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[B-180084, B-183174]

Subsistence—Per Diem—Hours of Departure, etc.—During Duty Hours

The "2-day per diem rule" of 53 Comp. Gen. 882 (1974) and 55 Comp. Gen. 590 (1975)—that up to but not including 2 days' per diem may be paid to enable an employee to travel during regular duty hours—is intended to preclude delays in initiation or continuation of travel over weekends or over the 2 consecutive days that an employee is otherwise scheduled not to be on duty.

Subsistence—Per Diem—Delays—To Avoid Travel After Duty Hours

Where an employee delays his travel from Friday in order to travel during regular duty hours on Monday in disregard of the "2-day per diem rule," his per diem is limited to that which would have been payable if he had begun his return travel following the completion of work on Friday and continued to destination without delay.

Subsistence—Per Diem—Fractional Days—Computation

Inasmuch as the Federal Travel Regulations (FPMR 101-7) (May 1973) provide for computation of per diem on the basis of quarters of days in a travel status, a cost factor of an additional 1¾ days' per diem is to be used in connection with a determination of permissible delay in initiation or continuation of travel to permit an employee to travel during regular duty hours.

In the matter of the two-day per diem rule, August 1, 1977:

This decision is in response to a request by the Per Diem, Travel and Transportation Allowance Committee for further explanation of the basis for our holdings in 53 Comp. Gen. 882 (1974) and 55 Comp. Gen. 590 (1975). In addition, the Committee poses the following specific questions:

a. When an employee delays return travel from a Friday to Monday, (e.g., following completion of temporary duty on Friday) so as to travel during regular duty hours, what per diem, if any, would be payable for the intervening Saturday and Sunday?

b. Does the phrase "up to 2 additional days" mean that only 1¾ days of per diem is payable or does it mean that 2 days of per diem is payable?

c. When an employee whose permanent station is Washington, D.C. is assigned to temporary duty at San Francisco with a requirement to be present there at a conference at 8:00 a.m. on a Monday morning, departs the permanent station on Friday, what per diem, if any, would be payable for Saturday and/or Sunday?

In 53 Comp. Gen. 882 we considered the travel circumstances of two employees who, after completing their temporary duty assignments, delayed their returns in order to travel during regular duty hours. Since the delays in return travel involved only 1 additional day of per diem, we held that the delay was not improper and that the additional per diem costs involved could be paid. In so holding, we indicated that initiation of an employee's return may be delayed to permit him to travel during his regular duty hours and that payment of up to 2 days' additional per diem for that purpose is not unreasonable.

Our decision at 55 Comp. Gen. 590 involved an employee who reported to his duty station 3 days in advance of his scheduled assignment, traveling during regular working hours on Friday to report for duty on the subsequent Tuesday following a Monday holiday. In denying his claim for 3 days' per diem for the intervening 3-day weekend, we cited the rule of 53 Comp. Gen. 882 that up to 2 days' additional per diem may be paid for the purpose of permitting an employee to travel during his regular duty hours, adding that payment of additional per diem costs for 2 days or more for that purpose is considered unreasonable.

This so-called "2-day per diem rule" is predicated in part on the following policy with respect to scheduling of travel set forth at 5 U.S.C. § 6101(b)(2):

> (2) To the maximum extent practicable, the head of an agency shall schedule the time to be spent by an employee in a travel status away from his official duty station within the regularly scheduled workweek of the employee.

Prior to the 1965 enactment of that provision we had taken the view that in performing travel necessary to his work, a Government employee was required to proceed as expeditiously as he would if traveling on his personal business, even though he may thereby be required to travel on nonworkdays. In 46 Comp. Gen. 425 (1966) we considered the effect of the above-quoted statutory language on the employee's obligation of expeditious travel. The employee in that case had delayed his return travel over a weekend from Friday until Monday. While recognizing that 5 U.S.C. § 6101(b)(2) to some extent impacted upon the employee's obligation of expeditious travel, we nevertheless concluded that that policy did not envision a weekend's delay in the initiation or continuation of travel and stated that:

> We do not believe it was intended that the head of an agency in exercising the administrative discretion under such provision could permit a traveler under the circumstance such as here involved to delay his return to his official headquarters until the Monday after a weekend so as to increase his entitlement to per diem in lieu of subsistence. Therefore, our view is that no additional per diem would be payable to Mr. Nelson by reason of his failure to return to his headquarters on the weekend of June 11-12, 1966.

Again, in B-167422, August 13, 1969, and B-165339, November 18, 1968, we restated the view that there was no authority for payment of per diem to an employee for the weekend after he has completed his assignment at a temporary duty location on Friday, prior to his delayed return the following Monday. The rule thus evolved in the context of a prohibition against delaying travel over a weekend for the sole purpose of allowing an employee to travel during working hours. Compare B-160258, January 2, 1970, and B-168855, March 24, 1970.

As the Committee suggests, the 2-day per diem rule stated in those decisions, in authorizing payment of up to but not including 2 days'

additional per diem for the purpose of enabling an employee to travel during regular duty hours, is intended to preclude delays over weekends or over the 2 consecutive days that an employee is otherwise not scheduled to be on duty.

The Committee's first specific question relates to the per diem payable in the case where an employee delays his travel for an unreasonably long period, as from Friday to Monday. We are asked what per diem, if any, would be payable for the intervening Saturday and Sunday. We believe that question is answered in 46 Comp. Gen. 425 and in 55 Comp. Gen. 590. In 46 Comp. Gen. 425 we held, with respect to an employee who had delayed his return travel from Friday to Monday, that no additional per diem was payable by reason of his failure to return to headquarters on the weekend, and that his per diem entitlement was limited to the amount otherwise payable if the return travel had been performed after completion of temporary duty on Friday without interruption. Similarly, in 55 Comp. Gen. 590 we held that additional per diem costs attributable to the employee's election to travel 3 days in advance may not be paid.

The Committee's second question relates to whether the phrase "up to 2 additional days" means that 1¾ days' per diem is payable or that 2 days' per diem is payable. The question apparently results from the fact that per diem entitlement is calculated on the basis of quarters of days in accordance with para. 1–7.6d of the Federal Travel Regulations (FTR) (FPMR 101–7) (May 1973). For example, an employee who is in a travel status from 12:01 a.m. until 7 p.m. of 1 day would be entitled to a full day's per diem for that day. The basic issue is whether, in making a determination as to permissible delay, per diem entitlement because of a delayed departure from a temporary duty station after completion of an assignment, rather than an immediate return, an agency should use an additional cost factor of 1¾ days' per diem or of 2 days' per diem in applying the phrase "up to 2 additional days." The 2-day per diem rule expressed in 53 Comp. Gen. 882 and 55 Comp. Gen. 590 relates to the amount of per diem payable and not to the actual number of hours that an employee delays his travel. In view of the per diem computation rule set forth in the FTR and the fact that an employee is entitled to receive 2 days' per diem for a period of more than 1¾ days, a cost factor of an additional 1¾ days' per diem is to be used.

Finally, we are asked to address the specific case of an employee whose permanent duty station is Washington, D.C., and who, being assigned to attend a conference in San Francisco at 8 a.m. on Monday morning, departs from Washington, D.C., on Friday. The Committee asks what per diem, if any, would be payable for Saturday and/or Sunday. For purposes of discussion it will be assumed that the em-

ployee departed at 1 p.m. on Friday and arrived in San Francisco before 6 p.m. the same day, and that he could have taken a flight departing and arriving at approximately the same times on Sunday. It will be further assumed that that Sunday flight was the last that would permit him to arrive in San Francisco at a reasonable hour.

In considering whether the employee may be paid additional per diem in connection with his early departure, the per diem costs associated with Friday departure, including per diem for the intervening weekend, should be compared with the per diem payable based on Sunday departure. Departure on Friday would involve per diem for one-half day on Friday, 2 full days' per diem for Saturday and Sunday, and per diem covering the remainder of the conference assignment. Sunday departure would involve per diem for one-half day on Sunday plus per diem covering the remainder of the conference assignment. Since 2 full days' additional per diem would have to be paid to permit the employee to travel during regular duty hours on Friday, his departure should be scheduled for Sunday. If the employee nevertheless departs on Friday, his per diem is limited to that which would have been payable had he departed on Sunday. This result is in accordance with the discussion set forth at the next-to-last paragraph of 46 Comp. Gen. 425, *supra*.

[B-187229]

Quarters Allowance—Basic Allowance For Quarters (BAQ)—Temporary Lodging Facilities—Effect of Occupancy

Under 37 U.S.C. 403 (1970) and applicable regulations, a member of a uniformed service may occupy Government "public quarters" for not in excess of 30 days at his permanent duty station incident to a permanent change of station without loss of basic allowance for quarters (BAQ). Payment of a service charge for linen and housekeeping services does not make such quarters "rental" quarters within the meaning of 37 U.S.C. 403(e) so as to allow occupancy for longer than 30 days without loss of BAQ.

Quarters Allowance—Basic Allowance For Quarters (BAQ)—Temporary Lodging Facilities—Operated By Nonappropriated Funds

A member of a uniformed service may occupy temporary lodging facilities in excess of 30 days without loss of basic allowance for quarters if a substantial "rent" for such quarters is charged to cover direct operating costs, loan repayment, repairs, etc., and which quarters are acquired and operated with nonappropriated funds.

In the matter of the Department of Defense Military Pay and Allowance Committee Action No. 529, August 1, 1977:

This action is in response to a letter dated August 13, 1976, from the Acting Assistant Secretary of Defense (Comptroller) requesting an

advance decision concerning payment of basic allowance for quarters to members of the uniformed services occupying temporary lodging facilities operated by nonappropriated fund activities of the Government. The specific question and discussion are presented in Department of Defense Military Pay and Allowance Committee Action No. 529 which was enclosed with the Acting Assistant Secretary's letter.

The question presented is as follows:

> May temporary lodging facilities (TLF's) which are constructed or designated for occupancy with charge and operated by nonappropriated funds on a self-sustaining basis be occupied for periods in excess of 30 days by members who are entitled to Basic Allowance for Quarters (BAQ) and who are in a permanent change of station (PCS) status without termination of their BAQ entitlement?

The statutory authority for the payment of BAQ is 37 U.S.C. 403 (1970 and Supp. IV, 1974), subsection (a) of which provides that except as otherwise provided by law, a member of a uniformed service who is entitled to basic pay is entitled to BAQ. However, subsection (b) provides generally that, except as otherwise provided by law, a member who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service is not entitled to BAQ. Subsection (e) provides in pertinent part as follows concerning occupancy on a rental basis of housing facilities under the jurisdiction of the United States.

> (e) Notwithstanding any other law (including those restricting the occupancy of housing facilities under the jurisdiction of a department or agency of the United States by members, and their dependents, of the armed forces above specified grades, or by members, and their dependents, of the Environmental Science Services Administration and the Public Health Service), a member of a uniformed service, and his dependents, may be accepted as tenants in, and may occupy on a rental basis, any of those housing facilities, other than public quarters constructed or designated for assignment to and occupancy without charge by such a member, and his dependents, if any. Such a member may not, because of his occupancy under this subsection, be deprived of any money allowance to which he is otherwise entitled for the rental of quarters.

Subsection (j) provides that the President may prescribe regulations for the administration of section 403.

The Committee Action discussion indicates that the question presented requires a determination of whether the fee charged by a TLF constructed or designated for occupancy with charge and operated by a nonappropriated fund instrumentality on a self-sustaining basis is a "rental" fee within the meaning of 37 U.S.C. 403(e) or a "service" fee. It is pointed out that section 403 of Part IV of Executive Order 11157, June 22, 1964, which implements 37 U.S.C. 403 provides in pertinent part:

> Any quarters or housing facilities under the jurisdiction of any of the uniformed services in fact occupied without payment of rental charges * * * shall be deemed to have been assigned to such member as appropriate and adequate quarters, and no basic allowance for quarters shall accrue to such member under such circumstances unless the occupancy * * * occurs while such member

is in a duty or leave status incident to a change of permanent station and is of a temporary nature under standards prescribed by regulations issued by the Secretary of Defense * * *

It is also indicated that Department of Defense (DOD) Directive 4165.55, December 1, 1972, which defines and establishes policy and responsibility for TLF's provides in part in paragraph IV.B, as follows:

1. TLFs provide short term housing accommodations for members of the Military Services and/or their dependents who are temporarily without permanent housing due to permanent change of station orders (PCS) * * *

* * * * * * *

3. Occupancy of TLFs does not preclude BAQ payment to a member otherwise eligible provided (a) the occupancy occurs while such member is in a duty status or leave status or leave status incident to a change of permanent station and does not exceed 30 days * * *

4. A *service/rental fee* must be paid by occupants of TLFs. * * * [Italic supplied.]

That directive also states that the normal maximum period of occupation of TLF's is 30 days for personnel affected by PCS orders, except that in cases of personal hardships the local commander may grant an extension beyond 30 days on a case-by-case basis. It indicates that TLF's are leased, constructed or otherwise acquired in some cases with nonappropriated funds and income derived from their operation, and in other cases with appropriated funds. Also, apparently the operation and maintenance of TLF's is funded in varying ways by use of nonappropriated funds, appropriated funds, and income derived from their operations. See also DOD Directive 1330.2, January 19, 1953, concerning funding of such activities.

The Committee Action notes that subparagraph IV.B.4 of DOD Directive 4165.55 recognizes a distinction between "service" and "rental" fees charged by TLF's, apparently because the term TLF loosely includes various types of facilities, some acquired or funded from appropriated funds and some from nonappropriated funds. It is stated that TLF's supported with appropriated funds charge a service fee designed to cover the cost of direct operations, with other appropriated funds being available for utilities, maintenance and repairs. For this reason the fee is relatively small. TLF's supported by nonappropriated funds charge a rental fee that is structured to cover not only the direct cost of operations but also loan repayment, maintenance, repair and capital replacement.

The Committee Action states that notwithstanding this distinction, the provisions of Directive 4165.55 treat both types of TLF's alike with regard to BAQ entitlement. It is pointed out, however, that the Department of Defense Military Pay and Allowances Entitlements Manual (DODPM) in its Glossary of Terms includes a definition of "Government quarters" which distinguishes, for BAQ purposes,

TLF's supported by nonappropriated funds. The DODPM defines Government quarters to include:

> * * * transient facilities such as guest houses, hostess houses, and hotel-type accommodations. (Accommodations built and operated by nonappropriated fund activities are considered to be rental quarters for the purpose of BAQ eligibility.) Payment of service charges for laundering of linens, janitorial services, etc., has no effect on whether the facilities are considered Government quarters or housing facilities; * * *

The Committee Action indicates that our decisions 31 Comp. Gen. 603 (1952) and 55 Comp. Gen. 130 (1975) appear to support the distinction drawn in the DODPM's definition of Government quarters, although apparently some doubt is cast on the matter by the holding in 39 Comp. Gen. 369 (1959).

The provisions of 37 U.S.C. 403(e), *supra*, are derived from the act of July 2, 1945, ch. 227, 59 Stat. 316. The purpose of that statute was to permit military personnel and their dependents to occupy on a rental basis housing facilities, including those under the jurisdiction of the Armed Forces, other than "public quarters" constructed or designated for assignment to or occupancy without charge by such personnel and their dependents, without loss of the otherwise proper money allowance in lieu of quarters (now BAQ). However, aside from such provisions, it has long been the practice to provide quarters for military personnel without charge as an essential part of military life. See 25 Comp. Gen. 798, 800 (1946). As a general rule when such "public quarters" are occupied by a member and his dependents there is no entitlement to BAQ. See 37 U.SC. 403(b); 25 Comp. Gen. 798, *supra;* and 46 Comp. Gen. 869, 872 (1967).

However, we have approved the issuance of regulations authorizing members to occupy temporarily transient type Government quarters for not more than 30 days at their permanent duty stations incident to a PCS without loss of BAQ. Apparently, the basis for such approval was that the temporary occupancy of transient quarters could be considered as not an assignment of quarters within the meaning of 37 U.S.C. 403(b). See 45 Comp. Gen. 347 (1965), 48 *id.* 40 (1968), and compare 34 *id.* 515 (1955). In accordance with those decisions the applicable provisions of the DODPM now authorize BAQ for members who occupy transient Government quarters for not to exceed 30 days incident to a PCS. See DODPM, Table 3–2–3, Rule 15, and Table 3–2–5, Rule 6. In that regard those provisions are in accord with DOD Directive 4165.55, *supra.*

We have also held that payment of a nominal service charge to cover linen and housekeeping services does not constitute a rental for the use and occupancy of free Government quarters since such a charge is not based on the reasonable value of the quarters occupied. 44 Comp. Gen. 626, 632 (1965).

In accordance with the foregoing, in 39 Comp. Gen. 369, to which the Committee Action refers, we held that an Army officer who occupied rooms in the Fort Ritchie, Maryland Open Mess (Officer's Club) for which he paid a small daily charge which was called "rent" was not entitled to BAQ. It was noted that the quarters were located in a building which was located on and a part of Fort Ritchie which had been purchased with appropriated funds and that the charge for such quarters was intended to defray costs incurred by the Officer's Club for maintenance of the quarters. It was also noted that charges for Government guest houses, even though designated as rent, have been regarded as service charges, and such quarters are not considered rental quarters. In the circumstances, it was held that the officer had occupied public quarters, not rental quarters, and that BAQ was therefore not payable.

In 31 Comp. Gen. 603, however, to which the Committee Action also refers, it was held that a member who occupies on a rental basis a motel-type housing unit constructed and operated at Fort Bragg, North Carolina, with nonappropriated funds of the Fort Bragg Officers' Mess would not forfeit his allowance for quarters. It was indicated that such quarters should not be considered public quarters constructed or designated for occupancy without charge. Also, as the Committee Action indicates, a somewhat similar conclusion was reached in 55 Comp. Gen. 130, in which it was held that certain Reserve members who incur lodging expenses at nonappropriated fund activities are entitled to per diem.

Thus, under our decisions and the applicable regulations and definitions contained in the DODPM, a member who occupies transient Government quarters for 30 days or less is entitled to BAQ for such period. If he occupies such quarters in excess of 30 days, BAQ entitlement is lost for the period in excess of 30 days. The payment of a nominal service charge for such things as linen and housekeeping services does not make such Government quarters rental housing within the meaning of 37 U.S.C. 403(b). However, the occupancy of quarters such as those discussed in 31 Comp. Gen. 603, *supra*, acquired and operated with nonappropriated funds which charge a substantial "rental" fee designed to cover direct costs, loan repayments, capital replacement, etc., is not considered assignment to public quarters within the meaning of 37 U.S.C. 403(b) for which entitlement to BAQ is lost. The period of occupancy of such quarters would have no bearing on the matter. On that basis, the question is answered in the affirmative. As the Committee Action indicates, the provisions of DOD Directive 4165.55 are not entirely clear in this regard; however, the applicable provisions of the DODPM, under which BAQ is paid, appear to be in accord with these views.

[B-162471]

Compensation—Double—Holding Two Offices—Military Officer Appointed County Clerk While On Terminal Leave

Should a commissioned Officer of the Regular Air Force on terminal leave pending retirement accept a civil office under a State government or perform the duties of the office during such leave, the sanctions of 10 U.S.C. 973(b) (1970), which provides for termination of his military appointment, would apply to him. Since the civil office is under a State government, the provisions of 5 U.S.C. 5534a (1970), which authorizes dual employment during terminal leave in certain other circumstances, would not exempt the member from those sanctions.

In the matter of Major Robert C. Crisp, USAF, August 2, 1977:

This action is in response to a letter dated June 20, 1977, with enclosures, from Mr. Arnold G. Bueter, Principal Deputy Assistant Secretary (Financial Management), Department of the Air Force, requesting an advance decision in the case of Major Robert C. Crisp, USAF, who wishes to begin employment with a State government while on terminal leave immediately prior to his retirement from the Air Force, if possible, without jeopardizing his active duty or retired status by becoming so employed. The request has been assigned Secretarial Submission Number SS-AF-1269 by the Department of Defense Military Pay and Allowance Committee.

The question asked is:

> May a regular officer of a uniformed service, while on terminal leave, accept or perform the duties of a civil office of a State, as that term is defined in 29 Comp Gen 363 and 44 Comp Gen 830, whether appointed or elected, under 5 U.S.C. 5534a without incurring the sanctions of 10 U.S.C. 973(b)?

The submission indicates that the member, a Regular Air Force officer (who is retiring for years of service), is scheduled to go on terminal leave beginning August 3, 1977. He wishes to obtain the position of County Clerk for Sutter County, California, and if his application is accepted, assume the duties of that office in August 1977, when he begins his terminal leave.

It is stated in the submission that the office of County Clerk is created by California statute. Since certain duties are statutorily prescribed for that office, the exercise of which duties would involve some portion of that State's sovereign power, the submission recognizes as an accepted fact that such position constitutes a civil office as that term is used in 10 U.S.C. 973(b) (1970). See 29 Comp. Gen. 363 (1950), and 44 *id.* 830 (1966).

Section 973(b) provides in part:

> (b) Except as otherwise provided by law, no officer on the active list of the * * * Regular Air Force * * * may hold a civil office by election or appointment, whether under the United States, a Territory or possession or a State. The acceptance of such a civil office or the exercise of its functions by such an officer terminates his military appointment.

The submission indicates, however, that since the member in the present case would accept the civil office while on terminal leave, certain decisions of this Office (25 Comp. Gen. 677 (1946) and 27 *id.* 12 (1947)), may be for application. Those decisions interpret the congressional intent regarding the predecessor statute to 10 U.S.C. 973(b)—section 1222, Revised Statutes—and a collateral code provision, 5 U.S.C. 5534a (1970), and its predecessor statute—the act of November 21, 1945, ch. 489, 59 Stat. 584, 5 U.S.C. 61a–1 (Supp. V. 1946), concerning employment while on terminal leave. As a result, it is indicated that it is not clear at the present time whether the language of 5 U.S.C. 5534a may be construed as also allowing the acceptance of a civil office or position under a State government without invoking the sanction of 10 U.S.C. 973(b).

Section 1222, Revised Statutes (section 18 of the act of July 15, 1870, ch. 294, 16 Stat. 319), prohibited the holding of any civil office by an officer of the Army and provided that should any such officer accept or exercise the functions of such an office, his commission would be vacated. Those provisions were brought forward into the 1925 edition of the United States Code as 10 U.S.C. 576 and have been consistently interpreted over the years as including a State office. See generally B–173783, October 9, 1975.

On codification of title 10 into positive law in 1956 (70A Stat.), those provisions became subsection 3544(b) (Army), and 8544(b) (Air Force), and for the first time, specifically included State civil offices in its proscription. In 1968, section 4 of Public Law 90–235, 81 Stat. 759, repealed sections 3544 and 8544 of title 10, and enacted 10 U.S.C. 973, in lieu thereof, in order to extend to all Regular officers of the Armed Forces the same restrictions against holding civil office as were applied to the Army and Air Force.

Parallel to and independent of the foregoing was the development of the concept of "terminal leave." Basically, "terminal leave," while it is a term of art which arose during World War II, was known by other names since shortly after the Civil War. In essence, such leave represented a leave of absence granted an officer at the end of his period of military services; a permission to be absent from duty. *Terry* v. *United States*, 120 Ct. Cl. 315 (1951).

Prior to 1945, under the leave laws then in effect (10 U.S.C. 842 (1940)), leave of up to 60 days without deduction from pay and allowances could be taken by Army officers at the discretion of the Secretary of War. However, there was no statutory authority to make lump-sum payments in lieu of the taking of leave by such members even where they were being separated or released from active duty. The inability to immediately release such members from active duty and pay them for accrued but unused leave on one hand, and the

dual office and dual employment prohibitions as well as section 1222, Revised Statutes, on the other hand, created a nearly untenable situation during the final phases of World War II and general demobilization, since service members could not be paid for leave and could not be employed by the Government during terminal leave time since they were still in an active duty status, unless they were willing to vacate their commissions and forfeit their leave.

Thus was enacted the act of November 21, 1945, *supra.* The act, in part, authorized in section 2(a) the employment and reemployment of members of the Armed Forces by the United States, its Territories or possessions, and the District of Columbia governments during terminal leave, and permitted them to continue to receive pay and allowances for the unexpired portion of terminal leave. For those who had already vacated their commissions, section 2(b) authorized payment of a lump-sum for such leave lost by virtue of such employment, and section 2(d) authorized the payment of a lump-sum for unused terminal leave where such member was to be employed by a State government, upon application to and permission granted by the appropriate Secretary.

In 27 Comp. Gen. 12 (1947), to which the submission refers, when we treated the act of November 21, 1945, as having broadly removed the then existing restrictions contained in the dual office and dual compensation laws, as well as section 1222, Revised Statutes, so as to permit officers on terminal leave to accept employment generally, we were relating to the entire scope and purpose of the law then in effect. However, on analyzing individually the authorities granted by sections 2 (a) and (d) of the 1945 act, there is an essential difference. Section 2(a) authorized dual employment during the terminal leave period for those entering or reentering Federal Government employment, whereas section 2(d) authorized a lump-sum payment for accrued but unused terminal leave for those who entered employment of a State. Thus, while the 1945 act sought to achieve a broad solution to the existing restrictions of the dual office and dual compensation laws, as well as section 1222, Revised Statutes, only section 2(a) permitted a member to continue to receive military pay and allowances on terminal leave "at the same rate and to the same extent" concurrently with the receipt of his civilian compensation.

In 1966, the provisions of the 1945 law (5 U.S.C. 61a–1 (1964)) were specifically repealed by section 8 of Public Law 89–554, approved September 6, 1966, 80 Stat. 378, 653, because the 1945 law was considered as having been impliedly rendered obsolete in its entirety by section 4(c) of the Armed Forces Leave Act of 1946, as amended (37 U.S.C. 501), and section 219(c) of the Public Health Service Act, as added August 9, 1950 (42 U.S.C. 210–1(c)), which provided for lump-sum

payments for accrued leave. As a result, all exemptions authorized by 5 U.S.C. 61a–1 from the application of the dual office and dual employment statutes, as well as the prohibitions against holding civil office then contained in 10 U.S.C. 3544 and 8544, were no longer in effect.

In 1967, it was recognized by Congress that section 4(c) of the Armed Forces Leave Act of 1946, as amended, did not render the 1945 terminal leave law completely obsolete and concluded that subsection (a) of former 5 U.S.C. 61a–1 (section 2(a) of the 1945 act) had a prospective effect and should have been reenacted in the 1966 codification of title 5, United States Code. Thus, by section 1(22) of Public Law 90–83, approved September 11, 1967, 81 Stat. 199, section 5534a was added to title 5 of the code and now provides:

> A member of a uniformed service who has performed active service and who is on terminal leave pending separation from, or release from active duty in, that service under honorable conditions may accept a civilian office or position in the Government of the United States, its territories or possessions, or the government of the District of Columbia, and he is entitled to receive the pay of that office or position in addition to pay and allowances from the uniformed service for the unexpired portion of the terminal leave.

It is to be observed that Public Law 90–83 did not reenact all of the provisions contained in former 5 U.S.C. 61a–1. It reenacted as section 5534a only those provisions previously contained in 5 U.S.C. 61a–1(a) relating to Federal, Territorial and District of Columbia governments. Thus, it is our view that the language in 27 Comp. Gen. 12, *supra*, is not controlling here and the reenactment of only a single subsection of 5 U.S.C. 61a–1 may not be construed as constituting a broad congressional intention to remove all existing restrictions on the holding of a civil office, including those under a State government, during periods of terminal leave.

Therefore, since a member on terminal leave pending retirement is still "on the active list" should he accept or perform the duties of a civil office of a State government during that time, the sanctions of 10 U.S.C. 973(b) would be for application. *Cf.* 25 Comp. Gen. 377, 381 (1945), and 44 *id.* 830, 832 (1965). Accordingly, the question presented is answered in the negative.

[B–189113]

Compensation—Premium Pay—Sunday Work Regularly Scheduled—"Eight-Hour Period of Service"—Effect of Change to Daylight Savings Time

Federal Aviation Administration (FAA) employee's regularly scheduled tour of duty was midnight Saturday to 8 a.m. Sunday. Daylight savings time began during tour of duty, and, therefore, employee was allowed, pursuant to provision of contract between FAA and union, to work from 8 a.m. until 9 a.m. so

as to work full 8-hour tour of duty. FAA refused to pay Sunday premium pay for the hour from 8 a.m. to 9 a.m. Claim for Sunday premium pay may be paid for entire 8-hour tour of duty, including hour from 8 to 9 a.m. 5 U.S.C. 5546(a) (1970).

In the matter of Eric Parker—Sunday premium pay, August 2, 1977:

This action is in response to a request of May 12, 1977, from Mr. William B. Peer, General Counsel, Professional Air Traffic Controllers Organization (PATCO), for a decision on the claim of Mr. Eric Parker for Sunday premium pay for hours worked as an employee of the Federal Aviation Administration (FAA).

On Sunday April 25, 1976, Mr. Parker, an air traffic controller at the Fort Worth Air Route Traffic Control Center, was scheduled to work a tour of duty from Saturday midnight to 8 a.m. Sunday. During that tour of duty at 2 a.m., daylight savings time began. Pursuant to the agreement between PATCO and the FAA, Mr. Parker was given the option of working a full 8 hours until 9 a.m., which he accepted and worked. The FAA paid him Sunday premium pay for only 7 of the 8 hours worked, and refused to pay Sunday premium pay for the eighth hour of the tour of duty (from 8 a.m. to 9 a.m.).

In denying Sunday premium pay for the eighth hour of the tour of duty, Mr. Reasoner, the Chief of the Fort Worth Air Route Traffic Control Center stated:

> Your regularly scheduled tour of duty on April 25, 1976, was from midnight to 8 a.m. Since the change to daylight savings time occurred on this date, this resulted in the tour being only seven hours. As stated, it was your option to work until 9 a.m.
>
> Based on a Comptroller General's decision—5 U.S.C. 5546, 46 Comp. Gen. 337 (1966)—
>
> > ". . . Thus, a full-time employee whose regularly scheduled tour of duty includes a period of service of less than 8 hours any part of which falls between midnight Saturday and midnight Sunday is entitled to premium pay for the number of hours worked not in excess of the number of hours regularly scheduled for such period. . . ."
>
> you would not be entitled to Sunday pay for the hour you chose to work that day. There was no requirement for you to remain on duty as the normal relief for the midnight shift reported at 8 a.m.

Mr. Peer has requested a ruling as to whether Mr. Parker is entitled to Sunday premium pay for the hour worked by him on Sunday, April 25, 1976, from 8 a.m. until 9 a.m. The issue presented is whether the optional hour worked by Mr. Parker may be considered to be part of Mr. Parker's "regularly scheduled" tour of duty so as to entitle him to Sunday premium pay under 5 U.S.C. § 5546 (1970), and consistent with decision 46 Comp. Gen. 337 (1966).

Entitlement of a General Schedule employee to Sunday premium pay is governed by 5 U.S.C. § 5546(a) (1970) which provides:

> § *5546. Pay for Sunday and holiday work.*
>
> (a) An employee who performs *work during a regularly scheduled 8-hour period of service* which is not overtime work as defined by section 5542(a) of this

title a part of which is performed on Sunday is entitled to pay for the entire period of service at the rate of his basic pay, plus premium pay at a rate equal to 25 percent of his rate of basic pay. [Italic supplied.]

We have construed the phrase "work during a regularly scheduled 8-hour period of service" as work which is duly authorized in advance and scheduled to recur on successive days or after specified intervals. *Matter of Clara A. Day*, B–185022, June 2, 1976. According to the claimant, and unrefuted by the FAA, the claimant had a tour of duty which included the period from Saturday midnight until 8 a.m. Sunday and which, pursuant to the agreement between the FAA and PATCO, was required to be posted 14 days in advance. The agreement provided that, "[o]n changing to daylight savings time, employees shall be afforded the opportunity to remain on duty for eight (8) hours."

Since Mr. Parker would normally have worked an 8-hour tour of duty from Saturday midnight until 8 a.m. Sunday, all 8 hours of such tour of duty would normally have been paid at Sunday premium rates. However, on the one Sunday each year when daylight savings time goes into effect, air traffic controllers on duty are allowed to work their normal 8 hours in spite of the time change. We believe that the optional hour from 8 a.m. to 9 a.m. is part of the regularly scheduled tour of duty since it is authorized in advance as a method of maintaining the normal length of the tour of duty. The reduction of time otherwise caused by the change to daylight savings time was simply negated by the provision in the agreement between PATCO and FAA.

For the above reasons, we believe that Mr. Eric Parker is entitled to premium pay for the full tour of duty he worked on Sunday, April 25, 1976, including the hour from 8 a.m. to 9 a.m. His claim for premium pay should be paid by FAA in accordance with the above.

[B–188399]

Contracts—Negotiation—Offers or Proposals—"Separate Charges"—Failure To Exercise Renewal Options

Agency decision to preclude use of separate charges for failure to exercise renewal options in automatic data processing procurement is not abuse of agency discretion because competition existed on basis of terms solicited.

In the matter of the Storage Technology Corporation, August 4, 1977:

Storage Technology Corporation (STC) protests the solicitation amendment which eliminates the provision for "separate charges" in General Services Administration (GSA) RFP GSC–CDPR–T–0028 for furnishing plug-to-plug memory requirements for currently installed automatic data processing equipment (ADPE).

Essentially, the protester argues that it should be permitted to require a separate charge for the Government's failure to exercise renewal options. Although professing agreement in some respects with our decision in *Burroughs Corporation*, 56 Comp. Gen. 142 (1976), 76-2 CPD 472, *modified*, in part, *affirmed*, in part, *Honeywell Information Systems, Inc.*, 56 Comp. Gen. 505 (1977), 77-1 CPD 256 (herein *Burroughs*), and *Honeywell Information Systems, Inc.*, 56 Comp. Gen. 167 (1976), 76-2 CPD 475 (herein *Honeywell*), STC contends that those cases have been misapplied by GSA, or that GSA has abused its discretion in refusing to permit separate charges in this instance.

Separate charges, in the past, have been used in an attempt to reconcile the conflict between the desirability to the Government of the use of long term ADPE leases, or leases with option to purchase provisions, and the statutory limitations in 31 U.S.C. §§ 665(a) and 712(a) (1970) and 41 U.S.C. § 11, which, in part, prevent the obligation of funds in advance of their appropriation by the Congress. According to STC, the ability of small firms to compete for large Government ADPE contracts depends upon whether they can obtain financing. That, in turn, depends upon their ability to convince their financial sources that the equipment, which is frequently quite expensive, will remain installed.

In *Burroughs* we indicated that the Government may not pay separate charges which do not represent the reasonable value of work performed at the time the contract is terminated. The Government may not obligate itself to do so. We stated that such charges are directly linked to future year needs, "since the charges actually compensate the contractor for the Government's failure to use the equipment in future years." As noted in our decision, contracts executed and supported under authority of fiscal year appropriations can only be made within the period that such funds are available for obligation and may be made *only* to meet a *bona fide* need arising within that period. *Leiter* v. *United States*, 271 U.S. 204 (1926); *Goodyear Tire and Rubber Co.* v. *United States*, 276 U.S. 287 (1928); 48 Comp. Gen. 497 (1969); *Storage Technology Corp.*, B-182289, April 25, 1975, 75-1 CPD 261.

We recognized, in *Burroughs*, that separate charges may be permissible, in specific instances. For example, we stated:

> * * * Payment of separate charges for early termination is proper if the only way the Government can obtain needed services or supplies * * * is by agreeing to pay such charges. * * *. This is to be contrasted with the highly competitive ADP industry where the Government does not have to pay charges to obtain ADP equipment and services. * * *.

Through counsel, SCI takes exception to the latter statement, asserting that the statement is not true in this instance. Moreover, it argues

that to obtain competition a solicitation must be drawn so as "to enable and induce the bidder or offeror to submit the best price practicable." In this regard, the law requires only that a solicitation be free from ambiguity and not be drawn in an unduly restrictive manner. Ordinarily an agency enjoys broad discretion to define its requirements and the terms of its solicitations. We will not question a determination that particular requirements are necessary, absent evidence that the agency's broad discretion was abused.

In this instance, GSA determined that separate charges should not be permitted. It has relied upon our recommendation, in connection with *Burroughs*, that the use of separate charges be reviewed and may not be necessary. Further, GSA believes competition is achieved without allowing separate charges, and was achieved in this case because at least two offers for each item were received from a total of ten firms. That a number of offers were received indicates that this case does not fall within the exception specifically mentioned in *Burroughs*, *i.e.*, instances where the Government could not fill its needs without allowing separate charges.

In further support of its position STC points to situations in which the Government, as self insurer, has agreed to absorb the cost of damage resulting from contractor negligence. In such instances, the amount of the Government's liability is not established by the contractor's intentional unilateral act and the Government does not assume a liability contingent upon the exercise by Congress of the very power, *i.e.*, to appropriate, which by law may not be encroached. By exposing such risks to competition we believe there will be greater assurance that such charges will not include inappropriate costs and will be limited to reflect the reasonable value of requirements which actually have been performed under the contract at the time the system is discontinued. See *Burroughs Corporation*, *supra*.

We believe the determination by GSA that separate charges should not be allowed is rationally supported in this case. Therefore, STC's protest is denied.

[B-189487]

Officers and Employees—Transfers—Relocation Expenses—Husband and Wife Divorced, Separated, etc.

Transferred employee sold interest in residence to his estranged wife. Employee may be reimbursed legal expenses for preparation of deed and preparation of affidavit of title since the sale of interest in a residence constitutes a residence transaction within the meaning of Federal Travel Regulations (FPMR 101-7) para. 2-6.2c. Reimbursement for costs of attorney's attendance at closing is not allowed as such expense is of an advisory nature.

In the matter of Kirk Anderson—real estate expenses—attorney fees, August 5, 1977:

This is in response to a request dated June 24, 1977, from Ms. Orris C. Huet, an authorized certifying officer of the Department of Agriculture, concerning the voucher of Mr. Kirk Anderson, an employee of the Farmers Home Administration of the Department of Agriculture, for reimbursement of certain attorney's fees incurred in the transfer of the title of his residence to his estranged wife incident to a permanent change of station.

Effective October 27, 1974, Mr. Anderson was transferred from Toms River, New Jersey, to Mt. Holly, New Jersey. Subsequently, Mr. Anderson and his estranged wife executed a property settlement agreement in anticipation of the eventual dissolution of their marriage. In accordance with that agreement, on August 14, 1975, Mr. Anderson sold all of his right, title, and interest in the marital residence at the old duty station to his wife in exchange for $15,000 and certain other real estate. At the time of the transaction, Mr. Anderson was separated, but not divorced, from his wife. He has requested reimbursement of the following legal fees incurred in connection with this sale:

Preparation of Deed for property	$25.00
Preparation of Affivadit of Title for property	15.00
Attendance at Closing (review of Closing statement; explanation of transactions and various documents; negotiations of various adjustments at Closing)	135.00
Total	$175.00

Since Mr. Anderson sold his interest in the residence to his estranged spouse, the certifying officer has questioned the propriety of reimbursement for the above expenses.

Statutory authority for reimbursement of the expenses of residence transactions of transferred employees is found at 5 U.S.C. § 5724a (a)(4) (1970). The regulations promulgated pursuant to this statute are found in the Federal Travel Regulations (FPMR 101–7, May 1973) para. 2–6.2c, and provide as follows:

c. *Legal and related expenses.* To the extent such costs have not been included in brokers' or similar services for which reimbursement is claimed under other categories, the following expenses are reimbursable with respect to the sale and purchase of residences if they are customarily paid by the seller of a residence at the old official station or if customarily paid by the purchaser of a residence at the new official station, to the extent they do not exceed amounts customarily charged in the locality of the residence: Costs of (1) searching title, preparing abstract, and legal fees for a title opinion or (2) where customarily furnished by the seller, the cost of a title insurance policy; costs of preparing conveyances,

other instruments, and contracts and related notary fees and recording fees; costs of making surveys, preparing drawings or plats when required for legal or financing purposes; and similar expenses. Costs of litigation are not reimbursable.

We have previously held that where a transferred employee and his divorced spouse sell a residence at the old duty station, each person receiving one-half of the proceeds and paying one-half of the closing costs, the employee may be reimbursed for his pro-rata share of such costs. B–174612, July 14, 1972. In the present case, both Mr. Anderson and his wife incurred separate legal fees for the sale and purchase aspects of the transaction, and Mr. Anderson has requested reimbursement only for the legal expenses which he personally incurred. It is our view that the sale of his interest in the residence constitutes a residence transaction within the meaning of FTR paragraph 2-6.2c (May 1973). Thus, the employee may be reimbursed to the extent permitted by the FTR and our decisions for such legal services as are customarily rendered incident to the sale of real estate in the locality of the transaction. In permitting reimbursement in similar instances, it is necessary to carefully distinguish between allowable real estate expenses which are ordinarily incurred in such transactions and are directly incurred by the employee in each case, and expenses which may have been paid by the employee, but which are the result of the divorce or property settlement. An example of the latter, unreimbursable, expenses would be a contractual provision for the employee to pay the spouse's legal fees incident to a residence transaction.

Our decision in *George W. Lay*, 56 Comp. Gen. 561 (1977), which establishes a new policy with respect to the reimbursement of attorney's fees, is prospective only. The rules set forth in that decision may not be applied where the settlement date for the transaction for which reimbursement is claimed is prior to April 27, 1977. Since the settlement date of Mr. Anderson's transaction was August 14, 1975, the holding of that decision is not applicable.

With regard to residence transactions settled prior to April 27, 1977, we have held that only those portions of an attorney's fee that represent services of the type enumerated in this regulation are reimbursable. No reimbursement may be allowed for legal services of an advisory nature. *Joseph R. Garcia*, B–186254, March 16, 1977; *Frank R. Smith*, B–184290, October 3, 1975. Attendance of the attorney at closing as distinguished from the cost of conducting the closing, has been considered to be an advisory service. *Thomas A. McDonnell*, B–183443, July 14, 1975. Accordingly, the $135 fee charged Mr. Anderson by his attorney for attendance at closing may not be certified for payment.

However, the other legal expenses in this case are reimbursable under the regulations. The cost of an attorney's services in preparing a deed

is one such expense. *Smith, supra.* Accordingly, payment of the $25 fee charged Mr. Anderson by his attorney for this function may be allowed. The regulations also provide for reimbursement of the costs of preparing other instruments required for legal purposes. Expenses incurred in the preparation of an Affidavit of Title have been held to be reimbursable under this provision. B–176876, November 27, 1972. Accordingly, Mr. Anderson's claim for reimbursement of $15 for this legal service may also be allowed.

Action on the voucher should be taken in accordance with the foregoing.

[B–189439]

Leaves of Absence—Traveltime—Excess—Annual Leave Charge

Where Federal Aviation Administration has authorized travel by common carrier to training course based on its determination that travel by privately owned vehicle is not advantageous to the Government, it is not an appropriate exercise of administrative discretion to excuse employees from duty without charge to leave for the excess traveltime occasioned by the employees' election as a matter of personal preference to travel by privately owned vehicle.

In the matter of the Federal Aviation Administration—administrative leave for excess traveltime, August 8, 1977:

The Department of Transportation has requested our opinion concerning its authority to grant administrative leave to employees incident to travel by privately owned vehicle as a matter of personal preference. This matter has become a significant issue in its negotiations with the National Association of Government Employees.

We are told that many Federal Aviation Administration (FAA) employees are required to attend training courses at the FAA Academy in Oklahoma City, Oklahoma. The courses, which may involve as many as 25 consecutive weeks of training, are scheduled to begin on Wednesdays so that travel may be performed during the employees' regularly scheduled workweeks. The FAA explains that in most cases the use of a privately owned vehicle cannot be authorized as advantageous to the Government under the Federal Travel Regulations (FTR) (FPMR 101–7) para. 1–2.2c (MMay 1973), as amended by FPMR Temporary Regulation A–11, Supp. 3. However, the agency permits its employees to travel by privately owned vehicle as a matter of personal preference. Employees who so elect are reimbursed for their travel expenses on the basis of the constructive cost of travel by common carrier and are charged leave for the traveltime which exceeds the traveltime that would have been involved if they had traveled by common carrier. Employees who live a considerable distance from the Academy must begin travel on Friday or on one of their regular days off in order to begin training on Wednesday. Those who

live in close proximity to the Academy, however, are authorized travel by privately owned vehicle as advantageous to the Government and, because their travel involves shorter periods of time, do not have to take leave for purposes of travel to the Academy.

Those employees who elect to drive their privately owned vehicles rather than travel by common carrier feel they should not be required to use their annual leave for the excess traveltime involved. Recognizing its authority to excuse employees from duty without charge to leave in appropriate situations, the Department of Transportation asks whether the FAA may, as a matter of policy, excuse these employees from duty without charge to leave for up to 2 days each way, depending on the distance between the employee's official duty station and the Academy. We understand that FAA proposes to limit the granting of administrative leave for travel by privately owned vehicle to those instances in which employees are required to attend training for more than 4 consecutive weeks and when travel by privately owned vehicle is authorized only as a matter of personal preference under FTR para. 1–2.2d.

The FAA's refusal to authorize travel by privately owned vehicle as advantageous to the Government is predicated on the following provisions of FTR paras. 1–2.2b and c (Temporary Regulation A–11, May 19, 1975):

b. *Selecting method of transportation to be used.* Travel on official business shall be by the method of transportation which will result in the greatest advantage to the Government, cost and other factors considered. In selecting a particular method of transportation to be used, consideration shall be given to energy conservation and to the total cost to the Government, including costs of per diem, overtime, lost work time, and actual transportation costs. Additional factors to be considered are the total distance of travel, the number of points visited, and the number of travelers. 5 U.S.C. 5733 requires that, "The travel of an employee shall be by the most expeditious means of transportation practicable and shall be commensurate with the nature and purpose of the duties of the employee requiring such travel."

c. *Presumption as to most advantageous method of transportation.*

(1) *Common carrier.* Since travel by common carrier (air, rail, or bus) will generally result in the most efficient use of energy resources and in the least costly and most expeditious performance of travel, this method shall be used whenever it is reasonably available. Other methods of transportation may be authorized as advantageous only when the use of common carrier transportation would seriously interfere with the performance of official business or impose an undue hardship upon the traveler, or when the total cost by common carrier would exceed the cost by some other method of transportation. The determination that another method of transportation would be more advantageous to the Government than common carrier transportation shall not be made on the basis of personal preference or minor inconvenience to the traveler resulting from common carrier scheduling.

* * * * * * *

(3) *Privately owned conveyance.* Except as provided in 1–2.2d, the use of a privately owned conveyance shall be authorized only when such use is advantageous to the Government. A determination that the use of a privately owned conveyance would be advantageous to the Government shall be preceded by a

determination that common carrier transportation or Government-furnished vehicle transportation is not available or would not be advantageous to the Government. To the maximum extent possible, these determinations and the authorization to use a privately owned conveyance shall be made before the performance of travel.

An agency's determination under the above-quoted provision that an employee's use of his privately owned vehicle for travel is or is not advantageous to the Government will not generally be questioned by this Office. 26 Comp. Gen. 463 (1947); B–161266, March 24, 1970; B–160449, February 8, 1967. The particular determination that privately owned vehicle travel of FAA employees to the FAA Academy in Oklahoma from distant locations is not advantageous to the Government is not questioned here. If the FAA found such method of transportation to be to the Government's advantage, then traveltime during regular duty hours of work, would be allowed, and per diem and mileage expenses would be payable, without regard to the constructive cost of travel by common carrier.

While FAA recognizes that its determination—that travel by privately owned vehicle is not advantageous to the Government—precludes its paying the additional mileage and per diem occasioned by the employees' use of their privately owned vehicles under FTR para. 1–4.3, its proposal would permit employees who travel by privately owned vehicle as a matter of personal preference to use official time to perform travel to and from the Academy.

There is no general statutory authority under which Federal employees may be excused from their official duties without loss of pay or charge to leave. However, excused absences have been authorized in specific situations both by law, as in section 6322 of title 5, United States Code, which authorizes an absence of up to 4 hours in any one day for a veteran to participate in funeral services under certain circumstances, and by Executive order, such as Executive Order 10529, April 22, 1954, which provides that employees may be excused for a reasonable amount of time up to a maximum of 40 hours in a calendar year to participate in Federally recognized civil defense programs. In addition, over the years it has been recognized that in the absence of a statute controlling the matter, the head of an agency may in certain situations excuse an employee for brief periods of time without charge to leave or loss of pay. Some of the more common situations in which agencies generally excuse absence without charge to leave are discussed in Federal Personnel Manual (FPM) Supplement 990–2, Book 630, subchapter S11. These include (1) registration and voting, (2) blood donations ,(3) tardiness and brief absences, (4) taking examinations, (5) attending conferences or conventions, and (6) representing employee organizations.

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The last five situations in which employees may be excused from duty without charge to leave are set forth at subchapter S11–5 as some of the more common situations in which employees may be excused from duty without charge to leave. That subchapter contains the following language permitting agencies to administratively determine appropriate situations in which to grant administrative leave:

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

Decisions by the General Accounting Office addressing the scope of agency authority to grant administrative leave have generally drawn a distinction between absences connected with activities which further the functions of the agency and those which, though for worthy cause, are not in furtherance of an agency function. Based on this we have upheld the denial of administrative leave for time spent in fighting a local fire outside the Government installation, 54 Comp. Gen. 706 (1975); we have held that Government attorneys voluntarily assigned to represent indigents in State or Federal Courts may not have such service regarded as in furtherance of a Federal function and may not be granted administrative leave therefor, 44 Comp. Gen. 643 (1965); and we have held that an employee may not be granted administrative leave for voluntary service to Africare notwithstanding the Government's support of the relief program by grant funds, B–156287, June 26, 1974. That distinction aside, we have approved the granting of administrative leave in situations relating to emergencies. 53 Comp. Gen. 582 (1974).

In the context of official travel we have recognized several situations in which administrative leave may appropriately be granted. In 55 Comp. Gen. 510 (1975) and in 56 Comp. Gen. 629 (1977), we recognized that employees may be granted brief periods of rest following air travel necessarily performed during hours normally allocated to rest. Where a transferred employee delayed his travel an additional day through no choice of his own but awaiting the tardy arrival of a moving company we upheld the granting of 8 hours administrative leave. 55 Comp. Gen. 779 (1976). Similarly, in B–180693, May 23, 1974, we held that an employee could be granted administrative leave for the purpose of complying with agency cancellation of an imminent and previously authorized transfer. See also B–160278, December 13, 1966, and B–160838, March 10, 1967.

Travel situations in which we have consistently held that absence should be charged to leave are those in which the excess traveltime is attributable to the employee's delay or deviation from the direct route of travel for personal reasons or where the excess traveltime is otherwise a matter of personal convenience to the employee. Thus,

we have held that where additional time away from his official duties was occasioned by the employee's election to travel by privately owned vehicle as a matter of personal preference, the excess absence from work should be charged to annual leave. B–175627, July 5, 1972; B–162720, February 16, 1968; B–155948, March 1, 1965; B–144215, October 31, 1960.

These holdings are consistent with the following language of FPM Supplement 990–2, chapter 630, subchapter S3–4:

> * * * Absences because of excess travel time resulting from the use of privately owned motor vehicles for personal reasons of official trips is generally chargeable to annual leave. * * *

We previously considered and rejected a proposal similar to FAA's proposal to grant administrative leave for excess traveltime. In the 1960s the Veterans Administration (VA) adopted a policy whereby employees who elected to travel by privately owned vehicle, and who were authorized expenses limited to the constructive cost of travel by common carrier were authorized to use official time for such travel based on "reasonable driving time and not on common carrier time." The VA instruction was tantamount to a grant of administrative leave for the excess traveltime occasioned by the employee's determination to travel by privately owned vehicle in the absence of a determination that such use is advantageous to the Government. By our letter B–155693, January 11, 1965, we brought the matter to the attention of the Administrator of Veterans Affairs, expressing the following concerns with that policy:

> Although the determination to charge an employee leave because he travels by privately owned vehicle when he could have accomplished the official business involved in a shorter time had he traveled by appropriate common carrier is a matter primarily within the sound discretion of the head of the agency concerned, we believe that in the interest of economy employees who use privately owned vehicles for official travel when such mode of travel is not to the advantage of the Government should be charged leave. Our opinion is that appropriate leave should be charged in the same manner and for the same reasons as leave is charged when an employee delays his travel or deviates from the direct route of travel for personal reasons.
>
> We believe that agency regulations should require the charge of leave for excess travel time in all cases where employees travel by privately owed vehicle for personal convenience except when a specific determination to the contrary is made. * * *

An additional reason for not sanctioning the granting of administrative leave for absences for excess traveltime is that the determination not to authorize an employee to travel by privately owned vehicle is made on the basis that the agency is unable to find such travel advantageous to the Government. To permit an agency to conclude that the employee's election as a matter of personal preference to travel by privately owned vehicle and the additional time away from his duties is in furtherance of the agency's function for purposes of administra-

tive leave is fundamentally inconsistent with its failure to find that travel by privately owned vehicle is advantageous to the Government.

Thus, in the absence of a finding that travel by privately owned vehicle is advantageous to the Government, we do not believe it is appropriate to excuse absences without charge to leave for the additional traveltime occasioned by the employee's use of a privately owned vehicle for personal reasons.

[B-184947]

Vessels—Crews—Compensation—Limitation on Pay Fixed by Administrative Action

Agency questions whether pay of crews of vessels set under 5 U.S.C. 5348 (Supp. V, 1975) is subject to ceiling of grade GS-19 as provided under 5 U.S.C. 5363 (1970). Since we find that pay for crews of vessels is fixed by administrative action, we hold that such pay is subject to section 5363 and may not exceed the rate for grade GS-18.

In the matter of marine officers—limitation on pay for crews of vessels, August 9, 1977:

This action is in response to a request for an advance decision from an authorized certifying officer of the National Oceanic and Atmospheric Administration (NOAA), Department of Commerce, reference AD43, dated September 15, 1975, concerning whether the provisions of 5 U.S.C. § 5363 (1970) limit the annual rate of basic pay which NOAA sets for its crews of vessels under 5 U.S.C. § 5348 (Supp. V, 1975).

NOAA operates ships which are engaged in oceanographic and biological research and which are manned by civilian employees. In addition, the Military Sealift Command (MSC), Department of the Navy, operates a fleet of ships which provide logistical support to the Navy's battle fleet, seagoing transportation for personnel and cargo for the Department of Defense (DOD), and support for scientific research projects and other programs conducted by DOD and other Government agencies. These ships operated by MSC are similarly manned entirely or in part by civilian marine employees.

The submission from NOAA states that, in accordance with the provisions of 5 U.S.C. § 5348, NOAA has established a pay plan which uses private sector maritime jobs as bench marks for similar positions with NOAA and for occupations and jobs with NOAA which are not found in the private sector. The agency then adjusts its pay schedule based upon the prevailing private sector maritime pay rate in accordance with 5 U.S.C. § 5348, but subject to an overall maximum limitation of the maximum rate for grade GS-18 (currently $47,500) as

provided in 5 U.S.C. § 5363. However, MSC has not applied this pay ceiling to its marine employees, and NOAA asks whether the limitation in section 5363 applies to salaries constructed under section 5348.

The statutes cited above provide, in pertinent part:

5 U.S.C. § 5348:

(a) Except as provided by subsections (b) and (c) of this section, the pay of officers and members of crews of vessels excepted from chapter 51 of this title by section 5102(c)(8) of this title shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry.

5 U.S.C. § 5363:

Except as provided by the Government Employees Salary Reform Act of 1964 (78 Stat. 400) and notwithstanding the provisions of other statutes, 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. This section does not impair the authorities provided by—

(1) section 121 of title 2, Canal Zone Code (76A Stat. 15);
(2) sections 248, 481, and 1819 of title 12;
(3) section 831b of title 16; or
(4) sections 403a–403c, 403e–403h, and 403j of title 50.

In response to our requests for comments, the Deputy Assistant Secretary of Defense for Manpower and Reserve Affairs (Civilian Personnel Policy), by letter dated October 4, 1976, argues that the pay system applicable to civilian marine employees is a statutory pay system and that the grade GS–18 pay ceiling on administrative pay systems is inapplicable. The report from DOD analogizes the pay system for crews of vessels to that for prevailing rate employees and cites a decision of our Office (54 Comp. Gen. 305 (1974)) which held that an adjustment of wage rates of prevailing rate employees is considered to be a statutory pay increase. The Department of Defense report argues that any discretion in the pay for crews of vessels was removed when the pertinent provisions of the Federal Employees Pay Act of 1945, § 606, 59 Stat. 304, providing that crews of vessels *may* be paid in accordance with the wage practices of the maritime industry were repealed and were replaced by the enactment of the Classification Act of 1949, Public Law 81–429, § 202(8), 63 Stat. 955 (currently 5 U.S.C. § 5348), which has remained virtually unchanged since its enactment and which provides that crews of vessels *shall* be paid in accordance with the wage practices of the maritime industry.

The report from DOD also cites further examples of the absence of discretion on the part of MSC, and it cites two decisions of our Office, 30 Comp. Gen. 356 (1951) and 30 *id.* 158 (1950), and the Court of Claims decision in *Blaha* v. *United States*, 511 F. 2d 1165 (Ct. Cl. 1975) (discussed below) in further support of its position. The report concludes:

In summary, 5 U.S.C. 5348 prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment. Therefore, like the pay system prescribed in PL 92-392, the civilian marine system must be considered as a statutory pay system. Accordingly, the salary limits applicable to administrative pay systems cannot be applied.

The General Counsel of the Civil Service Commission (CSC) also responded by letter dated March 24, 1977, to our request for comments, and the CSC agrees with the DOD position that the limitation in section 5363 does not apply to pay set under section 5348. The Commission's letter emphasizes that the language change in the statute from the permissive "may" in the 1945 Act to the mandatory "shall" in the 1949 Act evidences strong Congressional intent that crews of Government vessels always be paid at the prevailing industry rate. The letter states that to impose a limitation would violate a principle of statutory interpretation that statutes are enforced in such a manner as to achieve their overriding purpose, and that if Congress had intended to specifically limit the pay of crews of vessels it would have done so in 1949 rather than in 1964 when section 5363 was enacted. The General Counsel also points to another principle of statutory construction in that where there is an apparent conflict between two statutes, effect is to be given to all statutes on the same subject and the statutes are to be deemed capable of co-existence. In addition, the letter notes that repeals by implication are not favored in statutory construction, and the General Counsel argues that:

If section 5363 is permitted to limit the operation of the longstanding requirement of section 5348 that the compensation of crews of vessels be in accord with the prevailing rates and practices in the maritime industry, section 5348 will have been substantially repealed by implication, in violation of the above rule. In view of the strong Congressional mandate evidenced by the plain words in section 5348, as has been previously discussed, it is hardly likely Congress would have intended the implied repeal of section 5348, merely by enactment of section 5363.

Finally, the CSC letter notes that section 5348 is a special act, section 5363 a general act, and that where there are general and special acts on the same subject which cannot be harmonized, the special or specific act will prevail over the general.

We have also received comments from two unions representing crews of Government vessels, the Marine Engineers' Beneficial Association (MEBA) and the Masters, Mates and Pilots Union (MM&P). The letter from MEBA states that under section 5348 agencies are obligated to pay crews of vessels the prevailing rates and practices in the maritime industry unless or until section 5348 is amended by Congress. The letter from the Washington counsel to MM&P argues there is no limitation on pay set under section 5348 and that the decision in *Blaha* supports that argument.

Our prior decisions have held that under section 5348 there must be a two-part determination (1) that what is sought is a rate or

practice in the maritime industry and (2) that it is consistent with the public interest. See 50 Comp. Gen. 93 (1970) and 30 *id.* 356, *supra.* Therefore, we held that this two-part determination must be made by the agency head regarding the entitlement of crews of vessels to retroactive wage adjustments (50 *id.* 93) or to an "area bonus" (30 *id.* 356). See also *Hille and Reilly*, B–187972, March 25, 1977. In addition, the Court of Claims has repeatedly held that there is broad Government discretion in the fixing of pay under section 5348. See *Blaha*, at 1167 and cases cited therein. The court also noted in *Amell* v. *United States*, 182 Ct. Cl. 604, 607 (1968), that the wages of crews of vessels "* * * are not set through collective bargaining negotiations but are fixed by administrative action * * *" pursuant to the provisions of the Federal Employees Pay Act of 1945 and the Classification Act of 1949 (currently 5 U.S.C. § 5348).

It is our view, therefore, that Congress intended and the courts have interpreted section 5348 to be more than a mechanism for rubber-stamping maritime industry wage rates and practices. Section 5348 provides a mechanism whereby an agency head may fix wages for crews of vessels administratively without being bound to the confines of the General Schedule or the timetables and processes in the prevailing rate system. However, once having concluded that wages for crews of vessels are fixed administratively, we must also conclude that the authority of the agency head is limited by the pay ceiling contained in section 5363.

The comments of the General Counsel of the Civil Service Commission are pertinent, but there are other rules of statutory construction which have application in this situation. For example, as noted in the CSC letter, the authority for the payment of crews of vessels has remained virtually unchanged since 1949 while the limitation in section 5363 was not enacted until 1964. However, we are mindful of the principle of statutory construction that if two statutes are in conflict the statute enacted later in time controls as a more recent expression of Congressional intent. In addition, the principle of "expressio unius est exclusio alterius" would have application to section 5363 since the statute provides specific exclusions from coverage for certain employees of the Tennessee Valley Authority, Central Intelligence Agency, Federal Reserve Board, and other organizations, and the enumeration of exclusions from the operation of a statute indicates that it should apply to all cases not specifically excluded. Sands, *Sutherland's Statutes and Statutory Construction*, Section 47.23 (4th Ed. 1973).

With regard to the statement that the pay system for crews of vessels is analogous to that for prevailing rate employees which has been

interpreted to be a statutory pay system (see 54 Comp. Gen. 305, *supra*), we note that crews of vessels are specifically excluded from coverage under the prevailing rate system as provided by 5 U.S.C. § 5342(b)(3) (Supp. V, 1975) and as evidenced by the legislative history to Public Law 92–392, 86 Stat. 564. See H.R. Rept. No. 92–339, 92d Cong. 1st Sess. 18–19 (1971) and S. Rept. No. 92–791, 92d Cong. 2d Sess. 6 (1972). See also *Hille and Reilly*, *supra*. In addition, our decision in 54 Comp. Gen. 305 merely held that for the purposes of entitlement to a periodic step increase, a wage adjustment for prevailing rate employees under 5 U.S.C. § 5343 (Supp. V, 1975) is not considered as granted administratively but rather granted by statute. We do not, therefore, mean to imply that the pay system for prevailing rate employees is considered to be a statutory pay system for all purposes or that prevailing rate employees are not subject to the same pay limitation as crews of vessels. 54 Comp. Gen. 305, distinguished.

Our decision in 30 Comp. Gen. 158 (1950) is also distinguishable from the present case in that it merely holds that under the Classification Act of 1949 Panama Canal pilots are considered to be officers or members of crews of vessels who must be compensated under what is now section 5348.

Finally, both CSC and DOD as well as the two unions which submitted comments on this case all have relied upon the Court of Claims decision in *Blaha*, *supra*, in support of the position that there is no limitation on maritime wage rates under section 5348, no matter how high those wage rates are. In *Blaha*, the Court of Claims held that it was an abuse of discretion for NOAA to refuse to pay a "monthly leave supplement" merely because the agency did not characterize the payment as a "rate or practice in the maritime industry." The court also held that NOAA had not justified that such a payment was not consistent with the public interest, and the court noted that MSC had agreed to these payments. We believe the decision in *Blaha* is narrow and distinguishable from the question presented in this case. The court in *Blaha* did not say that the Government *must* adopt the pay practices of the maritime industry without further consideration, but only that the Government cannot pick and choose among various pay practices unless such practices are outside the scope of section 5348 (see *Amell*, *supra*) or unless there is an adequate determination that such practices are not "consistent with the public interest." In fact the court noted many prior decisions involving section 5348 in which "* * * the broad Government discretion in fixing pay under Section 5348 was repeatedly upheld against seamen's challenges." *Blaha*, *supra*, at 1167.

Accordingly, we conclude that pay for crews of vessels set under section 5348 constitutes pay fixed by administrative action as contem-

plated under section 5363 and that agency heads must set pay rates under section 5348 subject to an annual basic pay ceiling of the maximum rate for grade GS–18. Action should be taken to adjust existing pay rates to conform with this decision. Any previous overpayments of pay would be subject to waiver under 5 U.S.C. § 5584 (Supp. V, 1975) and 4 C.F.R. Part 91 (1977).

[B–187720]

Contracts—Protests—Procedures—Bid Protest Procedures—Reconsideration—New Contentions

Original decision of May 19, 1977, is affirmed where facts not discussed in that decision do not alter conclusion that the protester's own similar deviations to the request for proposals (RFP) requirements which it now considers material were accepted by the agency without an RFP amendment, since protester was reasonably on notice that such deviations were not considered by the agency to be either material or a relaxation of requirements, requiring RFP amendment pursuant to Federal Procurement Regulations 1–3.805–1 (1976).

Contracts—Protests—Procedures—Bid Protest Procedures—Reconsideration—Conference With Protester Not Provided For

Since General Accounting Office Bid Protest Procedures do not explicitly provide for conference when request for conference is made for the first time on reconsideration and because it is in the interest of those procedures to effect "prompt resolution" of reconsideration requests, the request for conference will only be granted where a matter cannot be promptly resolved without conference.

In the matter of the International Business Machines Corporation—reconsideration, August 9, 1977:

International Business Machines Corporation (IBM) requests reconsideration of our decision of May 19, 1977, B–187720, which denied that firm's protest of an award to TRW, Inc. for the EROS Digital Image Processing System (EDIPS) for the U.S. Geological Survey (USGS) EROS Data Center (EDC). The EDIPS system will process National Aeronautics and Space Administration (NASA)-furnished high density digital tapes into first generation film imagery (masters) and other computer compatible tapes.

IBM protested that the system proposed by TRW did not meet specification requirements. However, we found that the specifications, when read in conjunction with the "procurement philosophy" contained in the request for proposals(RFP), required no more than what TRW offered. We based our conclusions on the statements in the "procurement philosophy" which represented the detailed specification as a "concept" which USGS believed to be feasible and con-

sistent with its operational needs and requirements but which invited offers to "optimize" the system to save initial and operational costs so long as "throughput" and "output" (performance and functional) requirements of the specification were maintained. Our decision found that even though the TRW approach varied from the detailed specification by eliminating the need for a high density digital tape product for film production (HDTPF) its approach (as well as IBM's) maintained the "throughput" and "output" requirements, albeit in a manner which varied from the RFP's detailed specifications.

We also found that although the RFP did not specifically list the output products, IBM's proposal reflected awareness of the identity of those products and also eliminated certain intermediate tape products which were essential to the function of the USGS concept detailed in the specifications but not to the systems proposed by either offeror. Although IBM complained that USGS, by not amending the RFP to reflect TRW's proposed elimination of the intermediate tape product (HDTPF) in its system design, violated Federal Procurement Regulations (FPR) § 1-3.805-1(a)(5) by not affording IBM an opportunity to meet the agency's changed requirements, we found that the agency was not required to apprise all offerors of the proposed elimination of items which were not required by the particular design proposed to meet the RFP performance requirements.

IBM asserts the same arguments in support of its request for reconsideration as were considered in the original protest. However, it does state that the HDTPF was required to be permanently archived, and that the RFP required that offerors list their deviations to the detailed specification. Obviously, if the agency's operating needs included permanent storage of the tape, it had to be produced by the system, and would, of necessity, be an "output" rather than an "intermediate" product.

With respect to the contention that the HDTPF was to be permanently archived, we recognize that the detailed specification, when read by itself, clearly mandates the production of that tape. However, as in our original decision, we again emphasize the RFP must be read as a whole, including the "procurement philosophy." The functions of the EDIPS system (as described in the specification) are, in pertinent part, to provide for the production of *first generation* film imagery from digital image data, and to produce computer compatible tapes. To achieve this result, the EDIPS specification detailed the system design discussed above, and in so doing specified certain tape products which were essential to the operation of that concept. Film and computer compatible tape were specified in the "procurement philosophy" as the "output products" the system was required to gen-

erate for dissemination to the public (film products distributed to the public are actually copied from the first generation film imagery).

To accomplish the necessary functions of the system, section 2 of the specification described *operational workflow* in the context of the system design set forth in the specification. Section 2 contained the following specific caveat to the offerors, which in our opinion reflected the agency's recognition that proposed designs might vary significantly from the agency's system design:

> The following sections describe the operational philosophy of the EDIPS in *general* terms. These requirements shall be reflected in the EDIPS design features, which shall permit the execution or performance of the operational functions defined herein.

Contrary to IBM's contentions, the record does not reflect a requirement for *permanent* storage of the HDTPF tapes. As the offerors were advised, the only purpose of such a tape was to drive the equipment necessary to produce the "first generation film imagery," i.e., the "master copy" from which film products are produced. That function is accomplished in the TRW system by another means which eliminates the need for the HDTPF tape. If, for some reason, additional master copies are needed, they can be produced by reprocessing the original NASA tape. In our view, the TRW system permits the "performance of the operational functions" required by the specification—at a lower cost than the IBM approach.

However, our original decision did not consider the impact of a series of answers offered by the contracting officer to questions posed by the offerors. The contracting officer did state that both the HDTPF tape, as well as one other so called intermediate tape (which IBM eliminated in its design), were to be stored. While we believe the combination of the mandatory language of the specification and the contracting officer's answers may have created an uncertainty in the minds of the offerors as to the archival requirements for those tapes initially, we are still of the opinion that IBM's own deviations from the specification requirements which were accepted by the agency with no subsequent amendment reasonably put that firm on notice that elimination of those tapes was not considered by the agency to be a *material deviation* from the specifications. As we concluded in our original decision, in our view, IBM "was or should have been aware of the non-mandatory nature of certain aspects of the specifications."

With regard to the requirement in the RFP that offerors list "deviations" (and their rationale) to the system concept, such requirement does not change our view discussed above of what was required by the specifications. We believe the USGS would reasonably want to know, in a concise fashion, those areas in which an offeror's design "deviated" from the design set forth by the agency.

Although we do not believe IBM was prejudiced in this procurement, we think that the contracting officer had a unique opportunity to avoid any potential ambiguity with regard to the tape storage requirements of the proposed EDIPS operation when responding to direct inquiries on the subject prior to the receipt of proposals, by emphasizing the context in which the replies were offered, i.e., within the conceptual framework of the specification. Therefore, we recommend that future solicitations avoid any potential confusion by setting forth more specific detail as to those portions of the specifications which could not be varied.

We note that in its request for reconsideration, IBM requested a conference to "aid in sorting out the matter." However, our Bid Protest Procedures do not explicitly provide for conferences in this situation. See 4 C.F.R. § 20.9. Since it is the intent of the procedures to effect "prompt resolution" of reconsideration requests, we believe a request for a conference should be granted only where the matter cannot be promptly resolved without a conference. In our judgment, this is not such a case.

For the reasons set forth herein, the prior decision is affirmed.

[B-188385]

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

When, before award, information which reasonably would impeach small business self-certification of low bidder comes to attention of contracting officer, direct size protest with the Small Business Administration (SBA) should have been filed in order to assure that self-certification process is not abused. In absense of probative evidence, protester has not affirmatively established that small business self-certification was made in bad faith. Recommendation is made that agency consider feasibility of contract termination where SBA, less than 3 weeks after award, found contractor was other than small business because of affiliation with another firm discussed in preaward survey.

In the matter of Keco Industries, Inc., August 9, 1977:

Keco Industries, Inc. (Keco), protests the award to Wedj, Inc. (Wedj), for 40 air conditioners under total small business set-aside, invitation for bids (IFB) DSA400-76-B-4194, issued by the Defense General Supply Center (DGSC), Richmond, Virginia.

The IFB was opened as scheduled on October 20, 1976. Wedj submitted the low bid and self-certified itself small business, i.e., less than 750 employees. Keco, as next low bidder, protested on November 1, 1976, any proposed award to Wedj on the basis that it was not responsible to perform the contract for lack of expertise and capability. DGSC requested the Defense Contract Administration Services Re-

gion (DCASR), Philadelphia, Pennsylvania, to conduct a preaward survey on Wedj. The survey recommended on November 4, 1976, that no award be made to Wedj due to lack of financial resources. However, an addendum to the preaward survey prepared in January 1977 reads as follows:

> Subject proposed contract is for 40 Air Conditioners @ $4,655.00 for a total consideration of $186,200.00 to be delivered on or before 31 Aug. 1978. Progress payment financing for 85% of total costs are being requested by the company, and based on this type of financing and the protracted delivery schedule, it is closely estimated that the peak cash requirement on part of company would be estimated at $90 000. Company balance sheet, dated 31 October 1976 indicates a working capital position of $20,256 and a tangible net worth of $75,704. In telecon with writer [the financial analyst who participated in the preaward survey] on 6 January 1977, Dennis Gervant, Asst. Vice President of Chemical Bank, New York, N.Y. stated in effect that bank, in letter dated 6 January 1977 to WEDJ, Inc., York, Pa. certifies that $20,000 will be advanced to company for use on this proposed contract. Mr. Gervant has stated that this loan commitment had been guaranteed by Frigitemp Corp., New York, N.Y. who as of 31 December 1975 had a net worth of $15,320,413. Dennis Gervant, Asst. Vice President of bank stated apparently there was an agreement being consummated whereby Frigitemp would acquire WEDJ, Inc. From a financial point of view an award of IFB DSA400-76-B-4194 to WEDJ, Inc. for a consideration of $186,200.00 is recommended.
>
> Frigitemp Corporation stock is being traded on the American Stock Exchange and therefore in the case of guarantees to banks for loans to unrelated companies it is necessary that this information be disseminated to the U.S. Security and Exchange Commission, Washington, D.C. on Form 10K disclosing contingent liabilities. Phone call was placed by writer on 4 Jan. 1977 to Joe Heibrun, Senior Vice President and Treasurer of Frigitemp Corp. to determine the status of WEDJ, Inc. in the merger procedures. Mr. Heibrun stated in effect that Frigitemp Corporation was aware of its responsibility in the disclosure of contingent liabilities involving unrelated companies to the Securities & Exchange Commission and therefore Frigitemp Corp. was going to absorb WEDJ, Inc. as a wholly owned subsidiary, with this action to be finalized and approved at its Board of Directors meeting later in January 1977. This contemplated merger would materially improve the Government's exposure as to outstanding progress payments for 85% of total costs.

Based upon this new information, the contracting officer determined that Wedj was responsible and awarded the contract on January 21, 1977.

On January 24, 1977, Keco requested that DGSC reconsider the determination of responsibility. Additionally, Keco protested Wedj's size status due to the affiliation with the Frigitemp Corporation (Frigitemp). Also, Keco questioned the bona fides of Wedj's self-certification as small business in light of the impending merger.

Since the size protest was received after award, it was referred to the Small Business Administration (SBA) for action pursuant to Armed Services Procurement Regulation (ASPR) § 1-703(b)(1)(c) (1976 ed.), for consideration in future actions. This was communicated to Keco by letter dated February 3, 1977. On February 8, 1977, the SBA determined that Wedj was other than small business for procurements having the same size standard, i.e., 750 employees. This action resulted from Wedj's communication to SBA on February 7,

1977, that due to a "recent affiliation" with Frigitemp, its average employee size exceeded 750. Therefore, Wedj chose not to file an application for a small business size determination. Upon receipt of the foregoing information, Keco protested to our Office.

Keco challenges both the good faith of Wedj in self-certifying itself small, as well as the reasonableness of the contracting officer in proceeding to award to Wedj when he knew, or should have known, that Wedj was other than small business under the applicable size standard. In Keco's view, the reversal of the negative preaward survey report was predicated upon Wedj's improved financial situation as a result of the affiliation with Frigitemp. Keco maintains that when this information came to the attention of the contracting officer before award he should not have proceeded with award.

Keco also points out that there was evidence of the Wedj/Frigitemp affiliation as early as April 1976 in the records of York County, Pennsylvania (Wedj's place of business), in the form of a Uniform Commercial Code required financing statement indicating that Frigitemp held a security interest in substantially all of Wedj's assets, including contract rights.

Keco also traces a pattern of involvement among Wedj, Frigitemp and another corporation, Ferro Mechanical, dating back to June 1976. In one instance, a protest to DGSC by Keco that Ferro was not responsible was denied because Ferro and its subcontractor, Wedj, Inc., "* * * have adequate facilities, capabilities and resources * * *." Keco believes that this determination was, in turn, influenced by Wedj's affiliation with Frigitemp.

Further, Keco notes that two major components of the air conditioner are source-controlled. Keco maintains that in connection with the above-referenced procurement the manufacturers of the source-controlled parts received a purchase order directly from Frigitemp which referenced the Ferro contract and called for deliveries directly to Wedj. Keco has been unable to obtain any documentation to support these allegations, but suggests avenues of inquiry for DLA and our Office to verify Keco's allegations. In light of this, Keco questions the good faith of Wedj's self-certification in November 1976.

The Defense Logistics Agency (DLA) maintains that the award comports with applicable regulations. DLA states that the contracting officer is not empowered to determine a bidder's size status. That determination is the responsibility of the bidder in the first instance, and then the SBA. If there is doubt as to a self-certified bidder's size status, the contracting officer's only recourse would be to submit the matter to SBA. Noting that the contracting officer is afforded discretion whether to protest a size self-certification, DLA argues that the contracting officer is not required to protest to the SBA every size

certification when he finds an affiliation with another firm; nor is an investigation required to determine the effect to an affiliation upon the size status of the self-certified firm. Under this approach, DLA maintains that the contracting officer acted properly in considering the financial evidence for purposes of the responsibility inquiry. He was not required, in DLA's opinion, to inquire further into the acquisition of Wedj by Frigitemp in view of the self-certification.

As for the bona fides of Wedj's self-certification in November, DLA states that the information in the financing statement is not sufficient, in itself, to prompt the conclusion that Wedj was other than small business in October 1976. Since the February 8 SBA size determination did not consider the effect of such a financing statement, DLA is unable to conclude that Wedj did not self-certify in good faith.

Regarding Keco's allegations of affiliation of Frigitemp, Wedj and Ferro, DLA states that it is unreasonable to expect a contracting officer to connect a contract awarded in September 1976 to Ferro and subcontracted to Wedj, in part, to a preaward survey in January 1977 which indicated only a loan agreement and possible merger. Rather, DLA maintains that the facts indicate the need for the contracting officer to be able to rely upon the bidder's self-certification.

Under ASPR § 1-703(b) (1976 ed.) the contracting officer is free to accept a small business size self-certification, unless he receives a timely size protest, or has information to the contrary. See *Dyneteria, Inc.*, 55 Comp. Gen. 97 (1975), 75-2 CPD 36. In order to be timely and apply to a protested procurement, a size protest must be filed with, and delivered to, the contracting officer prior to the close of business on the fifth day after bid opening. ASPR § 1-703(b)(1) (1976 ed.). Otherwise, as was done here, the untimely protest may be forwarded to SBA for determination with regard to future procurements. ASPR § 1-703(b)(1) (1976 ed.). However, the contracting officer may question the size status of a bidder by filing a written protest with the SBA at any time after bid opening. That is, a contracting officer's protest is timely for the purpose of the procurement, even if filed after the 5-day period or after award. ASPR § 1-703(b)(2) (1976 ed.).

We recognize that the contracting officer is required to accept a self-certification in the absence of a timely protest by another bidder. The language of ASPR § 1-703(b)(2) (1976 ed.) is permissive regarding the filing of a protest directly with the SBA and calls for the exercise of discretion. See *Evergreen Funeral Home*, B-184149, November 6, 1975, 75-2 CPD 282. Therefore, a contracting officer's action or inaction must be measured against a standard of reasonableness in the particular case. See *Service Industries, Inc.*, 55 Comp. Gen. 502 (1975), 75-2 CPD 345. Consistent with this standard, we believe that the clear intent of the regulation is that, if information is brought to the atten-

tion of a contracting officer, which reasonably would impeach the self-certification of a bidder, the contracting officer must file a direct protest with the SBA in order to assure tht the self-certification process is not being abused. For example, we have not objected when an agency terminated for the convenience of the Government a contract awarded to a self-certified small business (under similar provisions in the Federal Procurement Regulations), when it was determined after award that sales information submitted with the bid should have caused the contracting officer to question the self-certification. *Service Industries, Inc., supra.*

In our opinion, the above-quoted addendum to the preaward survey clearly raised a substantial question as to the viability of Wedj's self-certification prior to award which should have prompted a direct size protest with the SBA. In light of the SBA determination communicated to the agency less than 3 weeks after award, we believe that DGSC should have terminated the Wedj contract as the agency did in *Service Industries, Inc., supra.*

While there appears to have been an ongoing relationship between Wedj and Frigitemp, the record is not clear as to what stage the relationship had progressed, in terms of affiliation, as of the time of the self-certification. Without further information, we could not state affirmatively that the self-certification was made in other than good faith. It is the responsibility of the protester to present evidence sufficient to affirmatively establish its position. *Phelps Protection Systems, Inc.*, B-181148, November 7, 1974, 74-2 CPD 244. It is not the practice of our Office to conduct investigations pursuant to our bid protest function for the purpose of establishing the veracity of a protester's speculative statements. *Mission Economic Development Association*, B-182686, August 2, 1976, 76-2 CPD 105. In the absence of probative evidence, we must assume that the protester's allegations are speculative and conclude that the protester has not met its burden of proof. *Mission Economic Development Association, supra.*

In view of the above, we recommend that DLA now consider the feasibility of terminating the Wedj contract for the convenience of the Government and communicate its results to our Office.

[B-188916]

Contracts—Negotiation—Requests for Proposals—Protests Under—Timeliness—Propriety of Substitution of Protesting Firm

Individual who files a protest in behalf of Association may continue protest in behalf of his firm when General Accounting Office is subsequently notified that Association withdraws from protest. For purpose of timeliness, the protest may be considered as having been filed by individual's firm initially.

Contracts—Awards—Small Business Concerns—Set-Asides—Administrative Determination

Contracting officer's decision not to set aside procurement for small business because of lack of sufficient number of qualified small business firms for the procurement is not subject to legal objection.

Contracts—Clauses—"Site Visit"

In a solicitation for services, the inclusion of a clause providing for site inspection on Government installation was proper, notwithstanding protester's contention that contract was essentially one for supplies.

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

In procurement of creative design concepts, which calls for creativity on part of individual offerors, agency's needs can be described only broadly; there is no requirement for use of detailed design specifications in such circumstances. Further, where agency seeks creativity and innovative approaches, agency is not required to award contract on the basis of lowest price since factors other than price are paramount.

Contracts—Negotiation—Evaluation Factors—Criteria—Order of Importance

Allegation that solicitation failed to indicate relative importance of evaluation criteria is without merit where criteria were listed in descending order of importance and solicitation so informed offerors. Absence from solicitation of precise numerical weights to be employed in evaluation is consistent with regulatory provision precluding such disclosure.

Contracts—Negotiation—Evaluation Factors—Prior Experience

Evaluation of prior experience/past performance is not improper or discriminatory with respect to small business.

Contracts—Negotiation—Evaluation Factors—Point Rating—Experience

Evaluation of traditional responsibility factors such as experience is not improper when an agency has a legitimate need to consider such factors in making relative assessment of offerors' proposals.

Contracts—Payments—Progress—Failure To Provide

Absence of solicitation providing for progress payments is not objectionable where only 90-day performance period is involved.

In the matter of General Exhibits, Inc., August 9, 1977:

General Exhibits, Inc. (GEI) has alleged various improprieties in request for proposals (RFP) No. DACW67-77-R-0008, issued March 28, 1977 by the Army Corps of Engineers, Seattle, Washington. The solicitation contemplated the award of a firm fixed-price contract for

the design, fabrication and installation of interpretive displays for the Visitor Center at Lake Washington Ship Canal and Hiram M. Chittenden Locks, Seattle, Washington. The center is to serve as a model for other similar centers throughout the country, and its purpose is to assist visitors to understand the role of the Corps of Engineers through project-related information.

The protester alleges that the requirement should have been issued as a small business set-aside since the Corps was purportedly aware of the availability of a number of capable small business concerns. Moreover, GEI contends that the RFP included a number of unreasonable and unnecessary requirements that worked to the detriment of small business concerns.

GEI first objects to a site examination clause, contending that the provision requires an unnecessary and expensive outlay of money, that the site conditions can be described in the RFP, and that the requirement for a site examination is legally restricted to contracts calling for the performance of services whereas the instant procurement is for supplies. GEI also objects to the RFP requirements for "speculative design concepts," "creative input" and "drawings requiring an unnecessary outlay of capital." GEI argues that the proposal should include a complete description of the design required and materials to be used. GEI considers the method of procurement used to be inappropriate, and feels that it should be accomplished through the award of a design contract under which the contractor would design the visitor center and produce specifications that would permit the issuance of an IFB for construction of the center. Further, the protestor contends that the award should be made to the lowest responsible offeror since the Government may not negotiate contracts at "premium prices" to obtain services of superior quality.

The protester also takes exception to various aspects of the solicitation's evaluation criteria, set out below:

1. EVALUATION CRITERIA

Evaluation of proposals will be made in the relative order of importance below:

a. Design originality, creativity and effectiveness of use of materials, colors, and graphics to accomplish specified objectives.

b. The appropriateness of the proposed materials, as well as their quality, ease of maintenance, resistance to vandalism and aesthetic appearance.

c. The quality of performance, reliability and appropriateness for the areas intended of the audio and electronic equipment provided by the offeror.

d. The professional qualifications of the personnel who will be assigned the various project tasks, including: fabrication, script editing, graphics design, audio direction and production, visual direction, production and programming.

e. The capability of the offeror to perform the scope of work within the time frame specified, based on past work performance of a similar nature.

f. The cost in conjunction with the effectiveness, quality and scope of the proposal. The Government reserves the right to reject any or all proposals at any time prior to award; to negotiate with any or all offerors; to award a contract to other than the offeror submitting the lowest price offered; and to award a contract to the offeror submitting the proposal determined by the Government to be the greatest value to the government.

With regard to the above-listed factors, GEI complains that:

criterion (a) is defective in that it is too abstract
criterion (b) is defective in that the Government fails to list inappropriate materials, standard maintenance limitations, or what security measures are required
criterion (c) is vague, ambiguous, and fails to establish a minimum need
criterion (d) does not state minimum acceptable qualifications
criterion (e) is discriminatory against small businesses because they may not have had prior experience even though they are qualified to perform.

It is also contended that factors (d) and (e) relate solely to an offeror's responsibility and by their inclusion as evaluation factors, the contracting officer is circumventing the authority of the Small Business Administration (SBA) to certify the competency of small business concerns as to matters of capacity and credit. Our decision 40 Comp. Gen. 106 (1960) is cited in this regard.

It is further contended that the solicitation fails to indicate the relative order of importance of the evaluation criteria in terms of ascending or descending order, so that no notice is provided whether cost (factor(f)) is of paramount or least importance. GEI also complains that the RFP fails to specify a point system so that all offerors will be apprised as to the precise mathematical basis upon which proposals will be scored.

Finally, GEI complains that the RFP does not provide for progress payments, requiring a small business to finance a $230,000 project under which payment will be made only after the project is completed and installed.

Initially, the Army contends that the GEI protest is untimely pursuant to section 20.2(b)(1) of our Bid Protest Procedures, which states that protests based upon alleged solicitation improprieties should be filed prior to the closing date for receipt of initial proposals. 4 C.F.R. § 20.2(b)(1) (1977). This protest initially was timely filed in our Office on April 25, 1977, the day before the time period for accepting proposals was to close, by Mr. Arthur L. Friedman in behalf of Exhibit Designers and Producers Association (the Association). On May 5, Mr. Friedman notified us that the Association had ordered him, as an officer of the Association, to withdraw the protest filed in behalf of the Association. However, Mr. Friedman requested "as an individual exhibit designer, producer and small business * * * and on the bid list for this procurement" to be allowed to have the protest "continued in behalf of my firm (GEI)." The Army argues that since the Association reportedly "never intended to question the spec-

ifications" the GEI protest which was first filed after the closing date for receipt of proposals is untimely.

We believe the protest should be considered to be timely. While the Army states that the Association never intended to protest the RFP, it is clear that Mr. Friedman did intend to protest. We do not think the intent of our timeliness standard is violated by permitting Mr. Friedman to substitute his firm, GEI, as the party in interest and treating the protest as if it had been filed initially by that firm.

As to the merits of the protest, the record shows that the contracting officer considered the possibility of setting the procurement aside for small business but rejected that course of action when he concluded that there were not a sufficient number of small business concerns capable of performing this contract because of the tight completion schedule (90-day delivery) and the budget limitations. In this regard, the Army reports that on April 28, 1977, a Small Business Administration (SBA) representative investigated the non-initiation of a set-aside, and no appeal was taken. See Armed Services Procurement Regulation (ASPR) § 1-706.3 (1976 ed.). Moreover, there is no legal requirement that any particular procurement be set aside for small business. B-164555, September 10, 1968. Thus, we are unable to object to the contracting officer's determination to solicit on an unrestricted basis. See *Groton Piping Corporation and Thomas Electric Company (Joint Venture)*, B-185755, April 12, 1976, 76-1 CPD 247.

With regard to the provision for a site inspection, the clause in question merely urged offerors to satisfy themselves as to any general and local conditions that may affect their particular cost of performance. The contracting officer explains that the clause was included in the RFP in accordance with ASPR § 3-501(b) Sec. C (XIII) which requires that the "site visit" clause be inserted in all contracts for the performance of services at a Government installation. Although the protester argues that the instant contract is a supply contract, it is clear that the contractor will be required to perform services at a Government installation. Therefore we think it was appropriate to include a "site visit" clause in the RFP.

Also, we are unable to agree with the protester's objection to the RFP requirements for "speculative design concepts," "creative input" and drawings. The record indicates that the procurement is not only for the purchase of a final product but also for the development of a design concept to serve as a model for other similar centers throughout the country. Inasmuch as there has been no prior procurement of these particular services, and since the purpose of the procurement is to acquire the fruits of the successful offeror's creativity, we are unable to say that the contract objectives should be accomplished through

detailed design specifications. In any case, we have recognized that the procuring agency must determine how its needs can best be met, and we cannot object to the determination absent a finding of unreasonableness or arbitrariness. 53 Comp. Gen. 270 (1973). We do not find these factors in this case.

As for the contention that the effort should be accomplished through the award of a design contract and a subsequent issuance of an IFB for the project, we note from the record that the entire project is scheduled to be completed by September 2, 1977, so that the Visitor Center will be available for public use before the Labor Day weekend. The purpose of the September 2 completion date is to take advantage of the peak late summer season and holiday weekend to test reaction to this prototype center and utilize the information gained on the balance of these visitor centers. It is obvious that the Army could not meet the September 2 deadline if this project were divided into two segments as urged by GEI. Consequently, we find no basis to question the early completion date.

Next, the protester, citing 50 Comp. Gen. 679 (1971), argues that this fixed-price contract should be awarded based on the lowest priced, acceptable technical proposal and that the agency has no authority to pay premium prices in order to obtain supplies or services of superior quality. The cited case, however, involved a mess attendant services procurement where offerors were required to enter staffing levels in manning charts to show the number of personnel required to perform described services. There the agency made award to the offeror proposing the greatest total hours on the basis that this offeror's price per manhour was low. We held that the award should have been made instead to the acceptable offeror who submitted the lowest *total* price. That situation is not applicable here, where the agency is seeking creativity and innovation rather than manpower and factors other than price are paramount. As we have consistently recognized, in the negotiation of fixed-price (as well as cost-type) contracts price need not be the controlling factor, and award may be made to a higher-priced, higher technically rated offeror. *Bell Aerospace Company*, 55 Comp. Gen. 244 (1975), 75-2 CPD 168. Therefore, we cannot sustain the protester's contention.

Moreover, we do not agree with GEI's contention that the evaluation criteria, set out above, give no indication of their relative order of importance in terms of ascending or descending order. The solicitation clearly stated that the evaluation "will be made in the relative order of importance below" and then listed the factors set forth above. No reasonable reading could indicate other than that (a) was most important and (f) least important. In our opinion the RFP adequately sets

forth the relative order of importance of the evaluation factors. See *BDM Services Company*, B-180245, May 9, 1974, 74-1 CPD 237 and cases cited therein. GEI also has noted that a point system was not specified. However. ASPR § 3-501(b) Sec. D(i) specifically requires that numerical weights which may be employed in the evaluation of proposals not be disclosed in a solicitation.

With regard to GEI's specific objections to the criteria, we note that the nature of the procurement makes it impossible to specify precisely what will or will not be acceptable since it cannot be anticipated what each offeror will submit as its unique approach. Accordingly, the agency must consider each approach offered on its individual merits, including submitted personnel qualifications, and determine the relative degree to which each meets the established evaluation criteria. Also we find nothing in factor (e) (past performance) that unreasonably discriminates against small business as alleged by GEI. There is nothing improper in requesting information on previous work performed as it might reflect on an offeror's capabilities, or in the evaluation of such capabilities. *See*, e.g., *Augmentation, Inc.*, B-186614, September 10, 1976, 76-2 CPD 234; *SBD Computer Services Corporation*, B-186950, December 21, 1976, 76-2 CPD 511; 52 Comp. Gen. 718 (1973).

The protester also believes that factors (d) (qualifications of proposed personnel) and (e) are "responsibility" factors solely within SBA's authority concerning matters of capacity and credit. It cites 40 Comp. Gen. 106 (1960) in support of this position. That case concerned an invitation for bids which required that each bidder must qualify as a manufacturer experienced in the design and manufacture of equipment similar to that required by the invitation. We held that the invitation requirement clearly went to the matter of capacity (and therefore responsibility) so that the authority of the SBA could not be defeated by treating the issue as one of responsiveness.

However, in negotiated procurements evaluation factors normally bearing on responsibility, such as "experience" and "other resources" are widely used in conjunction with evaluation factors bearing on technical approach, and all evaluation factors, whether relating to traditional concepts of responsibility or to technical approach, may properly be used to make relative assessments of the merits of individual proposals. See *Harry Kahn Associates, Inc.*, B-185046, July 19, 1976, 76-2 CPD 51, and cases cited. Those relative assessments should not be considered responsibility findings, which are made after proposal evaluation has been completed. 52 Comp. Gen. 854, 857 (1973). Accordingly, we are unable to object to the use of (d) and (e) as evaluation factors.

Finally, concerning the failure of the solicitation to provide for progress payments, the contracting officer states that such payments are inappropriate for a procurement with an approximate 90-day performance period and a $230,000 ceiling. In reviewing the ASPR, we find that Appendix E-504.1 provides for the inclusion of progress payments in advertised procurements when the contracting officer considers that the period between the beginning of the work and required delivery will exceed 4 months for small business concerns, or when he considers them otherwise useful. While we cannot find a comparable provision in the ASPR applicable to negotiated procurements, we think that the minimum 4-month period applicable to advertised procurement may be used as a standard in the case of negotiated procurements. Under the circumstances, we are unable to conclude that progress payments were required.

In view of the foregoing, we do not find that the solicitation is legally objectionable and the protest is accordingly denied.

[B-164105]

Lobbying—Federal Anti-Lobbying Statutes—Limited to Federal Legislation

Comments in "Breeder Briefs" newsletter (concerning Clinch River Breeder Reactor Project) urging readers to contact Congressmen in support of Project, do not violate Federal anti-lobbying statutes since statutes are conditioned on use of appropriated funds, and appropriated funds were not involved either in publication of newsletter or in payment of salary of Project official who made comments.

To The Honorable Lawrence Coughlin, House of Representatives, August 10, 1977:

This is in response to your request for our opinion on whether certain material appearing in the May 1976 issue of a newsletter entitled "Breeder Briefs" violated Federal anti-lobbying statutes. The newsletter provides information on the Clinch River Breeder Reactor Project (CRBRP), which project is funded in part by the Energy Research and Development Administration (ERDA).

The material which prompted your request appears on page 2 of the newsletter under the heading "Express CRBRP Support, Van Nort Urges," attributed to Mr. Peter S. Van Nort, General Manager of the Project Management Corporation, and is set forth below:

Peter S. Van Nort, PMC General Manager, urges supporters around the nation to express their views on the need for the Clinch River Breeder Reactor Plant Project.

"We have been informed that critics have called upon groups around the country to contact their Congressmen and say 'vote against the breeder.' It's time

that we use the same strategy," he said. Project opponents in Congress are planning amendments to fiscal year '77 authorization legislation and other tactics which would delay the project.

Van Nort notes that the view of a small number gets distorted in the minds of national leaders because "we are too conservative about speaking out on the issues. We need to make our Congressmen aware that the overwhelming number of people support the breeder. The Nation's future depends on it."

You ask specifically whether the above comments violate "18 U.S.C. 1913, 31 U.S.C. 628 or any other Federal statute." 18 U.S.C. § 1913 prohibits and provides penal sanctions for the use of "money appropriated by any enactment of Congress" for certain lobbying activities without express authorization. 31 U.S.C. § 628 prohibits the use of appropriated funds for other than their intended purpose. Also pertinent is section 607(a) of the Treasury, Postal Service, and General Government Appropriation Act, 1977, Public Law 94-363 (July 14, 1976), 90 Stat. 963, 978, which provides:

> No part of any appropriation contained in this *or any other Act*, or of the funds available for expenditure by any corporation or agency, shall be used for publicity or propaganda purposes designed to support or defeat legislation pending before Congress. [Italic supplied.]

The identical provision is found in section 607(a) of the Treasury, Postal Service and General Government Appropriation Act, 1976, Public Law 94-91 (August 9, 1975), 89 Stat. 441, 459.

In interpreting "publicity and propaganda" provisions such as section 607(a), we have consistently recognized that any agency has a legitimate interest in communicating with the public and with legislators regarding its policies and activities. If any policy or activity of an agency is affected by pending or proposed legislation, discussion by officials of that policy or activity will necessarily, either explicitly or by implication, refer to such legislation and will presumably be either in support of or in opposition to it. An interpretation of section 607(a) which strictly prohibited expenditures of public funds for dissemination of views on pending legislation would consequently preclude virtually any comment by officials on administration or agency policy or activities, a result we do not believe was intended.

We believe, therefore, that Congress did not intend, by the enactment of section 607(a) and like measures, to preclude all expression by agency officials of views on pending or proposed legislation. Rather, the prohibition of section 607(a), in our view, applies primarily to expenditures involving appeals addressed to the public suggesting that they contact their elected representatives and indicate their support of or opposition to pending or proposed legislation, *i.e.*, appeals to members of the public for them in turn to urge their representatives to vote in a particular manner. These general considerations form the basis for our determination in any given instance of whether there

has been a violation of section 607(a). See, *e.g.*, B–128938, July 12, 1976, copy enclosed.

In this context, the comments attributed to Mr. Van Nort seem clearly designed to urge members of the public to contact their Congressmen in support of the CRBRP and related legislation. Thus, assuming the cited statutes are otherwise applicable, publication of the comments would appear highly questionable. However, the statutory prohibitions have one element in common—they are directed at the use of appropriated funds rather than the lobbying activities themselves. An essential prerequisite to a violation of these statutes, therefore, is the use of appropriated funds in connection with the activities in question. Based on the information we received from ERDA, it appears that appropriated funds were not involved, either in the publication of the newsletter or in the payment of Mr. Van Nort's salary. Accordingly, we do not believe the statutes have been violated.

We would caution that the interpretation of 18 U.S.C. § 1913, because of its penal sanctions, is the responsibility of the Justice Department and the courts, and we would generally refrain from expressing an opinion on it. Our conclusion should therefore be viewed as relating primarily to section 607(a). However, since appropriated funds do not appear to have been involved, it seems unlikely that the Justice Department would pursue the matter further.

The material that follows, which formed the basis for our conclusion, was submitted by ERDA on June 10, 1977, in response to specific questions we presented. We are including this material essentially as provided, as background information in order to be responsive to all aspects of your request.

General comments

[T]he CRBRP Project is a cooperative effort between the Energy Research and Development Administration (ERDA) and approximately 740 United States electric utility systems. These utility systems are contributing in excess of $257 million to the Project. They are represented in the CRBRP Project by the Breeder Reactor Corporation (BRC) and the Project Management Corporation (PMC).

The Breeder Reactor Corporation is the utility organization established to provide utility advice at the top management level to the Project and to serve as liaison between the utilities and the Project. BRC keeps the utilities apprised of project status by holding regular information meetings and by providing for various types of written reports, including *Breeder Briefs*.

The Project Management Corporation is the working-level organization established by the utilities to administer their interests in the Project, PMC carries out its function by day-to-day monitoring of Project progress, managing the disbursement of utility funds, disseminating information to BRC and to the utilities as requested by BRC, and arranging for the participation of utility personnel in the Project.

ERDA's role in the Project is to provide overall project management and the necessary project funding in excess of that provided by the utilities. ERDA has established a Project Office in Oak Ridge, Tennessee, to provide day-to-day management of all project activities with the exception of those activities described above that are the sole responsibility of PMC.

1. *GAO question:* Legal authority for publication of the newsletter.

ERDA response:

Breeder Briefs is published as one of the ways in which PMC fulfills a contractual obligation to BRC to disseminate information about the Project.

Article XIV (a) of Modification No. 1 to Contract No. AT (49–18)–12–1 between BRC and PMC recognizes that BRC will serve as "primary liaison between the Project and the electric utility industry and the public, and in this respect shall use its best efforts to help assure the broad dissemination of Project data and information . . . PMC and BRC shall consult regularly with respect to programs for dissemination of such data and information." Under this provision BRC has requested PMC to assist in performing the information dissemination function and PMC has accepted that responsibility.

2. *GAO question:* Source of funding for the newsletter (publication and distribution).

ERDA response:

The printing and distribution of *Breeder Briefs* is funded by BRC from its Reserve for Expenses which BRC retains from utility contributions to cover its reasonable costs and expenses as provided in Article IV(b) of Modification No. 1 Contract No. AT(49–18)–12–1. * * *

3. *GAO question:* Is the newsletter published by Government personnel?

ERDA response:

The newsletter is written by the Information Division of the CRBRP Project Office and published under contract by a private printing firm. All division personnel are either employees of PMC or TVA. The PMC employees are paid from PMC's operating budget which is funded by utility contributions. In accordance with paragraph D–4.2 of Appendix D of Modification No. 1 to Contract No. AT (49–18)–12 between ERDA, TVA, CE and PMC, the TVA employees in the Information Division are assigned to and receive direct supervision from the General Manager of PMC when working on the newsletter. The salaries of the TVA personnel are paid by TVA from nonappropriated TVA funds and TVA is reimbursed by PMC for such expenses out of PMC's operating budget. Neither PMC's operating funds nor TVA's nonappropriated funds are federally-appropriated.

Paragraph D–2.1 of Modification No. 1 provides that, with certain exceptions not relevant here, TVA's direct and indirect expenses incurred in connection with TVA's Project Activities shall be reimbursed by ERDA. Contract No. AT (49–18)–12, as originally entered into, provided for PMC to reimburse TVA for all such direct and indirect expenses. After Modification No. 1 was executed PMC has continued to reimburse TVA for its expenses without interruption. Paragraph 4.1.12 of Modification No. 1 provides that "PMC shall be responsible for paying, or arranging for payment of, salaries and related costs of all PMC personnel and utility industry personnel assigned to the integrated Project management organization." Even though paragraphs D–2.1 and 4.1.12 appear to be in conflict, it was assumed by Project officials that under paragraph 4.1.12 PMC had authority for reimbursing TVA for the expenses of TVA personnel assigned to the Project, and under paragraph D–2.1 ERDA was to reimburse TVA for all other expenses incurred by TVA in connection with the Project. That assumption appears to have been confirmed by TVA's General Counsel in a letter dated April 21, 1977, to PMC's Comptroller.

4. *GAO question:* If published by non-Government personnel, has ERDA provided any instructions regarding the publication or content of the newsletter?

ERDA response:

ERDA has provided no instruction to PMC or BRC regarding publication or distribution of *Breeder Briefs.*

5. *GAO question:* If published by non-Government personnel, are there any procedures for review and/or approval of the newsletter by ERDA, and if so, were they followed for the May 1976 issue?

ERDA response:

There are no procedures per se for review of the newsletter by ERDA. However, specific articles concerning or quoting ERDA personnel may be coordinated with the person(s) about whom the article is written.

6. *GAO question:* What was the approximate cost of the May 1976 issue of the newsletter (publication and distribution)?

ERDA response:

Total publication and distribution costs for the May issue of *Breeder Briefs* were $561.00.

7. *GAO question:* Describe the distribution of the May 1976 issue (total number of copies printed and approximate number or portion distributed to Government employees and to non-Government individuals or entities).

ERDA response:

A total of 4,000 copies of the May 1976 *Breeder Briefs* were printed. Of the total printing, approximately 140 were distributed to government personnel and the remainder were distributed to nongovernment personnel. Government agencies receiving copies of the May newsletter included TVA, ERDA, the Nuclear Regulatory Commission, the Federal Energy Administration, the Environmental Protection Agency, and the General Accounting Office. Nongovernmnet receipients included utilities, CRBRP consultants and contractors, news media, Tennessee commmunity and business leaders, educational institutions, and private citizens by request.

8. *GAO question:* What is the source of the quotation attributed to Mr. Van Nort (speech, other publication, comment directly to newsletter staff, etc.)?

ERDA response:

The quotations in the newsletter were obtained from discussions between Mr. Van Nort and the *Breeder Briefs* staff.

A final question we raised with ERDA concerns Appendix F to Modification 1, Contract No. AT(49-18)-12, covering, among other things, the General Manager's salary, which you mentioned in your request. We obtained copies of the original 1973 contract and Modification 1, dated May 1976, and reviewed pertinent provisions. As in the case of the contract provisions dealing with TVA personnel (see ERDA response to question 3 above), these contract provisions appear somewhat confusing. Section 4.1.12 provides that PMC shall be responsible for paying, or arranging for payment of, salaries and related costs of utility industry personnel assigned to the integrated project management organization. Section F-6.1 provides that ERDA will reimburse Commonwealth Edison (CE) for all direct and indirect Project-related expenses.

According to an ERDA official, the parties have interpreted these provisions to mean that PMC will reimburse CE for salaries of assigned personnel out of utility contributions as long as those contributions remain (estimated to 1982). When the utility funds have been depleted, ERDA will be responsible for reimbursement under section F–6.1. At present, PMC is still making the reimbursements out of the utility contributions. ERDA's explanation, set forth below, makes it clear that, as a matter of fact, the General Manager is not being paid, directly or indirectly, with appropriated funds:

According to paragraph F–1.1 of Appendix F to Modification No. 1 to Contract No. AT(49–18)–12, Commonwealth Edison (CE) shall see "That there are made available to PMC, at Project cost, individuals qualified to serve and/or perform, as required, the functions of General Manager, and such additional functions as PMC and CE shall agree upon from time to time." The individuals made available by CE are to be at Project cost, although CE has agreed in paragraph F–6.2 to contribute $2 million (above and beyond its contribution to design and build the CRBRP) as a credit against CE's billings for work or services performed by CE under the contract. A credit of $14,891.00 is being deducted currently on a monthly basis for invoices under Appendix F.

Mr. Van Nort is a CE employee assigned to PMC to perform the functions of General Manager. His salary is paid by CE. CE is reimbursed by PMC for the salaries of Mr. Van Nort and other CE personnel assigned to PMC, subject to the above-noted credit. PMC makes such reimbursements out of its operating funds derived from utility contributions. No federally appropriated funds are involved. * * *

Contract No. AT(49–18)–12, as originally entered into, provided in paragraph F–1.1 that CE would make available to PMC, at Project cost, individuals to serve fulltime in various positions including General Manager of the Project. Paragraph F–6.1 provided for PMC to reimburse CE for all direct and indirect expenses incurred by CE in connection with Project Activities. Paragraph F–6.1 of Modification No. 1 provides for ERDA to reimburse CE for such expenses. After Modification No. 1 to Contract No. AT(49–18)–12 became effective, PMC continued to reimburse CE for its expenses without interruption. Project Office officials assumed that, as was the case with TVA * * * under paragraph 4.1.12 of Modification No. 1 PMC has authority to reimburse CE for expenses of CE personnel assigned to the Project and under paragraph F–6.1 ERDA is to reimburse CE for other expenses incurred by CE in connection with the Project. * * *

We reviewed the above information independently but found no reason to question its accuracy. We therefore reiterate our conclusion that the publication of the May 1976 newsletter, "Breeder Briefs," did not constitute a violation of Federal anti-lobbying statutes since no appropriated funds were involved.

We hope the foregoing information is helpful.

[B–188481]

Quarters Allowance—Basic Allowance For Quarters (BAQ)—Assigned to Government Quarters—Single *v.* Family—Married Members

A member of a uniformed service married to another member, who has no dependents other than his or her spouse, is entitled to partial basic allowance for

quarters (BAQ) under 37 U.S.C. 1009(d), when assigned to single-type Government quarters. However, such a member assigned to family quarters is not entitled to partial BAQ.

Quarters Allowance—Basic Allowance for Quarters (BAQ)—Assigned to Government Quarters—Single *v.* Family—Single Members

A single member without dependents is not entitled to partial BAQ under 37 U.S.C. 1009(d) when assigned to family quarters since partial BAQ is intended to be paid to members not entitled to full BAQ who are assigned to low-value Government single quarters, not higher value family quarters.

Quarters Allowance—Basic Allowance for Quarters (BAQ)—Shipboard Quarters Uninhabitable—Officers on Sea Duty

An officer on sea duty being reimbursed under 10 U.S.C. 7572(b) for the expense incurred for quarters because his shipboard quarters are uninhabitable is entitled to partial BAQ under 37 U.S.C. 1009(d).

In the matter of the Department of Defense Military Pay and Allowance Committee Action No. 535, August 10, 1977:

This action is in response to letter dated February 24, 1977, from the Assistant Secretary of Defense (Comptroller) requesting an advance decision on certain questions concerning payment of partial basic allowance for quarters (BAQ) which have arisen as a result of the enactment of section 303 of Public Law 94–361, July 14, 1976, 90 Stat. 923, 925, which added 37 U.S.C. 1009(c)–(f). The questions, together with a discussion, are contained in Department of Defense Military Pay and Allowance Committee Action No. 535.

Committee Action No. 535 presents the following questions concerning such partial BAQ:

1. Does the term "member without dependents," as used in 37 U.S.C. 1009(d), include a member married to a member, when neither has a dependent other than his or her spouse?
2. If the answer to question 1 is affirmative, is such a member entitled to the partial basic allowance for quarters (BAQ) authorized by 37 U.S.C. 1009(d), as implemented by Executive Order 11941 of October 6, 1976, when both members are assigned to family-type public quarters at the same station or separate stations?
3. If the answer to question 2 is negative, is a single member without dependents entitled to such partial BAQ when assigned to family-type public quarters?
4. Is an officer entitled to such partial BAQ when on sea duty and authorized to be reimbursed an amount not to exceed his applicable BAQ in accordance with 10 U.S.C. 7572(b)?

Sections 1009 (a) and (b), title 37, United States Code, provide for upward adjustments in the basic pay, basic allowance for subsistence and BAQ of members of the uniformed services whenever there is an adjustment in the General Schedule of compensation for Federal classified employees. Such adjustments are to be of the same overall percentage as the increase in General Schedule rates. Under section 1009

(c) the President may allocate the overall average percentage increase among the elements of compensation on an other than an equal percentage basis. When the President chooses to allocate the increase on an other than equal percentage basis, section 1009(d), which provides as follows, authorizes payment of a "partial" BAQ to certain members without dependents:

(d) Under regulations prescribed by the President whenever the President exercises his authority under subsection (c) to allocate the elements of compensation specified in subsection (a) on a percentage basis other than an equal percentage basis, *he may pay to each member without dependents who, under section 403 (b) or (c), is not entitled to receive a basic allowance for quarters*, an amount equal to the difference between (1) the amount of such increase under subsection (c) in the amount of the basic allowance for quarters which, but for section 403 (b) or (c), such member would be entitled to receive, and (2) the amount by which such basic allowance for quarters would have been increased under subsection (b)(3) if the President had not exercised such authority. [Italic supplied.]

Subsection 403(a) of title 37, United States Code, authorizes the payment of BAQ. However, subsections 403(b) and 403(c), respectively, provide generally that a member who is assigned adequate Government quarters or who is on field duty or sea duty is not entitled to BAQ.

The legislative history of 37 U.S.C. 1009(d) shows that it originated as part of a legislative proposal by the Department of Defense. The purpose of the proposal was explained in a letter dated March 3, 1976, from the General Counsel of the Department of Defense to the President of the Senate in which it was stated in part as follows:

The purpose of the proposed legislation is to provide the President with the flexibility to allocate a greater proportion of future military pay raises to the basic allowance for quarters (BAQ). There are both economic and intrinsic advantages to granting this flexibility.

The Congress, in enacting the three-way pay split legislation of 1974 (Public Law 93-419), has already provided that military pay raises are to be spread equally among the three cash elements of compensation—basic pay, basic allowance for quarters, and basic allowance for subsistence. This was an improvement over the previous practice in which military pay increases were allocated exclusively to basic pay. The current law, however, does not recognize that the level of the allowances may not be related to the costs of the services they were originally intended to procure. The Department of Defense believes that such is the case with the quarters allowance especially. *Further, military family quarters on the average have value substantially above the current rates of the BAQ, and military bachelor quarters have a value substantially below current BAQ rates.* The Department therefore wants to adjust BAQ rates to more nearly approximate the average value of military family quarters. This will be a first step toward replacing the current full BAQ "forfeiture" system with a fair market rental system in which members in military quarters would pay rent appropriate for the quarters they actually occupy.

We propose to do this by placing a portion of future military basic pay raises into BAQ and continuing to do so until BAQ matches the average value of military family quarters. *A part of these increases would be rebated to members without dependents who are on sea or field duty and to those who occupy bachelor quarters, in recognition of field and sea duty and of the lower value of those quarters.*

* * * * * * *

We currently expect that the initial adjustment for FY 1977 would reallocate approximately 25 percent of expected basic pay increase to the basic allowance for quarters. It would also pay to those members without dependents who are on sea or field duty or are in military quarters approximately 6% of the new BAQ rate in order to return to them a portion of the BAQ increase in recognition of sea and field duty and *of the lower value of bachelor quarters.* * * * [Italic supplied.]

See S. Rept. No. 94–878, 94th Cong., 2d Sess. 132–133 (1976).

Although the Senate did not pass the rebate provision now in subsection 1009(d) that provision was incorporated in the legislation as enacted in conference. The report of the Senate and House of Representatives conferees on H.R. 12438, which became Public Law 94–361, shows that it was felt especially by the House conferees, that reallocation of compensation increases would be inequitable without also authorizing the President "to rebate to single personnel living in barracks and Bachelor Officers Quarters." S. Rept. No. 94–1004, 94th Cong., 2d Sess. 45 (1976), and H.R. Rept. No. 94–1305, 94th Cong., 2d Sess. 45 (1976).

Therefore, as the submission indicates, it appears that the legislative purpose in enacting 37 U.S.C. 1009(d) was to pay partial BAQ to members without dependents who are not entitled to regular BAQ, because they are assigned to single-type Government quarters (barracks and bachelor quarters), or who are on sea or field duty, since it is recognized that the value of the quarters furnished in such cases is less than the BAQ forfeited.

Concerning question 1, while a spouse is defined as a dependent for BAQ purposes by 37 U.S.C. 401 (1970), pursuant to 37 U.S.C. 420 (1970) a member may not be paid BAQ at the "with dependents" rate on account of a spouse who is also a member of a uniformed service entitled to basic pay. See generally 53 Comp. Gen. 148, 152–154 (1973). Therefore, it is our view that a member whose only dependent is a spouse entitled to basic pay and, thus, whom he may not claim as a dependent for increased BAQ, may be considered a member without dependents for the purpose of section 1009(d). Accordingly the answer to the first question is affirmative.

Concerning questions 2 and 3, it was not the intent of Congress to extend the rebate to members who are already receiving the substantial benefit of living in family-type quarters. As is indicated previously, the reason the Department of Defense proposed, and the Congress approved, a partial rebate was that the value of Government single quarters is substantially below the current BAQ without dependents rates. Congress reasoned that is would be inequitable to reallocate compensation increases without also authorizing a rebate to members assigned to single quarters. It was recognized, however, that the value of family quarters exceed the BAQ rates. Therefore,

it is our view that to pay partial BAQ to members, single or married to other members, who occupy the higher value family quarters would be contrary to the purpose of the law. Accordingly, the answers to questions 2 and 3 are negative.

Concerning question 4, 10 U.S.C. 7572(b) provides as follows:

(b) Under such regulations as the Secretary prescribes, any officer of the naval service on sea duty who is deprived of his quarters on board ship because of repairs or because of other conditions that make his quarters uninhabitable, and who is not entitled to basic allowance for quarters, may be reimbursed for expenses incurred in obtaining quarters, in an amount not more than the basic allowance for quarters of an officer of his grade, if it is impracticable to furnish accommodations under subsection (a).

The submission indicates that if 37 U.S.C. 1009(d) is construed to allow payment of partial BAQ to officers being reimbursed under 10 U.S.C. 7572(b), in a majority of cases it will result in the officer receiving reimbursement of an amount equal or nearly equal to the BAQ rate plus partial BAQ.

Subsection 7572(b) does not provide for payment of BAQ, but provides for reimbursement of expenses incurred in obtaining quarters in an amount not to exceed the applicable BAQ rate. While such reimbursement may in many cases be at the maximum amount (full BAQ rate), that would not always be the case. Also, there is no indication in the legislative history of 37 U.S.C. 1009(d) that consideration was given to precluding payment of partial BAQ to an officer being reimbursed under 10 U.S.C. 7572(b) even though such reimbursement is limited to the BAQ amount which could be paid to that officer in appropriate circumstances. Therefore, since such an officer without dependents who is on sea duty fits the criteria established by section 1009(d), he would be entitled to partial BAQ. Accordingly, the answer to question 4 is affirmative.

[B-184849]

Military Personnel—Retired—Contracting With Government—What Constitutes Selling

Where a contractor, doing business with Department of Defense agency, sponsors and pays for a social function at which retired Regular officers of the uniformed services employed by the contractor make contact with departmental personnel who are in a position to influence procurements by the Department, such contacts will be viewed as establishing a *prima facie* case that such officers are "selling" within the meaning of 37 U.S.C. 801(c) and they will be subject to forfeiture of retired pay.

In the matter of the "Civil Selling Law," 37 U.S. Code 801(c), August 11, 1977:

Recently the activities of certain retired Regular officers of the uniformed services employed by contractors doing business with the De-

partment of Defense (DOD), and its various agencies, have been brought to our attention. Information made available to us indicates that these officers have attended social functions sponsored and paid for by their employers at which civilians and active duty military personnel of the DOD have been present. An example of this type activity involves functions held at hunting lodges leased by certain Defense contractors for the purpose of generating good will for the corporation.

Subsection 801(c) of title 37, United States Code, provides that payment may not be made to a retired Regular officer of the uniformed services who is engaged for himself and others in selling, or contracting, or negotiating to sell, supplies or war materials to an agency of the DOD or one of the uniformed services.

Activities prohibited by that provision are described in DOD Directive 5500.7 and in decisions of this Office.

In construing the above-cited law, we have held that contacts made by retired officers with personnel of the various agencies when the retired officers are in nonsales, executive or administrative positions, and contacts by the retired officer in his capacity as a noncontracting technical specialist which involve no sales activity are outside the purview of the statute. See 41 Comp. Gen. 784 (1962); 41 *id.* 799 (1962); 42 *id.* 87 (1962); 42 *id.* 236 (1962) and 52 *id.* 3 (1972). However, we have also maintained that where a retired officer actually participates in some phase of the procurement process, such activities bring him within the purview of the definition of selling contained in DOD Directive 5500.7. See 42 Comp. Gen. 52 (1962); 42 *id.* 236 (1962); and 43 *id.* 408 (1963).

In construing statutes similar to 37 U.S.C. 801(c), we have held that a retired Regular naval officer engaged in the promotion of good will on behalf of his employer, a contractor doing business with Navy, which resulted in sales to be effected by other employees of the employer, was "selling" within the meaning of the statutes. 38 Comp. Gen. 470 (1959).

Furthermore, while noting that the statutory provisions do not encompass purely social contacts, we have expressed the view that contacts with departmental officials for sales purposes at places other than Government facilities at social gatherings, if established, would not make it any less a sales activity for which forefeiture of retired pay would be required. See 42 Comp. Gen. 237, *supra.*

Thus, in any case arising in the future when a Defense contractor sponsors or pays for what could be construed as a social event, and retired Regular officers employed by the contractor attend together with departmental personnel, who are in a position to influence procurements, we will be compelled to view such contacts as establishing a *prima facie* case that the retired officers are "selling" within the

meaning of 37 U.S.C. 801(c) and, unless adequately rebutted, the officers will be subject to forfeiture of retired pay.

In order that our views on this matter may be clearly understood by all involved, we urge the Secretary of Defense to revise the applicable directive or take other steps calculated to inform all individuals concerned of our position in this matter. We also urge the Secretaries of Health, Education, and Welfare, Transportation and Commerce to take similar action with regard to the Commissioned Officer Corps of the Public Health Service, Coast Guard, and the National Oceanic and Atmospheric Administration.

[B-114839]

Canal Zone Government—Employees—Compensation—Retroactive Increases for Police, Firefighters and Teachers

The Canal Zone Government may not implement pay increases for police, firefighters, and teachers retroactively under authority of section 144(c) of title 2, Canal Zone Code. Although section 144(c) authorizes raises to be made effective "* * * not earlier than the effective date of the corresponding increases provided by Act of Congress," the corresponding increases for the same categories of employees of the District of Columbia, upon which comparability is based, are no longer established by "Act of Congress."

In the matter of the Canal Zone Government—authority for retroactive implementation of pay increases, August 12, 1977:

We have been requested by Representative Ralph H. Metcalfe, Chairman, Subcommittee on the Panama Canal, House Committee on Merchant Marine and Fisheries, to give our opinion on whether the Canal Zone Government has the authority to implement for its employees the retroactive portion of salary increases granted to District of Columbia police, firefighters, and teachers.

The pay increases referred to were made prospectively effective on July 4, 1976, in the case of Canal Zone police and firefighters. Canal Zone teachers received a temporary increase for prospective application beginning August 1, 1976, and terminating September 8, 1976. These pay increases corresponded in amount to increases established for the same groups of employees by the District of Columbia Government. However, the District of Columbia increases were made retroactively effective to October 1, 1975, in the case of police and firefighters, and to January 1, 1976, in the case of teachers. The question presented is whether the Canal Zone Government has the authority to implement a corresponding retroactive pay increase for its employees.

Salaries established for police, firefighters, and teachers for the District of Columbia have long provided the basis for wage revisions for

similarly situated Canal Zone employees. Pay comparability for employees in these categories was previously required by section 1(c) of the Act of October 25, 1951, 65 Stat. 637, which stated as follows:

> In the exercise of the authority granted by section 81 of title 2 of the Canal Zone Code, as amended, the Governor of the Canal Zone is authorized and directed to grant additional compensation to policemen, firemen, and school teachers employed by the Canal Zone Government, whenever additional compensation is granted to employees of the District of Columbia employed in similar or comparable positions. The additional compensation for such Canal Zone employees *shall be effective as of the date any additional compensation is granted to similar or comparable employees of the District of Columbia.* Act of Oct. 25, 1951 § 1(c), 65 Stat. 637. [Italic supplied.]

This provision was repealed by section 16(b)(2) of Public Law 85–550, July 25, 1958, 72 Stat. 405, 411. Section 5 of Public Law 85-550, 72 Stat. 407, substituted for the above provision the following language, now contained in section 144 of title 2, Canal Zone Code, governing the granting of pay increases in the Canal Zone:

> § *144. Compensation*
>
> (a) The head of each department, in accordance with this subchapter, shall establish, and from time to time may revise, the rates of basic compensation for positions and employees under his jurisdiction.
>
> (b) The rates of basic compensation may be established and revised in relation to the rates of compensation for the same or similar work performed in the continental United States or in such areas outside the continental United States as may be designated in the regulations referred to in section 155(a) of this title.
>
> (c) The head of each department may grant increases in rates of basic compensation in amounts not to exceed the amounts of the increases granted, from time to time, by Act of Congress in corresponding rates of compensation in the appropriate schedule or scale of pay. *The head of the department concerned may make the increases effective as of such date as he designates but not earlier than the effective date of the corresponding increases provided by the Act of Congress.* * * * [Italic supplied.]

At the time of enactment of Public Law 85–550, increases in the pay rates of District of Columbia police, firefighters, and teachers were legislated by Congress and the implementation of similar increases for Canal Zone personnel was authorized under 2 Canal Zone Code 144(c) with retroactivity permitted, "* * * but not earlier than the effective date of the corresponding increases provided by Act of Congress." This subsection remains the authority for retroactive implementation of pay increases by the Canal Zone Government.

Two subsequent enactments by the Congress substantially changed the way in which salary adjustments are accomplished for District of Columbia police, firefighters, and teachers. The District of Columbia Self-Government and Governmental Reorganization Act, Public Law 93–198, December 24, 1973, 87 Stat. 774, gives to the Mayor of the District of Columbia the authority to administer the personnel functions of the District, including pay of District of Columbia employees, under legislation enacted by Congress until such time as the Council of the District of Columbia establishes a merit system applicable to

District employees. Section 422(3), 87 Stat. 791. Section 714(c) of the Act, 87 Stat. 819, provides that personnel legislation relating to the District remains in effect until such time as the Council elects to provide equal or equivalent coverage. Sections 302, 404, and 717 of the Act, 87 Stat. 784, 787, and 820, respectively, vest in the Council of the District of Columbia general legislative powers, including the authority to amend laws and regulations in effect on the effective date of the District's Charter. With certain exceptions acts passed by the Council and approved by the Mayor become law if within 30 days of transmittal to the Congress, both Houses of Congress do not adopt a concurrent resolution disapproving the act. Section 602(c)(1), 87 Stat. 814.

Subsequent to passage of the District of Columbia Self-Government Act, Congress enacted Public Law 93-407, September 3, 1974, 88 Stat. 1036, which established a committee for a negotiated wage establishment for District of Columbia police and firefighters and a system for mayoral recommendations to the Council of proposed pay increases for teachers. In each instance, amounts approved by act of the Council are included in District of Columbia budget requests for appropriation by Congress.

The 1976 retroactive raises for District of Columbia police, firefighters, and teachers were accomplished under the new procedures established by Public Laws 93-198 and 93-407. The General Counsel of the Canal Zone Government is of the view that 2 Canal Zone Code 144(c) does not authorize these increases to be made retroactive for Canal Zone personnel because the District of Columbia raises were not provided by an "Act of Congress." Employee representatives, however, contend that the retroactive increases may be authorized under this section on the basis that the failure by Congress to enact a concurrent resolution disapproving the District of Columbia legislation is an "Act of Congress" approving such legislation.

We have been asked to take into consideration the following questions in making our determination:

1. Is there a rule that a noncorporate Federal agency is prohibited from making retroactive changes in employee compensation and allowances unless such changes are in accordance with an express provision of law?
2. Does the "District of Columbia Self-Government and Governmental Reorganization Act" have the effect of fixing the retroactive pay of police, fire, and teaching personnel in the District of Columbia by means other than an "Act of Congress"? Since Congress must approve the District of Columbia budget on a line-item basis and since the Congress retains power, through the Appropriations process, to augment, restore, or deny funds to specific arms of the D.C. Government, then can it be correct that the composite outcome of the D.C. budget process is other than an Act of Congress?
3. Should the definition of an "Act of Congress" be influenced by the legislative history of the statute in which the phrase appears? Specifically does the legislative intent in the writing of P.L. 85-550 help to clarify what

the meaning of the phrase "Act of Congress" should be in decisions on retroactive pay?

4. Is it correct that Appropriations Acts are in general considered "Acts of Congress"? Does the phrase "Act of Congress" in P.L. 85–550 have any special or different interpretation than the use of that phrase in other statutes?
5. Section 603(a) of the District of Columbia Home Rule Act provides that the Federal Government will retain its control of the D.C. budget in stating:

   Section 603(a)—"Nothing in this Act shall be construed as making any change in existing law, regulation, or basic procedure and practice relating to the respective roles of the Congress, the President, the Federal Office of Management and Budget, and the Comptroller General in the preparation, review, submission, examination, authorization, and appropriation of the total budget of the District of Columbia."

   Regarding Section 603(a), does retention of ultimate legislative authority for the Federal Government in the District affairs and the retention of budget power in offices of the Federal Government mean that the D.C. appropriations made by law are in fact that authority or limitation of increased compensation, both prospective and retroactive, to District Government personnel?

The general rule is that, in the absence of specific statutory authority, administrative changes in salary rates may not be made retroactively effective. See 10 Comp. Gen. 514 (1931); 25 *id.* 601 (1946); 31 *id.* 163 (1951); and *id.* 191 (1951). The first question is therefore answered in the affirmative.

Questions 2 through 5 are interrelated and therefore will not be addressed separately but will be answered as a group.

While the language of section 144(c) of title 2, Canal Zone Code, is not precise in specifying exactly which rates are to be used as the basis for comparability pay increases for Canal Zone employees, it is clear in requiring that increases in these base rates be granted or provided by an "Act of Congress." A statute which is clear and unambiguous on its face is not subject to construction. *Hamilton* v. *Rathbone*, 175 U.S. 414 (1899). We do not consider the provisions of this section referring to an "Act of Congress" to be susceptible to interpretation or subject to influence by the legislative history of Public Law 85–550.

"Act of Congress" refers to a law or statute enacted by the Congress. See Black's Law Dictionary, page 42 (Rev. 4th Ed. 1968) and cases cited therein. Under the D.C. Self-Government Act, Congress may by passage of a concurrent resolution disapprove legislation passed by the District of Columbia Council and an act of the Council becomes law if Congress fails to pass such a resolution. In neither case does congressional action result in a statute or "Act of Congress" within the usual meaning of that term.

The raises granted to District of Columbia school teachers retroactive to the first pay period on or after January 1, 1976, were first provided for in an emergency act of the District of Columbia Council passed on April 27, 1976. D.C. Act 1–110, April 26, 1976. Under the authority granted to the Council under section 412 of the D.C. Self-

Government Act, emergency legislation need not be presented to Congress for approval and may remain effective for no more than 90 days. Successive emergency acts continued the pay raise in effect until March 29, 1977, almost 1 year after the passage of the first act and 15 months from the effective date of the increase, on which date permanent legislation authorizing the increase for D.C. teachers was effective. D.C. Law 1–90, March 29, 1977. Permanent legislation was not submitted to the Congress until January 10, 1977, more than 1 year after the effective date of the increase. We conclude therefore that these pay increases were not provided by an "Act of Congress" as required by section 144(c) of title 2 of the Canal Zone Code.

Neither do we consider the appropriation act resulting from the District of Columbia congressional appropriation process to fulfill the requirement of section 144(c) of title 2 of the Canal Zone Code for retroactive application of pay increases that the increases be "provided by the Act of Congress." We note particularly that the sums appropriated for pay increases for fiscal years 1976 and 1977 for District of Columbia police, firefighters, and teachers, entitled "Personal Services" in the appropriation acts, are stated in a lump sum without reference to specific increases or pay rates. See Public Law 94–333, June 30, 1976, 90 Stat. 785, 789; Public Law 94 446, October 1, 1976, 90 Stat. 1490, 1492. We have long considered that the amount of individual items in estimates presented to Congress on the basis of which a lump sum appropriation is enacted are not binding on administrative officers unless carried into the appropriation itself. See 17 Comp. Gen. 147 (1937). In this case, Congress has provided for the enactment of pay increases by the District of Columbia Government under the procedures established in Public Laws 93–198 and 93–407, subject to the 30-day congressional review period of section 602(c)(1) of Public Law 93–198, 87 Stat. 814. The "Personal Services" appropriation provides the funding of pay increases rather than the establishment of the underlying wage rates. We find additional support for this view in the treatemnt accorded such increases in hearings before the appropriation committees of the Congress. (See e.g., District of Columbia Appropriations for 1975, Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, 93 Cong., 2d Sess., Part 2, pp. 964–971; District of Columbia Appropriations for 1976, Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, 94th Cong., 2d Sess., pp. 135–138.)

We are of the opinion that the foregoing statements apply equally to the Federal Government's retention of ultimate control over the District of Columbia budget under section 603(a) of Public Law 93–198. While it is unquestioned that control of the budget in the

aggregate has in fact been retained by the United States, this does not diminish the legislative authority granted to the District of Columbia Government under Public Laws 93–198 and 93–407 with respect to the establishment of wage increases for specific groups of employees. Questions 2 through 5 are answered accordingly.

In view of the above, we are of the opinion that pay increases for D.C. police, firefighters, and teachers may not be considered to be "granted by Act of Congress." Accordingly, we conclude that the Canal Zone Government lacks the authority to implement these pay increases retroactively for its police, firefighters, and teachers under the provisions of 2 Canal Zone Code 144(c).

[B–188542]

Contracts—Negotiation—Offers or Proposals—Best and Final—Additional Rounds—Auction Technique Not Indicated

Call for a new round of best and final offers, as a result of various material changes made to specification requirements after submission of best and final offers, is justified and does not constitute auction technique. Agency had no alternative but to institute a second round of negotiations. Moreover, the record indicates that price revisions made under second best and final offers were primarily the result of changed requirements and correction of proposal deficiencies.

Contracts—Negotiation—Evaluation Factors—Cost, etc., of Changing Contractors

Costs of phasing in a new contractor may be an evaluation factor where considered desirable to do so, but only if solicitation so provides.

Contracts—Negotiation—Evaluation Factors—Administrative Determination

Determinations of proposal merits are a matter of agency discretion which will not be disturbed unless demonstrated to be arbitrary or unreasonable, and the instant record fails to provide evidence of objectionable evaluation.

In the matter of the Rockwell International Corporation, August 16, 1977:

Rockwell International Corporation (Rockwell) protests the manner in which a cost-plus-award-fee contract was awarded to Xonics, Incorporated (Xonics). The award was made by the Environmental Protection Agency (EPA) under request for proposals (RFP) DU–76–B079 for the operation and maintenance of the CHAMP (Community Health Air Monitoring Program) air monitoring system, operated by the Health Effects Research Laboratory, Research Triangle Park, North Carolina.

Rockwell's primary contention is that EPA personnel engaged in a prohibited "action technique" and conferred an unfair competitive advantage on Xonics when, after best and final offers had been received and EPA had tentatively selected Rockwell for final negotiations and had advised Xonics that the selection was based on Rockwell's superiority in technical merit and lower cost, EPD reopened negotiations and requested an additional round of best and final offers.

Rockwell charges that the effect of the revelation that its proposal was superior from the standpoint of technical merit and lower cost was to advise Xonics that to win the procurement it had to make major technical improvements in its proposal and to substantially lower its costs. On the other hand, Rockwell contends it did not know what Xonics had been told, and therefore did not take steps to trim costs which it might have done had it known of the disclosure to Xonics. Rockwell further charges that Xonics was advised by EPA as to EPA's reservations about Rockwell's costs and, by implication, where Xonics' proposal could be strengthened to compare more favorably with Rockwell's, whereas Rockwell was not advised of EPA's concern until the announcement of the intended award to Xonics.

In addition, Rockwell charges that EPA's conversations with Xonics resulted in a "leveling" or "technical transfusion" of concepts unique to Rockwell's proposal, and that inadequate security measures may have compromised the confidentiality of Rockwell's proposal.

Rockwell alleges that as a direct result of the foregoing, Xonics' technical score was elevated from a score of 763 after the first best and final offer to 804 after the second, compared to Rockwell's 854, while Xonics' cost proposal, initially higher than Rockwell's, became lower after second best and final offers.

Accordingly, Rockwell charges EPA with a violation of the auction technique prohibition of Federal Procurement Regulations (FPR) § 1–3.805–1(b) (1964 ed.) which holds that an offeror may not be informed that his price is not low in relation to another offeror's. Citing decisions of this Office, Rockwell argues that the improper disclosure of information in proposals should be remedied by either award on the basis of initial best and final offers or, in the alternative, through a third round of best and final offers with information equalized between the respective offerors.

Rockwell further contends that in the evaluation of respective cost proposals, EPA failed to consider an alleged $645,775 that would be incurred in close-out and transition costs in replacing Rockwell (the incumbent contractor), which would render Rockwell's second best and final offer less expensive than Xonics'.

Finally, Rockwell takes exception to EPA's evaluation of its past performance, contending that its past performance and management approach should have received more favorable consideration; and that the contracting officer accepted unsupported allegations concerning past performance problems as an important factor in deciding not to make an award to Rockwell.

By way of background, the RFP was issued August 13, 1976, calling for the operation of the central control station, 23 fixed stations, and 5 mobile stations. It was contemplated that the contractor would be required to operate an average of 25 stations daily.

Only two proposals were received on October 4, 1976, in response to the solicitation. After written and oral discussions were conducted with both offerors, Rockwell and Xonics received respective technical scores of 829 and 763, resulting in a rating of technical acceptability for each. Rockwell's total proposed cost was $4,459,150 compared to Xonics' $5,920,616. The cost evaluation concluded that while the Rockwell proposal was tightly estimated, the system could be effectively operated at the amount proposed. Accordingly, it was determined on December 7, 1976, that Rockwell should be selected for final negotiations.

However, it was then found that the manhours Rockwell proposed were not adequate for the mobiles in addition to the fixed stations and the initial evaluation had mistakenly assumed that additional manhours were included in the Rockwell proposal for the mobile stations. As a result, 2.5 manyears were added to Rockwell's proposal for the mobile stations. Since Xonics had proposed 5 manyears for that purpose, its mobile station manning estimate was halved to put both offerors on the same footing. These changes, of course, affected projected costs.

The foregoing resulted in a decision to revise the cost evaluation but not to change the proposed selection. However, after further consideration a question arose as to whether Rockwell could in fact operate all 25 stations even with the 2.5 manyear increase. It was suspected that Rockwell, based on knowledge obtained as incumbent, had concluded that the level of operation required under the contract would be substantially less than contemplated by the solicitation. EPA officials felt the questions raised called for further discussions with Rockwell; however, discussions with Rockwell would require discussions also with the other offeror in the competitive range, Xonics. Therefore, and since the projected utilization was revised, another round of best and finals was called for. The proposed award fee criteria were revised to more than double the weighting of the cost con-

trol criterion. The number and location of the aerosol instrumentation was also revised. In addition, areas of clarification in the respective proposals of each offeror were requested. A revised proposal due date was set for January 17, 1977.

During the first 2 weeks of December 1976, EPA undertook special precautions to preserve the confidentiality of the respective proposals. Both firms were warned against improper contacts. Moreover, security measures were tightened for the evaluation of second best and final offers: a conference room was reserved for use in evaluating the proposals, and all copies of the proposals and revisions were collected and locked up.

To assist in the evaluators' understanding of the proposals, offerors were invited to explain orally their proposals during January 19 through January 20. After the second best and final offers had been evaluated, both offers were found to have sufficient, appropriately allocated manpower to operate the air monitoring system. Rockwell and Xonics were determined to have submitted technically acceptable offers, receiving 854 and 804 points respectively. However, Xonics' proposed cost was $4,547,185 to Rockwell's $4,854,039. A cost evaluation found that both proposals were closely estimated but neither was unrealistically low. It was then determined that only a slight technical superiority in favor of Rockwell did not outweigh the advantages to the Government of making award to Xonics on the basis of its lower-priced offer.

Subsequent to a protest filed by Rockwell with EPA in February 1977, EPA investigated charges of possible technical transfusions of Rockwell's approach into Xonics' second best and final offer. The investigations considered an original list of 11, plus an additional 6 items, alleged by Rockwell to be unique to its proposal, to determine whether they in fact appeared in the Xonics offer. After all changes between original and revised proposals were evaluated with regard to either real or apparent deviations from Xonics' original proposal which might be construed as information obtained from the Rockwell proposal, no evidence of proposal compromise was discerned.

EPA also investigated a matter presented by cross affidavits from Rockwell and Xonics employees referring to a purported conversation between Rockwell and Xonics personnel in November 1976, from which Rockwell inferred that Xonics was privy to special information regarding the merits of the Rockwell proposal. On the basis of extensive interviews with the Xonics personnel named in Rockwell's affidavits, EPA states that it was unable to find any impropriety or evidence of access by Xonics personnel to the Rockwell proposal.

EPA states that it never informed Xonics of Rockwell's total proposed cost, or of any of the features of the Rockwell cost or technical proposal, nor was Xonics given any information as to the specifics of EPA's evaluation of any of Rockwell's proposals. Our review of the record fails to provide any evidence to conclude otherwise. The most that the record reveals is a concession by EPA that on December 8, 1976, having decided to select Rockwell for final negotiations, EPA informed Xonics of its decision and of the general basis for the decision—that Rockwell was selected on the basis of a superior technical proposal and lower proposed cost. EPA states that such a preliminary notice of selection is customarily given in accord with EPA policy.

In determining the ultimate effect, if any, of that information on the revised technical scores and proposed costs emanating from the second round of best and final offers, consideration must be given to certain factors which evidently had a significant bearing both on the decision to seek the additional round of offers and upon the technical and cost revisions that ensued.

As noted above, and prior to EPA's preliminary notification to Xonics on December 8, 1976, of the initial selection of Rockwell for final negotiations, the Contract Specialist was first advised on that date of a serious technical deficiency in the Rockwell proposal in that 7.5 manyears were considered inadequate to operate 20 fixed and 5 mobile stations. The record indicates that until that point, it was erroneously thought that Rockwell had proposed 7.5 manyears for the fixed stations and additional manyears for the mobiles. When this came to light, both the Rockwell and Xonics cost proposals were adjusted to reflect manyear costs on an equal basis, the result being that the gap between proposals was already narrowed by approximately $1,000,000. When the manpower deficiencies in the Rockwell proposal were further explored on December 9, 1976, and an amount added to adequately operate the system at a level of 25 stations, the Rockwell cost became ±$50,000 of the Xonics proposal, depending upon the method of estimating.

Moreover, EPA personnel began to suspect that Rockwell may have been utilizing special knowledge derived from its incumbency as the CHAMP contractor to estimate that the full 25 stations, upon which the RFP required offerors to submit proposal costs, would not actually be utilized. EPA then concluded that the referenced changes in the solicitation based on a more current assessment of likely rate of station operation were essential not only to the receipt of more realistic cost estimates from the respective offerors, but also to negate any possible

advantage based on inside information that Rockwell may have gained by way of its incumbency.

Finally, the record indicates that there was another deficiency in the Rockwell approach that was not discovered until January 19, 1977, the correction of which also led to another significant increase in the Rockwell cost proposal.

The contracting officer reports:

> It is understood that Rockwell planned to provide the bulk of the air monitoring stations operator support by hiring part-time personnel who are paid $10 per station visit as is currently done on weekends and holidays. Neither the initial Rockwell technical proposal nor the first revisions explained this proposed method of operation which is a profound change to the current method of station support. Nor did the cost proposals provide sufficient detail to indicate such a change. Such an approach would be technically undesirable and, had the technical evaluation team been aware of the planned method of supporting the stations, the Rockwell technical evaluation score would have been lower. Had the part-time support of the stations been discovered only at final negotiations, the Contracting Officer would have had to halt the negotiations because it would have become evident the selection was based on a grave lack of understanding of the proposal and the procurement would have had to be resolicited. It was only at the January 19, 1977 discussion with Rockwell in which Rockwell's second best and final offer was being presented that the EPA learned of Rockwell's plan to use part-time help to provide the bulk of the station operation support.

As a result of Rockwell's apparent recognition of this deficiency, the contracting officer reports that Rockwell proposed full-time personnel for primary station operator support in its second best and final offer, limiting part-time help to holidays and weekends. The contracting officer reports that it was this change of approach by Rockwell more than any other item which caused the reversal of relative cost standings.

In view of the foregoing, we believe the record provides a substantial basis upon which to conclude that the reversal in relative standing as to cost between Xonics and Rockwell was attributable primarily to the correction of the above-cited defect in the Rockwell proposal and to the fact that both offerors were offering more realistic projected agency requirements (as a result of the changes upon which second best and final offers were requested), rather than the mere knowledge by Xonics that Rockwell's initial best and final offer was lower priced.

The question of whether an auction has been conducted through the reopening of negotiations and submission of new best and final offers must be determined in the light of the particular circumstances of each case. *See Bell Aerospace Company*, 55 Comp. Gen. 244, 247 (1975), 75-2 CPD 168, and citations therein.

Having reviewed the changes made to the solicitation by EPA, we must conclude not only that they were made for good faith reasons (based on a more realistic assessment of actual usage) but that such changes would have a substantial effect upon prices previously submitted. In view thereof, we find that the reopening of negotiations was

warranted in this instance. In this regard, once negotiations are properly reopened and new best and final offers requested, all offerors are free to revise their proposals, and we will not speculate on the reasons a particular offeror may choose to reduce its price. *Bell Aerospace Company, supra.*

In view of the foregoing, we cannot object to the second round of best and final offers. Nor do we find any basis in the record to support Rockwell's request for a third round of best and final offers. To the contrary, since both prices have been publicly revealed, such action would undeniably result in the very auction technique to which Rockwell objects.

With regard to Rockwell's contention that the Xonics proposal should have included, and EPA should have considered, an alleged $645,775 in close-out and transition costs in replacing Rockwell with Xonics, we note that the RFP did not provide for the consideration of such costs in the evaluation of proposals. EPA states that it considered the costs of all tasks required of, and proposed by, Xonics and such costs were found reasonable. However, EPA contends, and we agree, that since the RFP did not specify a changeover cost factor to be assigned to all proposals other than the incumbent's, it would not have been proper to consider such costs. While the costs of phasing in a new contractor may be considered as an evaluation factor where desirable to do so, the solicitation should specify that such costs will be considered as an evaluation factor. *Computer Data Systems, Inc.*, B–187892, June 2, 1977, 77–1 CPD 384; *EG&G Incorporated*, B–182566, April 10, 1975, 75–1 CPD 221.

Concerning the evaluation of Rockwell's past performance and management approach, the record shows that Rockwell received 195.8 of a possible 250 points for Criterion B, proposed technical and management organization, and 79.2 out of a possible 100 points for Criterion E, pertinent experience and past performance. Xonics received 209.2 and 82.5 points for these respective criteria. The contracting officer advises that he never stated that Rockwell was unacceptable in these areas, but only that there were *some* weaknesses in these areas. The evaluation scoring scheme shows that both Xonics and Rockwell had "*some*" weaknesses under the two subject criteria, and that Xonics' rating exceeded Rockwell's only by 13.4 points out 250, and 3.3 points out of 100 respectively, suggesting that both offerors were considered virtually equal in these areas.

Rockwell charges that the statement of the contracting officer is at variance with a November 30, 1976 memo from the CHAMP Project Officer stating that the incumbent contractor (Rockwell) was proposing essentially the current management team, and past experience in-

dicates they can effectively manage the CHAMP system. However, the record also contains a subsequent memo dated December 7, 1976, from the Chief, System Engineering Section, who, after reviewing technical responses to the questions presented in oral discussions, adjusted scores accordingly. He then scored Rockwell lower than in his initial ratings for various reasons, one being that while Rockwell had proposed a team of qualified scientists and engineers, very few of them were dedicated on a full-time basis. He felt this was inconsistent with good management practice. He concluded that notwithstanding the foregoing, both Rockwell and Xonics were "equally capable" of running the CHAMP system.

We have consistently held that procuring officials enjoy "a reasonable range of discretion in the evaluation of proposals and in the determination of which offeror or proposal is to be accepted for award," and that such determinations are entitled to great weight and must not be disturbed unless shown to be unreasonable or in violation of the procurement statutes or regulations. *METIS Corporation*, 54 Comp. Gen. 612, 614–5 (1975), 75–1 CPD 44; *Riggins and Williamson Machine Company, Incorporated, et al.*, 54 Comp. Gen. 783 (1975), 75–1 CPD 168; B–178220, December 10, 1973. The fact that the protester does not agree with that evaluation does not render the evaluation unreasonable. *Honeywell, Inc.*, B–181170, August 8, 1974, 74–2 CPD 87; *METIS Corporation, supra.* In view thereof, and of the pertinent revelations of the record set out above, we have no basis to conclude that the fact that the Rockwell proposal was given 195.8 and 79.2 points under the subject criteria, rather than some other score, was unreasonable, an abuse of discretion, or at variance with narrative evaluation comments provided in the record.

Accordingly, the protest is denied.

[B–187912]

Contracts—Competitive System—Federal Aid, Grants, etc.—Compliance With Requirements

Federal norm compelling "full and free" competition for Environmental Protection Agency (EPA) grantee contracts awarded under section 204(a)(6) of the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1284(a)(6) (Supp. V. 1975), together with imp'ementing regulations, applies whether grantee uses "brand name" purchase description or formal specification.

Contracts—Specifications—Definiteness Requirement—Specificity in Defining Terms

Notwithstanding grantee's intent to draft specifications for switchgear equipment so as to allow only manufacturers of circuit breakers to compete, drafted specifications did not reveal intent.

Contracts—Specifications—Intent *v.* Drafted Specifications—Resolicitation—Prejudice Requirement

It is clear that, to the extent grantee could have properly specified "manufacturer only" requirement for switchgear, the fact that grantee inadequately expressed intent would have not required resolicitation absent showing of prejudice to other than protester which was not otherwise eligible to compete under requirement.

Contracts—Specifications—Administrative Determination Conclusiveness—Phrase Interpretation

Since there is nothing in the legislative history of the Water Pollution Control Act that clearly details what is meant by phrases "brand names" or "trade names" of comparable quality, General Accounting Office (GAO) is reluctant to substitute its judgment—that phrases refer to product history, rather than manufacturerer identity, of switchgear—for EPA's judgment that phrases also mean manufacturer identity.

Contracts—Specifications—Manufacturer—Equipment — Switchgear

Long-standing history of disputes between complainant and Federal agencies regarding propriety of "manufacturer only" specification for switchgear equipment shows some agency engineers generally prefer the specification because of quality and inspection concerns. Notwithstanding such concerns, GAO has suggested that product experience clause be used instead of "manufacturer only" specification.

General Accounting Office—Recommendations—Contracts—Specifications—Substitution of Modified Product Experience Clause for Manufacturer Only Requirement

In the present case, motivation for "manufacturer only" requirement was prompted by grantee's stated inability to "write a specification that permits qualified assemblers to [compete] while precluding an assembler who is inexperienced and unqualified from doing so." It is unfair, however, to prevent competent concerns from competing because of inability; consequently, GAO suggests the use of suitably modified product experience clause to evaluate non-manufacturer's equipment in future procurements.

In the matter of the Powercon Corporation, August 17, 1977:

Powercon Corporation has complained about the decision of the Cleveland Regional Sewer District to "exclude the company from being the supplier of switchgear equipment" under a contract awarded in July 1976 to Hirsch Electric Company by the Cleveland (Ohio) Regional Sewer District for the construction of the power system for a wastewater treatment plant. The contract was funded in significant part by grant funds from the United States Environmental Protection Agency (EPA).

The bidding documents under which the contract was awarded contained detailed specifications for the power system which consisted of a 13–KV metal clad switchgear, underground ducts and manholes,

and a unit substation. The original specifications (issued in November 1975) for the power system contained the following provision:

> It is the intent of these specifications that the equipment to be supplied under this Item be an integrated assembly produced by a switchgear manufacturer such as General Electric, Westinghouse, or equal, who shall coordinate the application of its switchgear, relays and instrumentation to reflect the intent of the specification.
>
> Metal clad switchgear consisting of circuit breakers, relays and instrument components purchased from various sources and installed by an equipment assembler will not be approved as meeting the intent of these specifications.

By amendment of April 20, 1976, the phrase "Allis Chalmers, ITE; Federal Pacific" was inserted between the words "Westinghouse" and "or equal" as found in the original specifications. The phrase "relays and instrument components" was also deleted.

Powercon says that, prior to the April 20 amendment, it discussed the specifications for a related project with the grantee's consulting engineer. An employee of the consulting engineer allegedly told Powercon that "he was familiar with Powercon and realized that they made a good product but that [the consulting engineer] did not anticipate that Powercon would be eligible to bid on the switchgear equipment specified in [the related project]." In a subsequent conversation, Powercon says that it was told the grantee's engineer "wanted the supplier of this equipment to be a 'big' manufacturer of switchgear not a mere switchboard builder." In reply, Powercon informed the engineer that it was a "switchboard manufacturer and that it designs and builds its own bus ducts and interrupter switches and does all of its own metal work and that it buys its circuit breakers and relays for any particular job from only one manufacturer."

Powercon says that it then sent a letter to the consulting engineer. The letter requested the engineer's authorization to "bid on both [the related project] and [the project in question]." No reply was received in response to this letter. Therefore, Powercon "submitted a bill of materials for the switchgear equipment specified under [the project in question and] on April 22, 1976, quoted a price for the job to Hirsch Electric Company, and subsequently received a purchase order from Hirsch for this switchgear equipment after Hirsch was awarded the prime contract * * *." On August 10, 1976, Powercon was informed, however, that it "had been disqualified by the [grantee] from supplying the switchgear equipment under [the subject contract]."

The grantee explained its rejection of the proposed use of Powercon in an August 9 letter to Hirsch which said:

> There have been numerous requests either by your company or Power Con to consider them [Power Con] as a supplier for the switch gear for your Contract 9. I am sure you realized that Power Con is not considered as an original equipment manufacturer and therefore cannot be considered as a supplier of this item.
>
> Based on the foregoing and in order to avoid any delays, [we are] directing that you furnish the switchgear in strict accordance with item 7 of the contract specification.

Powercon then complained of the rejection to the grantee and EPA.

The basis of Powercon's protest was that "any interpretation of this specification which would exclude Powercon from supplying the switch gear equipment [under the contract] would be overly restrictive [and prohibited] under the EPA regulations * * *." The EPA regulations referred to are found at 40 C.F.R. § 35.936–13, § 35.936–7, and § 35.936–3 (1976). These regulations provide, as pertinent:

§ 35.936–13 Specifications.

(a) Nonrestrictive specifications. (1) No specification for bids or statement of work in connection with such works shall be written in such a manner as to contain proprietary, exclusionary, or discriminatory requirements other than those based upon performance, unless such requirements are necessary to test or demonstrate a specific thing or to provide for necessary interchangeability of parts and equipment, or at least two brand names or trade names of comparable quality or utility are listed and are followed by the words or equal.

§ 35.936–7 Small and minority businesses.

Positive efforts shall be made by grantees to utilize small business and minority-owned business sources of supplies and services. Such efforts should allow these sources the maximum feasible opportunity to compete for subagreements and contracts to be performed utilizing Federal grant funds.

§ 35.936–3 Competition.

It is the policy of the Environmental Protection Agency to encourage free and open competition appropriate to the type of project work to be performed.

Explaining its position that it is a "switch gear manufacturer," Powercon said that it had manufactured switchgear for several installations including four other wastewater treatment plants. Thus, Powercon urged that any interpretation which would exclude Powercon would be overly restrictive and prohibited under these regulations. The company also argued that it "is recognized throughout the industry as a 'switch gear manufacturer,' *equal*, if not superior to the companies listed in [the above-quoted specifications]." Urging that it is a "switch gear manufacturer," Powercon said that it "produces integrated metal-clad switch gear assemblies." The company further argued that it "does not purchase circuit breakers for its switch gear from *various sources*, but rather purchases all of its circuit breakers for any given project from only *one source* and was planning to use all GE circuit breakers on this job." Consequently, the company urged that under the "plain meaning of the words contained in this specification, Powercon cannot be excluded from furnishing the switch gear equipment on this job."

Powercon then argued:

If the District and its A&E had wanted to restrict the eligible switch gear suppliers to manufacturers of circuit breakers only, it would have been quite simple to write an unambiguous specification to this end. * * *

However, the present specification *does not* limit the eligible suppliers to switch gear manufacturers only, and no reasonable interpretation of this specification can be made which would lead to this conclusion. First, the various companies listed in specification 7.2 are the only circuit breaker manufacturers who are also manufacturers of switch gear equipment. If only circuit breaker manu-

facturers were to have been eligible, the "or equal" portion of this specification would then be inconsistent and contradictory, since it indicates that there are other switch gear manufacturers who are eligible.

The grantee did not consider the merits of Powercon's complaint because it found the complaint to have been untimely filed under EPA's complaint procedures. This "untimeliness" finding was subsequently reversed by EPA.

By decision dated November 15, 1976, the Regional Administrator (Region V) rejected the merits of Powercon's complaint. EPA found the "intent of the specifications" to be evident as follows:

> As originally written, a company which purchased "circuit breakers, relays and instrument components" and assembled them into the switchgear would not be acceptable to [the grantee]. After the addendum this requirement reads: "Metal clad switchgear consisting of circuit breakers purchased from various sources and installed by an equipment assembler will not be approved as meeting the intent of these specifications." Thus if the circuit breakers were purchased rather than manufactured by the equipment supplier, it would be unacceptable. The switchgear supplier must manufacture the circuit breakers.[4] This conclusion is further justified by clause 7.3 on page 7–6 of the specification which states: "The circuit breaker manufacturer shall furnish and install the protective relays, test devices, potential and current transformers as required, and shown on the Contract Drawings:
>
> * * * * * * *

Recognizing that Powercon had admitted that it was not a manufacturer of circuit breakers, EPA then decided that the grantee had "demonstrated a rational basis" for restricting suppliers to those who also manufactured circuit breakers and that the solicitation provisions in question did not violate the EPA regulations quoted above. As was stated by EPA:

> The switchgear in question is the one to tap into the CEI line for power to the facility. The very large and complex Cleveland Southerly Plant is dependent upon the switchgear functioning properly and if the circuit breakers fail, there could be a severe problem with the rest of the electrical systems in the facility. In cases of this type, this Agency will take a careful look at the underlying basis for the type of specification requirement. * * *
>
> The August 20, 1976, letter from the Grantee's consulting engineer (Pirnie) highlights the reasoning underlying the requirement.
>
> > "In the case of item 7, the proper coordination of the many sophisticated components that must be incorporated, together with detailed exacting requirements of the Cleveland Electric Illuminating Company for interfacing their Data Acquisition System, implies a considerable level of skill and experience.
> >
> > *"We do not know of any feasible way to write a specification that permits qualified assemblers to furnish the end item while precluding an assembler who is inexperienced and unqualified from doing so.* [Italic supplied.] That is the reason behind our decision to allow only those manufacturers who actually manufacture the 13 KV circuit breakers, to furnish the equipment."
>
> * * * * * * *

[4] Powercon has argued that since it purchases its circuit breakers from one source this requirement does not apply to it. While the language used may not be grammatically correct, the intent is evident: to qualify as the equipment supplier, one must manufacture its own circuit breakers.

The limitation, in the present case, to those suppliers who manufacture their own circuit breakers goes to the issue of the responsiveness of the bid and not to the responsibility of the bidder. The Comptroller General has held that the award of a contract can be limited to a class of bidders meeting specified qualitative and quantitative experience requirements in a specialized field where the invitation so provides and where the restriction is properly determined to be in the Government's best interests. *Plattsburgh Laundry and Dry Cleaning Corp.*, 54 Comp. Gen. 29 (1974); *Descomp, Inc.*, 53 Comp. Gen. 522 (1974).

Under the circumstances of this case, where there is a pressing need to proceed with this contract in conjunction with numerous other interrelated contracts for this complex project, and where the Grantee in fact obtained competition from enough vendors to meet the minimum U.S. EPA requirements, I find that there is a rational basis for the Grantees determination; in addition I also find that requiring resolicitation now would not best serve the public interest. In future instances, however, it should be noted that specification requirements comparable to the one at issue in this case will be more closely scrutinized to insure that any restriction is fully and adequately justified by the grantee or its consulting engineer, consonant with the Congressional and U.S. EPA requirements favoring full and free competition. Any restriction upon competition must be demonstrated to address salient performance characteristics addressed to the minimum needs of the project as well as the public benefit.

Consequently, EPA denied the complaint.

Powercon and EPA have affirmed their previously argued positions on the issue concerning the proper interpretation of the questioned specifications and the question whether the specifications—if construed to require potential suppliers to be manufacturers of circuit breakers—are unduly restrictive.

Before proceeding to a discussion of these issues a threshold question—whether Powercon's status as a prospective subcontractor precludes it from requesting our review of the award in question—is initially for decision.

We have decided to consider complaints against contracts awarded "by or for" grantees. Here the record shows that the grantee's engineering consultant drafted the questioned specifications and recommended the rejection of Hirsch's proposed use of Powercon as a supplier. Although Hirsch was the party actually awarding the subcontract, the subcontract award must be considered to have been made "for" the grantee because the grantee's participation in the award process had the net effect of causing Powercon's rejection. See *Copeland Systems, Inc.*, 55 Comp. Gen. 390 (1975), 75-2 CPD 237.

Another threshold question—the choice of the applicable procurement norm for resolution of the complaint—has been raised by EPA. In its report to our Office on the complaint, EPA urges that "prior decisions of our Office concerning restrictive specifications under direct Federal Procurements should not be routinely applied to the problem here" because:

(1) "* * * the provisions of section 204(a)(6) of the Federal Water Pollution Control Act, as amended [33 U.S.C. § 1284 (a)(6)], differ considerably from the Federal statutory and regulatory requirements which govern direct Federal pro-

curement." (They differ, EPA says, in that "performance type" specifications constitute the norm in Federal procurement; by contrast, however, EPA notes that the cited act expressly allows use of "brand name or equal" references as an alternate means of specifying actual needs.);

(2) The Administrator of EPA, not GAO, has the "authority * * * to interpret" the act;

(3) grantees lack "specialized expertise" in drafting specifications.

(Notwithstanding objection (2), EPA has "request[ed] the advice of [our] Office pursuant to 31 U.S.C. § 74 (1970), and does not object to [our] exercise of jurisdiction * * *" in hearing Powercon's complaint.)

Recently, in *BBR Prestressed Tanks*, 56 Comp. Gen. 575 (1977), 77-1 CPD 302, which involved a complaint against an award by an EPA grantee under the cited section of the same act, we held that the section and implementing regulations "impart the Federal norm regarding the requirement for full and free competition and the avoidance of restrictive specifications." Accepting, without deciding, EPA's argument that the act permits EPA grantees to employ brand name or equal purchase descriptions as a suitable alternative to a formal specification, whereas under the Federal procurement scheme a brand name or equal purchase description is a "last resort" method, the Federal norm compelling "full and free" competition under the specification ultimately chosen by the grantee still applies.

Turning to the issue of the interpretation of the questioned specifications, there is no doubt that the grantee's engineering consultant—with the concurrence of the grantee—intended to draft the specifications so as to "allow only those manufacturers who actually manufacture the 13 KV circuit breakers, to furnish the equipment." Notwithstanding this stated intent, the drafted specifications are less than clear that only manufacturers of circuit breakers would be considered as suitable suppliers. Although EPA's decision holds that there was "grammatical error" in the specification's prohibition against switchgear containing circuit breakers purchased from various *sources* (rather than "source") (which, on its face, would not contradict Powercon's stated intent to purchase its circuit breakers from only one source—General Electric Company), it implicitly rejects the notion that the error supports Powercon's interpretation of the specification.

We do not agree. The phrase, "Purchased from various sources," is grammatically harmonious with the term "circuit breakers" and, coupled with Powercon's admitted status as a switchgear manufacturer—albeit not a circuit breaker manufacturer—supports Power-

con's view that it qualifies under the specification as actually drafted. Nor do we agree that the solicitation's statement that the "circuit breaker manufacturer shall furnish and install the protective relays, test devices, potential and current transformers as required" supports the view that only circuit breaker manufacturers could furnish the entire switchgear requirement. As stated by Powercon:

> * * * when Powercon reviewed these specifications, it interpreted them as meaning what the clear words said, *i.e.*, a switchgear *manufacturer* who purchased circuit breakers from a *sole source* could supply the switchgear for this project as long as its own circuit breaker supplier also installed the relays, devices, and transformers in the switchgear equipment.

We therefore find that the specifications read as a whole rationally support Powercon's interpretation of them.

On the other hand it is clear that had the grantee been aware of the inadequacies inherent in its drafting of the specifications it would have corrected the specifications to make its stated intent clear. Moreover, it is clear that, to the extent the grantee could have properly specified a "circuit breaker-manufacturer only" requirement, the fact that it inadequately expressed its stated intent would not have required cancellation and resolicitation of the requirement absent a showing of prejudice. See *GAF Corporation*, 53 Comp. Gen. 586, 592 (1974), 74-1 CPD 68. The only "prejudice" Powercon has suffered—assuming the validity of the inadequately expressed "manufacturer only" requirement—is the preparation of a supplier's quotation without realizing that the quotation could not be considered because of the requirement. An example of the kind of "prejudice" that would support resolicitation under the cited precedent would be a showing that an otherwise eligible concern did not submit a bid because of a deficiently worded specification. Under this assumption, however, Powercon is not an "otherwise eligible" concern because it is not a circuit breaker manufacturer.

Turning to the validity of the expressed intent of the grantee to restrict suppliers only to manufacturers of circuit breakers, it is EPA's implicit position that this stated intent squares with the express language of the cited section of the act which permits specifications of requirements by referencing "at least two brand names or trade names of comparable quality or utility [provided they] are followed by the words 'or equal.'" EPA apparently reads the phrases "brand names" or "trade names" as meaning either listing of brand name *products* or the *manufacturers* of the brand name products, whichever the grantee chooses to select.

There is nothing in the legislative history of the cited section (see H.R. Report No. 92-911, 92d Cong., 2d Sess. (1972), which accompanied H.R. 11896 as amended (containing the cited section which,

after being incorporated into S. 2770, became law over the President's veto); S.Rept. No. 92–1236, 92d Cong., 2d Sess. (1972); comments of Mrs. Abzug, speaking for the House Committee on Public Works, 118 Cong. Rec. 10212 (1972)) which explains the intended meaning of the phrases "trade names" or "brand names."

We think the expressions "brand names" or "trade names" must reasonably be viewed as denoting brand name products rather than named manufacturers—otherwise the words "brand" and "trade" would be mere surplusage. On the other hand, since there is nothing in the legislative history of the cited act which clearly details what is meant by the terms in question we are reluctant to substitute our judgment as to the meaning of the phrases for the meaning of the phrases advanced by the agency charged with administering the statute. It is well settled that "deference [is to be given] to the interpretation given the statute by the officers or agency charged with its administration." *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) and cases cited in text. Nevertheless, given the uncertainties as to the precise meaning of the phrases as intended by the Congress, we think EPA and its grantees should, at a minimum, rationally support any "manufacturer only" requirement.

In a series of decisions commencing in 1965 involving Powercon Corporation, we have dealt with the problems stemming from "manufacturer only" requirements for switchgear equipment similar to the type involved in the subject contract. The first of these decisions—B–156680, July 13, 1965, addressed to Powercon Corporation—involved a Veterans Administration procurement for switchgear, "all components" of which were to be the "product of one manufacturer." Powercon did not submit descriptive literature with its bid showing the "stationary [super] structure" to which the switchgear components would be attached. Initially, as reflected in our July 1965 decision, both our Office and the procuring agency felt that Powercon's bid was properly rejected for failing to contain data showing the "superstructure" component.

Subsequently, by our decision in B–156680, September 9, 1965, we quoted from a supplemental report prepared by the Veterans Administration in which the Administration agreed with Powercon's assertion that the superstructure was not, in fact, considered to be a "major electrical component" of the required switchgear. The Administration's report continued:

> The purpose in requiring all components to be of one manufacture was to insure that the assembly would be an electrically coordinated unit of high quality. The importance of the superstructure in this assembly is secondary to

the manner of attaching the electrical components to the superstructure and to the proper spacing between elements within the superstructure.

Since the time when the specifications for the Perry Point project were issued, this office recognized that the specifications were unduly restrictive [because of the requirement that the superstructure be also made by the same manufacturer] and did not permit assemblers to supply such units to the V.A. We have since distinguished between "all components" and "all major electrical components." Furthermore, we are attempting to specify electrical coordination and spacing, insofar as being related to the superstructure to assure that the government will obtain high quality and that the specifications will not be unduly restrictive.

Further correspondence with the company then ensued. Powercon, while gratified that the Administration acknowledged that the superstructure was not considered to be a major electrical component of the assembly, continued to assert that it was unreasonably restrictive to require that even all electrical components be of the same manufacturer since "such a specification would be absolutely restrictive to only the General Electric Co. and the Westinghouse Electric Company." Powercon insisted that there was a "host of suppliers making first class equipment which could provide to an assembler such as myself or even G.E. and Westinghouse either better prices or better delivery * * *."

By letter of September 23, 1965, from our Office Powercon was told:

The question whether a specification is unduly restrictive or is necessary to assure a quality product is most difficult to determine. Unquestionably it is possible for a competent and conscientious assembler to produce a quality assembly equal to or perhaps even better than a regular manufacturer of the complete assembly. However, due to the nature of the assemblies, it is difficult, if not impossible, to determine after assembly whether the various components used are first-class, compatible, properly assembled, etc. Furthermore, in view of the small quantity involved, in particular procurements, many times only one item, it is not feasible to provide for inspection during assembly. For this reason engineering experts apparently are hesitant to accept other than a standard, known and proven type of assembly from a manufacturer regularly engaged in the field. This is understandable when the overall importance of the particular assembly is considered. A similar problem is involved when a minimum acceptable grade of a product is established. Some will urge that the standard is too high and a waste of money, while others will argue that it is not high enough and will be more costly overall.

During 1971 and 1972 we decided a related series of cases—again involving Powercon—concerning an electrical equipment purchase by the Government Printing Office (GPO). In 51 Comp. Gen. 315 (1971) we upheld the rejection of a low bid for failure to furnish required descriptive data on the electrical equipment to be supplied by Powercon under the prime contract. We also related in our decision the judgment expressed by the procuring office's engineering staff that there would be less risk of malfunction, and more trouble-free use of equipment if both the "circuit breakers and the switchboard [containing the breakers and other electrical components]" were made by the same manufacturer. Our decision went on to say:

* * * we see nothing in [the equipment specifications] or elsewhere in the IFB which would support the premise that GPO's requirements would be satisfied by a switchboard in which only the major electrical components were manufactured by the same firm as manufactured the circuit breakers. Nor do we concur with your view that B-156680, *supra*, stands for such premise.

The drafting of specifications reflecting the minimum needs of the Government and the determination whether items offered by bidders will meet such needs are primarily the responsibility of the particular contracting agency. 17 Comp. Gen. 554 (1938). In recognition of such well established principles of competitive bidding, we did not hold in B-156680, *supra*, that a procurement requirement that the entire switchgear, or switchboard, including the superstructure, be the product of one manufacturer was restrictive of competition per se. To so hold would have been to require other contracting agencies to accept VA's determination without regard to their own requirements.

In our decision in B-172006, June 30, 1972, to the attorney representing Powercon's prime contractor, we made it clear that we did not express either agreement or disagreement with GPO's technical position or with the view that it might have been appropriate to have rejected the prime contractor's bid solely on the basis that the switchgear offered would have been assembled by a firm other than the manufacturer of the components of the switchgear. We also said:

While we appreciate your concern as to the possibility that an agency might issue a solicitation which would preclude the installation of a switchboard assembled by Kennedy's supplier (Powercon), the question of whether a solicitation is unduly restrictive of competition must necessarily be decided under the particular circumstances pertaining to that individual procurement. The procurement statutes require that specifications be drawn so as to permit the greatest amount of competition possible consistent with the needs of the Government. This is an affirmative responsibility of the procuring activity which may not be evaded by arbitrary or capricious actions, and when competition is materially restricted by precluding the use of products of certain manufacturers the agency must be able to show a substantial basis for its action. In cases where the items being procured are of a type which has been generally produced by the manufacturing concerns involved, as we understand the switchboards in question to be, we tend to agree with the view indicated in the affidavit of the president of Powercon that the subjective judgment of engineering personnel of the procuring activity as to the reliability of a manufacturer's product can be offset by the factual history of that product's actual performance in comparison with the performance histories of those products of other manufacturers.

Finally, in two recent cases involving protests from Abbot Power Corporation—a supplier of switchgear equipment similar to Powercon Corporation—(B-186568, December 21, 1976, 76-2 CPD 509; B-186198, January 7, 1977, 77-1 CPD 13) the Veterans Administration informed us that it views a "manufacturer only" requirement for switchgear to be an unrealistic and restrictive requirement. As a result of VA's decision to reject the requirement, the issue involving the validity of the requirement was rendered moot, and we expressed no opinion on the propriety of the VA requirement.

From this historical review of "manufacturer only" requirements for electrical switchgear equipment, it is clear that some engineers prefer the requirements because it is difficult, if not impossible, to determine after assembly whether the "various components used are first-class, compatible, [and] properly assembled"—especially given

the administrative difficulty of providing inspection during assembly. On the other hand, it is also clear that we think the subjective preference of engineering personnel can be offset by the factual history of the assembler's product compared with the performance history of a manufacturer's product—as apparently was the case with four other EPA grantees who have accepted Powercon's product. Also, as suggested by the series of decisions in the 1960's involving this engineering problem, it seems that greater engineering effort in specifiying design criteria for "electrical coordination and spacing, insofar as * * * related to the superstructure [of switchgear]" might tend to lessen the felt need for a "manufacturer only" requirement.

Indeed, in the present case, it seems that the motivation for the "manufacturer only" requirement may not be so much a preference for the requirement but—in the words of the grantee's consulting engineer—an inability to "write a specification that permits qualified assemblers to furnish the end item while precluding an assembler who is inexperienced and unqualified from doing so." This stated inability—perhaps prompted by reluctance and the long-standing engineering preference for a "manufacturer only" specification when switchgear purchases are involved—constitutes the rationale for Powercon's exclusion.

It is manifestly unfair, in our view, that admittedly qualified concerns be excluded from competition because of an engineer's stated inability—or reluctance—to draft a suitable product history specification and additional design specifications providing component spacing and coordination for switchgear equipment. As an example of a product history clause (for diesel engines) that, with appropriate modifications, might be used as a model for a product history clause for switchgear is the following provision (taken from the procurement involved in 48 Comp. Gen. 291, 294 (1968)):

> Each of two diesel engines of the same model for each type of plant specified herein and operating at the same or higher speed. brake mean effective pressure (bmep) as the equipment proposed hereunder, shall have performed satisfactorily in an installation independent of the contractor's facilities for a minimum of 8,000 hours of actual operation. This operating experience shall have been accumulated within a consecutive period of 2 years as of the date of bid opening * * *.
>
> The engines cited as meeting the operating experience requirement shall be the same model, shall have operated at or above the same rating, speed, brake mean effective pressure, and shall have the same cylinder configuration as the units proposed hereunder. * * *

It is evident that the development of a suitable product history clause for assessing switchgear would take an indeterminate amount of time, however. Once developed, the clause—insofar as the present case is concerned—would have to be released in a new competitive solicitation so that any concern which might have decided not to submit a quotation to Hirsch because of the original specifications would

also have a chance to bid along with Powercon. Moreover, we cannot conclude that Powercon would necessarily qualify under that clause or submit the lowest quotation for the switchgear.

In any event, the grantee has informed us that: "The prime contractor, Hirsch Electric Company, issued a purchase order in November, 1976, to Allis Chalmers Corporation for the subject equipment which has since been manufactured and partially delivered. The circuit breakers have been delivered to Cleveland and the remainder of the equipment is scheduled for delivery in June. Final installation of this equipment is scheduled to be completed by the end of July. Based on the above, it is evident that any change of equipment suppliers at this time would be a practical impossibility." We concur in this assessment especially in view of the critical nature of the equipment.

We are recommending, however, that EPA bring the switchgear specification problem to the attention of its grantees nationally so that in future grantee procurements a suitable product experience clause might be drafted before a solicitation is released.

[B-188516, B-188517, B-188656]

Contracts—Specifications—Waiver of Requirement—Modified Contracts and Amended Solicitations

Where the Government has unknowingly accepted nonconforming item, concedes acceptability of item by granting waivers accompanied by price decreases under existing contracts and has amended current solicitations and presumably will amend future solicitations to permit delivery of item, minimum needs are overstated. Although the record demonstrates uncertainty as to impact on bidding, proper method to determine savings is resolicitation of two preaward procurements reflecting needs of Government. Concerning the two awarded contracts, if any favorable action is contemplated on current or future requests for waivers, termination with view toward resolicitation should be considered.

Contracts—Protests—Authority To Consider—Waiver of Specification Requirement After Award By Contract Modification

Post-award protests against waiver of specification requirement after award by contract modification will be considered where request for waiver has not been acted on by agency under one contract and no request for waiver has been made under another contract although presumably such request is foreseeable.

In the matter of Domar Industries, August 26, 1977:

This decision involves the following four solicitations issued by the Department of the Army, United States Army Materiel Development and Readiness Command:

Reference No.	Solicitation	Issued	Contract
B-188516	DAAE07-77-B-3240	February 2, 1977	(Before award)
B-188517	DAAE07-77-B-3238	February 4, 1977	(Before award)
B-188656	DAAE07-77-B-3246	January 20, 1977	DAAE07-77-C-3502
	DAAE07-77-R-3178	November 29, 1976	DAAE07-77-C-3350

Aurora Cord & Cable Company (Aurora) was the lowest bidder/offeror on each of the above solicitations. Domar Industries (Domar) has challenged any award to Aurora on that grounds that Aurora intends to use material not conforming to the specification in the fabrication of Military Part Number (MPN) 8724316, "Body Assembly, Trailer Plug" (Plug) and specifically the shell thereof. The plug is common to all of the end items (Cable Assemblies) being procured under the above solicitations. The record indicates that end items containing nonconforming plugs have been unknowingly accepted by the Government for a number of years. This did not surface until after the Army investigated the grounds for Domar's protests filed in this office.

The plug consists of several metal parts, one of which is the "Shell" (MPN 8701279). The drawings require the shell to be made from material in accordance with specification QQ-S-631, or QQ-S-634, or QQ-S-637, which is steel bar stock. Aurora, in response to Domar's protest, admitted use of seamless steel tubing for several years. Additionally, Aurora contends that it is merely supplying the same material for the shell as numerous other contractors have done since 1958. There is no question but that compliance with the specification is possible. The acceptance of nonconforming material is directly attributable to the Army's admitted failure to closely scrutinize the alleged certificates of conformance of Aurora's plug subcontractors. The Army has reported that improved inspection and acceptance procedures to avoid recurrences have been implemented.

A waiver under a contract not involved in the protests (DAAE07-76-C-1505) was requested by Aurora on March 4, 1977, after the Government declined to accept additional nonconforming plugs. The Government allowed the waiver after Aurora had shipped almost the entire contract quantity of nonconforming items, on the oral advice of the Defense Contract Administration Services Management Area, Chicago (DCASMA), that the cost of the plug would be about equal when made from either material.

Following its original waiver request under contract DAAE07-76-C-1505, Aurora requested similar waivers on four additional contracts and one purchase order, as follows:

Contract/Purchase Order No.	Award Date
DAAE07-76-C-1505	November 14, 1975
DAAE07-76-C-2876	March 26, 1976
DAAE07-76-C-4310	August 19, 1976
DAAE07-76-C-4204	July 28, 1976
DAAE07-76-M-5097	January 20, 1977
DAAE07-77-C-3350 (B-188656)	January 28, 1977

Contract modifications have been issued with a negotiated decrease in unit prices for all of the above except the contract under protest for which a waiver was requested.

The DCASMA Price/Cost Analysis Report upon the waiver requests differs from the earlier oral advice that the cost of the plugs using bar stock or tubing was indicated to be approximately equal due to offsetting cost differences. Bar stock was supposedly lower in material cost but higher in machining cost than tubing. The report indicates lower costs in both material and machining in the use of tubing. An amount for the plug using the specified bar stock could not be calculated based on actual experience, since no companies had previously used that material. The report found that Aurora had never purchased bar stock in the past or had a current supply. Aurora had purchased and used steel tubing since the inception of the contracts for which waivers were requested. The report recommended a price reduction of $0.29 per unit whereas Aurora had proposed price increases.

The Army and Aurora have raised the question of the timeliness of Domar's protests under B-188656. The closing date for receipt of proposals under request for proposals (RFP) DAAE07-77-R-3178 was December 27, 1976. Aurora was awarded contract No. DAAE07-77-C-3350 on January 28, 1977, and on the same day written notice of award was mailed to the protester. Domar did not file a protest with this Office until March 23, 1977.

Under invitation for bids (IFB) DAAE07-77-B-3246, bids were opened on February 15, 1977. Award was made to Aurora on February 23, 1977. Notice of award was mailed to Domar on the same day. Domar filed its protest with this Office on March 23, 1977. Both the Army and Aurora argue that, since Domar was aware prior to award that Aurora previously used nonconforming material in the plug, the protest to be timely should have been filed within 10 working days after Domar received notice of award. 4 C.F.R. part 20 (1977).

The bases for Domar's protests are that (1) Aurora, because of its past practice of supplying nonconforming items, should be determined nonresponsive and (2) waiver of the requirements by the Government immediately after award would be prejudicial to other bidders. The first basis of protest is clearly untimely since Domar received notice of award within a few days of mailing and protested here well over 10 days thereafter. However, the Government has withheld action on the waiver request under contract DAAEO7-77-C-3350 and has stated that further waivers will be considered individually upon request from Aurora, presumably referring to contract DAAEO7-77-C-3502 and contracts for which Aurora is in line for award. It would be incongruous to dismiss Domar's protest as untimely and then await expected

future waivers based on past Army action after issuance of our decision so that Domar could then timely protest the waivers.

Accordingly, we will consider Domar's protests on these two contracts on the merits as well as the protests before award which are also timely filed.

The Army states that the nonconforming plug has not been reported as a cause of failure on 20 end items which included the plug. Further, in the agency report, the Army admits that "an amount for the 'Plug' using the specified bar stock could not be calculated based on actual experience since no companies had previously used that material." Also, there is an indication from Aurora that to the best of its knowledge conforming material has not been used since 1958.

It is clear that the Government has overstated its minimum or actual needs in requiring the shell to be made from bar stock. Besides accepting the nonconforming items in the past, originally unknowingly, and presently by the formal granting of waiver requests, the Army has amended outstanding and, we presume, will amend future solicitations, to reflect an Engineering Evaluation Report (EER) which will permit the use of steel tubing as additional optional material with which to perform contracts.

As for the two protests filed before award, we did state in *Edward B. Friel, Inc.*, 55 Comp. Gen. 231, 237 (1975), 75–2 CPD 164, that "The fact that the terms of an IFB are deficient in some way does not necessarily justify cancellation after bids have been opened and bidders' prices exposed." See *Joy Manufacturing Company*, 54 Comp. Gen. 237 (1974), 74–2 CPD 183. However, in determining if such a cogent and compelling reason exists to justify cancellation two factors must be examined: (1) whether the best interest of the Government would be served by making an award under the subject solicitation, and (2) whether bidders would be treated in an unfair and unequal manner if such an award were made.

The question of whether bidders would be competitively prejudiced if such an award were made cannot be answered with certainty from the record. Domar contends the reduction in material and machining costs to make plugs from tubing is $0.81 to $0.84 per unit not including profit and general and administrative (G&A) expenses. The DCASMA report estimates only a $0.29 difference per unit or less because of possible scrap savings by Aurora in using bar stock. To further emphasize the uncertainty, the DCASMA report was admittedly based on certain judgmental areas including agency estimates rather than contractor-provided G&A rates. Also, Aurora and the Army negotiated actual contract decreases per unit of $0.16. The record also shows that Aurora is at least $1 per unit below Domar on all of the protested so-

licitations. Under the circumstances, we feel the proper method to determine the possible cost savings to the Government and impact resulting from this apparent inequality of competition is resolicitation accurately reflecting the needs of the Government after the cancellation of DAAEO7-77-B-3240 and DAAEO7-77-B-3238. *Cummins Mid-America, Inc.*, B-185664, May 26, 1976, 76-1 CPD 343, and cases cited in text; see *Terra Corporation*, B-181447, December 26, 1974, 74-2 CPD 383.

With regard to the two contracts awarded, similar to our holding above, we believe that since the Army overstated its minimum needs in competing the contracts, the Army should consider the feasibility of terminating those contracts with Aurora for the convenience of the Government with a view toward resolicitation if any favorable action on current or future requests for waivers is contemplated.

Accordingly, the protest of Domar is sustained.

[B-164031(2)]

Public Buildings—Moving Costs, etc., of One Agency for Convenience of Another—Appropriation Availability

To the extent one agency requires the relocation of another to meet its own space needs and the relocation is performed for the benefit of the requesting agency, its appropriations, not those of the relocated agency, are available to pay the cost of the relocated agency's move. The appropriations of the relocated agency would not be available to that same extent since the costs incurred are not necessary for it to carry out the purposes of its appropriations. 35 Comp. Gen. 701 and other similar cases overruled.

Appropriations—Availability—Agency's Payment of Moving Expenses of Another Agency to Obtain Space—Health, Education and Welfare Department Paying Moving Expenses and Rent of Another Agency to Consolidate HRA in One Building—Apportionment of Costs

Intraagency apportionment by HEW of Health Resources Administration moving costs among appropriations of other HEW constituent agencies which benefitted from move, on basis of amount of additional space made available to each agency, is proper if apportioned part of costs incurred was necessary or incident to meeting space needs of each constituent agency. 35 Comp. Gen. 701 and other similar cases overruled.

In the matter of funding for the Health Resources Administration move, August 31, 1977:

This decision is to the Secretary, Department of Health, Education, and Welfare (HEW), concerning the proposed manner of funding for the move of the Health Resources Administration (HRA), Public Health Service (PHS), HEW, to Prince Georges Center, Hyattsville, Maryland.

The reorganization of PHS in July 1973 resulted in the establishment of six health agencies, one of which was HRA. Each of these health agencies has continued to expand its operations in Montgomery County, Maryland, since that time. The employees of HRA were located in three seperate buildings in Montgomery County. Because of the increasing space needs of all the organizational units within PHS, including HRA, it became necessary for PHS to request additional space from the General Services Administration (GSA). Since there was apparently no additional space available at comparable rental rates in Montgomery County, Maryland, near the other PHS occupied office space, GSA made available the Prince Georges Plaza Building, in adjoining Prince Georges County, Maryland, which was being vacated by the Navy.

According to a report dated March 28, 1977, concerning this matter from HEW, PHS had two broad alternatives when the space was requested: (1) to locate in the new space all the additional employees of each of the several agencies which were expanding, or (2) to use the opportunity to consolidate the additional number of employees of each of the scattered agencies into one location for each agency. The latter alternative was selected because PHS determined that it would provide for a more efficient operation. As stated by HEW, in its submission of March 28, 1977:

> * * * Such a move by HRA would consolidate its employees at that location, albeit one removed from the central offices of PHS in the Parklawn Building, and simultaneously permit the expansion of NIH operations on its own campus. Moreover, agencies such as the Food and Drug Administration, the Alcohol, Drug Abuse, and Mental Health Administration, and the Health Services Administration could, by using space being vacated, expand into contiguous space. The decision also avoided any further dispersion of those agencies in the future in relation to their additional employees.

HRA contracted with GSA to make certain alterations to Prince Georges Plaza to meet its needs. See, in this regard, our Report, "Proposed Moves of Certain Agencies in the National Capital Region," LCD-77-309, January 27, 1977, on this matter for an explication of the details of the move. Pursuant to the statutory provisions discussed below, the alterations were to be performed on a reimbursable basis. The total amount of the reimbursable charges arising out of the alterations, according to HEW, is $1 million.* Rather than charge the full cost to HRA funds, it was decided to charge the costs of the move to the various health agencies and other organizational units within HEW (henceforth collectively referred to as "agencies") purportedly benefitting from the move, on the basis of the amount of

*We have been informally advised by HEW personnel, that the difference between this figure and that reported in our Report, LCD-77-309, *supra*, is due to funding by GSA of the remainder of the cost.

additional space made available to each. HEW's submission indicates, in this regard, as follows:

> * * * Since the reason for securing additional space was to meet the needs of the several expanding programs and, at the same time, to effect consolidation, it was decided that each component of PHS and the other organizational units involved should share in the cost of the special services in direct proportion to the additional space each was acquiring through the planned moves, which included not only the move of HRA into Prince Georges Plaza but also the expansion of the other organizational units into space made available as a result of the moves. The money for that purpose was to be provided out of direct operating funds of the several organizational units involved as follows:

Organizational Unit	Estimated Gain of New Space in Square Feet	Share of Cost
Office of The Assistant Secretary for Health	9, 000	$38, 000
Alcohol, Drug Abuse, and Mental Health Administration	7, 000	30, 000
Center for Disease Control	10, 000	42, 000
Food and Drug Administration	45, 000	191, 000
Health Resources Administration	35, 000	148, 000
Health Services Administration	38, 000	161, 000
National Institutes of Health	92, 000	390, 000
Total	236, 000	$1, 000, 000

HEW, in effect, presents three reasons for this manner of funding. First, it contends that the agencies acquiring additional space are benefitting directly or indirectly from the HRA move, and should therefore pay a proportional share of the costs. Second, six organizational units are actually involved in the moves and are being consolidated, and since the decision to move HRA to Prince Georges Plaza permitted such consolidation for the benefit of PHS, as a whole, and its constituent units individually, the concept of apportioning costs among those units is grounded in good management, policy, and economy. Finally, HEW suggests that the proposed manner of funding is specifically authorized by GSA's Federal Property Management Regulations, at 41 C.F.R. § 101–21.601(b) (1976), set forth *infra*.

We have on several occasions considered the question of funding for an agency's move, when it is precipitated not at its own request, but rather by a request or demand of another agency which desired or needed such space for its own purposes. See, in this regard, 35 Comp. Gen. 701 (1956), 34 *id.* 454 (1955), 33 *id.* 423 (1954), 27 *id.* 391 (1948), 22 *id.* 462 (1942), B–118803, February 24, 1954, B–86457, June 3, 1949, and B–27024, July 7, 1942. In each of the cases cited above we determined that the appropriations of the agency requesting the move could not be used to pay for the moving or related costs (including lease payments or construction costs for replacement space) of the

moving agency. The three basic rationales underlying our decisions were as follows:

1. Use of appropriations of the requesting agency would augment the appropriations of the moving agency;
2. The appropriations of the requesting agencies were not available for funding space requirements of other agencies, and their use would therefore violate 31 U.S.C. § 628 (1970) which provides that appropriations are available solely for the objects for which they were made; and
3. GSA may require payments, to the extent that its appropriations are insufficient, from agencies to which space is assigned, to fund the expenses of moving and the costs of rent, and therefore reimbursments for such costs to GSA may only be made by the agency which is moving into leased quarters.

GSA has been given broad authority over the management of public buildings. It is empowered to furnish space and related services to the agencies, to assign and reassign the space acquired, and to charge rental therefor (usually referred to as Standard Level User Charge (SLUC)). GSA may also provide additional special services on a reimbursable basis. Monies received from SLUC or from special services are deposited into the Public Buildings Fund established by the Public Buildings Amendments of 1972, Public Law 92–313, June 13, 1972, 86 Stat. 218. GSA has issued statutory regulations to carry out its functions under the Act, as amended. Pertinent statutory provisions include 40 U.S.C. §§ 285, 289, 304c, 486, 490, and 490 nt. (1950 Reorganization Plan No. 18, 64 Stat. 1270, July 1, 1950). In particular, 40 U.S.C. §§ 490(f)(6) and (j) (Supp. V, 1975) provide respectively as follows:

40 U.S.C. § 490(f)(6):

(6) Nothing in this section shall preclude the Administrator from providing special services not included in the standard level user charge on a reimbursable basis and such reimbursements may be credited to the fund established under this subsection.

40 U.S.C. § 490(j):

(j) The Administrator is authorized and directed to charge anyone furnished services, space, quarters, maintenance, repair, or other facilities (hereinafter referred to as space and services, at rates to be determined by the Administrator from time to time and provided for in regulations issued by him. Such rates and charges shall approximate commercial charges for comparable space and services, except that with respect to those buildings for which the Administrator of General Services is responsible for alterations only (as the term "alter" is defined in section 612(5) of this title), the rates charged the occupant for such services shall be fixed by the Administrator so as to recover only the approximate applicable cost incurred by him in providing such alterations. The Administrator may exempt anyone from the charges required by this subsection if he determines that such charges would be infeasible or impractical. To the extent any such exemption is granted, appropriations to the General Services Administration are authorized to reimburse the fund for any loss of revenue.

See also 40 U.S.C. §§ 304c and 304d (1970). Section 486(c) of title 40 grants general authority to the Administrator to issue regulations to carry out his functions under the Act.

Various Executive orders have further delineated GSA's functions under the Act. Two separate Executive orders have provided, in effect, that space assignment should be accomplished after consideration of the following factors, among others: (1) economy and efficiency of Government activity; (2) consolidation of Federal agencies; and (3) consultation with Federal agencies as to their perceived requirements. See Executive Order No. 11512, February 27, 1970, 40 U.S.C. § 490 note (1970), which superseded a prior Executive Order (No. 11035, July 9, 1962) with similar provisions. Executive Order No. 11512 provides in pertinent part as follows:

> Sec. 2. (a) The Administrator, and the heads of executive agencies, shall be guided by the following policies for the acquisition, assignment, reassignment, and utilization of office buildings and space in the United States:
> (1) Material consideration shall be given to the efficient performance of the missions and programs of the executive agencies and the nature and function of the facilities involved, with due regard for the convenience of the public served and the maintenance and improvement of safe and healthful working conditions for employees;
>
> * * * * * * *
>
> (5) *Space planning and assignments shall take into account the objective of consolidating agencies and constituent parts thereof in common or adjacent space for the purpose of improving management and administration;* [Italic supplied.]

To carry out these legislative and Executive mandates, GSA has promulgated the Federal Property Management Regulations. As originally proposed and published in the Federal Register on February 8, 1974 (39 F.R. 4888, 4924), proposed section 101–21.601 of title 41, Code of Federal Regulations (FPMR), provided as follows:

> § 101–21.601 Budgeting information for standard level user charges.
> (a) GSA provides to agencies summary level and detailed documentation in support of budgetary information it submits for the space and related services it furnishes. The documentation identifies organizations and organizational elements by an agency and bureau code numbering system.
> (b) Agencies reassigned space as a result of reassignment directed by GSA at space and related service charges higher than that budgeted for are billed for charges applicable to the space assigned immediately preceding the reassignment until the first fiscal year that funds for the higher cost space can be budgeted for. Agencies reassigned space as a result of reassignment [sic] directed by GSA at space and related service charges lower than that occupied immediately preceding the reassignment are billed for charges applicable to the newly assigned space.
> (c) Agencies reassigned space as a result of reassignment requested by the agency at space and related service charges either higher or lower than that budgeted for are billed for charges applicable in the newly assigned space.

As finally amended and adopted, a new subsection (b) was added to provide:

> (b) Federal agencies that require relocation of other agencies because of expanding space needs are responsible for funding (1) moving and related costs incurred by GSA in relocating displaced agencies and, (2) with respect to that amount of replacement space for the space previously occupied by the displaced agency(ies), such alterations above the standard provided by GSA as are re-

quired to make such amount of replacement space comparable to such previously occupied space on a square foot for square foot basis.

We have been informally advised by GSA personnel that several agencies requested the insertion of subsection (b) as now constituted because of concern that one Federal agency, after consultation with the GSA as provided in the Executive orders noted above, might request or demand that another agency vacate certain space to permit consolidation of the first agency. Subsection (b) as currently constituted was inserted to assure that the moving agency would be compensated for any moves not made at its request.

41 C.F.R. § 101–21.601(b) is a statutory regulation issued pursuant to GSA's broad authority, outlined above, to provide and charge for space and services provided by it in the manner it deems most appropriate. By itself, however, 41 C.F.R. § 101–21.601(b) cannot make an agency's appropriations available for objects for which it could not otherwise be used. As noted above, our prior decisions have stated that the appropriations of an agency requesting or demanding a move by another agency were not available for funding the space requirements of such other agency and, such use of appropriations would violate 31 U.S.C. § 628 and augment the appropriations of the moving agency. We have reconsidered these holdings.

Appropriations of the various agencies are generally made available to meet space needs and related costs. It is a long established principle that when an appropriation is made for a particular object, it confers, by implication, authority to incur expenses which are necessary or incident to the proper execution of the object. See, *e.g.*, 50 Comp. Gen. 534 (1971). Having fully reviewed the matter, we are now of the view that when one agency requires the relocation of another to meet its own space requirements, the relocation is done for the benefit of the requesting agency. Therefore, we now believe that the costs of the move must be considered necessary or incident to meeting the space needs of the requesting agency. Use of the requesting agency's appropriations would not, therefore, augment the appropriations of the displaced agency. In fact, to the extent the move and related renovations to accommodate the displaced agency are made due to the request of another agency, the costs thereof cannot be considered necessary to further the purposes of the displaced agency's appropriations. Hence, the displaced agency's appropriations are not available to pay those expenses.

Accordingly, charges assessed by GSA pursuant to 41 C.F.R. § 101–21.601(b) against an agency requiring the relocation of another, to reimburse GSA for moving and related costs incurred by GSA in relocating the displaced agency, may properly be paid by the agency charged.

To the extent inconsistent, 35 Comp. Gen. 701 (1956); 34 *id.* 454 (1955); 33 *id.* 423 (1954); 27 *id.* 391 (1948); 22 *id.* 462 (1942); B-118803, February 24, 1954; B-86457, June 3, 1949; and B-27024, July 7, 1942 are hereby overruled.

It remains to consider whether HEW may apportion the charges assessed by GSA against it for costs incurred in connection with the HRA move in the manner noted above. The HRA move will permit consolidation of seven separate agencies and organizational elements of HEW. While it will provide space in one central location for HRA, and is therefore for the benefit of HRA, by freeing space to be made available to six other constituent agencies within HEW, the move is also of benefit to those agencies. This is especially evident when it is considered that the additional space in Prince Georges Plaza could have been made available to meet the increased space needs of all seven elements of HEW. Instead, however, PHS, of which HRA is a constituent part, made a management decision to utilize the additional space to consolidate all those elements, which were previously scattered in several locations.

In light of above, it is our view that the apportionment of costs by HEW among the appropriations available to various organizational elements of HEW resulted in the use of those appropriations for expenses incident or necessary to the objects for which they were made—*i.e.*, to provide for, among other things, the space needs of each individual agency—and did not constitute an augmentation of HRA's appropriation.

[B-187560]

Contracts—Protests—Court Action—Dismissal—Without Prejudice—Consideration On Merits by GAO

Argument that, as a matter of policy, General Accounting Office should not consider merits of protest after protester has had hearing in United States District Court which resulted in adverse findings and conclusions of law in denial of motion for preliminary injunction is not adopted. Since ruling on either temporary restraining order or preliminary injunction is not final adjudication of merits and if case is dismissed without prejudice, we will consider merits of the protest if otherwise timely filed.

Contracts—Negotiation—Requests For Proposals—Protests Under—Allegation of Bias Not Substantiated

Where protester contends that bias against it by agency personnel in evaluating its technical proposal was sole cause of its omission from competitive range, protester must establish existence of bias and impact upon its competitive position by showing that evaluation was not reasonable. Even assuming bias existed, since there is no indication that it affected protester's competitive standing, protest is denied.

In the matter of Optimum Systems, Inc., August 31, 1977:

Optimum Systems, Inc. (OSI), raises one issue in its protest against its exclusion from the competitive range in connection with request for

proposals (RFP) No. WA 75-E216, issued by the Environmental Protection Agency (EPA). OSI maintains that EPA's bias in its evaluation of OSI's proposal was the sole reason it was not considered in the competitive range. The RFP was for automatic data processing (ADP) services and was ultimately awarded to the Computer Network Corporation (Comnet).

PROCEDURAL BACKGROUND

OSI's protest was filed with our Office on October 4, 1976. OSI was informed by EPA that its proposal was not considered to be in the competitive range on August 16, 1976. By letter of August 27, 1976, OSI protested that action to EPA, which denied the protest by letter of September 22, 1976. At the time it filed its protest with our Office, OSI advised that a debriefing was scheduled shortly thereafter. Our Office acquiesced in OSI's request that it be permitted to submit the details of its protest after the debriefing. The debriefing on November 24, 1976, apparently failed to satisfy OSI's objections.

Consequently, on November 30, 1976, OSI filed its Complaint for Declaratory Judgment and Injunctive Relief in the United States District Court for the District of Columbia, Civil Action No. 76-2198. On that date, a temporary restraining order (TRO) was issued pending further order of the court and a hearing on the Application for Preliminary Injunction was set for December 6, 1976. After consideration of the complaint, depositions, memoranda, and testimony, United States District Court Judge John Lewis Smith, Jr. ordered on December 7, 1976, that the Motion for Preliminary Injunction be denied and the TRO be vacated and dissolved. Judge Smith found that OSI had "failed to satisfy the requirements for the granting of a preliminary injunction." Our consideration of the case was suspended during this period.

At that point, our Office informed OSI that, pursuant to 4 C.F.R. § 20.10 (1976) of our Bid Protest Procedures, we could not consider the merits of the protest while the case was before the court. Therefore, upon motion of OSI, Judge Smith ordered on February 24, 1977, that OSI's motion to dismiss without prejudice be granted. OSI then pursued its protest with our Office.

STATEMENT OF PROTEST

Essentially, OSI maintains that its omission from the competitive range was caused solely by an undue bias against it by the EPA evaluators, which manifested itself in the form of unwarranted low scores.

OSI traces the prejudice to the predecessor contract which it was performing. OSI was awarded the ADP contract to provide a wide range of computer services on a fixed-price basis after a competitive

procurement in 1973. The record indicates that a degree of dissatisfaction with OSI's performance existed within the EPA components served by OSI. These were primarily the Management Information and Data Systems Division (MIDSD) and its user group called the Storet Division, concerned with statistics and data on the nation's waterways. The initial dissatisfaction was based upon the belief of the user community that OSI was reaping an inordinately high profit on the contract. In fact, a "Preliminary Comparison of Operating Costs for Application Run at the OSI and NCC Facility," prepared by MIDSD in October 1975, called OSI's monthly bill "juicy." (NCC is another EPA installation for ADP work.) The contract was awarded on a fixed-price per unit basis based upon the EPA estimated use in 1973. We note that the actual usage far exceeded that estimated, which gave rise to higher total profits for OSI than EPA expected.

OSI outlines other examples of what it terms bias against it. The history of these events may be stated briefly at this point. The first events occurred in January 1973 and concerned the undue withholding of information by the head of the Storet Division as to the location of EPA computer terminals. OSI maintains that knowledge of that information would have permitted it to meet the contract requirements in a more timely and responsive manner. The second occurrence was also in 1973 and involved alleged misuse of the computer system to disseminate to all EPA terminals the personal resume of an EPA computer official, causing embarrassment to the EPA official and damage to OSI's reputation for its inability to maintain the confidentiality of its systems. Third, in May 1974 the head of the Storet Division unsuccessfully tried to have work, properly the subject of the 1973 contract, transferred to another contract. Fourth, the head of the Storet Division, as moderator of a conference on Storet use held December 2–4, 1975, attended by a large segment of the EPA computer community, allegedly indicated that his preference to perform the protested contract was anyone other than OSI. It is further alleged that he said he would actively work to bring about that change. Allegedly, the remarks were spontaneous and delivered just prior to the submission of best and final offers for the instant RFP. (These allegations have been denied in a deposition taken in connection with the court proceedings.) Fifth, on December 17, 1975, an EPA employee entered certain commands into the OSI computer specifically designed to render the computer inoperable. This deliberate action occurred during OSI's benchmark test which must have been successfully completed to be eligible for further competition for the RFP. The individual who performed this act was in the Storet Division. Sixth, in February 1976, MIDSD published the *EPA Systems News*, which impliedly criticized OSI for the amount of its billings.

THE BLUE RIBBON PANEL

As a result of the accumulated effect of this chain of events, OSI lodged a formal protest with EPA on March 23, 1976, alleging bias against OSI in the conduct of the procurement. Essentially, OSI maintained that it could not receive a fair and impartial consideration of its proposal from the Technical Evaluation Committee (TEC) which was delegated the responsibility to evaluate the technical merits of its proposal. As a consequence, the source selection official (SSO) for the procurement in conjunction with the Assistant Administrator for Planning and Development appointed a Blue Ribbon Panel (Panel) to investigate the charges on May 24, 1976. The Panel was composed of two senior level ADP officials from the Department of Agriculture and the National Aeronautics and Space Administration. The charter of the Panel stated, in part:

> * * * Specifically, EPA management wants to know if the OSI proposal was evaluated fairly and objectively in spite of any personal feelings that might have been harbored by members of the evaluation panel.
>
> We are requesting, therefore, that the blue ribbon panel provide EPA with a written report of their findings so that the Agency can decide either (1) to let the evaluation stand, or (2) to begin the process anew. The panel is invited to examine any documents, interview any EPA personnel, and/or perform any task that in its judgment would be necessary to assure itself that the integrity of the procurement process has not been violated.

The Panel's investigation concluded on June 18, 1976, when it presented its formal report to the Assistant Administrator for Planning and Management. Pertinent portions of the report follow:

> 1.2 *Purpose and Scope of Report*
>
> The purpose of this report is to document the findings of the authors on the question of bias and its effect on the procurement process. This report has a limited scope. It deals specifically with the displeasure and concerns expressed in the OSI letter of March 23, 1976, to EPA. Having dealt with the basis for these OSI concerns and the question of their validity, the report goes on to deal with their effect on the quality of treatment guaranteed OSI by procurement laws and regulations in their responding to the Request for Proposal.
>
> * * * * * * *
>
> 1.4 *Executive Summary*
>
> As a result of our review and discussions, we have concluded:
>
> (1) There was considerable dissatisfaction with OSI services. However, it has been stated to the authors that this dissatisfaction has diminished somewhat during the past year.
>
> (2) There is considerable basis or at least the perception on the part of some EPA employees that EPA is being charged more for the services provided by OSI than under some other contractor or some more satisfactory contractual arrangement with OSI.
>
> (3) At various times, this discontent with OSI services and the perceived (whether actual or not) overcharge by OSI has surfaced in explicit statements and outward manifestations. The motivation for these is difficult to uncover. However, the authors attribute this enmity primarily to "the lack of co-located personnel and the resulting loss of communication and understanding."
>
> (4) The timeliness of these statements and activities has been most unfortunate, occurring as they have in the midst of a very sensitive and mutually critical procurement to EPA and OSI.
>
> (5) OSI, for its part, has seized upon issues as they have occurred to promote its best interests relative to the solicitation and potential contract to be awarded from RFP No. WA 75-E216.

(6) The technical evaluation panel has had an extremely difficult task. In addition to the ordinary duties of each member, it has been asked to devote an unexpectedly long period of time to the technical evaluation of a voluminous and sophisticated set of proposals. These have been made even more voluminous by the format requested by EPA in its RFP.
(7) In evaluating OSI and Comnet proposals relative to the EPA specifications, the technical evaluation panel appears to have been inconsistent in addressing some strengths and weaknesses of the two companies relating to the same requirements.
(8) It is the authors' belief that OSI's relative ranking among the offerors was not changed significantly through these inconsistencies.

The factual investigation centered on four types of influence that permeated the relationship between EPA and OSI: (1) role of audit reports; (2) relationship of OSI and NCC cost study and related newsletter; (3) impact of the "downing" incident on the benchmark test; and (4) other relevant activities, statement and attitudes. As the executive summary indicates, there existed a degree of dissatisfaction towards OSI within EPA. The Panel compared the equality of treatment of the OSI and Comnet proposals, as follows:

3.1 *Comparative Equity in Treatment of Optimum Systems, Inc., and Computer Network Corporation Throughout the Procurement Cycle*

From the comparative analysis referenced above, the authors determined that several inconsistencies exist in the way "strengths and weaknesses" were assigned to the two companies reviewed by the authors. Citing a particular example, something which was declared nonresponsive for both OSI and Comnet was treated differently when viewed under the "strengths and weaknesses" area. After properly declaring it nonresponsive, OSI repeatedly was cited with a weakness for offering that item in its proposal. In the evaluation of Comnet, on the other hand, the item was never mentioned as a weakness beyond the point where it was originally declared nonresponsive. This treatment indicates a case of "double jeopardy" for one offeror and not for the other. In other parts of the evaluation report, the technical evaluation panel members appear to be using "style" and "emphasis" in a manner which could be construed as favoring one vendor over the other. Specifically, in discussing the strength of the two vendors offering essentially the same item, the panel members, on the one hand, use considerable verbiage and use of adjectives to highlight the Comnet offering while, on the other hand, use only brief statements and routine adjectives in describing the same offering from OSI. Since this happens more than once, the cumulative effect cannot be overlooked as totally accidental.

Another inconsistency seems to occur when essentially the same offering by the two vendors (Comnet and OSI) evoke contradictory responses from the panel as pertains to the two vendors. In responding to one section of the RFP dealing with the hardware capacity, both vendors essentially offered an IBM 370/168 configuration. Comnet did not have a 370/168 system at the time of their submission; OSI, on the other hand, had a 168 system for the use of the Federal Energy Administration (though not for EPA).

The panel, however, gave Comnet a "strength" while according OSI a "weakness" in this particular area. In another area of the RFP. an uninterruptible power supply (UPS) is required. OSI already has a "UPS" installed in its computer center. Comnet proposes to combine the "UPS" and the motor generator also requested. Both companies are given "strengths" under "UPS." However, OSI is given this strength with approximately three words, whereas Comnet is accorded several lines of "verbiage" to receive the same strength.

In one case, the panel charged a weakness to a vendor erroneously when it declared that the particular vendor in question had not made any mention of a specific requirement requested by EPA. The vendor had actually offered the required item (which was relatively minor in nature) and the net result was a misapplication of strengths and weaknesses to that particular vendor. In this case the vendor was Comnet.

In addition to the inconsistencies illustrated above regarding the treatment accorded OSI and Comnet, there is one other possible impropriety which should be surfaced at this time. It is that a disproportionate number of advisors were

utilized for scoring the various sections of the proposals. Notwithstanding the fact that there were at various times approximately 30 members of the technical advisory group, only two of these technical advisors scored one of the sections. It should be pointed out that these two technical advisors did evaluate and score all offerors' written proposals for this section. Secondly, detailed technical knowledge in the area covered by this section of the requirements is not widespread amongst the ADP community. Consequently EPA may not have had more knowledgeable technical expertise available. The technical evaluation panel members have stated that they required the technical advisors to defend their scorings of this section through the same freedom of expression interchange discussed elsewhere in this report.

In summary, from a review of the strengths and weaknesses accorded OSI and Comnet, and the overall treatment accorded both vendors during the evaluation and procurement cycle, the authors find: (1) There were a disproportionate number of technical advisors who scored the various sections of the proposals. It does not appear to have caused unequal treatment of any vendor. (2) Some inconsistencies in the treatment of "strengths and weaknesses" have been found. While individually these seem to be of minor importance, if viewed cumulatively, they could be construed as a tool to weaken the position of OSI and strengthen that of Comnet. While the scores were not individually correlated with each strength and weakness, thus precluding the authors from making a judgment as to the degree that these inconsistencies actually hurt OSI or helped Comnet, it is felt that the relative rankings of these vendors in relationship to each other, would not have been altered.

In addition, the Panel presented EPA with a three page, unofficial observation concerning related matters which surfaced during its investigations. The Panel has stated that this format was used because the observations were considered inappropriate for inclusion in the official report. The Panel stated that the matters were excluded because they were considered outside of the scope of the charter and might "restrict management's flexibility if made a part of the official report." Five observations were offered:

1. The technical evaluation panel may have exceeded its authority in declaring "unacceptable" all proposals offering shared computer systems.
2. It was probably a mistake to have only two technical advisors as sole evaluators of the telecommunications portion. The scores and rankings of these two evaluators were accepted by the panel totally. These two individuals did not attend the orals of the incumbent contractor OSI and did attend the orals of Comnet.
3. Within the group of "acceptable offerors," the panel established a subgroup called "above the competitive range" for purposes of further negotiation. When asked, the panel members almost unanimously stated that those acceptable offerors which were below the established competitive range could perform the requirements specified in the RFP though only with greater probabilities of difficulty or greater management risks. This delineation while perhaps legal may be questionable.
4. In scoring the vendor proposals, a range of points are given for adjective delineators such as "1–25 points; poor, 26–50; average or okay." In the final rankings some vendors with "average" or "good" strengths or weaknesses were recommended to be excluded from further negotiation. Not to negotiate further with a vendor after describing his offerings with the adjective delineators poor, average, good or outstanding may be difficult to explain on the part of the Agency.
5. It appears that EPA concentrated so much effort in the security area that some questionable procurement practices may have been introduced such as those mentioned above.

The Panel also offered suggestions relative to the observation designed to remedy the noted deficiencies for use on the current effort and future procurements.

EPA ACTIONS

EPA concluded its initial evaluation of proposals on April 26, 1976, when the TEC transmitted to the SSO its final technical evaluation report. Of the three sections in the RFP, OSI was rated sixth of seven in computing services (section I), third of four in telecommunication services (section II) and fifth of seven in user support services (section III). In all three cases, the report indicated the TEC's conclusion that OSI's proposal was "outside the competitive technical range." The ratings were arrived at by the TEC members after reviewing written comments of technical advisors and their own review of the proposals.

No action was taken on this report pending the outcome of the Panel's investigation. After the Panel's report was received, the SSO requested the TEC to reconvene to rank all proposals numerically, which had been omitted in the April report. This was accomplished by amendment No. 1 to the technical evaluation report, dated July 12, 1976. On July 27, 1976, the Chairman of the TEC sent a memorandum to the SSO to clarify the use of the "technical competitive range" used in the report. The Chairman indicated that the TEC used the term to connote technical acceptability of the proposals in the competitive range, while those considered outside of the competitive range were deemed unacceptable.

Thereafter, in August the SSO reviewed both reports of the TEC and the Panel's report, as well as the report of the committee which evaluated the cost and business proposals. Also, the SSO questioned the TEC members, analyzed the point ratings of the proposals and reviewed the proposals himself. Based upon this review, the SSO established a final competitive range consisting of two firms, excluding OSI. On August 16, 1976, OSI was notified of its exclusion from the competitive range.

PROCEDURAL ASPECTS

Comnet, the successful offeror, initially contends that our Office should not consider the merits of OSI's protest. Comnet correctly notes that our Office will not consider the merits of a protest when it is pending before a court of competent jurisdiction, or where there has been a final decision on the merits by the court. 4 C.F.R. § 20.10 (1976). Comnet urges our Office to extend this policy to the situation at hand, i.e., where the court has issued findings of fact and conclusions of law on the merits of a motion for preliminary injunction, even though the case is later dismissed without prejudice. While recognizing that the findings of the court in denying a preliminary injunction are not tantamount to a disposition on the merits, Comnet asserts that a policy of discouraging forum shopping and avoiding

unnecessary and possibly embarrassing confrontations with the court will ultimately serve to expedite the orderly process of Government procurement. Indeed, Comnet states that it has found no previous instance where our Office has considered a protest after a court decided the merits of the factual contentions in ruling on a Motion for Preliminary Injunction.

The factual situation presented here does appear to be a case of first impression. However, we have had occasion to rule on the merits of a protest following the denial of a Motion for a Temporary Restraining Order and the voluntary dismissing of the action by the plaintiff-protester. *Planning Research Corporation Public Management Services, Inc.*, 55 Comp. Gen. 911 (1976), 76-1 CPD 202. While counsel for Comnet attempts to distinguish that case from the facts at hand, since the ruling on either a request for a TRO or Preliminary Injunction is not a final adjudication of the merits, we believe that Comnet's position that we not consider the merits of the protest is not to be adopted.

DISCUSSION

Was OSI's proposal evaluated fairly? This is the central issue presented by this protest. As OSI states, this case fundamentally presents no technical issues at all. The first inquiry is whether the alleged bias exerted an unwarranted influence upon the evaluation of the proposals. If there is no competitive impact as a result of the alleged bias, then we are aware of no statute or regulation that has been violated. *Decision Sciences Corporation*, B-183773, September 21, 1976, 76-2 CPD 260. We have held that even where evaluators were aware that one offeror had issued reports critical of the agency, there is no basis to object in the absence of evidence that their opinions were unduly influenced. *Ackco, Inc.*, B-184518, September 14, 1976, 76-2 CPD 239. Thus, even assuming the validity of an allegation of bias, our inquiry has centered upon the manner in which the bias is manifested. To establish the existence or nonexistence of the effect of the bias, the protester must show by clear evidence that there was no rational basis for the evaluation. *Joanell Laboratories, Incorporated*, 56 Comp. Gen. 291 (1977), 77-1 CPD 51. In this vein, one of the ways to demonstrate the irrationality or unreasonableness of the evaluation is to inspect the relative merits of the proposals. *Economic Development Corporation*, B-184017, September 16, 1975, 75-2 CPD 152.

We note that the District Court viewed the same record now before our Office under the same standard as we do:

* * * In considering the first of the four requisites for an issuance of a preliminary injunction. likelihood of success on the merits, in a case as that here, the guideline for judicial review was articulated in *M. Steinthal & Co.* v. *Seamans*, 147 U.S. App. D.C. 221, 455 F.2d 1289 (D.C. Cir. 1971). In *Steinthal*, the Court made it clear that in this case

"courts should not overturn any procurement determination unless the aggrieved bidder demonstrates that there was no rational basis for the agency's action. [*Id.* at 147 U.S. App. D.C. 233, 455 F. 2d 1301.]"

Under this approach, the court concluded in pertinent part:

11. Neither the pleadings, the affidavits nor the testimony introduced at the hearing indicate any basis for concluding that the procurement decision challenged lacks a firm factual predicate. To the contrary, the testimony of the Source Selection Official, and members of the Blue Ribbon Panel rebut any notion that the procurement decision was motivated by any improper consideration. In short, the record before this Court demonstrates that there was a rational basis for the procurement action challenged.

12. The Request for Proposals and the responses thereto were scrutinized by technical personnel both from an automatic data processing vantage as well as from a cost and business vantage. The technical sections of the proposals were each point scored and each of the cumulative point scores were compared in the final analysis. Those cumulative scores revealed (See Exhibit A to the Defendant's Opposition Memorandum) that OSI's best proposal ranked eighth with regard to computer service, third of four proposals with regard to telecommunications service and fifth of seven proposals with regard to user support services. The successful offeror, COMNET, ranked first in each of the technical sections. Additionally, the testimony of the Source Selection Official indicated that there was substantial weakness in the cost and business aspects of OSI's proposals. The procedure set forth in the Request for Proposals and utilized in the evaluation process provided a rational basis upon which the Source Selection Official could make his determination. The record before this Court demonstrates that the Source Selection Official utilized the procedure established and made a determination consistent with results of that procedure.

13. The Court concludes that Plaintiff OSI has failed to demonstrate a likelihood of success on the merits, having failed to show that the procurement decision which it attacks lacked a rational basis or was in some other regard "illegal."

* * * * * * *

18. Based on the above, it appears to this Court that Plaintiff has failed to satisfy the requirements for the granting of a preliminary injunction. OSI has not demonstrated a strong likelihood of success on the merits. In fact, it appears that the decision challenged was properly based on the evaluation factors set forth in the Request for Proposals and was not the product of any improper consideration, including "bias." * * *

We also do not find any evidence of specific competitive prejudice to OSI. Rather, OSI, relying upon the report of the Blue Ribbon Panel, has taken the position that the existence of bias is *per se* an indication that the proposal was not fairly considered. However, while conceding the existence of "considerable dissatisfaction with OSI services" within EPA, as well as inconsistencies in the evaluation rating of Comnet and OSI, the Panel concluded that OSI's "relative ranking among the offerors was not changed significantly through these inconsistencies." In other words, any preconceived bias or dissatisfaction with OSI was not translated to the evaluation process in a manner that affected OSI's competitive posture. While OSI has attempted to impeach the validity of the Panel's procedures in reviewing the ratings of Comnet vis-a-vis OSI as opposed to reviewing every proposal, we cannot at this point call the investigation of the Panel unreasonable or consider the results of their inquiry impeached. Moreover, the evidence is that the SSO, as well as the TEC, realized the existence of the dissatisfaction and made allowance in their reviews for the situation.

On the record, OSI has failed to present clear evidence that the evaluation was not reasonable. Therefore, the protest is denied.

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