, the prior method of inputting under Franklin's SWIRS contract involved the use of a "remote computer communication terminal.")

Informatics also alleged that cost data relating to its technical approach were also discussed. Both the technical approach and costs in question allegedly related to the contents of an unsolicited proposal that Informatics had previously submitted to EPA. The company further alleged that it was planning to resubmit its unsolicited proposal in response to the subject RFP.

Informatics therefore asserted that Franklin had obtained an "enormous advantage," in violation of law, in competing against Informatics under RFP –E371. Consequently, among other requests, Informatics' counsel requested EPA to disqualify Franklin from responding to "* * * RFP WA–74–E371 or any other RFP dealing with the SWIRS project."

EPA INVESTIGATION

Thereafter, EPA began an internal investigation of the August visit. Concurrently, Informatics filed a protest with our Office to the same effect as set forth in its earlier correspondence with EPA.

On November 4, 1974, EPA decided to: (1) cancel the existing RFP; (2) issue a revised RFP dividing work requirements so that multiple awards might be made; (3) disqualify Franklin from "* * * eligibility for award of any task involving placing [inputting] into machine readable form previously abstracted and indexed data" (Franklin was advised of this decision by letter dated December 3, 1974); and (4) remove its project officer from the procurement. After receiving news of this decision, Informatics withdrew its protest before our Office.

REVISED RFP

The newly issued RFP contained (on page 6 of the solicitation package) a statement that work tasks had been divided into two tasks (task I required the contractor to deliver "clean copy" on all input (abstracts) to the task II contractor; task II required the prep-

aration of magnetic computer tape for placement in the SWIRS data bank); that separate technical and pricing proposals were to be submitted for each part; and that it was anticipated that multiple award by task might be made. The period of performance under the basic contract was stated to be for 12 months from January 1, 1975, through December 31, 1975. Two successive 1-year option provisions were also provided for the period from January 1, 1976, through December 31, 1976, and from January 1, 1977, through December 31, 1977.

FRANKLIN'S PROTEST

By letter dated December 11, 1974, to EPA, counsel for Franklin protested its exclusion from task II of the reissued RFP.

The general thrust of Franklin's protest, as amplified in further correspondence, was that its employee who was at the August meeting with EPA's officer, although not introduced as a Franklin employee, was not exposed to proprietary information. Franklin later alleged that the August visit was for a proper purpose and was unrelated to proposals that could be submitted under the RFP existing at the time of the visit; that, at the time of the visit, Franklin had no reason for believing that the method of "inputting" to the computer system would be changed to require the preparation of magnetic tapes (the method of "inputting" was changed by a September 1974 RFP amendment); that no cost figures relating to work under the existing RFP were exposed at the meeting; and that the discussion related solely to selection of the Government-furnished computer system for future SWIRS work and "* * * not to work which Informatics might * * * [subsequently purpose]." Consequently, Franklin insisted that an "after the fact" appearance of impropriety had been created which previously did not exist.

EPA'S PROTEST ANALYSIS

EPA's response to Franklin's protest is mainly evidenced in the written record before our Office in two documents—a January 14, 1975, memorandum signed by the contracting officer and the Head, ADP Contracts Unit, and a January 17, 1975, letter to Franklin's attorney signed by the Head, ADP Contracts Unit.

Both documents refer to the factual dispute existing between Informatics and Franklin as to the things that were discussed at the August visit; observe that if Informatics' allegations were true EPA would have to bar Franklin from consideration for the "compromised" part of the work (task II); and conclude that, since Franklin's employee failed to identify himself as such during the visit, EPA would assume that Informatics' version of the events discussed was correct.

The January 14 memorandum specifically states that the August visit concerned discussion of an "* * * alternate method to * * * on-line keying * * * for inputting data to the data bank" (the method employed under the prior SWIRS contract). This position is repeated at another point in the memorandum where it is recited that the "* * * discussion involved methods or equipment which were possible alternate ways of performing a portion of SWIRS work * * *."

DECISION

We agree that Franklin's employee should have been identified at the beginning of the visit. Whatever the motive or cause of the failure to do so, and even assuming the failure was caused in part by EPA's officer, any information obtained as a result, even if not immediately related to the contents of an existing solicitation, should not be allowed to accrue to Franklin's possible competitive advantage under a revised solicitation.

An award to Franklin under the revised solicitation for the task II work would, by provoking suspicion and mistrust, reduce confidence in the competitive bidding system. We are, however, mindful of the need to maximize competition and to give all interested parties an opportunity to compete for the contract. Where circumstances permit, we have favored eliminating an undue advantage to one bidder—because he was improperly provided information not available to other bidders—by resoliciting with information needed to compete intelligently made available to all interested parties. *See* 49 Comp. Gen. 251 (1969). In the cited case such information could properly be made available by the Government.

We think it is desirable, where it can be done without compromising the Government's needs, to eliminate in this manner any improper advantage which may have been gained by a competitor, since the advantage is thereby eliminated without reducing competition. This could be done by restoring the original method of "inputting" called for under the prior SWIRS contract. Whether such an approach would satisfy the needs of the Government is within the reasonable discretion of EPA. If EPA concludes, after reviewing the matter, that its interests call for continuing the procurement under the current two-task RFP, we find no basis to object to the EPA position that Franklin should be excluded from competing for task II. On the other hand, if EPA concludes that its mission will be as well served by reverting to the original "inputting" method, we believe the RFP should be modified accordingly and all parties, including Franklin, given the opportunity to compete.

We recognize that an EPA cost study shows that the inputting method under task II of the current RFP could be less costly than the procedure presently in use. Cost is a legitimate factor for consideration. However, it is not the only factor and may not necessarily be controlling. We believe that the approach to be followed should be selected based on a full consideration of all pertinent factors.

[B-183025]

Travel Allowance—Military Personnel—Enlistment Extension, Discharge, Reenlistment, etc.—Consecutive Overseas Tours—Same Station

Proposed revision of Volume 1 of the Joint Travel Regulations granting leave travel entitlements authorized under 37 U.S.C. 411b (Supp. III, 1973), to members reassigned to second tours of duty at same overseas station, is contrary to clear language of statutory provision which provides for this entitlement in connection with a "change of permanent station to another duty station."

Leaves of Absence—Military Personnel—Reenlistment Leave—Leave Travel Entitlements

There is no objection to a proposed revision of Volume 1 of the Joint Travel Regulations to grant leave entitlements under 37 U.S.C. 411b, where because of the critical nature of the member's job he is not authorized leave travel between permanent station assignments provided such travel takes place within a reasonable time following the change of station, and entitlements do not exceed those provided if travel had occurred between assignments.

In the matter of leave travel entitlements of military members assigned consecutive overseas tours, September 26, 1975:

This action is in response to a request by the Assistant Secretary of the Navy (Manpower and Reserve Affairs) for a decision as to whether it is legally permissible to amend Volume 1 of the Joint Travel Regulations to authorize travel and transportation allowances in the instances described below. The letter was forwarded to our Office by the Per Diem, Travel and Transportation Allowance Committee, and has been assigned PDTATAC Control No. 74–45.

The submission indicates that paragraphs M5500 and M5501 of Volume 1 of the Joint Travel Regulations implement new leave travel entitlements authorized by 37 U.S. Code § 411b (Supp. III, 1973), which provides as follows:

(a) Under uniform regulations prescribed by the Secretaries concerned, a member of a uniformed service stationed outside the forty-eight contiguous States and the District of Columbia who is ordered to make a change of permanent station to another duty station outside the forty-eight contiguous States and the District of Columbia may be paid travel and transportation allowances in connection with authorized leave from his last duty station to a place approved by the Secretary concerned, or his designee, or to a place no farther distant than his home of record if he is a member without dependents, and from that place to his designated post of duty, if either his last duty station or his designated post of duty is a restricted area in which dependents are not authorized.

(b) The allowances prescribed under this section may not exceed the rate authorized under section 404(d) of this title. Authorized travel under this section is performed in a duty status.

The current regulations, cited above, do not authorize leave travel when members are assigned to a second tour of duty at the same overseas station, one of the assignments being to an "all others tour." Although there is no permanent change of station in connection with such a reassignment it is suggested that the member should be entitled to leave travel between his two assignments to the same extent as a member who makes an actual permanent change of station, since both have the same need for family relocation or visitation with family or relatives. Further, it is indicated that members serving consecutive terms at the same location do so to the Government's advantage and should not be denied entitlement because of what is referred to as "the technical definition of permanent change of station contained in the Joint Travel Regulations."

Although those considerations support the reasonableness of providing leave travel allowances for members serving consecutive tours at the same duty station, the language of section 411b clearly limits the entitlement to members who are "ordered to make a change of permanent station *to another duty station*," [Italic supplied.]. As a general rule of statutory construction, words and phrases of a statute should be given their plain, ordinary and usual meaning unless persuasive evidence indicates that a different meaning was intended. *Banks* v. *Chicago Grain Trimmers*, 390 U.S. 459, 465 (1968); *Crane* v. *Commissioner*, 331 U.S. 1, 6 (1947).

Although we consider that the words of 37 U.S.C. § 411b clearly preclude the extension of this entitlement as suggested in the submission, we have reviewed the legislative history of that provision and have found no expression of congressional intent to authorize leave travel in those circumstances. Consequently, we find no statutory authority for revising Volume 1 of the Joint Travel Regulations to provide leave travel entitlements to members incident to consecutive assignments to the same overseas duty station.

It is also indicated in the submission that current regulations do not provide leave travel entitlements to a member reassigned on a permanent change of station between overseas duty stations who would normally qualify for those entitlements, but who, because of the critical nature of his job, was not authorized such leave travel incident to the change of official station travel. It is suggested that such a member should have a "saved entitlement" to leave travel that he could use at the first available time he could be spared from his new job and authorized leave. It is indicated that since the member would otherwise qualify for the leave travel, he should not be denied

that entitlement because the needs of his service precluded his taking leave in connection with the permanent change of station.

Although the wording of the statute in question clearly contemplates that the leave travel authorized thereby will be performed incident to the authorized change of station, the language used does not clearly preclude the authorization of leave travel at another time. A review of the legislative history reveals no expression of a specific congressional intent with respect to the time at which leave travel will be performed although it is clearly contemplated that under normal circumstances leave will be taken between tours of duty and the authorized travel performed at that time. S. Report No. 497, 93d Cong., 1st Sess. 2 (1973). It is equally clear that there existed a congressional concern that the entitlement created by section 411b be carefully limited to *bona fide* travel for family relocation or visitation. Congress expected that regulations implementing this enactment would stringently prevent deviation from this objective. S. Report No. 497, *supra.*

Since the statutory language in question does not specifically prohibit the delay of leave travel until after the change of station has taken place, it is our view that Volume I of the Joint Travel Regulations may be revised to permit a member who is not authorized leave between overseas assignments because of the critical nature of his job, to receive section 411b entitlements when leave is subsequently authorized. However, any implementing regulations should clearly limit leave travel entitlements to instances in which denial of authorized leave between duty stations was required by the needs of the member's service. Furthermore, such regulations should provide that authorized leave must be taken within a reasonable time following reassignment to ensure that the purposes of section 411b are properly observed.

It should be recognized, however, that the statutory entitlements of section 411b may not be enlarged by the proposed revision of Volume 1 of the Joint Travel Regulations. Section 411b authorizes a limited travel and transportation allowance whose maximum under the statute is the cost of travel from the member's last duty station to a place no further distant than his home of record or to a place approved by the Secretary concerned, or his designee, and from there to his new duty station. The proposed regulations must recognize this limitation even though in some instances, such as where a member's new duty station is farther from his home of record than his old duty station, the allowance may not be sufficient to pay for the full cost of his travel.

Consequently, Volume 1 of the Joint Travel Regulations may be revised as indicated above. However, regulations to be promulgated to provide for leave travel under these circumstances would provide

an additional entitlement not authorized by current regulations. Although we view that entitlement as within the scope of the authorizing statute, since it has not previously been provided for by regulations, it would be prospective only.

The questions submitted are answered accordingly.

[B–61937]

Military Personnel—Dependents—Certificates of Dependency—Filing Requirements

In view of the reasonable assurance that changes in dependency status for payment of basic allowance for quarters do not go undetected under the Joint Uniform Military Pay System, the annual recertification of dependency certificates prescribed in 51 Comp. Gen. 231, as they relate to Marine Corps, Navy, and Air Force members, no longer will be required, provided that adequate levels of internal audit are maintained.

In the matter of recertification of dependency certificates, September 29, 1975:

This action is in response to letter dated February 12, 1975, from the Assistant Secretary of Defense (Comptroller), requesting authorization of the discontinuance of the requirement for annual recertification of primary dependents by Marine Corps, Navy, and Air Force members receiving basic allowance for quarters (BAQ) at the with dependent rate. The request was assigned Department of Defense Military Pay and Allowance Committee Action No. 516, a copy of which was enclosed with the Assistant Secretary's letter.

The discussion in the Committee Action referred to our decision B–61937, dated August 6, 1974 (54 Comp. Gen. 92) which held that in view of the Army procedures for recertifying and verifying dependency for payment of BAQ under the Joint Uniform Military Pay System (JUMPS), the annual recertification of dependency certificates prescribed by 51 Comp. Gen. 231 (1971), as they relate to Army members' primary dependents, no longer would be required. The Committee Action discussion states that the Marine Corps, Navy, and Air Force Joint Uniform Military Pay Systems contain similar procedures that will provide reasonable assurance that changes in dependency status do not go undetected.

The Marine Corps justification enclosed with the Committee Action indicates that Marine Corps JUMPS continuously audits all field records to insure agreement with the control-site master record. Further, a Leave and Earnings Statement (LES) prepared at and distributed by the Marine Corps Finance Center, Kansas City, Missouri, for every Marine on a monthly basis contains personnel and pay data, including BAQ which must be audited upon receipt by the cognizant

disbursing officer and commanding officer to insure that all displayed data is correct. In addition, a Visual Audit Sheet (VAS) is produced annually during the member's month of birth and on the occasion of each permanent change of station. This computer generated document is also required to be audited by the disbursing officer and commanding officer. In this regard, the member concerned is personally queried as to the correctness of all information contained on the VAS, including BAQ, and must certify the correctness of all displayed data. As a result, the Marine Corps believes that the numerous audits and controls built into their JUMPS provide sufficient assurance that any discrepancies in the payment of BAQ will be detected early. The justification concludes by stating that the annual recertification and monthly/annual audit requirements are a duplication of effort and are not cost-effective.

The Navy justification indicates that their segmental approach to JUMPS currently provides assurance that any changes in dependency which have been overlooked or unreported for other reasons will be detected in a timely manner without the requirement for an annual recertification of dependency. Such assurance is based on: (a) monthly LES verification by the member and his disbursing officer of BAQ entitlement; (b) recurring verification by personnel/administrative/disbursing officers (1) upon reporting to a new duty station, (2) upon return from deployment, (3) upon application for dependent's Identification and Privilege (ID) card, (4) upon payment of dependent's travel claim, (5) upon issue of transportation requests to dependent, (6) upon application for Government housing; and (c) annual recertification of secondary dependents by the Navy Family Allowance activity. Thus, as in the case of the Marine Corps, the Navy believes that the present regular and frequent intermittent verification of primary dependents make annual recertification a duplicative and unnecessary effort and not cost-effective.

The Air Force justification indicates that JUMPS-Air Force has a "shred-out" program comparable to the Army for verifying a member's entitlement to BAQ at the with dependent rate (BAQ-W). It is stated that quarters' assignments are verified by sending a management notice (listing members assigned to adequate and inadequate Government quarters) to the servicing Accounting and Finance Officer (AFO) in April and October of each year. The AFO, in turn, compares this listing with the listing submitted by the Base Housing Officer to the AFO each April and October. If discrepancies are discovered, the AFO submits BAQ adjustment transactions to the Air Force Accounting and Finance Center. The Air Force notifies each member annually, staggered throughout the year, via an entry on the member's LES of

the requirement for him to recertify his primary dependents in order to continue BAQ–W entitlement. A member's failure to respond to that request is the basis for administrative discontinuance of BAQ entitlement. Since experience has shown that Air Force members remain at the same installation for periods in excess of 24 months, Air Force recertification policy would concentrate on: (a) continued semiannual comparison of members assigned Government quarters with members in receipt of BAQ–W, and (b) establishment of the requirement for all members in receipt of BAQ–W to recertify their primary dependents at least every 2 years and/or upon the member's departure from his duty station. Thus, the Air Force believes the existing degree of control, including semiannual and annual verifications, designed for early detection of BAQ discrepancies, also make annual recertification a duplication of effort and not cost-effective.

It appears that the Marine Corps and Navy systems of audits and controls and intermittent verifications, as well as the Air Force "shred-out" program to verify entitlements, under JUMPS would provide reasonable assurance that changes in dependency status for payment of BAQ do not go undetected.

Accordingly, we have no objection to the discontinuance of the requirement for annual recertification of primary dependents by Marine Corps, Navy, and Air Force under the procedures outlined in Committee Action No. 516.

Approval of this proposal is contingent upon an understanding that the services establish and maintain adequate levels of internal audit to assure the legality, propriety and correctness of all disbursements for BAQ. In this regard, it is our view that the internal audit function should be separate from the procedures discussed in the Committee Action and in addition to any controls that have been built into the JUMPS currently in operation or under development by the services. It should, instead, be designed to evaluate the effectiveness of these procedures and controls.

[B–176994]

Agriculture Department—Domestic Food Programs—Authority To Continue—Continuing Resolution

Appropriation of funds in continuing resolution for fiscal year 1976 for domestic food programs established under National School Lunch Act and Child Nutrition Act confers upon Department of Agriculture necessary authority to continue such programs until termination of continuing resolution, notwithstanding expiration of funding authorization in enabling legislation on September 30, 1975.

Appropriations—Continuing Resolutions—Availability of Funds—In Absence of Regular Appropriations

Proviso in section of continuing resolution, which suspends effectiveness of provisions in appropriation acts making availability of appropriations contingent

upon enactment of authorizing legislation, was intended to apply only to appropriation bills prior to their final enactment. Thus, enactment of appropriation act with such contingency provision will supersede continuing resolution and will suspend availability of funds pending enactment of necessary legislative authority.

In the matter of the authority to continue domestic food programs under continuing resolution, September 30, 1975:

This decision to the Secretary of Agriculture is in response to a request dated September 15, 1975, from the General Counsel, Department of Agriculture (DOA), concerning the authority of DOA to continue three domestic food programs after September 30, 1975, in light of the circumstances set forth below. The programs, all administered by DOA, are—

(1) School Breakfast Program, section 4 of the Child Nutrition Act of 1966, as amended, 42 U.S. Code § 1773. This program provides grants to States to provide breakfasts free or at a reduced price to needy schoolchildren.

(2) Special Food Service Program for Children, section 13 of the National School Lunch Act, as amended, 42 U.S.C. § 1761. Established in 1968, this program authorizes grants and other assistance to States to provide nonprofit food service programs for needy and handicapped children in "service institutions" as defined in the act.

(3) Special Supplemental Food Program (known as "WIC"—women, infants, and children), section 17 of the Child Nutrition Act of 1966, as amended, 42 U.S.C. § 1786. WIC was established in 1972 to aid local health or welfare agencies or private nonprofit agencies, and Indian tribes and organizations, in making supplemental foods available to pregnant or lactating women and to infants determined to be nutritional risks.

Funds for the three programs were authorized in the respective sections of the enabling legislation and have been appropriated in the annual DOA appropriation acts. Without legislative action in the First Session of the 94th Congress, the authorization for all three programs would have expired on June 30, 1975. Legislation, H.R. 4222, was introduced early in the session to extend the programs, passed both the House and the Senate, and was reported out of conference on July 30 (H.R. Report No. 94–347). However, on September 5, the Senate voted to recommit the conference report. Cong. Rec., September 5, 1975 (daily ed.), S15394–99. In addition, the Agriculture and Related Agencies Appropriation Act for 1976, H.R. 8561, is also presently under consideration. The bill passed the House on July 14, passed the Senate on July 25, and is now ready for conference.

On May 2, 1975, Congress extended the Special Food Service Program to September 30, 1975, by Public Law 94–20, 89 Stat. 82. This was done to enable proper planning by sponsoring agencies for the summer program without fear of having the program expire midway in the summer. S. Report No. 94–57, 94th Cong., 1st Sess. 2 (1975). Similarly, WIC was extended to the same date on May 28, 1975, by Public Law 94–28, 89 Stat. 96. This was deemed necessary because the program faced interruption if States did not receive their letters of credit containing WIC funds by approximately June 1. S. Report No. 94–158, 94th Cong., 1st Sess. 3 (1975). No special legislation was enacted to extend the School Breakfast Program, but it was specifically included in the Joint Resolution making continuing appropriations for fiscal year 1976 ("Continuing Resolution"), Public Law 94–41 (June 27, 1975) § 101(e) (13th unnumbered paragraph), 89 Stat. 225, 229.

DOA expresses doubt that authority would exist to continue the Special Food Service and WIC Programs beyond September 30, 1975, if H.R. 4222 or similar legislation is not enacted by that date. DOA further believes this result is not affected by the Continuing Resolution. The Department's position is summarized in its September 15 letter as follows:

> We have concluded, however, that there is no basis in Public Law 94–41, the Joint Resolution, for considering either the Special Food Service Program or the WIC Program as having been continued beyond September 30, 1975, despite the fact that the Resolution does provide funding authority for them in section 101(e) and (f). We reach this result because shortly before the Resolution was passed, legislation specifically extending these two programs to September 30, 1975 was adopted; the Senate Committee Report on the Resolution, while mentioning the School Breakfast Program, is silent with respect to these other two programs; and, there is language with respect to the WIC Program in section 101(f) of the Resolution which excepts section 17(b) (the funding provision) of the Child Nutrition Act.

DOA further believes that the enactment of H.R. 8561 prior to H.R. 4222 would cause termination of all three programs because H.R. 8561 (title III, pages 56 and 57) expressly makes the availability of appropriations for the three programs contingent upon the enactment of "necessary legislative authority."

If neither the authorizing legislation nor the appropriation act is enacted by September 30, it is necessary to consider the effect of the Continuing Resolution in order to determine the status of the programs in question. Pertinent provisions of Public Law 94–41 are set forth below:

> [T]he following sums are appropriated out of any money in the Treasury not otherwise appropriated * * *:
>
> * * * * * * *

[Section 101(e)] Such amounts as may be necessary for continuing the following activities, but at a rate for operations not in excess of the current rate unless otherwise provided specifically in this subsection * * *

The following activities for which provision was made in the Agriculture-Environmental and Consumer Protection Appropriation Act, 1975: * * *

Food programs under section 32 of the Act of August 24, 1935, and section 416 of the Agricultural Act of 1949, as amended, including cost-of-living increases mandated by law and the School Breakfast Program; * * *.

* * * * * * *

[Section 101(f)] Such amounts as may be necessary to permit payments and assistance mandated by law for the following activities which were conducted in fiscal year 1975— * * *

Activities under the Food Stamp Act, the Child Nutrition Act, and the School Lunch Act, as amended, except for section 17(b) of the Child Nutrition Act of 1966;

* * * * * * *

[Section 102] Appropriations and funds made available and authority granted pursuant to this joint resolution shall be available from July 1, 1975, and shall remain available until (a) enactment into law of an appropriation for any project or activity provided for in this joint resolution, or (b) enactment of the applicable appropriation Act by both Houses without any provision for such project or activity, or (c) sine die adjournment of the first session of the Ninety-fourth Congress, whichever first occurs.

We have recognized that Congress may appropriate funds in excess of a cost limitation contained in the original authorization act and that the agency is thereby authorized to continue the program at the higher level. 36 Comp. Gen. 240 (1956). By the same token, it would seem that the appropriation of funds for a program whose authorization is due to expire during the period of availability of the funds, confers the necessary authority to continue the program during that period of availability, in the absence of indication of contrary intent. A Continuing Resolution has the same "force and effect" as an appropriation act. *Oklahoma* v. *Weinberger*, 360 F. Supp. 724, 726 (W.D. Okla. 1973). The specific inclusion of the School Breakfast Program in section 101(e) of the Resolution is a clear indication of the intent of Congress that this program continue under the Resolution, notwithstanding the expiration of its authorization on June 30. Thus, it is our view that the appropriation made by Public Law 94–41 confers upon DOA the authority to continue the School Breakfast Program at the rate specified in section 101(e), until the availability of that appropriation terminates by the occurrence of one of the three events specified in section 102.

The situation with respect to the Special Food Service and WIC Programs is only slightly different, in that, as noted above, Congress has extended these programs to September 30 by specific legislation. In our opinion, the enactment of this specific legislation (Public Laws 94–20 and 94–28) shortly before the Continuing Resolution

should not be construed as preempting the Resolution since, as discussed above, the timing of those two statutes seems to have been dictated not by any intent to alter the effect of the Continuing Resolution, but rather by the particular needs of the programs involved. Indeed, it is manifest from the enactment of Public Laws 94–20 and 94–28, the pending extension of authorization in H.R. 4222, which has passed both Houses, and the appropriation provided in H.R. 8561, which has also passed both Houses, that the intent of Congress with respect to the Special Food Service and WIC Programs is that they be continued. It would therefore be illogical to conclude that this intent must be frustrated for the two programs which were not specifically mentioned in the Resolution but which were extended to September 30 while continuing the School Breakfast Program for which no extension was enacted at all for the time being, pending further consideration by the substantive committee.

We note further that the Special Food Service Program and the major portion of the WIC Program are funded under "section 32 of the Act of August 24, 1935," as amended. Thus it may be argued that the Continuing Resolution did provide for these programs, albeit not as specifically as in the case of the School Breakfast Program. In this connection, the specific mention in section 101(f) of section 17(b) of the Child Nutrition Act, 42 U.S.C. § 1786(b), does not appear to have been intended to totally exclude the WIC Program from the operation of the Continuing Resolution. The purpose of this specific mention, although it is not discussed in the legislative history, appears merely to be to exclude WIC from the specialized coverage of section 101(f). Section 101(e), quoted above, would in our opinion still be applicable.

In light of the foregoing considerations, it is our view that authority to continue the three subject programs exists under the Continuing Resolution, unless the DOA appropriation act is sooner enacted. Barring some further congressional indication of intent to terminate the subject programs, this authority will extend to the sine die adjournment of the first session of the 94th Congress.

If H.R. 8561, the DOA appropriation act for fiscal year 1976, is enacted prior to H.R. 4222 or similar authorizing legislation, DOA points out that the availability of appropriations for the subject programs would, by the terms of H.R. 8561, be made contingent upon the enactment of "necessary legislative authority" (see p. 56, lines 17–20 and p. 57, lines 10–13 of H.R. 8561). The Department's position is that the prior enactment of H.R. 8561 would satisfy section 102(a)

of the Continuing Resolution, thereby terminating the operation of the Resolution. The subject programs would then terminate because there would be no funds available for them. In this connection, section 101(a)(3) of Public Law 94–41 (89 Stat. 225) provides:

> Whenever the amount which would be made available or the authority which would be granted under an Act listed in this subsection as passed by the House as of July 1, 1975, is different from that which would be available or granted under such Act as passed by the Senate as of July 1, 1975, the pertinent project or activity shall be continued under the lesser amount or the more restrictive authority: *Provided*, That no provision in any appropriation Act for the fiscal year 1976, which makes the availability of any appropriation provided therein dependent upon the enactment of additional authorizing or other legislation, shall be effective before the date set forth in section 102(c) of this joint resolution.

The "date set forth in section 102(c)" is the sine die adjournment of the first session of the 94th Congress. The Department's position regarding the effect of section 101(a)(3) is set forth in the September 25 submission:

> The subsection of the Resolution in which [the proviso in section 101(a)(3)] appears does not refer to appropriations for the Department of Agriculture. In any event, if the appropriation bill is finally agreed upon and signed by the President it would constitute a later legislative enactment which would seemingly supersede section 101(a)(3) of the Resolution even if it were applicable.

The proviso of section 101(a)(3) was first used in the Continuing Resolution for fiscal year 1973, Public Law 92–334 (July 1, 1972), 86 Stat. 402. Its purpose was explained by the House Committee on Appropriations as follows:

> In several of the appropriation bills for 1973 the Senate has attached provisions to a number of appropriations, making their availability contingent on enactment of authorization legislation. Thus, in these instances the effective Senate-passed amounts are zero and if the provisions are operative as of July 1, under the standard application of the section 101(a)(3) groundrule they would be without funds come July 1. Pending disposition of the provisions and the authorizations to which they refer, the above-quoted provision in the accompanying continuing resolution is necessary to avoid what would in its absence be the case; namely, an abrupt cutoff of funds for many important on-going programs and agencies come midnight, June 30. H.R. Rep. No. 92–1173, 92d Cong., 2d Sess. 3 (1972).

It seems clear from this legislative history, as well as from the relationship of the language of the proviso to the language in the rest of section 101(a)(3) that the proviso was intended to suspend the effect of contingency provisions only in appropriation bills prior to their final enactment. There is nothing in the legislative history to indicate an intent to cover such bills once they have been enacted. Indeed, such an interpretation would be inconsistent with the basic purport of a continuing resolution, which is to provide funding on an interim basis until the applicable appropriation act can be enacted. To conclude otherwise would require continued operation of these pro-

grams under the Continuing Resolution despite the fact that the Congress might choose to deal otherwise with the programs involved in subsequent legislation. Therefore, if H.R. 8561 is enacted prior to new authorizing legislation, or prior to additional extensions such as Public Laws 94–20 and 94–28, the contingency provisions therein will supersede the Continuing Resolution and will become the controlling legislative statement. In that event, the availability of funds for the subject programs will be suspended pending the enactment of "necessary legislative authority."

[B–183833]

Officers and Employees—Contracting With Government—Public Policy Objectionability—Corporation

Where Government employee owns 39.95 percent of stock of corporation, it is concluded that he has substantial ownership in corporation. Conclusion is reached in view of significant history which has discouraged contracting between Government and its employees. Therefore, while agency restricted its view to employee's role in day-to-day management of corporation, since reasonable ground did exist, rejection of corporation low bid was not improper.

In the matter of Capital Aero, Inc., September 30, 1975:

Invitation for bids (IFB) No. R1–11–75–44 was issued on March 21, 1975, by the United States Department of Agriculture, Forest Service, seeking bids to provide aircraft services for the Helena National Forest. Bid opening was held on April 23, 1975. The low bid was submitted by Capital Aero, Inc.

However, subsequent to bid opening it was discovered that Mr. John F. Patten, who had signed Capital's bid as president of that corporation, was a full-time employee of the United States Government.

Section 1–1.302–3 of the Federal Procurement Regulations (FPR) (1964 ed. amend. 95) states that:

> Contracts shall not knowingly be entered into between the Government and employees of the Government or business concerns or organizations which are substantially owned or controlled by Government employees, except for the most compelling reasons, such as cases where the needs of the Government cannot reasonably be otherwise supplied.

The contracting officer relates that on several occasions, he telephoned Capital with regard to determining the bidder's responsibility. Each time he was informed by the answering party that he would have to discuss the matter then in question with Mr. Patten, and only Mr. Patten. This indicated to the contracting officer that Mr. Patten exercised substantial control over the management of the corpora-

tion's business activities and, consequently, the contracting officer determined that in accordance with FPR § 1–1.302–3, *supra*, award should not be made to Capital. Award was thereafter made to Morrison Flying Service, the second low bidder, on May 2, 1975.

Capital protested the agency's actions since the Capital bid was signed by Mr. Patten, not as an individual, but as an agent of the corporation and the contracting officer should have made an inquiry to determine whether or not Mr. Patten substantially owned or controlled Capital. With regard to this latter point, Capital relates that had such an inquiry been made the contracting officer would have found that Mr. Patten does not "substantially own or control a majority of the stock of said corporation."

As set out in 41 Comp. Gen. 569, 571 (1962) "* * * contracts between the Government and its employees have been considered subject to criticism from a public policy standpoint on the grounds of possible favoritism and preferential treatment. Our Office has often expressed the view that such contracts should not be made except for the most cogent reasons. See 4 Comp. Gen. 116, 5 *id.* 93, 14 *id.* 403, 21 *id.* 705, 25 *id.* 690, 27 *id.* 735." *See* § 4–1.302–3 Agriculture Procurement Regulations, 41 C.F.R. § 4–1.302–3 (1974).

This rule is equally applicable to corporations owned or controlled by Government employees. B–167036, February 18, 1970; B–124557, October 10, 1955.

In the instant case, we have been advised that John Patten owns 499 shares of Capital stock and that his wife, Judith, owns 750 shares. By our calculations, Mr. Patten owns 39.95 percent of the stock of the corporation. Viewing FPR § 1–1.302–3 against the significant history which has discouraged contracting between the Government and its employees, we conclude that Mr. Patten has a substantial ownership in the corporation. In that connection, FPR § 1–1.302–3 does not speak of "majority" ownership, only "substantial" ownership.

The Forest Service, in determining to reject Capital's bid, restricted its consideration to Mr. Patten's role in the day-to-day management operations of the company. We need not rule on the validity of the basis underlying the Forest Service's action, since it is clear that a reasonable ground did, in fact, exist to support the rejection. In light of Mr. Patten's substantial ownership interest in the corporation, we cannot conclude that the rejection of Capital's bid was improper.

Accordingly, the protest is denied.

[B-184145]

General Accounting Office—Decisions—Advance—Disbursing and Certifying Officers—Payments Prohibited by Statutes

In view of certifying officer's statutory right to request and receive advance decision from the Comptroller General on matters of law, certifying officers are not "bound" by conclusion of law rendered by agency's general counsel. 31 U.S.C. 82d.

Certifying Officers—Liability—Failure To Use Statutory Authority To Obtain Comptroller General's Decision

Where there is doubt as to legality of a payment, certifying officer's only complete protection from liability for an erroneous payment is to request and follow Comptroller General's advance decision under 31 U.S.C. 82d.

Certifying Officers—Relief—Erroneous Payments—Statutory Prohibition

The Comptroller General may not relieve a certifying officer from liability if the Comptroller General finds a payment was specifically prohibited by statute, even though payment was made in good faith and for value received. 31 U.S.C. 82c.

Certifying Officers—Submission to Comptroller General—Doubtful Payments

Test of good faith regarding legal questions concerning certified vouchers is whether or not certifying officer was "in doubt" regarding payment, and, if so, whether he exercised his right to request and receive advance decision from Comptroller General. 31 U.S.C. 82c, 82d.

Certifying Officers—Certification Effect—Liable for Improper Payments—Based on Fact, Law or Both

Certifying officer is liable moment an improper payment is made as a result of his erroneous certification. This is true whether certification involves question of fact, question of law, or mixed question of law and fact.

Certifying Officers—Relief—Lack of Due Care, etc.—Evidence

This Office has sought to apply the certifying officer's relief statute by considering practical conditions and procedures under which certifications are made. Consequently, diligence required of a certifying officer before requests for relief can be granted is matter of degree dependent on practical conditions prevailing at time of certification, sufficiency of administrative procedures protecting interests of Government, and apparency of the error.

In the matter of responsibilities and liabilities of certifying officers, September 30, 1975:

In a letter of June 4, 1975, the Chief Certifying Officer of the U.S. Energy Research and Development Administration requested our guidance as to the role and responsibilities of a certifying officer. The certifying officer is concerned with the degree of reliance he can and should place on the advice of the agency's legal counsel in view of his responsibilities which are fixed by law. In addition to requesting gen-

eral advice concerning his responsibilities, the certifying officer specifically asks—

> If our Office of General Counsel determines that a claim meets all legal requirements and is proper for payment or that payments under a proposed agency policy would not be contrary to any statutory provisions specifically prohibiting payments of the character involved, is the certifying officer bound by such determinations?
>
> To what extent, if any, can a certifying officer be relieved of his financial responsibility when he has relied upon a legal opinion by the Agency's General Counsel?*

The responsibilities of a certifying officer are fixed by the acts of December 29, 1941, c. 641, § 2, 55 Stat. 875, as amended (31 U.S. Code § 82c (Supp. III, 1973)), and April 28, 1942, c. 247, title III, 56 Stat. 244, 31 U.S.C. § 82f (1970). *See* 21 Comp. Gen. 976, 978 (1942); 28 *id.* 425, 426 (1949). These acts provide that:

> The officer or employee certifying a voucher shall (1) be held responsible for the existence and correctness of the facts recited in the certificate or otherwise stated on the voucher or its supporting papers *and for the legality of the proposed payment under the appropriation or fund involved;* and (2) be held accountable for and required to make good to the United States 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 under the appropriation or fund involved * * *. 31 U.S.C. § 82c (Supp III. 1973) [Italic supplied.]

and—

> The responsibility and accountability of certifying officers under sections 82b, 82c to 82e of this title shall be deemed to include the correctness of the computation of certified vouchers * * *. 31 U.S.C. § 82f (1970).

If the certifying officer should either make a "false, inaccurate, or misleading certificate" that is the proximate cause of any illegal, improper, or incorrect payment, or issue a certificate causing a payment prohibited by law or which does not represent a "legal obligation under the appropriation or fund involved," then the certifying officer is liable to the United States for any payment made under such certificate. 31 U.S.C. § 82c (Supp. III, 1973).

Furthermore, a certifying officer is liable the moment an improper payment is made as the result of his erroneous certification. *See* 54 Comp. Gen. 112, 114 (1974). This is true whether the certification involves a matter of fact, a question of law, or a mixed question of law and fact. 4 Comp. Dec. 332, 337 (1897); 23 Comp. Gen. 181, 183 (1943); 30 *id.* 298, 300 (1951); 39 *id.* 548, 549 (1960); 45 *id.* 447 (1966). Moreover, this Office looks only to the certifying officer for reimburse-

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*The instant submission is not appropriate under 31 U.S.C. § 82d, *infra* in text, since it does not involve legal questions arising in a specific voucher presented for certification. However, we respond to the questions raised as a matter of general interest.

ment even though some other administrative employee may be liable to the certifying officer under administrative regulation. 32 Comp. Gen. 332 (1953); 15 *id.* 962 (1936).

Under the first proviso of 31 U.S.C. § 82c (Supp. III, 1973)—

> * * * *the Comptroller may, in his discretion,* relieve such certifying officer or employee of liability for any payment otherwise proper whenever he finds (1) that the certification was based on official records and that such certifying officer or employee did not know, and by reasonable diligence and inquiry could not have ascertained, the actual facts, or (2) that the obligation was incurred in good faith, that the payment was not contrary to any statutory provision specifically prohibiting payments of the character involved, and that the United States has received value for such payment * * *. [Italic supplied.]

Subsection (1) of the relief proviso allows the Comptroller General, in his discretion, to relieve a certifying officer from liability based on the officer's certification of incorrect facts, provided such certification occurred under circumstances as stipulated therein. As a general rule, a certifying officer may not escape liability for losses resulting from improper certification merely by stating either that he was not in a position to ascertain of his personal knowledge that each item on a voucher was correctly stated or that he must depend on the correctness of the computations of his subordinates. If he relies upon statements and computations of subordinates, he must assume responsibility for the correctness of their statements and computations, unless it can be shown that neither he, nor his subordinates, in the reasonable exercise of care and diligence, could have known the true facts. Otherwise, the certification would be without material value as a protection of the United States against erroneous payments if, after certifying definitely to the correctness of the voucher, the certifying officer could then escape liability by merely stating that he was not personally familiar with the facts to which he certified and did not know whether they were correct. 49 Comp. Gen. 486 (1970). The function of certification is not perfunctory, but involves a high degree of responsibility. 20 Comp. Gen. 182 (1940); 26 *id.* 578, 579 (1947). Thus we have held that press of work cannot relieve the certifying officer of his responsibilities. B-147747, December 28, 1961. On the other hand, we have held that, where proper administrative safeguards exist, certifying officers do not need to examine time, attendance, and leave records in order to certify the correctness of amounts shown on payrolls submitted to them. 31 Comp. Gen. 17, 18 (1951).

We have never undertaken to formulate any general rule declaring what acts may carry exemption from liability for certification of incorrect facts. Rather, we have sought to apply the relief provisions by considering the practical conditions and procedures under which cer-

tifications of fact are made. Consequently, the diligence to be required of a certifying officer before requests for relief under the act will be considered favorably is a matter of degree dependent upon the practical conditions prevailing at the time of certification, the sufficiency of the administrative procedures protecting the interest of the Government, and the apparency of the error.

Subsection (2) of the relief proviso of 31 U.S.C. § 82c (Supp. III, 1973) allows the Comptroller General, in his discretion, to relieve certifying officers from liability for payments made in good faith and for value received by the United States. But the Comptroller General may not relieve a certifying officer if the Comptroller General finds that the payment was specifically prohibited by statute, regardless of value received by the Government or the certifying officer's good faith. 46 Comp. Gen. 135 (1966); 31 *id.* 653, 654 (1952); 14 *id.* 578, 583 (1935). Assuming value received for a payment and the absence of statutory prohibition, the test of good faith regarding legal questions concerning certified vouchers is whether or not the certifying officer was "in doubt" regarding the payment, and, if so, whether he exercised his right to request and receive an advance decision from the Comptroller General on any question of law involved in a payment on any voucher presented to him for certification, under section 3 of the act of December 29, 1941, 31 U.S.C. § 82d (1970). Thus, we have held that a certifying officer, who accepts the advice and instruction of an administrative or legal officer concerning a doubtful payment instead of exercising his right to obtain a decision by the Comptroller General, may not be relieved of responsibility for making an erroneous payment. 31 Comp. Gen. 653, 654 (1952); 14 *id.* 578, 583 (1935); B–180752, June 12, 1974.

Replying to the certifying officer's two questions quoted previously herein, where there is doubt as to the legality of a payment, the certifying officer's only complete protection from liability for an erroneous payment is to request and follow the Comptroller General's advance decision under 31 U.S.C. § 82d (1970). Moreover in view of the certifying officer's statutory right to request and obtain an advance decision from the Comptroller General regarding the lawfulness of any payment to be certified we can see no reason for concluding that the agency's general counsel's conclusions of law regarding such payment are "binding" on the agency's certifying officers.

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Responsibility *v.* bid responsiveness
Bidder ability to perform

Question whether surplus bidders under solicitations for aircraft and aircraft related parts—incorporating ANA Bulletin No. 438c (age controls for age-sensitive elastomeric items)—can comply with Bulletin requirements for identification, marking, and storage of parts containing elastomeric components is one affecting responsibility---- 1

BIDS
Acceptance
Unbalanced bids
Improper

Proposed acceptance of apparent low mathematically unbalanced bid is not proper where (1) agency determines bid is low through reevaluations using substantially revised estimates of work requirements, which, in themselves, indicate that "material unbalancing" (existence of reasonable doubt that any award would result in lowest cost to Govt.) is present; (2) under reevaluation using one of revised estimates, bid is not low, confirming existence of material unbalancing; (3) reevaluation procedure has effect of introducing new evaluation factors into procurement and contravenes requirement that bidders compete equally based on objective factors in IFB. B-161208, Aug. 8, 1967, modified---- 231

Additives. (*See* **BIDS, Aggregate *v.* separable items, prices, etc., Additives**)

Aggregate *v.* separable items, prices, etc.
Additives
Correction
Not prejudicial to other bidders

Where bid included alternate item price, bid deviated from amended bidding requirement that alternate work and price therefore be included in base bid price. However, bid may nevertheless be accepted if otherwise proper since deviation did not prejudice other bidders as bidder is obligated to perform all work and bid is low overall whether price under alternate item is included or is in addition to base bid price---- 168

BIDS—Continued
All or none
Qualified. (*See* **BIDS, Qualified, All or none**)
Bidders, generally. (*See* **BIDDERS**)
Changes, erasures, reviews, etc.
Initialing Page
Contention that "all or none" qualification on bidding schedule was change in bid requiring initialing by bidder is without merit because (1) qualification was not change; (2) assuming qualification was change, bidding schedule was initialed; and (3) lack of initialing of change could have been waived as minor informality 100
Collusive bidding
Allegations unsupported by evidence
Unsupported allegation that successful bidder, issued COC by SBA, bid collusively with another bidder, and was not unaffiliated bidder as represented in bid is not sufficient to overcome certification of unaffiliation in bid and lack of evidence to show violation of certification 97
Competitive system
Federal aids, grants, etc.
Equal Employment Opportunity programs
Where applicable regulations of Federal Govt. agency require that procurements by grantees be conducted so as to provide maximum open and free competition, certain basic principles of Federal procurement law must be followed by grantee. Therefore, rejection of low bid under grantee's solicitation as nonresponsive was improper where basis for determining responsiveness to minority subcontractor listing requirement was not stated in IFB and b dder otherwise committed itself to affirmative action requirements. It is therefore recommended that contract awarded to other than low bidder be terminated 139
Late bids
Hand-carried bid may be accepted even though received late since lateness is result of bid opening officer's erroneous rejection of initial tender which was timely made and consideration of bid does not compromise integrity of competitive bid system 267
Negotiated contracts. (*See* **CONTRACTS, Negotiation, Competition**)
Restrictions on competition
Prohibition
Surplus material
Navy "blanket" prohibition of all surplus material (whether new and unused surplus or reconditioned surplus) is not in compliance with requirements for "free and open" competition and drafting specifications stating Govt.'s actual needs. Navy contracting officer and cognizant technical personnel should determine, if possible under circumstances of particular procurement, at time solicitation is issued whether surplus and/or reconditioned material will meet its actual needs 1
Conformability of articles to specifications. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered**)
Contracts, generally. (*See* **CONTRACTS**)
Deviations from advertised specifications. (*See* **CONTRACTS, Specifications, Deviations**)

BIDS—Continued
Discarding all bids
Resolicitation
Revised specifications Page
As general rule, mathematically unbalanced bid—bid based on enhanced prices for some work and nominal prices for other work—may be accepted if agency, upon examination, believes IFB's estimate of work requirements is reasonably accurate representation of actual anticipated needs. But where examination discloses that estimate is not reasonably accurate, proper course of action is to cancel IFB and resolicit, based upon revised estimate. B–161208, Aug. 8, 1967, modified 231
Evaluation
Aggregate *v.* separable items, prices, etc.
All or none bid
Where IFB permits multiple awards, "all or none" bid lower in aggregate than any combination of individual bids available may be accepted by Govt. even though partial award could have been made at lower unit cost 100
All or none bids
Qualified. (*See* **BIDS, Qualified, All or none**)
Alternate bases bidding
Propriety of evaluation
Where bid included alternate item price, bid deviated from amended bidding requirement that alternate work and price therefore be included in base bid price. However, bid may nevertheless be accepted if otherwise proper since deviation did not prejudice other bidders as bidder is obligated to perform all work and bid is low overall whether price under alternate item is included or is in addition to base bid price 168
Conformability of equipment, etc. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered**)
Contrary to terms of solicitation
Presumption of unacceptability
Agency's presumption that bidders offering surplus material can meet QPL requirements only if bidder affirmatively volunteers and shows in its bid that it could meet acceptance test, QPL, and other Govt. requirements, is contrary to basic procurement policy 1
Labor costs
Old *v.* new wage rates
When contract is awarded on basis of old wage rates after new Service Contract Act wage determination has been received after bid opening, option should not be exercised since proper way to determine effect of new wages is to recompete rather than assume new rate would affect bidders equally. Recommendation is being referred to appropriate congressional committees pursuant to Legislative Reorganization Act of 1970, 31 U.S.C. 1172 97
Failure to furnish something required. (*See* **CONTRACTS, Specifications, Failure to furnish something required**)
Hand carried
Delivery location
Provision in solicitation that bids be mailed to certain address or hand-carried to depositary located at mailing address does not prohibit hand delivery to official located in bid opening room who was authorized to receive bids 267

BIDS—Continued
Invitation for bids
Cancellation
Justification Page

Cancellation of IFB and negotiation of sole-source award to low bidder offering surplus material was not improper, even though contracting officer failed to ask QPL preparing activity for required waiver of those QPL requirements, which were not required of bidder, pursuant to ASPR 1–1108; however, recommendation is made that waiver be gotten prior to exercise of option under contract---------- 1

Not prejudicial to other bidders

Although it would seem that cantracting officer, who canceled IFB for supply of aircraft parts after determining that nonresponsive bid offering surplus material met Govt.'s actual minimum needs for much lower cost and who negotiated sole-source contract with surplus bidder on "public exigency" basis, acted improperly in failing to solicit other bidders on same basis, other bidders were not prejudiced since it is unlikely they would have offered surplus and low surplus bid was responsive to IFB---------- 1

Interpretation
Oral explanation

Oral explanation furnished bidder regarding manner of award has no legal effect where IFB requires bidders to request in writing any explanation desired regarding meaning or interpretation of IFB---------- 100

Labor stipulations. (*See* **CONTRACTS, Labor stipulations**)

Late
Acceptance
Not prejudicial to other bidders

Hand-carried bid may be accepted even though received late since lateness is result of bid opening officer's erroneous rejection of initial tender which was timely made and consideration of bid does not compromise integrity of competitive bid system---------- 267

Conflicting statements

Factual statements made by attendee at bid opening who claimed to have observed occurrences from far corner of room are rejected in preference to contrary statements submitted by bid opening officer and alternate who directly participated in contested delivery of bid---------- 267

Identification of bid erroneous
Negotiated procurement. (*See* **CONTRACTS, Negotiation, Late proposals and quotations, Identification erroneous**)

Negotiated procurement
Late proposals and quotations. (*See* **CONTRACTS, Negotiation, Late proposals and quotations**)

Recommendation to ASPR Committee and FPR Division
Revision of late bid provisions of procurement regulations

Recommendation is made to ASPR Committee and FPR Division that GAO comments on possibility that late bid provisions involving acceptable evidence to establish timely receipt of bids may be unnecessarily causing Govt. to lose benefits of low bids be considered with respect to possible revision of procurement regulations---------- 220

BIDS—Continued
Late—Continued
Telegraphic modifications
Evidence of timely delivery
Page

Telegraphic bid modification, Govt. time-stamped 3 minutes after time for bid opening in office designated in IFB, which, if for consideration, would make third low bidder low, was properly rejected as late, notwithstanding documentary evidence of Western Union indicating delivery at time for bid opening, since only acceptable evidence to establish timely receipt in IFB is time-date stamp of Govt. installation on bid wrapper or other documentary evidence of receipt maintained by installation 220

Time variances

Where bid opening officer states that hand-carried bid initially was tendered, according to clock in bid opening room, prior to scheduled bid opening time and prior to authorized public declaration that such time had arrived, rejection of bid as late is not required even though officer initially rejected tender of bid in accordance with time shown on unsynchronized clock outside bid opening room. Authorized public declaration, made in accordance with clock in bid opening room, that time for bid opening has arrived is *prima facie* evidence of that fact 267

Mistakes
Correction
Base bid and alternative items

Where bidder stated separate prices for both base bid and alternate item, even though amendment (which was acknowledged) required inclusion of alternate work and price in base bid, bidder may correct base bid price by adding alternate price thereto as bidder has submitted clear and convincing evidence as to both the existence of mistake and price intended and bid is low both as corrected and uncorrected. However, agency is advised that in future bid schedules should be revised to conform with revisions in bidding instructions 168

Rule

Departments are authorized under applicable procurement regulation to make administrative determinations prior to award to resolve suspected mistakes in bid 267

Negotiated contracts. (*See* **CONTRACTS, Negotiation, Mistakes**)
Modification
After bid opening
Evidence to substantiate allegation lacking

In absence of evidence affirmatively showing that low responsive bidder added "all or none" qualification to bid after opening, award is not questioned even though an appearance of impropriety was created when bid opening officer and preparer of bid abstracts, respectively, failed to read aloud or note qualification in violation of ASPR on bid opening procedures. GAO reviewed answers by Govt. employees to written interrogatories propounded by protester and received expert handwriting analysis from U.S. Secret Service 100

Negotiated procurement. (*See* **CONTRACTS, Negotiation**)

BIDS—Continued
Omissions
Information
Qualified products information
Test number identification Page
Bidder under QPL procurement, who fails to identify manufacturer or applicable QPL test number, but who identifies product's manufacturer's designation, is responsive to IFB, and omissions may be waived as minor informalities---- 1
Opening
Time for opening determination
Bid deadline for hand-carried bid may not be deemed to have arrived because of bid opening officer's removal of bids from depositary since public declaration that time set for bid opening had arrived subsequently was made by authorized official consistent with clock in bid opening room---- 267
Proposals and quotations. (*See* **CONTRACTS, Negotiation, Late proposals and quotations**)
Protests. (*See* **CONTRACTS, Protests**)
Qualified
All or none
Evaluation. (*See* **BIDS, Evaluation, Aggregate *v.* separable items, prices, etc., All or none**)
Failure to read aloud and record qualification
Validity of award
Failure of procuring activity personnel to read aloud and properly record on abstracts "all or none" qualification is deviation of form from procurement regulations, not of substance, and does not affect validity of award. However, in view of failure of procuring activity personnel to follow ASPR bid opening procedures, GAO recommends that Secretary of Army take appropriate action to insure compliance with applicable ASPRs---- 100
Interpretation of qualification
Contention that "all or none" qualification on bidding schedule was change in bid requiring initialing by bidder is without merit because (1) qualification was not change; (2) assuming qualification was change, bidding schedule was initialed; and (3) lack of initialing of change could have been waived as minor informality---- 100
Qualified products. (*See* **CONTRACTS, Specifications, Qualified products**)
Rejection
Contrary to basic procurement policy
Presumption of unacceptability
Agency's presumption that bidders offering surplus material can meet QPL requirements only if bidder affirmatively volunteers and shows in its bid that it could meet acceptance test, QPL, and other Govt. requirements, is contrary to basic procurement policy---- 1
Nonresponsive
Bidder's intent not indicated
Bidder, who intends to "refurbish" new unused parts by replacing elastomer components, but who does not indicate this intent in its bid, may be rejected as nonresponsive where bid indicates that parts bidder is offering would exceed allowable shelf life unless elastomers are replaced-- 1

BIDS—Continued
Rejection—Continued
Propriety
Conflict of interest Page

Where Govt. employee owns 39.95 percent of stock of corporation, it is concluded that he has substantial ownership in corporation. Conclusion is reached in view of significant history which has discouraged contracting between Govt. and its employees. Therefore, while agency restricted its view to employee's role in day-to-day management of corporation, since reasonable ground did exist, rejection of corporation low bid was not improper ---- 295

Requests for proposals. (*See* **CONTRACTS, Negotiation, Requests for proposals**)

Sole source procurement. (*See* **CONTRACTS, Negotiation, Sole source basis**)

Specifications. (*See* **CONTRACTS, Specifications**)

Two-step procurement
Conformability of equipment offered to specifications. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered, Technical deficiencies, Two-step procurement**)
First-step
Protest timeliness

Notwithstanding that protester might have deduced identity of the precise model on which low bid was submitted from shipping weight and container size stated in bid on step two of two-step procurement, protest issue of model's acceptability under first step of procurement is timely since it was filed promptly after agency revealed the precise model bid by low bidder ---- 267

Technical approaches

While three units accepted under first step of two-step procurement were not equal in terms of weight, horsepower, or price, proposals frequently are based on different technical approaches. In the circumstances agency acted reasonably in determining that three proposals were acceptable and thus available for step two competition ---- 267

Mistakes. (*See* **BIDS, Mistakes, Two-step procurement**)
Specifications
Deviations
Acceptability

Protester's extrapolation from low bidder's data that low bidder would not meet contract's compaction test requirement is rejected since all permissible variations in compaction test procedures were not covered in low bidder's data and therefore unacceptability of low bidder's product has not been established ---- 267

Unbalanced
Estimates
Accuracy

As general rule, mathematically unbalanced bid—bid based on enhanced prices for some work and nominal prices for other work—may be accepted if agency, upon examination, believes IFB's estimate of work requirements is reasonably accurate representation of actual anticipated needs. But where examination discloses that estimate is not reasonably accurate, proper course of action is to cancel IFB and resolicit, based upon revised estimate. B-161208, Aug. 8, 1967, modified ---- 231

BIDS—Continued
Unbalanced—Continued
Evaluation Page
Proposed acceptance of apparent low mathematically unbalanced bid is not proper where (1) agency determines bid is low through reevaluations using substantially revised estimates of work requirements, which, in themselves, indicate that "material unbalancing" (existence of reasonable doubt that any award would result in lowest cost to Govt.) is present; (2) under reevaluation using one of revised estimates, bid is not low, confirming existence of material unbalancing; (3) reevaluation procedure has effect of introducing new evaluation factors into procurement and contravenes requirement that bidders compete equally based on objective factors in IFB. B–161208, Aug. 8, 1967, modified..... 231

CERTIFYING OFFICERS
Certification effect
Liable for improper payments
Based on fact, law or both
Certifying officer is liable moment an improper payment is made as a result of his erroneous certification. This is true whether certification involves question of fact, question of law, or mixed question of law and fact..... 297
Liability
Failure to use statutory authority to obtain Comptroller General's decision
Where there is doubt as to legality of payment, certifying officer's only complete protection from liability for erroneous payment is to request and follow Comptroller General's advance decision under 31 U.S.C. 82d..
Relief
Erroneous payments
Statutory prohibition
The Comptroller General may not relieve a certifying officer from liability if Comptroller General finds payment was specifically prohibited by statute, even though payment was made in good faith and for value received. 31 U.S.C. 82c..... 297
Lack of due care, etc.
Evidence
This Office has sought to apply the certifying officer's relief statute by considering practical conditions and procedures under which certifications are made. Consequently, diligence required of certifying officer before requests for relief can be granted is matter of degree dependent on practical conditions prevailing at time of certification, sufficiency of administrative procedures protecting interests of Govt., and apparency of the error..... 297
Submission to Comptroller General
Doubtful payments
In view of certifying officer's statutory right to request and receive advance decision from the Comptroller General on matters of law, certifying officers are not "bound" by conclusion of law rendered by agency's general counsel. 31 U.S.C. 82d..... 297
Test of good faith regarding legal questions concerning certified vouchers is whether or not certifying officer was "in doubt" regarding payment, and, if so, whether he exercised right to request and receive advance decision from Comptroller General. 31 U.S.C. 82c, 82d..... 297

CLAIMS

Assignments

Contracts

Set-off. (*See* **SET-OFF Contract payments, Assignments**)

"Financing institutions" requirement Page

Govt. contractor's grant of security interest in accounts receivable to holding company alleged to be intermediary for bank's financing of contractor is not valid assignment under 31 U.S.C. 203, even if properly filed with Govt., since Govt. contract proceeds may be assigned only to financing institutions and holding company does not qualify as proper assignee 155

Set-off

Contract payments. (*See* **SET-OFF, Contract payments, Assignments**)

Validity

Assignee loan not for contract performance

Assignment to bank of Govt. contract proceeds where bank's alleged financing is through intermediary holding company may not be recognized as statutory assignment since there has been no showing that intermediary or bank actually provided funds to Govt. contractor or that intermediary expended funds for the performance of the contract .. 155

Damages

Contracts

Anticipated profits

Decision by U.S. Govt., acting in its sovereign capacity, to rehabilitate Suez Canal is not a taking of a valuable contractual right requiring compensation, as claimant had only anticipated contract for services, loss of which is not responsibility of U.S. Govt. Moreover, submission of unsolicited proposal makes claimant a pure volunteer, affording no basis upon which payment may be authorized 164

Set-off. (*See* **SET-OFF**)

Statutes of limitation. (*See* **STATUTES OF LIMITATION**)

Transportation

Property damage, etc.

Reclaim of set-off. (*See* **SET-OFF, Transportation, Property damage, etc., Reclaim of set-off**)

Waiver

Debt collections. (*See* **DEBT COLLECTIONS, Waiver**)

COLLECTIONS (*See* **DEBT COLLECTIONS**)

COMPENSATION

Aggregate limitation

Alaska Railroad employees

Amount in lieu of the cost-of-living allowance may be paid to employees in Alaska of Federal Railroad Administration, Dept. of Transportation, whose pay is fixed administratively, since statutory provisions limiting such salaries to amounts not in excess of salaries of specified grades under General Schedule refer to basic compensation rates in subch. I, Ch. 53, Title 5, U.S. Code, not to allowances in Ch. 59, Title 5, U.S. Code 196

Alaska Railroad employees. (*See* **ALASKA RAILROAD, Employees**)

Ceiling. (*See* **COMPENSATION, Aggregate limitation**)

COMPENSATION—Continued
Increases. (*See* **COMPENSATION, Promotions**)
Retroactive
Customs Service inspectional employees
Parties receiving services not liable Page
In 1972 and 1973 flying club arranged aircraft flights and paid for required overtime services of Customs Service inspectional employees pursuant to 19 U.S.C. 267. In 1974 Customs Service billed club for additional overtime salary payments resulting from retroactive pay increases from Oct. 1, 1972, to Jan. 6, 1973. Parties in interest are not liable for charges stemming from retroactive pay increase since generally accounts billed and paid for at prevailing rates may not be subsequently reopened and statute does not explicitly require retroactive salary increases to be paid for by parties in interest. 31 Comp. Gen. 417 and B–107243, Nov. 3, 1958, shall no longer be followed 226
Wage board employees. (*See* **COMPENSATION, Wage board employees, Increases**)
Limitation. (*See* **COMPENSATION, Aggregate limitation**)
Military pay. (*See* **PAY**)
Missing, interned, captured, etc., employees
Overtime
Entitlement
Civilian employee is entitled to overtime compensation based on amount received prior to missing status if such compensation was part of his regularly scheduled pay and allowances and such overtime compensation continues throughout missing status period even though office to which employee was assigned is disestablished. However, where overtime compensation is not part of regularly scheduled pay and allowances, employee does not receive same unless he "may become entitled thereafter" and such entitlement would be based on overtime performed by his replacement or average irregularly scheduled overtime of employees in his unit. 54 Comp. Gen. 934, modified 147
Names
Married women. (*See* **NAMES, Married women**)
Overpayments
Waiver. (*See* **DEBT COLLECTIONS, Waiver**)
Overtime
Actual work requirement
Exception
Back pay arbitration award
Federal Labor Relations Council questions the propriety of sustaining an arbitration award that orders backpay for employees deprived of overtime work in violation of a negotiated agreement. Agency violations of negotiated 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. Improper agency action may be either affirmative action or failure to act where agreement requires action. Thus, award of backpay to employees deprived of overtime work in violation of agreement is proper and may be paid 171
Administrative approval requirement
Employee alleged she was compelled to perform substantial amounts of overtime because superiors assigned her abnormal workload. Claim is denied since she failed to show work was ordered or induced by official who had authority to order or approve overtime and failed or refused to do so 55

COMPENSATION—Continued
Overtime—Continued
Fair Labor Standards Amendments of 1974, Pub. L. 93-259
Professional employees exempted from overtime provisions Page

Although Fair Labor Standards Act of 1938 has been amended to apply to Federal employees, professional employees are exempted from application of the overtime provisions of the Act. 29 U.S.C. 213(a)(1)---- 55

Promotions
Retroactive
Administrative error
Collective bargaining agreement

Collective-bargaining agreement provides that certain Internal Revenue Service career-ladder employees will be promoted effective the first pay period after 1 year in grade, but promotion of seven employees covered by agreement were erroneously delayed for periods up to several weeks. Since provision relating to effective dates of promotions becomes non-discretionary agency requirement, if properly includable in bargaining agreement, General Accounting Office will not object to retroactive promotions based on administrative determination that employees would have been promoted as of revised effective dates but for failure to timely process promotions in accordance with the agreement---------- 42

Removals, suspensions, etc.
Deductions from backpay
Outside earnings
In excess of "back pay" due

Employee was restored to duty after his service had been terminated during probation as a result of racial discrimination. Total interim earnings from private enterprise are for offset against total Federal backpay otherwise due, even though this results in no backpay payment. Interim earnings may not be computed and set off on a pay period by pay period basis to reduce the effect of interim earnings---------- 48

Employee was restored to duty after his service had been terminated during probation as a result of racial discrimination. Lump-sum pay for annual leave may not be considered for waiver under 5 U.S.C. 5584, since payment was proper when made. Also, there is no authority to waive payment of retirement deductions on the amount of Federal pay that would have been earned during the period of separation, notwithstanding interim earnings exceeded amount of Federal pay---------- 48

Wage board employees
Increases
Retroactive

Wage survey at Interior installation, commenced in time to be effective Feb. 4, 1973, was not effected until May 7, 1973, because wage board rates were set by labor-management negotiated agreement and there was question of union representation. Wage adjustment may not be effective retroactively since the provisions in 5 U.S.C. 5344 regarding the effective date of wage board pay adjustments are not applicable to labor-management agreements and no tentative agreement as to the effective date of the wage adjustment was made prior to May 7, 1973--- 162

CONFLICT OF INTEREST STATUTES
Contract validity Page
In absence of condition in solicitation which clearly limited proposals only to those firms (including officers of firms) which have no connection with oil or gas industry, together with clearly supportable reason for so limiting competition, and since there is no relevant legal prohibition, award of automatic data processing services contract by FEA to firm whose Chairman of Board of Directors has some interest in oil or gas industry was not improper. Firm should not be excluded from competition simply on basis of theoretical or potential conflict of interest------ 60

CONTRACTORS
Incumbent
Elimination from competitive range
Negotiated contract
Agency's elimination of incumbent contractor from competitive range had reasonable basis. Totality of many allegedly "informational" deficiencies made proposal so materially deficient that it could not be made acceptable except by major revisions and additions. Incumbent's low proposed estimated costs did not have to be considered since proposal was found to be totally technically unacceptable. There is no basis for favoring incumbent in competitive range determination with presumptions based merely on prior satisfactory service, since proposal must demonstrate compliance with essential RFP requirements------ 60
Responsibility
Determiniation
Review by GAO
Effect of issuance of COC by SBA
GAO will not review determination of responsibility when SBA issues COC in view of SBA's statutory authority, absent *prima facie* showing that action was taken fraudulently or with such wilful disregard of facts as to necessarily imply bad faith. Under this standard, GAO reviewed COC file and found no evidence of fraud or bad faith------ 97

CONTRACTS
"Affirmative action programs." (*See* CONTRACTS, Labor stipulations, Nondiscrimination, "Affirmative action programs")
Assignments. (*See* CLAIMS, Assignments)
Automatic Data Processing Systems. (*See* EQUIPMENT, Automatic Data Processing Systems)
Awards
Advantage to Government
Negotiated contracts. (*See* CONTRACTS, Negotiation, Best advantage to Government)
Negotiated contracts. (*See* CONTRACTS, Negotiation, Awards)
Bids
Generally. (*See* BIDS)
Damages
Claims. (*See* CLAIMS, Damages, Contracts)
Government liability
Sovereign acts
Decision by U.S. Govt., acting in its sovereign capacity, to rehabilitate Suez Canal is not a taking of a valuable contractual right requiring compensation, as claimant had only anticipated contract for services, loss of which is not responsibility of U.S. Govt. Moreover, submission of unsolicited proposal makes claimant a pure volunteer, affording no basis upon which payment may be authorized------ 164

CONTRACTS—Continued

Equal employment opportunity requirements. (*See* **CONTRACTS, Labor stipulations, Nondiscrimination**)

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

Labor stipulations

Minimum wage determinations

Effect of new determination Page

When contract is awarded on basis of old wage rates after new Service Contract Act wage determination has been received after bid opening, option should not be exercised since proper way to determine effect of new wages is to recompete rather than assume new rate would affect bidders equally. Recommendation is being referred to appropriate congressional committees pursuant to Legislative Reorganization Act of 1970, 31 U.S.C. 1172 97

Nondiscrimination

"Affirmative action programs"

Commitment requirement

There is no basis to conclude that bidders were unreasonably misled as to affirmative action requirements clearly set forth which were included in IFB containing bidders' schedules, provisions, conditions, drawings and specifications, rather than with separate bid packet. Requirements clearly advised that, unless proper documentation was submitted, bid would be considered nonresponsive 262

That bidder has affirmative action plan filed elsewhere or has agreed to accept standard equal opportunity clause of invitation does not create required binding obligation to affirmative action requirements of present invitation 262

Grants-in-aid

Where applicable regulations of Federal Govt. agency require that procurements be grantees by conducted so as to provide maximum open and free competition, certain basic principles of Federal procurement law must be followed by grantee. Therefore, rejection of low bid under grantee's solicitation as nonresponsive was improper where basis for determining responsiveness to minority subcontractor listing requirement was not stated in IFB and bidder otherwise committed itself to affirmative action requirements. It is therefore recommended that contract awarded to other than low bidder be terminated 139

Bidder who fails to submit, prior to bid opening, affirmative action plan under Part II of Bid Conditions, but who has properly executed and submitted Part I certification wherein bidder "will be bound by the provisions of Part II" for listed appropriate trades to be used in the work, has submitted responsive bid; that pages of Part II were not submitted with bid is of no consequence. Bids containing no Part I or Part II documentation were nonresponsive. Recommendation is made that grantor agency, which concluded that all bids were nonresponsive, advise grantee to award contract to bidder who submitted Part I certification 262

Mistakes

Allegations before award. (*See* **BIDS, Mistakes**)

For errors prior to award. (*See* **BIDS, Mistakes**)

CONTRACTS—Continued
Negotiated. (*See* **CONTRACTS, Negotiation**)
Negotiation
Auction technique prohibition
Protest Page
Various changes made to specification requirements and evaluation scheme after submission of initial best and final offers, resulting in additional calls from new best and final offers, does not indicate presence of "auction bidding" since record shows changes were based on legitimate Govt. needs which warranted reopening negotiations. Neither is auction indicated by fact that reduced price offered in revised best and final offers was not related to change, since offerors are free to revise proposals in any manner they deem appropriate once negotiations are reopened---- 244
Audit requirements
Agency's failure to audit revised proposal is not objectionable, since contracting officer need not request audit when sufficient information is available to determine price reasonableness and determination that such information is available is not subject to question unless clearly erroneous- 244
Awards
Multi-year basis
Award of negotiated contract on multi-year basis when technical considerations rather than cost were primary factors for award was inappropriate since multi-year contracting method envisions award on basis of lowest evaluated unit price---- 244
Not prejudicial to other offerors
Although RFP, which only stated that "cost is an important factor in selection of the offeror for contract award," was defective for failing to apprise offerors of *relative* importance of estimated costs vis-a-vis other specified evaluation factors, there was no prejudice because successful offeror's proposal received highest score on technical evaluation and offered lowest evaluated estimated costs, and proposals of other offeror in competitive range completely responded to all factors considered in award selection---- 60
Offerors noncompliance with RFP requirements
Countervailing factors
Although successful offeror for computer services in facilities dedicated exclusively to FEA did not comply with RFP "internal" security requirement of protection from read access by FEA users to other FEA users' programs and codes and operating system located in computer's main memory, countervailing factors mandate against disturbing award because of agency's improper relaxation of mandatory requirement without informing other offerors, e.g., lack of certainty of deficiency's effect on award selection or of whether offerors would have changed offers if specification was relaxed, agency's short life, and large excess costs and adverse effect on agency's performance of basic functions---- 60
Prejudice alleged
Offeror's claim that agency showed favoritism toward other offeror by waiving certain specification requirements is not supported by record, which shows only that one specification requirement was relaxed and such relaxation accommodated both offerors---- 244

CONTRACTS—Continued
Negotiation—Continued
Awards—Continued
Price one factor in determination Page
Although cost was listed as least important of four evaluation factors used in evaluation of proposals leading to award of fixed price contracts, protester's claim that cost was ignored by agency is incorrect, since cost was considered both in computation of numerical scoring and again in source selection process. Since negotiated procurement was involved, award may be made to technically superior offeror, notwithstanding that offeror's higher price 244
Validity
Validity of award by FEA for dedicated automatic data processing services through facilities management contract was not affected by Brooks Act, 40 U.S.C. 759, and implementing regulations and policies, because FEA was entitled to rely on authorizations to proceed with procurement given by OMB and GSA after reviews of solicitation and FEA's cost and other justifications. Also, provisions of OMB Cir. No. A–54 and FMC 74–5 concerning ADPE acquisitions are ordinarily executive branch policy matters not for resolution by GAO 60
Changes, etc.
Price revision after close of negotiations
Attempted late price reductions submitted by unsuccessful offeror after receipt of initial proposals were properly rejected, because RFP late proposal clause (see ASPR 7–2002.4) provided generally for rejection of late proposals and modifications, and none of specified exceptions to general rule were satisfied. But Navy then erred in accepting late price increase from successful offeror, as this action constituted discussions with that offeror and discussions were not held with other offerors in competitive range 201
Specifications
Series of specification changes and requests for new best and final offers did not cause technical "leveling" of proposals, which refers to unfair practice of helping offeror bring unacceptable proposal up to level of other adequate proposals through successive rounds of negotiations, since only two proposals under consideration were both regarded as acceptable throughout testing and evaluation period and proposal which protester regards as having been brought up to level of its proposal was regarded by agency as superior proposal 244
Competition
Award under initial proposals
Where substantial technical uncertainties exist in initial proposals, award on basis of initial proposals is precluded though proposals may be considered technically acceptable. 10 U.S.C. 2304(g) requires written or oral discussions to be conducted with offerors in competitive range to extent necessary to resolve technical uncertainties, so that Govt. can be assured of obtaining most advantageous contract 201
Competitive range formula
Predetermined cut-off score
Not prejudicial
Although use of predetermined cut-off score to establish competitive range is not in accord with sound procurement practice, it is not prejudicial to offeror eliminated from competitive range in view of offeror's low technical score of 44.8 points on 100-point scale in relation to scores of proposals included in competitive range (96.3, 92.1 and 88.2) 60

CONTRACTS—Continued
Negotiation—Continued
Competition—Continued
Discussion with all offerors requirements
Proposed revisions Page

By accepting offeror's initial turnkey housing proposal—regarded as most favorable to Govt.—which nonetheless substantially varied from specific RFP requirements, Navy waived those requirements for purposes of competition among seven offerors in competitive range. This change in specifications, without complying with provisions of ASPR 3-805.4, deprived other offerors of equal opportunity to compete and Govt. of benefits of maximum competition 201

Written or oral negotiations

Where award on basis of initial proposal substantially varying from RFP requirements has changed specifications and substantial uncertainties in initial proposals and improper acceptance of late price modification required written or oral discussions with all offerors in competitive range, protest is sustained. GAO recommends competition be renewed through discussions with offerors based on actual minimum requirements, disclosing information showing relative importance of price as evaluation factor. Depending on competition results, existing contract should be terminated for convenience, or, if contractor remains successful, contract should be modified pursuant to final proposal 201

Exclusion of other firms

Protester's claim that agency unduly restricted competition by seeking production proposals only from development contractors instead of conducting new competition is untimely, since under 4 C.F.R. 20.2(a) issue should have been raised prior to date set for receipt of proposals .. 244

No exclusion on basis of potential or theoretical conflict of interest

In absence of condition in solicitation which clearly limited proposals only to those firms (including officers of firms) which have no connection with oil or gas industry, together with clearly supportable reason for so limiting competition, and since there is no relevant legal prohibition, award of automatic data processing services contract by FEA to firm whose Chairman of Board of Directors has some interest in oil or gas industry was not improper. Firm should not be excluded from competition simply on basis of theoretical or potential conflict of interest. 60

Preservation of system's integrity
Status of undisclosed competitor

Where Agency representative brought protester's employee into meeting with competitor without disclosing relationship and discussion may have given protester competitive advantage, RFP should be revised to eliminate advantage, if that can be done without sacrifice to Agency interests, since such action would enhance competition and provide opportunity for all interested parties to compete. However, if Agency interests call for continuing procurement in form that precludes elimination of possible competitive advantage, protester may be excluded from portion of procurement involving possible advantage 280

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

CONTRACTS—Continued
Negotiation—Continued
Cost, etc., data
Estimated
Low Page

Agency's elimination of incumbent contractor from competitive range had reasonable basis. Totality of many allegedly "informational" deficiencies made proposal so materially deficient that it could not be made acceptable except by major revisions and additions. Incumbent's low proposed estimated costs did not have to be considered since proposal was found to be totally technically unacceptable. There is no basis for favoring incumbent in competitive range determination with presumptions based merely on prior satisfactory service, since proposal must demonstrate compliance with essential RFP requirements 60

Price adjustment

Attempted late price reductions submitted by unsuccessful offeror after receipt of initial proposals were properly rejected, because RFP late proposal clause (see ASPR 7-2002.4) provided generally for rejection of late proposals and modifications, and none of specified exceptions to general rule were satisfied. But Navy then erred in accepting late price increase from successful offeror, as this action constituted discussions with that offeror and discussions were not held with other offerors in competitive range 201

Cost-plus-award-fee contracts
Estimated costs
Automatic data processing services

Recognizing that low cost estimates should not be accepted at face value and that agency should make independent cost projection of estimated costs, agency's determination, after cost analysis, that successful offeror's proposed low estimated costs for cost-plus-award-fee contract for automatic data processing services were realistic, was reasonable, notwithstanding lack of complete explanation of why proposed costs were substantially less than those of protester, who offered similar computer configuration 60

Discussion requirement
Competition. (*See* **CONTRACTS, Negotiation, Competition, Discussion with all offerors requirement**)

Evaluation factors
Conformability of equipment, etc.
Technical deficiencies. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., Technical deficiencies, Negotiated procurement**)

Cost analysis
Normalized treatment

"Normalization" methodology used to compute dollar value of technical point spread between proposals did not conform to established relative weights and produced misleading result which could have affected source selection decision. Therefore, Comptroller General recommends that source selection decision be reconsidered on basis of appropriate computation 244

CONTRACTS—Continued
Negotiation—Continued
Evaluations—Continued
Factors other than price
Relative importance of price Page

Although RFP, which only stated that "cost is an important factor in selection of the offeror for contract award," was defective for failing to apprise offerors of *relative* importance of estimated costs vis-a-vis other specified evaluation factors, there was no prejudice because successful offeror's proposal received highest score on technical evalution and offered lowest evaluated estimated costs, and proposals of other offeror in competitive range completely responded to all factors considered in award selection---- 60

Technical acceptability

Although cost was listed as least important of four evaluation factors used in evaluation of proposals leading to award of fixed price contracts, protester's claim that cost was ignored by agency in incorrect, since cost was considered both in computation of numerical scoring and again in source selection process. Since negotiated procurement was involved, award may be made to technically superior offeror, notwithstanding that offeror's higher price---- 244

Point rating
Competitive range formula

Although use of predetermined cut-off score to establish competitive range is not in accord with sound procurement practice, it is not prejudicial to offeror eliminated from competitive range in view of offeror's low technical score of 44.8 points on 100-point scale in relation to scores of proposals included in competitive range (96.3, 92.1 and 88.2)---- 60

Price elements for consideration

Where award on basis of initial proposal substantially varying from RFP requirements has changed specifications and substantial uncertainties in initial proposals and improper acceptance of late price modification required written or oral discussions with all offerors in competitive range, protest is sustained. GAO recommends competition be renewed through discussions with offerors based on actual minimum requirements, disclosing information showing relative importance of price as evaluation factor. Depending on competition results, existing contract should be terminated for convenience, or, if contractor remains successful, contract should be modified pursuant to final proposal---- 201

Late proposals and quotations
Identification erroneous

Where proposal package was received in proper office by required time, and such receipt was verified by procurement personnel in response to offeror's telephone call, but without reference to offeror's mislabeling of package with non-existent RFP number, proposal may be considered timely received, notwithstanding return of package to offeror unopened as result of incorrect labeling, and subsequent resubmission after closing date for submission of proposals but before award---- 36

Multi-year procurements
Cost *v.* technical considerations

Award of negotiated contract on multi-year basis when technical considerations rather than cost were primary factors for award was inappropriate since multi-year contracting method envisions award on basis of lowest evaluated unit price---- 244

CONTRACTS—Continued
Negotiation—Continued
Offers or proposals
Best and final
Additional rounds
Leveling alleged Page

Series of specification changes and requests for new best and final offers did not cause technical "leveling" of proposals, which refers to unfair practice of helping offeror bring unacceptable proposal up to level of other adequate proposals through successive rounds of negotiations, since only two proposals under considerations were both regarded as acceptable throughout testing and evaluation period and proposal which protester regards as having been brought up to level of its proposal was regarded by agency as superior proposal---------- 244

Late. (*See* **CONTRACTS, Negotiation, Late proposals and quotations**)
Prices
Reasonableness

Agency's failure to audit revised proposal is not objectionable, since contracting officer need not request audit when sufficient information is available to determine price reasonableness and determination that such information is available is not subject to question unless clearly erroneous- 244

Pricing data. (*See* **CONTRACTS, Negotiation, Cost, etc., data**)
Propriety
Procedures deficient

Where Agency representative brought protester's employee into meeting with competitor without disclosing relationship and discussion may have given protester competitive advantage, RFP should be revised to eliminate advantage, if that can be done without sacrifice to Agency interests, since such action would enhance competition and provide opportunity for all interested parties to compete. However, if Agency interests call for continuing procurement in form that precludes elimination of possible competitive advantage, protester may be excluded from portion of procurement involving possible advantage------- 280

Reopening
Propriety
Auction bidding not indicated

Various changes made to specification requirements and evaluation scheme after submission of initial best and final offers, resulting in additional calls from new best and final offers, does not indicate presence of "auction bidding" since record shows changes were based on legitimate Govt. needs which warranted reopening negotiations. Neither is auction indicated by fact that reduced price offered in revised best and final offers was not related to change, since offerors are free to revise proposals in any manner they deem appropriate once negotiations are reopened------ 244

Requests for proposals
Late receipt of proposal. (*See* **CONTRACTS, Negotiation, Late proposals and quotations**)
Protests under
Favoritism alleged
Evidence lacking

Offeror's claim that agency showed favoritism toward other offeror by waiving certain specification requirements is not supported by record, which shows only that one specification requirement was relaxed and such relaxation accommodated both offerors---------- 244

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

Protester's claim that agency unduly restricted competition by seeking production proposals only from development contractors instead of conducting new competition is untimely, since under 4 C.F.R. 20.2(a) issue should have been raised prior to date set for receipt of proposals ---- 244

Sole source basis
Propriety

Low bidder offering surplus parts under IFB for supply of QPL aircraft parts appears to be responsive bidder, inasmuch as surplus bids were not precluded in QPL procurements and bid offering new, unused, unreconditioned, nondeteriorative surplus parts was not in violation of "New Material" clause. Decision to cancel and negotiate sole-source award on virtually same basis to surplus bidder was proper ---- 1

Qualified products listing. (*See* **CONTRACTS, Specifications, Qualified products, Sole source negotiation**)

Specification conformability. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered, Technical deficiencies, Negotiated procurement**)

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

Payments

Absence of unenforceability of contracts. (*See* **PAYMENTS, Absence or unenforceability of contracts**)

Protests

Authority to consider
Grant procurements

GAO will consider protest against contract awarded by grantee in order to advise grantor agency whether Federal competitive bidding requirements have been met and since courts before which present matter is being litigated have expressed interest in GAO views ---- 139

Bidder who fails to submit, prior to bid opening, affirmative action plan under Part II of Bid Conditions, but who has properly executed and submitted Part I certification wherein bidder "will be bound by the provisions of Part II" for listed appropriate trades to be used in the work, has submitted responsive bid; that pages of Part II were not submitted with bid is of no consequence. Bids containing no Part I or Part II documentation were nonresponsive. Recommendation is made that grantor agency, which concluded that all bids were nonresponsive, advise grantee to award contract to bidder who submitted Part I certification ---- 262

Timeliness

Allegation that protest was untimely filed is unfounded since protester received formal notification as to reasons telegraphic modification was submitted late and not for award consideration on June 16 and telegram protesting award was received at GAO within 10 working days on June 20. See sec. 20.2(a) of Bid Protest Procedures, 40 Fed. Reg. 17979 (1975) ---- 220

CONTRACTS—Continued
Protests—Continued
Timeliness—Continued
Considered on merits

Page

Although protest against exclusion from competitive range was untimely filed under GAO's bid protest procedures, issues raised by protest will be considered on merits in view of GAO's continuing audit interest in particular procurement and assurances made by GAO representatives that protest would be considered. However, untimely protest of another protester against exclusion from competitive range filed over 4 months after protester became aware of reasons its proposal was rejected will not be considered on merits in view of advanced stage of GAO review 60

Constructive notice of GAO procedures

Although successful offeror for computer services in facilities dedicated exclusively to FEA did not comply with RFP "internal" security requirement of protection from read access by FEA users to other FEA users' programs and codes and operating system located in computer's main memory, countervailing factors mandate against disturbing award because of agency's improper relaxation of mandatory requirement without informing other offerors, e.g., lack of certainty of deficiency's effect on award selection or of whether offerors would have changed offers if specification was relaxed, agency's short life, and large excess costs and adverse affect on agency's performance of basic functions 60

Information copy of protest to agency *v.* formal copy to GAO

Fact that information copy of protest to GAO was received by procuring activity prior to bid opening does not convert otherwise untimely direct protest to GAO (protest was not received until after bid opening) under Bid Protest Procedures, since information copy was not protest to procuring activity such as to make that portion of procedures dealing with initial protests to agencies applicable 133

Untimely protest consideration basis

Protest alleging arbitrary and capricious action on part of contracting officer in restricting procurement wholly to small business without making independent examination of competitive market conditions, filed after bid opening, is untimely under 20.2(b)(1) of Bid Protest Procedures which requires that protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening be filed prior to bid opening. Sec. 20.2(b)(3) exception to 20.2(b)(1), concerning protest by mailgram, is inapplicable, as mailgram was not sent by third day prior to final date for filing protest 133

Wording

Mailgram to procuring activity prior to award advising that "* * * should the low bid be withdrawn the specifications are quite clear as to the procedure for this basis of award for which we would be in line" should have been construed as a preaward protest, but does not affect validity of award which is not subject to question 100

Qualified products. (*See* **CONTRACTS, Specifications, Qualified products**)

Sole source procurements. (*See* **CONTRACTS, Negotiation, Sole source basis**)

CONTRACTS—Continued

Specifications

Conformability of equipment, etc., offered

Ability to meet requirements Page

Question whether surplus bidders under solicitations for aircraft and aircraft related parts—incorporating ANA Bulletin No. 438c (age controls for age-sensitive elastomeric items)—can comply with Bulletin requirements for identification, marking, and storage of parts containing elastomeric components is one affecting responsibility 1

Acceptance

Propriety

Argument that low bidder's proposed unit is not acceptable because it did not meet specification requirement regarding both length of public marketing of unit and type of engine offered is rejected since record supports opposite conclusion 267

Administrative determination

Basis of evaluation

Procuring agency had reasonable basis for determining, after discussions had been conducted, that successful offeror's proposal for automatic data processing services complied with RFP requirements concerning data base management system, testing, manpower, dedicated facilities, communications processors, and telecommunications network 60

Noncompliance

Rejection of bid

Bidder for Navy QPL products, who offers products on which elastomer components exceed age limitations allowed under applicable shelf life requirements, which have not been shown to be unreasonable, is nonresponsive. Allegedly different Air Force shelf life requirements are not necessarily determinative of Navy's shelf life requirements 1

Technical deficiencies

Negotiated procurement

Agency's elimination of incumbent contractor from competitive range had reasonable basis. Totality of many allegedly "informational" deficiencies made proposal so materially deficient that it could not be made acceptable except by major revisions and additions. Incumbent's low proposed estimated costs did not have to be considered since proposal was found to be totally technically unacceptable. There is no basis for favoring incumbent in competitive range determination with presumptions based merely on prior satisfactory service, since proposal must demonstrate compliance with essential RFP requirements 60

Where substantial technical uncertainties exist in initial proposals, award on basis of initial proposals is precluded though proposals may be considered technically acceptable. 10 U.S.C. 2304(g) requires written or oral discussions to be conducted with offerors in competitive range to extent necessary to resolve technical uncertainties, so that Govt. can be assured of obtaining most advantageous contract 201

Series of specification changes and requests for new best and final offers did not cause technical "leveling" of proposals, which refers to unfair practice of helping offeror bring unacceptable proposal up to level of other adequate proposals through successive rounds of negotiations, since only two proposals under consideration were both regarded as

CONTRACTS—Continued
Specifications—Continued
Conformability of equipment, etc., offered—Continued
Technical deficiencies—Continued
Negotiated procurement—Continued
acceptable throughout testing and evaluation period and proposal which protester regards as having been brought up to level of its proposal was regarded by agency as superior proposal ... Page 244
Two-step procurement
Protester's extrapolation from low bidder's data that low bidder would not meet contract's compaction test requirement is rejected since all permissible variations in compaction test procedures were not covered in low bidder's data and therefore unacceptability of low bidder's product has not been established ... 267
Tests
Qualified products acceptance test requirements
Applicable to all bidders
QPL acceptance test requirements in Military Specification incorporated into IFB for supply of QPL products are applicable to all bidders, not just manufacturers, even though tests may have once been performed by manufacturer to Govt.'s satisfaction or products are former Govt. surplus property ... 1
Necessity
No probative evidence has been presented which would show QPL acceptance tests in Military Specification incorporated into IFB for supply of QPL products are not necessary to determine products' acceptability. Responsibility for establishment of tests and procedures is within ambit of technical activity responsible for qualification of QPL products ... 1
Definiteness requirement
Surplus material
New, unused or reconditioned
Navy "blanket" prohibition of all surplus material (whether new and unused surplus or reconditioned surplus) is not in compliance with requirements for "free and open" competition and drafting specifications stating Govt.'s actual needs. Navy contracting officer and cognizant technical personnel should determine, if possible under circumstances of particular procurement, at time solicitation is issued whether surplus and/or reconditioned material will meet its actual needs ... 1
Deviations
Not prejudicial to other bidders
Alternate bids
Where bid included alternate item price, bid deviated from amended bidding requirement that alternate work and price therefore be included in base bid price. However, bid may nevertheless be accepted if otherwise proper since deviation did not prejudice other bidders as bidder is obligated to perform all work and bid is low overall whether price under alternate item is included or is in addition to base bid price ... 168
Failure to furnish something required
Information
Minority manpower utilization
Bidder who fails to submit, prior to bid opening, affirmative action plan under Part II of Bid Conditions, but who has properly executed and submitted Part I certification wherein bidder "will be bound by the

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

provisions of Part II" for listed appropriate trades to be used in the work, has submitted responsive bid; that pages of Part II were not submitted with bid is of no consequence. Bids containing no Part I or Part II documentation were nonresponsive. Recommendation is made that grantor agency, which concluded that all bids were nonresponsive, advise grantee to award contract to bidder who submitted Part I certification ..... Page 262

There is no basis to conclude that bidders were unreasonably misled as to affirmative action requirements clearly set forth which were included in IFB containing bidders' schedules, provisions, conditions, drawings and specifications, rather than with separate bid packet. Requirements clearly advised that, unless proper documentation was submitted, bid would be considered nonresponsive 262

Government surplus clause
Failure to include
Effect

Navy's contention that surplus material can never be considered unless it has been specifically invited by solicitation is overly restrictive interpretation of ASPR 1–1208(c). Provision states that no special consideration or waiver of contract requirements can be extended to surplus material by virtue of fact that it once was owned by Govt. Therefore, agency must determine whether surplus is acceptable for each procurement and include appropriate limitation in solicitation if it is determined that surplus is not acceptable. Failure to include "Government Surplus" clause is not sufficient notice to bidders that surplus is not acceptable 1

Military
Acceptance test requirements
Qualified products

Contractor, who supplies products under QPL procurement, is not relieved from its obligation to perform acceptance tests required by Military Specification on basis that product passed qualification tests .. 1

Conformance requirement

Although agency's determination whether existing Military Specifications will meet its actual needs will not be questioned unless shown to have no reasonable basis, Military Specifications are mandatory, and procuring agency should, under ASPR 1–1108, ask QPL preparing activity for waiver of those requirements (including contract acceptance test requirements) included in Military Specification defining qualified product, which are not to be required of sole-source contractor receiving award after cancellation of QPL solicitation 1

"New Material" clause
Exception
New, unused surplus

"New Material" clause in solicitation does not preclude bids offering new unused unreconditioned surplus material which is not overage or deteriorated 1

CONTRACTS—Continued
Specifications—Continued
"New Material" clause—Continued
Exception—Continued
Reconditioning *v.* refurbishing Page
Upon examination of part, which revealed it could be easily and quickly disassembled and reassembled by nontechnical people, and in absence of any apparent critical tolerances for reassembly, GAO has doubts whether bidder's proposed replacement of overage elastomer components in new unused "critical" aircraft related part would constitute "reconditioning" in violation of "New Material" clause. However, GAO cannot disagree with ASO determination that elastomer replacement in different aircraft part constituted "reconditioning" 1
Qualified products
Changes
Machinery, products, etc.
Although it is within discretion of QPL preparing activity to determine whether replacement of elastomer components in QPL aircraft and aircraft related parts has sufficiently changed the parts so as to consider them no longer qualified, there is some question whether they remain qualified products in view of disassembly and reassembly processes necessary to replace elastomers 1
Dealer or distributor
Protest that surplus dealer is not "regular dealer" within purview of Walsh-Healey Public Contracts Act, 41 U.S.C. 35–45, and related implementing regulations, ASPR 12–601 and 12–607, and therefore is ineligible for award, is not for consideration, since such determinations are exclusively vested with contracting officer subject to final review by Dept. of Labor 1
Listing
Restrictive interpretation
Agency's position that only bids submitted by manufacturers or their authorized distributors under QPL procurements can be considered responsive is overly restrictive interpretation of QPL requirements contained in ASPR 1–1101 *et seq.*, and would constitute QPL a qualified bidders list 1
Product designation
Bidder under QPL procurement, who fails to identify manufacturer or applicable QPL test number, but who identifies product's manufacturer's designation, is responsive to IFB, and omissions may be waived as minor informalities 1
Requirement
Waiver
Cancellation of IFB and negotiation of sole-source award to low bidder offering surplus material was not improper, even though contracting officer failed to ask QPL preparing activity for required waiver of those QPL requirements, which were not required of bidder, pursuant to ASPR 1–1108; however, recommendation is made that waiver be gotten prior to exercise of option under contract 1
Sole source negotiation
Low bidder offering surplus parts under IFB for supply of QPL aircraft parts appears to be responsive bidder, inasmuch as surplus bids were not precluded in QPL procurements and bid offering new, unused, unreconditioned, nondeteriorative surplus parts was not in violation of "New Material" clause. Decision to cancel and negotiate sole-source award on virtually same basis to surplus bidder was proper 1

CONTRACTS—Continued
Specifications—Continued
Technical deficiencies. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered, Technical deficiencies**)
Tests
Conformability of equipment, etc., offered to specifications. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered, Tests**)
Necessary amount of testing Page

QPL acceptance test requirements in Military Specification incorporated into IFB for supply of QPL products are applicable to all bidders, not just manufacturers, even though tests may have once been performed by manufacturer to Govt.'s satisfaction or products are former Govt. surplus property---------- 1

Administrative determination

No probative evidence has been presented which would show QPL acceptance tests in Military Specification incorporated into IFB for supply of QPL products are not necessary to determine products' acceptability. Responsibility for establishment of tests and procedures is within ambit of technical activity responsible for qualification of QPL products---------- 1

Requirements
Administrative determination

Protester's extrapolation from low bidder's data that low bidder would not meet contract's compaction test requirement is rejected since all permissible variations in compaction test procedures were not covered in low bidder's data and therefore unacceptability of low bidder's product has not been established---------- 267

Status
Federal grants-in-aid

GAO will consider protest against contract awarded by grantee in order to advise grantor agency whether Federal competitive bidding requirements have been met and since courts before which present matter is being litigated have expressed interest in GAO views---------- 139

Termination
Convenience of Government
Reporting to Congress

Where award on basis of initial proposal substantially varying from RFP requirements has changed specifications and substantial uncertainties in initial proposals and improper acceptance of late price modification required written or oral discussions with all offerors in competitive range, protest is sustained. GAO recommends competition be renewed through discussions with offerors based on actual minimum requirements, disclosing information showing relative importance of price as evaluation factor. Depending on competition results, existing contract should be terminated for convenience, or, if contractor remains successful, contract should be modified pursuant to final proposal---------- 201

CONTRACTS—Continued
Termination—Continued
"No cost" Page
Where applicable regulations of Federal Govt. agency require that procurements by grantees be conducted so as to provide maximum open and free competition, certain basic principles of Federal procurement law must be followed by grantee. Therefore, rejection of low bid under grantee's solicitation as nonresponsive was improper where basis for determining responsiveness to minority subcontractor listing requirement was not stated in IFB and bidder otherwise committed itself to affirmative action requirements. It is therefore recommended that contract awarded to other than low bidder be terminated---------- 139

CORPORATIONS
Officers
Government employees
Contracting with Government objectionable
Where Govt. employee owns 39.95 percent of stock of corporation, it is concluded that he has substantial ownership in corporation. Conclusion is reached in view of significant history which has discouraged contracting between Govt. and its employees. Therefore, while agency restricted its view to employee's role in day-to-day management of corporation, since reasonable ground did exist, rejection of corporation low bid was not improper---------- 295

CREDIT CARDS
Use
Travel and transportation costs
Rental car agreement stating cost had been charged to personal credit card does evidence that employee incurred rental cost as a personal obligation and will be regarded as satisfying receipt requirements of FTR para. 1–11.3c(5) for purpose of reimbursing employee for cost of rental car. Credit card number need not be shown on invoice. From nature of transaction it must appear that Govt. could not be held liable for the expense in event of nonpayment of the obligation by employee-------- 224

CUSTOMS
Employees
Overtime services
Reimbursement
Customs Service inspectional employees
Parties in interest not liable for retroactive salary increases
In 1972 and 1973 flying club arranged aircraft flights and paid for required overtime services of Customs Service inspectional employees pursuant to 19 U.S.C. 267. In 1974 Customs Service billed club for additional overtime salary payments resulting from retroactive pay increases from Oct. 1, 1972, to Jan. 6, 1973. Parties in interest are not liable for charges stemming from retroactive pay increase since generally accounts billed and paid for at prevailing rates may not be subsequently reopened and statute does not explicitly require retroactive salary increases to be paid for by parties in interest. 31 Comp. Gen. 417 and B–107243, Nov. 3, 1958, shall no longer be followed---------- 226
Services to public
Reimbursement. (*See* **FEES, Services to public**)

DEBT COLLECTIONS

Waiver

Basic allowance for quarters (BAQ)

Junior Reserve Officer Training Corps instructors Page

While the "additional amount" to which a retired member employed as a JROTC instructor becomes entitled under 10 U.S.C. 2031(d)(1) is the difference between retired or retainer pay and active duty pay and allowances to which entitled if called or ordered to active duty, such amount is neither retired pay nor active duty pay, rather, is compensation paid to such member in a civilian capacity. As such, recovery by the U.S. of any erroneous payments of that "additional amount" may only be waived, if at all, under 5 U.S.C. 5584 44

Civilian employees

Compensation overpayments

Waiver entitlement basis for payment

Army officer, assigned as Executive Assistant to Ambassador-at-Large, retired from Army in anticipation of civilian appointment to that position. After retirement he continued to serve as Executive Assistant for 7 months before Dept. of State determined he could not be appointed. Claimant is *de facto* officer who served in good faith and without fraud. He may be paid reasonable value of services despite lack of appointment in view of fact that had compensation been paid, claimant could retain it under *de facto* rule or recovery could be waived under 5 U.S.C. 5584. Although he was not paid, administrative error arose when claimant in good faith entered on duty with understanding of Govt. obligation to pay for services. On reconsideration, B–181934, Oct. 7, 1974, is overruled, and 52 Comp. Gen. 700, amplified 109

Leave payments

Lump-sum leave payment

Employee was restored to duty after his service had been terminated during probation as a result of racial discrimination. Lump-sum pay for annual leave may not be considered for waiver under 5 U.S.C. 5584, since payment was proper when made. Also, there is no authority to waive payment of retirement deductions on the amount of Federal pay that would have been earned during the period of separation, notwithstanding interim earnings exceeded amount of Federal pay 48

Military personnel

Pay, etc.

Amount of claim

Effect of set-off

Where member requests waiver of claim under 10 U.S.C. 2774, which is less than total erroneous payment, and he does not know that an accounting setoff for underpayment which was otherwise due him has been made or of his right to request waiver for that amount, or that erroneous payment was actually determined to be for greater amount, we would act on entire erroneous payment in view of beneficial nature of law. However, where member knows of proper total erroneous payment, accounting setoff for underpayment and his right to request waiver in such amount, but requested waiver of amount less than total, we would act only on amount of waiver request 113

DEBT COLLECTIONS—Continued
Waiver—Continued
Military personnel—Continued
Pay, etc.—Continued
Total amount of erroneous payment Page

Amount of claim of U.S. against member of uniformed services arising out of overpayments of pay and allowances, which is subject to consideration for waiver under 10 U.S.C. 2774, is total amount of erroneous payments made, even where audit of member's pay account reveals underpayment of pay and allowances, whether that underpayment involves same item of pay and allowances or different item than was involved in overpayment, or was in same or different period---------- 113

DEPARTMENTS AND ESTABLISHMENTS
Promotion procedures. (*See* **REGULATIONS, Promotion procedures**)

DETAILS
Military personnel
Officers serving as Assistant Judge Advocates General

Court of Claims in *Selman* v. *United States*, 204 Ct. Cl. 675 held that naval officers ordered to serve in positions of Assistant Judge Advocates General are entitled to at least the pay of rear admiral (lower half) while serving in such positions whether they were "detailed" or "assigned" to such positions. Our decision at 50 Comp. Gen. 22 which determined that such officers were not entitled to pay of rear adminiral (lower half) will no longer be followed. Consequently, successors to plaintiffs in *Selman* in the statutorily created positions are also entitled to receive pay of rear admiral (lower half)---------- 58

DISCHARGES AND DISMISSALS
Military personnel
Discharged with readjustment pay
Travel and transportation allowances
To selected home

A Regular Army commissioned officer discharged with readjustment pay in accordance with 10 U.S.C. 3814a may receive travel and transportation allowances provided in 37 U.S.C. 404(c), 406(d) and 406(g) for members involuntarily released from active duty with readjustment pay, since the congressional intent was to treat such officers in the same manner as Reserve officers involuntarily released from active duty with readjustment pay---------- 166

DISCRIMINATION (*See* **NONDISCRIMINATION**)
ENLISTMENTS
Reenlistments
Unexpired term of prior enlistment
Additional obligated service

Service member who, within 3 months of the expiration of his current enlistment or extension thereof, is discharged pursuant to the authority of Secretary concerned under 10 U.S.C. 1171, where such discharge is for the sole purpose of reenlisting, may not have that unexpired term of enlistment or extension thereof considered as "additional obligated service" for purpose of determining the multiplier for Selective Reenlistment Bonus computation under 37 U.S.C. 308, as amended by Pub. L. 93-277, May 10, 1974, 88 Stat. 119---------- 37

EQUAL EMPLOYMENT OPPORTUNITY

Contract provisions. (*See* **CONTRACTS, Labor stipulations, Nondiscrimination**)

Grant programs

Contract awards Page

Where applicable regulations of Federal Govt. agency require that procurements by grantees be conducted so as to provide maximum open and free competition, certain basic principles of Federal procurement law must be followed by grantee. Therefore, rejection of low bid under grantee's solicitation as nonresponsive was improper where basis for determining responsiveness to minority subcontractor listing requirement was not stated in IFB and bidder otherwise committed itself to affirmative action requirements. It is therefore recommended that contract awarded to other than low bidder be terminated---------- 139

EQUIPMENT

Automatic Data Processing Systems

Computer service

Evaluation propriety

Where Agency representative brought protester's employee into meeting with competitor without disclosing relationship and discussion may have given protester competitive advantage, RFP should be revised to eliminate advantage, if that can be done without sacrifice to Agency interests, since such action would enhance competition and provide opportunity for all interested parties to compete. However, if Agency interests call for continuing procurement in form that precludes elimination of possible competitive advantage, protester may be excluded from portion of procurement involving possible advantage----- 280

General Services Administration

Responsibilities under Brooks Act

Validity of award by FEA for dedicated automatic data processing services through facilities management contract was not affected by Brooks Act, 40 U.S.C. 759, and implementing regulations and policies, because FEA was entitled to rely on authorizations to proceed with procurement given by OMB and GSA after reviews of solicitation and FEA's cost and other justifications. Also, provisions of OMB Cir. No. A-54 and FMC 74-5 concerning ADPE acquisitions are ordinarily executive branch policy matters not for resolution by GAO---------- 60

EXPERTS AND CONSULTANTS

Travel expenses

Within metropolitan area

Commuting from residence to place of employment

Intermittently employed consultant may be paid transportation expenses pursuant to 5 U.S.C. 5703 and par. C3053, subpar. 2, of Joint Travel Regs., Vol. 2, for commuting from his residence to place of employment where residence is outside corporate limits but within metropolitan or geographic area of place of duty, insofar as intermittent employment occasions him transportation expenses he would not otherwise have incurred. 22 Comp. Gen. 231, overruled---------- 199

FAIR LABOR STANDARDS ACT
Applicability
Employees of United States
Fair Labor Standards Amendments, Pub. L. 93–259
Professional employees exempted from overtime provisions Page
Although Fair Labor Standards Act of 1938 has been amended to apply to Federal employees, professional employees are exempted from application of the overtime provisions of the Act. 29 U.S.C. 213(a)(1)--- 55

FEES
Investment adviser
Invalid
Refunds
Annual charge assessed pursuant to User Charge Statute, 31 U.S.C. 483a, by SEC upon investment advisers and deposited in Treasury as miscellaneous receipts, which charge is now considered erroneous by SEC because of recent Supreme Court decisions, may be refunded by SEC out of permanent indefinite appropriation established by 31 U.S.C. 725q–1 to pay moneys "erroneously received and covered." This refund is authorized to all who paid such invalid fee regardless of whether payment was made under protest---------- 243

Services to public
Inspectional services
Retroactive pay increases
Reimbursement
In 1972 and 1973 flying club arranged aircraft flights and paid for required overtime services of Customs Service inspectional employees pursuant to 19 U.S.C. 267. In 1974 Customs Service billed club for additional overtime salary payments resulting from retroactive pay increases from Oct. 1, 1972, to Jan. 6, 1973. Parties in interest are not liable for charges stemming from retroactive pay increase since generally accounts billed and paid for at prevailing rates may not be subsequently reopened and statute does not explicitly require retroactive salary increases to be paid for by parties in interest. 31 Comp. Gen. 417 and B–107243, Nov. 3, 1958, shall no longer be followed---------- 226
Comptroller General decision stating that parties in interest who use overtime services of Customs Service inspectional employees are not required to pay for employees' retroactive salary increase reflects a change in construction of law. Therefore, decision is not retroactive, but is effective from date of its issuance. In circumstances present in this case, our Office would offer no objection to collection action being terminated under 4 C.F.R. 104.3---------- 226

FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES
Territorial cost-of-living allowances
Basic pay requirement
Exception
Alaska Railroad employees with administratively set salaries
Amount in lieu of the cost-of-living allowance may be paid to employees in Alaska of Federal Railroad Administration, Dept. of Transportation, whose pay is fixed administratively, since statutory provisions limiting such salaries to amounts not in excess of salaries of specified grades under General Schedule refer to basic compensation rates in subch. I, Ch. 53, Title 5, U.S. Code, not to allowances in Ch. 59, Title 5, U.S. Code---------- 196

FOREIGN GOVERNMENTS

Egypt

Suez Canal

Rehabilitation by U.S. Government Page

Decision by U.S. Govt., acting in its sovereign capacity, to rehabilitate Suez Canal is not a taking of a valuable contractual right requiring compensation, as claimant had only anticipated contract for services, loss of which is not responsibility of U.S. Govt. Moreover, submission of unsolicited proposal makes claimant a pure volunteer, affording no basis upon which payment may be authorized 164

FUNDS

Federal grants, etc., to other than States

Applicability of Federal statutes

Competitive bidding system

Where applicable regulations of Federal Govt. agency require that procurements by grantees be conducted so as to provide maximum open and free competition, certain basic principles of Federal procurement law must be followed by grantee. Therefore, rejection of low bid under grantee's solicitation as nonresponsive was improper where basis for determining responsiveness to minority subcontractor listing requirement was not stated in IFB and bidder otherwise committed itself to affirmative action requirements. It is therefore recommended that contract awarded to other than low bidder be terminated 139

Contract status

GAO will consider protest against contract awarded by grantee in order to advise grantor agency whether Federal competitive bidding requirements have been met and since courts before which present matter is being litigated have expressed interest in GAO views 139

Miscellaneous receipts. (*See* **MISCELLANEOUS RECEIPTS**)

GENERAL ACCOUNTING OFFICE

Contracts

Protests. (*See* **CONTRACTS, Protests**)

Recommendation for corrective action

Where award on basis of initial proposal substantially varying from RFP requirements has changed specifications and substantial uncertainties in initial proposals and improper acceptance of late price modification required written or oral discussions with all offerors in competitive range, protest is sustained. GAO recommends competition be renewed through discussions with offerors based on actual minimum requirements, disclosing information showing relative importance of price as evaluation factor. Depending on competition results, existing contract should be terminated for convenience, or, if contractor remains successful, contract should be modified pursuant to final proposal 201

Recommendation to ASPR Committee and FPR Division

Revision of late bid provisions of procurement regulations

Recommendation is made to ASPR Committee and FPR Division that GAO comments on possibility that late bid provisions involving acceptable evidence to establish timely receipt of bids may be unnecessarily causing Govt. to lose benefits of low bids be considered with respect to possible revision of procurement regulations 220

GENERAL ACCOUNTING OFFICE—Continued
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Contract matters Page

When contract is awarded on basis of old wage rates after new Service Contract Act wage determination has been received after bid opening, option should not be exercised since proper way to determine effect of new wages is to recompete rather than assume new rate would affect bidders equally. Recommendation is being referred to appropriate congressional committees pursuant to Legislative Reorganization Act of 1970, 31 U.S.C. 1172 97

Decisions
Advance
Disbursing and certifying officers
Payments prohibited by statutes

In view of certifying officer's statutory right to request and receive advance decision from the Comptroller General on matters of law, certifying officers are not "bound" by conclusion of law rendered by agency's general counsel. 31 U.S.C. 82d 297

Where there is doubt as to legality of payment, certifying officer's only complete protection from liability for erroneous payment is to request and follow Comptroller General's advance decision under 31 U.S.C. 82d 297

Other than heads of departments, etc.

In appropriate instances where questions of payments to be made by a Governmental department are presented to the Comptroller General for decision by a departmental official who is not the department head, the questions will be decided and transmitted to the department head as if he had submitted them under 31 U.S.C. 74 52

Reflecting change in construction of law
Effective from date of decision

Comptroller General decision stating that parties in interest who use overtime services of Customs Service inspectional employees are not required to pay for employees' retroactive salary increase reflects a change in construction of law. Therefore, decision is not retroactive, but is effective from date of its issuance. In circumstances present in this case our Office would offer no objection to collection action being terminated under 4 C.F.R. 104.3 226

Jurisdiction
Contracts
Small business matters

GAO will not review determination of responsibility when SBA issues COC in view of SBA's statutory authority, absent *prima facie* showing that action was taken fraudulently or with such wilful disregard of facts as to necessarily imply bad faith. Under this standard, GAO reviewed COC file and found no evidence of fraud or bad faith 97

Recommendations
Reporting to Congress
Contract matters

Where applicable regulations of Federal Govt. agency require that procurements by grantees be conducted so as to provide maximum open and free competition, certain basic principles of Federal procurement law must be followed by grantee. Therefore, rejection of low bid under

GENERAL ACCOUNTING OFFICE—Continued
Recommendations—Continued
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grantee's solicitation as nonresponsive was improper where basis for determining responsiveness to minority subcontractor listing requirement was not stated in IFB and bidder otherwise committed itself to affirmative action requirements. It is therefore recommended that contract awarded to other than low bidder be terminated ..... Page 139

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Automatic Data Processing Systems
Validity of award by FEA for dedicated automatic data processing services through facilities management contract was not affected by Brooks Act, 40 U.S.C. 759, and implementing regulations and policies, because FEA was entitled to rely on authorizations to proceed with procurement given by OMB and GSA after reviews of solicitation and FEA's cost and other justificatcns. Also, provisions of OMB Cir. No. A–54 and FMC 74–5 concerning ADPE acquisitions are ordinarily executive branch policy matters not for resolution by GAO 60

GRANTS
To other than States. (*See* **FUNDS, Federal grants, etc., to other than States**)

GRATUITIES
Selective Reenlistment Bonus
Computation
Multiplier
Use of full month of service only
For the purpose of computing the Selective Reenlistment Bonus under 37 U.S.C. 308, as amended, a fraction of a month of additional obligated service may not be counted as a full month in determining monthly fractions of a year because, unlike similar statutes where specific authorization to do so is provided therein, 37 U.S.C. 308, as amended, contains no authorization to permit fractions of months to be counted as whole months 37

Use of unexpired term of prior enlistment
Service member who, within 3 months of the expiration of his current enlistment or extension thereof, is discharged pursuant to the authority of Secretary concerned under 10 U.S.C. 1171, where such discharge is for the sole purpose of reenlisting, may not have that unexpired term of enlistment or extension thereof considered as "additional obligated service" for purpose of determining the multiplier for Selective Reenlistment Bonus computation under 37 U.S.C. 308, as amended by Pub. L. 93–277, May 10, 1974, 88 Stat. 119 37

Use of years, months and days of service
The Selective Reenlistment Bonus entitlement provided for in 37 U.S.C. 308, as amended, may not be computed by using as the multiplier, the years, months and days of additional obligated service because that section clearly and unambiguously limits that multiplier to "the number of years, or the monthly fractions thereof, of additional obligated service." 37

HAWAII
Station allowances
Military personnel. (*See* **STATION ALLOWANCES, Military personnel, Excess living costs outside United States, etc.**)

HOUSING
Construction
Turnkey contract. (*See* **HOUSING, "Turnkey" developers, Contracts**)
Loans
Default
Mobile home repossessed and sold
Computation of Government's claim — Page

Lender's claim on Govt-insured mobile home loan in default may properly be certified for payment based on sale price of mobile home, notwithstanding that regulation calls for use of higher of sale price or appraised value, where lender complied with regulations and acted consistently with protection of Govt.'s interest and where, through no fault of lender, appraised value cannot be ascertained ---- 151

Maturity date of loan

Since note dated May 1, 1970, submitted for insurance pursuant to Title I of National Housing Act contained projected maturity date 17 days in excess of 7 years and 32 days maximum that was prescribed by statute when loan was made, claim submitted by bank—which is primarily responsible for assuring that term of note does not exceed statutory limitation—for reimbursement of its loss on note must be denied. Although note was not assigned to bank or funds disbursed thereby until May 19, 1970, statute specifically limits term of obligation or note underlying loan and makes no provision for exceptions ---- 126

"Turnkey" developers
Contracts
Negotiation procedures

By accepting offeror's initial turnkey housing proposal—regarded as most favorable to Govt.—which nonetheless substantially varied from specific RFP requirements, Navy waived those requirements for purposes of competition among seven offerors in competitive range. This change in specifications, without complying with provisions of ASPR 3-805.4, deprived other offerors of equal opportunity to compete and Govt. of benefits of maximum competition ---- 201

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Reclamation Service. (*See* **RECLAMATION SERVICE**)

LEASES
Oil and gas. (*See* **OIL AND GAS, Leases**)
Rent
Oil and gas. (*See* **OIL AND GAS, Leases, Rental**)

LEAVES OF ABSENCE
Lump-sum payments
Removal, suspension, etc., of employee
Refund on reinstatement Page

Employee was restored to duty after his service had been terminated during probation as a result of racial discrimination. Lump-sum pay for annual leave may not be considered for waiver under 5 U.S.C. 5584, since payment was proper when made. Also, there is no authority to waive payment of retirement deductions on the amount of Federal pay that would have been earned during the period of separation, notwithstanding interim earnings exceeded amount of Federal pay---------- 48

Military personnel
Reenlistment leave
Leave travel entitlements

There is no objection to proposed revision of Vol. 1, JTR, to grant leave entitlements under 37 U.S.C. 411b, where because of the critical nature of the member's job he is not authorized leave travel between permanent station assignments provided such travel takes place within reasonable time following the change of station, and entitlements do not exceed those provided if travel had occurred between assignments---------- 284

Status during
Civil arrest and military confinement

Service member charged with commission of a civil offense on foreign soil is not entitled to pay and allowances for period when actually absent from military installation for purposes of judicial proceedings by foreign civil authorities unless such absence is excused as unavoidable---------- 186

Sick
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Award of arbitrator granting sick leave to employee who attended sick member of family not afflicted with contagious disease, who as result was not able to perform his duties, may not be implemented by agency since there is no legal authority to grant sick leave in the circumstances---------- 183

LEGISLATION
Construction. (*See* **STATUTORY CONSTRUCTION**)

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MARINE CORPS
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Dependents
Proof of dependency for benefits. (*See* **MILITARY PERSONNEL, Dependents, Proof of dependency for benefits**)

MILEAGE
Travel by privately owned automobile
Advantage to Government
Temporary duty
Local travel

Since rental cars and taxicabs are considered special conveyances under FTR, constructive cost of local travel by such modes may not be included as constructive cost of common carrier transportation under

MILEAGE—Continued
Travel by privately owned automobile—continued
Advantage to Government—continued
Temporary duty—continued
Local travel—continued
FTR para. 1–4.3 for purpose of determining maximum reimbursement when for personal reasons privately owned conveyance is used in lieu of common carrier transportation. However, to extent such local travel is authorized, constructive cost of common carrier transportation (bus or streetcar) for such travel may be included or use of privately owned conveyance may be approved as being advantageous to Govt. and reimbursement determined on this basis---------- Page 192

Common carrier cost limitation
Computation
Total actual cost *v.* total constructive cost
Although on basis of our decisions agency travel regulation requires actual versus constructive costs for transportation and per diem to be compared separately in determining employee's reimbursement when, for personal reasons, privately owned conveyance is used in lieu of common carrier transportation, our decisions were based on interpretation of regulations which have been superseded. We interpret the current regulation, FTR para. 1–4.3, as requiring agency to determine employee's reimbursement for such travel by comparing total actual costs to total constructive costs. 45 Comp. Gen. 592 and 47 *id.* 686 will no longer be followed---------- 192

Rates
Increases
Effective date
Blanket travel order issued on July 1, 1974, authorized per diem rate of $25 per day and mileage rate of 12 cents for use of privately owned automobile, as prescribed by Commerce Dept.'s regulations. On May 19, 1975, Temporary Reg. A–11 (GSA), implementing the Travel Expense Amendments Act of 1975, amended the Federal Travel Regs. (FTR) to increase the maximum per diem and mileage rates for official travel. Under blanket travel order, employee who traveled May 15 to 20, 1975, is entitled to higher per diem and mileage rates of amended FTR for travel on May 19 and 20 since such rates were mandatory. 49 Comp. Gen. 493 followed. 35 Comp. Gen. 148, distinguished---------- 179

Within metropolitan area
Commuting from residence to place of employment
Experts and consultants
Intermittently employed consultant may be paid transportation expenses pursuant to 5 U.S.C. 5703 and par. C3053, subpar. 2, of Joint Travel Regs., Vol. 2, for commuting from his residence to place of employment where residence is outside corporate limits but within metropolitan or geographic area of place of duty, insofar as intermittent employment occasions him transportation expenses he would not otherwise have incurred. 22 Comp. Gen. 231, overruled---------- 199

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Station. (*See* **STATION ALLOWANCES**)
Annuity elections for dependents
Survivor Benefit Plan. (*See* **PAY, Retired, Survivor Benefit Plan**)
Civil arrest
Status Page

Service member charged with commission of a civil offense on foreign soil is entitled to pay and allowances for any pretrial custodial period at a U.S. military installation where decision to incarcerate or to merely restrict member to duty station and assign him to perform duties on full-time basis remains in installation commanders. 36 Comp. Gen. 173, modified 186

Service member charged with commission of a civil offense on foreign soil is to be considered constructively absent from duty and not entitled to pay and allowances when member is actually incarcerated on basis of request for incarceration by foreign civilian authorities under provisions of a treaty or other international agreement. 36 Comp. Gen. 173, modified 186

Cost-of-living allowances. (*See* **STATION ALLOWANCES, Military personnel, Excess living costs outside United States**)
Dependents
Certificates of dependency
Filing requirements

In view of reasonable assurance that changes in dependency status for payment of basic allowance for quarters do not go undetected under Joint Uniform Military Pay System, annual recertification of dependency certificates prescribed in 51 Comp. Gen. 231, as they relate to Marine Corps, Navy, and Air Force members, no longer will be required, provided that adequate levels of internal audit are maintained 287

Details. (*See* **DETAILS, Military personnel**)
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Enlistments
Generally. (*See* **ENLISTMENTS**)
Gratuities. (*See* **GRATUITIES**)
Judge Advocates General
Assistants
Officers serving in positions
Entitled to pay of rear admirals

Court of Claims in *Selman* v. *United States*, 204 Ct. Cl. 675 held that naval officers ordered to serve in positions of Assistant Judge Advocates General are entitled to at least the pay of rear admiral (lower half) while serving in such positions whether they were "detailed" or "assigned" to such positions. Our decision at 50 Comp. Gen. 22 which determined that such officers were not entitled to pay of rear admiral (lower half) will no longer be followed. Consequently, successors to plaintiffs in *Selman* in the statutorily created positions are also entitled to receive pay of rear admiral (lower half) 58

Mileage. (*See* **MILEAGE, Military personnel**)
Pay. (*See* **PAY**)
Per diem. (*See* **SUBSISTENCE, Per diem, Military personnel**)

MILITARY PERSONNEL—Continued
Quarters allowance. (*See* **QUARTERS ALLOWANCE**)
Reenlistment status. (*See* **ENLISTMENTS, Reenlistments**)
Reservists
Training duty
Per diem Page

Member of Reserve component ordered to annual active duty for training stayed at Navy Lodge, a nonappropriated fund temporary lodging facility, at $9 daily charge. In view of 37 U.S.C. 404(a)(4), 1 JTR para. M6000–1, which provides that members of Reserve components ordered to annual active duty for training are not entitled to per diem if Govt. quarters and mess are available, does not preclude per diem where members of Reserves incur lodging expenses at nonappropriated fund activities which were defined as Govt. quarters for purposes of 1 JTR without consideration that such expenses would be incurred---------- 130

Selective reenlistment bonus. (*See* **GRATUITIES, Selective Reenlistment Bonus**)
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MISCELLANEOUS RECEIPTS
Refund of moneys
Erroneously received
Propriety at time of deposit
Investment adviser fees

Annual charge assessed pursuant to User Charge Statute, 31 U.S.C. 483a, by SEC upon investment advisers and deposited in Treasury as miscellaneous receipts, which charge is now considered erroneous by SEC because of recent Supreme Court decisions, may be refunded by SEC out of permanent indefinite appropriation established by 31 U.S.C. 725q–1 to pay moneys "erroneously received and covered." This refund is authorized to all who paid such invalid fee regardless of whether payment was made under protest---------- 243

MISSING PERSONS ACT
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Compensation. (*See* **COMPENSATION, Missing, interned, captured, etc., employees**)

MOBILE HOMES
Loans. (*See* **HOUSING, Loans**)

NAMES
Married women
Use of married name
Payrolls

A woman, notwithstanding her marriage, has the right to use her maiden name on Govt. checks and payrolls provided that she uses the same name consistently on all Govt. records. This is, however, subject to any general regulation that might be issued by the CSC. In addition, a female employee may be carried on the payroll as Ms., regardless of her marital status, if she so desires. 19 Comp. Gen. 203, modified---------- 177

NAVY DEPARTMENT
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Basis of race Page
Employee was restored to duty after his service had been terminated during probation as a result of racial discrimination. Lump-sum pay for annual leave may not be considered for waiver under 5 U.S.C. 5584, since payment was proper when made. Also, there is no authority to waive payment of retirement deductions on the amount of Federal pay that would have been earned during the period of separation, notwithstanding interim earnings exceeded amount of Federal pay ---------- 48
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OFFICERS AND EMPLOYEES
Appointments. (*See* **APPOINTMENTS**)
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Contracting with Government
Public policy objectionability
Corporation
Where Govt. employee owns 39.95 percent of stock of corporation, it is concluded that he has substantial ownership in corporation. Conclusion is reached in view of significant history which has discouraged contracting between Govt. and its employees. Therefore, while agency restricted its view to employee's role in day-to-day management of corporation, since reasonable ground did exist, rejection of corporation low bid was not improper ---------- 295
Debt collections. (*See* **DEBT COLLECTIONS**)
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Army officer, assigned as Executive Assistant to Ambassador-at-Large, retired from Army in anticipation of civilian appointment to that position. After retirement he continued to serve as Executive Assistant for 7 months before Dept. of State determined he could not be appointed. Claimant is *de facto* officer who served in good faith and without fraud. He may be paid reasonable value of services despite lack of appointment in view of fact that had compensation been paid, claimant could retain it under *de facto* rule or recovery could be waived under 5 U.S.C. 5584. Although he was not paid, administrative error arose when claimant in good faith entered on duty with understanding of Govt. obligation to pay for services. On reconsideration, B–181934, Oct. 7, 1974, is overruled, and 52 Comp. Gen. 700, amplified ---------- 109
Disputes
Arbitration
Collective-bargaining agreement provides that certain Internal Revenue Service career-ladder employees will be promoted effective the first pay period after 1 year in grade, but promotion of seven employees covered by agreement were erroneously delayed for periods up to several weeks. Since provision relating to effective dates of promotions becomes nondiscretionary agency requirement, if properly includable in bargaining agreement, General Accounting Office will not object to retroactive promotions based on administrative determination that employees would have been promoted as of revised effective dates but for failure to timely process promotions in accordance with the agreement ---------- 42

OFFICES AND EMPLOYEES—Continued
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Federal Labor Relations Council questions the propriety of sustaining an arbitration award that orders backpay for employees deprived of overtime work in violation of a negotiated agreement. Agency violations of negotiated 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. Improper agency action may be either affirmative action or failure to act where agreement requires action. Thus, award of backpay to employees deprived of overtime work in violation of agreement is proper and may be paid..... 171

Award of arbitrator granting sick leave to employee who attended sick member of family not afflicted with contagious disease, who as result was not able to perform his duties, may not be implemented by agency since there is no legal authority to grant sick leave in the circumstances..... 183

Equal employment opportunity
Discrimination actions

Employee was restored to duty after his service had been terminated during probation as a result of racial discrimination. Total interim earnings from private enterprise are for offset against total Federal backpay otherwise due, even though this results in no backpay payment. Interim earnings may not be computed and set off on a pay period by pay period basis to reduce the effect of interim earnings..... 48

Ethics
Abuse

Where Agency representative brought protester's employee into meeting with competitor without disclosing relationship and discussion may have given protester competitive advantage, RFP should be revised to eliminate advantage, if that can be done without sacrifice to Agency interests, since such action would enhance competition and provide opportunity for all interested parties to compete. However, if Agency interests call for continuing procurement in form that precludes elimination of possible competitive advantage, protester may be excluded from portion of procurement involving possible advantage..... 280

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Employee who moves household goods from old station to new station pursuant to transfer may not later claim expenses for transportation of mobile home under FTR para. 2–7.1(a)..... 228

Purchase costs

Employee who, pursuant to transfer of station, purchased mobile home for use as residence at new station may be reimbursed for miscellaneous expenses normally associated with relocation of mobile homes. FTR para. 2–3.1(b)..... 228

Travel by foreign air carriers. (*See* **TRAVEL EXPENSES, Air travel, Foreign air carriers, Prohibition, Availability of American carriers**)
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OIL AND GAS
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Within National Wildlife Refuges
Disposition of receipts from oil and gas rights

Receipts from oil and gas leases on lands within the National Wildlife Refuge System, and administered by the Fish and Wildlife Service, whether lands were made part of the System by acquisition or by withdrawal from public domain, are required to be disposed of pursuant to 16 U.S.C. 715s rather than pursuant to the Mineral Leasing Act which generally prescribes disposition of receipts from leases of mineral rights in public lands, because, to the extent there is conflict between requirements of the statutes, the more recent one is controlling..... 117

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Mileage and per diem rates

Blanket travel order issued on July 1, 1974, authorized per diem rate of $25 per day and mileage rate of 12 cents for use of privately owned automobile, as prescribed by Commerce Dept.'s regulations. On May 19, 1975, Temporary Reg. A–11 (GSA), implementing the Travel Expense Amendments Act of 1975, amended the Federal Travel Regs. (FTR) to increase the maximum per diem and mileage rates for official travel. Under blanket travel order, employee who traveled May 15 to 20, 1975, is entitled to higher per diem and mileage rates of amended FTR for travel on May 19 and 20 since such rates were mandatory. 49 Comp. Gen. 493 followed. 35 Comp. Gen. 148, distinguished..... 179

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Service member charged with commission of a civil offense on foreign soil is to be considered constructively absent from duty and not entitled to pay and allowances when member is actually incarcerated on basis of request for incarceration by foreign civilian authorities under provisions of a treaty or other international agreement. 36 Comp. Gen. 173, modified 186
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Aviation duty
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Involuntary removal
Proposed amendment to E.O. 11157 which would authorize incentive pay for up to 120 days to enlisted members involuntarily removed from flight status without notice is reasonably restricted to effecting the primary purpose of the statute (37 U.S.C. 301) authorizing such pay and, therefore, would be valid 121
Limited duration
Incentive pay entitlement
Air Force policy which in unusual cases retains enlisted members on flight status by distributing flight duty among more enlisted members than necessary so as to prevent termination of flight status and incentive pay without 120 days' notice is questionable administrative practice, but it may not be said as a matter of law that members in such cases are not entitled to incentive pay 121
Civilian employees. (*See* **COMPENSATION**)
Incentives
Hazardous duty
Flight pay. (*See* **PAY, Aviation duty**)
Judge Advocates General
Assistants
Officers serving in positions
Entitled to pay of rear admirals
Court of Claims in *Selman* v. *United States*, 204 Ct. Cl. 675 held that naval officers ordered to serve in positions of Assistant Judge Advocates General are entitled to at least the pay of rear admiral (lower half) while serving in such positions whether they were "detailed" or "assigned" to such positions. Our decision at 50 Comp. Gen. 22 which determined that such officers were not entitled to pay of rear admiral (lower half) will no longer be followed. Consequently, successors to plaintiffs in *Selman* in the statutorily created positions are also entitled to receive pay of rear admiral (lower half) 58

PAY—Continued

Periods of confinement by military authorities for foreign civil offenses

Under jurisdiction of installation commanders Page

Service member charged with commission of a civil offense on foreign soil is entitled to pay and allowances for any pretrial custodial period at a U.S. military installation where decision to incarcerate or to merely restrict member to duty station and assign him to perform duties on full-time basis remains in installation commanders. 36 Comp. Gen. 173, modified 186

Readjustment payment at discharge

Regular commissioned officers

Travel and transportation allowances entitlement

To selected home

A Regular Army commissioned officer discharged with readjustment pay in accordance with 10 U.S.C. 3814a may receive travel and transportation allowances provided in 37 U.S.C. 404(c), 406(d) and 406(g) for members involuntarily released from active duty with readjustment pay, since the congressional intent was to treat such officers in the same manner as Reserve officers involuntarily released from active duty with readjustment pay 166

Retired

Survivor Benefit Plan

Revocation, etc.

Administrative error

Secretarial prerogative

Members who retired before SBP effective date and elected to participate in the Plan under subsec. 3(b) of Pub. L. 92–425 may not unilaterally revoke such elections during the 18-month period provided for such election or at any time thereafter. Revocation or correction of an SBP election based on "administrative error" is a secretarial prerogative under 10 U.S.C. 1454. 53 Comp. Gen. 393, modified 158

Election based on misinformation

Revocation or correction of an SBP election based upon "administrative error" is a secretarial prerogative under 10 U.S.C. 1454 and may be exercised to revoke or modify SBP coverage based upon a finding that the member received erroneous or insufficient information and that such information caused him to make an election he would not otherwise have made 158

Waiver of overpayments. (*See* **DEBT COLLECTIONS, Waiver, Military personnel, Pay, etc.**)

PAYMENTS

Absence or unenforceability of contracts

Volunteer services

Unsolicited proposals

Decision by U.S. Govt., acting in its sovereign capacity, to rehabilitate Suez Canal is not a taking of a valuable contractual right requiring compensation, as claimant had only anticipated contract for services, loss of which is not responsibility of U.S. Govt. Moreover, submission of unsolicited proposal makes claimant a pure volunteer, affording no basis upon which payment may be authorized 164

PAYMENTS—Continued
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Acceptability Page
Rental car agreement stating cost had been charged to personal credit card does evidence that employee incurred rental cost as a personal obligation and will be regarded as satisfying receipt requirements of FTR para. 1–11.3c(5) for purpose of reimbursing employee for cost of rental car. Credit card number need not be shown on invoice. From nature of transaction it must appear that Govt. could not be held liable for the expense in event of nonpayment of the obligation by employee---- 224

PAYROLLS
Signatures
Married women
A woman, notwithstanding her marriage, has the right to use her maiden name on Govt. checks and payrolls provided that she uses the same name consistently on all Govt. records. This is, however, subject to any general regulation that might be issued by the CSC. In addition, a female employee may be carried on the payroll as Ms., regardless of her marital status, if she so desires. 19 Comp. Gen. 203, modified---- 177

PROPERTY
Public
Damage, loss, etc.
Carrier's liability
Air carriers. (*See* **AIRCRAFT, Carriers, Property damage, loss, etc., Liability of carrier**)

QUARTERS
Occupancy of nonappropriated fund lodging facilities
Reservists
Training duty periods
Member of Reserve component ordered to annual active duty for training stayed at Navy Lodge, a nonappropriated fund temporary lodging facility, at $9 daily charge. In view of 37 U.S.C. 404(a)(4), 1 JTR para. M6000–1, which provides that members of Reserve components ordered to annual active duty for training are not entitled to per diem if Govt. quarters and mess are available, does not preclude per diem where members of Reserves incur lodging expenses at nonappropriated fund activities which were defined as Govt. quarters for purposes of 1 JTR without consideration that such expenses would be incurred---- 130

QUARTERS ALLOWANCE
Basic allowance for quarters (BAQ)
Dependents
Certificates of dependency
Filing requirements
Annual recertification
In view of reasonable assurance that changes in dependency status for payment of basic allowance for quarters do not go undetected under Joint Uniform Military Pay System, annual recertification of dependency certificates prescribed in 51 Comp. Gen. 231, as they relate to Marine Corps, Navy, and Air Force members, no longer will be required, provided that adequate levels of internal audit are maintained---- 287

QUARTERS ALLOWANCE—Continued
Basic allowance for quarters—continued
Junior Reserve Officer Training Corps instructors
Recalled to active duty
Overseas areas Page

Where retired members are employed as administrators or instructors in the JROTC program under 10 U.S.C. 203(d) at DOD-operated schools on U.S. military bases in foreign countries and occupy Govt. owned or controlled quarters which are determined by such installation commander to be adequate for the member and dependents for his grade or rating if called to active duty at that location, such retired member may not be credited with BAQ in the computation of the "additional amount" payable to him under 10 U.S.C. 2031(d)(1)---------- 44

RECLAMATION SERVICE
Employees
Wage board employees
Retroactive increases

Wage survey at Interior installation, commenced in time to be effective Feb. 4, 1973, was not effected until May 7, 1973, because wage board rates were set by labor-management negotiated agreement and there was question of union representation. Wage adjustment may not be effective retroactively since the provisions in 5 U.S.C. 5344 regarding the effective date of wage board pay adjustments are not applicable to labor-management agreements and no tentative agreement as to the effective date of the wage adjustment was made prior to May 7, 1973---------- 162

REGULATIONS
Compliance
Mandatory *v.* permissive

Blanket travel order issued on July 1, 1974, authorized per diem rate of $25 per day and mileage rate of 12 cents for use of privately owned automobile, as prescribed by Commerce Dept.'s regulations. On May 19, 1975, Temporary Reg. A–11 (GSA), implementing the Travel Expense Amendments Act of 1975, amended the Federal Travel Regs. (FTR) to increase the maximum per diem and mileage rates for official travel. Under blanket travel order, employee who traveled May 15 to 20, 1975, is entitled to higher per diem and mileage rates of amended FTR for travel on May 19 and 20 since such rates were mandatory. 49 Comp. Gen. 493 followed. 35 Comp. Gen. 148, distinguished---------- 179

Overtime policies
Collective bargaining agreement

Federal Labor Relations Council questions the propriety of sustaining an arbitration award that orders backpay for employees deprived of overtime work in violation of a negotiated agreement. Agency violations of negotiated 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. Improper agency action may be either affirmative action or failure to act where agreement requires action. Thus, award of backpay to employees deprived of overtime work in violation of agreement is proper and may be paid---------- 171

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Promotion procedures

Collective bargaining agreement Page

Collective-bargaining agreement provides that certain Internal Revenue Service career-ladder employees will be promoted effective the first pay period after 1 year in grade, but promotion of seven employees covered by agreement were erroneously delayed for periods up to several weeks. Since provision relating to effective dates of promotions becomes nondiscretionary agency requirement, if properly includable in bargaining agreement, General Accounting Office will not object to retroactive promotions based on administrative determination that employees would have been promoted as of revised effective dates but for falure to timely process promotions in accordance with the agreement ---------- 42

SECURITIES AND EXCHANGE COMMISSION

Fees

Investment adviser

Refunds

Annual charge assessed pursuant to User Charge Statute, 31 U.S.C. 483a, by SEC upon investment advisers and deposited in Treasury as miscellaneous receipts, which charge is now considered erroneous by SEC because of recent Supreme Court decisions, may be refunded by SEC out of permanent indefinite appropriation established by 31 U.S.C. 725q–1 to pay moneys "erroneously received and covered." This refund is authorized to all who paid such invalid fee regardless of whether payment was made under protest ---------- 243

SET-OFF

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Assignments

Claim matured prior to assignment

Govt. contractor's assignment to bank of contract proceeds executed after contractor's operations ceased is invalid under 31 U.S.C. 203 since purpose of statute removing bar to assignments is to induce financial institutions to lend money to finance contractor's operations -- 155

Debt collections

Military personnel

Waiver

Where member requests waiver of claim under 10 U.S.C. 2774, which is less than total erroneous payment, and he does not know that an accounting setoff for underpayment which was otherwise due him has been made or of his right to request waiver for that amount, or that erroneous payment was actually determined to be for greater amount, we would act on entire erroneous payment in view of beneficial nature of law. However, where member knows of proper total erroneous payment, accounting setoff for underpayment and his right to request waiver in such amount, but requested waiver of amount less than total, we would act only on amount of waiver request ---------- 113

SET-OFF—Continued
Transportation
Property damage, etc.
Reclaim of set-off Page
Air carrier is liable for damages sustained to shipment of Govt. property notwithstanding contention of improper packing, since applicable tariff filed with CAB provides that acceptance of shipment constitutes prima facie evidence of proper packing and puts burden of proof on carrier to show absence of negligence. Issue of liability is determinable under provisions of tariff; common law rules and presumptions apply only when not in conflict with tariff 149

STATION ALLOWANCES
Military personnel
Excess living costs outside United States, etc.
Reservists performing active duty
Less than 20 weeks
In view of the broad authority contained in 37 U.S.C. 405, Vol. 1, Joint Travel Regs., may be amended to authorize payment of station allowances at with or without dependent rates as appropriate to members of Reserve components who perform active duty for less than 20 weeks outside the U.S. or in Hawaii or Alaska and who reside permanently in those areas with their families (if any) 135

STATUTES OF LIMITATION
Claims
Transportation
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Motor-water and rail-water
When ocean carrier has issued joint tender with a motor or rail carrier and the motor or rail carrier is subject to 3-year statute of limitations under 49 U.S.C. 66 and that time period has expired, the ocean carrier's claim for the applicable transportation charges is barred 174

STATUTORY CONSTRUCTION
Change in construction of law
Prospective effect
Comptroller General decision stating that parties in interest who use overtime services of Customs Service inspectional employees are not required to pay for employees' retroactive salary increase reflects a change in construction of law. Therefore, decision is not retroactive, but is effective from date of its issuance. In circumstances present in this case, our Office would offer no objection to collection action being terminated under 4 C.F.R. 104.3 226
Conflicting provisions
More recent one controlling
Receipts from oil and gas leases on lands within the National Wildlife Refuge System, and administered by the Fish and Wildlife Service, whether lands were made part of the System by acquisition or by withdrawal from public domain, are required to be disposed of pursuant to 16 U.S.C. 715s rather than pursuant to the Mineral Leasing Act which generally prescribes disposition of receipts from leases of mineral rights in public lands, because, to the extent there is conflict between requirements of the statutes, the more recent one is controlling 117

SUBSISTENCE
Per diem
Constructive costs
Privately owned vehicle travel
Common carrier cost limitation

Although on basis of our decisions agency travel regulation requires actual versus constructive costs for transportation and per diem to be compared separately in determining employee's reimbursement when, for personal reasons, privately owned conveyance is used in lieu of common carrier transportation, our decisions were based on interpretation of regulations which have been superseded. We interpret the current regulation, FTR para. 1–4.3, as requiring agency to determine employee's reimbursement for such travel by comparing total actual costs to total constructive costs. 45 Comp. Gen. 592 and 47 *id.* 686 will no longer be followed 192

Increases. (*See* **SUBSISTENCE, Per diem, Rates, Increases**)
Military personnel
Training duty periods
Reservists

Member of Reserve component ordered to annual active duty for training stayed at Navy Lodge, a nonappropriated fund temporary lodging facility, at $9 daily charge. In view of 37 U.S.C. 404(a)(4), 1 JTR para. M6000–1, which provides that members of Reserve components ordered to annual active duty for training are not entitled to per diem if Govt. quarters and mess are available, does not preclude per diem where members of Reserves incur lodging expenses at nonappropriated fund activities which were defined as Govt. quarters for purposes of 1 JTR without consideration that such expenses would be incurred 130

Rates
Increases
Effective date

Blanket travel order issued on July 1, 1974, authorized per diem rate of $25 per day and mileage rate of 12 cents for use of privately owned automobile, as prescribed by Commerce Dept.'s regulations. On May 19, 1975, Temporary Reg. A–11 (GSA), implementing the Travel Expense Amendments Act of 1975, amended the Federal Travel Regs. (FTR) to increase the maximum per diem and mileage rates for official travel. Under blanket travel order, employee who traveled May 15 to 20, 1975, is entitled to higher per diem and mileage rates of amended FTR for travel on May 19 and 20 since such rates were mandatory. 49 Comp. Gen. 493 followed. 35 Comp. Gen. 148, distinguished 179

TRANSPORTATION
Air carriers
Foreign
American carrier availability
Authority to use foreign aircraft

HEW employee may use foreign flag air carriers during travel while performing temporary duty because the use of one such carrier saved more than 12 hours from origin airport to destination airport than use of American flag air carrier, and use of other such carrier is essential to accomplish the Dept.'s mission, which would render American flag air carriers "unavailable" under 5 of International Air Transportation Fair Competitive Practices Act of 1974, Pub. L. 93–623, 88 Stat. 2104 (49 U.S.C. 1517) 52

TRANSPORTATION—Continued
Air carriers—Continued
Loss and damage liability
Air carrier is liable for damages sustained to shipment of Govt. property notwithstanding contention of improper packing, since applicable tariff filed with CAB provides that acceptance of shipment constitutes prima facie evidence of proper packing and puts burden of proof on carrier to show absence of negligence. Issue of liability is determinable under provisions of tariff; common law rules and presumptions apply only when not in conflict with tariff 149
Household effects
House trailer shipments
Household effects shipment precluded
Employee who moves household goods from old station to new station pursuant to transfer may not later claim expenses for transportation of mobile home under FTR para. 2–7.1(a) 228
Ocean carriers
Time-barred claims
Joint carrier service. (*See* **STATUTES OF LIMITATION, Claims, Transportation, Joint carrier service**)

TRAVEL ALLOWANCE
Military personnel
Enlistment extension, discharge, reenlistment, etc.
Consecutive overseas tours
Same station
Proposed revision of Vol. 1, JTR, granting leave travel entitlements authorized under 37 U.S.C. 411b, to members reassigned to second tours of duty at same oversea station, is contrary to clear language of statutory provision which provides for this entitlement in connection with "change of permanent station to another duty station" 284
Leave travel entitlements
Consecutive overseas tours
Same station
There is no objection to proposed revision of Vol. 1, JTR, to grant leave entitlements under 37 U.S.C. 411b, where because of the critical nature of the member's job he is not authorized leave travel between permanent station assignments provided such travel takes place within reasonable time following the change of station, and entitlements do not exceed those provided if travel had occurred between assignments 284

TRAVEL EXPENSES
Air travel
Foreign air carriers
Prohibition
Availability of American carriers
HEW employee may use foreign flag air carriers during travel while performing temporary duty because the use of one such carrier saved more than 12 hours from origin airport to destination airport than use of American flag air carrier, and use of other such carrier is essential to accomplish the Dept.'s mission, which would render American flag air carriers "unavailable" under 5 of International Air Transportation Fair Competitive Practices Act of 1974, Pub. L. 93–623, 88 Stat. 2104 (49 U.S.C. 1517) 52

TRAVEL EXPENSES—Continued
Automobile hire. (*See* **VEHICLES, Rental**)
Experts and consultants. (*See* **EXPERTS AND CONSULTANTS, Travel expenses**)
Military personnel
Release from active duty
Rights Page

A Regular Army commissioned officer discharged with readjustment pay in accordance with 10 U.S.C. 3814a may receive travel and transportation allowances provided in 37 U.S.C. 404(c), 406(d) and 406(g) for members involuntarily released from active duty with readjustment pay, since the congressional intent was to treat such officers in the same manner as Reserve officers involuntarily released from active duty with readjustment pay ---------- 166

Special conveyance hire
Advantage to Government determination

Since rental cars and taxicabs are considered special conveyances under FTR, constructive cost of local travel by such modes may not be included as constructive cost of common carrier transportation under FTR para. 1–4.3 for purpose of determining maximum reimbursement when for personal reasons privately owned conveyance is used in lieu of common carrier transportation. However, to extent such local travel is authorized, constructive cost of common carrier transportation (bus or streetcar) for such travel may be included or use of privately owned conveyance may be approved as being advantageous to Govt. and reimbursement determined on this basis ---------- 192

UNIONS
Agreements
Wage increases
Wage board employees

Wage survey at Interior installation, commenced in time to be effective Feb. 4, 1973, was not effected until May 7, 1973, because wage board rates were set by labor-management negotiated agreement and there was question of union representation. Wage adjustment may not be effective retroactively since the provisions in 5 U.S.C. 5344 regarding the effective date of wage board pay adjustments are not applicable to labor-management agreements and no tentative agreement as to the effective date of the wage adjustment was made prior to May 7, 1973 ---- 162

Federal service
Arbitration services
Effect on administrative determinations

Collective-bargaining agreement provides that certain Internal Revenue Service career-ladder employees will be promoted effective the first pay period after 1 year in grade, but promotion of seven employees covered by agreement were erroneously delayed for periods up to several weeks. Since provision relating to effective dates of promotions becomes nondiscretionary agency requirement, if properly includable in bargaining agreement, General Accounting Office will not object to retroactive promotions based on administrative determination that employees would have been promoted as of revised effective dates but for failure to timely process promotions in accordance with the agreement ---------- 42

VEHICLES
Rental
Credit card use Page
Rental car agreement stating cost had been charged to personal credit card does evidence that employee incurred rental cost as a personal obligation and will be regarded as satisfying receipt requirements of FTR para. 1–11.3c(5) for purpose of reimbursing employee for cost of rental car. Credit card number need not be shown on invoice. From nature of transaction it must appear that Govt. could not be held liable for the expense in event of nonpayment of the obligation by employee.. 224

VOUCHERS AND INVOICES
Credit cards. (*See* **CREDIT CARDS**)

WOMEN
Married
Use of maiden name on payrolls. (*See* **NAMES, Married women, Use of maiden names, Payrolls**)

WORDS AND PHRASES
Financing Institution
Holding Company
Govt. contractor's grant of security interest in accounts receivable to holding company alleged to be intermediary for bank's financing of contractor is not valid assignment under 31 U.S.C. 203, even if properly filed with Govt., since Govt. contract proceeds may be assigned only to financing institutions and holding company does not qualify as proper assignee.. 155
Leveling
Technical
Series of specification changes and requests for new best and final offers did not cause technical "leveling" of proposals, which refers to unfair practice of helping offeror bring unacceptable proposal up to level of other adequate proposals through successive rounds of negotiations, since only two proposals under consideration were both regarded as acceptable throughout testing and evaluation period and proposal which protester regards as having been brought up to level of its proposal was regarded by agency as superior proposal.. 244
Mathematically unbalanced bids
As general rule, mathematically unbalanced bid—bid based on enhanced prices for some work and nominal prices for other work—may be accepted if agency, upon examination, believes IFB's estimate of work requirements is reasonably accurate representation of actual anticipated needs. But where examination discloses that estimate is not reasonably accurate, proper course of action is to cancel IFB and resolicit, based upon revised estimate. B–161208, Aug. 8, 1967, modified.. 231