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[B-139703]

Food and Drug Administration—Adjudicative Proceedings, etc.—Public Intervenors—Financial Assistance

Food and Drug Administration (FDA) may reimburse costs of otherwise eligible persons or groups who participate in its proceedings where agency determines that such participation "can reasonably be expected to contribute substantially to a fair determination of" issues before it. Participation need not be "essential" in the sense that issues cannot be decided without such participation. B-92288, Feb. 19, 1976, modified.

Food and Drug Administration—Adjudicative Proceedings, etc.—Indigent Persons

Food and Drug Administration may reimburse costs of persons or groups who participate in proceedings before it only where person or group lacks financial resources to participate adequately. Absent specific statutory authority, agency may not adopt more liberal standard of eligibility based on factors other than person's or group's actual financial resources which could be applied to participation in agency proceeding.

Payments—Advance—Authority

Food and Drug Administration may not make advance payments for costs of otherwise eligible persons or groups for participation in proceedings before it, absent specific statutory authority which overcomes prohibition against advance payments in 31 U.S.C. 529.

Food and Drug Administration—Agency Proceedings, etc.—Participants—Financial Assistance

Food and Drug Administration's authority to reimburse costs of otherwise eligible persons or groups who participate in proceedings before it extends to all types of agency proceedings.

In the matter of costs of intervention—Food and Drug Administration, December 3, 1976:

The Acting Commissioner of the Food and Drug Administration (FDA) has requested our decision on certain questions raised by a petition filed by Consumers Union which has been published as an Advance Notice of Proposed Rulemaking in 41 Fed. Reg. 35855 (August 25, 1976).

In general terms the questions presented to us involve the extent of FDA's legal authority to provide financial assistance, in the form of attorneys' fees and other expenses of administrative litigation to certain participants in its adjudicatory and rulemaking proceedings. Specific questions are raised concerning the criteria to be applied in determining eligibility for financing the expenses of participants under the terms proposed by Consumers Union in the light of prior statements by this Office on the subject in B-139703, July 24, 1972;

B–92288, February 19, 1976; and a letter to the Chairman of the Oversight and Investigations Subcommittee of the House Committee on Interstate and Foreign Commerce, B–180224, May 10, 1976. See also, our opinion to several members of the Congressional Black Caucus in B–139703, September 22, 1976.

Our decisions in this area, referred to above, address the extent to which payments to parties and other participants in agency proceedings may be considered "necessary expenses" within the discretion accorded the Federal agency in carrying out its statutory functions. Thus we observed in B–92288, *supra*, with respect to the Nuclear Regulatory Commission (NRC):

> While 31 U.S.C. § 628 (1970) prohibits agencies from using appropriated funds except for the purposes for which the appropriation was made, we have long held that where an appropriation is made for a particular object, purpose, or program, it is available for expenses which are reasonably necessary and proper or incidental to the execution of the object, purpose or program for which the appropriation was made, except as to expenditures in contravention of law or for some purpose for which other appropriations are made specifically available. 6 Comp. Gen. 621 (1927); 17 *id.* 636 (1938); 29 *id.* 421 (1950); 44 *id.* 312 (1964); 50 *id.* 534 (1971); 53 *id.* 351 (1973).
>
> The question, of course, is whether it is necessary to pay the expenses of indigent intervenors in order to carry out NRC's statutory functions in making licensing determinations. We believe only the administering agency can make that determination.
>
> * * * * * * *
>
> In view of the above, if NRC in the exercise of its administrative discretion, determines that it cannot make the required determination unless it extends financial assistance to certain interested parties who require it, and whose participation is essential to dispose of the matter before it, we would not object to use of its appropriated funds for this purpose. * * *

The basic criteria to be applied were stated in B–180224, *supra*, as follows:

> * * * appropriated funds of each agency may be used to finance the costs of participants in agency hearings whenever the agency finds that (1) it cannot make the required determination unless it extends financial assistance to certain interested parties who require it, and whose representation is necessary to dispose of the matter before it; and (2) the party is indigent or otherwise unable to finance its participation. * * *
>
> We would like to emphasize, however, that it is within the discretion of each individual agency to determine whether the participation of the particular party involved is necessary in order for it to properly carry out its functions and whether the party is indigent or otherwise unable to finance its participation. No party has a right to intervene at Federal expense unless the agency so determines.

Our opinion in B–139703, September 22, 1976, concerning the Federal Communications Commission (FCC), elaborated upon these criteria:

> * * * FCC appropriations are available to make payments to persons (and organizations) representing an interest in a matter before it where the Commission determines that such payments are necessary to achieve a fair resolution of the matter. This conclusion follows from our prior decisions, discussed *supra* * * *.
>
> As indicated in our decisions, the prerequisite to such payments is a determination by the agency that the payments are "necessary" to the accomplishment of its functions. Certainly this would include obtaining presentations or other forms

of participation which enable the full and fair resolution of matters before the Commission. However, we would emphasize that our decisions are limited to situations in which the payment, as well as the participation, is necessary; that is, lack of financial resources on the part of the person involved would preclude participation without reimbursement. Accordingly, the Commission must determine that both the participation itself and payment therefor are necessary. In the absence of relevant statutory standards, we believe that the Commission must be accorded considerable discretion in making these determinations. Compare H.R. 13901 [94th Congress] (page 3, line 15–page 4, line 12), and S. 2715 [94th Congress] (page 9, line 7–page 10, line 3), *supra*, with respect to proposed statutory standards in this regard.

The Consumers Union petition advocates the adoption of standards which would define eligibility for receipt of compensation for costs of participants as follows:

(a) (1) The Commissioner may provide compensation for reasonable attorneys' fees, expert witness fees, and other reasonable costs of participation incurred by eligible participants in any rule making or adjudicatory proceeding conducted pursuant to Subparts B, C, D, and E of these regulations, whenever public participation in such a proceeding promotes or can reasonably be expected to promote a full and fair determination of the issues involved in the proceeding.

(2) Any person is eligible to receive an award under this section * * * for * * * participation (whether or not as a party) in a rule making or adjudicatory proceeding if

(i) The person represents an interest the representation of which contributes or can reasonably be expected to contribute substantially to a fair determination of the proceeding, taking into account the number and complexity of the issues presented, the importance of public participation, and the need for representation of a fair balance of interests; and

(ii) (a) The economic interest of the person in the outcome of the proceeding is small in comparison to the costs of effective participation in the proceeding by that person *or* in the case of a group or organization, the economic interest of the individual members of such group or organization is small in comparison to the costs of effective participation in the proceedings; *or*

(b) The person demonstrates to the satisfaction of the Commissioner that such person does not have sufficient resources available to adequately participate in the proceeding in the absence of an award under this section. [Italic supplied.]

FDA's specific questions concerning the proposal, and our responses, are as follows:

1. Your decision concerning the Nuclear Regulatory Commission indicates that payments can be made if the agency determines that participation is "essential" to dispose of the matter. We request your views on whether FDA may pay the costs of participants if FDA finds that the participation would be useful in disposing of a matter but cannot conscientiously find that the participation is "essential."

While our decision to NRC did refer to participation being "essential," we did not intend to imply that participation must be absolutely indispensable. We would agree with Consumers Union that it would be sufficient if an agency determines that a particular expenditure for participation "can reasonably be expected to contribute substantially to a full and fair determination of" the issues before it, even though the expenditure may not be "essential" in the sense that the issues cannot be decided at all without such participation. Our previous decision, B–92288, *supra*, may be considered modified to this extent.

2. Under the Consumers Union petition, assistance could be provided when public participation can "reasonably be expected to promote a full and fair deter-

mination of the issues" and when the participant "represents an interest the representation of which * * * can reasonably be expected to contribute substantially to fair determination * * *." This standard seems to give special weight, in assistance determinations, to the role of the participant in representing consumers and other interests potentially affected by FDA decisions. We would appreciate your views on whether FDA may make awards solely to ensure that a potentially affected interest is represented, or may give the representational role of the participant special weight in deciding whether to provide financial assistance.

As noted in our answer to question 1, we perceive no legal objection to the proposed standard. Of course, it is the agency that must determine whether the standard has been met in particular cases, and the agency has considerable discretion in this regard.

With respect to the second part of the question, the agency also has discretion in determining the value of a participant's representational role. We do not read the standard as requiring participation of all those representing consumers or other parties affected by FDA determinations unless the FDA also finds that such participation will substantially contribute to the full and fair disposition of the particular matters before it.

3. Under the financial eligibility criteria in the petition, payment could be made to persons or organizations who have (or have members with) an economic interest in the outcome which is small in comparison with the costs of effective participation or who demonstrate they do not have sufficient resources to participate adequately. In a May 10, 1976 letter to Congressman Moss, your office indicated that payments may be made to a party who is "indigent or otherwise unable to finance its participation." We would like your views on whether payments under the financial criterion in the Consumers Union petition would be authorized.

As stated in our opinion in B–139703, September 22, 1976, *supra:*

* * * our decisions are limited to situations in which the payment, as well as the participation, is necessary; that is, lack of financial resources on the part of the person involved would preclude participation without reimbursement. Accordingly, the * * * [agency] must determine that both the participation itself and payment therefor are necessary. * * *

We are still of the view set forth in our prior opinions that a regulatory agency may not pay costs of a party requesting to participate in a regulatory agency proceeding unless the agency first determines that the party is indigent or otherwise unable to finance its participation. Accordingly, it is our view that FDA may not extend financial assistance to a party requesting to participate which has the financial resources to participate but does not, for whatever reason, wish to use its resources for this purpose.

Section 2.151(a)(2)(ii) of the proposed Consumers Union regulation would permit reimbursement for costs of participation *either* where lack of sufficient resources can be demonstrated *or* where:

* * * the economic interest of the person in the outcome of the proceeding is small in comparison to the costs of effective participation in the proceeding by that person or, in the case of a group or organization, the economic interest of the individual members of such group or organization is small in comparison to the costs of effective participation in the proceedings * * *.

Since the latter standard, as quoted, is based on factors other than financial ability to participate in a strict sense, we must conclude that it is not acceptable under our prior decisions and in the absence of specific statutory authority.

Also, we note that the Consumers Union proposed regulation would permit advance payments in certain circumstances. However, unless FDA has specific statutory authority therefor, advance payments would be precluded by 31 U.S.C. § 529 (1970). See B-139703, September 22, 1976, *supra*, at page 4.

4. * * * the Consumers Union petition asks that awards be available for hearings in connection with rulemaking and adjudicatory proceedings, including public hearings before a public advisory committee pursuant to Subpart D of the proposed regulations on administrative practices and procedures published in the September 3, 1975 *Federal Register* (40 FR 40682). The NRC decision dealt only with costs of participation in an adjudicatory licensing hearing.

We see no basis for distinction in terms of the nature of agency proceedings for the purposes here relevant.

5. Like the Nuclear Regulatory Commission, the Food and Drug Administration generally receives a lump sum appropriation for salaries and expenses. The Agency does not have any express statutory authority to use its appropriated funds specifically to assist participants.

Any expenditure made by FDA to provide assistance to participants will also come within the scrutiny of the Congressional subcommittees responsible for our appropriations, *i.e.*, the Subcommittees for Agriculture and Related Agencies of the House and Senate Appropriation Committees. We would appreciate your comments on whether we need to obtain the views of these subcommittees on this issue, or whether these subcommittees have expressed agreement with your position on this matter.

Our opinions in this area are concerned only with the availability of appropriations as a matter of law. Strictly speaking, notice to, or approval by, the appropriations subcommittees is not required for the use of appropriations sanctioned by our opinions, assuming that there are no applicable statutory requirements for prior congressional approval. Thus the question raised here is one of policy and the relationships between the agency and the subcommittees which we cannot resolve. Our Office does, of course, favor the greatest possible disclosure of spending activities to interested congressional committees and subcommittees.

In response to the final question, we are not aware that the subcommittees referred to have expressed any views on our opinions in this area.

[B-186233]

Contracts—Hospital Management Services—Advertising *v.* Negotiation

Alleged impossibility of drafting specifications regarding "coordination of work tasks" does not justify negotation since "coordination of work tasks" is inherent

in proper furnishing of any product or service whether required under specification or not.

Advertising—Advertising *v.* Negotiation—Specifications Availability

Assuming that impossibility of drafting specifications for management services related to furnishing immediate product or service is consideration which might otherwise justify negotiation even though specifications for furnishing basic product or service are known, fact remains that Air Force admits it could develop specification for management services—thereby negating any claim that it is impossible to draft specifications.

Contracts—Negotiation—Impossibility of Drafting Specifications—Basis for Exception to Formal Advertising

Since Air Force admits it has capability of drafting management services specifications, fact that it may not be able to specify all details of services for fear of lessening competition by limiting firms to specified management procedures does not justify determination that it is impossible to draft specifications for management services. Degree competition might be lessened is speculative; moreover, procurement regulation under which contracting officer negotiated procurement contemplates impossibility of drafting specifications, not difficulty or inconvenience.

Advertising—Advertising *v.* Negotiation—Advertising When Feasible and Practicable

Problems with preaward surveys and performance difficulties that Air Force has encountered in obtaining adequate hospital cleaning service do not constitute reasons, in themselves, to authorize negotiation in lieu of advertised procurement method, which is preferred by statute.

Contracts—Negotiation—Level of Quality

Record suggests that need to obtain higher level of quality of service than that thought obtainable under formal advertising method was also reason prompting choice of negotiated procurement method for hospital cleaning services. Legislative history of Armed Services Procurement Act of 1947, source of authority for negotiated procurement in question, shows, however, that Congress specifically rejected proposal to permit negotiation to secure desired level of quality of services even when "health of personnel of the services are involved." Further analysis mandates conclusion that negotiated procurement method is not rationally founded under limits of existing law and regulation.

Contracts—Termination—Negotiation Procedures Propriety

Recognizing difficulties encountered by Air Force in obtaining suitable hospital cleaning service and problem attending definition of common set of management procedures sufficient to presently permit reasonable degree of competition under advertised procurement, termination of contracts awarded under unauthorized negotiated solicitation is not recommended.

General Accounting Office—Recommendations—Contracts—Agency Review of Procurement Policies and Procedures

Recommendations are made that: (1) options in negotiated hospital cleaning contracts and in any similar contracts to be exercised subsequent to June 1977 not be exercised; and (2) Air Force immediately commence study of alternative solutions to problems and difficulties which prompted unauthorized negotiated

procurement method. Recommendations are made under Legislative Reorganization Act of 1970.

Contracts—Negotiation—Awards—Erroneous—Remedial Action Impracticable

No useful purpose in terms of remedy would be served by deciding protests against combination of requirements, experience clauses, and proposal evaluation under procurement which was improperly negotiated since protests, if found meritorious, assume either that award should be made under outstanding RFP, as perhaps modified, which would be contrary to holding that procurement was improperly negotiated, or that award should be made under advertised solicitation which may not be immediately possible.

Contracts—Awards—Small Business Concerns—Set-Asides—Failure to Use

Since nothing in Small Business Act or procurement regulations mandates that there be set-aside for small business as to any particular procurement and because it has been held that agency's decision not to make "8(a)" award for given procurement is not subject to review, protests demanding either small business set-aside or "8(a)" award are denied.

In the matter of Tidewater Protective Services, Inc., and others, December 3, 1976:

Tidewater Protective Services, Inc. (Tidewater), and others have questioned the authority of the Department of the Air Force to negotiate a requirement for "hospital aseptic management services." The services were described in Request for Proposals (RFP) No. F33600-76-R-0253 issued on February 4, 1976, by Wright-Patterson Air Force Base.

Services at 14 Air Force hospitals—possibly requiring the award of more than one fixed-price contract—were covered by the RFP. The services were for the period from October 1, 1976, through June 30, 1977, with an option reserved for two additional years of services. The required "aseptic" services (also referred to by the Air Force as "complete housekeeping service") were described in 80 pages of general specifications applicable to all hospitals and in separate "exhibits" keyed to the varying housekeeping needs of each hospital. Apart from housekeeping services pegged to custodial tasks (for example, floor maintenance, mopping, carpet vacuuming, wall cleaning, window cleaning, glass cleaning, drape and curtain cleaning), the services outlined in the RFP required the contractor to: (1) provide training of employees in infections control; (2) establish a "General Procedural Manual"—that is, written procedures to guide personnel in providing a hygienic environment for patient and staff; and (3) establish a "quality control program" (under this provision the contractor(s) is required, among other things, to monitor bacteria in critical hospital areas—surgery, newborn nursery, OB delivery suite, and intensive care units).

To assist the contractor in focusing his work energies, the RFP divided hospital cleaning areas into "critical," "sub-critical," and "service" areas. "Critical areas" were required to be cleaned with the "maximum level of aseptic technique to control and/or eliminate infections through housekeeping services." Notwithstanding the direction to use the maximum level of cleaning care for these areas, however, housekeeping employees were "not to clean surgical instruments, anesthesia machines, cautery machines, cardiac monitoring equipment, or any other item so specified by the surgical/delivery from staff."

The RFP also cautioned offerors that only concerns with 2 years of suitable cleaning experience (especially relating to experience in "clean-up" of hospital areas used for surgery, recovery, labor and delivery, infant nursery, emergency room, intensive care, cardiac care, central sterile supply, oral surgery, cystoscopy, cardiac catheterization and isolation) in providing comparable hospital cleaning service would be considered for award. Prospective offerors were also required to propose a key manager ("Executive Housekeeper") for the service. The manager was also required to meet certain educational and experience requirements.

The RFP was negotiated under authority of 10 U.S.C. § 2304(a)(10) (1970), which provides that contracts may be negotiated if the contract is for "property or services for which it is impracticable to obtain competition." According to the mandate in Armed Services Procurement Regulation (ASPR) § 3–210.3 (1975 ed.) (concerning limitations on the authority described in 10 U.S.C. § 2304(a)(10)), a determination and findings (D&F) justifying use of the authority was prepared. The D&F provides:

* * * * * * *

Procurement by negotiation of the above described services is necessary to insure effective control of microorganism growth which is directly related to and the cause of infections. The control of microorganism in hospital critical areas such as operating suites, intensive care units and new born infant nurseries is of the utmost importance in order to optimize a healthful and safe patient environment and to insure continued accreditation of USAF hospitals. The technical specification is not sufficiently detailed to permit formal advertised bidding.

Use of formal advertising for procurement of the above described services is impracticable due to the impossibility of drafting a definitized specification or any other adequately detailed description of the services required.

Determination

The proposed contract is for services for which it is impracticable to obtain competition by formal advertising.

Tidewater and others have questioned this determination in light of our decision in *Nationwide Building Maintenance, Inc.*, 55 Comp. Gen. 693 (1976), 76–1 CPD 71. In our *Nationwide* decision we concluded that the decision of the General Services Administration (GSA) to negotiate purchases of janitorial services under authority

similar to that cited by the Air Force in the subject procurement was not rationally founded. In the cited case, although GSA asserted that it could not draft specifications for janitorial services which would be suitable for formal advertising, we noted that: (1) GSA's negotiated solicitation for janitorial services contained 19 pages of specifications for the services; (2) GSA had used specifications similar to those in the RFP to previously procure janitorial services under formal advertising; and (3) the Department of Defense invariably used formal advertising to procure janitorial services. Because of these facts, we felt that the actual reason for negotiating these services was GSA's view that it could obtain a higher level of "quality services" by using the negotiated rather than the advertised procurement method.

We pointed out, however, that none of the statutory exceptions (41 U.S.C. § 252(c)(1)–(15) (1970)) authorized GSA to negotiate only to secure a desired level of quality of services. Moreover, our reading of the legislative history of the Federal Property and Administrative Services Act (40 U.S.C. § 471 (1970)), under which GSA procured the services, showed that the Congress specifically rejected a proposal to permit negotiation solely to secure a desired level of quality services.

Here, the Department's D&F does not expressly state that negotiation of the hospital services is being employed to obtain a certain quality of services. Instead, the D&F cites crucial health concerns and the lack of sufficiently detailed specifications to permit formal advertising.

The Air Force has furnished us with additional written information bearing on the lack of detailed specifications suitable for advertising. The Air Force informs us that:

> Over recent years, the Hospital Aseptic Management Services (HAMS) program has presented substantial difficulties to the Air Force. Originally, procurements of HAMS were advertised, and the procurement function was performed at base level. This approach proved to be totally unsatisfactory. Due to the clear relationship between the services to be performed and the health of individuals, a comprehensive technical evaluation was necessary for each bid. The evaluation was performed through the use of a rigorous pre-award survey (PAS). The impracticability of policing the PAS teams for each of the many bidders made it difficult to ensure that each bidder was evaluated on the same basis. In addition, many bidders did not understand the true scope of the HAMS requirement, particularly the management demands, at the time of bid submission. When the scope of the effort became apparent, they were unable, due to the restrictions inherent in formal advertising, to modify their approaches to the work and the resultant bid prices. This approach led to a serious deterioration in hospital asepsis and a consequent potential for the spread of nosocomical infections among hospital patients. The capability of the Surgeon General of the Air Force to provide, to the extent possible, an infection-free hospital environment was in jeopardy.
>
> In 1974, the Air Force concluded that HAMS had to be significantly improved. The Air Force reevaluated the HAMS program to determine what steps, if any, could be taken to facilitate procurement on a competitive basis. Originally, some thought was given to the development of a detailed specification for use in a formally advertised procurement. Development of a specification was contracted with the University of Oklahoma. Both that institution, and other agen-

cies of the Government, indicated that there were a number of contractors who provided commercially a HAMS-type service; that each had its own management techniques and programs for HAMS; and that, if the Air Force were to specify its own procurement techniques and programs, the effect would be to exclude from competition most or all of the current commercial sources. This, in our judgment, would have had an adverse effect on both competition and price. Therefore, the Air Force authorized development of a more general specification (Hospital Aseptic Management Services Specifications, dated 1 October 1975), which emphasized the training and qualifications of personnel and allowed each contractor to develop his own program in the following areas: Procedural Manual (TP1.07), Quality Control Program (TP1.08), and Personnel Training (TP1.05). In addition, while the specification defines in some detail the individual tasks to be performed by a contractor, no attempt was made to describe the manner in which such tasks should be integrated into the contractor's overall effort.

The Air Force admits, in effect, that it could develop a specification suitable for advertising the required services. But because commercial firms have unique "techniques and programs," the Air Force believes that competition would be restricted by developing a detailed specification for these techniques and programs. The particular areas involving "techniques and programs" are currently referred to in the RFP as a "Procedural Manual," "Quality Control Program" and "Personnel Training." Additionally, the Air Force states that it has not attempted to specify how the individual cleaning tasks should be integrated into the contractor's "overall effort."

We do not agree that the cited impossibility of drafting the specifications regarding "coordination of work tasks" justifies negotiation since "coordination of work tasks" is inherent in the proper furnishing of any product or service whether required under specification or not. Since "coordination of work tasks" is generally required without specification, the alleged impossibility of drafting specifications regarding this coordination is not a reason sufficient to justify negotiation under the cited exception.

Moreover, even if we assume, for the sake of discussion, that impossibility in drafting specifications for management services involved in providing a basic product or service is a consideration which might otherwise justify negotiation even though specifications for the basic product or service are known, the fact remains that the Air Force admits it could develop a specification for these management services—thereby negating any claim that it is "impossible" to draft specifications—but that it chose not to do so because it felt competition would thereby be restricted.

We understand that competition would be restricted, in the Air Force's view, because each company has its own management and procedures; consequently, an individual concern might not compete for an award unless its own procedures were specified. Since management services obviously vary from company to company, any attempt to specify all details of a particular management approach might lessen

competition. The degree to which competition might be lessened is, of course, speculative.

Nevertheless, since the Air Force admits it has the capability of drafting management services specifications, the fact that it may not be able to specify all details of the services for fear of lessening competition does not justify a determination that it is impossible to draft specifications for these services. The regulation (ASPR § 3-210.2(xiii) (1975 ed.)) which was cited by the contracting officer as authority for negotiating the services, contemplates *impossibility* of drafting adequate specifications, not difficulty or inconvenience. 52 Comp. Gen. 458, 461 (1973). Neither do we consider that the theoretical possibility of restricting competition by use of adequate specifications is a sufficient reason to justify negotiation under the exception cited here, since it seems that a basic specification listing fundamental needs could be developed without unduly limiting competition. In the alternative, the Department could permit bidders to bid on any of a number of existing management procedures that are considered satisfactory.

We appreciate the problems with preaward surveys and performance difficulties that the Air Force has encountered in obtaining adequate hospital cleaning service, especially in critical areas. These problems and difficulties, however, do not constitute reasons, in themselves, under 10 U.S.C. § 2304(a)(1)-(17) (1970) or ASPR, section III, Procurement by Negotiation, to authorize negotiation in lieu of the advertized procurement method which is preferred by statute (10 U.S.C. § 2304(a) (1970 ed.)).

Moreover, it seems to us that these difficulties and problems were linked in the Air Force's view with what it felt was a lower level of quality of service than that considered desirable. Although the contracting officer has not expressely cited a need to obtain a higher level of quality service under the negotiated method than that thought obtainable under the formal advertising method, the record suggests that this need was considered important. We observe, however, that the legislative history of the Armed Services Procurement Act of 1947, the source of the authority (See 10 U.S.C. chapter 137 (1970)) under which the RFP was issued, shows that Congress specifically rejected the proposal to permit negotiation to secure a desired level of quality of services even when "safety and health of personnel of the services are involved." As we stated in 43 Comp. Gen. 353, 370 (1963), cited in our *Nationwide* decision:

> In this connection it would appear to be especially pertinent to note that H.R. 1366, 80th Congress, which subsequently was enacted as the Armed Services Procurement Act of 1947, 41 U.S.C. 151 note (1952 ed.), originally included, as

Section 1(xii), a request for authority to negotiate under the following circumstances:

"(xii) for supplies or services as to which the agency head determines that advertising and competitive bidding would not secure supplies or services of a quality shown to be necessary in the interest of the Government."

As passed by the House of Representatives, H.R. 1366 included this authority, and the necessity and justification for its enactment by the Senate was presented to the Senate Committee on Armed Services by the Assistant Secretary of the Navy during hearings on June 24, 1947, with the following concluding statement:

"Where quality is a matter of critical—in many cases life-and-death—importance, discretion must reside in the services to select sources where experience, expertness, know-how, facilities and capacities are believed to assure products of the requisite quality. *Where national security or the safety and health of personnel of the services are involved, any compromise of quality dictated by mandatory considerations of price would be indefensible.* (See page 15, Hearings before the Committee on Armed Services, United States Senate, on H.R. 1366, 80th Congress.)" [Italic supplied.]

Notwithstanding the above, the Senate Armed Services Committee deleted this provision from the bill and explained its action at page 3, S. Rept. No. 571, 80th Congress, as follows:

"The bill was amended by deleting the authority to negotiate contracts for the purpose of securing a particular quality of materials. Your Committee is of the opinion that this section is open to considerable administrative abuse and would be extremely difficult to control. For this reason it has been eliminated."

Because of our analysis we must conclude that the determination supporting the negotiated method of procurement used here is not rationally founded under the limits of existing law and regulation. At the same time, it is our view that the Department should be given additional time to study alternative solutions to its difficulties—especially in light of the problem attending the definition of a common set of management procedures sufficient to permit a reasonable degree of competition. For this reason, we are not recommending termination of the contracts which were recently awarded under the subject RFP or under any outstanding contracts which may have been awarded under similar negotiating authority. We are recommending, however, that the options in the awarded contracts and in any similar contracts to be exercised subsequent to June 1977 not be exercised and that the Air Force immediately commence a study of alternative solutions to its problems and difficulties that do not involve "exception 10" negotiating authority.

As this decision contains recommendations for corrective action to be taken, it is being transmitted by letters of today to the congressional committees named in the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970).

Other Protests

Other protests have been filed by companies under this RFP, namely: (1) the combination of requirements for the 14 hospitals involved worked an unfair burden on small businesses competing under the RFP; (2) the 2-year experience requirements and requirement

for an "Executive Housekeeper" are excessive; (3) the services requirements should be a small business set-aside or an "8(a)" procurement; and (4) certain individual proposals (submitted by Oneida Chemical Company, Inc., Batchelor's Building Maintenance Service, Inc., and Nationwide Building Maintenance, Inc.) were improperly rejected.

No useful purpose in terms of a remedy would be served by deciding protests Nos. 1, 2, and 4, since these protests, if found meritorious, assume that award would have to be made under the outstanding RFP, as perhaps revised, or under formal advertising procedures, if the RFP were canceled. Any subsequent award under the subject RFP would be contrary, however, to our holding that use of the cited negotiation authority was not rationally founded within the limits of existing law and award under formal advertising procedures may not be possible to satisfy the immediate requirements involved. Consequently, we will not decide these protests. See *Three D Enterprises, Inc.*, B-185745, February 20, 1976, 76-1 CPD 117.

Further, as to the protests that the procurement should be a small business set-aside or an "8(a)" contract, we have recently held: (1) that nothing in the Small Business Act or procurement regulations make it mandatory that there be a set-aside for small business as to any particular procurement (*Groton Piping Corporation* and *Thames Electric Company (joint venture)*, B-185755, April 12, 1976, 76-1 CPD 247); and (2) that an agency's decision not to make an "8(a)" award for a given procurement is not subject to review by our Office (*Welmetco, Ltd.*, B-185583, March 11, 1976, 76-1 CPD 173). Consequently, these protests are denied.

[B-114868]

Indian Affairs—Bureau of Indian Affairs—Attorney Fees, etc.—Administrative Proceedings or Judicial Litigation

Snyder Act, 25 U.S.C. 13, provides discretionary authority for Secretary of the Interior to use appropriated funds to pay for attorneys' fees and related expenses incurred by Indian tribes in administrative proceedings or judicial litigation, for purpose of improving and protecting resources under jurisdiction of Bureau of Indian Affairs. Attorneys' fees and expenses incurred in judicial litigation may only be paid where representation by Department of Justice is refused or otherwise unavailable, including situation where separate representation is mandated by Court.

Appropriations—Interior Department—Availability—Litigation Costs Incident to Beneficial Interest—Indian Tribes

Attorneys' fees and related litigation expenses incurred by Northern Pueblo Tributary Water Rights Association, prior to decision by Court of Appeals that private attorneys may intervene in suit in which U.S. District Court denied

intervention, may be paid from appropriations of Department of the Interior, because Department of Justice conceded before Court of Appeals that its representation would constitute conflict of interest and allowed private attorneys to cooperate in preparation and presentation of Northern Pueblo position despite failure of Court to permit intervention.

Indian Affairs—Bureau of Indian Affairs—Attorney Fees, etc.—Determination—Secretary of Interior—Basis of Financial Status of Tribe

Secretary of Interior is not obligated to pay for attorneys' fees and related expenses incurred by Indian tribes, but may, within his broad discretion to make expenditures he deems necessary for protection of Indian resources, make such payments on basis of factors he concludes should be considered, including relative impecuniousness of tribe. Determinations, however, should be made on uniform basis. B-114868, May 30, 1975, modified.

In the Matter of Expenditures for Legal Expenses of Indian Tribes, December 6, 1976:

This decision to the Secretary of the Interior responds to two separate submissions from the Solicitor, Department of the Interior, with enclosures, concerning the payment of attorneys' fees and related expenses incurred or potentially to be incurred by the Northern Pueblo Tributary Water Rights Association, the Northern Cheyenne Tribe, and the San Pasqual Band, in separate litigation and administrative proceedings.

The Solicitor requests, in effect, that we reconsider the position taken in *Expenditures for the legal expenses of Indian tribes*, B-114868, May 30, 1975, in which we stated:

> * * * the Secretary of the Interior has the discretion to expend available appropriations to pay tribal legal expenses including attorney's fees where he determines it necessary to do so, subject to the limitations set forth below. In cases where the opposing party is not the United States, 25 U.S.C. § 175 (providing for representation by United States attorneys) would bar the use of appropriated funds, except in cases in which the Attorney General refused assistance or in which his assistance was not otherwise available.*

The Solicitor has apparently taken the position that the Secretary has discretion to pay Indian tribes' attorney fees and related expenses, and to institute litigation prior to consultation with the Attorney General and irrespective of the Attorney General's determination as to whether or not to represent the Indians involved, if he determines that such representation is necessary for the protection of Indian resources, and essential to the "* * * fulfillment of the trust obligations of the United States to protect its Indian wards and their property."

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*25 U.S.C. § 175 (1970) provides as follows:
"In all States and Territories where there are reservations or allotted Indians the United States attorney shall represent them in all suits at law and in equity."

This duty has been construed as a discretionary one, and the Attorney General has been held to have properly refused to represent tribes in cases presenting a conflict of interest, both where the United States was a party and where it was not. See B-114868, May 30, 1975, and court cases cited therein.

We have also been requested to clarify or reconsider our position in B–114868, *supra*, in which we stated that the Secretary of the Interior should make a finding, before expending funds for attorneys' fees for Indian tribes, that they do not have sufficient funds to otherwise obtain such services.

Northern Pueblo Tributary Water Rights Association

In B–114868, *supra*, we indicated, with regard to the payment of attorneys' fees and related expenses incurred by the Northern Pueblo Tributary Water Rights Association (Northern Pueblo) as follows:

> * * * we question the availability of appropriated funds to retain private attorneys to, in effect, review the Justice Department's preparation of the case involving the Northern Pueblo Tributary Water Rights Association.

Since the Justice Department had agreed to represent the Northern Pueblo, we reasoned that the Department of the Interior could not also expend funds to review that case.

It now appears, from the material provided in the Solicitor's current submission, that the contract providing for the payment of attorneys' fees and related litigation expenses in the subject case was to pay for attorneys to participate as intervenors in litigation entitled *State of New Mexico* v. *Aamodt* (Nos. 75–1069 and 75–1106), filed in the United States District Court for the District of New Mexico, adjudicating the rights of certain Pueblos to the use of water of the Nambe-Pojoaque River system.

The subject litigation was actually initiated in 1966. However, it was not until 1973 that the four Pueblos involved in the *Aamodt* case—Pojoaque, Nambe, Tesuque, and San Ildefonso—formed the Northern Pueblo Tributary Water Rights Association, because they believed that the court was planning to decide the case against them, even before commencement of the trial (then scheduled several months in the future). Up to this point, the Department of Justice had been representing the Pueblos, and the question of conflict of interest had apparently not been raised. It was at this time that the attorney contract was entered into, and the attorneys, unfamiliar with the work done on the case up to that time, began reviewing the theory, evidence, and trial preparation of the Department of Justice.

The District Court, on its own motion, struck a tendered complaint in intervention, proffered by attorneys for the Northern Pueblo, holding that private counsel "* * * may not separately and independently represent the Pueblos which are already represented by government counsel." Although the Department of Justice was required to remain as nominal counsel for all four Pueblos involved because of the

District Court's decision to deny intervention, it conceded before the Court of Appeals that a conflict of interest existed, and that the Pueblos should have been afforded separate representation. Moreover, the Department permitted private counsel to assume a predominant role in the preparation and espousal of the position of the Pueblos.

The Department of Justice had also intervened in the adjudication as the necessary representative of the United States, as owner of the Santa Fe National Forest, the water rights of which were also to be adjudicated in the subject litigation. The Commissioner of Indian Affairs apparently continued to pay for private counsel for the Pueblos, having determined that, under the circumstances, this was the only practical means of fully protecting their rights in the case.

Attorneys for the Northern Pueblo subsequently appealed the denial of intervention. In *State of New Mexico* v. *Aamodt*, 437 F. 2d 1102 (1976), the Court of Appeals for the Tenth Circuit held that the denial of the request for intervention was erroneous. The court reasoned, *supra* at 1106, as follows:

> * * * The claim that the Pueblos are adequately represented by government counsel is not impressive. Government counsel are competent and able but they concede that a conflict of interest exists between the proprietary interests of the United States and of the Pueblos. In such a situation, adequate representation of both interests by the same counsel is impossible.

The Court went on to indicate, *supra* at 1107, as follows:

> * * * The United States in the case at bar recognizes and supports the right of the Pueblos to private representation.

In light of the above and the broad authority granted in 25 U.S.C. § 2 to the Commissioner of Indian Affairs to provide for and manage all matters arising out of Indian relations, the Court held that the Commissioner could properly decide that separate representation for the Pueblos should be provided, and that such a determination would be wholly compatible with the fiduciary obligations of the United States to the Indians. *State* v. *Aamodt*, *supra* at 1107.

As noted above, appropriated funds may be used to pay for attorneys' fees and related expenses where representation by the Attorney General is refused or is otherwise unavailable. Accordingly, once the Court of Appeals determined that the failure of the District Court to permit intervention was erroneous, and that the Pueblos' private attorneys should henceforth control the litigation, rather than the Department of Justice, funds appropriated to the Department of the Interior would be available to pay attorneys' fees thereafter incurred.

Moreover, in light of the decision by the Court of Appeals that the denial of intervention was erroneous, as well as the determinations by the Attorney General that a conflict of interest existed and that separate representation should have been accorded to the Northern Pueblo,

we conclude that appropriated funds may be used by the Department of the Interior to pay for attorneys' fees and related expenses incurred by the Northern Pueblo prior to that decision.

NORTHERN CHEYENNE TRIBE

The Solicitor also requests our concurrence with the view that under guidelines set forth in B-114868, *supra*, appropriated funds may be used to pay attorneys' fees and related expenses incurred by the Northern Cheyenne Tribe in connection with a continuing administrative proceeding and possible litigation against various energy companies concerning the validity of certain coal exploration permits and leases on the Northern Cheyenne Reservation.

As noted in our previous decision, the Northern Cheyenne Tribe had petitioned the Department of the Interior to withdraw departmental approval of leases and permits previously granted for the purpose of allowing the stripmining of coal on the Northern Cheyenne Reservation. The Secretary of the Interior, on June 4, 1974, granted the petition in part, denied it in part, referred some questions to an administrative hearing, and held others in abeyance. Moreover, the Secretary stated in that decision that he would support the tribe in a lawsuit against the coal companies or a request that the Justice Department bring a suit in the name of the Tribe to test the validity of the permits and leases under 25 U.S.C. § 175 (1970). In response to the Solicitor's inquiry concerning the Secretary's authority to pay such expenses, we issued our decision of May 30, 1975, B-114868, *supra*.

In a supplemental decision of September 8, 1975, the then Acting Secretary of the Interior indicated that the GAO decision did not provide clear authority to fund or reimburse the Northern Cheyenne Tribe for the cost of an administrative proceeding or judicial litigation in the instant situation. Accordingly, he directed that specific authorizing legislation and appropriations be sought for the funding of Indian tribal legal expenses in this and similar circumstances.

A subsequent decision was issued November 10, 1975, by Secretary Kleppe, in which he determined that despite the lack of clarity which existed concerning the Department's broad authority to pay tribal attorneys' fees, he would pay such fees for the Northern Cheyenne Tribe on condition that he receive an opinion from us that such payment is lawful.

With regard to the payment of attorneys' fees in possible litigation, we have noted above that 25 U.S.C. § 175 provides for representation of Indians by the United States attorney in all suits at law and in equity. Because the courts have construed this statute as permitting

the U.S. attorney to refuse assistance when he determines that a conflict of interest exists, we have determined that private representation could be paid for from appropriated funds where the Attorney General refused assistance or assistance was otherwise unavailable.

As we understand the instant situation, should the Northern Cheyenne ever institute a suit, the Department of the Interior (and hence the United States) would be a necessary party, since the validity of coal leases and permits approved by the Department of the Interior would be the basic issue being litigated. The Department of Interior apparently takes the position that the Department of Justice could not properly represent both the United States and the Northern Cheyenne. Even if this is so, however, the right to make the ultimate determination of whether assistance should be provided is accorded by statute and court cases to the Department of Justice. Neither the statute nor the court cases suggest that any other governmental official has the discretion to decide whether the Attorney General should represent the Indians. To so decide would render the mandate of 25 U.S.C. § 175 a nullity.

State of New Mexico v. *Aamodt*, *supra*, decided by the Court of Appeals for the Tenth Circuit, does not as the Solicitor suggests, indicate otherwise. In that case the court noted that the Government not only conceded that there existed a conflict of interest but also supported the right of the Indians involved to private representation. The court distinguished *Pueblo of Picuris in State of New Mexico* v. *Abeyta*, 50 F.2d 12 (10th Cir. 1931), where the private counsel for the Pueblo and counsel for the United States took contrary positions on appeal. The court held in that case that when he is representing the party involved, the Attorney General of the United States, and not private counsel, must control the court of litigation.

We are of the view that if the Department of the Interior wishes to pay attorneys' fees from appropriated funds for any litigation which may be brought by the Northern Cheyenne, 25 U.S.C. § 175 would require that the Department of Justice be contacted first, for exploration of the question of whether it would, in the particular circumstances involved, decline to provide representation.

As noted above, the Northern Cheyenne are also involved in a continuing administrative proceeding concerning the validity of certain coal exploration permits and leases. As noted in B-114868, *supra*, the basic authority for the expenditure of funds appropriated for the benefit of Indians is found in the Snyder Act, ch. 115, 42 Stat. 208 (1921), 25 U.S.C. § 13 (1970), which provides as follows:

> The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from

time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes:
General support and civilization, including education.
For relief of distress and conservation of health.

* * * * * * *

And for general and incidental expenses in connection with the administration of Indian affairs.

The Supreme Court, in commenting on the provision has stated "[t]his is broadly phrased material and obviously is intended to include all BIA activities." *Morton* v. *Ruiz*, 415 U.S. 199, 208 (1974). Moreover, as noted in B–114868, *supra:*

Appropriations for the operation of Indian programs are normally available for among other things "expenses necessary to provide * * * management, development, improvement, and protection of resources and appurtenant facilities under the jurisdiction of the Bureau of Indian Affairs." This appropriation is enacted in the form of a lump-sum with no specific limitations as to use. Thus, the determination of what expenses are necessary for the stated purpose is left to the reasonable discretion of the Secretary.

Accordingly, we continue to be of the view expressed in our prior decision, that:

In light of the foregoing, and particularly the broad language and legislative history of the Snyder Act, as well as our obligation to liberally construe statutes passed for the benefit of Indians and Indian Communities (*Ruiz* v. *Morton*, 462 F.2d 818, 821 (9th Cir. 1972), *aff'd mem.*, *Morton* v. *Ruiz*, *supra.*), it is our view that the Secretary of the Interior has the discretion to expend available appropriations to pay tribal legal expenses including attorney's fees where he determines it necessary to do so, subject to [certain limitations].

The provisions of 25 U.S.C. § 175, discussed above, which require that a request first be made to the Attorney General for his representation in suits at law or in equity would not apply to the subject administrative proceeding, which is being conducted within the Department of the Interior itself.

SAN PASQUAL BAND

The Solicitor also questions whether attorneys' fees may be paid by the Department of the Interior in connection with proceedings before an Administrative Law Judge of the Federal Power Commission (FPC) (Project No. 176, Dockets No. E–7562 and 7655). In these proceedings the firm of Gajarsa, Liss & Sterenbuch are representing the San Pasqual Band pursuant to Contract No. 14–20–0550–2406. The Department of Justice does not participate in FPC proceedings. The Secretary of the Interior is a party to them, and is being represented by the Office of the Solicitor. In this regard, the August 2, 1976, submission from the Solicitor indicates as follows:

* * * The contract to pay attorneys fees * * * deals only with the proceedings before the Federal Power Commission, which does not involve the Department of Justice in any way.

There are several reasons why such a contract is necessary. First, the Justice Department does not participate in FPC proceedings. The Secretary of the Interior is a party to these proceedings, but he cannot without at least the appearance of a conflict of interest represent the San Pasqual Band (or indeed any of the bands). Initially, part of the FPC proceedings entail the assessment of past annual charges against the present licensee. One of the underlying allegations being made in this assessment is the breach of the fiduciary duty by the failure of the Secretary of the Interior to request these annual charges on behalf of the Bands at an earlier date. The annual license fee issue is an awkward one for the Department, because it involves allegations of possible past derelictions of duty by Department officials and a potential monetary liability for the United States in [an Indian Claims Commission proceeding]. Similarly, if the district court [in a related case] or the Federal Power Commission holds that the Bands are entitled to water diverted from the San Luis Rey in the past by non-Indians, the United States could be liable to the Bands for the value of the water diverted in [the Indian Claims Commission proceeding] on the theory that as a trustee the United States should have prevented the diversions. Hence, attorneys for the Justice Department and this Department obviously could be inhibited by this duality of interests from effective representation of the Bands.

In addition, the five Mission Indian Bands, all of which are located within San Luis Rey River Watershed, have conflicting interests because of the limited amount of water within the watershed and the Escondido watershed. Physically, the San Pasqual Reservation is located along the canal carrying the water away from the San Luis Rey River toward Escondido. In certain respects, it could receive potential benefits from the diversions which would harm the Bands located on the San Luis Rey River. Because of these specific conflicts, it was determined that the Secretary of the Interior would be in a direct conflict of interest where his duties as a trustee would be compromised if it advanced one Band's interest over another. The other Bands in the watershed are represented by counsel associated with the Native American Rights Fund which cannot represent all of the Bands. Consequently, it was necessary to enter into the contract with Mr. Gajarsa to provide representation to the San Pasqual Band.

It is not our prerogative to determine whether an actual or potential conflict of interest exists in the subject situation. As long as the Secretary of the Interior acts within his broad discretion according to the criteria set forth above with regard to the Northern Cheyenne Tribe, payment for attorneys' fees in this situation would be proper.

INDIGENCY OF THE INDIAN TRIBE

The Solicitor of the Interior also questions the determination made in B-114868, *supra*, that "* * * it would seem appropriate that before * * * expenditures [for attorneys' fees] are made by the Secretary there be a finding that the Indians have insufficient funds to otherwise obtain those services." In this regard, the Solicitor argues as follows:

* * * The United States owes a trust responsibility to Indian tribes irrespective of the assets of the tribe. Nothing in the two operative statutes considered in your May, 1975 opinion—25 U.S.C. § 13 and § 175—limits the availability of federal services to indigent tribes. Nor, so far as we are aware, does any other statute authorizing the United States to provide services to or expend appropriated funds on behalf of Indians require that the tribe be indigent. Regardless of whether the tribe is able to hire its own counsel, the United States (and specifically this Department) has an independent trust responsibility to the tribe. And—where the Department of Justice is unwilling or unable to discharge fully that responsibility by legal representation—this Department as trustee must have the latitude to fund special counsel to represent the tribe. While the ability of the tribe to hire its own counsel may be a factor influencing

the Secretary's decision whether to pay such fees in a particular case, in our view he is not absolutely constrained by the operative statutes to limit such payments to impecunious tribes.

We agree that the operative statutes do not limit payments by the Secretary for attorneys' fees and related expenses to impecunious tribes. This does not mean, however, that the relative impecuniousness of an Indian tribe may not be a factor for consideration by the Secretary when a determination is being made as to whether expenditures should be made to pay for such expenses incurred by a particular Indian tribe in connection with a particular administrative or judicial proceeding. The operative statutes accord to the Secretary broad discretion to pay expenses deemed *necessary* by him for the protection of Indian resources. While he could determine that payment for attorneys' fees incurred by an Indian tribe should be paid in a particular instance, he is under no obligation to make such payment. Under these circumstances, the Secretary, within his broad discretion, could determine that the relative impecuniousness of tribes should be considered in deciding whether to make payments for attorneys' fees and related expenses. If this factor is to be considered, however, it should be applied uniformly in similar situations.

B-114868, May 30, 1975, is modified to the extent inconsistent herewith.

[B-180010.09]

Arbitration—Award—Implementation by Agency—Travel Expenses—Use of Privately Owned Automobile Not Authorized

Employee's request to use privately owned vehicle (POV) as advantageous to Government for temporary duty travel was denied although official told him it would be approved. Arbitrator held that employee should be paid as though request had been approved since agency's failure to act on it within time frame in its regulations and official's statement amounted to approval. Award may not be implemented since no determination was made that POV is advantageous to Government on basis of cost, efficiency or work requirements as required by Federal Travel Regulations.

Agents—Government—Government Liability for Acts Beyond Authority—Erroneous Information

Although agency official indicated to an employee that his request to use POV as advantageous to the Government for temporary duty travel would be approved, such statement does not bind Government since official had no authority to approve POV use and Government is not estopped from repudiating advice given by one of its officials if that advice is erroneous.

In the matter of Joseph Pradarits—arbitrator's award of travel expenses, December 9, 1976:

This action involves the request of July 13, 1976, by the Executive Director of the Federal Labor Relations Council (FLRC) for an ad-

vance decision as to the legality of an arbitrator's award which granted reimbursement of certain travel expenses and recredit of leave in the case of *Professional Air Traffic Controllers Organization and Federal Aviation Administration, Eastern Region* (Wolf, Arbitrator), FLRC No. 76A–10. The case is before the Federal Labor Relations Council as a result of a petition for review filed by the Department of Transportation alleging that the arbitration award violates applicable law and appropriate regulations.

FACTS

The record indicates that on March 12, 1974, the grievant, Mr. Joseph Pradarits, an employee of the New York Air Route Traffic Control Center of the Federal Aviation Administration (FAA), was tentatively selected for a position as an air traffic control instructor at the FAA Academy, Oklahoma City, Oklahoma, subject to his successful completion of basic instructor and manager training courses which were to commence on April 2, 1974. For some unexplained reason, the latter commencement date was postponed for several weeks.

On April 1, 1974, Mr. Pradarits requested authorization to use his privately owned vehicle (POV) as being "advantageous to the Government" for the travel to Oklahoma City from New York City. Mr. Pradarits' justification for the request was that if he went to Oklahoma City by common carrier, he would subsequently have to make a 6-day house-hunting trip and incur other costs incident to his permanent change of station move to Oklahoma City at a total estimated cost of $1,450, whereas if he were allowed to use his POV he would be able to perform the temporary duty travel and perform his house-hunting and other chores at the same time, thus incurring a lesser cost estimated at $971.

On or about April 11, 1974, Mr. Harold Eisbrock, Operation Specialist of the Air Traffic Division, whose function it was to evaluate such requests, called Gerald Shipman, who was then Personnel Management Specialist in the New York center, requesting the facility's recommendation regarding the request. Mr. Eisbrock did not say that if the facility recommended approval it would definitely be approved, but he did say that the request would probably be approved. The facility's recommendation to allow the use of a POV as being advantageous to the Government was sent to Mr. Eisbrock on April 12, 1974.

Mr. Eisbrock reviewed the request and the recommendation and concluded that the criteria in the pertinent FAA regulations were not met, since it was not cheaper for Mr. Pradarits to travel by POV; nor was it more efficient for him to have the vehicle in Oklahoma City, nor would it enhance his work at the Academy. Mr. Eisbrock considered the ad-

vice of the FAA's Accounting Division that it was not customary to authorize POV use when the employee's tentative selection as air traffic control instructor at the FAA Academy was contingent upon his satisfactorily completing the basic instructor and manager training courses, since unless he satisfactorily completed the courses he would not be transferred and would not incur permanent change of station expenses. Mr. Eisbrock did not advise Mr. Shipman of his denial of Mr. Pradarits' request until about April 19, 1974.

On April 15, 1974, Mr. Pradarits left for the FAA Academy in his personal vehicle without travel orders under the impression that his request to use the POV as being advantageous to the Government would be approved. However, on April 19, 1974, a travel order was issued allowing Mr. Pradarits use of a POV under "Personal preference" conditions only. Mr. Pradarits did not receive the travel order until May 23, 1974.

ARBITRATOR'S AWARD

Mr. Pradarits filed a grievance against the FAA's decision to deny him the use of his personal vehicle as being advantageous to the Government. The grievance went to arbitration, with the issue presented being whether or not Mr. Pradarits was reimbursed for his travel consistent with the provisions of Article 18, sections 1 and 2, of the 1973 PATCO-FAA agreement, which provide:

> Travel and Per Diem
>
> Section 1. The desires of the traveler will be considered to the extent that they are not inconsistent with the principle that travel by common carrier generally results in the least costly and most expeditious method of travel. This method will be used unless the circumstances involved make travel by Government owned vehicle, privately owned conveyance, or special conveyance preferred for reason of cost, efficiency or work requirements.
>
> Section 2. An employee permitted to travel by privately owned vehicle will be paid the mileage rate authorized for such travel by agency directives.

The arbitrator held for Mr. Pradarits as follows:

> The grievance is granted
>
> The FAA is directed to reimburse the grievant as though he had traveled POV under conditions "Advantageous to the Government," and that his time and leave credits be corrected accordingly.

The basis for the arbitrator's award was his belief that Mr. Pradarits had complied with the Department of Transportation's regulation 1500.14 EA SUP 5, February 6, 1974, concerning criteria that must be considered for determining whether the use of POV is advantageous to the Government for en route travel to and from the Aeronautical Center. The latter regulation states in part:

> The requirement that authorizing officials make individual determinations of POV use as advantageous to the Govenment is not changed. As a minimum, cri-

teria set forth in paragraph 451–S1, of Order 1500.14, Appendix 1, as revised herein must be used in making these determinations. (i.e., paragraph 451–S1 subparagraph b, must be considered in conjunction with paragraph 451–S1, subparagraph a.) It is incumbent upon authorizing officials to first determine the mode of travel which will best assure that the mission is accomplished.

With the Departmental objective of encouraging the reduction in motor vehicle fuel consumption for official Government travel, and in view of the expanded FAA bus service available at the Aeronautical Center, the basic policy is that the use of POV cannot be considered as advantageous to the Government. Use of POV should not be justified solely on the basis of cost, but rather on the basis of need. Although travel by POV should be discouraged, this will not preclude the use of POV for personal convenience on a comparative cost basis provided the extra travel time (annual leave) does not conflict with workload before or after the training course.

Requests for exception of the policy which necessitate POV travel as advantageous to the Government must be justified including the extenuating circumstances thereof. Exceptions require the approval of the Division Chief and should therefore be submitted in writing through the Facility Chief or Sector Manager sufficiently in advance (at least 15 days prior) of the scheduled departure for the training course. * * *

The arbitrator held that under regulation 1500–14 EA, SUP 5, *supra*, it was incumbent upon the authorizing officials to determine the mode of travel within the 15-day time period stated therein. Since Mr. Pradarits had submitted his request for POV use 14 days prior to his departure and the FAA had been alerted to his travel in March, the arbitrator found that Mr. Pradarits had done all that was expected of him under the FAA-PATCO agreement and the regulations. Moreover, the arbitrator held that although the agency official had not approved the use of POV as being advantageous to the Government as required by appropriate regulations, those regulations also provided that the authorizing official had discretion to approve use of POV and the use of POV could have been approved. The arbitrator concluded:

* * * The errors delayed the non-approval until too late and, under the circumstances, must be deemed an approval at the time Pradarits departed.

The Government must necessarily shoulder the responsibility for the negligence of those officials whose duty it was to act. It is unrealistic to expect an employee to assume the burden of official negligence even if his request might have been disapproved under regulations. The burden must be borne by the Government. A principal is responsible for acts of its agents within their ostensible authority.

OPINION

Paragraph 1–2.2c of the Federal Travel Regulations (FPMR 101–7) (May 1973) states in pertinent part:

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

(1) *Common carrier.* Since travel by common carrier will generally result in the least costly and most expeditious performance of travel, this method shall be used unless the circumstances involved make travel by Government, privately owned, or special conveyance preferred for reasons of cost, efficiency, or work requirements. The advantages which may result from common carrier transportation must be fully considered by the agency before it is determined that some other method of transportation should be used.

(2) *Government-owned or Government-contract rental automobiles.* When it is determined that an automobile is required for official travel, a Government-owned automobile shall be used. A Government-contract rental automobile shall be used when a Government-owned automobile is unobtainable or its use is im-

practicable. Privately owned or special conveyances shall be approved for use in lieu of Government-owned or Government-contract rental automobiles only when preferred for reasons of cost, efficiency, or work requirements. Cost advantages which will normally result from use of Government-owned automobiles must be fully considered since these vehicles are operated at a relatively low cost. Costs involved in using a Government-owned or Government-contract rental automobile shall include any administrative costs and any costs associated with picking up and returning the automobile.

(3) *Privately owned conveyance.* A determination that use of a privately owned conveyance would be advantageous to the Government shall normally be made when the use of a commercially rented conveyance would otherwise be authorized for the travel involved. A determination that use of a privately owned conveyance would be advantageous to the Government must be preceded by determinations that both common carrier and Government-owned vehicle transportation are not feasible in the circumstances or that transportation by those means would be more costly to the Government. Those determinations shall be based on both the direct transportation cost and the economies which result from the more expeditious and effective performance of Government business through the use of one or another method of transportation. Other factors to be considered are the total distance of travel, the number of points visited, and the number of travelers.

The Federal Travel Regulations applicable here are prescribed pursuant to statutory authority. See 5 U.S.C. §§ 5702(a), 5704(a) and 5707. Accordingly, an agency's internal regulations implementing the Federal Travel Regulations must be consistent with and may not void any mandatory provisions contained in the Federal Travel Regulations. 40 Comp. Gen. 704 (1961); B–171947–78, July 9, 1976; B–184789, October 30, 1975. Moreover, Executive Order 11491, as amended, 3 C.F.R. 254 (1974), entitled "Labor Management Relations in the Federal Service," provides in section 12(a) that labor management agreements are subject to applicable laws and regulations. Therefore, the issue here is whether the Department's regulation 1500.14 EA, SUP 5, *supra*, as interpreted by the arbitrator, is a proper exercise of the agency's authority in view of paragraph 1–2.2c of the Federal Travel Regulations and Executive Order 11491, *supra*. Or more simply, can regulation 1500.14 EA, SUP 5, *supra*, properly bind the agency to make a favorable disposition of employee requests to use POV as advantageous to the Government when the agency delays giving an employee a response to his request under the circumstances applicable to Mr. Pradarits' situation?

We hold that regulation 1500.14 EA, SUP 5, as interpreted by the arbitrator, contradicts the express requirements of the Federal Travel Regulations. Paragraph 1–2.2b of those regulations states that "[i]n selecting a particular method of transportation to be used, consideration shall be given to the total cost to the Government * * *." Paragraph 1–2.2c(1) requires that the advantages of using common carrier transportation "* * * must be fully considered by the agency before it is determined * * *" that an alternate mode may be used. Moreover, "[a] determination that use of a privately owned conveyance would be advantageous to the Government must be pre-

ceded by determinations that both common carrier and Government-owned vehicle transportation are not feasible in the circumstances or that transportation by those means would be more costly to the Government." Paragraph 1-2.2c(3).

It is evident that the above regulatory requirements would be completely nullified if an agency could set an arbitrary time limit within which, if it does not make the required determinations, it must allow the employee to use POV as advantageous to the Government regardless of the facts of the case. An agency could evade the requirements of the Federal Travel Regulations merely by failing to make the appropriate findings within the specified period. The determining factors as to whether POV use is advantageous to the Government would be subordinated to an artificial constraint of time.

The purpose of the paragraphs of the Federal Travel Regulations cited above is quite clearly to prohibit the use of privately owned vehicles as being advantageous to the Government unless specified conditions have been determined to be met. The arbitrator, however, held that the agency bound itself to grant approval of POV use as advantageous to the Government on a basis not sanctioned nor contemplated by the Federal Travel Regulations. Regulation 1500.14 EA, SUP 5, *supra*, as interpreted by the arbitrator, would allow constructive approval of POV use. Since the arbitrator's basis for his award would circumscribe the agency's responsibility to make certain determinations required by the Federal Travel Regulations, and since the agency is without authority to void those provisions of the Federal Travel Regulations, we find that the arbitrator's award is improper.

The fact that an agency official indicated to Mr. Pradarits that his request would be approved does not bind the Government, as that official was without authority to approve Mr. Pradarits' request. When a Government employee acts outside the scope of the authority actually held by him, the United States is not estopped to deny his unauthorized or misleading representations, commitments, or acts, because those who deal with a Government agent, officer, or employee are deemed to have notice of the limitations on his authority, and also because even though a private individual might be estopped, the public should not suffer for the act or representation of a single Government agent. *Utah Power & Light Co.* v. *United States*, 243 U.S. 389 (1917); *Bianco* v. *United States*, 171 Ct. Cl. 719 (1965); *Potter* v. *United States*, 167 Ct. Cl. 28 (1964), *cert. denied*, 382 U.S. 817 (1965); *Vest Bros. Mfg. Co.* v. *United States*, 160 Ct. Cl. 578 (1960). The Government is not estopped from repudiating advice given by one of its officials if that advice is erroneous. *von Kalinowski* v. *United States*, 151 Ct. Cl. 172 (1960), *cert. denied* 368 U.S. 829 (1961).

In view of the above, the arbitrator's award may not be implemented.

[B-183012]

Appointments—Presidential—Federal Insurance Administrator

Federal Insurance Administrator, a position established under 42 U.S.C. 3533a (1970), requires Presidential nomination and confirmation under Article II, Sec. 2, Cl. 2 of Constitution. Constitution presumes all officers of United States must be appointed with advice and consent of Senate except when Congress affirmatively delegates full appointment authority elsewhere.

Housing and Urban Development Department—Federal Insurance Administrator—Compensation—Past Payments—Prior to Confirmation

Rejection by Conference Committee of Senate amendment to require confirmation of Federal Insurance Administrator does not constitute waiver of constitutional right and duty to advise and consent. Secretarial authority to appoint, including officers, under 42 U.S.C. 3535(c) (1970) does not include Insurance Administrator. However, no exception will be taken to past compensation of incumbent or for reasonable period after date of this decision to allow time for presentation of his name for Senate confirmation.

In the matter of the appointment of the Federal Insurance Administrator, December 9, 1976:

By congressional request, the General Accounting Office has been asked to determine whether the incumbent Federal Insurance Administrator has been validly appointed by the Secretary of Housing and Urban Development (HUD) and, if not, what legal action by this Office is necessary. We understand that the present incumbent was first appointed by the Secretary to serve in an acting capacity and that the appointment was later made permanent by the Secretary without presenting his name to the Senate for confirmation. The question is whether the Secretary had authority to complete the appointment herself or whether Presidential nomination and Senate confirmation of the position of Federal Insurance Administrator was required.

The position of Federal Insurance Administrator was established by section 1105(a) of the Housing and Urban Development Act of 1968, approved August 1, 1968, Pub. L. No. 90-448, 82 Stat. 476, 567 (42 U.S.C. § 3533a (1970)). This section provides:

> There is hereby established in the Department of Housing and Urban Development the position of Federal Insurance Administrator.

There is no specific requirement for Senate confirmation, but neither is there a delegation of authority to establish the position without confirmation. Moreover, there is nothing in the legislative history of the Act which explains the silence as to the method of appointment, which, in fact, may have resulted from an oversight. We note that in the Senate version of the bill (S. 3497, May 29, 1968) the Administrator's duties would be performed through a Government corporation,

headed by an executive director, who would have been subject to confirmation. The House bill (H.R. 17989, June 25, 1968) vested all the insurance duties in the Secretary. The Conferees substituted the present provision, but offered no particular reason for the change. H. Rept. No. 1785, 90th Cong., 2d Sess., 159 (1968). Thus, it is difficult to infer a positive intent to drop the requirement for confirmation.

In our view, Article II, sec. 2, of the United States Constitution requires all "officers of the United States" to be nominated by the President and confirmed by the Senate unless there is an affirmative exception expressed by the Congress in "law." The pertinent section of the Constitution reads as follows:

> * * * [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

This provision was interpreted by a circuit court in *Scully* v. *United States*, 193 F. 185, 187 (C.C. Nev. 1910) as follows:

> The Constitution thus divides the officers of the United States into two classes: First, those whom the President shall nominate, and by and with the advice and consent of the Senate appoint. This class includes ambassadors, other public ministers, consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not otherwise provided for in the Constitution itself, and which shall be established by law: second, inferior officers which shall be established by law, whose appointment Congress may vest in the President alone, in the courts of law, or in the heads of departments. *When Congress creates an office, whether it be inferior or not, and omits to specify how the incumbent is to be appointed, it is one of that class designated in the Constitution as "all other officers of the United States whose appointments are not herein otherwise provided for;" and in such cases the appointment must be made by the President by and with the advice and consent of the Senate.* [Italic supplied.]

In *Williams* v. *Phillips*, 360 F. Supp. 1363 (D.D.C. 1973), the Court stated as follows:

> The constitutional provision governing the appointment of federal officials is clear in its mandate. Unless Congress has vested the power of appointment of an officer in the President, the Courts, or a Department head, he may be appointed only with the advice and consent of the Senate, unless that body is in recess.

In other words, the Constitution presumes that all officers of the United States must be appointed with the advice and consent of the Senate. Only when it clearly delegates the full appointment power for a particular position or class of positions by law to "the President alone, in the Courts of Law, or in the Heads of Departments," can an appointment be lawfully made without such consent. It is thus not necessary that the Congress make each new position it creates subject to its advice and consent authority. It is automatically so subject unless the Congress affirmatively delegates the full appointment authority elsewhere.

It is true that in the great majority of statutes containing legislatively established positions, the Congress either specifically required the President to nominate the officer with advice and consent of the Senate, or it specifically delegated the appointment power elsewhere. See, *e.g.*, the provisions of section 4 of Pub. L. No. 89-174, the Act which established the Department of Housing and Urban Development, in which the Under Secretary, the General Counsel and four Assistant Secretaries were required to have Senate confirmation but a fifth Assistant Secretary for Administration was authorized to be appointed by the Secretary with the approval of the President only. One exception in which the Congress established positions but was silent as to the method of appointment is in the Act of March 3, 1875, chapter 130, pertaining to Treasury Department personnel. The positions of "deputy comptroller," "deputy commissioner of customs," "deputy auditor," and "deputy register" were simply designated in the statute, and a salary set, but nothing more. There was, however, a general provision authorizing the Secretary to appoint on his own "such number of clerks of the several classes recognized by law and such messengers, assistant messengers, copyists, watchmen, laborers, and other employees, and at such rate of compensation respectively as may be appropriated for by Congress from year to year." The Secretary of the Treasury asked the Attorney General the same question we are now considering. The Attorney General replied:

> My conclusion is that section 169 of the Revised Statutes does not invest the head of the Treasury Department with authority to appoint the new deputy bureau officers; and there being no other statutory provision, within my knowledge, which imparts to him this authority, it seems to me that under the Constitution their appointment can only be made by the President, with the advice and consent of the Senate; though in the recess of the Senate the President may, of course, fill them by temporary commissions.
>
> It is true that in regard to the two deputy commissioners of internal revenue, and to the deputy comptroller of the currency, previously established, their appointment is in the Secretary of the Treasury. But this is by force of express legislative enactment, specially applicable to those officers; and from the fact that authority to appoint has been thus conferred in certain cases, the existence of a general authority of like character, exercisable in similar cases, is not to be inferred, but rather the contrary. 15 Op. Attorney General 3, June 25, 1875. See also 18 Op. Attorney General 98, January 6, 1885, and 409, May 26, 1886.

We agree with the Attorney General that no valid inference of Congressional intent may be drawn from the fact that appointment authority is usually spelled out in most statutes establishing legislative positions but that this was not done in the statute in question.

The General Counsel of HUD, replying on the Secretary's behalf in a letter dated October 27, 1976, to our request for the Department's views on this issue, states:

> The issue of Senate confirmation was not raised from the program's inception in 1968 until November of 1975, when Senator Thomas F. Eagleton questioned the legality of the appointment without Senate confirmation.

In order to resolve this issue an amendment to Section 1105(a) of the Housing and Urban Development Act of 1968 was introduced on April 28, 1976. (Section 15 of S. 3295, Senate Report No. 94-749, 94th Congress, 2d Session, 1976.) The amendment reads as follows:

Sec. 15. (a) Section 1105(a) of the Housing and Urban Development Act of 1968 is amended by adding at the end thereof the following new sentence: "The Federal Insurance Administrator shall be appointed by the President, by and with the advice and consent of the Senate."

(b) The amendment made by subsection (a) becomes effective on January 1, 1977.

The General Counsel then points out that section 15 was deleted in conference, and states:

It is significant that the *Congress* specifically considered an amendment requiring that the FIA Administrator be appointed by the President and confirmed by the Senate and, after full and free conference, agreed to delete the amendment. [Italic supplied.]

The General Counsel concludes therefrom that the Secretary had the authority to appoint the Federal Insurance Administrator.

We are not privy, of course, to information about the nature and extent of Conference Committee deliberations about this issue. The Conference Committee report states only as follows:

Confirmation of the Federal Insurance Administrator. The Senate bill contained a provision not in the House amendment requiring that the FIA Administrator be appointed by the President and confirmed by the Senate, effective January 1, 1977. The conference report does not contain this provision.

We have been informed that Senator Eagleton, one of the conferees, had made available to the Committee two advisory opinions—one from this Office and one from the Library of Congress—which concluded that confirmation was constitutionally required. We believe that the Conference Committee's action may, with equal validity, be attributed to a belief that the amendment was not necessary because confirmation was already mandated by the Constitution. In any case, we cannot interpret the Conference Committee's action, in the absence of an express statement to that effect, as evidence of the necessary affirmative intent to waive the Senate's right and duty to advise and consent on this appointment.

The next question is whether there is in fact an affirmative delegation of authority "by law" to the Secretary to make the appointment we are considering.

The General Counsel, in his October 27 letter, *supra*, expresses the belief that 42 U.S.C. § 3535(c) (1970), gives the Secretary of the Department the authority to appoint the Administrator. This provision states in pertinent part:

(c) Employment, compensation, authority, and duties of personnel.

"The Secretary is authorized, subject to the civil service and classification laws, to select, appoint, employ, and fix the compensation of such officers and employees, including attorneys, as shall be necessary to carry out the provisions of this chapter and to prescribe their authority and duties.* * *

Section 3535(c) was originally enacted as section 7(c) of the Department of Housing and Urban Development Act, approved September 9, 1965, Pub. L. No. 89-174, 79 Stat. 667, 670. There is a reference to the provisions of section 7(c) of the Act in House Report No. 337, 89th Congress, 1st Sess. 16 (1965), which speaks to the differences between H.R. 6927, a bill to establish a Department of Housing and Urban Development, and Reorganization Plan No. 1 of 1962. Included among these differences are the following:

> (3) *Legislative provisions and new functions and powers.*—The 1965 bill contains legislative provisions and authorizations, which could not legally be included in the plan, as follows:
>
> * * * * * * *
>
> (f) The Secretary would be authorized to appoint personnel, and fix compensation for heads of organizational components he establishes.* * *

In view of this explanation and the general purport of section 7(c), it appears that Congress only intended to give the Secretary authority under this provision to appoint personnel for offices within the Department which the Secretary establishes, as opposed to offices which Congress itself establishes.

It is not necessarily significant that the delegation of appointment authority in 42 U.S.C. § 3535(c) was enacted several years before the Insurance Administrator's position was created if it is reasonable to conclude that the new position is in the same class with those described in 42 U.S.C. § 3535(c). However, we note that the position involves the administration of three congressionally mandated property insurance programs, involving large sums of money. Moreover, the Insurance Administrator is compensated at executive level IV and appears on the HUD reorganization chart at the same level as the General Counsel and the Assistant Secretaries. As noted earlier, section 4 of Pub. L. No. 89-174 makes each of the above named positions (except the Assistant Secretary for Administration) subject to Senate confirmation.

Accordingly, we believe that the position of Federal Insurance Administrator cannot be included among those subject to the Secretary's general appointment powers under section 3535(c). This is especially true in view of the highly responsible nature of the Insurance Administrator's duties and the desirability of affording the Congress an opportunity to be fully informed about the Administrator's qualifications. We therefore conclude that the incumbent has not been legally appointed and must be presented to the Senate for confirmation at the earliest opportunity.

While we disagree with the view of the HUD General Counsel that 42 U.S.C. § 3535(c) provides authority for the Secretary to appoint the Insurance Administrator, or that the rejection of an advice and

consent amendment by the Conference Committee constitutes a waiver of the constitutional requirement for confirmation, we cannot say that there is no reasonable basis for his opinion. Since we had not rendered a formal opinion at the time the permanent appointment was made, we do not think it is appropriate for this Office to take an exception to the past payments of compensation to the incumbent Insurance Administrator. Moreover, since the Congress is presently not in session, we will not object to compensation paid to him for a reasonable period of time following the date of this decision in order to afford an opportunity to present the incumbent to the Senate for confirmation to the position of Federal Insurance Administrator.

[B-186313]

Contracts—Protests—Procedures—Bid Protest Procedures—Time for Filing

Since protester observed opening of best and final offer prior to designated time, protest against early opening filed more than 10 days later is untimely under section 20.2(b)(2) of Bid Protest Procedures. Where protester's understanding was that no best and final offers other than its own had been submitted prior to designated closing time, protest concerning alleged untimely receipt of awardee's best and final offer filed more than 10 days after notification of award is also untimely under section 20.2(b)(2) of Bid Protest Procedures, and will not be considered.

Contracts—Protests—Timeliness—Concrete Evidence by Protester Not Required

Protest based on procuring agency's administration of awardee's benchmark tests and allegation that awardee was improperly permitted to submit revised best and final offer after December 31, 1975, 2 p.m. closing time, which was filed in April 1976 and amended in June 1976 within 10 working days of when protester says it became aware of respective bases for protest, is timely under section 20.2(b)(2) of Bid Protest Procedures in absence of objective evidence to contrary. Protester is not required to demonstrate by concrete evidence that protest is timely.

Equipment—Automatic Data Processing Systems—Tests—Benchmark—Allegations of Unfairness—Not Supported by Record

Record does not support protester's contentions that awardee of automatic data processing (ADP) contract was permitted to perform benchmark test requirements in less demanding manner than request for proposals (FRP) required, wander in any material way from proposed system configuration, or utilize special computer software not meeting RFP requirements to pass tests.

Contracts—Negotiation—Offers or Proposals—Revisions—Cost—Proposal Unacceptable

Where, concurrent with submission of best and final communication, offeror stated "arithmetic" error was made in cost tables which would result in price increase of "*approximately* $120,000," communication was ineligible for award consideration, since it proposed neither fixed, nor finitely determinable, prices

which the Government would be bound to pay if award were to be based on communication. Also, since offeror's final technical submission proposed significantly different equipment configuration from that which underwent benchmark testing, proposal is unacceptable.

Contracts—Negotiation—Offers or Proposals—Best and Final—Late Modification—Resolicitation Recommended

Because "approximate" pricing communication should not have been considered for award and, since offeror's "corrected" cost tables, modifying communication, were submitted unacceptably late, recommendation is made that requirement be resolicited. Resolicitation is also recommended, since offeror was permitted to significantly correct unacceptable ADP configuration after closing time for best and final offers.

Equipment—Automatic Data Processing Systems—Leases—Long Term

Under provisions of ADP contract funded with fiscal year appropriations having multiple yearly options up to 65 months, separate charges are payable to contractor if Government returns contractor's equipment or otherwise terminates ADP system prior to intended system's life end. Payment of charges—a percentage of future years' rentals on discontinued equipment based on contractor's "list prices"—would violate 31 U.S.C. 665(a), 31 U.S.C. 712a and 41 U.S.C. 11, since charges represent part of price of future years' ADP requirements rather than reasonable value of actually performed, current fiscal year requirements. Liability for such substantial charges in lieu of exercising option renders Government's option "rights" essentially illusory. B–164908, July 7, 1972, overruled.

Contracts—Options—Multiple Year—Termination of Contract—Computation of Charges

Under provisions of ADP contract funded with fiscal year appropriations having multiple yearly options up to 65 months, separate charges are payable to contractor if Government returns contractor's equipment or otherwise terminates ADP system prior to intended system's life end. Charges are based, in part, on percentage of contractor's future years' commercial catalog prices for equipment. Inasmuch as catalog prices are subject to change within contractor's sole discretion, effect of provision would subject Government to indeterminate, uncertain or potentially unlimited liability, in violation of 31 U.S.C. 665(a), 31 U.S.C. 712a and 41 U.S.C. 11. B–164908, July 7, 1972, overruled.

Contracts—Termination—Convenience of Government—"Allowable Cost"

If ADP contract is terminated for convenience of Government, payment of separate charges, which, by contract's provisions, are payable if Government returns equipment or otherwise terminates ADP system prior to intended 60-month system's life, would seem to be inconsistent with mandatory termination for convenience clause remedy. in that separate charges do not represent costs incurred in performance of work terminated and would clearly exceed basic contract's value. B–164908, July 7, 1972, overruled.

Contracts—Termination—Prior to Intended Life of Automatic Data Processing System—Computation of Charges

Although some separate charges payable for termination of ADP system prior to intended system's multiyear life contained in contracts supported by fiscal year funds with multiple yearly options are illegal, it is proper to pay separate

charges in cases where charges, taken together with payments already made, reasonably represent value of fiscal year requirements actually performed. B-164908, July 7, 1972, overruled.

Contracts—Clauses—"Fixed-Price Options"—Ambiguous—Modification Recommended

Inasmuch as payment of certain separate charges payable in event of termination of ADP system prior to intended multiyear life is illegal, indication in "fixed-price options clause" required to be included in such ADP procurements by Federal Property Management Regulation 101-32.408-5 that separate charges may be quoted is inappropriate and misleading to potential offerors on contracts supported by fiscal year funds with multiple yearly options. In addition, clause is unclear as to how separate charges are to be evaluated, such that offerors are clearly unable to propose separate charges with any assurance that offers would not be rejected as unacceptable. Consequently, clause should be appropriately modified by GSA. B-164908, July 7, 1972, overruled.

In the matter of the Burroughs Corporation, December 9, 1976:

BACKGROUND

By letters dated April 12 and June 28, 1976, the Burroughs Corporation (Burroughs) protested the award of a contract to Honeywell Information Systems, Inc. (Honeywell), under request for proposals (RFP) S2751008. The RFP was issued by the Mine Enforcement and Safety Administration (MESA), Department of the Interior, for the acquisition of an automatic data processing (ADP) system for a proposed 65-month period if option rights under the contract were completely exercised. The contract awarded is being funded with fiscal year funds.

To be eligible for award of the fixed-price contract contemplated by the RFP, an offeror had to successfully pass specified benchmark tests utilizing the equipment it proposed to furnish under the contract. Award was to be made to the offeror submitting the lowest priced offer (as evaluated) of those offerors which had successfully passed the benchmark tests. The RFP, as amended, informed offerors that the lowest offer would be determined by evaluating offerors' prices for the basic contract period and the option requirements involved as follows:

II.2. FIXED PRICE OPTIONS

The solicitation is being conducted on the basis that the known requirements exceed the basic contract period (and quantity) to be awarded, but due to the unavailability of funds, the option(s) cannot be exercised at the time of award of the basic contract (although there is a reasonable certainty that funds will be available thereafter to permit exercise of the options); realistic competition for the option periods (and quantity) is impracticable once the initial contract is awarded; and it is in the best interest of the Government to evaluate options in order to eliminate the possibility of a "buy-in." * * * Despite the foregoing, offerors are reminded that although the evaluation which will lead to contract award will be based on systems (items) life costs, the exercise of the option(s) is dependent not only on the continued existence of the requirement and the availability of funds, but also on an affirmative determination that such exercise is in the best interest of the Government.

The closing date was September 16, 1975, for receipt of initial proposals and October 20, 1975, for receipt of benchmark proposals. Burroughs, Honeywell, Digital Equipment Corporation (DEC) and International Business Machines (IBM) submitted timely initial proposals. IBM proposed an alternate system not in accordance with the RFP requirments; the company's proposal was therefore rejected by MESA as unacceptable. DEC's proposal was rejected when the company requested an extension of 8 weeks to complete the benchmark tests. In late November and early December, MESA determined that Burroughs and Honeywell had successfully passed the benchmark tests.

On December 16, 1975, Burroughs and Honeywell were advised that they were required to submit best and final offers no later than 2 p.m., December 31, 1975. Burroughs submitted its best and final offer on December 31, at 1:30 p.m. MESA states that Honeywell's best and final communication was logged in at 1:50 p.m. Honeywell's communication was accompanied by a letter which stated in pertinent part:

> * * * The enclosed cost tables contain an error. They are currently being reprinted and will be in your hands by 3 PM today. The arithmetic error is approximately $120,000 in evaluated cost and will result in an increase in cost to the tables enclosed.

As of the time "best and final" proposals were due, Burroughs' lowest offer was for an estimated evaluated price of $1,944,561 for a proposed "systems life" of 65 months; Honeywell's "uncorrected" cost tables reflected an estimated evaluated price of $1,784,395. MESA states that Honeywell's revised cost tables were delivered at 2:45 p.m., December 31, 1975. These tables indicated a total estimated evaluated price of $1,877,749, an increase of $93,354 over the "uncorrected" cost tables.

In January 1976, MESA found that both Burroughs and Honeywell had submitted technically acceptable best and final offers. After a detailed evaluation of the cost proposals was made, MESA found that Burroughs and Honeywell had not computed costs as specified in the RFP. Consequently, prices were reevaluated as follows:

Honeywell	$1,884,874
Burroughs	1,977,816

Contract No. S2761010 was then awarded to Honeywell on February 10, 1976, for a contract period extending to June 30, 1976, with options to renew to a maximum of 65 months. MESA informed Burroughs of Honeywell's award selection on February 10, 1976.

Burroughs' bases for protest are as follows: (1) Burroughs' best and final proposal was improperly opened before the "best and final" deadline; (2) Honeywell was improperly permitted to submit its "initial" best and final communication after the "2:00 p.m. deadline"; (3) Honeywell was permitted to: (a) perform the benchmark requirements in a "less demanding manner than was required by the RFP,"

e.g., the "data com" inquiries were run separate from the batch processing run; (b) use an "input-output" multiplexer (IOM) having more channels than the system proposed; and (c) use a COBOL complier not complying with the RFP requirements; and (4) Honeywell was improperly permitted to submit its "revised" best and final proposal after the "2:00 p.m. deadline"; moreover, Honeywell's initial communication "neither had a firm price nor a method of deriving a firm price."

Is Burroughs' Protest Timely?

Both MESA and Honeywell assert that Burroughs' protest is untimely filed under section 20.2(b)(2) of our Bid Protest Procedures (4 C.F.R. § 20.2(b)(2) (1976)), which provides:

> * * * bid protests shall be filed not later than 10 days after the basis for protest is known or should have been known, whichever is earlier.

Argument is made that all bases of Burroughs' protest were known or should have been known by the company months before Burroughs actually filed its protest. Consequently, it is urged that Burroughs' protest should not be considered.

Burroughs, by contrast, argues that the bases for protest did not become known to it until April 1, 1976 (as to bases of protest Nos. 1, 2, 3 (a and b), and 4), and June 17 (as to basis of protest 3(c)).

Burroughs has stated that its representatives were present at the office designated for receipt of proposals from 1:25 p.m. until 2:03 p.m. on December 31; moreover, the company specifically admits its representatives were present when MESA officials opened Burroughs' best and final offer. Because of this admission, we think Burroughs must be held to have had knowledge about any irregularities relating to the early opening of its offer on December 31. Since the protest raising this issue was filed months after that day, Burroughs' first basis of protest is untimely filed under section 20.2(b)(2) of our Bid Protest Procedures, and will not be considered.

The allegation concerning the untimely receipt of Honeywell's "initial" best and final communication is based on the understanding of Burroughs' representatives that no other "best and final" proposal had been submitted as of the 2 p.m. closing time. In addition, Burroughs also knew that all offerors were required to submit best and final offers by that time. Consequently, when Burroughs learned of the award of a contract under the RFP to Honeywell on February 10, 1976, the protester must be presumed to have known—under its own version of the facts—that MESA permitted Honeywell to submit a proposal after the closing time. Since the protest raising this issue was not filed until April 1976, this issue must also be considered to

have been untimely raised under section 20.2(b)(2) of our Bid Protest Procedures, and will not be considered.

We consider Burroughs' remaining bases for protest to be timely filed, however. Although Burroughs was told of the award selection immediately, it states it did not become aware of bases of protest 3 (a and b) and 4 until April 1, 1976, and basis of protest 3(c) until June 17, 1976. Since the conduct of the benchmark tests and the content of the cost proposals were not publicly disclosed, we are not in a position to question Burroughs' statements regarding when it became aware of its bases for protest. Nor has MESA or Honeywell presented any evidence which would indicate that Burroughs was aware, or should have been aware, of these bases for protest at an earlier date. Under these stated dates, Burroughs' April 12 protest (as amended by its letter of June 28, 1976) is timely filed under section 20.2(b)(2) of our Bid Protest Procedures.

We are unable to agree with Honeywell's assertion that Burroughs should be required to demonstrate by concrete evidence that its protest is timely. Rather, we believe, under the circumstances, that Burroughs' protest should be considered timely in the absence of objective evidence to the contrary.

Benchmark Tests

Burroughs' third ground of protest concerns alleged improprieties in the conduct of Honeywell's benchmark tests. In considering Burroughs' contentions, we, in consultation with a technical expert, have reviewed a substantial amount of the documentation surrounding the Honeywell benchmark tests.

Burroughs contends that Honeywell was permitted to run the "data com" inquiries separate from the batch processing run in violation of the RFP benchmark test requirements. However, from our review, we have been unable to find any evidence, nor has Burroughs furnished any concrete evidence, to support this contention.

Burroughs has also alleged that Honeywell used a 36-channel IOM for the benchmark tests. The Honeywell IOM, which is a part of the central processing unit (CPU), interfaces and transfers data between peripheral devices and the CPU system controller. Our review of Honeywell's technical proposal reveals that Honeywell offered an IOM with 18 channel slots, together with an IOM "expansion" adding 9 more channel slots, for a total of 27 channel slots. MESA states, and our review confirms, that only 19 channel slots are utilized in Honeywell's proposed system.

We understand that a 37 channel slot IOM was used in the Honeywell benchmark tests. However, we agree with MESA and Honeywell that additional channel slots would not help Honeywell pass the bench-

mark tests or make the Honeywell system more capable, inasmuch as only 19 channel slots were being used. The devices connected to the CPU through the channel slots when the system is operated for the benchmark tests determine the system configuration that exists for operation in the tests. The presence of *unused* (unconnected) channel slots does not increase the capability of the tested system any more than the presence of unused electric sockets in a house increases a household's electric bill.

Burroughs has also asserted that a COBOL compiler not in compliance with the RFP requirement that "the COBOL compiler must be the full standard level 2 ANSI Standard COBOL X3.28-1968" was employed in the benchmark tests in conjunction with a special software program identified as "Charlie Brown." MESA states that the WWMCCS WW 6.0 COBOL compiler was proposed by Honeywell, used in the Honeywell benchmark tests, and delivered by Honeywell under the contract. Additionally, the Federal COBOL Compiler Testing Service (FCCTS), Department of the Navy, has stated that it had previously tested the Honeywell WWMCCS WW 6.0 COBOL compiler and that it conforms to the applicable RFP standards. Since FCCTS is the Federal authority on COBOL (see Federal Information Processing Standards Publication 21-1, December 1, 1975), we are satisfied that Honeywell's proposed COBOL compiler complied with the RFP requirements. The "Charlie Brown" referenced by Burroughs is apparently a library file containing the subroutines called for by the COBOL compiler in the Honeywell system.

From our review of the documentation concerning Honeywell's benchmark tests, we have found no evidence that Honeywell was permitted to perform benchmark requirements in a "less demanding manner than was required by the RFP" or to wander in any material way from its proposed system configuration in the conduct of the benchmark tests. Also, we have found no suggestion that any unfair or preferential treatment was afforded Honeywell during the tests.

Late Proposal

Concurrent with the submission of its best and final communication, Honeywell stated it had made an "arithmetic" error which would increase its price "approximately $120,000."

Burroughs has urged that by virtue of Honeywell's concurrent assertion of error Honeywell did not submit a proposal offering a firm-fixed price before the 2 p.m., December 31, 1975, closing date for receipt of best and final offers. Burroughs also contends that Honeywell's late "corrected" best and final communication should not have been considered for award.

The consideration of late offers and modifications is governed by section I.7 of the General Instructions of the RFP which provides:

I.7 LATE OFFERS AND MODIFICATIONS OR WITHDRAWALS

(a) Any proposal received at the office designated in the solicitation after the exact time specified for receipt will not be considered.

* * * * * * *

(b) Any modification of a proposal, except a modification resulting from the Contracting Officer's request for "best and final" offer, is subject to the same conditions as in (a) (1) and (a) (2) of this provision.

(c) A modification resulting from the Contracting Officer's request for "best and final" offer received after the time and date specified in the request will not be considered unless received before award and the late receipt is due solely to mishandling by the Government after receipt at the Government installation.

* * * * * * *

(e) Notwithstanding (a), (b), and (c) of this provision, a late modification of an otherwise successful (selected) proposal which makes its terms more favorable to the Government will be considered at any time it is received and may be accepted.

The contracting officer has justified the acceptance of Honeywell's late "corrected" cost tables as follows:

Since Honeywell's offer was received before 2:00 P.M. and I was notified of the arithmetic error and that corrected cost tables would be provided in less than one hour, as Contracting Officer I decided that Honeywell's statement of "approximately $120,000" would be the maximum change to the cost tables that I would accept and, therefore, Honeywell had submitted an acceptable offer consisting of the original $1,784,395 stated in their proposal plus $120,000 indicated in their letter for a total of $1,904,395. This offer was well below Burroughs' offer and made Honeywell the apparent low offeror. The revised tables delivered to our Headquarters Office at 2:45 P.M. December 31, 1975, indicated a total price of $1,877,749. Since this was an increase of $93,354, well under the "approximately $120,000", I further considered this to be a late modification of an otherwise successful proposal which made its terms more favorable to the Government and accepted the proposal as authorized by paragraph (e) of the Late Proposals, Modifications of Proposals, and Withdrawal of Proposals clause contained in the RFP * * *. To do otherwise would have further reduced competition from two vendors to one for an already recognized arithmetic error in a very long, detailed and complex set of cost tables.

Neither MESA nor Honeywell has made any explanation of the nature of the alleged "arithmetic" error. However, during our review we noted that the technical portion of Honeywell's best and final communication proposed equipment different from that previously proposed and benchmark tested. Honeywell's best and final communication proposed only one code translator for the magnetic tape processor, although two translators were initially proposed and benchmark tested. Also, Honeywell's best and final communication did not propose the nine channel slot IOM expansion unit (discussed above) initially proposed and benchmarked. We also note that the cost figures for the CPU, of which the IOM expansion is considered a component, and for the tape processor, of which the code translators are considered parts, were the principle figures adjusted from the "uncorrected" cost tables to the "corrected" cost tables. Consequently, it seems that the

"arithmetic" error referenced by Honeywell might well have been caused by its inadvertent failure to include the IOM expansion and code translators it proposed and benchmark tested.

Section II.2.1 of the RFP clearly required offerors to propose "fixed prices, or prices which can be finitely determinable" for the initial contract and option periods. See *Computer Machinery Corporation*, 55 Comp. Gen. 1151, 76-1 CPD 358, affirmed *C3, Inc.*, B-185592, August 5, 1976, 76-2 CPD 128. Honeywell's best and final communication, however, did not propose any fixed or finitely determinable price which the Government would be bound to pay if award had been based on this communication. It is elementary that an offer must be sufficiently definite and certain to give rise to a binding contract. 17 AM. JUR. *Contracts* §§ 31, 75 (1964); 1 *Corbin on Contracts* §11 (1963). If the consideration (price) stipulated in a contract is indefinite or uncertain, a primary purpose of contracting, i.e., to make the rights of the parties definite and certain, has been thwarted. See 13 Comp. Gen. 181, 183 (1934). Moreover, where competition is required for the award of a Government firm fixed-price contract, as here, it is essential that a definite and certain fixed price be stated in order for a proposal to be considered eligible for award, especially where price essentially determines award.

In the present case, it is clear that the Government could not bind Honeywell to the price quoted in its "uncorrected" cost tables in view of the concurrent assertion by Honeywell that this price was in error. This evidenced Honeywell's clear intent that the price tendered in its "initial" best and final communication was not to be considered a firm offer (proposal).

Moreover, Honeywell's price could not be rendered finitely determinable by merely adding $120,000 to the "uncorrected" evaluated price. Honeywell did not limit the amount of its alleged "arithmetic" error to $120,000, but rather stated that its offered price would be adjusted upwards "*approximately* $120,000" (italic supplied). By adding the term "approximately," any definiteness or certainty as to what fixed price Honeywell intended to offer was negated. Indeed, under the circumstances of the present case, it would appear that "approximately" would allow for other than *de minimus* variations from $120,000; that is, Honeywell's corrected price adjustment varied $26,646 or 22 percent from $120,000. Although the contracting officer stated he would have limited the correction of Honeywell's evaluated price to $120,000, there is no authority for him to so limit the price. The term "approximately" does not mean "no more than," but rather allows for adjustments of greater than $120,000.

In addition, Honeywell's final technical submission was technically unacceptable. As discussed above, Honeywell proposed a significantly different equipment configuration from that which passed the benchmark tests. Although Honeywell's failure to include the IOM expansion and the second magnetic tape processor code translator in its final configuration may have been inadvertent, Honeywell effectively superseded its previous technically acceptable configuration. See *Patty Precision Products Company*, B–182861, May 8, 1975, 75–1 CPD 286. Since we understand that the benchmarked configuration has been installed, it seems clear that Honeywell was permitted to correct its apparent oversight after the closing date.

In view of the foregoing, Honeywell's "corrected" best and final offer should have been considered late under the RFP's "Late Offers and Modifications or Withdrawals" clause and not for consideration, since Honeywell's "initial" best and final communication was not the "otherwise successful proposal." Discussions with Burroughs as well as Honeywell should have been conducted and a new round of best and final offers been called, so that both Honeywell and Burroughs could have competed on an equal basis. See 51 Comp. Gen. 479 (1972); *Corbetta Construction Company of Illinois, Inc.*, 55 Comp. Gen. 201 (1975), 75–2 CPD 144, modified by 55 Comp. Gen. 972 (1976), 76–1 CPD 240; *Elgar Corporation*, B–186660, October 20, 1976, 76–2 CPD 350.

Separate Charges

Before deciding what remedial action should be recommended with regard to Honeywell's contract because of the foregoing analysis, we must ascertain the effect of the "separate charges" proposed by Honeywell. Under this provision of the Honeywell contract, MESA is supposed to pay "separate charges" if it returns the Honeywell equipment or otherwise terminates the ADP system prior to the end of the intended 60-month "systems life." (Although contract term was 65 months, system equipment was scheduled to be installed in the seventh of 66 evaluated months.) Similar separate charges are at issue in various other bid protests pending in our Office, in particular, Honeywell's protest of the General Services Administration (GSA) procurement of ADP equipment for the Navy under RFP CDPA–75–13, which is the subject of our decision of today (56 Comp. Gen. 167 (1976)). The "separate charges" provision of Honeywell's contract reads as follows:

> The prices and terms and conditions are predicated upon the Government's stated current intention to retain the proposed system under this contract by purchase and/or continuing rental for the entire system's life (contract evaluation months 7 through 66). The stated prices and discounts shall be valid unless and until the Government fails to acquire and retain the initial installation for said system's life. In this event, prices may revert to then current Honeywell list.

While the Government is not obligated to exercise its options to extend the term of this contract for the full 60-month system life, the parties hereto acknowledge that the stated prices and discounts and other terms and conditions are based on the Government's current intention to so extend the term of this contract. Accordingly, the Government agrees that for each proposed item of equipment not purchased or rented and retained on rental for the entire 60-month system life or respective remaining portion thereof, the Government shall pay to Honeywell an "Early Lease Termination Charge" of 30% of the monthly list rental price (standard Honeywell list price as reflected in the then current Honeywell ADP Schedule or, in its absence, in Honeywell's then current commercial catalog) multiplied by the remaining number of respective months until the end of the 60-month system life. Thus, if an item is returned to Honeywell 15 months prior to the end of the 60-month system life period, the Government shall pay to Honeywell an "Early Lease Termination Charge" of 4½ month's rent at list rental price. The "Early Lease Termination Charge" is similarly applicable to optional proposed augmentation equipment not retained on rental for the full 60-month system life or respective remaining portion thereof.

Honeywell's separate charges flow from the RFP's expressed reservation that there is only a "reasonable certainty" that all options would be exercised. ADP equipment represents a very large capital investment for a contractor. Should the equipment supplied under the contract be returned to Honeywell by MESA prior to the expiration of the systems life, either because of termination of the contract, failure to exercise an option, a desire by the Government to cut back the system to save money, or for any other reason, the contractor may well suffer a loss on the equipment it is supplying the Government if it is unable to find another user for the equipment. The separate charges quoted by Honeywell are apparently intended to protect against this contingency.

Moreover, the RFP essentially invited offerors to quote "separate charges" if they so desired by means of the following provisions:

II.2.2. EVALUATION OF PRICES

Offers will be evaluated for purposes of award by adding the total price of all optional periods and, if applicable, all stated optional quantities to the total price for the intial contract period covering the initial system or items. * * * *Separate charges, if any, which will incur to the Government should the latter fail to exercise the options, will not be considered in the evaluation, except as stated in II.2.3. below.* [Italic supplied.]

II.2.3. UNBALANCED PRICES

An offer which is unbalanced as to prices for the basic and optional quantities may be rejected. An unbalanced offer is one which is based on prices significantly less than cost for some systems and/or items and prices which are significantly overstated for the other systems and/or items. *In determining an offer which is unbalanced as to prices, the Government will evaluate separate charges, if any, which the Government will incur for failure to exercise the options.* [Italic supplied.]

These provisions are part of the "fixed-priced options" clause, which Federal Property Management Regulation (FPMR) § 101–32.408–5, 41 C.F.R. § 101–32.408–5 (1976), required be included in the present RFP. The regulation provides:

When the Government has firm requirements for ADPE, software, or maintenance services which exceed the basic contract period (and quantity) to be

awarded, but due to the unavailability of funds the option(s) cannot be exercised at the time of award of the basic contract (although there is a reasonable certainty that funds will be available thereafter to permit exercise of the options); realistic competition for the option periods (and quantity) is impracticable once the initial contract is awarded; and it is in the best interest of the Government to evaluate options in order to eliminate the possibility of a "buy-in," the * * * [fixed-price options] clause shall be inserted in solicitation documents.

Since the Honeywell contract is being funded with fiscal year appropriations, payment of the separate charges quoted by Honeywell would necessarily involve consideration of 31 U.S.C. § 665(a) (1970), 31 U.S.C. § 712a (1970), and 41 U.S.C. § 11 (1970), which provide:

31 U.S.C. § 665(a):

No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.

31 U.S.C. § 712a:

Except as otherwise provided by law, all balances of appropriations contained in the annual appropriation bills and made specifically for the service of any fiscal year shall only be applied to the payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made within that year.

41 U.S.C. § 11:

No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the Departments of the Army, Navy, and Air Force, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year.

In 42 Comp. Gen. 272, 275 (1962), we summarized the import of these statutes as follows:

These statutes evidence a plain intent on the part of the Congress to prohibit executive officers, unless otherwise authorized by law, from making contracts involving the Government in obligations for expenditures or liabilities beyond those contemplated and authorized for the period of availability of and within the amount of the appropriation under which they are made; to keep all the departments of the Government, in the matter of incurring obligations for expenditures, within the limits and purposes of appropriations annually provided for conducting their lawful functions, and to prohibit any officer or employee of the Government from involving the Government in any contract or other obligation for the payment of money for any purpose, in advance of appropriations made for such purpose; and to restrict the use of annual appropriations to expenditures required for the service of the particular fiscal year for which they are made.

Contracts executed and supported under authority of fiscal year appropriations, as here, can only be made within the period of their obligation availability and must concern a *bona fide* need arising within such fiscal availability. *Leiter* v. *United States*, 271 U.S. 204 (1926); *Goodyear Tire and Rubber Company* v. *United States*, 276 U.S. 287 (1928); 48 Comp. Gen. 497 (1969); *Storage Technology Corporation*, B-182289, April 25, 1975, 75-1 CPD 261. Those contracts entered into

under fiscal year appropriations purporting to bind the Government beyond the fiscal year involved must be construed as binding upon the Government only to the end of the fiscal year. *Leiter, supra.* Specific affirmative action by the Government, in effect making a new contract and complying with the advertising requirements, is required in order to extend the term of the contract beyond the fiscal year. See 42 Comp. Gen., *supra; Leiter, supra; Goodyear, supra.*

These principles were applied in 36 Comp. Gen. 683 (1957) and affirmed at 37 Comp. Gen. 155 (1957)—a similar case to that involved here. In the cited case, we were asked for our opinion as to the Atomic Energy Commission's authority to enter into a 5-year supply contract for magnesium. The proposed contractor intended to build a new plant for the supply of the mineral. In return for quoting a favorable base price, which could not otherwise be obtained for the mineral, the proposed contractor wanted the Commission to guarantee that, should the contract be terminated before the end of the 5-year period, it would recover a "sliding-scale" percentage (depending on the year of termination) of its capital costs for the plant as a termination penalty (separate charge).

We found that the proposed 5-year contract could not be entered into with fiscal year funds. We went on to say:

> Furthermore, even if the contract were to be executed on a one-year basis with renewals optional on the part of the Commission, question would arise as to the validity of the proposed termination charge provisions. * * *
>
> It has consistently been held by the accounting officers that [the above-quoted] statutes preclude the obligation of an appropriation made for the use of one fiscal year for needs of other years. In other words, a fiscal year appropriation such as the usual appropriations for the Commission may be obligated only for the procurement of supplies or services which are needed during that fiscal year. See 32 Comp. Gen. 565, and decisions there cited. The invitation for proposals and the proposed contract in the present case demonstrate that the maximum need of the Commission for the magnesium to be furnished is 7,000,000 pounds in any one year. Consequently, under the statutory limitations cited above, the maximum amount which properly may be obligated against any fiscal year appropriation is the [reasonable] cost of that quantity.
>
> It is understood that other contracts similar to that now proposed have been made by the Commission, and that there have been obligated under such contracts termination charges of a similar nature. The theory behind such obligations (covering amortized facility costs unrecovered at time of termination) has been that a need existed during the fiscal year the contracts were made for the productive plant capacity represented by the new facilities which were to be built by the contractor to enable him to furnish the supplies called for by the contracts. After thorough consideration of the matter, we believe that such obligations cannot be justified on the theory of a present need for productive capacity.
>
> The ultimate need of the Commission in these cases is for the supplies themselves, and, as stated above, in the present case the maximum annual need is for 7,000,000 pounds of magnesium. *Any contract provision which would obligate the Commission to pay more than the [reasonable] cost of this quantity of magnesium in any one fiscal year as a penalty or damages for failing to renew the contract for subsequent fiscal years could not be considered as pertaining to the needs of the current year. The real effect of the termination liability is to obligate the Commission to purchase a certain quantity of magnesium during each of five successive years or to pay damages for its failure to do so.*

In other words, the termination charges represent a part of the price of future, as distinguished from current, deliveries and needs under the contract, and for that reason such charges are not based on a current fiscal year need.

It is our opinion, therefore, that in the absence of special statutory authority the Commission properly may not execute the proposed contract. * * * [Italic supplied.]

The Commission requested reconsideration of this decision. In 37 Comp. Gen. 155, *supra*, we acknowledged that we had approved arrangements similar to those suggested by the proposed magnesium contractor when the arrangement was the *only* way the Government could obtain the supply or service. See, for example, 8 Comp. Gen. 654 (1929), involving a utility contract for water service (discussed below). But we noted the Commission could meet its current and future magnesium needs from other sources without the construction of the new plant under the proposed scheme involving separate charges. Moreover, we concluded that the cost (including separate charges) of any particular fiscal year's magnesium needs under the scheme would be far in excess of the reasonable cost of the magnesium from the existing source. Consequently, we affirmed our prior decision.

It seems apparent that the separate charges present in the Honeywell contract actually represent a part of the price of the ADP requirements of future years rather than merely current needs under the contract. Honeywell's separate charges penalty is clearly intended to recapitalize the contractor for its investment based upon a full 60-month systems life if the Government fails to continue to use the equipment. Indeed, Honeywell's penalty is a percentage of all future years' rentals of discontinued system equipment based on Honeywell's "list prices" at the time of discontinuance. For example, if MESA were to terminate the contract in December 1976, Honeywell would be entitled, in theory, to payment of a penalty equal to 30 percent of Honeywell's "monthly list price" for the discontinued system equipment multiplied by 55 months—the then remaining intended contract life. An even more egregious example could have been demonstrated had MESA terminated the contract and paid the separate charges in the first few weeks or months of the contract. If the Government were liable for the charges involved, it is apparent that the Government's option "rights" under the Honeywell contract are essentially illusory, since the Government would have to pay a substantial penalty in lieu of exercising the option.

Honeywell's separate charges, therefore, do not reasonably relate to the value of the current fiscal year requirements which have actually been performed. Consequently, the charges are not based on a current fiscal year need, and payment of these charges would violate the above-quoted statutes. 36 Comp. Gen., *supra;* 48 *id.* 497; B–164908, July 6, 1970.

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To be contrasted with the improper Honeywell scheme, the Government may properly pay a higher *base rate* for the first year than subsequent years of multiple year requirements covered by the same procurement funded with fiscal year appropriations. Award may be made under the circumstances set out in FPMR § 101-32.408-5 to an offeror proposing the lowest overall price adding the base contract price and the prices of all options intended to be eventually exercised, rather than to the offeror proposing the lowest initial price for the base contract period only. See B-162839, December 13, 1968; B-164908, July 6, 1970, *supra*. Award, in effect, is to be made to the offeror proposing the lowest overall average price for the projected contract life—assuming that there is a reasonable certainty that the options will be exercised. So long as the lowest overall offer is not "unbalanced"—e.g., based on prices significantly understated for some work and overstated for other work—any part of the higher initial contract price for the base period does not represent future year needs, since award, in fact, is being made to the lowest bidder for the entire intended contract term. See B-162839, *supra;* B-164908, July 6, 1970, *supra*. On the other hand, separate charges which do not represent the reasonable value of the performed work at termination—e.g., Honeywell's separate charges—can be 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. Moreover, separate charges cannot be logically added to the base and option prices to determine the lowest-priced offer, since both these prices and the separate charges will not be paid because they are alternative in nature.

Additionally, Honeywell's separate charges are based, in part, on a percentage of "Honeywell's then current commercial catalog" prices. These catalog prices are to be used only if no current ADP schedule contract exists for the particular equipment. Honeywell's catalog prices are subject to change at any time solely within the exercise of Honeywell's discretion. Moreover, there is no requirement that Honeywell continue its ADP schedule contracts. Also, there is no limitation on how much Honeywell could decide to raise its catalog prices if it so desired (to be contrasted with ADP schedule contract prices where the Government has the discretion not to enter into schedule contracts if the prices are considered too high, see *Digital Equipment Corporation*, B-180833, July 2, 1974, 74-2).

The effect of this provision would be to subject the Government to an indeterminate liability. We have consistently recognized that the Government may not be obligated to pay uncertain or potentially unlimited contingent liabilities, since it can never be said that sufficient funds have been appropriated to cover such contingencies. This violates

the above-quoted statutes. See 16 Comp. Gen. 803 (1937); A–95749, October 14, 1938; 20 Comp. Gen. 95, 100 (1940); *California-Pacific Utilities Company* v. *United States*, 194 Ct. Cl. 703, 715 (1971). Consequently, Honeywell's separate charges are also invalid insofar as they may be based upon "Honeywell's then current catalog" prices.

Furthermore, if the Honeywell contract were terminated for the convenience of the Government, it seems that payment of the Honeywell separate charges would be inconsistent with the standard termination for convenience (T for C) clause remedy. This clause was included in the Honeywell contract by requirement of Federal Procurement Regulations (FPR) § 1–8.700 (Amend. 153, 1975).

The Honeywell separate charges do not represent costs incurred in the performance of the work terminated—the measure of recovery under the clause. Moreover, these charges would clearly exceed the value of the contract—the limit of recovery under the clause—if complete termination of the system occurred during the first few years. Consequently, payment of the Honeywell separate charges would allow for recovery of costs not cognizable under the T for C clause.

In the absence of an express waiver pursuant to FPR § 1–1.009 (Amend. 9, 1965), an agency is not authorized to agree to termination damages inconsistent with the T for C clause remedy. See B–155936, March 15, 1968; *G. L. Christian & Associates* v. *United States*, 160 Ct. Cl. 1 (1963), *cert. denied* 375 U.S. 954 (1963), where a claim for anticipatory profits arising from an early termination of a contract was denied, because the clause, which is reflective of long-standing policy, was incorporated in the contract by operation of law. In any case, by virtue of the RFP's Order of Precedence clause, the T for C clause here clearly takes precedence over the separate charges provisions. Additionally, counsel for Honeywell (in a letter furthering its aforementioned protest (decided today) with GSA, where very similar separate charges provisions are involved) apparently admits that the separate charges are inconsistent with the T for C clause remedy, and that the clause would govern in determining any termination liability rather than the separate charges provisions.

This is not to say that all separate charges are violative of the above-quoted statutes. Payment of separate charges for early termination is proper if the *only* way the Government can obtain needed services or supplies (e.g., utilities) is by agreeing to pay such charges. See 8 Comp. Gen., *supra*; B–164772, August 16, 1968. This is to be contrasted with the highly competitive ADP industry where the Government does not have to pay separate charges to obtain ADP equipment and services. For example, Burroughs proposed no separate charges in the present case.

Also, the payment of separate charges for early termination, which, taken together with payments already made, reasonably represent the value of fiscal year requirements actually performed is proper, even when—as in most ADP related procurements—the goods or services can be obtained without allowing offerors to propose these charges. (See 48 Comp. Gen. 497, which inferentially modified 37 Comp. Gen., *supra*, as to the permissibility of allowing these charges, even though the goods or services might be obtained from some concerns without separate charges.) If the Government expresses a firm intent (notwithstanding the reservation of options) that the equipment is to be used for multiple years, a supplier may well discount its offered annual rental for the ADP equipment based upon usage for this projected term. If otherwise allowed by the procuring agency and subject to the T for C clause, it would be proper for an offeror, under the circumstances, to provide for the contingency that the equipment may not be used for the entire projected term by providing for recovering the reasonable value (e.g., ADP schedule price) of the actually performed work at termination based upon the shortened term. Any decision which may be inconsistent with this view should no longer be followed. See, for example, B–164908, July 7, 1972.

Inasmuch as the payment of certain separate charges is illegal, the indication of the FPMR "fixed-price options" clause that separate charges may be quoted is inappropriate and misleading to potential offerors on contracts with multiple yearly options funded with fiscal year appropriations. This improper FPMR implication cannot act, however, to bind the Government to violate the congressionally mandated proscription against such charges contained in the above-quoted statutes.

In addition, we believe the FPMR clause is unclear as to how separate charges are to be evaluated. The clause states that separate charges for failing to exercise an option are only to be considered in determining whether an offer is "unbalanced" as to price. But, although "unbalancing" with regard to basic prices is defined in the clause, the specific mechanism for determining whether *separate charges* make an offer "unbalanced" is nowhere indicated by the clause. Nor are there any objective or common guidelines and standards in the clause by which an offeror could reasonably determine whether its separate charges made its offer unacceptable. Faced with the existing clause, offerors are clearly unable to propose separate charges with any assurance that their offers would not be rejected because of "unbalancing." *Cf. Mobilease Corporation*, 54 Comp. Gen. 942, 946 (1974), 74–2 CPD 185; *Standard Services, Incorporated*, B–182294, April 8, 1975, 75–1 CPD 212. Also, see GSA's methodology in applying the "unbalancing" tests to very similar separate charges in the aforementioned Honeywell protest (decided today).

Conclusion

We recommend that Burroughs and Honeywell be afforded an opportunity to submit new price proposals in a manner consistent with this decision. After negotiating with these sources, the Honeywell contract should be terminated for the convenience of the Goverment, if Burroughs is the successful offeror. In this event, Honeywell should not be paid separate charges; rather, settlement with Honeywell is required to be made in a manner consistent with the T for C clause. If Honeywell is successful at a price lower than that contained in its existing contract, the contract should be modified in accordance with Honeywell's final proposal. Also, a clause in the RFP to be used for resoliciting price proposals should expressly provide that Honeywell, as a condition of participating in the resolicitation, agrees to the modification scheme. Technical and benchmark proposals need not be solicited from other sources in the present case, since no firm other than Burroughs was prejudiced by the foregoing procurement deficiencies.

We understand that there are various other extant ADP contracts containing separate charges which may be questionable under our analysis. We do not believe those otherwise properly awarded contracts containing such charges should be disturbed. However, if any of the systems covered by these contracts are terminated prior to their contemplated life, the payment of the illegal separate charges, as indicated in this decision, would be prohibited.

If GSA still wishes to allow separate charges in fiscal year funded contracts with multiple yearly options, the FPMR clause should be modified to specifically advise prospective offerors as to what separate charges are not acceptable; that is, a specific ceiling on separate charges should be stated. An appropriate ceiling on separate charges would seem to be the reasonable value (e.g., based on ADP schedule prices, catalog prices extant at contract execution or cost data) of the ADP requirements which have been actually performed under the contract at the time of discontinuance of the system. In any case, we believe that GSA may want to reevaluate the wisdom of permitting separate charges to be quoted at all in ADP procurements. We are bringing the problems we have found with the FPMR "fixed-price options" clause to the attention of the Administrator of GSA by letter of today, together with our recommendation that the FPMR clause be appropriately modified.

As this decision contains recommendations for corrective action to be taken, it is being transmitted by letters of today to the congressional committees named in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970), which requires the submission of written statements by the agency(s) involved to the House and

Senate Committees on Government Operations and Appropriations concerning the actions taken with respect to our recommendations.

[B-186386]

Contracts—Protests—Timeliness—Significant Issue Exception

Post-award protest that Department of Labor (DOL) Service Contract Act (SCA) wage determination attachment was omitted from request for proposals, involving a deficiency apparent before closing date for receipt of proposals (RFP), is untimely but presents issue of widespread interest concerning frequent SCA procurements and will be considered on merits as significant issue under 4 C.F.R. 20.2(c) (1976).

Contracts—Labor Stipulations—Service Contract Act of 1965—Minimum Wage, etc., Determinations—Labor Department's Interpretation

Department of Labor's interpretation of Service Contract Act filing requirements and application of wage determinations to solicitation and contract, as interpretation of regulations by issuer, is accorded great deference.

Contracts—Labor Stipulations—Service Contract Act of 1965—Minimum Wage, etc., Determinations—Prospective Wage Rate Increases

In view of (1) agency knowledge for over 3 weeks before award that wage determination was to be issued in close proximity to anticipated award date; (2) fact that agency's failure to include incumbent's collective bargaining agreement with Department of Labor (DOL) SF 98 significantly contributed to delay in issuance of new wage determination for inclusion in RFP; (3) fact that agency made preaward arrangement with successful offeror to accept expected wage determination, and modification was issued; and (4) DOL view that closing date should have been postponed when agency was notified that wage determination would be delayed: contract awarded was different from contract solicited. Therefore, requirements covered by current option should be resolicited.

Contracts—Time and Materials—Ceiling Price Requirement

Time and materials portion of contract which did not contain ceiling price was formulated in contravention of ASPR 3-406.1(c) (1975 ed.), which makes use of ceiling price mandatory condition in this method of contracting.

In the matter of the High Voltage Maintenance Corporation, December 9, 1976:

High Voltage Maintenance Corp. (HVM) protests the award of contract No. F33601-76-90312 by the Department of the Air Force (Air Force), Wright-Patterson Air Force Base, Ohio, to E.I.L. Instruments, Inc. (EIL), for electrical maintenance and repair of equipment at the Air Force Aero Propulsion Laboratory, resulting from request for proposals (RFP) No. F33601-76-09244.

A single contract was to be awarded for all the items. The RFP provided that items IA and IE (straight time rates for three personnel,

and the data to be delivered during the basic period) would be awarded on a firm-fixed-price basis; items IB, IC and ID (on-call rates for straight time and overtime, and estimated materials and subcontracting) would be awarded on a time and materials-type basis. The term of the contract, April 5, 1976, through June 30, 1976, could be extended for a first option period of July 1, 1976, through September 30, 1976, and a second option period of October 1, 1976, through September 30, 1977; offerors were requested to submit offers for the base, first option, and second option periods.

With respect to evaluation and award, the RFP stated that award would be made to the "responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered" and that "award will be made in the aggregate to the low responsive and responsible offeror." Further, the RFP cautioned that "[t]he Government may award a contract, based on initial offers received, without discussion of such offers." The RFP and resulting contract incorporated by reference the provision applying the Service Contract Act of 1965 (41 U.S.C. § 351 *et seq.* (1970)) (SCA) to the procurement as required by ASPR § 7-1903.41(a) (1975 ed.); the RFP did not, however, contain a Department of Labor (DOL) SCA wage determination.

According to the Air Force, HVM, the incumbent contractor, had performed services "substantially the same" as those to be performed under the protested contract, although the instant contract additionally includes "on-call" services. DOL wage determination No. 72-172 (Rev. 3), which set forth the wage and fringe benefits reflected in a collective bargaining agreement (cba) between HVM and its employees, was applicable to the prior contract. A new cba, effective June 1, 1975, existed at the time the previous contract expired.

On January 22, 1976, the Air Force submitted a Standard Form (SF) 98, "Notice of Intention to Make a Service Contract and Response to Notice," to DOL. 29 C.F.R. § 4.4 (1975); ASPR § 12-1005.2 (a) (1975 ed.). The RFP, issued on February 27, 1976, required that proposals be submitted by March 18, 1976. Of 11 proposals solicited, the Air Force received only those of HVM and EIL, which were considered to be within the competitive range. On April 2, 1976, award was made to EIL, the low offeror.

HVM essentially contends that Air Force violations of procurement law and regulations in making the award necessitate cancellation of EIL's contract and resolicitation of the Government's requirements, on the following grounds:

1. The award violated the SCA, ASPR §§ 12-1005 and 7-1903.41 (a) (1975 ed.) because neither the RFP nor the contract included a wage and fringe benefit determination by DOL.

2. The contracting officer failed to conduct discussions with the offerors.
3. The award to EIL was illegal because the RFP lacked sufficient evaluation criteria.
4. EIL did not submit the cost or pricing data required by the RFP.

HVM asserts that the award to EIL violated the SCA and implementing regulations because neither the RFP nor the contract included a DOL wage and fringe benefit determination. The Air Force contends that the absence of a wage determination attachment from the RFP was apparent before the proposals were to be submitted, and that a protest on this ground filed subsequent to award of the contract is, therefore, untimely, citing section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. Part 20 (1976). Because HVM's protest was filed after the closing date for receipt of initial proposals, omission of the wage determination attachment from the RFP as a ground of the protest is untimely.

We have determined, however, that this ground of the protest should be considered on the merits because it raises an issue which "goes to the heart of the competitive procurement process." *Willamette-Western Corporation; Pacific Towboat & Salvage Co.*, 54 Comp. Gen. 375 (1974), 74-2 CPD 259. The frequency of SCA procurements and DOL's position in recent, related protests before this Office (discussed below) evidence the presence of a "principle of wide-spread interest" requisite to a "significant issue," within the exceptions to the timeliness rule under 4 C.F.R. § 20.2(c) (1976). *Fairchild Industries, Inc.*, B-184655, October 30, 1975, 75-2 CPD 264; *Ibid.*; 52 Comp. Gen. 20, 23, (1972).

The Air Force submitted an SF 98 to DOL on January 22, 1976; but no determination had been communicated to the Air Force by February 27, 1976, the date the RFP was issued. A determination had not been issued by the closing date for receipt of proposals, March 18, 1976. Nevertheless, in a letter dated April 1, 1976 (the day before award), confirming a telephonic conversation of that date with the Air Force, EIL acknowledged, in pertinent part, that:

> * * * It is understood that a Wage Determination was inadvertently left out of the * * * solicitation. E.I.L. will, of course, accept any Wage Determination which is offered as an amendment or modification to the contract.
>
> It is also understood that in the event the determination is higher than the actual wage paid our personnel the Government will then re-adjust the hourly rate accordingly.

Written communication of DOL's new wage determination (No. 72-172, Rev. 4), issued March 31, 1976, was not received by the Air Force until April 2, 1976—15 days after the closing date for receipt of pro-

posals, and, according to the Air Force, "several hours after the award." We observe here that the new wage determination was based on the cba which existed at the time the prior contract expired and contained increased wage rates.

By letter of April 23, 1976, the Air Force requested DOL's guidance in administering the protested service contract because the agency had received DOL's new wage determination subsequent to award. In reply, DOL, by letter dated July 30, 1976, noted that, although the Air Force had timely filed the SF 98, the delay in issuing wage determination No. 72–172 (Rev. 4) was because DOL subsequently discovered that HVM, the incumbent contractor, was a party to a cba. DOL had advised the Air Force of this discovery on March 10, 1976 (8 days prior to the closing date for receipt of initial proposals), and on that date had requested a copy of the cba. The agency supplied the information by letter of March 12, 1976. DOL did not receive a copy of the cba until March 19, 1976, the day after the closing date. Consequently, although the Air Force had timely filed the SF 98 more than 30 days prior to issuance of the RFP, the agency failed to comply with the regulatory requirements for filing the SF 98. 29 C.F.R. § 4.4(c) (1975) provides in pertinent part:

> If the services to be furnished under the proposed contract will be substantially the same as services being furnished for the same location by an incumbent contractor * * * [who] is furnishing such services through the use of service employees whose wage rates and fringe benefits are the subject of one or more collective bargaining agreements, *the contracting agency shall file with its Notice of Intention to Make a Service Contract (SF 98) a copy of each such collective bargaining agreement* together with any related documents specifying the wage rates and fringe benefits currently or prospectively payable under such agreement. * * * [Italic supplied.]

In fact, the submitted SF 98 was misleading in this regard. The space provided on the SF 98 for information on any applicable cba for then current performance was completed as not applicable and no cba, as required, was attached even though the Air Force knew that HVM was performing the prior contract under a wage determination based on a cba. While the Air Force argues that diligent efforts to obtain a wage determination from DOL were evident, under the above circumstances, it is our view that the Air Force's incomplete and misleading filing of the SF 98 significantly contributed to the delay in the issuance of the new wage determination.

The Air Force cites ASPR § 12–1005.3(a) (1975 ed.), which requires that:

> The * * * request for proposals actually issued, as well as any contract entered into, in excess of $2,500, shall contain an attachment setting forth the minimum wages and fringe benefits specified in any applicable currently effective determination, including any expressed in any document referred to in * * *
>
> (i) any written communication from the Administrator, responsive to the notice [SF 98] required by 12–1005.2(a); however, such communications

> received by the Federal agency later than 10 days before the date established for the initial receipt of proposals shall not be effective except where the agency finds that there is a reasonable time to notify * * * offerors thereof;
>
> (ii) any revision of the wage determination prior to the award of the contract * * * however, revisions received by the Federal agency later than 10 days before * * * the date established for the initial receipt of proposals shall not be effective except where the agency finds that there is a reasonable time to notify * * * offerors of the revision.

On this basis, the Air Force takes the anomalous position that the wage determination was not effective for the contract, notwithstanding the fact that the agency had obtained EIL's agreement in advance of making the award to incorporate a determination in the contract as a modification or amendment. Further, on June 11, 1976, the Air Force issued modification M002, paragraph B of which incorporated wage determination No. 72–172 (Rev. 4) into the existing contract.

Moreover, DOL, in its letter of July 30, 1976, in response to the Air Force's post-award inquiry, advised the Air Force, in effect, that the closing date for receipt of proposals should have been postponed based upon DOL's March 10, 1976, notice that the pertinent SF 98 did not contain requisite supporting information and would necessitate delay in processing the required wage determination. Because the Air Force had already made the award, DOL exhorted prompt amendment of the EIL contract in order to incorporate wage determination No. 72–172 (Rev. 4) "retroactively to the contract commencement date." During the interim between the Air Force's inquiry and DOL's reply, the Air Force had decided to exercise the first option under the contract. The Air Force was, therefore, required to submit another SF 98 to DOL prior to exercising this option; each option is treated, for the purposes of the SCA, as a new contract. ASPR § 12–1005.8(b) (1975 ed.). In this regard, DOL advised the Air Force that incorporation of wage determination 72–172 (Rev. 4) into the contract option period was inappropriate; rather, wage determination 76–762, issued July 20, 1976, "should be incorporated retroactively into the July 1 contract option period." We note, however, that while the authority for the issuance of these determinations was different, the wage rates and fringe benefits prescribed by both determinations were identical.

In considering the requirements for filing the SF 98 and incorporation of the wage determination in the solicitation and resultant contract, we must accord great deference to DOL's interpretation of regulations which it issued pursuant to valid authority. *Mayfair Construction Company*, B–186278, August 10, 1976, 76–2 CPD 148. Furthermore, DOL has taken a similar and consistent position with respect to recent, related cases before this Office in which the procuring activity failed to comply with regulations governing submission of

the SF 98 and application of subsequent wage determinations. *Minjares Building Maintenance Company*, 55 Comp. Gen. 864, 866–67 (1976), 76–1 CPD 168; *Dyneteria, Inc.*, 55 Comp. Gen. 97 (1975), 75–2 CPD 36; *aff'd sub nom. Tombs & Sons, Inc.*, B–178701, November 20, 1975, 75–2 CPD 332.

In our decision, *Dyneteria, Inc., supra*, at 100, we held that the assumption that all bids submitted in an advertised procurement will be equally affected by the issuance of new wage rates in excess of those contained in the solicitation was inappropriate, and that an award made under that assumption was in controvention of the well-established rule that the contract awarded should be the contract advertised. We concluded that the proper way to determine the effect of such a change in the Government's specifications is to compete the procurement under the new rates. We have subsequently held that the principles set forth in *Dyneteria* are equally applicable to negotiated procurements. *Minjares Building Maintenance Company, supra*, at 868; *Management Services Incorporated*, 55 Comp. Gen. 715 (1976), 76–1 CPD 74.

We believe that these principles have application to what occurred here. The record indicates that EIL's proposal was not based upon the wage rates being paid by the predecessor contractor (HVM) under the latest cba, the rates upon which DOL's subsequent wage determinations (Rev. 4 and 76–762) were based. By letter of July 1, 1976, EIL disputed the Air Force's incorporation, by modification, of Wage Determination No. 72–172 (Rev. 4) in the contract, contending that a "locality" wage determination [see 29 C.F.R. § 4.163 (1975)] containing lower rates was applicable to the contract. Further, our review of the HVM proposal shows that the firm computed its proposal price on the basis of cba rates. It is, therefore, obvious that EIL and HVM were not formulating their proposals on the basis of the same information.

In view of the length of time prior to award that the Air Force knew or should have known that a DOL wage determination was to be issued (March 10–April 2, 1976) in close proximity to the anticipated award date; the Air Force's significant contribution to the delay in the issuance of the determination; the preaward arrangement for a contract modification, which was issued after the award; and the advice of DOL in the letter of July 30, 1976, we think that the Air Force's actions were tantamount to awarding a contract different from the one solicited in the RFP. As such, the Air Force's reliance on ASPR § 12–1005.3(a) (1975 ed.) is unfounded. The effect of the above circumstances was to prevent the offerors here from competing on an equal basis. *Minjares Building Maintenance Company, supra.*

Based on the above discussion, we conclude that the award to EIL was improper and, consequently, the protest is sustained.

The base term of the contract and the first option period have expired; we cannot, therefore, recommend corrective action with respect to them. However, the second option under the contract for the term October 1, 1976, through September 30, 1977, has recently been exercised by the Air Force. We recommend that the requirements of the 1-year second option be resolicited in a manner consistent with this decision. After negotiating under a new RFP, the option under which EIL is now performing should be terminated for the convenience of the Government and a new contract entered into with the successful offeror, if other than EIL. If EIL is successful, the existing option should be modified in accordance with its final proposal.

The Secretary of the Air Force is being advised of this recommendation by letter of today.

In view of our recommendation, there remains a further matter for correction in the Air Force's resolicitation. As mentioned above, a portion of the contract was solicited and awarded on a time and materials basis. ASPR § 3-406.1(c) (1975 ed.) prescribes the following mandatory limitation in the use of this type of contract:

> * * * Because this type of contract does not encourage effective cost control and requires almost constant Government surveillance, it may be used only after determination that no other type of contract will suitably serve. *This type of contract shall establish a ceiling price* which the contractor exceeds at his own risk. The contracting officer shall document the contract file to show valid reasons for any change in the ceiling and to support the amount of such change. [Italic supplied.]

Although the RFP incorporated by reference into the contract the provisions of ASPR § 7-901.6(c) (1975 ed.) which referred to a ceiling price, no ceiling price was set forth in the contract schedule. Consequently, the time and materials portion of the RFP and the resultant contract were formulated in contravention of the above-cited regulatory restriction.

Parenthetically, we note that the Air Force admits that the RFP should have indicated the impact of the option periods on the method of evaluation pursuant to ASPR § 1-1504(b) (1975 ed.).

The foregoing renders unnecessary any discussion of HVM's additional grounds of protest.

Because our decision contains a recommendation for corrective action, we have furnished a copy to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970), which requires the submission of written statements by the agency to the Committees on Government Operations and Appropriations concerning the action taken with respect to our recommendation.

[B-186940]

Contracts—Clauses—"Fixed-Price Options"—Inappropriate and Misleading—Contracts Funded With Fiscal Year Appropriations

Statement in "fixed-price options" clause of Federal Property Management Regulations 101-32.408-5, to effect that "separate charges" (that is, penalty to be assessed against Government for non-exercise of option rights) may be quoted in certain data processing procurements, is inappropriate and misleading to potential offerors in contracts funded with fiscal year appropriations.

Appropriations—Fiscal Year—Availability Beyond—Contracts—Automatic Data Processing Systems

Based on rationale employed in companion decision involving similar separate charges scheme, it is concluded that protesting offeror's proposed separate charges are violative of statutory restrictions on appropriations.

Contracts—Clauses—"Fixed-Price Options"—Inadequate

Request for proposals' "fixed-price options" clause failed to: inform offerors that certain charges may violate statutory restrictions; state how separate charges were to be specifically evaluated in determining whether charges made offer "unbalanced"; and warn as to how charges might improperly affect Government's flexibility in substituting equipment. Discussions with offeror did not cure failures nor give any indication that charges would be evaluated as ultimately done.

Contracts—Negotiation—Offers or Proposals—"Separate Charges"—Alternate in Nature

"Separate charges" cannot logically be added to base and option prices to determine successful offeror or to determine bid "unbalancing," since both prices and separate charges will not be paid—they are alternative in nature.

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

Because of analysis of deficiencies, recommendation is made that all offerors be afforded opportunity for another round of negotiations.

In the matter of Honeywell Information Systems, Inc., December 9, 1976:

Honeywell Information Systems, Inc. (Honeywell), has protested the award of a fixed-price contract to any other offeror under solicitation No. CDPA-75-13 issued by the General Services Administration (GSA) on June 25, 1975, for "seven firm and one optional automatic data processing systems" to function as data processing service centers for the Department of the Navy. These eight centers will replace thirty-five existing, obsolete systems located throughout the United States. The contract, which will be funded with fiscal year appropriations, would ultimately be for a period of 96 months (if all GSA's option rights under the proposed contract are exercised). Since award

under the RFP has not yet been made, our discussion of the facts involved must necessarily be restricted.

The protest arises out of GSA's evaluation of certain "separate charges" contained in Honeywell's best and final proposal submitted under the RFP. For the reasons discussed below, we are recommending that all offerors be afforded an opportunity to submit revised pricing proposals.

The RFP contained the "fixed-price options" clause required to be inserted in certain RFPs for data processing equipment and related procurements by Federal Property Management Regulation (FPMR) § 101–32.408–5, 41 CFR § 101–32.408–5 (1976), which provides:

> When the Government has firm requirements for ADPE, software, or maintenance services which exceed the basic contract period (and quantity) to be awarded, but due to the unavailability of funds the option(s) cannot be exercised at the time of award of the basic contract (although there is a reasonable certainty that funds will be available thereafter to permit exercise of the options); realistic competition for the option periods (and quantity) is impracticable once the initial contract is awarded; and it is in the best interest of the Government to evaluate options in order to eliminate the possibility of a "buy-in," the * * * [fixed-price options] clause shall be inserted in solicitation documents.

The clause, essentially, informed offerors that:

(1) Fixed prices were to be proposed for the base period requirement plus all option requirements.

(2) Option prices would be evaluated in determining the successful offeror for the expected contract life—96 months if all options are exercised.

The clause went on to say:

> Offers will be evaluated for purposes of award by adding the total price of all optional periods and, if applicable, all stated optional quantities to the total price for the initial contract period covering the initial systems or items. *Separate charges, if any, which will incur to the Government should the latter fail to exercise the options, will not be considered in the evaluation,* except as stated in II.2.3. below. [Italic supplied.]
>
> II.2.3. Unbalanced Prices
>
> An offer which is unbalanced as to prices for the basic and optional quantities may be rejected as nonresponsive. This will include an evaluation of the separate charges, if any, which will incur to the Government should the Government fail to exercise the option. An unbalanced offer is one which is based on prices significantly less than cost for some systems and/or items and prices which are significantly overstated for the other systems and/or items.

Both Honeywell and GSA agree that certain discussions took place concerning the meaning of the "separate charges" provision of this clause prior to the submission of Honeywell's best and final offer which contained the separate charges provision giving rise to the present controversy. GSA insists that "while these discussions were proceeding, Honeywell was fully informed that any separate charges proposed must be reasonable, that they must not operate to take away the Government's option not to renew and that they represented contingent

liabilities which posed certain associated funding problems with the Navy." Honeywell admits that the skeletal outline ("percent of charge not indicated") of its "best and final," separate charges provision was "discussed at length" and that the "lawyer representing GSA [at the discussions] indicated that the clause would be a Go/No Go clause based on the reasonableness of the amounts in question."

After these discussions, Honeywell submitted its best and final proposal. The company's "best and final" prices were expressly based on the assumption that the entire contract period would be 96 months. The best and final proposal also contained an "Early Lease Discontinuance Charge" ("separate charge") which, in theory, would be payable (with certain minor exceptions) to the contractor should GSA neither purchase nor retain on rental (for a specified minimum period of months—varying with the class of equipment involved) equipment which would be "ordered and installed." The separate charge was stated to be a percentage of the remaining monthly rental charges which would have otherwise accrued to Honeywell had the items remained on rental for the number of months specified.

Honeywell's final "separate charges" were evaluated on a "worst-case basis" under the following conditions:

> These changes shall be additive to the systems life cost.
> They [the charges] shall be assessed effective one year from the date of installation of both initial and augmented equipment for each system * * *.

As a result of this directive, GSA and the Navy determined that Honeywell's separate charges "created an unbalanced offer" for the following reasons:

> If the Government failed to exercise the option to renew the contract for the initial equipment ordered, the Government, for [some] * * * equipment, would pay discontinuance charges equal to * * * the equivalent of two years' rent. Thus, the Government, in effect, would be paying three years' rent for one year of service. These charges were considered to be significantly overstated for the initial items. * * *
>
> Honeywell's separate charges were structured on discontinuances of individual units of equipment at any time during the systems life. Thus, they were continual throughout the life of the system and at varying prices for identical equipment, discontinued within the same fiscal year. The separate charges were designed to be assessed dependent on the date of installation and the date of discontinuance.
>
> As an example, equipment installed in year two and discontinued at the end of year three would result in a larger discontinuance charge than identical equipment installed in year one and discontinued at the end of year three, even though both units were discontinued in the same year and at the same time.
>
> No discontinuance charges would be assessed for any equipment installed within five years prior to the expiration of 120 months from the award date and returned to Honeywell after 120 months, while at the same time, for identical equipment installed prior to that five years and discontinued within the last five years, discontinuance charges would be assessed.

GSA also decided that Honeywell's proposed separate charges "took away all of the Government's flexibility [as to increasing or decreasing a 'configuration' and to substitute equipment]" and learned that

the Navy did not have sufficient funds available for obligation to cover the estimated "5.4 million dollars in separate charges" which might be incurred in fiscal year 1977 under the Honeywell scheme. Consequently, GSA is of the position that Honeywell's offer is not properly for acceptance.

Once Honeywell became aware of GSA's evaluation and position, the company submitted its protest. The company contends that GSA improperly evaluated the separate charges contained in its best and final proposal. Alternatively, Honeywell argues that the RFP provisions concerning separate charges do not contain any indication as to how these charges are to be evaluated, and that, in any event, GSA failed, during negotiations with the company, to convey appropriate information about the proposed evaluation of the separate charges scheme.

ANALYSIS

By companion decision of today in *Burroughs Corporation*, 56 Comp. Gen. 142 (1976), we have concluded that the statement in the FPMR "fixed-price options" clause to the effect that separate charges may be quoted is inappropriate and misleading to potential offerors on contracts funded, as here, with fiscal year appropriations. We have so concluded because, among other deficiencies, the clause does not even suggest that certain separate charges cannot be funded under statutes (31 U.S.C. § 665(a); 31 U.S.C. § 712a and 41 U.S.C. § 11 (1970 ed.)) imposing restrictions on the use of fiscal year appropriations.

These statutes require that contracts executed under authority of fiscal year appropriations can be made only within the period of their obligation availability and must concern a *bona fide* need arising within fiscal availability. *Leiter* v. *United States*, 271 U.S. 204 (1926); *Goodyear Tire and Rubber Company* v. *United States*, 276 U.S. 287 (1928); 48 Comp. Gen. 497 (1969); *Burroughs Corporation*, *supra*. In order to comply with the cited precedent and similar decisions (see, for example, 36 Comp. Gen. 683 (1957); 37 *id.* 155 (1957)), the charge, including "separate charges," for any good or service must reasonably relate to the value of the current fiscal year requirements which have actually been performed.

In construing a similar separate charges scheme proposed by Honeywell in its contract involved in the *Burroughs* decision we concluded:

* * * It seems apparent that the separate charges present in the Honeywell contract actually represent a part of the price of the ADP requirements for future years rather than merely current needs under the contract. Honeywell's "separate charges" penalty is clearly intended to recapitalize the contractor for its investment based upon a full 60 month systems life if the Government fails to continue to use the equipment. For example, if MESA were to terminate the contract in December 1976, Honeywell, under its separate charges scheme, would be entitled, in theory, to payment of a penalty equal to 30% of Honeywell's "monthly

list price" for the discontinued system equipment multiplied by 55 months—the then remaining intended contract life. An even more egregious example could have been demonstrated had MESA terminated the contract and paid the "separate charges" in the first few weeks or months of the contract. If the Government were liable for the [separate charges] involved, it is apparent that the Government's option "rights" under the Honeywell contract are essentially illusory * * *.

Under the same rationale expressed in the *Burroughs* decision, we conclude that the present Honeywell separate charges scheme is violative of statutory restrictions on appropriations.

On the other hand, in our *Burroughs* decision we upheld the propriety of certain separate charges so long as payment of the charges (including any payments already made for the service) "represents the reasonable value (e.g., ADP schedule price) of the actually performed work requirements at termination."

Nevertheless, because of our conclusion that the FPMR "fixed-price options" clause, incorporated in the RFP, does not even suggest that certain separate charges may run afoul of statutory restrictions on appropriations, it is our view that the clause in the subject RFP is deficient. The clause is deficient, moreover, because it does not state how the separate charges are to be evaluated. As we stated in our *Burroughs* decision:

* * * The clause states that separate charges for failing to exercise an option are only to be considered in determining whether an offer is "unbalanced" as to price. But, although "unbalancing" with regard to basic prices is defined in the clause, the specific mechanism for determining whether *separate charges* make an offer "unbalanced" is nowhere indicated by the clause. Nor are there any objective or common guidelines and standards in the clause by which an offeror could reasonably determine whether its separate charges made its offer unacceptable. Faced with the existing clause, offerors are clearly unable to propose separate charges with any assurance that their offers would not be rejected because of "unbalancing." *Cf. Mobilease Corporation*, 54 Comp. Gen. 242, 246 (1974), 74-2 CPD 185; *Standard Services Incorporated*, B-182294, April 8, 1975, 75-1 CPD 212 * * *.

Moreover, contrary to GSA's views, we do not agree that the information given to Honeywell during discussions that the separate charges must be "reasonable," or the other advice given, cured the deficiencies inherent in the "fixed-price options" clause. This advice did not give Honeywell any concrete information as to objective guidelines to be used in determining whether proposed separate charges would be reasonable. Nor did the advice convey any indication that separate charges would be evaluated as ultimately directed by GSA (namely, by adding "worst-case" separate charges estimates to systems life cost), or that separate charges might improperly affect the Government's flexibility in substituting equipment—yet another criticism of Honeywell's final separate charges proposal. Further, it is our view that separate charges cannot logically be added to base and option prices to determine the successful offeror or to determine

"unbalancing," since both these prices and the separate charges will not be paid—they are alternative in nature.

Because of this analysis, we are recommending that GSA afford all offerors another round of negotiations. Should GSA still desire to allow any offeror the opportunity of quoting separate charges, the RFP's "fixed-price options" clause should be appropriately modified to specifically inform offerors that separate charges which exceed an appropriate ceiling—e.g., schedule prices, catalog prices at contract execution, or cost data—will be cause for the rejection of an offer (thereby eliminating GSA's felt need for a "worst-case" analysis approach). Also, specific guidance should be given as to how an offeror's separate charges might improperly affect the Government's flexibility to substitute equipment.

As this decision contains a recommendation for corrective action to be taken, it is being transmitted by letters of today to the congressional committees named in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970), which requires the submission of written statements by the agency to the House and Senate Committees on Government Operations and Appropriations concerning the action taken with respect to our recommendation.

[B-186547]

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

Offeror contesting exclusion of proposal from competitive range must be held to have notice of basis for protest concerning rejection of proposal when offeror obtained procuring agency's excised evaluation report on proposal. Offeror was not entitled to wait for decision on release of "back-up" material to evaluation report before being held to have actual or constructive notice of basis for protest, since material was not final analysis of proposal and, at best, should have been considered to contain only individual judgments already evidenced in report.

Contracts—Protests—Timeliness—Negotiated Contracts—"Non-Solicitation Defect"—Applicability

Protest that was filed with procuring agency and the General Accounting Office (GAO) more than 10 working days from date on which basis of protest was known is untimely filed under section 20.2 of Bid Protest Procedures (4 C.F.R. 20.2 1976). Argument that time limits specified in Bid Protest Procedures for filing protests relating to "non-solicitation defect" matters should not apply to protests filed before award has been previously considered and rejected.

Contracts—Protests—Timeliness—Negotiated Contracts—"Significant Issue Exception" Lacking

Elimination of one offeror from competitive range in particular procurement is not regarded as "significant issue" to permit consideration of untimely protest. Principle enunciated in *Power Conversion, Inc.*, B-186719, September 20, 1976, applies to present untimely protest against exclusion of one of two competing offerors from competitive range.

In the matter of the Singer Company, December 14, 1976:

On May 20, 1976, a protest was received from Singer Company protesting against the rejection of its proposals under request for proposals (RFP) No. N61339-76-R-0002 issued by the Naval Training Equipment Center, Orlando, Florida, on July 9, 1975, for "air combat maneuvering simulators."

BACKGROUND

Singer had previously been notified by the Center of rejection of its proposals under the RFP by message dated March 2, 1976, as follows:

> * * * The technical evaluation encompassed all elements of your written technical proposals and the demonstrations of critical areas presented under the subject RFP. The technical approach proposed was deemed to be unacceptable in the computer and visual system areas for [the simulators]. * * * Pursuant to ASPR 3-508.4 a debriefing on your proposal will be held at the earliest feasible time subsequent to contract award.

By letter dated March 4, 1976, Singer formally protested the "proposed award of a contract" under the subject RFP to the contracting officer. Singer's letter of protest further insisted that the decision to reject Singer's proposal was not considered to be "in the best interest of the Government." Finally, Singer offered to withdraw its protest if, as a result of a debriefing, the Navy could "justify its position of Singer's technical unacceptability."

By letter dated March 11, 1976, the contracting officer denied Singer's protest. The contracting officer informed Singer that the company had previously been informed as to the reasons why the company's proposal was considered unacceptable according to the mandate in ASPR § 3-508.2(a) (1975 ed.), which provided:

> * * * the contracting officer, upon determination that a proposal is unacceptable, shall provide prompt notice of that fact to the source submitting the proposal. * * * In addition to stating that the proposal has been determined unacceptable, notice to the offeror shall indicate, in general terms, the basis for such determination * * *.

The contracting officer also affirmed his position that the "general terms" notice previously given Singer as to the reasons why the company's proposal was found unacceptable was all that could be given prior to award and that the immediate debriefing which the company had requested could not be granted under ASPR § 3-508.4 (1975 ed.). The cited regulation provided:

> * * * Debriefing is the process by which purchasing offices provide unsuccessful offerors with the Government's evaluation of the significant factors contained in their proposals, citing determinative deficiencies and weaknesses. * * * Debriefings shall be provided at the earliest feasible time after contract award.

By mailgram dated March 16, 1976, Singer submitted a request to the contracting officer for "all records of the technical evaluation by and all personnel of the Naval Training Equipment Center * * * pertaining to [Singer's proposal]."

By letter dated March 30, 1976, the Department informed Singer that the company would be furnished a copy of the evaluation report on the company's proposal. The report, the Department further said, would be excised to remove "those portions applicable to other than [Singer's proposal] as well as numerical scores and weights * * *." The Departemnt also informed Singer that, although a decision on release of "back-up" data was expected to be made by April 13, 1976, the Department's inability to decide the question of the release of the data within the "statutory time limit" constituted a technical denial of the request for release of the data.

On April, 9, 1976, the Department hand-delivered to Singer a copy of the evaluation report concerning the company's proposal. On April 22, 1976, the Department formally denied Singer's request for the "back-up data."

On May 5, 1976, Singer lodged a new protest with the contracting officer. Singer's protest requested that the procurement be canceled because of a change in the scope of work under the RFP that Singer thought should be prompted by the Department's issuance of a stop work order under an existing Singer contract.

On May 14, 1976, two representatives of Singer met with the Navy to discuss the "unacceptable" rating assigned to Singer's proposal. The contracting officer reports that it was "obvious [to Singer] that the Navy position in this matter had not changed and did not change" as a result of this meeting.

Is Singer's Protest Timely Filed with GAO?

The contracting officer asserts that Singer's protest is untimely filed under our Bid Protest Procedures (4 C.F.R. part 20 (1976)).

It is the apparent position of the contracting officer that Singer possessed the basis of its May 19 protest to our Office by early March 1976 (the date Singer received the Navy's message concerning the unacceptable rating assigned the company's proposal) or, alternatively, no later than April 9, 1976 (the date on which Singer was given a copy of an edited version of the Navy's evaluation report on the company's proposal). The contracting officer further points out that even if April 9 is the date on which it could be said that Singer first had notice of grounds of protest against the unacceptable rating through receipt of the Navy's evaluation report, Singer waited until May 19 to file its protest with GAO. Since the time interval (27 work-

ing days) between April 9 and May 19 exceeds 10 working days, the contracting officer argues that Singer's protest is untimely filed under section 20.2(b)(2) of our Bid Protest Procedures which requires that protests not based upon solicitation defects be filed within 10 working days from the date the basis of protest is known or should have been known.

Singer insists that it was not in possession of facts sufficient to give rise to a "basis of protest" concerning the rejection of its initial proposal until April 26—the date on which "Singer received the Navy's denial of its request for important back-up data." And Singer further argues that its May 5 "efforts to arrange a meeting as soon as possible between the Commanding Officer of NTEC and the President of Singer-SPD" were made within 10 working days of April 26. Finally, Singer concludes that its May 14, 1976, meeting with the Navy was the "first opportunity that Singer was afforded to present an informed protest [concerning the rejection of its proposal]."

Because of this analysis, Singer argues that its May 19 protest to GAO was timely since it was made within 10 working days of the date Singer's May 14 protest was denied by the Department.

Analysis

Singer must be considered to have been sufficiently informed of the reasons for rejection of its proposal no later than April 9, 1976—the date on which it received the excised six-page evaluation report on its proposal. The degree of detail contained in the six-page report clearly showed why the Department considered Singer's proposal to be unacceptable.

Singer argues, however, that it was entitled to wait for the Navy's decision (received by Singer on April 26) on the question of the release of the "back-up" material before it should be held to have known the basis for protest against the rejection of its proposal. To buttress its argument, Singer cites *Lambda Corporation*, 54 Comp. Gen. 468 (1974), 74-2 CPD 312, in which we held that a protester could reasonably withhold filing a protest to our Office until it had a debriefing conference with the procuring agency to find out the specific reasons why award was made to another offeror.

Here, however, Singer did possess the specific reasons as to why its proposal was rejected—inferentially including any possible reasons as to how the Navy may have erroneously applied the RFP evaluation criteria in evaluating Singer's proposal (an additional basis for protest)—when it received the evaluation report on April 9, 1976. Moreover, unlike the *Lambda* case, nothing in the nature of a formal debriefing could have been afforded Singer given the preaward status of the

procurement in April 1976 and the stipulation in ASPR § 3-508.4, *supra*, that debriefings are to be provided after award.

The requested "back-up" material was clearly identified by the Navy's March 30 letter as being only "preliminary, individual evaluation." Thus, the requested material should have reasonably been recognized by Singer as relating to initial evaluation only and not the *final*, specific reasons (contained in the evaluation report as to why its proposal was rejected. Conversely, we think that Singer should have realized that the requested data merely contained, at best, only individual judgments already evidenced in the entirety of the evaluation report and not any unknown reasons as to why its proposal was rejected. Consequently, we do not agree that Singer was entitled to wait for a decision on the release of the back-up material before being held to have actual or constructive notice of the basis for protest against the rejection of its proposal. *Cf. Power Conversion, Inc.*, B-186719, September 20, 1976, 76-2 CPD 256. (In the cited case, the protester was given the specific reasons for the rejection of its proposal prior to award by means of a three sentence statement (contrast this with the six-page evaluation report given to Singer on April 9) as to the reasons why its proposal was rejected. This statement was considered sufficient to enable the protester to submit a protest against the rejection of its proposal.)

Since Singer admits that it did not file a protest with the Navy until May 5, 1976 (or 18 working days after the company's receipt of the Navy's evaluation report on April 9, 1976), Singer's protest must be considered untimely filed with the Navy under section 20.2 of our Bid Protest Procedures, which provides:

> (a) * * * If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 10 days of formal notification of * * * adverse agency action will be considered *provided the initial protest to the agency was filed in accordance with the time limits prescribed in paragraph (b) of this section.* * * * [Italic supplied.]
>
> * * * * * * *
>
> (b)(2) In cases other than [protests involving solicitation defects] bid protests shall be filed not later than 10 days after the basis for protest is known or should have been known, whichever is earlier.

Alternatively, Singer argues that the time limits specified in our Bid Protest Procedures for filing protests relating to "non-solicitation defect" matters should not apply to preaward protests (award under the subject RFP was made to another offerer in September of this year—or more than 3 months after Singer filed its protest with our Office) since "effective remedial action" is still possible when award has not yet been made.

A similar argument was recently considered and rejected in *Power Conversion, Inc., supra*, which also involved a preaward protest against the rejection of a proposal, when we said:

> PCI also contends that neither the Air Force nor any other party has been prejudiced by PCI's failure to submit a protest within 10 days of receipt of the May 13 letter because no award has yet been made and the procurement cannot reasonably be regarded as urgent. PCI also notes that the Air Force has not alleged that it was prejudiced in any way by this delay. Consequently, PCI asserts that we should exercise the discretion it alleges we possess under our Bid Protest Procedures, and consider PCI's protest on the merits. PCI also states that we should consider the protest because of the acknowledgement letter we sent to PCI and since we did not tell PCI that there was any problem regarding the timeliness of its protest until 3 weeks after filing.
>
> None of the foregoing arguments forms a basis for consideration of PCI's protest on the merits. See *Leasco Information Products, Inc.*, 53 Comp. Gen. 932 (1974), 74–1 CPD 314; *Cessna Aircraft Company; Beech Aircraft Corporation*, 54 Comp. Gen. 97 (1974), 74–2 CPD 91; *Art Metals-U.S.A., Inc.*, [B–184411, August 29, 1975, 75–2 CPD 132].

Finally, Singer argues that even if we find its protest to have been untimely filed we should nonetheless consider the protest under the "significant issue" exception to our filing limitations. Singer urges that the issue of the rejection of its proposal must be considered "significant" because it resulted in the elimination of one of the two offerors competing for the contract in question.

The "significant issue" exception to our filing limitations generally refers to the presence of questions of widespread interest and not necessarily to the sums of money involved. *Eocom, Inc.*, B–185345, March 25, 1976, 76–1 CPD 196. Generally, however, we do not regard a protest concerning the elimination of one offeror from the competitive range in a particular procurement to involve any "significant issues." *Power Conversion, Inc., supra.* Singer argues, however, that a significant issue is always involved when a protest, as here, is directed against a procuring agency's decision to conduct discussions with only one offeror. In support of this argument Singer cites *RCA Alaska Communications, Inc.*, B–178442, June 20, 1974, 74–1 CPD 336, where we held that the question of the General Services Administration's "obligation to obtain competition in procuring public utility services" was a significant issue. The cited case involved the question of the degree to which GSA has to obtain competition for *all* of its public utility services contracts. Clearly, therefore, the issue was considered significant because it specifically affected a broad range of procurements by the agency. By contrast, Singer's protest essentially involves the question whether one company was properly excluded from negotiations in one procurement.

Singer also cites *Willamette-Western Corporation; Pacific Towboat & Salvage Company*, 54 Comp. Gen. 375 (1974), 74–2 CPD 259, where we found that the question of the propriety of an agency's release of a draft copy of a solicitation to only one of several prospective

offerors was a significant issue. The allegation of irregular practices in the *Willamette-Western case*, if found to be accurate, would have clearly indicated partiality to the offeror in question to the prejudice of competition, contrary to the concept implicit in negotiated procurements and the statutory requirement for maximum competition. Although this issue did not specifically affect a class of procurements as in the *RCA Alaska Communications, Inc.*, decision, the question of specific partiality toward one offeror was nevertheless considered significant because of the flagrant circumstances alleged and shown. By contrast, Singer's protest here simply takes issue with the Navy's technical judgment.

Finally, Singer cites our decision in response to the protest of *Aircraft Armaments, Inc.* (AAI)—45 Comp. Gen. 417 (1966)—which also involved a Navy procurement where, as here: (1) only two concerns submitted proposals; and (2) one offeror (AAI) was eliminated from negotiations and consideration for award. We criticized AAI's exclusion from negotiations since we could find nothing in the record which indicated that the company's proposal should have been excluded. Singer argues that our approach of actively reviewing the AAI protest should require our considering the merits of Singer's similar protest here. The AAI protest, however, was received and considered several years before the issuance of our Bid Protest Procedures. Consequently, the decision cannot be read as authorizing the consideration of an otherwise untimely protest of the type lodged by Singer.

Because of our analysis, we conclude that the principle enunciated in *Power Conversion, Inc., supra* (namely: generally, we do not regard a protest concerning the elimination of one offeror from the competitive range in a particular procurement as involving any "significant issues"), applies to the present protest.

Therefore, Singer's protest will not be considered on the merits.

[B-187082]

Indian Affairs—Contracts—Bureau of Indian Affairs—Advertising *v.* Negotiation

No clear abuse of agency discretion as to whether to invoke authority to negotiate a contract without competition with an Indian concern under "Buy Indian Act" (25 U.S.C. 47) is found where agency relied on Tribal resolution recommending procurement by formal advertising.

Indian Affairs—Contracting With Government—Preference to Indian Concerns

Agency's internal policy memorandum implementing "Buy Indian Act," which allegedly required sole-source negotiation with protester (Indian concern), does not establish legal rights and responsibilities such as to make actions taken in violation of memorandum illegal.

In the matter of Means Construction Company and Davis Construction Company, a joint venture, December 14, 1976:

The Department of the Interior, Bureau of Indian Affairs (BIA), issued invitation for bids (IFB) No. BIA0150–76–12 for construction of the Standing Rock Boarding School, Fort Yates, North Dakota. Subsequent to issuance, preliminary discussions were held with Means Construction Company on the possibility of sole-source negotiation and award under the "Buy Indian Act," 25 U.S.C. § 47 (1970). However, the BIA decided to procure by open competition. Means Construction Company and Davis Construction Company (both 100-percent Indian-owned and controlled businesses), a joint venture, protested the action.

The main thrust of the protest is that provisions of the "Buy Indian Act" are mandatory in nature and preclude open competition on this project.

On July 2, 1976, addendum No. 6 to the IFB was issued which reestablished a bid opening date which had been postponed indefinitely. The decision not to procure under the "Buy Indian Act" was formalized in a letter to the protester dated July 8, 1976. Since the protest was not filed (received) in our Office until July 28, 1976, more than 10 days after either date, the Department of the Interior has questioned the timeliness of the protest under our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1976). In this connection the protester alleges that (1) it never received the amendment, and (2) the letter was not received until July 14. Therefore, we will hear the protest on the merits.

The "Buy Indian Act" reads as follows:

> So far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior.

This provision permits negotiation of contracts with Indians to the exclusion of non-Indians. 41 C.F.R. § 14H–3.215–70 (1976). The Secretary of the Interior delegated his authority under the act to the Commissioner of Indian Affairs by Secretarial Order 2508.

Contrary to protester's view, the law and regulation do not require that awards be made to Indians, but only permit such awards if the Commissioner of Indian Affairs decides to invoke the authority of the "Buy Indian Act." We held in 50 Comp. Gen. 94 at 96 (1970) that the "Buy Indian Act" confers a considerable degree of discretion upon the Secretary of the Interior in purchasing the products of Indian industry. In fact, this provision has been recognized as authorizing negotiations with Indian industries of contracts which would otherwise have been subject to requirements for formal advertising. In view

of the broad discretion afforded the Secretary of the Interior, we believe the same rationale applies to decisions not to invoke the authority of the "Buy Indian Act." See B–167841, December 18, 1969. In the absence of clear abuse of such discretion, we would not object to the preference given pursuant to the act or alternatively the decision not to employ the authority to negotiate. See 37 Comp. Gen. 368 (1957); B–167841, *supra.*

By resolution dated June 10, 1976, the Standing Rock Sioux Tribal Council stated its concern over the assurance of quality construction on the project and recommended that the Commissioner of Indian Affairs use formal advertising to effect that goal. The Commissioner referred to and clearly considered the Tribal resolution in his decision to procure by formal advertising. According to BIA this was in conformity with the Bureau's policy to include Tribal input in the major decisions with respect to Indian school projects, and, in our view, did not constitute a clear abuse of discretion.

The protester, however, contends that the following language contained in 20 Bureau of Indian Affairs Manual (BIAM) Bulletin 1, March 3, 1976, is mandatory in nature and required negotiation with and award to it:

> * * * Therefore, the purpose of this Bulletin is to briefly state the Bureau's policy on the use of the "Buy Indian Act," pending publication of regulations dealing therewith in the Bureau's Procurement Regulations (41 CFR 14H).
>
> It is the Bureau's policy that all purchases or contracts be made or entered into with qualified Indian contractors to the maximum practicable extent. Before taking any procurement action, contracting officers shall first determine if there are any qualified Indian contractors within the normal competitive area that can fill the procurement requirement. Non-Indian contractors may be contacted only after it has been determined that there are no qualified Indian contractors within the normal competitive area that can fill or are interested in filling the procurement requirement.

The Bulletin is an internal memorandum which expresses BIA's policy on the implementation of the "Buy Indian Act." Due to the degree of discretion conferred by the statute and regulation, we must regard the provisions of the Bulletin as matters which do not establish legal rights and responsibilities such as to make actions taken in violation of the memorandum illegal and subject to objection by our Office. See 43 Comp. Gen. 217 (1963); *American Telephone and Telegraph Company*, B–179285, February 14, 1974, 74–1 CPD 72.

Accordingly, the protest is denied.

[B–168661]

Station Allowances—Military Personnel—Housing—Advance Payments

Joint Travel Regulations may not be amended to allow advance payment for station housing and similar allowances paid under 37 U.S.C. 405, as the advance payment authorization in section 303(a) of the Career Compensation Act of 1949,

as amended, 37 U.S.C. 404(b)(1), is limited to payments for the member's travel, which does not include station housing allowance. Therefore, in the absence of specific statutory authority for advance payment of such allowances, 31 U.S.C. 529 precludes such advance payments.

In the matter of advance payment of housing allowances—PDTATAC Control No. 76–20, December 15, 1976:

This action is in response to a letter dated October 21, 1976, from the Acting Assistant Secretary of the Army (Manpower and Reserve Affairs), requesting our opinion as to the validity of a proposed amendment to the Joint Travel Regulations (JTR) to provide for advance payments of housing allowances in view of the prohibition against advance payments in section 3648, Revised Statutes, 31 U.S.C. 529 (1970). The request was forwarded to this Office by letter dated October 29, 1976, from the Per Diem, Travel and Transportation Allowance Committee (Control Number 76–20).

It is asserted in the submission that financial hardship is experienced by certain members of the uniformed services who are required to make extraordinarily large outlays of cash for deposits to secure leases on satisfactory dwellings in certain foreign areas where housing is in short supply. In order to alleviate this situation, it is proposed to amend Volume 1 of the JTR to authorize advances of "station allowances" as that term is defined in paragraph M4300–4 of 1 JTR, with particular emphasis on housing allowances. It is proposed that such advances would be recouped as the allowances thereafter accrue.

It is pointed out that under subsection 303(a) of the Career Compensation Act of 1949, 63 Stat. 802, 813–814, as amended, now codified as 37 U.S.C. 404(b)(1), the Secretaries of the uniformed services, among other things, may prescribe the conditions under which travel and transportation allowances are authorized, "including advance payments thereof." It is indicated that, on the basis that housing allowances are "travel and transportation allowances," the advance payment authority contained in 37 U.S.C. 404(b)(1), *supra*, may be considered as overcoming the general prohibition against advance payments contained in 31 U.S.C. 529, which provides in part that:

> No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law. * * *

The station allowances set out in 1 JTR paragraph M4300–4 are the following:

1. housing and cost-of-living allowances authorized in 1 JTR paragraph M4301,
2. interim housing allowances authorized in 1 JTR paragraph M4302, and
3. temporary lodging allowances authorized in 1 JTR paragraph M 4303.

The statutory authority for those allowances is 37 U.S.C. 405 (1970), which provides as follows:

Travel and transportation allowances: per diem while on duty outside United States or in Hawaii or Alaska.

Without regard to the monetary limitations of this title, the Secretaries concerned may authorize the payment of a per diem, considering all elements of the cost of living to members of the uniformed services under their jurisdiction and their dependents, including the cost of quarters, subsistence, and other necessary incidental expenses, to such a member who is on duty outside of the United States or in Hawaii or Alaska, whether or not he is in a travel status. However, dependents may not be considered in determining the per diem allowance for a member in a travel status. A station housing allowance may be prescribed under this section without regard to costs other than housing costs and may consist of the difference between basic allowance for quarters and applicable housing cost. Housing cost and allowance may be disregarded in prescribing a station cost of living allowance under this section.

In addition to the station allowances specified in paragraph M4300–4, overseas travel per diem allowances are also promulgated pursuant to 37 U.S.C. 405. The submission indicates that such travel per diem allowances have long been advanced to members.

The submission asks, therefore:

* * * whether under the above reasoning, or any other reasoning, your office would be required to object to an amendment to the Joint Travel Regulations to provide for advance payments of housing allowances. If you agree that such advances may be made, is there any limit to the period of time for which such advances may be made? In addition, in proper cases, may other allowances prescribed under 37 U.S.C.A. 405 such as: cost-of-living allowances, temporary lodging allowances, interim housing allowances, etc., be advanced in proper cases? * * *

The statutory authority for the station allowances, 37 U.S.C. 405, is the codification of subsection 303(b) of the Career Compensation Act of 1949, 63 Stat. 814, as amended, while the advance payment authority provided in 37 U.S.C. 404 (b)(1) is derived from subsection 303(a) of that act.

In 39 Comp. Gen. 659 (1960) we considered a similar question concerning whether payments of trailer allowances authorized under other subsections of section 303 could be advanced under the advance payment authority in subsection 303(a). In that case we stated that the wording of the statute shows that the advance payment authority is limited to advances for a member's personal travel (personal transportation costs, mileage, and travel per diem) as provided in subsection 303(a). It was also stated that the meaning of the language of the statute could not be changed by considering the title of the section in the interpretation of the text. Therefore, it was held that the advance payment authority in subsection 303(a) does not overcome the prohibition in section 3648, Revised Statutes, 31 U.S.C. 529, for the advance payment of trailer allowances. That reasoning was reexamined and reaffirmed in 54 Comp. Gen. 764 (1975), which held that advance payments to members for rental of vehicles for movement of personal property is precluded by 31 U.S.C. 529. See also 40 Comp. Gen. 77

(1960), wherein it was held that advance payments to a member for the travel of dependents incident to the member's release from active duty is precluded by 31 U.S.C. 529.

The station allowances referred to in 1 JTR paragraph M4300-4 are not personal travel and transportation allowances of the type prescribed in subsection 303(a) of the Career Compensation Act of 1949 (such as is the overseas travel per diem allowance), for which that subsection authorizes advance payments. Also, with the limited exception of situations covered by 37 U.S.C. 1006(b) (1970), where a member is on duty "at a distant station where the pay and emoluments to which he is entitled cannot be disbursed regularly," we are not aware of statutory authority for the proposed change in regulations. Therefore, it is our view that advance payment of station housing allowances, and other similar allowances prescribed under 37 U.S.C. 405 (other than travel per diem allowances), is precluded by 31 U.S.C. 529 and, unless statutory authority is enacted to provide for such advance payments, we would be required to object to the proposed change in regulations.

The questions are answered accordingly.

[B-185955, B-186168]

Contracts—Specifications—Restrictive—Particular Make—"Or Equal" Product Not Solicited

Although request for proposals (RFP) specified part number of item, which only one firm had previously supplied, alternate, qualified, equal, and interchangeable products made by other firms meeting Government's RFP requirements can be considered, since these alternate products were not specifically excluded by RFP, albeit they were not specifically solicited; previous sole-source firm was made aware that requirement was going to be competed; and there is no indication of prejudice to potential offerors because of RFP's failure to state "equal" assemblies were acceptable.

Contracts—Negotiation—Requests for Proposals—Qualified Products—Modification

No modification to qualified product portion of item offered by successful offeror under RFP was necessary to meet Government's requirement of interchangeability with previously supplied product, although unqualified portion of item was altered. In any case, qualified products list (QPL) preparing activity, acting within its discretion, has found requalification of product to be not necessary. Therefore, offeror offered qualified product in accordance with RFP QPL requirements and was eligible for award.

Contracts—Protests—Patent Infringement

Protests that successful offeror cannot meet requirement that procured items be interchangeable with protester's previously supplied units, without violating proprietary rights and infringing on patents of protester, will not be considered on merits.

In the matter of the Galbraith-Pilot Marine Corporation, December 15, 1976:

The Galbraith-Pilot Marine Corporation (GPMC) has protested the award of contracts to Beckman Instruments, Inc. (Beckman), under requests for proposals (RFP's) N00104–76–R–XA31 (–XA31) and N00104–76–R–1376 (–1376), issued by the Navy Ships Parts Control Center (SPCC), Mechanicsburg, Pennsylvania. RFP –XA31 called for NSN (National Stock Number) 2H 6630–00–983–2579 (NSN–2579), GPMC part number PMC N8LV–MODS, salinity-indicating cell and valve assemblies. RFP–1376 called for NSN 1H 6630–00–983–2577 (NSN–2577), GPMC part number CN8–S3, cell and valve assemblies. The RFP's required the assemblies to be qualified for listing on qualified products list (QPL) 15103–6, dated April 1, 1975.

The Navy has reported that NSN–2579 and NSN–2577 assemblies are extremely similar. Each designated NSN assembly consists of the same GPMC manufactured cell and valve assembly, listed on the QPL, with different sized flanges, nuts and bolts.

Since these items had previously been supplied only by GPMC, the RFP's were initially issued to GPMC in August and September of 1975. However, in August 1975, the Defense Contract Audit Agency and the Defense Contract Administration Services Region had determined that GPMC's price under a previously awarded letter contract (N00104–75–C–4264) for NSN–2579 assemblies appeared to be excessive. Consequently, in November 1975, after GPMC submitted prices under the RFP's, SPCC contacted other potential suppliers of the assembies, including Beckman, to ascertain whether units equivalent to and interchangeable with GPMC's units could be obtained. In December 1975, Beckman, which also has a cell and valve assembly listed on the above QPL, indicated an interest in competing under the RFP's. Therefore, the RFP's were opened for competition.

Although Beckman's assembly is of different construction than the GPMC unit, Beckman guaranteed electrical and mechanical interchangeability of its unit with the units previously acquired from GPMC. Beckman also stated that it would manufacture the unit in accordance with Beckman's design approved for listing on QPL 15103–6. Beckman also required certain additional information about the GPMC unit to assure interchangeability, which SPCC apparently supplied.

The closing dates for receipt of proposals under the RFP's were on January 30, 1976. Awards were made to Beckman as the low offeror for $212 per unit under RFP –2579 on February 20, 1976, and for $248 per unit under RFP –2577 on February 24, 1976.

GPMC has protested that, although Beckman may have qualified assemblies for listing on QPL 15103–6, it had not qualified a cell and valve assembly in accordance with NSN –2577 and –2579 as required by the RFP's and consequently was ineligible for award. GPMC has also alleged that the Beckman assemblies are not designed to operate interchangeably with the GPMC units currently in use, and the likelihood of malfunctions, damage, and errors in readings and connections would significantly increase if such an interchange were attempted. GPMC also contends that the RFP's, as amended, require interchangeability to be established prior to award, which the Navy admits Beckman did not establish here. GPMC finally asserts that GPMC's proprietary data rights (e.g., the temperature resistance characteristic curve data for the thermistor on the GPMC assembly) would have to be violated and various GPMC patents would have to be infringed in order to make Beckman's assemblies interchangeable.

Each RFP schedule specified a National Stock Number and GPMC part number, which represented an item only GPMC had previously supplied. However, although alternate products were not specifically solicited, the RFP's did not specifically exclude alternate, qualified, equal and interchangeable assemblies meeting the Government's RFP requirements and manufactured by firms other than GPMC. Moreover, since of those firms approached by SPCC which have products listed on the QPL only Beckman expressed an interest in competing on the RFP's, there is no indication that any potential offeror was prejudiced by the RFP's failure to state that "equal" assemblies were acceptable under the RFP's. Finally, the Navy states that GPMC was made aware that the RFP's were going to be competed rather than sole-sourced. Under these circumstances, SPCC could consider such alternate assemblies under the RFP's. See B–149962, December 26, 1962; B–164848, October 15, 1968; 48 Comp. Gen. 605, 610 (1969); 48 *id.* 612, 613 (1969); B–176861, January 24, 1973.

Furthermore, although the Navy clearly apprised Beckman prior to the closing dates for receipt of proposals that interchangeability was an essential requirement, the RFP's did not specifically include this requirement. Nor was there any RFP requirement that interchangeability be demonstrated prior to award.

The Beckman contracts awarded pursuant to the RFP's did include a requirement for electrical and mechanical interchangeability with the GPMC unit and provide for tests to confirm interchangeability. The Navy reports that the interchangeability tests were successfully completed under the contracts on sample Beckman unit. GPMC has submitted no substantive evidence to indicate that the Beckman assemblies to be supplied are not totally interchangeable with GPMC's units.

If a manufacturer, such as Beckman, has modified or changed the material or processing in a qualified product, reexamination, retesting and/or removal from the QPL of the product could be found necessary. See paragraph 4-109, *Defense Standardization Manual* 4120.3-M, January 1972; *D. Moody & Co., Inc.*, 55 Comp. Gen. 1, 28 (1975), 75-2 CPD 1. However, it is within the discretion of the QPL-preparing activity (in the present case, the Naval Ship Engineering Center (NAVSEC), Hyattsville, Maryland) to determine whether a qualified product has been "sufficiently" changed to require reexamination, retesting, or removal from the QPL. The preparing activity's determination in this regard will not be questioned absent a clear showing of arbitrary or capricious action. See 52 Comp. Gen. 653, 666 (1973); B-176159, September 26, 1972, affirmed January 24, 1973.

In the present case, the Navy asserts that although the Beckman unit was calibrated electrically, in thermistor value, to be compatible with GPMC's unit, no modifications to Beckman's qualified cell and valve assembly were necessary to make it interchangeable with GPMC's assembly. The Navy indicates that the flanges of the RFP items were altered in order to meet the interchangeability requirements. However, as indicated above, the flanges are not subject to qualification requirements. In any case, the interchangeability tests were observed by a NAVSEC (QPL-preparing activity) representative, who found that the altered Beckman units did not have to be requalified. In view of the foregoing, it would appear that Beckman was offering a qualified product in accordance with the RFP's requirements and was thus eligible for award. See 49 Comp. Gen. 224 (1969), affirmed B-165179, B-165800, December 16, 1969; 52 Comp. Gen. *supra;* B-176159, *supra.*

Also, we have held that protests that patent infringement would result from performance under a Government contract are not for consideration by our Office. Rather, any patent holder's remedy against the Government under such circumstances is by suit in the United States Court of Claims for money damages. See *Aeroquip Corporation*, B-184598, September 25, 1975, 75-2 CPD 188, and cases cited therein; 28 U.S.C. § 1498 (1970).

Finally, GPMC's contention that its proprietary data rights would have to be violated in order for Beckman to supply an interchangeable assembly relates to Beckman's responsibility, i.e., Beckman's ability to perform the contract in accordance with the RFP's requirements. We no longer consider "proprietary data" protests, which either directly or indirectly question another firm's responsibility. *Polarad Electronics Corporation*, B-187517, November 9, 1976.

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

[B-187824]

Contracts—Discounts—Commencement of Discount Period

Disallowance of claim for prompt payment discount allegedly taken improperly is affirmed, since payment was made within discount period properly computed by excluding from computation day "from" which period began.

In the matter of Raye Limited, Inc., December 15, 1976:

Raye Limited, Inc. has requested review of our Claims Division Settlement of October 22, 1975, disallowing the firm's claim for $1,721.78, representing a prompt payment discount alleged to have been erroneously taken in connection with contract No. DAKF48-75-W-3077-1, awarded by the Department of the Army, Fort Hood, Texas.

The contract included the discount term "20%—10 days." Both the Army and the claimant agree that under the contract the discount period is to be computed from date of delivery and that the date of delivery was August 14, 1975. It is also agreed that payment was effected on August 25, 1975. The claim arises out of claimant's contention that August 14, 1975, must count as the first day of the 10-day discount period.

The claimant's position is contrary to the weight of judicial authority and to the prior decision of this Office. The word "from," when used with respect to the measurement of time, is generally held to be a term of exclusion, so that when a period of time is to be reckoned "from" a certain day (unless there is something in the context or circumstances to indicate a different intention), the day from which the time is to be reckoned will be excluded from the computation. *See* 74 Am. Jur. 2d *Time* § 21 (1974) and 86 C.J.S. *Time* § 13(3) (1954) and the cases cited therein; B-104419, September 21, 1951. A leading case on this point, *Sheets* v. *Selden's Lessee*, 69 U.S. 177 (1864), states:

> The general current of modern authorities on the interpretation of contracts, and also of statutes, where time is to be computed from a particular day or a particular event, as when an act is to be performed within a specified period *from* or *after* a day named, is to exclude the day thus designated and to include the last day of the specified period. 69 U.S. at 190.

See also *Best* v. *Polk*, 85 U.S. 112 (1873).

Accordingly, the Army, in computing the discount period, properly did not count the delivery date. Since the properly determined discount period ended on August 24, 1975, a Sunday, the payment made on the following business day constituted compliance with the discount terms. 20 Comp. Gen. 310 (1940); B-108143, February 29, 1952. Therefore, the taking of the discount was proper and the disallowance of the claim is affirmed.

[B-186001]

Contracts—Negotiation—Evaluation Factors—Criteria—Application of Criteria

When evaluation provision of request for proposals (RFP) gives no indication of relative importance of criteria, offerors may properly assume that all are of equal importance. Evaluation which eliminated protester from competitive range on basis of emphasis on one section vis-a-vis another was not in accordance with evaluation scheme in RFP and was therefore improper. This Office recommends rescoring proposal on basis of all criteria being equal to determine if the proposal should have been included in competitive range.

Contracts—Negotiation—Evaluation Factors—Evaluators—Board Membership

Protest that changes to membership of technical evaluation board occurred after evaluation process had started and replacement personnel were less qualified than personnel removed is denied, since investigation revealed that all membership changes occurred before start of evaluation and educational and professional backgrounds of replacement personnel were comparable to those removed.

Contracts—Negotiation—Requests for Proposals—Statement of Work—Unsolicited Proposal

While comparison of statement of work in RFP and protester's previously submitted, unsolicited proposal, which initiated instant RFP, indicates that some portions of statement of work were taken verbatim from unsolicited proposal, no impropriety is shown as need for procurement was documented in review by Air Force predating unsolicited proposal.

Military Personnel—Retired—Contracting With Government—Negotiations Preparatory to Contract

Participation in preproposal conference of retired Air Force General to ascertain if his retired status affected his acceptability as project manager is not a violation of 18 U.S.C. 281, and implementing regulations, in absence of further contacts for selling purposes, since contact between retired officers and former branch of military is permissible in nonsales environment and mere association of retired officer's name with particular company is not sufficient to establish violation.

In the matter of the Dikewood Services Company, December 22, 1976:

Nellis Air Force Base issued request for proposals (RFP) F26600-76-09025 on December 1, 1975, for system engineering and technical assistance (SETA) in the improvement, expansion and management of the Nellis test ranges. Dikewood Services Company (Dikewood) protests rejection of its proposal as technically unacceptable.

The RFP solicited responses to either the SETA portion, systems support (SS), or both. Proposals were required to be submitted in four volumes with page limitations: 1) contractual, 10 pages; 2) technical, 80 pages; 3) management, 40 pages; and 4) cost, unlimited. Proposers

were cautioned at paragraph 36(2)(a) of the RFP that the technical proposal was the most important consideration in the award of the contract. The pertinent provisions cautioned that the technical proposal should be complete and specific:

> b. The proposal should contain an outline of the proposed lines of investigation, method of approach to the statement of work (SOW), the phases or steps into which the project may logically be divided, estimated time required to complete each phase or step and any information considered pertinent to the SOW.
>
> * * * * * * *
>
> c. The proposal should briefly outline a response to the sample Task Directives xxx-001 and xxx-002 which, along with the applicable DOD are included as attachment 1. The proposal of additional alternative tasks which would enhance achieving an improved capability is encouraged.
>
> d. Twelve (12) copies of this [technical] volume shall be submitted * * * consisting of no more than 80 pages * * *.

The SOW was divided into four sections—1. Introduction, 2. Scope of Work in support of the Tactical Fighter Weapons Center (TFWC) Range Group, 3. General Background (Services and Definitions), 4. Tasks (SETA). Under section 2, the contractor was required to provide general SETA and technical review. Specific SETA tasks were stated in section 4.

Dikewood's proposal was determined by the technical evaluation board (Board) to be outside of the competitive range as technically unacceptable. The reasons offered by the contracting officer in his letter of notification to Dikewood were:

> a. Much of the Statement of Work was merely reiterated as it was stated in the RFP, without explanations as to how the work would be accomplished.
>
> b. The technical approach lacked depth in substantially all areas. For instance, the discussions of Systems Studies and Preparation of Specifications were not innovative and an understanding of the requirements was not demonstrated.
>
> c. The degree of authority vested in the on-site manager was not clear.

Dikewood responded to the Air Force's letter by attempting to refute the reasons advanced. Dikewood indicated that its proposal was organized to correspond to the SOW and deliberately retained the SOW headings to facilitate evaluation. To this extent Dikewood admits iteration of the SOW.

As for an explanation as to how the work would be done, Dikewood maintained that with the exception of the sample tasks (xxx–001 and xxx–002), no specific range improvement tasks were identified in the RFP as work to be accomplished. In the absence of specific problems, Dikewood emphasized its understanding of the technical areas of range improvement and presented a general methodology of systems engineering in response to section 2 of the SOW. Further, section 2 of Dikewood's proposal also contained a summary of particular methods of requirements definition, which it believes crucial to the definition

and justification of range improvements. Specific methods of improvements were also discussed.

Dikewood stressed that it made a conscious election to devote the bulk of its proposal to:

> * * * detailed, in-depth discussions of the principal technical areas within which TFWC range improvements will be required. This emphasis was inferred from the evaluation criteria, which stressed the ability to develop and allocate requirements, and understanding of the problem (of range improvement we supposed). Consequently, a lower page count was allocated to the mechanics of specification writing, ECP processing, meeting attendance, etc. Therefore, within the imposed page limitation, discussion of these routine matters was necessarily curtailed. * * * Section 4.1.2.1.3 refers to MIL-STD-490, which is the "how to" document for the mechanics of specification writing. We assumed that evaluators would not expect "reiteration" of those instructions in a page-limited proposal. We also assumed that the desire for innovativeness and creativity applies not to matters of routine paperwork such as specification writing, but to methods to determine what is most urgently needed and how to obtain improvements with constraints of costs, time and existing environment—in short, in deciding *what* to specify, rather than how to write a specification * * *.

Dikewood also attempted to rebut the Air Force's assessment that the authority of the on-site manager was not clear. Dikewood points to section 2.3.1.2, which states, "[I]n performance of the total SETA effort, and in responding to changes in direction of the Range Group program as it affects the SETA effort, Mr. Shaskey, as the Project Manager, will take *full responsibility*."

In its report to our Office in response to Dikewood's protest, the Air Force maintains that the:

> * * * primary and overriding reason for disqualification was due to the fact that the Dikewood proposal did not clearly demonstrate how it would accomplish the work. The overall lack of depth in the technical areas, such as the discussions of Systems Studies and preparation of specifications, did not demonstrate an understanding of the requirements or present any innovative approaches. Other failings were the lack of clarity on the degree of authority vested in the on-site manager to be assigned to the program by Dikewood.

Dikewood has raised additional issues in support of its contention that its proposal was technically acceptable. Dikewood maintains that an unsolicited proposal it submitted 8 months earlier to the Air Force for SETA services to TFWC formed the basis for a large portion of the SOW, parts of which were incorporated verbatim in the SOW. Dikewood stresses that its experience in other ranges and as incumbent at Nellis demonstrates overwhelmingly its capability to perform the work. Since qualifications based upon U.S. Government experience were listed as the second most important evaluation criterion, Dikewood infers that the Board could not have adhered to the evaluation criteria stated in the RFP in concluding that Dikewood's proposal was outside the competitive range.

Concerning the composition of the Board, Dikewood alleges that an unusual number of personnel changes were made to the Board which replaced allegedly qualified personnel with less qualified personnel.

Finally, Dikewood questions the propriety of the participation of a retired Brigadier General at the preproposal conference as a representative of one of the firms determined to be in the competitive range. Dikewood notes that the Brigadier General asked questions and discussed the suitability of a retired officer serving as the SETA program manager.

In order to respond to certain of Dikewood's allegations, we found it necessary for GAO representatives to conduct an on-site investigation at Nellis. This review was conducted by personnel from our Los Angeles Regional Office and has generated the factual basis upon which our conclusions hereafter are based. The review encompassed interviewing the SETA project officer, contracting officer and several members of the Board. We also reviewed various proposals submitted by Dikewood and others; Dikewood's unsolicited proposal and several of Dikewood's systems engineering contract work statements; the source selection plan utilized by the Board; proposal evaluation criteria; Board minutes and personal notes of Board members; Nellis Range Management Plan; and the personnel files of several members of the Board. The results of this review have not heretofore been released.

Applicable Legal Principles

At this point, it is necessary to outline the legal principles within which the information developed as a result of our investigation must be considered. The first consideration concerns the determination of the competitive range. In *Servrite International, Ltd.*, B–187197, October 8, 1976, 76–2 CPD 325, and cases cited, our Office restated the circumstances permitting the exclusion of a proposal, as submitted, from the competitive range, as a result of informational deficiencies. Essentially, exclusion is permissible if the deficiencies are so material as to preclude any possibility of upgrading the proposal to an acceptable level, except through major revisions or additions, which would be tantamount to the submission of a new proposal. In reviewing the reasonableness of the agency's determination, our Office has considered: 1) how definitely the RFP called for detailed information, the omission of which was relied upon in excluding a proposal from the competitive range; 2) the nature of the informational deficiency, e.g., whether it tended to show that the offeror did not understand what was required or merely made the proposal inferior, but not unacceptable; 3) the scope and range of the deficiency and the effort required to correct it; and 4) whether the "deficient," but reasonably correctable, proposal represented a significant cost savings.

In light of the above, it must also be borne in mind that the RFP must be drafted so as to permit offerors to compete equally. This duty

may be discharged in part by informing offerors of the evaluation criteria by which the proposals will be judged, the relative importance of those criteria, and applying those criteria in the stated relative importance. Unless stated otherwise, offerors may properly assume that all criteria are of equal importance. 52 Comp. Gen. 686 (1973). Each subcriterion need not be disclosed so long as offerors are advised of the basic criteria, and any subcriteria used by the agency in the actual evaluation are merely definitive of the basic criteria. However, where a relatively sketchy evaluation plan is stated in the RFP, and the agency possesses an extremely detailed evaluation scheme with numerous, unannounced, definitive subcriteria, the withholding of those known subcriteria does not promote the basic procurement objective of providing offerors with sufficient information to prepare an intelligent response to the Government's requirements. Moreover, when the exclusion of a proposal from the competitive range has the effect of keeping only one proposal in the competitive range, that determination will be closely scrutinized due to its oppressive effect on the competitive aspects of procurement.

It must be clearly recognized that in questions concerning technical considerations, it is not the function of our Office to substitute its opinion for that of the procuring activity. Since the procuring activity is most often in the best position to evaluate the merits of a proposal, and that activity must bear the day-to-day problems as they arise as a result of their determination, our Office will accept the agency determination unless demonstrated to be unreasonable or founded on fraud or bad faith.

Lastly, in the evaluation process, we have stated that the test of whether the Government unfairly construes its work statement too narrowly should be judged not solely on the basis of the work statement, but must be viewed in light of the evaluation factors set out in the RFP and those which the Government utilized in ranking proposals. *Iroquois Research Institute*, 55 Comp. Gen. 787 (1976), 76-1 CPD 123. Moreover, the evaluation must be predicated upon the proposal as submitted and may not encompass peripheral knowledge assumed by an offeror to be possessed by the Government due to its familiarity with the offeror as a result of its status as incumbent. *Comten-Comress*, B-183379, June 30, 1975, 75-1 CPD 400.

Evaluation Process

As part of our review, the relative areas of emphasis of Dikewood's proposal vis-a-vis the highest rated proposals show that Dikewood chose to stress its response to section 2 of the work statement, while the proposals rated higher devoted their attention mainly to section

4 of the SOW. This result is generated by the preference of the Air Force for section 4 responses and is reflected in the expanded evaluation criteria. The evaluation plan essentially applied a four-pronged test against each factor listed in section 4: understanding of the problems; providing a sound approach; demonstrating compliance with the requirements; indicating company or personnel are qualified to do the job. Essentially, this approach was also used in evaluating responses to task directives xxx–001 and xxx–002. The expanded evaluation criteria did not consider section 2 tasks *per se*. They were not subjected to the same scrutiny as the section 4 tasks. However, as will be discussed more fully below, as the section 2 requirements overlapped or impacted upon section 4, they were considered by the technical evaluation board.

To illustrate the impact of this evaluation plan upon the acceptability of the proposals, section 2, entitled "Scope of Work," was approximately 2 pages long in the RFP. It had three major headings with a total of 29 subheadings. On the other hand, section 4 was 7½ pages long, with 16 major headings with 63 subheadings. This aspect of the evaluation takes on an added significance when considered in conjunction with the 80-page limitation imposed upon the technical proposal. Obviously, an incorrect assessment of the Air Force's desires causes an offeror to expend effort and pages in response to one area to the detriment of another, with little or no credit for the misplaced effort. Without the page limitation, the misdirected emphasis could be offset by fully responding to each section of the SOW.

This analysis is borne out in this instance by the fact that Dikewood spent 59 of its total of 79 pages in responding to section 2, while only 8 pages were spent in response to section 4. Also, Dikewood devoted only 7 pages to sample task directives xxx–001 and xxx–002, while the top-ranked proposals spent 24 and 21 pages, respectively. Another aspect of this confusion is that had Dikewood put its main effort into its section 4 response, it is highly probable that the Board's criticism of Dikewood's response being merely a "playback" would have been eliminated.

It seems to us, with the benefit of hindsight, that the essence of the dispute between Dikewood and Nellis revolves about the clarity of the RFP. As stated earlier, the purpose for the rule requiring a listing of the evaluation criteria and their relative order of importance is to satisfy the requirement that offerors be given sufficient information to submit an intelligent proposal. Furthermore, by outlining the relative importance attached to each criterion by the Government, proposals may be structured to give the Government the best advantage for its dollars. Thus, the inquiry here becomes whether the RFP conveyed to offerors the Government's overwhelming concern with responses to

section 4 vis-a-vis the rest of the SOW. A corollary of this issue is whether the technical evaluation team followed the evaluation criteria in the RFP in considering the second and third most important factors—qualifications based on U.S. Government experience and qualifications based on offeror data.

We believe that the RFP was deficient in this regard. The specific language which gives rise to the controversy is in the evaluation criterion, "Technical Approach," which states:

> * * * The contractor's technical approach will be evaluated based on its soundness and adequacy to accomplish *all tasks* outlined in the Statement of Work * * *. [Italic supplied]

The table of contents of the SOW shows four headings: 1) Introduction; 2) Scope of Work; 3) General Background; 4) Tasks. In the body of the SOW, section 2.0 is labeled "Scope of Work" and section 2.1 is entitled "Specific Tasks."

Since there was no clear indication from the RFP that the Air Force would place greater emphasis on section 4 responses, Dikewood could properly assume that section 2 and section 4 were of equal importance. In this light, it is understandable that Dikewood might have assumed that the Air Force was aware of its capabilities to perform the more technical aspects of section 4 and allocated the bulk of its page-limited technical proposal to the area Dikewood felt would complement the knowledge already within the Air Force's possession. That is not to say that Dikewood's assessment was proper since the Air Force may not properly consider any knowledge of Dikewood's capabilities other than those stated in Dikewood's proposal.

Thus, the Air Force failed to stress its strong concern with section 4, and Dikewood was eliminated from the competitive range on the basis of an evaluation different than that stated in the RFP. We recommend that the Air Force reevaluate Dikewood's proposal on the basis of sections 4 and 2 being weighted equally. If, after conducting such a reevaluation the Air Force concludes that Dikewood should have been in the competitive range, negotiations should be reopened. On the other hand, if the reevaluation reaches the same conclusion as the initial evaluation, we would offer no objection to continuing with the procurement.

Composition of and Qualifications of Technical Evaluation Board Members

Dikewood has challenged, as unusual, the number of changes made to the composition of the technical evaluation Board personnel. Dikewood also believes that changes occurred in the personnel after the evaluation process had commenced. Also, Dikewood maintains that

well-qualified individuals were removed from the Board in favor of less qualified individuals.

To respond to these charges our investigators reviewed the personnel files of the individuals involved and interviewed all of the evaluators except one, who was on vacation. We also reviewed related documentation to establish when the changes occurred in relation to the commencement of the evaluation, as well as to establish the reasons for the replacements.

We are concerned here with the composition of the technical evaluation Board, not the management or cost proposal evaluators. The Board met first on January 19, 1976. The original source selection plan contemplated 5 members on the technical review board. Of that original complement, 3 were removed and were replaced by only two others for a total of four. Our investigation established that the two additions were made before the technical evaluation commenced. Our files reflect statements concerning the release of unauthorized procurement information signed on January 8 and 19, 1976. Our investigation has uncovered no evidence which disputes this fact.

Concerning the qualifications of the removed technical board members measured against their replacements, our review of the educational and professional backgrounds indicates that all of the persons involved were well qualified. The training and experience of the three members removed from the Board are as follows:

1. Bachelor of Science degree in electrical engineering. Masters of Business Administration. Several systems engineering courses. Nine years practical range experience, including six and one-half years at the Nevada Test Site and two and one-half years at Nellis AFB.
2. Bachelor of Science degree in electrical engineering. Ten years experience in electronic warfare. Served on two source evaluation boards in last three years.
3. Eight years experience in threat simulation at Nellis and Eglin Air Force Base. Served on one source evaluation board.

The qualifications of the individuals appointed to the Board are:

1. Bachelor of Science degree in mechanical engineering. Extensive graduate studies. Several technical courses. Ten years of range experience including eight years at the Atlantic Fleet Weapons Range and two years at Nellis. Nine years as electrical engineer with U.S. Army Map Service.
2. Bachelor of Science degree in engineering. Technical adviser to the Range Management officer, Advanced Development Test Center, Eglin Air Force Base. Co-chairman of ADTC evaluation committee on range operation and maintenance contracts. Previous experience in proposal evaluation.

The qualifications of the two members originally appointed to the Board are:

1. Bachelor of Science degree in mechanical engineering. Extensive graduate work. Several technical courses. Eight years experience with White Sands Missile Range. Nine years at Nellis, responsible for design development, engineering and management of instrumentation range. Served on one major and several smaller source evaluation boards.
2. Extensive courses in computers. Fifteen years experience in various phases of computers including two and one-half years in electronic warfare at Nellis.

In comparing the credentials of the various individuals, we do not perceive any substantial difference in the qualifications of those appointed to the Board vis-a-vis those removed from the Board vis-a-vis those that remained on the Board.

Unsolicited Proposal

Dikewood also questions its elimination from the competitive range since it believes that the SETA contract was initiated by an unsolicited proposal for range improvement dated April 21, 1975, submitted by Dikewood to Nellis. Dikewood states that long sections of the unsolicited proposal were quoted *verbatim* in the RFP and formed the foundation of the SOW.

We reviewed the unsolicited proposal, the SOW, the Nellis Range Management Plan drafted in March 1975, a Space and Missile Systems Organization (SAMSO) contract with the Aerospace Corporation, F04701-75-C-0076, SAMSO Regulation 800-8, June 1, 1974, entitled "Policies and Procedures Relating to the Aerospace Corporation Technical Support," and other Dikewood/Air Force contracts.

A comparison of the unsolicited proposal and the SOW shows that two items appear in both. Nine of the 16 functional/technical areas in section 2 of the SOW, Scope of Work, correspond exactly with the "Scope" section of the unsolicited proposal. Also, the introduction to the SOW was identical in both documents.

On the other hand, an overwhelming majority of the specific tasks in section 4 of the SOW are from SAMSO Regulations 800-8. As discussed earlier, it is section 4 that outlines the details of the work to be performed, not section 2. We note that SAMSO Regulation 800-8 accompanied the Aerospace Corporation/Air Force contract -0076.

Thus, we are unable to agree with Dikewood that the verbatim use of portions of Dikewood's unsolicited proposal compels the conclusion that the unsolicited proposal initiated the SETA procurement. The need for range improvement was foreseen by Nellis in the March 1975

Preliminary Range Improvement Plan. Moreover, even assuming that Dikewood's unsolicited proposal planted the seed for a range improvement project, it does not automatically follow that Dikewood would be best qualified to perform that function. To iterate, the merits of each proposal must be judged on the basis of the proposal as submitted.

Involvement of Retired Air Force General in the Procurement

Dikewood has stated that a retired Air Force General participated in this procurement. The retired General attended the preproposal conference and discussed the suitability of a retired regular officer as the SETA manager. Dikewood also stated that the retired General indicated that appointments had been made with senior military personnel associated wtih the procurement. Dikewood questions the propriety of such involvement.

The controlling legislation concerning this matter is 18 USC § 281 (1970), wherein it is provided:

> Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department. agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.
>
> Retired officers of the armed forces of the United States, while not on active duty, shall not by reason of their status as such be subject to the provisions of this section. Nothing herein shall be construed to allow any retired officer to represent any person in the sale of anything to the Government through the department in whose service he holds a retired status.
>
> This section shall not apply to any person because of his membership in the National Guard of the District of Columbia nor to any person specially excepted by Act of Congress.

This statute is implemented by Department of Defense Directive 5500.7, August 8, 1967, which is in turn implemented by Air Force Regulation (AFR) 30–30, March 12, 1976. As pertinent, AFR 30–30 provides:

> A retired regular officer is prohibited, at all times, from receiving or agreeing to receive any compensation for representing any person in the sale of anything to the Government through the department in whose service he holds a retired status (See 18 U.S.C. 281).
>
> * * * * * * *
>
> For the purpose of this statute; selling means:
>
> * * * * * * *
>
> b. Negotiating a contract;
>
> c. Contacting an officer or employee of any of the foregoing departments or agencies for the purpose of:
>
> (1) Obtaining or negotiating contracts,
>
> * * * * * * *

d. Any other liaison activity with a view toward the ultimate consummation of a sale although the actual contract therefor is subsequently negotiated by another person.

Inasmuch as title 18 of the United States Code concerns criminal matters, its interpretation is within the exclusive province of the Department of Justice. In the event that we reach the initial opinion that a *prima facie* case of a violation exists, we then forward our information to the Department of Justice, for its consideration.

However, the position of our Office as to what activities constitute selling has evolved through our interpretation of the civil selling law, 37 U.S.C. § 801(c) (1970), which is applicable by its terms only to selling of "supplies or war materials." Thus, selling activities to provide services is not within the purview of the civil selling law and consequently not subject to its prohibitions. B–158148, February 9, 1966. However, this statute is also implemented by DOD Directive 5500.7, and applies the same definition of selling. Thus, our decisions rendered on this point are analogous and may be used for our present purposes.

In this instance, we are concerned with activities promoting the sale of services, rather than supplies or war materials. Thus the civil selling statute is inapplicable.

We are not convinced that the activities here in question represent violations of 18 U.S.C. § 281 (1970), and implementing regulations. It is our position that while every precontract contact is not *per se* a violation, such contacts should be viewed as violations unless clearly shown to be for other purposes. 42 Comp. Gen. 236 (1962). It is in this light that our decision B–181056, *supra*, must be distinguished. In that case, the retired officer made numerous visits to the procurement officials at the base for the express purpose of selling a product of his employer, in addition to attending the preproposal conference.

The record indicates that the retired General asked only one question at the preproposal conference, and that concerned his suitability as project manager in his retired status. The Air Force response referred him to another authority for the answer. We do not believe that this alone can be regarded as a sales contact within the meaning of AFR 30–30. The only possible sales connotation must be inferred from the association of the retired General with the particular firm. However, to view the event as a sales liaison would virtually preclude a retired officer who works for a firm that does business with his former branch of service from any contact with his former military associates. We have recognized that contacts for nonsales purposes are, indeed, permissible. See 42 Comp. Gen. 87 (1962) ; 41 Comp. Gen. 799 (1962).

Our investigation revealed that the retired General visited the Vice Commander, Tactical Fighter Weapons Center, Nellis, on a personal

matter and there was apparently only a brief reference in their conversation to the procurement.

We perceive no violations of applicable statute or regulations in the course of conduct described.

[B–186008]

Compensation—Downgrading—Saved Compensation—Employee Development Program—Not Considered at Employee's Request

Employee was reduced in grade upon accepting new position with lower initial grade, but higher potential grade than her present position. Agency denied salary retention under 5 U.S.C. 5337, since reduction was at employee's request in response to agency announcement of vacancy. However, employee is entitled to salary retention, since Civil Service Commission determined that reduction in grade was result of employee development program, which is not considered to be at employee's request, and that denial of salary retention constituted unjustified or unwarranted personnel action under Back Pay Act, 5 U.S.C. 5596.

In the matter of Faye Abu-Ghazaleh—salary retention, December 22, 1976:

This action is in response to the request for an advance decision from R. G. Bordley, Chief, Accounting and Finance Division, Office of the Comptroller, Defense Supply Agency (DSA), regarding the propriety of granting salary retention to Ms. Faye Abu-Ghazaleh, a DSA employee.

The record indicates that on September 5, 1973, Ms. Abu-Ghazaleh, in response to a Job Opportunity Announcement posted by the agency, applied for the position of Industrial Property Management Specialist, grade GS–5, with a target potential of grade GS–9. The employee was selected for the position effective February 10, 1974, and, since she had been employed as a Secretary (steno), grade GS–6, step 10, her acceptance of this position resulted in a change to a lower grade, GS–5, step 10, with the notation on the SF–50 that the action was taken "at the employee's request." Ms. Abu-Ghazaleh completed her training and was promoted to grade GS–7 on February 23, 1975. The employee, however, made several inquiries to her personnel office regarding her entitlement to salary retention. The question was reviewed by various commands and offices within DSA, and it was concluded by the Deputy Director, Defense Contract Administration Services Region, Detroit, that Ms. Abu-Ghazaleh was entitled to salary retention. The Accounting and Finance Officer, however, questions the propriety of payment since the employee's demotion was at her request and was not part of an employee development program.

Under 5 U.S.C. § 5337 (1970), an employee who is reduced in grade may, under certain conditions, retain his previous rate of pay for 2 years, if the reduction in grade was not at his own request. See also

5 C.F.R. Part 531, Subpart E (1976), and FPM Supp. 990–2, Book 531, Subchapter 5d. In view of the fact that the Civil Service Commission is granted authority to issue regulations supplementing 5 U.S.C. § 5337, we requested the Commission's views on the present case. By letter dated October 29, 1976, the Commission provided the following opinion:

As provided in 5 U.S.C. 5337, "an employee * * * whose reduction in grade is not * * * at his request * * * is entitled to basic pay at the rate to which he was entitled immediately before the reduction in grade * * *," if otherwise eligible. When a demotion is initiated by the agency for the primary benefit of the agency, it is not taken at the employee's request, even though the employee may have applied through merit promotion procedures or the employee may have requested the agency to consider his personal situation. On the other hand, if the demotion is initiated by the employee for his personal advantage (e.g., dissatisfaction with present employment, unable to perform duties, or health), salary retention is inappropriate. However, it cannot be assumed, simply because management initiates recruitment by advertising a vacancy, that it has initiated the demotion of an employee. and therefore that that action automatically entitles an employee to salary retention. To make such an assumption would effectively negate the statutory proviso "at his request" by filling all positions through established vacancy announcement machinery. On the other hand, it cannot be assumed that because an employee applies for consideration for a vacant position that the action is taken at the employee's request, that it falls within the exclusion criteria of the law, and that the employee is automatically ineligible for salary retention. In order to deny salary retention, it must be established that the agency does *not* have a *special* recruitment need, and that this is *not* in fact the paramount factor leading to the downgrading.

In FPM Supplement 990–2, Book 531, the Commission has provided examples of the kinds of actions which are not considered to be initiated by the employee even though the employee may have requested consideration for the position involved. Included in these examples is "A demotion or reassignment of an employee as part of an employee development program in order to provide him with a specific type of experience necessary to his further development." Employee development programs encompass the formal training programs, in connection with which the agencies usually have written career plans, training agreements, and so-called "career promotions" without further recourse to merit promotion vacancy announcements. Upward Mobility Programs, Apprentice Training Programs, and Intern Programs are some of the more common development programs. They are programs which are initiated by the agency primarily to benefit the agency, in that they offer trainnig and experience which aid in the development of the workforce or otherwise meet the agency's need to develop a reservoir of trained persons with skills and knowledges essential to the agency's mission.

From the information available it appears that the change to lower grade of Ms. Abu-Ghazaleh was part of an employee development program. This seems to be substantiated by the fact that (1) the Job Opportunity Announcement No. 79(73) summarized the position functions as "an entrance level trainee in Industrial Property Administration undergoing systematic training preparatory to higher grade work performance," (2) the Request for Personnel Action initiated by the Training Officer and proposing Ms. Abu-Ghazaleh's promotion to Industrial Property Management Specialist, GS–1103–07, stated "Satisfactory completion of career development program for Industrial Property Management Specialist under career training program," and (3) the notification of the promotion action, effective February 23, 1975, contains the remark "processed in accordance with DCASR, Detroit Career Training and Development Program for Industrial Property Management Specialist dated March 1976."

The fact that the agency did not include in the Job Opportunity Announcement the information that salary retention was appropriate thus denying equity to unknown persons who might have applied for the position if they had been so informed, and the fact that Ms. Abu-Ghazaleh was told that salary retention would not apply and signed a statement to that effect. does not lessen the mandatory requirement for application of salary retention when the requirements of the law, the regulations, and other Commission enunciated criteria have been

met. We concur in the correction of the personnel actions granting salary retention to Ms. Abu-Ghazaleh retroactive to February 10, 1974 and payment of salary due as a result thereof under provision of the Back Pay Act (5 U.S.C. 5596). Denial of salary retention due to erroneous application of nondiscretionary procedures may be considered an unjustified or unwarranted personnel action.

Based on the record before us and on the views of the Civil Service Commission, we conclude that the denial of salary retention was due to an erroneous application of a nondiscretionary procedure and constituted an unjustified or unwarranted personnel action under the prosions of the Back Pay Act, 5 U.S.C. § 5596 (Supp. V, 1975). Therefore, Ms. Abu-Ghazaleh is entitled to salary retention for the period in question.

Accordingly, the employee's claim may be paid in the amount found due.

[B-186248]

Contracts—Negotiation—Offers or Proposals—Preparation—Costs

Claim for proposal preparation costs on basis that cancellation of request for proposals (RFP) was motivated by prejudice against claimant is denied where claimant has not affirmatively proved that decision was not result of reasonable exercise of discretion to program limited funds to another project.

Contracts—Negotiation—Requests for Proposals—Cancellation—Unavailability of Funds

Cancellation of RFP due to unavailability of funds is reasonable exercise of discretion because Anti-Deficiency Statute, 31 U.S.C. 665(a), prohibits the obligation of funds in excess of amount appropriated from one program to another.

Contracts—Negotiation—Competition—Propriety—Method of Conducting Negotiations

Procurement officials' actions in not informing offerors of possible funding problems while matter of reprogramming was being considered within agency, and continuing to proceed with the procurement, thereby causing further expenditure of funds by offerors, were not the cause of claimant which was in line for award not receiving award, and cannot serve as basis for claim for proposal preparation costs, as such action was not arbitrary so as to deprive claimant of a fair appraisal of its proposal.

Contracting Officers—Regulation Compliance

Failure to fill out form required by Department of Defense Directive 7250.10, which contains internal guidelines for reprogramming of funds, is not a violation of a regulation as envisioned by courts to sustain claim for proposal preparation costs.

In the matter of A.R.F. Products, Inc., December 30, 1976:

This decision concerns the claim of A.R.F. Products, Inc. (ARF), that the Naval Avionics Facility, Indianapolis, Indiana (Avionics), acted arbitrarily in canceling request for proposals (RFP) N00163-76-R-0282, for electronically tuned digital receivers. It is ARF's

contention that Avionics' actions were motivated by a desire to avoid awarding the contract to ARF, thereby constituting a basis to reimburse ARF for the expenses it incurred in responding to the RFP. ARF submitted its protest prior to the date the RFP was canceled. At that time, ARF protested the prospective cancellation and any resolicitation of the procurement or award to any other firm under the RFP. Alternatively, ARF submitted its claim for proposal preparation costs. Since the RFP was canceled, we have treated this matter solely as a claim for proposal preparation costs.

The RFP was issued on October 10, 1975, for receipt of initial proposals on November 19, 1975, Ultimately, the RFP was amended five times. Amendments 0001 and 0002 changed technical requirements and amendment 0002 also extended the closing date for receipt of proposals to December 1, 1975. Nine proposals were initially received by the specified time, offering alternate proposals for differing data requirements, as required by the RFP.

On December 19, amendment 0004 was issued as "* * * a continuation of negotiations under [the] RFP * * *" and changed some of the specifications. Amendment 0005 was issued on December 22 to extend the closing date until January 5, 1976. Ten proposals were received. ARF submitted the lowest proposal for the alternate selected for award, at $359,349. ITT was next low at $367,502.

On January 16, 1976, a preaward survey (PAS) was conducted at the ARF facility. As a result, the preaward survey team recommended no award to ARF on January 22. This recommendation was:

> * * * based on the bidder's lack of pre-planning as indicated by the unsatisfactory findings of the Preaward Survey Team in the areas of Technical Capability, Production Capability, Purchasing and Subcontracting, and Ability to Meet Required Schedule.

These were the conclusions of the survey team responsible for reviewing the technical capability of ARF.

As a consequence of the foregoing, on January 27, 1976, the contracting officer executed a determination that ARF was nonresponsible. The determination, predicated upon the PAS, stated:

> A.R.F. Products, Inc. is nonresponsible for purposes of performing the proposed contract. This determination is based on the fact that the aforementioned contractor does not have adequate technical, production, purchasing or subcontracting capability, or the ability to meet the required schedule, nor the ability to obtain such due to the lack of capacity.

Therefore, ARF applied to the Small Business Administration (SBA) for a Certificate of Competency (COC). While this was transpiring, a PAS was conducted on ITT on January 19, which resulted in a positive recommendation for award to it. As a result of actions by the SBA and ARF, a second PAS was conducted on ARF on February 25 and 26. The reasons which prompted the initial adverse recom-

mendations were discussed and clarified to the satisfaction of the technical review members to the extent that the negative recommendation for award was changed to positive.

Pending the outcome of these procedures all offerors were requested to extend their offers until April 5. On March 12, SBA issued a COC to ARF. On March 13, Navy advised ARF of the potential problems in receiving funding, as well as problems discovered in the specifications.

Pursuing the matter further, SBA wrote the Navy to express its concern that award had not been made to ARF since the issuance of the COC apparently resolved the Navy's objections. The Navy replied on March 25 that "* * * a decision as to awarding the contract however has been held in abeyance pending clarification of technical and fiscal problems involved in this procurement."

On March 29 the Chief of Naval Operations (CNO) advised the Naval Air Systems Command (NAVAIR) that funding for the communications jammer (COMM JAMMER) was no longer available. On April 2, ARF protested any proposed cancellation of the RFP to our Office. On April 5, the contracting officer canceled the RFP due to the withdrawal of funds.

While the foregoing transpired, a parallel set of events was being undertaken within the Navy. Apparently in anticipation of the Department of Defense (DOD) receiving less research, development, test and evaluation (RDT&E) funds from Congress than requested, steps were pursued to accommodate the fund reductions. Thus, on December 11, the Director, RDT&E, issued a memorandum concerning possible reprogramming of funds for the fiscal transition period during the change of fiscal year accounting. Of a possible $9.1 million of reprogrammed funds, an $824,000 reduction applicable to the COMM JAMMER project was indicated. The instant procurement was a part of the communications jammer project.

On January 6, NAVAIR sent a message to the CNO outlining its concern for the viability of the COMM JAMMER project in light of an $824,000 reduction in funding. NAVAIR noted that other portions of the program were already under contract and that a contract for the instant procurement had been negotiated and was ready to be signed. The CNO responded by message of January 24, which directed a delay in implementation of the contract, while indicating that contracts already awarded should not be terminated. A briefing on the matter was scheduled for February 9. On February 9 Congress appropriated less RDT&E funds than requested. Also on this date, the Director, RDT&E, issued a memorandum expressing his concern over continued funding for electronic warfare research (as in the instant case) in favor of other programs deemed to be more critical.

On March 10, the Navy notified ARF of the funding problems. On March 29, the CNO directed Navy to discontinue all in-house efforts on the COMM JAMMER project and report any balances available for recoupment.

When superimposing the two chains of events on each other, ARF maintains that the withdrawal of funds was motivated to preclude its receipt of the contract. This conclusion is buttressed, in ARF's view, by the manner in which the first PAS was conducted. The PAS was, in effect, a technical review beyond the scope of its purpose to determine ARF's responsibility. ARF notes that the PAS findings were based upon improper technical considerations. Thus, ARF feels that it was required to undergo unnecessary expenses for the second PAS. Furthermore, ARF contends that Avionics acted unreasonably in requiring ARF to undergo the expense of both PAS's when it was aware of the funding problems. At the least, ARF feels that the procurement should have been held in abeyance until a decision was made on the funding.

It is the position of the Navy that its actions were reasonable. The Navy maintains that proceeding with the procurement while the vagaries concerning the funding were being resolved would have allowed the Navy to make an immediate award upon a release of the funds. While there were uncertainties whether funding would be available, the Navy believed that there existed as much of a possibility for the release of the funds as for their nonrelease.

Moreover, the Navy feels that it pursued the funding problem positively. In this regard the Navy notes that the contracting officer was first aware of the funding problem in December. On January 6, 1976, NAVAIR sent a message to the CNO indicating that the proposed reprogramming of $824,000 from the COMM JAMMER project would "jeopardize the orderly development of this program." NAVAIR maintains that it sought to restore the funds because funds for other portions of the program had already been committed. Further, NAVAIR notes that on January 6, when the message to the CNO was transmitted, ARF was the apparent low offeror. Thus, the inference Navy would have us draw from this is that there was no effort to keep ARF from receiving the contract.

Next, Navy notes that a conference was scheduled to review the reprogramming in early February. NAVAIR was directed not to obligate any funds until that conference. Since the decision concerning funding was not made until February and ARF was determined nonresponsible on January 27, Navy maintains that ARF was not prejudiced by the delay because ARF could not have received an award in January. Also, since the delay in award was not attributable to actions of NAVAIR, but to a higher level of command within the

Navy, NAVAIR maintains that there was no direct action taken by it towards ARF.

The standards applicable to claims for proposal preparation costs have evolved from the courts in response to claims that the Government did not fairly and honestly consider the proposals submitted to satisfy the Government's requests for proposals. The ultimate standard to be applied is whether the Government's conduct was arbitrary and capricious toward the offeror. *Keco Industries, Inc.*, v. *United States*, 492 F. 2d 1200, 203 Ct. Cl. 566 (1974). *Keco* indicates four ways by which the ultimate standard may be satisfied: (1) subjective bad faith on the part of procuring officials which deprives the offeror of a fair and honest consideration of its proposal; (2) no reasonable basis for the administrative action; (3) a sliding degree of proof commensurate with the amount of discretion afforded the procuring officials; and (4) proven violation of pertinent statutes or regulations which may suffice for recovery. Proof establishing any one of the above connotes a breach of the implied contract that goes with each Government solicitation that if the offeror expends the effort and expense to prepare a response to the Government's solicitation, the Government will fairly and honestly consider that proposal.

Our Office has adopted these standards. *T & H Company*, B-181261, September 5, 1974, 74-2 CPD 148; *National Construction Company*, B-185148, March 23, 1976, 76-1 CPD 192. In addition, our Office requires the offeror/claimant to present evidence and argumentation which affirmatively establish the liability of the United States. *DOT Systems, Inc.*, B-183697, June 11, 1976, 76-1 CPD 368. When the claim is submitted with regard to the actions of the Government in canceling a solicitation (a decision entrusted largely to the discretion of the procuring official as to when such action is the best interests of the Government, 10 U.S.C. § 2305 (1970)), the claimant is faced with the problem that the degree of proof required under standard 3 of *Keco*, *supra*, is high due to the discretion afforded the procuring official. Our Office has held that it is proper to reject all offers and cancel a solicitation where there are not sufficient funds available to cover the contract. This conclusion is required by the Anti-Deficiency Act, 31 U.S.C. § 665(a) (1970), which prohibits expenditures of contract obligations in excess of appropriated funds or apportionments made to achieve the most effective use of funds. *Ocean Data Systems, Inc.*, B-180248, August 16, 1974, 74-2 CPD 103; *TIMCO*, B-186177, September 14, 1976, 76-2 CPD 242.

However, ARF has sought to look behind the cancellation at the reason that sufficient funds were not available for contract obligation and whether the contracting activity acted reasonably during its deliberations whether funds would be available. The first aspect raises a

question of executive discretion—reprogramming of funds. This procedure allows executive officials some latitude in shifting funds within an appropriation account to move them from one program to another. Louis Fisher, *Presidential Spending Power* (1975). Thus, ARF is required, under the Keco standard, to establish that the CNO's decision was wholly arbitrary, in light of the discretion afforded him.

The Navy has offered that the decision to reprogram funds from the COMM JAMMER project was prompted by two considerations: (1) the amount of RDT&E funds appropriated by Congress was less than requested; and (2) the anti-aircraft research was considered a more immediate need. Navy maintains that its choice was reasonable in light of the existing facts.

On the other hand, ARF notes that the funds which were reprogrammed were those of the fiscal transition period available during the change in the end of the fiscal year from June 30 to September 30. However, RDT&E funds are not fiscal year funds and are available for obligation within 2 years of appropriation. Thus, ARF asserts that the Navy could have used FY76 funds, since this program appears to be an on-going one. Therefore, in ARF's view, the break in funding for the transition period should not mandate the cancellation of the RFP. It is this line of reasoning that led ARF to believe that funding for the project would be continuous.

Reprogramming of funds is controlled by Department of Defense (DOD) Directives 7250.5 and 7250.10, January 14, 1975, entitled "Reprogramming of Appropriated Funds" and "Implementation of Reprogramming of Appropriated Funds," respectively (Directives). DOD 7250.10, Section IIIa, defines reprogramming actions as:

> * * * changes in the application of financial resources from the purpose originally contemplated and budgeted for, testified to, and described in the justifications submitted to the congressional committees in support of fund authorizations and budget requests.

Three types of reprogramming actions are treated in the Directives: (1) reprogramming actions requiring prior approval of congressional committees; (2) reprogramming actions requiring notification to congressional committees; and (3) reprogramming actions classified as audit trail type changes (internal reprogramming). It is into the last category that the instant reprogramming action falls.

DOD Directive 7250.5, Section II A, underscores, as follows, the flexibility and discretion inherent in reprogramming:

> The congressional committees * * * have generally accepted the view that rigid adherence to the amounts justified for budget activities or for subsidiary items of programs may unduly jeopardize the effective accomplishment of planned programs in the most businesslike and economical manner, and that unforeseen requirements, changes in operating conditions, revisions in price estimates, wage rate adjustments, etc., require some diversion of funds from the specific

purposes for which they were justified. Reprogramming measures * * * will provide * * * a timely device for achieving flexibility in the execution of Defense programs.

Standard 4 of Keco, *supra*, equates arbitrary action by the Government towards the claimant with a proven violation of a statute or regulation, which may suffice for recovery. In fact, it is upon this basis that the only two suits for bid preparation cost have been successful: *Armstrong & Armstrong, Inc.* v. *United States*, 356 F. Supp. 514 (E.D. Wash. 1973); and *The McCarty Corporation* v. *United States*, 499 F.2d 633, 204 Ct. Cl. 768 (1974). However, the regulations involved in those instances were the Armed Services Procurement Regulation concerning procedures to be followed when a mistake in bid is claimed. Little discretion is afforded the procuring officials in that area, unlike reprogramming of funds. Moreover, we do not view the Directives to be the type of regulation envisioned by the court in Keco, *supra*. The Directives afford internal guidelines to "* * * establish an orderly system for obtaining approvals and related operating procedures * * *." DOD Directive 7250.10(F)(b). In this light, we do not view the failure to complete DD Form 1415 as the type of violation of regulation equated with arbitrary action. Furthermore, while the information in the DD Form 1415 as to the reasons for the reprogramming action would have been helpful to determine if the funds were reprogrammed to avoid an award to ARF, in its absence, we cannot ascribe any purposeful action directed towards ARF from the record.

Since ARF has presented no direct evidence on this point, we conclude that the failure to follow the DOD Directive is not sufficient to sustain the claim of proposal preparation costs. Also, we find nothing in the record to indicate that the reprogramming action itself was directed towards ARF. The December 11 memorandum indicates that the reduction in available funding was distributed over a broad range of programs. Therefore, the claim on this basis is denied.

There remains that part of the claim that the Navy acted unreasonably in inducing ARF to expend the money necessary for the second PAS. The essence of this line of argumentation is that once the Navy was aware of the funding problems, the Navy should have alerted all offerors of the problem and suspended procurement actions until the problem was resolved, not that the proposals were improperly induced in the first instance. ARF points to the December 11 memorandum as the initial date when the contracting officer knew of the problem and should have informer all offerors. The initial mistake, in ARF's judgment, is compounded at each step of the procurement as it became more evident that funding would be withdrawn.

We think it is clear that the Government may breach its implied contract to fairly and honestly consider proposals at any stage of the procurement process short of award. The question is whether ARF's proposal received a fair consideration, or whether action of the Government arbitrarily deprived ARF of a fair opportunity for award. It must be emphasized, at this point, that unfair or prejudicial motives will not be attributed to individuals on the basis of inference or supposition. *Datawest Corporation*, B–180919, January 13, 1975, 75–1 CPD 14. The record contains conflicting affidavits whether the first PAS team was prejudicially disposed to recommend no award to ARF regardless of ARF's qualifications. Affidavits submitted by ARF indicate that statements were overheard to that effect. Members of the PAS team have submitted affidavits denying the allegations.

The protester or claimant has the burden of affirmatively proving his case. We do not believe that such burden is met where conflicting statements of the parties constitute the only evidence. *Reliable Maintenance Service, Inc.,—request for reconsideration*, B–185103, May 24, 1976, 76–1 CPD 337. We are of the view that ARF has not met this burden. Therefore, the claim is doubtful and it must be disallowed. *Afghan Carpet Cleaners*, B–175895, April 30, 1974, 74–1 CPD 220, and cases cited therein.

We agree with ARF that the Navy should have warned offerors of the funding problem before it actually did. In ARF 's case, this information should have been communicated at least before ARF was required to undergo the second PAS. However, the action of the Navy in this regard did not deprive ARF of a fair and honest consideration of its proposal or an opportunity for award. Indeed, had any award been made it would have been to ARF. The courts, as well as our Office, are aware of the right of the agency to cancel a solicitation under statute and solicitation provisions when it is deemed in the Government's best interest. *Cf. Robert F. Simmons & Associates* v. *United States*, 360 F. 2d 962, 175 Ct. Cl. 510 (1966). However, it was not these actions which precluded ARF from receiving award. Rather, it was the withdrawal of funds. Therefore, the action of the Navy in pursuing the PAS cannot give rise to a successful claim for proposal preparation costs.

Since we have concluded that the cancellation in this instance was not arbitrary or capricious, but rather resulted from a compelling reason, the claim of ARF for proposal preparation costs must be denied.

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Navy installation, in separate grievances, was ordered by two arbitrators to pay environmental differential to certain employees, which the installation began to pay. Navy Headquarters, however, concluded the awards were inconsistent with applicable regulations and directed installation to terminate payments. Navy received an unfair labor practice citation and seeks a ruling on legality of the terminated awards. General Accounting Office (GAO) holds that arbitrators' findings and conclusions satisfied the regulatory criteria and that awards may be implemented with backpay for period of termination 8

Consistent with law, regulations and GAO decisions

Navy installation terminated two arbitration awards for environmental differential for certain employees on basis payments were improper. Assistant Secretary for Labor-Management Relations cited the naval installation for an unfair labor practice and ordered awards be reinstated with backpay. To preclude ordering payments that may be illegal, GAO recommends that Assistant Secretary state in orders that payments shall be made "consistent with laws, regulations, and decisions of the Comptroller General." This would permit agency to obtain decision from this Office 8

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Agreement between Federal Aviation Administration and union (PATCO) provided that discrimination would not be used in the agency's awards program. Arbitrator found that employee had been discriminated against by supervisor in violation of agreement and directed that cash performance award be given to employee. Payment of cash award ordered by arbitrator would be improper since granting of awards is discretionary with agency, agency regulations require at least two levels of approval, and labor agreement did not change granting of awards to nondiscretionary agency policy 57

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Since grant contract included competitive bidding requirement, basic principles of Federal procurement law must be followed by grantee in absence of contrary provisions in grant contract. Even though all Federal Procurement Regulations (FPR) provisions need not necessarily be followed to comply with basic principles, an action which follows FPR is consistent with such principles. Therefore, failure of only acceptable bid to include bid bond as required by solicitation may be waived since FPR 1–10.103–4(a) provides exception when only one bid is received 43

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Since grant contract included competitive bidding requirement, basic principles of Federal procurement law must be followed by grantee in absence of contrary provisions in grant contract. Even though all Federal Procurement Regulations (FPR) provisions need not necessarily be followed to comply with basic principles, an action which follows FPR is consistent with such principles. Therefore, failure of only acceptable bid to include bid bond as required by solicitation may be waived since FPR 1-10.103-4(a) provides exception when only one bid is received 43

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Navy installation, in separate grievances, was ordered by two arbitrators to pay environmental differential to certain employees, which the installation began to pay. Navy Headquarters, however, concluded the awards were inconsistent with applicable regulations and directed installation to terminate payments. Navy received an unfair labor practice citation and seeks a ruling on legality of the terminated awards. General Accounting Office (GAO) holds that arbitrators' findings and conclusions satisfied the regulatory criteria and that awards may be implemented with backpay for period of termination 8

Navy installation terminated two arbitration awards for environmental differential for certain employees on basis payments were improper. Assistant Secretary for Labor-Management Relations cited the naval installation for an unfair labor practice and ordered awards be reinstated with backpay. To preclude ordering payments that may be illegal, GAO recommends that Assistant Secretary state in orders that payments shall be made "consistent with laws, regulations, and decisions of the Comptroller General." This would permit agency to obtain decision from this Office 8

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Since nothing in Small Business Act or procurement regulations mandates that there be set-aside for small business as to any particular procurement and because it has been held that agency's decision not to make "8(a)" award for given procurement is not subject to review, protests demanding either small business set-aside or "8(a)" award are denied 115

Bid procedures. (*See* **BIDS**)
Buy American Act
Computer data
Conversion and storage
Services *v.* manufacturing

A contract for conversion and storage of data to machine (computer) readable form is not manufacturing for the purpose of the Buy American Act 18

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Buy American Act—Continued
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A computer program, consisting of an enhanced magnetic tape produced in the United States from a master tape, and associated documentation printed in the United States, is properly considered to be a domestic source end product for purpose of the Buy American Act, even though program was developed in a foreign country 102
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Ambiguous
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Master agreements
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Advertising *v.* negotiation
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Service Contract Act of 1965
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In view of (1) agency knowledge for over 3 weeks before award that wage determination was to be issued in close proximity to anticipated award date; (2) fact that agency's failure to include incumbent's collective bargaining agreement with Department of Labor (DOL) SF 98 significantly contributed to delay in issuance of new wage determination for inclusion in RFP; (3) fact that agency made preaward arrangement with successful offeror to accept expected wage determination, and modification was issued; and (4) DOL view that closing date should have been postponed when agency was notified that wage determination would be delayed: contract awarded was different from contract solicited. Therefore, requirements covered by current option should be resolicited. 160
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Contracting officer's error detection duty
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Basis of previous offer
Where offeror orally submits firm fixed price for amended request for quotations work statement, protest based on contention that such price was based on mistake and that agency should have used earlier list of prices submitted for obsolete work statement is without merit 93
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Propriety of award

Request for proposals provided that award will be made to that technically acceptable offeror whose technical and price proposal was most advantageous to Government, "price and other factors considered." Protester's contention, made after award, that RFP failed to advise offerors of relative importance of price to other factors is untimely under subsection 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. 20.2(b)(1), since alleged impropriety was apparent prior to closing date for receipt of initial proposals ---------- 62
Erroneous
Remedial action impracticable

No useful purpose in terms of remedy would be served by deciding protests against combination of requirements, experience clauses, and proposal evaluation under procurement which was improperly negotiated since protests, if found meritorious, assume either that award should be made under outstanding RFP, as perhaps modified, which would be contrary to holding that procurement was improperly negotiated, or that award should be made under advertised solicitation which may not be immediately possible ---------- 115
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Contention that protester was prejudiced because evaluators examined competitor's disk during evaluation is without merit because there was no need for experienced technicians to examine PCB because PCB's have been very common for many years ---------- 62
Cancellation
Generally. (*See* **CONTRACTS, Cancellation**)
Competition
Competitive range formula

When evaluation provision of request for proposals (RFP) gives no no indication of relative importance of criteria, offerors may properly assume that all are of equal importance. Evaluation which eliminated protester from competitive range on basis of emphasis on one section vis-a-vis another was not in accordance with evaluation scheme in RFP and was therefore improper. This Office recommends rescoring proposal on basis of all criteria being equal to determine if the proposal should have been included in competitive range ---------- 188

CONTRACTS—Continued
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Effect of eliminating one offeror Page

Offeror contesting exclusion of proposal from competitive range must be held to have notice of basis for protest concerning rejection of proposal when offeror obtained procuring agency's excised evaluation report on proposal. Offeror was not entitled to wait for decision on release of "back-up" material to evaluation report before being held to have actual or constructive notice of basis for protest, since material was not final analysis of proposal and, at best, should have been considered to contain only individual judgments already evidenced in report 172

Elimination of one offeror from competitive range in particular procurement is not regarded as "significant issue" to permit consideration of untimely protest. Principle enunciated in *Power Conversion, Inc.*, B–186719, September 20, 1976, applies to present untimely protest against exclusion of one of two competing offerors from competitive range 172

Master agreements
Enhancing competition

Department of Agriculture's proposed use of master agreements for prequalifying firms to compete for agency consulting requirements is tentatively approved, since it is not unduly restrictive of competition but may actually enhance competition in situations where small firms otherwise might not be able to compete 78

Propriety
Method of conducting negotiations

Procurement officials' actions in not informing offerors of possible funding problems while matter of reprogramming was being considered within agency, and continuing to proceed with the procurement, thereby causing further expenditure of funds by offerors, were not the cause of claimant which was in line for award not receiving award, and cannot serve as basis for claim for proposal preparation costs, as such action was not arbitrary so as to deprive claimant of a fair appraisal of its proposal 201

Evaluation factors
Administrative determination

Agency failed to recognize ribbonless operation capability of protester's equipment during initial technical evaluation of proposals. After award agency reevaluated proposals, taking this feature into consideration, and concluded that it did not substantially affect its decision because of other advantages of competitor's equipment in that evaluation category. Since procurement officials enjoy a reasonable degree of discretion in evaluating proposals and their determinations are entitled to great weight, on basis of record we cannot conclude that agency acted arbitrarily 62

Protester contends that agency's conclusion that disk can be changed more simply than PCB is based on generalized information and not concrete facts. Since operator may attempt to insert PCB upside down but such error is not possible with disk, on whole, we believe that agency's conclusion is based on reasoned judgment of its source selection personnel in accordance with established evaluation factors 62

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Areas of evaluation Page

Protester contends that pallet storage characteristics and field-reprogramming capability should not have been considered by agency Procurement Review Board because such features were not scored by technical evaluators. Since such features were within listed evaluation criteria and technical point scores are merely useful guides to agency source selection, it was entirely proper for Board to consider such features as explained to it by evaluators even though such features were not scored 62

Conformability of equipment, etc. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered, Technical deficiencies, Negotiated procurement**)

Technical deficiencies. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered, Technical deficiencies, Negotiated procurement**)

Criteria

Contention that pallet storage characteristics and field-reprogramming capability were improper evaluation criteria is without merit since agency reasonably considered them to be within purview of listed subfactor, "ease of operation and maintenance" 62

Application of criteria

Agency initially evaluated proposals and made award based on improper evaluation criteria. After protest, agency noticed its mistake, reconsidered its decision, and again selected same firm. During development of protest, agency was made aware of another error, reconsidered, and again determined that its source selection was justified. Contention that reconsiderations were invalid because contemporaneous documentation was not prepared is without merit because adequate documentation to support decision now exists and time of preparation does not affect substance of justification 62

When evaluation provision of request for proposals (RFP) gives no indication of relative importance of criteria, offerors may properly assume that all are of equal importance. Evaluation which eliminated protester from competitive range on basis of emphasis on one section vis-a-vis another was not in accordance with evaluation scheme in RFP and was therefore improper. This Office recommends rescoring proposal on basis of all criteria being equal to determine if the proposal should have been included in competitive range 188

Subcriteria

Concerning protester's contention that it was prejudiced because it assumed incorrectly that each subfactor was listed in descending order of importance, we have held that there is no obligation to advise offerors of relative importance of evaluation subfactors, or to list subfactors in descending order of importance, if they are to be considered of equal or approximately equal importance. Since subfactors were approximately equal in importance, we believe that RFP reasonably advised offerors of evaluation criteria to be applied 62

CONTRACTS—Continued
Negotiation—Continued
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Evaluators
Allegations of bias, unfairness, etc. Page

Contention that protester was prejudiced because evaluators examined competitor's disk during evaluation is without merit because there was no need for experienced technicians to examine PCB because PCB's have been very common for many years---------- 62

Board membership

Protest that changes to membership of technical evaluation board occurred after evaluation process had started and replacement personnel were less qualified than personnel removed is denied, since investigation revealed that all membership changes occurred before start of evaluation and educational and professional backgrounds of replacement personnel were comparable to those removed---------- 188

Factors other than price
Technical acceptability

Request for proposals provided that award will be made to that technically acceptable offeror whose technical and price proposal was most advantageous to Government, "price and other factors considered." Protester's contention, made after award, that RFP failed to advise offerors of relative importance of price to other factors is untimely under subsection 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. 20.2(b)(1), since alleged impropriety was apparent prior to closing date for receipt of initial proposals---------- 62

Method of evaluation
Not prejudicial

Procurement officials' actions in not informing offerors of possible funding problems while matter of reprogramming was being considered within agency, and continuing to proceed with the procurement, thereby causing further expenditure of funds by offerors, were not the cause of claimant which was in line for award not receiving award, and cannot serve as basis for claim for proposal preparation costs, as such action was not arbitrary so as to deprive claimant of a fair appraisal of its proposal-- 201

Technical proposals

Protester contends that its teleprinter has fewer total parts, resulting in easy maintenance at low cost. Agency indicates that competitor's unit is better because its printhead has fewer moving parts, resulting in less maintenance at user level. Although protester disagrees with agency's technical judgment on this point, our examination of record does not reveal grounds to conclude that agency acted arbitrarily or unreasonably in its evaluation of this point---------- 62

Point rating
Disclosure of evaluation base

Although it is clear that the request for proposals (RFP) did not meet "relative importance of evaluation factors" disclosure requirement of our decisions and the Armed Services Procurement Regulation, since protester assumed correctly that point 1, Technical Approach, was most significant factor and since protester's and competitor's proposals were essentially equal and near maximum score on other points, we do not believe that protester was prejudiced by RFP's failure to disclose relative importance of evaluation factors. 50 Comp. Gen. 117, distinguished- 62

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Preference
Prejudice alleged Page

Protester contends that procuring agency had strong preference for disk-type pallet over printed circuit board (PCB) type pallet and that agency's failure to notify all competitors of such preference had prejudicial effect on competition. Where competing offerors' proposals were acceptable and satisfied RFP requirement using two distinct state-of-the-art approaches, agency had no duty to amend RFP to specify particular approach 62

Propriety of evaluation

Protester contends that agency's conclusion that disk can be changed more simply than PCB is based on generalized information and not concrete facts. Since operator may attempt to insert PCB upside down but such error is not possible with disk, on whole, we believe that agency's conclusion is based on reasoned judgment of its source selection personnel in accordance with established evaluation factors 62

Technical
Erroneous computation
Not prejudicial

Although protester's contention that agency erroneously computed scoring of technical evaluation factors by failing to weigh factors as intended is correct, proper computation of scoring results in approximately same percentage difference (5.1 versus 5.15 percent). Accordingly, we cannot perceive that protester was prejudiced by erroneous computation 62

Impossibility of drafting specifications
Basis for exception to formal advertising

Since Air Force admits it has capability of drafting management services specifications, fact that it may not be able to specify all details of services for fear of lessening competition by limiting firms to specified management procedures does not justify determination that it is impossible to draft specifications for management services. Degree competition might be lessened is speculative; moreover, procurement regulation under which contracting officer negotiated procurement contemplates impossibility of drafting specifications, not difficulty or inconvenience... 115

Level of quality

Record suggests that need to obtain higher level of quality of service than that thought obtainable under formal advertising method was also reason prompting choice of negotiatied procurement method for hospital cleaning services. Legislative history of Armed Services Procurement Act of 1947, source of authority for negotiated procurement in question, shows, however, that Congress specifically rejected proposal to permit negotiation to secure desired level of quality of services even when "health of personnel of the services are involved." Further analysis mandates conclusions that negotiated procurement method is not rationally founded under limits of existing law and regulation 115

CONTRACTS—Continued
Negotiation—Continued
Lowest offer
Price and other factors considered Page
Where RFP inconsistently states that award will be made to firm submitting "lowest evaluated acceptable offer," and that award will be made based on the most advantageous proposal "price and other factors considered," Order of Precedence Clause of RFP indicates that latter basis is proper basis for award ---------- 62
Offers or proposals
Best and final
Additional rounds
Because of analysis of deficiencies, recommendation is made that all offerors be afforded opportunity for another round of negotiations ---------- 167
Late modification
Resolicitation recommended
Because "approximate" pricing communication should not have been considered for award and, since offeror's "corrected" cost tables, modifying communication, were submitted unacceptably late, recommendation is made that requirement be resolicited. Resolicitation is also recommended, since offeror was permitted to significantly correct unacceptable ADP configuration after closing time for best and final offers ---------- 142
Time limit
Since protester observed opening of best and final offer prior to designated time, protest against earlv opening filed more than 10 days later is untimely under section 20.2(b)(2) of Bid Protest Procedures. Where protester's understanding was that no best and final offers other than its own had been submitted prior to designated closing time, protest concerning alleged untimely receipt of awardee's best and final offer filed more than 10 days after notification of award is also untimely under section 20.2(b)(2) of Bid Protest Procedures, and will not be considered. 142
Evaluation
Errors
Not prejudicial
Agency failed to recognize ribbonless operation capability of protester's equipment during initial technical evaluation of proposals. After award agency reevaluated proposals, taking this feature into consideration, and concluded that it did not substantially affect its decision because of other advantages of competitor's equipment in that evaluation category. Since procurement officials enjoy a reasonable degree of discretion in evaluating proposals and their determinations are entitled to great weight, on basis of record we cannot conclude that agency acted arbitrarily ---------- 62
Preparation
Costs
Claim for proposal preparation cost on basis that cancellation of request for proposals (RFP) was motivated by prejudice against claimant is denied where claimant has not affirmatively proved that decision was not result of reasonable exercise of discretion to program limited funds to another project ---------- 201
Failure to fill out form required by Department of Defense Directive 7250.10, which contains internal guidelines for reprogramming of funds, is not a violation of a regulation as envisioned by courts to sustain claim for proposal preparation costs ---------- 201

CONTRACTS—Continued
Negotiation—Continued
Offers or proposals—Continued
Revisions
Cost
Proposal unacceptable Page

Where, concurrent with submission of best and final communication, offeror stated "arithmetic" error was made in cost tables which would result in price increase of "*approximately* $120,000," communication was ineligible for award consideration, since it proposed neither fixed. nor finitely determinable, prices which the Government would be bound to pay if award were to be based on communication. Also, since offeror's final technical submission proposed significantly different equipment configuration from that which underwent benchmark testing, proposal is unacceptable 142

"Separate charges"
Alternate in nature

"Separate charges" cannot logically be added to base and option prices to determine successful offeror or to determine bid "unbalancing," since both prices and separate charges will not be paid—they are alternative in nature 167

Options
Generally. (*See* **CONTRACTS, Options**)
Requests for proposals
Cancellation
Unavailability of funds

Cancellation of RFP due to unavailability of funds is reasonable exercise of discretion because Anti-Deficiency Statute, 31 U.S.C. 665(a), prohibits the obligation of funds in excess of amount appropriated from one program to another 201

Clauses
Order of precedence

Where RFP inconsistently states that award will be made to firm submitting "lowest evaluated acceptable offer," and that award will be made based on the most advantageous proposal "price and other factors considered," Order of Precedence Clause of RFP indicates that latter basis is proper basis for award 62

Evaluation criteria

When evaluation provision of request for proposals (RFP) gives no indication of relative importance of criteria, offerors may properly assume that all are of equal importance. Evaluation which eliminated protester from competitive range on basis of emphasis on one section vis-a-vis another was not in accordance with evaluation scheme in RFP and was therefore improper. This Office recommends rescoring proposal on basis of all criteria being equal to determine if the proposal should have been included in competitive range 188

Master agreements
Use of list

Department of Agriculture's proposed use of master agreements for prequalifying firms to competc for agency consulting requirements is tentatively approved, since it is not unduly restrictive of competition but may actually enhance competition in situations where small firms otherwise might not be able to compete 78

CONTRACTS—Continued
Negotiation—Continued
Requests for proposals—Continued
Order of precedence clause. (*See* CONTRACTS, Negotiation, Requests for proposals, Clauses, Order of precedence)
Protests under Page
Protests that successful offeror cannot meet requirement that procured items be interchangeable with protester's previously supplied units, without violating proprietary rights and infringing on patents of protester, will not be considered on merits ---- 183
Conflict between allegations and report
Protest that changes to membership of technical evaluation board occurred after evaluation process had started and replacement personnel were less qualified than personnel removed is denied, since investigation revealed that all membership changes occurred before start of evaluation and educational and professional backgrounds of replacement personnel were comparable to those removed ---- 188
Merits
Post-award protest that Department of Labor (DOL) Service Contract Act (SCA) wage determination attachment was omitted from request for proposals, involving a deficiency apparent before closing date for receipt of proposals, is untimely but presents issue of widespread interest concerning frequent SCA procurements and will be considered on merits as significant issue under 4 C.F.R. 20.2(c) (1976) ---- 160
Timeliness
Contention first made in letter dated July 30, 1976 (received in our Office August 4, 1976) that other offeror's proposal does not satisfy requirements of RFP is untimely under subsection 20.2(b)(2) of our Bid Protest Procedures, 4 C.F.R. 20.2(b)(2) (1976), since basis of protest was known on July 1, 1976, and was not filed in our Office within 10 working days ---- 62
Constructive notice
Offeror contesting exclusion of proposal from competitive range must be held to have notice of basis for protest concerning rejection of proposal when offeror obtained procuring agency's excised evaluation report on proposal. Offeror was not entitled to wait for decision on release of "back-up" material to evaluation report before being held to have actual or constructive notice of basis for protest, since material was not final analysis of proposal and, at best, should have been considered to contain only individual judgments already evidenced in report ---- 172
Solicitation improprieties
Request for proposals provided that award will be made to that technically acceptable offeror whose technical and price proposal was most advantageous to Government, "price and other factors considered." Protester's contention, made after award, that RFP failed to advise offerors of relative improtance of price to other factors is untimely under subsection 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. 20.2(b)(1), since alleged impropriety was apparent prior to closing date for receipt of initial proposals ---- 62

CONTRACTS—Continued
Negotiation—Continued
Requests proposals—Continued
Qualified products
Modification

No modification to qualified product portion of item offered by successful offeror under RFP was necessary to meet Government's requirement of interchangeability with previously supplied product, although unqualified portion of item was altered. In any case, qualified products list (QPL) preparing activity, acting within its discretion, has found requalification of product to be not necessary. Therefore, offeror offered qualified product in accordance with RFP QPL requirements and was eligible for award 183

Statement of work
Unsolicited proposal

While comparison of statement of work in RFP and protester's previously submitted, unsolicited proposal, which initiated instant RFP, indicates that some portions of statement of work were taken verbatim from unsolicited proposal, no impropriety is shown as need for procurement was documented in review by Air Force predating unsolicited proposal 188

Requests for quotations
Firm offer confirmation
Mistake alleged

Where offeror orally submits firm fixed price for amended request for quotations work statement, protest based on contention that such price was based on mistake and that agency should have used earlier list of prices submitted for obsolete work statement is without merit 93

Specifications. (*See* **CONTRACTS, Specifications**)
Specifications unavailable
"Impossibility" requirement

Since Air Force admits it has capability of drafting management services specifications, fact that it may not be able to specify all details of services for fear of lessening competition by limiting firms to specified management procedures does not justify determination that it is impossible to draft specifications for management services. Degree competition might be lessened is speculative; moreover, procurement regulation under which contracting officer negotiated procurement contemplates impossibility of drafting specifications, not difficulty or inconvenience 115

Termination. (*See* **CONTRACTS, Termination**)
Negotiation v. advertising. (*See* **ADVERTISING, Advertising *v.* negotiation**)
Options
Duration
Computation

Under provisions of ADP contract funded with fiscal year appropriations having multiple yearly options up to 65 months, separate charges are payable to contractor if Government returns contractor's equipment or otherwise terminates ADP system prior to intended system's life end. Payment of charges—a percentage of future years' rentals on discontinued equipment based on contractor's "list prices"—would

CONTRACTS—Continued
Options—Continued
Duration—Continued
Computation—Continued Page
violate 31 U.S.C. 665(a), 31 U.S.C. 712a and 41 U.S.C. 11, since charges represent part of price of future years' ADP requirements rather than reasonable value of actually performed, current fiscal year requirements. Liability for such substantial charges in lieu of exercising option renders Government's option "rights" essentially illusory. B–164908, July 7, 1972, overruled 142
Multiple year
Termination of contract
Computation of charges
Under provisions of ADP contract funded with fiscal year appropriations having multiple yearly options up to 65 months, separate charges are payable to contractor if Government returns contractor's equipment or otherwise terminates ADP system prior to intended system's life end. Charges are based, in part, on percentage of contractor's future years' commercial catalog prices for equipment. Inasmuch as catalog prices are subject to change within contractor's sole discretion, effect of provision would subject Government to indeterminate, uncertain or potentially unlimited liability, in violation of 31 U.S.C. 665(a), 31 U.S.C. 712a and 41 U.S.C. 11. B–164908, July 7, 1972, overruled 142
Not to be exercised
Requirements to be resolicited
In view of (1) agency knowledge for over 3 weeks before award that wage determination was to be issued in close proximity to anticipated award date; (2) fact that agency's failure to include incumbent's collective bargaining agreement with Department of Labor (DOL) SF 98 significantly contributed to delay in issuance of new wage determination for inclusion in RFP; (3) fact that agency made preaward arrangement with successful offeror to accept expected wage determination, and modification was issued; and (4) DOL view that closing date should have been postponed when agency was notified that wage determination would be delayed: contract awarded was different from contract solicited. Therefore, requirements covered by current option should be resolicited 160
Protests
Allegations of unfairness
Not supported by record
Record does not support protester's contentions that awardee of automatic data processing (ADP) contract was permitted to perform benchmark test requirements in less demanding manner than request for proposals (RFP) required, wander in any material way from proposed system configuration, or utilize special computer software not meeting RFP requirements to pass tests 142
Patent infringement
Protests that successful offeror cannot meet requirement that procured items be interchangeable with protester's previously supplied units, without violating proprietary rights and infringing on patents of protester, will not be considered on merits 183

CONTRACTS—Continued
Protests—Continued
Procedures
Bid Protest Procedures
Constructive notice Page

Offeror contesting exclusion of proposal from competitive range must be held to have notice of basis for protest concerning rejection of proposal when offeror obtained procuring agency's excised evaluation report on proposal. Offeror was not entitled to wait for decision on release of "back-up" material to evaluation report before being held to have actual or constructive notice of basis for protest, since material was not final analysis of proposal and, at best, should have been considered to contain only individual judgments already evidenced in report 172

Improprieties and timeliness

Contention first made in letter dated July 30, 1976 (received in our Office August 4, 1976) that other offeror's proposal does not satisfy requirements of RFP is untimely under subsection 20.2(b)(2) of our Bid Protest Procedures, 4 C.F.R. 20.2(b)(2) (1976), since basis of protest was known on July 1, 1976, and was not filed in our Office within 10 working days 62

Time for filing

Since protester observed opening of best and final offer prior to designated time, protest against early opening filed more than 10 days later is untimely under section 20.2(b)(2) of Bid Protest Procedures. Where protester's understanding was that no best and final offers other than its own had been submitted prior to designated closing time, protest concerning alleged untimely receipt of awardee's best and final offer filed more than 10 days after notification of award is also untimely under section 20.2(b)(2) of Bid Protest Procedures, and will not be considered 142

Reprocurement

Because "approximate" pricing communication should not have been considered for award and, since offeror's "corrected" cost tables, modifying communication, were submitted unacceptably late, recommendation is made that requirement be resolicited. Resolicitation is also recommended, since offeror was permitted to significantly correct unacceptable ADP configuration after closing time for best and final offers 142

Impracticable

No useful purpose in terms of remedy would be served by deciding protests against combination of requirements, experience clauses, and proposal evaluation under procurement which was improperly negotiated since protests, if found meritorious, assume either that award should be made under outstanding RFP, as perhaps modified, which would be contrary to holding that procurement was improperly negotiated, or that awards should be made under advertised solicitation which may not be immediately possible 115

CONTRACTS—Continued
Protests—Continued
Timeliness
Concrete evidence by protester not required Page

Protest based on procuring agency's administration of awardee's benchmark tests and allegation that awardee was improperly permitted to submit revised best and final offer after December 31, 1975, 2 p.m. closing time, which was filed in April 1976 and amended in June 1976 within 10 working days of when protester says it became aware of respective bases for protest, is timely under section 20.2(b)(2) of Bid Protest Procedures in absence of objective evidence to contrary. Protester is not required to demonstrate by concrete evidence that protest is timely 142

Negotiated contracts
"Non-solicitation defect"
Applicability

Protest that was filed with procuring agency and the General Accounting Office (GAO) more than 10 working days from date on which basis of protest was known is untimely filed under section 20.2 of Bid Protest Procedures (4 C.F.R. 20.2 (1976)). Argument that time limits specified in Bid Protest Procedures for filing protests relating to "non-solicitation defect" matters should not apply to protests filed before award has been previously considered and rejected 172

"Significant issue exception" lacking

Elimination of one offeror from competitive range in particular procurement is not regarded as "significant issue" to permit consideration of untimely protest. Principle enunciated in *Power Conversion, Inc.*, B–186719, September 20, 1976, applies to present untimely protest against exclusion of one of two competing offerors from competitive range 172

Significant issue exception

Protest after bid opening against inviting bids on requirements-type contract on net or single percentage factor basis to be applied to agency priced items not stating quantity estimates is considered significant issue, since propriety of method of soliciting bids which is continuing and increasing never has been addressed in prior decisions and is considered in circumstances to be of widespread application to procurement practices; however, since protest is untimely no corrective action is recommended for immediate procurement 107

Post-award protest that Department of Labor (DOL) Service Contract Act (SCA) wage determination attachment was omitted from request for proposals, involving a deficiency apparent before closing date for receipt of proposals, is untimely but presents issue of widespread interest concerning frequent SCA procurements and will be considered on merits as significant issued under 4 C.F.R. 20.2(c) (1976). 160

Solicitation improprieties

Protest after bid opening against ambiguity in item description apparent prior to bid opening is untimely and will not be reviewed as matter of widespread interest since it relates to isolated procurement 107

CONTRACTS—Continued
Requests for proposals
Negotiated procurement. (*See* **CONTRACTS, Negotiation, Requests for proposals**)
Requirements
Estimated amounts basis
Invitation for bids (IFB) soliciting bids on requirements-type contract on net basis or single percentage factor applied to agency priced items not stating estimated quantities or list of past orders is in violation of Federal Procurement Regulations para. 1-3.409(b)(1) and contrary to 52 Comp. Gen. 732, 736 107
Net basis or single percentage factor effect
Requirement for submitting net or single percentage bid on requirements-type contract prevents deliberate unbalancing of prices by bidder, which assures award to low bidder regardless of quantities ordered. Further, if predetermined prices in IFB are too low or too high, bidders can adjust prices by offered plus or minus percentage factor 107
Specifications
Conformability of equipment, etc., offered
Technical deficiencies
Negotiated procurement
Request for proposals provided that award will be made to that technically acceptable offeror whose technical and price proposal was most advantageous to Government, "price and other factors considered." Protester's contention, made after award, that RFP failed to advise offerors of relative importance of price to other factors is untimely under subsection 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. 20.2(b)(1), since alleged impropriety was apparent prior to closing date for receipt of initial proposals 62
Deviations
Informal *v.* substantive
Failure to bid on each item
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Particular make
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Convenience of Government
"Allowable cost"
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Negotiation procedures propriety
Recognizing difficulties encountered by Air Force in obtaining suitable hospital cleaning service and problem attending definition of common set of management procedures sufficient to presently permit reasonable degree of competition under advertised procurement, termination of contracts awarded under unauthorized negotiated solicitation is not recommended 115
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Termination—Continued
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Computation of Charges—Continued Page
such ADP procurements by Federal Property Management Regulation 101–32.408–5 that separate charges may be quoted is inappropriate and misleading to potential offerors on contracts supported by fiscal year funds with multiple yearly options. In addition, clause is unclear as to how separate charges are to be evaluated, such that offerors are clearly unable to propose separate charges with any assurance that offers would not be rejected as unacceptable. Consequently, clause should be appropriately modified by GSA. B–164908, July 7, 1972, overruled..... 142
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Under provisions of ADP contract funded with fiscal year appropriations having multiple yearly options up to 65 months, separate charges are payable to contractor if Government returns contractor's equipment or otherwise terminates ADP system prior to intended system's life end. Charges are based, in part, on percentage of contractor's future years' commercial catalog prices for equipment. Inasmuch as catalog prices are subject to change within contractor's sole discretion, effect of provision would subject Government to indeterminate, uncertain or potentially unlimited liability, in violation of 31 U.S.C. 665(a), 31 U.S.C. 712a and 41 U.S.C. 11. B–164908, July 7, 1972, overruled ---------- 142

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Improprieties

Where, concurrent with submission of best and final communication, offeror stated "arithmetic" error was made in cost tables which would result in price increase of "*approximately* $120,000," communication was ineligible for award consideration, since it proposed neither fixed, nor finitely determinable, prices which the Government would be bound to pay if award were to be based on communication. Also, since offeror's final technical submission proposed significantly different equipment configuration from that which underwent benchmark testing, proposal is unacceptable ---------- 142

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Agreement between Federal Aviation Administration and union (PATCO) provided that discrimination would not be used in the agency's awards program. Arbitrator found that employee had been discriminated against by supervisor in violation of agreement and directed that cash performance award be given to employee. Payment of cash award ordered by arbitrator would be improper since granting of awards is discretionary with agency, agency regulations require at least two levels of approval, and labor agreement did not change granting of awards to nondiscretionary agency policy 57

FEES
Searching for and producing records
Tax matters
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In view of enactment of section 1205 of Tax Reform Act of 1976 expressly authorizing such payments effective Jan. 1, 1977, and a variety of court cases and Comptroller General decisions, we will not object if, when Internal Revenue Service (IRS) determines that it will avoid costly litigation and delays in obtaining necessary documents pursuant to duly issued summons, IRS enters into agreement with third party record holder to pay the reasonable costs of searching for, producing and/or transporting documents which are the subject of that summons 36

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Food and Drug Administration may reimburse costs of persons or groups who participate in proceedings before it only where person or group lacks financial resources to participate adequately. Absent specific statutory authority, agency may not adopt more liberal standard of eligibility based on factors other than person's or group's actual financial resources which could be applied to participation in agency proceeding. 111
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Employee placed in position within United States following reduction in force in Canal Zone requests ruling on whether tropical differential authorized by section 7(a)(2) of Act of July 25, 1958, 72 Stat. 407, may be included in "rate of basic pay" for purpose of applying "highest previous rate" rule. Question is based on provision of above-cited law requiring inclusion of tropical differentials as basic compensation for, *inter alia*, "any other benefits which are related to basic compensation." In 39 Comp. Gen. 409 we held that tropical differential may not be included in applying "highest previous rate" rule 60

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Department of Defense

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Reprogramming data

Failure to fill out form required by Department of Defense Directive 7250.10, which contains internal guidelines for reprogramming of funds, is not a violation of a regulation as envisioned by courts to sustain claim for proposal preparation costs 201

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GENERAL ACCOUNTING OFFICE

Jurisdiction

Protests generally. (*See* **CONTRACTS, Protests**)

Small business matters

Since nothing in Small Business Act or procurement regulations mandates that there be set-aside for small business as to any particular procurement and because it has been held that agency's decision not to make "8(a)" award for given procurement is not subject to review, protests demanding either small business set-aside or "8(a)" award are denied 115

Recommendations

Contracts

Agency review of procurement policies and procedures

Recommendations are made that: (1) options in negotiated hospital cleaning contracts and in any similar contracts to be exercised subsequent to June 1977 not be exercised; and (2) Air Force immediately commence study of alternative solutions to problems and difficulties which prompted unauthorized negotiated procurement method. Recommendations are made under Legislative Reorganization Act of 1970 115

Reevaluation of best and final offers

Because of analysis of deficiencies, recommendation is made that all offerors be afforded opportunity for another round of negotiations 167

GENERAL SERVICES ADMINISTRATION

Contracts

Obligation of current funds for future needs

Based on rationale employed in companion decision involving similar separate charges scheme, it is concluded that protesting offeror's proposed separate charges are violative of statutory restrictions on appropriations 167

GOVERNMENT PRINTING OFFICE
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Credit sales Page

Except for certain transactions subject to statutory prohibitions against credit sales, Government Printing Office (GPO) may sell publications on credit, through its own facilities, where it determines that extending credit will facilitate sales without increasing administrative costs or price of publications. Under the same circumstances, and subject to the same statutory restrictions, GPO may also arrange with credit card company for sales by credit card. Moreover, sales to company cardholders could include transactions for which GPO is prohibited from making credit sales, since credit here is extended by card company rather than by GPO as vendor 90

GRANTS
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HOUSING AND URBAN DEVELOPMENT DEPARTMENT
Federal Insurance Administrator
Appointment
Authority

Federal Insurance Administrator, a position established under 42 U.S.C. 3533a (1970), requires Presidential nomination and confirmation under Article II, Sec. 2, Cl. 2 of Constitution. Constitution presumes all officers of United States must be appointed with advice and consent of Senate except when Congress affirmatively delegates full appointment authority elsewhere 137

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Rejection by Conference Committee of Senate amendment to require confirmation of Federal Insurance Administrator does not constitute waiver of constitutional right and duty to advise and consent. Secretarial authority to appoint, including officers, under 42 U.S.C. 3535(c) (1970) does not include Insurance Administrator. However, no exception will be taken to past compensation of incumbent or for reasonable period after date of this decision to allow time for presentation of his name for Senate confirmation 137

HUSBAND AND WIFE
Dual rights where both in military or Federal service
Dislocation allowance

Where a permanent change of station requires the disestablishment of a household in one place and a reestablishment of the household in another, a dislocation allowance is authorized, except for members without dependents who are assigned to Government quarters. In no event can more than one dislocation allowance be paid where only one movement of a household is required. However, where both members of the uniformed services married to each other qualify for a dislocation allowance upon a permanent change of station but only one movement of the household occurs, they may elect to be paid the greater amount of the two entitlements 46

INDIAN AFFAIRS
Bureau of Indian Affairs
Attorney fees, etc.
Administrative proceedings or judicial litigation Page
Snyder Act, 25 U.S.C. 13, provides discretionary authority for Secretary of the Interior to use appropriated funds to pay for attorneys' fees and related expenses incurred by Indian tribes in administrative proceedings or judicial litigation, for purpose of improving and protecting resources under jurisdiction of Bureau of Indian Affairs. Attorneys' fees and expenses incurred in judicial litigation may only be paid where representation by Department of Justice is refused or otherwise unavailable, including situation where separate representation is mandated by Court 123
Determination—Secretary of Interior
Basis of financial status of tribe
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Payments on retroactive rate increases
Air carriers
Overseas
Payment of interest by the Government on retroactive increases in rates granted to overseas air carriers by the Civil Aeronautics Board is limited by the contract provisions and by the dates the increases are announced 55
Retroactive rate increases to overseas air carriers. (*See* **INTEREST, Payments on retroactive rate increases, Air carriers, Overseas**)

INTERIOR DEPARTMENT
Bureau of Indian Affairs. (*See* **INDIAN AFFAIRS, Bureau of Indian Affairs**)

INTERNAL REVENUE SERVICE
Tax matters
Summons
Fees
Searching for and producing records
In view of enactment of section 1205 of Tax Reform Act of 1976 expressly authorizing such payments effective Jan. 1, 1977, and a variety of court cases and Comptroller General decisions, we will not object if, when Internal Revenue Service (IRS) determines that it will avoid costly litigation and delays in obtaining necessary documents pursuant to duly issued summons, IRS enters into agreement with third party record holder to pay the reasonable costs of searching for, producing and/or transporting documents which are the subject of that summons 36

LANDS
Land and Water Conservation Act
Appropriations
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Grants from appropriations under the Land and Water Conservation Fund Act (Act), 16 U.S.C. 460*l*–4 to 460*l*–11 may be applied to costs incurred by States after Sept. 3, 1964 (date of enactment), but prior to availability of the appropriation charged, if it is determined that such payments would aid in achieving the purposes of the Act, since nothing in the Act prohibits such payments and there is no possibility that Federal dollars will be used merely to replace State dollars expended for non-Federal purposes. Furthermore, there is no Anti-Deficiency Act objection since the grant itself would not be made until the appropriation charged becomes available 31

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LEAVES OF ABSENCE
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Because employing agency has discretion to charge transferred employee for excess time consumed by employee's failure to travel on any day, agency may require employee to submit accurate time and attendance reports for each day traveled 104
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LEAVES OF ABSENCE—Continued
Interruption
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Travel expenses. (*See* **TRAVEL EXPENSES, Leaves of absence, Temporary duty, After departure on leave**)
Recording requirements
Hours of departure and return to duty
Transferred employee claimed per diem on travel voucher which stated only date of departure from old station, date of arrival at new station, and allowable travel time based on miles between stations divided by 300 miles per day. Payment of per diem must be suspended since voucher does not meet requirements of Federal Travel Regulations (FTR) para. 1–11.5a, which specifies that taking of leave and exact hour of departure from and return to duty status be recorded---------- 104

LITE (Legal Information Through Electronics)
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MILEAGE
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Administrative approval
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Employee's request to use privately owned vehicle (POV) as advantageous to Government for temporary duty travel was denied although official told him it would be approved. Arbitrator held that employee should be paid as though request had been approved since agency's failure to act on it within time frame in its regulations and official's statement amounted to approval. Award may not be implemented since no determination was made that POV is advantageous to Government on basis of cost, efficiency or work requirements as required by Federal Travel Regulations---------- 131
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MILITARY PERSONNEL
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Retired
Contracting with Government
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Participation in preproposal conference of retired Air Force General to ascertain if his retired status affected his acceptability as project manager is not a violation of 18 U.S.C. 281, and implementing regulations, in absence of further contacts for selling purposes, since contact between retired officers and former branch of military is permissible in nonsales environment and mere association of retired officer's name with particular company is not sufficient to establish violation 188
Retired pay. (*See* **PAY, Retired**)
Retirement
Effective date
Active duty after retirement
De facto status
Member, retired for disability who has notice of such retirement on or before the designated retirement date, is considered retired on the designated date even though delivery of retirement orders is delayed beyond the retirement date. This is so even if he performs additional days of active duty subsequent to retirement date and received payment therefor. Such delay does not in any way add to member's retirement rights in absence of specific active duty orders covering the additional period of service 98

NONDISCRIMINATION
Discrimination alleged
Basis of physical handicap
Agreement between Federal Aviation Administration and union (PATCO) provided that discrimination would not be used in the agency's awards program. Arbitrator found that employee had been discriminated against by supervisor in violation of agreement and directed that cash performance award be given to employee. Payment of cash award ordered by arbitrator would be improper since granting of awards is discretionary with agency, agency regulations require at least two levels of approval, and labor agreement did not change granting of awards to nondiscretionary agency policy 57

OFFICERS AND EMPLOYEES
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Relocation of employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)
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OFFICERS AND EMPLOYEES—Continued

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Relocation expenses

Transferred employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)

Salary retention. (*See* **COMPENSATION, Downgrading, Saved compensation**)

Subsistence

Per diem. (*See* **SUBSISTENCE, Per diem**)

Training

Expenses

Travel and transportation

Relocation allowances paid to employee transferred for training purposes are strictly limited by 5 U.S.C. 4109. Fact that cognizant agency officials erroneously authorized reimbursement of expenses beyond those permitted by statute will not form basis for estoppel against Government. Although estoppel has been found in some cases where there is contractual relationship between Government and citizen, same doctrine is not applicable here because relationship between Government and its employees is not contractual, but appointive, in strict accordance with statutes and regulations 85

Transfers

Relocation expenses

Leases

Forfeited prepaid rent

Transferred employee paid lessor of rented apartment entire balance of rent due for unexpired term of 7 months immediately upon transfer. Five months later, employee removed household goods from apartment and relet premises. Reimbursement of rent paid for 5 months between transfer and date of sublease may not be reimbursed because Federal Travel Regulations (FTR) para. 2-6.2h (May 1973) requires employee to make reasonable efforts to compromise outstanding obligation, and employee failed to make such efforts 20

Miscellaneous expenses

Dental contract loss

Amount forfeited under contract for orthodontic services at old duty station is reimbursable as miscellaneous expense where employee's transfer necessitated forfeiture. Cost of completion contract at new duty station may not be used as measure of forfeiture 53

Pollution control devices

Installed in automobiles

Cost of installation of pollution control device in automobile of employee transferred to California may be reimbursed as miscellaneous expense. California requires installation and certification of such devices on automobiles previously registered out of state prior to registration in California, and installation may therefore be properly regarded as a necessary cost of automobile registration 53

Orthodontic services

Amount forfeited under contract. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses, Miscellaneous expenses, Dental contract loss**)

Pollution control devices installed in automobiles. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses, Miscellaneous expenses, Pollution control devices, Installed in automobiles**)

OFFICERS AND EMPLOYEES—Continued
Transfers—Continued
Relocation expenses—Continued
Temporary quarters
Beginning of occupancy
Thirty day period Page

Transferred employee occupied temporary quarters for more than 30 days. Employee contends that the calendar day quarter on which he became eligible for reimbursement of temporary quarters expenses should be used throughout his eligibility period to determine when reimbursement should cease. Since the authorizing statute allows reimbursement only for calendar days spent in temporary quarters and the implementing regulations utilize the quarter day concept to ascertain commencement of eligibility only, date of initial eligibility constitutes one calendar day. Thereafter, reimbursement may be made only in units of whole calendar days 15

Travel expenses. (*See* **TRAVEL EXPENSES**)

PANAMA CANAL
Employees
Differential
Tropical

Employee placed in position within United States following reduction in force in Canal Zone requests ruling on whether tropical differential authorized by section 7(a)(2) of Act of July 25, 1958, 72 Stat. 407, may be included in "rate of basic pay" for purpose of applying "highest previous rate" rule. Question is based on provision of above-cited law requiring inclusion of tropical differentials as basic compensation for, *inter alia*, "any other benefits which are related to basic compensation." In 39 Comp. Gen. 409 we held that tropical differential may not be included in applying "highest previous rate" rule 60

PAY
Civilian employees. (*See* **COMPENSATION**)
Retired
Disability
Computation
Method

Member, voluntarily retireable, but who is retired for disability with retired pay computed under 10 U.S.C. 1401, has three retired pay computation methods available, two methods of which, in absence of Secretarial action under 10 U.S.C. 1221, designating earlier retirement date, are subject to Uniform Retirement Date Act, 5 U.S.C. 8301, which requires use of basic pay rates in effect on date member was retired. Third method authorizes computation as though member's retirement was voluntary (not subject to 5 U.S.C. 8301), thereby permitting use of increased basic pay rates, if in effect on date member's name is placed on retired rolls 98

PAY—Continued
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Effective date
Delay Page

Member, retired for disability who has notice of such retirements on or before the designated retirement date, is considered retired on the designated date even though delivery of retirement orders is delayed beyond the retirement date. This is so even if he performs additional days of active duty subsequent to retirement date and received payment therefor. Such delay does not in any way add to member's retirement rights in absence of specific active duty orders covering the additional period of service 98

PAYMENTS
Advance
Authority

Food and Drug Administration may not make advance payments for costs of otherwise eligible persons or groups for participation in proceedings before it, absent specific statutory authority which overcomes prohibition against advance payments in 31 U.S.C. 529 111

Housing allowances
Military personnel

Joint Travel Regulations may not be amended to allow advance payment for station housing and similar allowances paid under 37 U.S.C. 405, as the advance payment authorization in section 303(a) of the Career Compensation Act of 1949, as amended, 37 U.S.C. 404(b)(1), is limited to payments for the member's travel, which does not include station housing allowance. Therefore, in the absence of specific statutory authority for advance payment of such allowances, 31 U.S.C. 529 precludes such advance payments 180

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Relocation expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses, Miscellaneous expenses, Pollution control devices, Installed in automobiles**)

PRESIDENT
Presidential appointees
Federal Insurance Administrator

Federal Insurance Administrator, a position established under 42 U.S.C. 3533a (1970), requires Presidential nomination and confirmation under Article II, Sec. 2, Cl. 2 of Constitution. Constitution presumes all officers of United States must be appointed with advice and consent of Senate except when Congress affirmatively delegates full appointment authority elsewhere 137

PRINTING AND BINDING
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Change of command ceremonies Page
Government payment of expense of printing invitations to Coast Guard change of command ceremony is proper since ceremony is traditional and appropriate observance, and printing of invitations may be considered necessary and proper expense incident to ceremony 81

PROTESTS
Contracts. (*See* **CONTRACTS, Protests**)

PURCHASES
Payment
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Except for certain transactions subject to statutory prohibitions against credit sales, Government Printing Office (GPO) may sell publications on credit, through its own facilities, where it determines that extending credit will facilitate sales without increasing administrative costs or price of publications. Under the same circumstances, and subject to the same statutory restrictions, GPO may also arrange with credit card company for sales by credit card. Moreover, sales to company cardholders could include transactions for which GPO is prohibited from making credit sales, since credit here is extended by card company rather than by GPO as vendor 90

QUARTERS ALLOWANCE
Civilian overseas employees
Temporary quarters. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses, Temporary quarters**)

REGULATIONS
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Mistake procedures
Applicable to advertised and negotiated procurements
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Compliance
Contracting officers. (*See* **CONTRACTING OFFICERS, Regulation compliance**)
Federal Property Management Regulations
"Fixed-price options" clause
Data processing procurements
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Retired pay. (*See* **PAY, Retired**)

STATES

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Availability

In advance of appropriation availability Page

Concerning use of grant funds to pay for costs incurred by grantee prior to availability of appropriation to be charged, General Accounting Office (GAO) will no longer apply "general rule" that, in connection with grants, Federal Government may not participate in costs where the grantee's obligation arose before availability of appropriation to be charged unless the legislation or its history indicates a contrary intent, since such rule did not reflect actual basis on which decisions cited in support thereof were decided and, in any event, has no legal basis. 45 Comp. Gen. 515, 40 *id.* 615, 31 *id.* 308 and A–71315, Feb. 28, 1936, modified-- 31

Federal statutory restrictions

Competitive bidding procedure

Since grant contract included competitive bidding requirement, basic principles of Federal procurement law must be followed by grantee in absence of contrary provisions in grant contract. Even though all Federal Procurement Regulations (FPR) provisions need not necessarily be followed to comply with basic principles, an action which follows FPR is consistent with such principles. Therefore, failure of only acceptable bid to include bid bond as required by solicitation may be waived since FPR 1–10.103–4(a) provides exception when only one bid is received---------- 43

Payments

Prior to availability of appropriations

Grants from appropriations under the Land and Water Conservation Fund Act (Act), 16 U.S.C. 460*l*–4 to 460*l*–11 may be applied to costs incurred by States after Sept. 3, 1964 (date of enactment), but prior to availability of the appropriation charged, if it is determined that such payments would aid in achieving the purposes of the Act, since nothing in the Act prohibits such payments and there is no possibility that Federal dollars will be used merely to replace State dollars expended for non-Federal purposes. Furthermore, there is no Anti-Deficiency Act objection since the grant itself would not be made until the appropriation charged becomes available---------- 31

SMALL BUSINESS ADMINISTRATION

Authority

Small business concerns

Allocation of 8(a) subcontracts

Since nothing in Small Business Act or procurement regulations mandates that there be set-aside for small business as to any particular procurement and because it has been held that agency's decision not to make "8(a)" award for given procurement is not subject to review, protests demanding either small business set-aside or "8(a)" award are denied---------- 115

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Contracts

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Small Business Investment Act

Venture capital

Investments (including certain long-term loans) by small business investment company (SBIC) in small business concerns which otherwise meet the requirements of 15 U.S.C. 683(b) and implementing regulations do not lose their character as "venture capital" even though the SBIC-lender reserves right to approve or disapprove future borrowings of small business concern from other potential lending institutions..... 23

STATION ALLOWANCES

Military personnel

Housing

Advance payments

Joint Travel Regulations may not be amended to allow advance payment for station housing and similar allowances paid under 37 U.S.C. 405, as the advance payment authorization in section 303(a) of the Career Compensation Act of 1949, as amended, 37 U.S.C. 404(b)(1), is limited to payments for the member's travel, which does not include station housing allowance. Therefore, in the absence of specific statutory authority for advance payment of such allowances, 31 U.S.C. 529 precludes such advance payments..... 180

STATUTORY CONSTRUCTION

Court interpretation

Effect

Rule of statutory construction developed by courts which disfavors retroactive application of statute is relevant primarily where retroactive application of a statute would abrogate pre-existing rights or otherwise cause result which might seem unfair. However, these considerations, and thus cited rule of statutory construction, do not appear relevant to allowance of grant payments for costs incurred by grantee prior to availability of appropriation to be charged. Furthermore, it is doubtful that such use of grant funds even involves retroactive application of a statute in customary sense since determination of whether to allow payment, as well as payment itself, will be made after the appropriation becomes available..... 31

STORAGE

Household effects

Temporary storage

In former residence

Transferred employee who left household goods in former residence for 5 months prior to reletting apartment may not be reimbursed for temporary storage since placement or retention of employee's goods at his residence may not serve as the basis for reimbursement..... 20

SUBSISTENCE
Per diem
Actual expenses
Itemization of actual food expenses Page
National Labor Relations Board employee who is authorized reimbursement for actual subsistence expenses while on 90-day detail may not be reimbursed for meal expenses claimed on a flat-rate basis and must provide itemization of actual daily food expenses---------- 40
Calendar day
Midnight to midnight
Transferred employee occupied temporary quarters for more than 30 days. Employee contends that the calendar day quarter on which he became eligible for reimbursement of temporary quarters expenses should be used throughout his eligibility period to determine when reimbursement should cease. Since the authorizing statute allows reimbursement only for calendar days spent in temporary quarters and the implementing regulations utilize the quarter day concept to ascertain commencement of eligibility only, date of initial eligibility constitutes one calendar day. Thereafter, reimbursement may be made only in units of whole calendar days---------- 15
Rates
Lodging costs
Apartment rental
Cleaning services
Although employee who rents apartment while on temporary duty may be reimbursed expenses for cleaning services as a cost of lodgings, claim for $600 for maid service for 3 months is excessive based on cleaning needs of a one-bedroom apartment occupied by one individual. Reimbursement should be limited on the basis of the cost of commercial cleaning service provided on a once-a-week basis---------- 40
Telephones and televisions
Employee who rents apartment while on temporary duty may be reimbursed telephone user charges, taxes thereon, and television rental charges as costs of lodgings. However, the cost of telephone installation may not be included as an expense of lodgings---------- 40
Transferred employees
Reimbursement basis
Mileage distance
Transferred employee claimed per diem on travel voucher which stated only date of departure from old station, date of arrival at new station, and allowable travel time based on miles between stations divided by 300 miles per day. Payment of per diem must be suspended since voucher does not meet requirements of Federal Travel Regulations (FTR) para. 1–11.5a, which specifies that taking of leave and exact hour of departure from and return to duty status be recorded---------- 104
Compliance with FTR para. 1–11.5a (May 1973), which specifies voucher requirements, is not wavied by FTR para. 2–2.3d(2), which fixes maximum allowable per diem on basis of minimum driving distance of 300 miles per day, since latter provision is for application when it appears from properly executed and documented voucher that traveler failed to maintain prescribed minimum mileage---------- 104

TELEPHONES
Long distance calls
Government business necessity Page
31 U.S.C. 680a provides that long distance telephone calls must be for transaction of official business and that agency heads or officials designated by them must determine and certify that such calls are in interest of Government before payment is made from appropriated funds. If, after examining facts surrounding long distance tolls on travel vouchers to traveler's family, properly designated official determines said calls were in interest of Government, General Accounting Office (GAO) will not question such determination 28
31 U.S.C. 680a provides that long distance telephone calls must be for transaction of public business and that department and agency heads or officials designated by them must determine and certify that such calls are in interest of Government before payment is made from appropriated funds. Certifying officers are not liable for payment of long distance tolls if official designated under 31 U.S.C. 680a improperly certifies toll 28

TRANSPORTATION
Dependents
Military personnel
Dislocation allowance
Husband and wife both members of uniformed services
Where a permanent change of station requires the disestablishment of a household in one place and a reestablishment of the household in another, a dislocation allowance is authorized, except for members without dependents who are assigned to Government quarters. In no event can more than one dislocation allowance be paid where only one movement of a household is required. However, where both members of the uniformed services married to each other qualify for a dislocation allowance upon a permanent change of station but only one movement of the household occurs, they may elect to be paid the greater amount of the two entitlements 46
Household effects
Storage. (*See* **STORAGE, Household effects**)

TRAVEL
Transfers
Relocation expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)

TRAVEL EXPENSES
Apartment rental
Temporary duty. (*See* **TRAVEL EXPENSES, Temporary duty, Rental of apartment**)
Leaves of absence
Temporary duty
After departure on leave
Payment basis
Agency believes that it would be unreasonble for employee to assume expenses of returning to his permanent duty station via a temporary duty station after his annual leave was interrupted by directions that he testify before a Federal district court. Such expenses may not be allowed since purpose of employee's vacation was in large part accomplished and vacation was interrupted only a day before it would have otherwise ended 96

TRAVEL EXPENSES—Continued
Miscellaneous expenses
Telephones
Long distance calls
Voucher certifications Page

Travel Voucher, Standard Form 1012, revised August 1970, provides for certification of long distance telephone calls by officials authorized under 31 U.S.C. 680a on voucher itself. Separate certification of long distance calls is no longer required. 44 Comp. Gen. 595 and B–115511, July 3, 1953, modified ---- 28

Permanent change of station
Relocation expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)
Temporary duty
Apartment rental. (*See* **TRAVEL EXPENSES, Temporary duty, Rental of apartment**)
Rental of apartment
Cleaning services

Although employee who rents apartment while on temporary duty may be reimbursed expenses for cleaning services as a cost of lodgings, claim for $600 for maid service for 3 months is excessive based on cleaning needs of a one-bedroom apartment occupied by one individual. Reimbursement should be limited on the basis of the cost of commercial cleaning service provided on a once-a-week basis ---- 40

Telephones
User charges, etc.

Employee who rents apartment while on temporary duty may be reimbursed telephone user charges, taxes thereon, and television rental charges as costs of lodgings. However, the cost of telephone installation may not be included as an expense of lodgings ---- 40

VEHICLES
Privately owned
Cost of installing pollution control devices in automobiles
Relocation expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses, Miscellaneous expenses, Pollution control devices, Installed in automobiles**)
Leave during travel status
Recording requirements

Transferred employee claimed per diem on travel voucher which stated only date of departure from old station, date of arrival at new station, and allowable travel time based on miles between stations divided by 300 miles per day. Payment of per diem must be suspended since voucher does not meet requirements of Federal Travel Regulations (FTR) para. 1–11.5a, which specifies that taking of leave and exact hour of departure from and return to duty status be recorded ---- 104

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WATER

Land and Water Conservation Act

Appropriations

Grants Page

Grants from appropriations under the Land and Water Conservation Fund Act (Act), 16 U.S.C. 460*l*–4 to 460*l*–11 may be applied to costs incurred by States after Sept. 3, 1964 (date of enactment), but prior to availability of the appropriation charged, if it is determined that such payments would aid in achieving the purposes of the Act, since nothing in the Act prohibits such payments and there is no possibility that Federal dollars will we used merely to replace State dollars expended for non-Federal purposes. Furthermore, there is no Anti-Deficiency Act objection since the grant itself would not be made until the appropriation charged becomes available 31

WITNESSES

Third party

Administrative proceedings

Fees

Searching for and producing records

In view of enactment of section 1205 of Tax Reform Act of 1976 expressly authorizing such payments effective Jan. 1, 1977, and a variety of court cases and Comptroller General decisions, we will not object if, when Internal Revenue Service (IRS) determines that it will avoid costly litigation and delays in obtaining necessary documents pursuant to duly issued summons, IRS enters into agreement with third party record holder to pay the reasonable costs of searching for, producing and/or transporting documents which are the subject of that summons .. 36

WORDS AND PHRASES

Basic compensation

"Rate of basic pay"

Employee placed in position within United States following reduction in force in Canal Zone requests ruling on whether tropical differential authorized by section 7(a)(2) of Act of July 25, 1958, 72 Stat. 407, may be included in "rate of basic pay" for purpose of applying "highest previous rate" rule. Question is based on provision of above-cited law requiring inclusion of tropical differentials as basic compensation for, *inter alia*, "any other benefits which are related to basic compensation." In 39 Comp. Gen. 409 we held that tropical differential may not be included in applying "highest previous rate" rule 60

Master agreements

Department of Agriculture's proposed use of master agreements for prequalifying firms to compete for agency consulting requirements is tentatively approved, since it is not unduly restrictive of competition but may actually enhance competition in situations where small firms otherwise might not be able to compete 78

WORDS AND PHRASES—Continued

Unbalanced bids

Unbalancing of prices Page

Requirement for submitting net or single percentage bid on requirements-type contract prevents deliberate unbalancing of prices by bidder, which assures award to low bidder regardless of quantities ordered. Further, if predetermined prices in IFB are too low or too high, bidders can adjust prices by offered plus or minus percentage factor..... 107

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